

UNEXPLAINABLE ON GROUNDS OF RACE—A REPLY TO COMMENTS

Gabriel J. Chin*

INTRODUCTION

*Unexplainable on Grounds of Race: Doubts About Yick Wo*¹ (“*Doubts*”) proposed an explanation for the failure of *Yick Wo v. Hopkins* in the twelve decades of its existence to result in any published opinions invalidating racially discriminatory prosecutions. After discussing a line of cases ending in the 1960s holding *Yick Wo* inapplicable to criminal cases,² *Doubts* offered several reasons that *Yick Wo* was unlikely to serve as a direct restriction on discriminatory prosecution. First, the Court understood the conduct at stake, operating a laundry, to be a constitutional right, taken by the City of San Francisco without sufficient justification.³ Therefore, the decision had no necessary implications for prosecutions for conduct the state had the power to criminalize. Second, *Yick Wo* was not a race case in the sense that race was unnecessary to the decision,⁴ because a person of any race can object to deprivation of constitutional rights without justification.⁵ Third, the colorful equal protection language of the decision was an artifact of the jurisprudence of the time, which regarded every deprivation of property without due process of law to be a denial of equal protection. Accordingly, the *Yick Wo* Court’s equal protection analysis following a due process discussion did not necessarily represent an independent basis of decision.⁶

* Chester H. Smith Professor of Law, Professor of Public Administration and Policy, University of Arizona. Many thanks to David Bernstein, Darryl Brown, Lenese Herbert, and Tom Joo for their characteristically creative, thoughtful, and expert responses that forced me to sharpen my thinking on this topic; to the editors of the *University of Illinois Law Review*, who worked so hard on this project; and to Dean Toni Massaro and the University of Arizona Law College Association for financial support of this project.

1. 2008 ILL. L. REV. 1359.

2. *Id.* at 1365–72.

3. *Id.* at 1374–75.

4. See Richard S. Kay, *The Equal Protection Clause in the Supreme Court 1873–1903*, 29 BUFF. L. REV. 667, 699 (1980) (*Yick Wo* was only “incidentally a decision invalidating racial discrimination. . . . Since it was not the use of race itself which caused the constitutional defect, but only its failure to contribute to a proper state function, the way was open to sustain ‘reasonable’ racial classification.”).

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

6. *Id.* at 1374–76.

Finally, *Doubts* tried to reconcile the Court's grant of relief to Yick Wo with its approval of prohibition on land ownership against "aliens ineligible to citizenship," when by statute this was a racial category, comprised of Asians statutorily barred from becoming citizens.⁷ The 1923 land cases show that the Equal Protection Clause standing alone did not prohibit all economic discrimination against Asians.⁸ Accordingly, *Doubts* argued that some other provision of law protected Chinese interests in operating a laundry, and suggested the treaty between the United States and China, promising the same rights, privileges, immunities, and exemptions enjoyed by citizens of the most favored nation.

The argument is not that the Court in *Yick Wo* applied only the treaty and did not apply the Fourteenth Amendment. Instead, it is that the treaty was necessary to the Court's Fourteenth Amendment analysis because the treaty precluded consideration of factors that might have justified the discrimination under the freestanding Fourteenth Amendment, and, indeed, did in 1923.⁹

Doubts was honored by challenging and thoughtful responses from Professors Darryl Brown,¹⁰ David Bernstein,¹¹ Lenese Herbert¹² and Thomas Joo.¹³ This Reply now addresses some of their observations.¹⁴

7. *Id.* at 1383.

8. *Id.*

9. *Id.* at 1378–86.

10. *Yick Wo and the Constitutional Regulation of Criminal Law*, 2008 ILL. L. REV. 1405.

11. *Revisiting Yick Wo v. Hopkins*, 2008 ILL. L. REV. 1393. Professor Bernstein correctly notes that *Yick Wo* led to victories for racial minorities in cases like *Quong Wing v. Kirkendall*, 130 P. 2 (Mont. 1913), but that was a civil suit for recovery of a laundry license fee and so is consistent with the point that there are no reported cases of *Yick Wo* invalidating criminal prosecutions.

12. *On Precedent and Progeny: A Response to Professor Gabriel J. Chin's "Doubts About Yick Wo,"* 2008 ILL. L. REV. 1415.

13. *Yick Wo Re-Visited: Nonblack Nonwhites and Fourteenth Amendment History*, 2008 ILL. L. REV. 1427.

