YICK WO RE-REVISITED: NONBLACK NONWHITES AND FOURTEENTH AMENDMENT HISTORY

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In *Unexplainable on Grounds of Race: Doubts About* Yick Wo,[1] Professor Gabriel Chin presents a new view of the 1886 Supreme Court case, *Yick Wo v. Hopkins*.[2] As my earlier work shows, I agree with Chin on two fundamental revisionist points about *Yick Wo*: first, that it was not a harbinger of the mid-twentieth-century revolution in racial civil rights, and second, that the case was primarily about economic rights.[3] We disagree, however, on the role of race in the decision. Chin takes an extreme position, arguing that *Yick Wo* "is not a race case at all."[4] But although the case was primarily about economic rights, the use of the Fourteenth Amendment to vindicate those rights necessarily entangled economic rights with race. While issues of "race" in American law tend to focus on the distinction between nonwhiteness and whiteness, however, the "race" of the Chinese plaintiffs in *Yick Wo* was also significant in its nonblackness as distinct from blackness. The Court's prior jurisprudence had not only declined to recognize Fourteenth Amendment economic rights, but had also suggested that the Amendment did not protect any rights of nonblack persons. Race was thus crucial to the development of constitutional economic rights doctrine (unless those rights were to benefit only blacks).

Chin argues that although the case recognizes economic rights under the Fourteenth Amendment, the Amendment alone was insufficient to extend those rights to Chinese aliens, and U.S. treaty obligations to China were a necessary factor. I continue to believe that the Court care-

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1. 2008 UNIV. ILL. L. REV. 1359.

2. 118 U.S. 356 (1886).

3. *See* 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 (1995).

4. Chin, *supra* note 1, at 1376.

fully and deliberately constructed a legal argument that relied entirely on the Fourteenth Amendment, applying it to "any person," in order to establish economic rights that would include white persons. But Professor Chin has caused me to seriously consider for the first time the role of treaty rights in the case, as I will discuss below.

Yick Wo was an early step in the Fourteenth Amendment counter-revolution of its day, which eventually led to the so-called *Lochner* era of substantive due process jurisprudence. After the federal government abandoned Reconstruction in the 1870s, the Court undertook to redefine the Fourteenth Amendment away from the protection of black political rights and toward the protection of economic rights.[5] Thus, by the end of the nineteenth century, the Fourteenth Amendment did not protect a black citizen from segregation,[6] but did protect a corporation's right to contract.[7] The fact that *Yick Wo* involved not only economic interests but also the economic interests of nonblacks made the case a significant part of this evolution.

I. *YICK WO*, TREATIES, AND THE FOURTEENTH AMENDMENT

The *Yick Wo* opinion does not on its face focus on treaty obligations. Although the opinion mentions the 1880 treaty between the United States and China (the Treaty) before mentioning the Amendment, it mentions the Treaty only once, quoting it without discussion. The remaining six pages of the nine-page opinion discuss the Fourteenth Amendment in detail and mention section 1977 of the Revised Statutes once, but do not mention the Treaty again. According to Chin, it is unclear from the opinion itself whether the Treaty, the Amendment, or the statute was the primary basis for the result.[8] (As will be discussed below, he ultimately argues that the Treaty was the primary basis.)

Chin overstates the ambiguity of the Court's reasoning, however. On its face, the opinion states that the Fourteenth Amendment alone is both necessary and sufficient to support the result. The Treaty and its predecessor treaties did not in themselves protect any economic rights of Chinese immigrants in the United States.[9] Chin states that the opinion

5. On this trend, see generally, e.g., G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 106 (3d ed. 2007).

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

7. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897). *Allgeyer* did not state whether E. Allgeyer & Co., the plaintiff's business, was incorporated, but its contracting counterparty was. *Id.* at 580. According to the Court, both businesses "had the right to enter into a contract." *Id.* at 592.