14. I plead *non vult* to the claims of Professors Bernstein and Joo about *Yick Wo*'s role, or lack thereof, in the development of substantive due process jurisprudence. Bernstein, *supra* note 11, at 1393 (*Yick Wo* "was, at best, a distant cousin to the *Lochner* line of cases."); Joo, *supra* note 13, at 1430 n.18 (*Yick Wo* "marked the turning point from an era that did not recognize such rights to one that did."). The critical point, with which they might well agree, is that at least by the time of *Yick Wo*, the Court recognized a constitutionally protected right to operate a laundry in the absence of a reasonable basis for restriction. This seems to have been the view of the courts below. And at least some of the expansive language of *Yick Wo* was foreshadowed in Justice Matthews' earlier defense of the necessity for fair process:

Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.

Hurtado v. California, 110 U.S. 516, 535–36 (1884); see also *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

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

Commentators questioned several steps in the argument that approval of racial discrimination against Asians in 1923 meant that discrimination was permissible in the era of *Yick Wo*. One historical claim is that there were reasons for the Court to defend Chinese in 1886 which did not exist in 1923. Tom Joo's Comment, *Yick Wo Re-Visited: Non-black Nonwhites and Fourteenth Amendment History*, emphasizes the interest on the part of some members of the Court in expanding the scope of the Fourteenth amendment, "applying it to 'any person,' in order to establish economic rights that would include white persons."¹⁵ While not an explicit ground of decision in *Yick Wo*, this seems plausible and consistent with the idea that *Yick Wo* was not motivated by radical racial egalitarianism. In addition, the focus of *Doubts* on doctrine is consistent with a range of background concerns, which could be satisfied through a range of doctrinal outcomes.

But commentators also offered responses which, if correct, undermine the argument of *Doubts*. The objection is that: 1) The alien land law cases of 1923 were not based on race, so they are not an example of judicial approval of economic discrimination against Asians; and 2) the Fourteenth Amendment is sufficient to explain judicial protection of aliens' rights in *Yick Wo*, without consideration of the treaty. These points are addressed in turn.

A. *Were the 1923 Alien Land Law Cases Based on Race?*

When the Supreme Court upheld laws denying property rights to "aliens ineligible to citizenship"¹⁶ Professor Bernstein contends that the Court was not holding that states "*may discriminate on the basis of race*. Indeed, the Court consistently specified that it was *not* holding that states may discriminate on racial grounds with respect to land ownership."¹⁷ Thus, he argues that it is incorrect to claim that these decisions represent judicial approval of racial discrimination against Asians in economic enterprise. Because the point is critical to the Essay's argument and as a matter of legal history, it is addressed here with some specificity.

The category "alien ineligible to citizenship" comes from federal naturalization law. Section 13 of the Immigration Act of 1924 provided

15. Joo, *supra* note 13, at 1427. Similarly, Professor Bernstein suggests that "the anti-Chinese riots that spread throughout the West in 1885–86 persuaded the Court that it needed to assert ultimate federal authority over Chinese immigration." Bernstein, *supra* note 11, at 1400 n.51.

16. *Frick v. Webb*, 263 U.S. 326 (1923) (holding that aliens can be denied right to own stock in company controlling land); *Webb v. O'Brien*, 263 U.S. 313 (1923) (holding that aliens can be denied the right to lease); *Porterfield v. Webb*, 263 U.S. 225 (1923) (holding that aliens ineligible to citizenship can be prohibited from owning land); *Terrace v. Thompson*, 263 U.S. 197 (1923) (holding that land ownership can be restricted to citizens and aliens who have declared their intention to become citizens).

17. Bernstein, *supra* note 11, at 1401 (citing *Terrace v. Thompson*, 263 U.S. 197 (1923)).

that no “alien ineligible to citizenship shall be admitted to the United States” as an immigrant.¹⁸ The Court construed the term in *Chang Chan v. Nagle*, where the Court refused to admit four wives of U.S. citizens, because “[t]he excluded wives [were] alien Chinese ineligible to citizenship here.”¹⁹ The Court cited not to the general requirements for naturalization, but to the racial test, which provided: “The provisions of this chapter shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.”²⁰