8. Chin, *supra* note 1, at 1382.

9. The 1880 Treaty was a "modification" of the previous treaties between the U.S. and China, signed in 1869 and 1858. It permitted the U.S. to restrict, but not prohibit, Chinese immigration and guaranteed Chinese subjects the right "to go and come of their own free will." Treaty on Immigration, U.S.-China, art. II, Nov. 17, 1880, 22 Stat. 826. The Chinese Exclusion Acts, which prohibited new Chinese immigration and prohibited the re-entry of Chinese residents who exited the United States, abrogated the 1880 Treaty. Nonetheless, the Court upheld the Exclusion Acts immediately after *Yick*

discusses the Fourteenth Amendment only after "carefully demonstrating that a treaty and a federal statute protected Chinese economic activity."[10] But it merely quotes, without discussion, a single provision in which the United States pledges to "secure to [Chinese subjects 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, and to which they are entitled by treaty."[11]

This provision does not establish any rights, economic or otherwise, other than the right to enjoy the same rights as other foreign subjects.[12] Those rights, according to the Court, derive from the Fourteenth Amendment. The Court states, "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens," and then goes on to quote the Amendment: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Court then states that the Amendment applies "to *all persons* within the territorial jurisdiction, *without regard to any differences of race, of color, or of nationality*."[13] Further, the Court states that section 1977 of the Revised Statutes was enacted "accordingly," giving all persons within U.S. jurisdiction "the full and equal benefit of all laws."[14]

The only way the Court suggests that the ordinance violated the Treaty was by denying the Chinese laundry owners Fourteenth Amendment rights (and section 1977 rights) available to other foreigners, indeed to "all persons." Thus, the Fourteenth Amendment is necessary to the result.[15] Moreover, under the Court's reasoning, the Amendment was also legally sufficient to support the result: because the Amendment applied to "all persons" (even those without treaty rights), the ordinance was void on constitutional grounds alone, and the Treaty right was re-

Wo, casting further doubt on Chin's insistence that Treaty rights were important in *Yick Wo*. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

10. Chin, *supra* note 1, at 1364.

11. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Article VI of the 1868 Treaty had similar language.

12. The 1868 Treaty (known as the Burlingame Treaty), not mentioned in *Yick Wo*, enumerated a few specific, noneconomic rights not relevant to the case, such as freedom of religion and the right to attend public schools on par with subjects of the most favored nation. *See* Additional Articles to the Treaty Between the United States and China, July 28, 1868, 16 Stat. 739.

13. *Yick Wo*, 118 U.S. at 369 (emphasis added).

14. *Id.* Chin states that section 1977 of the Revised Statutes (predecessor to the current 42 U.S.C. § 1981) was passed to implement the Treaty. Chin, *supra* note 1, at 1381–82. The legislative history of the statute, however, clearly indicates that it was passed, in 1870, to protect Chinese rights under both the 1868 Treaty *and* the Fourteenth Amendment. *See* CHARLES J. MCCLAIN, JR., IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 36–38 (1994) (quoting resolution introduced by Senator Stewart, sponsor of the bill that became section 1977); *see also* Runyon v. McCrary, 427 U.S. 160, 192 (1976) (White, J., dissenting). Furthermore, the *Yick Wo* Court's brief mention of the statute suggests that it understood the statute as an implementation of the Amendment alone and not of the Treaty.

15. Because the statute was passed "accordingly," the Amendment is also necessary to support the statutory argument.

dundant. The opinion discusses only whether the San Francisco ordinance violated the minimal constitutional rights of "all persons." It never discusses any additional most-favored-nation rights that Chinese subjects would receive from the Treaty independent of the Amendment, although such an argument might have been made. For example, the most-favored-nation clause may have been violated in that Chinese residents were singled out for ill-treatment not directed at other foreigners. Alternatively, the Court might have sought most-favored economic rights in international law, treaties with other nations, or statutes. Such an approach could have avoided constitutional interpretation altogether.

The foregoing is not simply a formalist parsing of the text of *Yick Wo*. The historical context supports the view that the Court intended to make a statement about the meaning of the Fourteenth Amendment that would not be limited to the Treaty context. *Yick Wo* states that the Amendment applies to "all persons . . . without regard to any differences of race, of color, or of nationality"[16] and that the Amendment prohibits states from arbitrarily interfering with the right to pursue a livelihood.[17] But although the Court states these two propositions without discussion, neither was the established interpretation at the time.[18] The *Yick Wo* opinion egregiously fails to mention that the Supreme Court had expressed deep skepticism about these propositions thirteen years earlier in the *Slaughter-House Cases*, the first Supreme Court case to interpret the Thirteenth and Fourteenth Amendments.[19] The real point of *Yick Wo* was to further the counter-revolution in Fourteenth Amendment jurisprudence by dispelling those lingering doubts.

II. *YICK WO* AS A RESPONSE TO *SLAUGHTER-HOUSE*: THE ROAD TO LOCHNERISM

In *Slaughter-House*, New Orleans butchers argued that a city ordinance banning slaughterhouses, with an exception for a single corporation, violated the Fourteenth Amendment. Their primary argument was that the statute violated the Privileges and Immunities Clause by interfering with the right to practice their trade. They also alleged that the ordinance deprived them of their property without due process of law and denied them equal protection by favoring the corporation. The

16. 118 U.S. at 369.

17. *Id.* at 374.

18. Chin states that the case arose "in an era where the Court believed the Constitution robustly protected economic rights," particularly the right to pursue a harmless occupation. Chin, *supra* note 1, at 1365. To be clear, *Yick Wo* was not decided "in" such an era, but marked the turning point from an era that did not recognize such rights to one that did. Economic rights had been recognized in the Ninth Circuit, largely thanks to Justice Field implementing his *Slaughter-House* dissenting views, but not yet by the Supreme Court. *See* Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 883 (1943).

19. *See* 83 U.S. (16 Wall.) 36, 66–67 (1873).

Court (with four Justices dissenting) rejected the claims under all three Clauses and attacked the theories on which they were based.

The Court held that the butchers' asserted right to practice their trade did not fall within the protection of the Amendment. First, the Court stated that all of the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) were passed primarily to protect "the freedom of the slave race."[20] Second, the Court held that the Privileges and Immunities Clause protects only rights of national citizenship and not "fundamental" rights, which derive from state citizenship.[21] Third, *Slaughter-House* rejected, with no real explanation, the plaintiff's Due Process Clause argument.[22] Finally, the Court rejected the plaintiff's Equal Protection Clause claim on the ground that the Clause was intended only to prohibit postwar laws discriminating against black freedmen: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[23]

In the 1870s and 1880s, "[t]erm after term the court was being pressed at the bar to reconsider the renunciation it had made in the *Slaughter-House* decision."[24] *Slaughter-House* had been a 5-4 decision, with three lengthy dissents filed. By 1886, only three members of the *Slaughter-House* Court remained on the bench: Justice Miller, the author of the majority opinion, and Justices Field and Bradley, both of whom had not only dissented in *Slaughter-House* but also argued for an expansive view of the Amendment in many other cases.[25] Justice Field, sitting as Ninth Circuit Justice, had helped develop *Yick Wo*'s Fourteenth Amendment theories in numerous circuit cases involving the rights of Chinese.[26] Justice Miller had by this time publicly disavowed his own so-called negro rights theory,[27] and the Court and the federal government

20. *Id.* at 71–72.

21. *Id.* at 74–76. Rights of national citizenship include those enumerated in the Constitution and international law. *Id.* at 79–80.

22. *Id.* at 80–81.

23. *Id.* at 81. The Court's discussion clearly implies that the butchers were not black, although the opinion does not mention their race. In any event, regardless of their race, the ordinance in question did not appear to have been aimed at oppressing blacks.

24. CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862–1890, at 197–98 (Harvard Univ. Press 1939) (citing Munn v. Illinois, 94 U.S. 113 (1877) and the other Granger Cases).

25. *See* WHITE, *supra* note 5, at 106; *see also* Davidson v. New Orleans, 96 U.S. 97, 107–08 (1878) (Bradley, J., concurring) (articulating an early version of "substantive due process" by arguing that courts must consider the "cause and object" of a burden on private property as well as the procedure by which it was imposed).

26. As I have argued elsewhere, Field's Ninth Circuit had a critical influence on *Yick Wo*. *See* Joo, *supra* note 3, at 363–65. *Yick Wo* closely resembles the Ninth Circuit opinion below, *In re Wo Lee*, 26 F. 471 (C.C.D. Cal. 1886), down to its curious reliance on a Maryland state case, *Baltimore v. Radecke*, 49 Md. 217 (1878).