Thus, as the Kansas Supreme Court explained in an interpretation of its alien land law, “‘Eligible to citizenship’ as used in our statutes means capable, as free white persons, of becoming citizens. It does not mean qualified to be naturalized by compliance with the statutory requirements.”²¹ Functionally, according to the California Supreme Court, these laws make “certain races ineligible to own real property.”²²

True, “alien ineligible to citizenship” in the alien land or immigration laws was not a “facial” racial classification in the sense that the laws pointed to a definition contained in another statute, instead of identifying the affected races in words. But this cannot make a constitutional difference.²³ Because the category in 1923 included all Asian aliens²⁴ and no white aliens,²⁵ it is a more perfect racial classification than, for example, the familiar classifications based on “color or previous condition of servitude”²⁶ or granting suffrage based on the fact that one’s grandfather

18. Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162, *repealed by* Immigration and Nationality Act, ch. 477, § 403(a)(23), 66 Stat. 163, 279.

19. *Chang Chan v. Nagle*, 268 U.S. 346, 351 (1925).

20. Act of July 14, 1876, ch. 254, § 7, 16 Stat. 254, 256, *amended by* Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318. Naturalization had been restricted to whites from 1790 until 1868, when persons of African nativity or descent were added. As Peter Schuck explained, “From the Republic’s earliest days, American citizenship was relatively easy to acquire, at least for white men.” Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 2 (1989).

21. *Hughes v. Kerfoot*, 263 P.2d 226, 229 (Kan. 1953). The Kansas court must be right: If a person was “ineligible to citizenship” for failure to meet all qualifications for naturalization, then no one could immigrate, because naturalization required several years of U.S. residence, among other things, yet all aliens “ineligible to citizenship” were excluded from coming to the United States in the first place. “Alien ineligible to citizenship” necessarily meant something else.

22. *Mott v. Cline*, 253 P. 718, 721 (Cal. 1927); *see also* *Babu v. Petersen*, 48 P.2d 689, 690 (Cal. 1935) (“[T]he parties . . . are . . . members of the Hindu native races of India, and are admittedly ineligible to citizenship under the laws of the United States, and therefore are inhibited from exercising or enjoying the right to ‘acquire, possess, enjoy, use, cultivate, transfer, transmit, and [or] inherit real property.’”) (alteration in original); *People v. Osaki*, 286 P. 1025, 1026 (Cal. 1930) (once state proves that “defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States,” the burden shifts to defendant to prove “citizenship or eligibility to citizenship”).

23. A state could not evade prohibitions on school segregation by, for example, defining “African-Americans” in section 204 of a code and “Caucasians” in section 205, and then providing in section 206 that “[n]o person defined in section 204 shall attend school with a person defined in section 205.”

24. And perhaps some members of other races deemed nonwhite. *See generally* IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1997).

25. If the issue were eligibility to citizenship in a general rather than racial sense, white aliens who for some reason were temporarily or permanently qualified would have been covered.

26. U.S. CONST. amend. XIV.

could vote at some point before the Fifteenth Amendment.²⁷ These classifications could burden some whites or benefit some people of color, yet are understood, correctly, as racial.

The Court's 1948 decisions effectively prohibiting discrimination against aliens ineligible to citizenship recognized the laws' racial basis. In *Oyama v. California*,²⁸ a minor U.S. citizen, Fred Oyama, held title to land paid for by his father, an ineligible alien. California prevailed in an escheat action, but the Supreme Court held unconstitutional certain statutory presumptions, applicable only because an ineligible alien, Fred's father, paid for and managed the property. The Court said the case presented the "question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable."²⁹

*Takahashi v. Fish & Game Commission*³⁰ invalidated denial of fishing licenses to aliens ineligible to citizenship. The Court noted: "Federal laws, based on distinctions of 'color and race,' have permitted Japanese and certain other nonwhite racial groups to enter and reside in the country, but have made them ineligible for United States citizenship."³¹ Invalidating the law, the Court concluded that "[i]t does not follow . . . that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications."³² The state cases invalidating discrimination against aliens ineligible to citizenship also turned on the conclusion that they were racial classifications.³³

It is true, as Professor Bernstein observes, that in one of the alien land cases, *Terrace v. Thompson*,³⁴ the Court upheld Washington's alien land law in an opinion finding that it did not discriminate based on "race and color."³⁵ He reads this to mean that the Court considered all alien land laws to be race-neutral. Washington's particular law, however, was actually race-neutral. It did not restrict aliens ineligible to citizenship. It

27. *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (invalidating version of grandfather clause: "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination").