27. In an 1882 oral argument, Justice Miller claimed he had never heard any Justice espouse the theory and noted that *Slaughter-House* had not conclusively rejected it. FAIRMAN, *supra* note 24, at 186–87 (quoting oral argument in *San Mateo County v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885)). *San*

generally had given up on Reconstruction. Republican Rutherford B. Hayes won the disputed 1876 presidential election via backroom deals promising the Democrats a return to "home rule" in the Southern states.[28] The Republican Court continued the trend, restricting the Reconstruction Amendments' ability to protect black rights in the *Civil Rights Cases*.[29] Thus, the stage was set for a new interpretation of the Fourteenth Amendment that was not based on black rights.

The six *Yick Wo* Justices appointed after *Slaughter-House* were all Republican nominees, most of whom were favorably disposed to broad federal power under the Fourteenth Amendment.[30] Justice Matthews, the author of *Yick Wo*, was a former railroad lawyer nominated to the Court in 1881.[31] His nomination met with fierce opposition for fear he would vote to reverse *Munn v. Illinois* and the other so-called Granger cases of 1877, which had upheld state railroad rate regulations against a Fourteenth Amendment economic rights challenge.[32] These fears were borne out in 1886, the year *Yick Wo* was decided, when the Court changed course and began striking down railroad rate regulations,[33] eventually reversing *Munn* in 1890.[34] This marked the beginning of the general turn toward the constitutional protection of economic rights.

The idea that the judiciary should guarantee unenumerated "fundamental" rights, such as economic rights, long predates the Fourteenth Amendment.[35] Justice Chase advanced the argument, without a textual basis, as early as 1798.[36] Beginning in the 1850s, state law cases held that deprivations of property violated the "due process" guarantees of state constitutions.[37] And in 1856, Chief Justice Taney's infamous *Dred Scott* opinion stated that the Missouri Compromise violated the Fifth Amendment's Due Process Clause by depriving slave owners of their property.[38]

Mateo raised the question of whether railroad corporations were "persons" protected under the Amendment. While that case was dismissed as moot, a related case, *Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886), decided the same day as *Yick Wo*, stated, without elaboration, that the Amendment applies to corporations.

28. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 580–81 (1988).

29. 109 U.S. 3 (1883).

30. Chief Justice Waite was probably the only exception. Although he was a Republican, appointed by President Grant, he was the author of *Munn v. Illinois* and remained tolerant of state economic regulation. *See* WHITE, *supra* note 5, at 106.

31. *See* John P. Frank, *Are the Justices Quasi-Legislators Now?*, 84 NW. U. L. REV. 921, 921 (1990).

32. *See* LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 94 (2005); Frank, *supra* note 31, at 921.

33. *See, e.g.*, Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394 (1886); Wabash v. Illinois, 118 U.S. 557 (1886).

34. *See* Chi., Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 461 (1890).

35. *See generally* EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).

36. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 386–88 (1798).

37. *See, e.g.*, Wynehamer v. People, 13 N.Y. 378 (1856); CORWIN, *supra* note 35, at 114–15.

38. *See* Dred Scott v. Sandford, 60 U.S. 393, 450–52 (1856).

The ratification of the Fourteenth Amendment in 1868 offered the venerable fundamental rights theory new possibilities for a textual home. *Slaughter-House* had squarely and exhaustively rejected the Privileges and Immunities Clause as a textual basis for economic rights for all citizens. That Clause had provided the main legal argument for both the plaintiffs and the dissenting Justices. *Slaughter-House* had denied and cast doubt on Equal Protection and Due Process Clause arguments, but it had not expressly ruled out the possibility that one or both might apply to the economic rights of nonblacks.

As Chin notes, early economic rights cases tended to conflate the Equal Protection and Due Process Clauses.[39] Although *Yick Wo*'s references to "arbitrary" acts of the supervisors sound like procedural criticism, the Court in fact relied almost exclusively on equal protection and did not expressly apply due process. It has been suggested that the ugly associations of *Dred Scott* prevented Taney's Fifth Amendment due process theory of economic rights from developing in the Civil War and Reconstruction periods.[40] This taint likely extended to the Fourteenth Amendment's Due Process Clause, explaining the Court's reluctance to rely solely on the Clause until the role of due process in *Dred Scott* had faded from memory.

As Chin argues, it seems unlikely that any of the Justices valued racial equality for its own sake. The Court and individual Justices openly expressed belief in white supremacy and the undesirability of the Chinese in America.[41] As Chin astutely points out, *Yick Wo* did not frame the case in terms of the right of nonwhites to be free from racial discrimination. Rather, it focused on the right of all persons to pursue a lawful occupation. Thus, Chin argues, "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."[42] While Chin is correct that the case is not a modern racial equal protection case, he overstates the matter by concluding that "nonracial considerations suffice to explain the outcome of the case."[43] As Chin points out, the Court found an equal protection violation in the Board of Supervisors's arbitrary denial of economic rights. But the fact that the right was an economic one does not mean the case had nothing to do with race. The Court plainly states that the denial of economic rights was "arbitrary" because it constituted "discrimination" on the basis of "race and nationality":

39. Chin, *supra* note 1, at 1374.

40. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.1 (7th ed. 2004).

41. Chin, *supra* note 1, at 1387–88; *see also* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996); Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was "The Great Dissenter?"*, 32 AKRON L. REV. 629 (1999); Joo, *supra* note 3, at 364.

42. Chin, *supra* note 1, at 1373.

43. *Id.*

> And while this consent of the supervisors is withheld from them and from two hundred others . . . , all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it 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. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.[44]

That is, while the Fourteenth Amendment does not prohibit only racial discrimination or all forms of racial discrimination, it does prohibit all arbitrary denials of fundamental economic rights, including those based on racial discrimination.

Race was even more significant to the case in another respect: by holding that the Fourteenth Amendment applied to Chinese plaintiffs at all, *Yick Wo* made clear that the Amendment's protections apply not only to economic rights, but to economic rights outside the context of anti-black discrimination. Other cases had involved economic claims of nonblacks, and many had generated favorable dicta,[45] but the Court had not used the Fourteenth Amendment to vindicate the economic rights of nonblacks before *Yick Wo*. Thus, the race of the plaintiffs was even more significant for its nonblackness than its nonwhiteness.

This argument raises a question: If the Court was more concerned with economic rights generally than the equal rights of nonwhites, why did it first grant Fourteenth Amendment protection to economic rights in a case involving nonwhite noncitizens rather than one with white plaintiffs? A partial explanation may be that the anti-Chinese laws of the Western states provided powerful examples of wholesale denials of economic rights. Prior economic rights cases, which failed to move a majority of the Court, had involved less extreme burdens. In *Slaughter-House*, for example, the butchers could have practiced their trade outside city limits or by renting space from the one corporation permitted to run a slaughterhouse, and in the Granger Cases, rates were regulated, but the railroads still operated and profited.

Another partial explanation is that extending the Amendment to whites, despite *Slaughter-House*, would have been too big a step to take all at once. Unlike the Privileges and Immunities Clause, the "second choice" homes for economic rights—the Equal Protection and Due Process Clauses—did not guarantee the rights of citizens, but of "all persons." Despite the literal meaning of the phrase, *Slaughter-House*, the only case

44. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

45. *See, e.g.*, Barbier v. Connolly, 113 U.S. 27 (1884); Davidson v. New Orleans, 96 U.S. 97, 105 (1878); Munn v. Illinois, 94 U.S. 113 (1876).

to construe it, had refused to apply it to (presumably) white plaintiffs, suggesting it referred only to black persons. Even though Justice Miller had personally repudiated the notion by the 1880s, it remained on the books. Of course, the Court could have simply ignored it. But the convention of respect for precedent and the preference for relative consistency (or at least the appearance thereof) make incremental doctrinal change rhetorically superior to sudden reversals, particularly with respect to this important doctrinal change implicating the twin controversies of race and fundamental rights. Thus, it makes sense that the Court would make the transition gradually, expanding the Amendment's coverage from one despised minority to another despised, but nonblack, minority, rather than applying it directly to the dominant white race.

This emphasis on easing the transition may also make room for Chin's treaty argument. To better justify the Court's first step toward a new reading of an unchanged text, the Treaty offered a distinguishing factor: the San Francisco laundry operators, unlike the New Orleans butchers, were protected by an additional legal authority. I hasten to reiterate, however, that the Court merely pointed out this distinguishing factor and did *not* make it a necessary element of its reasoning. To have done so would have limited the reach of the case to treaty beneficiaries, while the Court's intent was to stress the broad meaning of "any person." Chin insists on the importance of the Treaty, and I insist that the Fourteenth Amendment was sufficient alone. But perhaps we are both right in the sense that the Court was trying to have it both ways: suggesting that the Treaty made the case a special exception to precedent even as it articulated a general Fourteenth Amendment rule that did not depend on the Treaty.