28. 332 U.S. 633 (1948).

29. *Id.* at 646.

30. 334 U.S. 410 (1948).

31. *Id.* at 412 (citation omitted).

32. *Id.* at 418.

33. *See 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 [E]qual [P]rotection [C]lause of the Fourteenth Amendment to the Constitution of the United States."); *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."); *Kenji Namba v. McCourt*, 204 P.2d 569, 583 (Or. 1949) ("[O]ur Alien Land Law must be deemed violative of the principles of law which protect from classifications based upon color, race and creed.") (citation omitted).

34. 263 U.S. 197 (1923).

35. *Id.* at 220.

applied, like the federal alien land law now in the U.S. Code,³⁶ to all aliens who had not filed a declaration of intention to become a citizen³⁷ in accordance with the naturalization laws.³⁸ But the laws of California and other states applied only to aliens ineligible to citizenship, and the Court upheld them as well,³⁹ conscious that they applied “in light of [judicial] rulings as to the effect of birth and race.”⁴⁰ The Nowak and Rotunda treatise explains that “when the Court upheld a California statute prohibiting the use of land by ‘ineligible’ aliens it, in effect, sanctioned a racial classification.”⁴¹

B. Yick Wo’s Holding: Due Process, Equal Protection, or Both?

Professor Bernstein asserts, contrary to the claim in *Doubts*, Yick Wo’s elaborate discussion of due process was “(unusually influential) dicta,”⁴² rather than a holding and that the Court’s actual holding was based on equal protection. He acknowledges that other scholars disagree.⁴³ If Bernstein is right, then the emphasis in *Doubts* about the race-neutral nature of the due process analysis is weakened. His logic, however, makes clear that the point, even if valid, is technical.

Professor Bernstein correctly observes that the Court “rejected racial or ethnic hostility as a valid police power rationale for otherwise illicit discrimination by government.”⁴⁴ The “otherwise illicit” qualification, however, makes clear that the point is not about racial hostility that does not interfere with constitutional rights. Allowing racial hostility *simpliciter* to invalidate an otherwise proper law would have been highly problematic in this era. First, a search for hostility conflicts with the Court’s refusal during this period to examine legislative motivation, even motivation alleged to be discriminatory. Second, there cannot be a con-

36. 48 U.S.C. § 1501 (2000) (“No alien or person . . . who has not declared his intention to become a citizen of the United States . . . shall acquire title to or own any land in any of the Territories of the United States.”). The western territories, the apparent subject of the section, became states and no longer exist.

37. A declaration of intention was a court filing. Act of June 29, 1906, ch. 2592, §§ 3–4, 34 Stat. 596, 596, *repealed by* Nationality Act of 1940, ch. 867, § 504, 54 Stat. 1137, 1172. The form required identification of “color” as well as “complexion.” *Id.* § 27, 34 Stat. 596, 603.

38. *Terrace*, 263 U.S. at 212 n.1 (law applicable to “aliens, other than those who in good faith have declared their intention to become citizens of the United States”). Even such “race-neutral” statutes had a racially disparate effect on Asians. “The practical effect of both classes of statutes is to bar the ineligible alien, for one who cannot become a citizen is unable to make a *bona fide* declaration of intention to become one.” Comment, *Anti-Alien Land Legislation*, 31 YALE L.J. 299, 305 (1922). Washington subsequently made its law applicable only to aliens ineligible to citizenship. *De Cano v. State*, 110 P.2d 627, 632–33 (Wash. 1941).

39. *Porterfield v. Webb*, 263 U.S. 225, 233 (1923) (“In the case now before us the prohibited class includes ineligible aliens only. In the matter of classification, the States have wide discretion.”).

40. *Morrison v. California*, 291 U.S. 82, 86 (1934).

41. 3 JOHN NOWAK & ROBERT ROTUNDA, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE AND PROCEDURE § 18.12(b) (4th ed. 2008).

42. Bernstein, *supra* note 11, at 1399.

43. *Id.* at 1398.

44. *Id.* at 1400.

stitutional distinction between hostility and mere discrimination; if it is constitutional, for example, to keep African-Americans out of white schools and vice versa, it cannot matter whether those passing or enforcing a segregation law are thrilled, oblivious to the potential significance of the decision, or filled with regret at their unfortunate duty. Finally, a pure hostility test is not practical. It is not clear how courts could measure legislative emotion. And after releasing the first decision invalidating a law based on hostility, courts would likely never encounter another one without a dispassionate, hence lawful, legislative history. “Otherwise illicit” must mean government action that is unconstitutional in the absence of a satisfactory justification because it interferes with a constitutional right on its face.

If this is the case, then the point that “otherwise illicit” conduct cannot be justified on racial grounds, while accurate, is nearly tautological. Professor Bernstein notes that, early in its analysis, the *Yick Wo* Court found that “Chinese resident aliens have the same right to operate laundries as white citizens.”⁴⁵ Thus, though the decision indeed recognized “the principle that mere racial hostility could not justify discriminatory legislation depriving individuals of their constitutional rights,”⁴⁶ that principle applies only when a constitutional right is at stake. Having found that the Chinese have a protected right, it would make no sense for the Court then to say that being Chinese is a sufficient reason to restrict that right. If people can be denied a right solely because they are Chinese, the Chinese people do not hold that right.

In addition, while Professor Bernstein emphasizes equal protection, the formulation necessarily implies a due process violation. In a case identical to *Yick Wo* but involving a white plaintiff or corporation, if the Court concluded: 1) there was a right to engage in a business in the absence of reasonable grounds for restriction; 2) the plaintiff complied with every applicable health, fire, or other regulation; and 3) San Francisco offered no reason for denial of a license, but rested on its arbitrary discretion, then the Court would have found a denial of due process. That a reason for government action is unknown, nonracial, or nonexistent does not defeat either a due process or equal protection claim when “otherwise illicit discrimination” is at issue. Therefore, some justification is required. In *Yick Wo*, as Richard S. Kay wrote, “The fact of racial discrimination . . . does not substitute for but supplements the [due process] defect It is not the presence of race but the absence of justification [that] is paramount.”⁴⁷

45. *Id.* at 1398.

46. *Id.* at 1400.

47. Kay, *supra* note 4, at 695.

C. Aliens, Real Property, and the Freestanding Fourteenth Amendment

Professors Bernstein and Joo emphasize *Yick Wo*'s application of the Fourteenth Amendment to the Chinese.⁴⁸ They suggest that the Fourteenth Amendment, perhaps along with the civil rights laws, explains *Yick Wo*'s victory.⁴⁹ They are correct that the Fourteenth Amendment applied to aliens,⁵⁰ as *Doubts* recognized,⁵¹ and that *Yick Wo* found a Fourteenth Amendment violation. There are strong reasons, however, to believe that the freestanding Fourteenth Amendment would not have protected *Yick Wo*'s interest in owning or controlling real property for commercial purposes, and that the treaty, or some other source of law, was necessary to the outcome of the case.

This is the argument: First, much discrimination against aliens was held to be consistent with equal protection. Second, the Fourteenth Amendment did not abrogate the common law principle that aliens could be denied the right to control real property. Third, the 1923 alien land cases held consistent with the Fourteenth Amendment that there could be discrimination among groups of aliens in the area of use and control of land, including discrimination on the basis of race, if it was reasonable. Fourth, unless discrimination against Chinese was somehow foreclosed, there is no reason to think that discrimination against aliens ineligible to citizenship, such as the Chinese, was any less reasonable under the Fourteenth Amendment in 1886 than the Court found it to be in 1923. Under similar legal regimes with similar attitudes toward Asians, the Court found discrimination against aliens ineligible to citizenship constitutional in 1886.⁵² Since the underlying operative factors were similar, something

48. See Bernstein, *supra* note 11, at 1398; Joo, *supra* note 13.

49. Bernstein, *supra* note 11, at 1398 ("[I]n fact, *Yick Wo* was widely understood to stand for the proposition that all legal residents of the United States were entitled to the Fourteenth Amendment's protections."); Joo, *supra* note 13, at 1430 ("*Yick Wo* states that the Amendment applies to 'all persons . . . without regard to differences of race, color, or of nationality.'").

50. It was clear as early as the *Slaughter-House Cases* that the Amendment's coverage was not limited to African-Americans:

We do not say that no one else but the negro can share in this protection. . . . Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But . . . in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all

83 U.S. (16 Wall.) 36, 72 (1872); see also *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) ("Nor if a law should be passed excluding all naturalized Celtic Irishmen [from jury service], would there be any doubt of its inconsistency with the spirit of the amendment.").