III. TREATY OBLIGATIONS REDUX: THE ALIEN LAND LAWS CASES

Though our conclusions agree in many respects, I take issue with a significant aspect of Chin's methodology, which is apparent in his use of the Alien Land Laws cases to support his treaty argument, as well as in his discussion of *Yick Wo*'s applicability to criminal prosecutions. Although Chin states that *Yick Wo* should be "understood in the context of the jurisprudence of the era," he does this largely by trying to harmonize *Yick Wo* with several decades of subsequent decisions from both the Supreme Court and state courts, rather than emphasizing cases that led up to *Yick Wo* or immediately followed it.[46] For example, Chin points to Supreme Court cases from the first quarter of the twentieth century that cited *Yick Wo* in invalidating various ordinances interfering with property rights. Because none of these cases involved allegations of racial discrimination, Chin argues that they show that the "Court understood

46. For example, Chin's article does not mention *Slaughter-House*, the leading Fourteenth Amendment case at the time, or the Granger Cases, which directly addressed economic rights.

the prohibited classification not as between races, but between those allowed and denied their property rights."[47] Although such examples show how the early twentieth-century Court viewed economic rights, they say nothing about what a differently constituted Court in a different historical context intended when it decided *Yick Wo* in 1886. Similarly, though I agree with Chin that *Yick Wo* was not about criminal prosecutions, twentieth-century state court cases expressing that view tell us only what the state courts of that time thought of federal power over state criminal authorities; they offer no insight into the Supreme Court of 1886.

It is far beyond the scope of this paper to criticize at length the practice of harmonization, a foundational aspect of legal reasoning from precedent. Suffice to say that harmonization is based on the assumption that cases widely separated by time, court composition, and jurisdiction can and should be construed so as to reveal consistent principles animating them. This is fundamentally different from a legal-historical method, which makes no assumption of consistency and instead tries to explain a legal event as a result of local historical forces.[48] That is, though we have some agreement (and some disagreement) over what *Yick Wo* "actually meant,"[49] we appear to disagree on what "actually meant" actually means. Of course, as evidenced by my insistence on the influence of *Slaughter-House*, I do believe that precedent—at least relatively recent precedent—has some constraining effect on the pace of legal change and the rhetoric used to express those changes. But doctrinal contradictions among cases can be explained primarily by historical forces (such as politics, economics, and ideology), and the role of precedent diminishes as cases become more widely separated in time and space. Whether widely separated cases can be harmonized on doctrinal grounds is of course important when deploying them in legal argument, but is of little significance as a matter of historical interpretation.

Taken on its own terms, Chin's strategy to use harmonization to support his treaty argument is an ingenious, indirect one. He contrasts *Yick Wo* with the Alien Land Laws cases of 1923.[50] Just as the laundry ordinance in *Yick Wo* interfered with the economic opportunities of Chinese aliens, the Alien Land Laws of Washington and California interfered with Japanese aliens' abilities to engage in an economic activity, owning or leasing land for farming. Although the Alien Land Laws applied to "aliens ineligible to citizenship," they were aimed specifically at

47. Chin, *supra* note 1, at 1376.

48. *See* Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 679 (2005) ("[T]he conventions determining what is a good or bad legal argument about the Constitution . . . change over time in response to changing social, political, and historical conditions."); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-In-Law*, 71 CHI.-KENT. L. REV. 909, 918, 925 (The typical use of history in law "acknowledges the contradictory data and explains them away," with little emphasis on "historical forces.").