51. See Chin, *supra* note 1.

52. As San Francisco denied discriminating at all, it offered no justifications for its conduct, such as a claim that it was discriminating against aliens ineligible to citizenship. But assuming that *Yick Wo* was not essentially a pleading case, it is reasonable to assume that the outcome was based on substantive considerations. It is extremely unlikely that the Court believed that San Francisco could have done exactly what it did and excluded all Chinese from the laundry business, but they lost because they did not use the particular legal terms justifying such action.

in addition to the freestanding Fourteenth Amendment must have operated to preclude consideration in 1886 of the factors the Court found dispositive in 1923. The treaty is the obvious candidate.

1. *Aliens and Equal Protection*

Before the modern era of constitutional law,⁵³ that aliens were within the scope of the Fourteenth Amendment did not mean that discrimination against them was unconstitutional.⁵⁴ As the Nowak and Rotunda treatise explains, “In *Yick Wo v. Hopkins*, the Supreme Court found that aliens are ‘persons’ so as to enjoy the protection of the [E]qual [P]rotection [C]ause.” But “[i]n the period from the *Yick Wo* decision until 1948, aliens were not accorded very significant constitutional protection. Aliens could be treated differently than citizens when the alienage status made them dissimilar for some legitimate reason.”⁵⁵

The Court set an almost comically low standard for what constituted a “legitimate reason.” For example, in *Patsone v. Pennsylvania*,⁵⁶ Pennsylvania prohibited unnaturalized foreign-born persons from possessing rifles or shotguns, to effectuate its prohibition on such persons killing wildlife or animals. Given that the question “is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong on its facts,” a unanimous Court through Justice Holmes accepted the “premise for the law that resident unnaturalized aliens were the particular source of the evil that it desired to prevent.”⁵⁷ Its test: “[I]t is enough that this Court has no such knowledge of local conditions as to be able to say that it was manifestly wrong.”⁵⁸ If

53. For background on modern equal protection review of alienage classifications, see generally NOWAK & ROTUNDA, *supra* note 41; Michael Scaperlanda, *Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases*, 8 GEO. IMMIGR. L.J. 1 (1994).

54. Even by 1886, it was long established that “equal protection” did not necessarily require precisely identical treatment. See, e.g., *Missouri v. Lewis*, 101 U.S. 22, 31 (1879) (upholding geographical distinction on court jurisdiction: “The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies.”); *Strauder*, 100 U.S. at 310 (holding that while racial discrimination in juries is impermissible, the state may “make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this.”).

55. 3 NOWAK & ROTUNDA, *supra* note 41, § 18.12(b). Similarly, Justice John Paul Stevens famously explained that the constitutional protection of noncitizens did not mean that they could be expected to be treated identically to citizens, particularly by the federal government: “The Fifth Amendment, as well as the Fourteenth Amendment, protects every [alien in the United States] from deprivation of life, liberty, or property without due process of law.” But that “all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.” For example, the law can distinguish between “the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, [and] the illegal entrant.” *Mathews v. Diaz*, 426 U.S. 67, 77–80 (1976).

56. 232 U.S. 138 (1914).

57. *Id.* at 144.

58. *Id.* at 144–45.

speculation justified discrimination in two areas in service of a problem that might or might not exist, it is not surprising that the Court invalidated few discriminations against aliens.

2. *Aliens' Right to Own Land*

Bernstein doubts the proposition that the Court allowed states to deny land ownership on the basis of race because for that to be correct, "one would have to believe the dubious proposition that the Court was far more sympathetic to African-American claims to *live in integrated neighborhoods* at this time,"⁵⁹ a right they protected in *Buchanan v. Warley*.⁶⁰ "[T]han to the right of persons of Asian decent to *own any land whatsoever*."⁶¹ However, states could, consistent with equal protection, deny aliens the right to have any interest in land.

On their face, the civil rights laws distinguish between aliens and citizens in the context of real property. The 39th Congress that proposed the Fourteenth Amendment also drafted the Civil Rights Act of 1866.⁶² Part of that act became 42 U.S.C. § 1981, but another part dealt specifically with use and control of land. Now codified at 42 U.S.C. § 1982, that provision protects only citizens: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."⁶³ At first blush, it appears that the same legislators who framed the Fourteenth Amendment granted these particular rights only to citizens.⁶⁴ Like § 1982, § 1981 applied only to citizens when drafted in 1866,⁶⁵ when its coverage was expanded to "all persons" in 1870,⁶⁶ § 1982 was not amended.