49. Chin, *supra* note 1, at 1372.

50. *See* Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923).

the Japanese, as was acknowledged at the time.[51] But the Supreme Court held that the Alien Land Laws did not violate the Fourteenth Amendment. The only relevant distinction from *Yick Wo*, Chin argues, was that the Alien Land Laws violated no treaty obligations to Japan. Thus, he concludes that *Yick Wo* turned on the presence of a treaty obligation.[52]

But it is an oversimplification to argue that these two cases (or any two cases) can be harmonized by a single doctrinal distinction. And the distinction offered here—the absence of a treaty obligation—is itself an oversimplification. Japan and the United States did have a treaty at the time, whose language could have been interpreted to invalidate the Alien Land Laws. The applicability of that treaty, like the applicability of any legal rule in any but the simplest of cases, is not an external, independent fact, but a contestable legal interpretation actively constructed by the Court and influenced by the historical and political context.

Unlike the treaties with China, the 1911 Treaty of Commerce and Navigation between the United States and Japan (Japan Treaty) specifically guaranteed economic rights for Japanese nationals in the United States.[53] The treaty also guaranteed the Japanese in America most-favored-nation status with respect to "commerce"[54] and, unlike the treaties with China, the right "to carry on trade" and "to do anything incident to or necessary for trade upon the same terms as native citizens or subjects."[55]

Despite this broad language, the Court found that the Japan Treaty did not protect the right to hold agricultural land. The Japan Treaty specifically guaranteed the right to own or lease "houses, manufactories, warehouses, and shops" and to "lease land for residential and commercial purposes."[56] But the Court held that farming was not a permissible "commercial purpose" even for a Japanese farmer who, like most modern farmers, was in the business of trading his produce.[57] The Court held that the treaty's enumeration of "houses, manufactories, warehouses, and shops" implicitly excludes other uses from the permitted category of "commercial purposes."[58] But the text was certainly susceptible to a

51. *See* Chin, *supra* note 1, at 1383 & n.166.

52. Ironically, however, *Terrace* itself cites *Yick Wo* for the proposition that the Fourteenth Amendment applies to aliens. *See* 263 U.S. at 216.

53. Treaty of Commerce and Navigation, U.S.-Japan, Feb. 21, 1911, 37 Stat. 1504.

54. *See id.* art. XIV.

55. *See id.* art. I. The Alien Land Laws arguably violated these provisions by denying land ownership to Japanese while offering it to "native citizens" and aliens who could naturalize.

56. *Id.*

57. *Terrace*, 263 U.S. at 222.

58. Although the Court held that the language alone was sufficient to conclude that the Treaty did not apply, it also pointed to the Secretary of State's 1912 letter to Japanese officials, which makes the same textual argument as the Court and claims that a Japanese diplomat recognized that the various American states might have diverse laws about alien land ownership. *See id.* at 223 (citing Terrace v. Thompson, 274 F. 841, 845 (W.D. Wash. 1921)). Although the Secretary's interpretation deserves consideration, it is an after-the-fact interpretation by an interested party. The other party, Japan, evidently construed the Treaty otherwise. Furthermore, the relevance of the 1912 letter is questionable,

broader reading. Indeed, just five years later, the Court seemed to contradict itself, interpreting permissible "commercial purposes" under the Japan Treaty to include the unenumerated right to lease land to operate a hospital.[59]

In each instance, the real question is not whether there "was" a treaty obligation, but what historical and political forces may have influenced why the Court did or did not find one, and moreover, why the Court ultimately did or did not strike down the challenged law. Although both cases involved economic rights, the Alien Land Laws cases involved noncitizens asserting a right to own American soil. Land, of course, has a *sui generis* status in law and culture. In the Alien Land Laws context, ownership of land by Japanese subjects also created specific economic and military fears. Japanese farmers had come to the Western states as cheap labor after the Chinese Exclusion Acts reduced the supply of Chinese workers.[60] The emerging agribusiness industry found them to be highly skilled but less tractable and better educated than the Chinese peasants who had preceded them.[61] As Keith Aoki has pointed out, the availability of land ownership could potentially transform them from mere workers to significant economic competitors.[62] Furthermore, Japan, unlike China, was seen as a potential military threat because of its 1905 defeat of Russia. Thus, Japanese immigrants, unlike the Chinese, were not only a blight and a nuisance, but also "an imminent fifth column threat within the United States."[63] These racialized fears of the Japanese caused states to pass the Alien Land Laws, and the Court evoked them to justify the laws: "If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens."[64]

Moreover, history had marched on in the four decades since *Yick Wo*. Not only had the entire personnel of the Court changed, but Fourteenth Amendment jurisprudence had changed as well. Unlike the Chinese in 1886, the nonblackness of the Japanese in 1923 had no instrumental value, making the undesirability of their nonwhiteness and alienage more salient than their economic rights. As argued above, the 1880 Treaty may have provided a rhetorical justification for a break with precedent that the Court was prepared to make for other reasons, but it did not determine the result in *Yick Wo*. Similarly, the "absence" of a

as the Alien Land Laws challenged in the cases were not passed until 1920 and 1921. *See* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 55–59, 60 (1998).