In all probability, Congress chose not to restrict state power to exclude aliens from interests in land in § 1982 because such a change would have dramatically altered prevailing law. Blackstone, for example, explained:

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase, they are under still greater disabilities. And, as they can neither hold by purchase, nor

59. Bernstein, *supra* note 11, at 1401 n.56.

60. 245 U.S. 60 (1917).

61. Bernstein, *supra* note 11, at 1401 n.56.

62. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

63. 42 U.S.C. § 1982 (2000). See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (applicable to private action); *Hurd v. Hodge*, 334 U.S. 24 (1948) (applicable to the District of Columbia).

64. See ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 727 (1905) ("[T]he distinction between security of rights held, and capacity to hold rights, is recognized by the United States Revised Statutes. [Section 1981] gives all persons the same security, while [§ 1982] gives only to all citizens of the United States the same right to inherit, purchase, lease, sell, hold and convey real and personal property.").

65. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

66. See Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144.

by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit.⁶⁷ This was the early American rule.⁶⁸ While § 1982 made clear that there could be no discrimination among classes of citizens, there was no hint that either the Equal Protection Clause or § 1981 changed the rule with respect to aliens.⁶⁹

In the absence of some legal basis to own property, aliens did not enjoy the right to own or control land, which was reserved exclusively to citizens by 42 U.S.C. § 1982. Thus, even in 1948, when the Court invalidated classifications against citizens based on racial ancestry and aliens ineligible to citizenship, a majority reserved the question of whether alien land laws applicable only to ineligible aliens were valid.⁷⁰

3. *Land Ownership and Distinctions Among Aliens*

If Chinese had a right to control real property for use in laundries it was not because they had a direct federal constitutional or statutory right to own land, something no alien enjoyed. Instead, it would have to have been because of a right not to be discriminated against with respect to privileges granted to other aliens. At least by 1923, not only were classifications between citizens and aliens often reasonable, so too were classifications among different groups of aliens. Therefore, consistent with the Equal Protection Clause, aliens ineligible to citizenship could be disadvantaged compared to other aliens: “The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable.”⁷¹ Chinese aliens were ineligible to citizen-

67. 15 MODERN AMERICAN LAW: BLACKSTONE’S COMMENTARIES 236 (Henry Winthrop Bal-lantine ed., 1915).

68. *Mager v. Grima*, 49 U.S. (8 How.) 490, 493–94 (1850) (“Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee.”); *Craig v. Leslie*, 16 U.S. (3 Wheat.) 563, 576–77 (1818) (“The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the state of Virginia, that this incapacity does not extend to personal estate.”); *Apthorp v. Backus*, Kirby 407 (Conn. 1788) (“A state may exclude aliens from acquiring property within it of any kind, as its safety or policy may direct”; Framers Roger Sherman and future Chief Justice of the United States Oliver Ellsworth were two of the judges who unanimously joined this part of the opinion.).

69. EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD: OR, THE LAW OF INTERNATIONAL CLAIMS* 86 (1915) (“The right to acquire immovables, by purchase or descent, and to own and dispose of them, may be forbidden to aliens.”); 2 ALFRED G. REEVES, *TREATISE ON THE LAW OF REAL PROPERTY* 1448 (1909) (“At common law, an alien could not take real property of any kind by operation of law He could acquire it by devise or deed—by purchase; but he took a defeasible title, subject to the power of the sovereign to deprive him of it.”).

70. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 422 (1948) (“Assuming the continued validity of those cases, we think they could not . . . be controlling.”); *Oyama v. California*, 332 U.S. 633, 646 n.27 (1948) (“[W]e do not reach petitioner’s second argument, that it is unconstitutional for a state to forbid the ownership of land by an ineligible alien.”).