59. *See* Jordan v. Tashiro, 278 U.S. 123 (1928).

60. *See* Aoki, *supra* note 58, at 45.

61. *See id.* at 53–54.

62. *Id.* at 62–63.

63. *Id.* at 47.

64. Terrace v. Thompson, 263 U.S. 197, 220–21 (1923) (quoting Terrace v. Thompson, 274 F. 841, 846 (W.D. Wash. 1921)).

treaty obligation does not explain the results of the Alien Land Laws cases. Rather, anti-Japanese sentiment (and the absence of instrumental value) explains why the Court found no treaty obligation (and no Fourteenth Amendment protection). By 1923, the Court had rejected *Slaughter-House*'s narrow "negro rights" view of the Fourteenth Amendment and turned it on its head. The Court expanded substantive due process to reach the economic rights of white persons and corporations, while contracting the racial aspect of equal protection to abandon blacks to Jim Crow segregation.[65] Although economic rights nominally applied to all persons, whites were of course economically dominant. Moreover, nonwhites' economic opportunities were limited by both private and government discrimination, with the Court's blessing.[66] After the *Civil Rights Cases*, neither the Thirteenth nor the Fourteenth Amendment prohibited discrimination by private parties until the 1960s.[67]

Ironically, even though *Yick Wo* upheld the rights of nonwhites, it was a critical step in this eventual diversion of the Fourteenth Amendment away from the protection of racial equality. The opportunistic manipulation of nonblackness and nonwhiteness in the Chinese and Japanese cases fits into a larger pattern of American law and politics pitting Asians and other nonblack minorities against African Americans. The economic success of some Asian Americans, for example, is "used to deny racism and put down other groups."[68] Affirmative action for blacks and Latinos is sometimes attacked as harming "more qualified" Asian applicants.[69] While distinguishing one's racial group from blacks may yield benefits for nonblack nonwhites, it is also likely to breed bitterness and estrangement from African Americans.[70] Furthermore, any benefits are likely to be narrow and short-lived. The Chinese benefited when their nonblackness was useful in creating economic rights for whites. But what the law gave with one hand, it soon took away with the other. The number of Chinese immigrants who could enjoy economic rights was limited and continued to dwindle due to the Chinese Exclusion Acts, which the Supreme Court upheld just three years after *Yick Wo*.[71] The Alien Land Laws cases, the denial of naturalization to Asian residents, immigration quotas imposed on Asian countries, and the World War II in-

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

66. David Bernstein has argued that substantive due process provided racially "neutral principles." David E. Bernstein, Lochner*, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 292–93 (1999). That argument is beyond the scope of this paper, but in any event, other laws and practices of the day were openly racist and limited the value of economic rights to nonwhites.

67. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

68. Mari Matsuda, *We Will Not Be Used*, 1 ASIAN PAC. AM. L.J. 79, 80 (1993).

69. *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 821–23 (1997).

70. *See* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581, 1585–90 (1993). Ikemoto also notes that the divisive process also works in reverse: the "Americanness" of blacks is sometimes invoked to highlight the undesirable "foreignness" of Asians and other immigrants. *Id.*

71. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

ternment of Japanese-Americans further undercut the law's apparent protection of nonblack nonwhites.

The conventional wisdom oversimplifies the issue by viewing *Yick Wo* as protecting and empowering Chinese immigrants. But Professor Chin also oversimplifies things by suggesting that the case did nothing for them other than apply their clear treaty rights. As Eric Yamamoto has pointed out, "members of racialized groups are neither fully autonomous nor puppets controlled by others but are instead social actors empowered and constrained by multiple socio-economic settings. . . . [R]acial groups . . . [can] be simultaneously oppressed and oppressive, liberating and subordinating."[72]

72. Yamamoto, *supra* note 69, at 890–91.