71. *Terrace v. Thompson*, 232 U.S. 197, 220 (1923); *see also Webb v. O’Brien*, 263 U.S. 313 (1923).

ship.⁷² As of 1923, then, as aliens ineligible for citizenship, Chinese in California had no right under the freestanding Fourteenth Amendment to use real property in the laundry business in the face of a correctly crafted law prohibiting them from so doing.⁷³

Professor Joo suggests that historical changes explain why *Yick Wo* won in 1886 but ineligible aliens lost in 1923.⁷⁴ However, if the test is whether there is a legitimate reason for distinction there is no reason to think that ineligible aliens would have fared better in 1886. *Doubts* summarizes some of the Supreme Court's statements about Chinese shortly after deciding *Yick Wo*, which suggests that discrimination in that era would have been reasonable based on legitimate distinctions between that group of aliens and others.⁷⁵

While the racial attitudes of lawmakers and judges were clear, there is a more fundamental reason that ineligible aliens cannot be considered similarly situated. The probable and actual effect of the network of laws concerning the Chinese are stark. The Chinese were excluded from the country by the Chinese Exclusion Act.⁷⁶ Since 1875, female Chinese immigrants were presumptively prostitutes and restricted by the Page Law.⁷⁷ Accordingly, most of the population was male. Chinese men were prohibited from marrying white women by antimiscegenation statutes in effect in California and many other states where they lived.⁷⁸ In an era of rapid population growth, the effect, unquestionably intentional, was to reduce by half the Chinese population in the United States. The state and federal laws were a kinder, gentler form of ethnic cleansing

72. They were covered by the general limitation to free white persons and those of African Nativity and descent, Act of July 14, 1876, ch. 254, § 7, 16 Stat. 254, 256, *superseded by* Nationality Act of 1940, ch. 876, 54 Stat. 1137, and a specific law providing that "[n]o State court or court of the United States shall admit Chinese to citizenship," Act of May 6, 1882, ch. 126, 22 Stat. 58, 61, *repealed by* Act of Dec. 17, 1943, ch. 344, 54 Stat. 600, 600.

73. See *Territory v. Lee*, 2 Mont. 124 (1874) (Montana territory does not have sovereignty to pass a law dispossessing Chinese alien of land).

74. Joo, *supra* note 13, at 1438–39 ("Moreover, history had marched on in the four decades since *Yick Wo*. Not only had the entire personnel of the Court changed, 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.").

75. Chin, *supra* note 1, at 1387.

76. See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990*, at 45–49 (1993); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13–14 (1998); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 281 (1996).

77. Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 410–11 (2005) ("[T]he 1875 Page Law, which through its targeting of prostitutes from 'China, Japan, or any other Oriental country,' almost completely shut down Chinese female immigration.").

78. Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 ASIAN L.J. 1, 27–29 (2002).

based on a judgment that the Chinese population should not be encouraged to develop in the United States.

Looking at the question not from a post-*Brown* perspective, but in light of the legal regime of 1886, it is nearly inconceivable that a court would find no reasonable distinction between Chinese in the process of being phased out, and the white immigrants who the people's representatives in Congress and the states encouraged to come, naturalize, intermarry, homestead, and become part of the fabric of the United States. A judge in 1886 thinking Chinese might be similarly situated to other immigrants would have to answer the question why, if that is so, the States and the United States arbitrarily decided to make dealing with a pretended "yellow peril" a central public policy goal.

Courts did not closely interrogate the premises of governmental action in this area. In *Ohio ex rel. Clarke v. Deckebach*,⁷⁹ the Court upheld a requirement that pool hall operators be citizens, noting that "[t]he present regulation presupposes that aliens . . . are not as well qualified as citizens to engage in this business."⁸⁰ In 1886 no less than 1923, it is undeniable that people who can never become citizens, who are unlikely to establish families, who live knowing they are subject to deportation at any time if Congress so chooses, are less likely to be good stewards of the land of the state than people without those characteristics. If that is so, then there is a reasonable basis of distinction between this group and others, unless some law other than the Fourteenth Amendment cuts off examination of the reasonableness of the distinction.⁸¹

4. *Treaties' Advantages*

Treaties offered potential benefits to aliens that the Equal Protection Clause did not.⁸² First, they could grant access to real property.

79. 274 U.S. 392 (1927).

80. *Id.* at 397; see also, e.g., *Trageser v. Gray*, 20 A. 905 (Md. 1890) (upholding statute restricting liquor licenses to citizens).

81. Of course, apart from statutes, treaties, and the Fourteenth Amendment, there may be federalism reasons that states may not discriminate even against the most undesirable aliens who have been allowed by the national government to reside in the United States. Thus, in *How Ah Kow v. Nunan*, Field as Circuit Justice wrote that hostility to the Chinese was reasonable, but a federal question:

Their dissimilarity in physical characteristics, in language, manners and religion would seem, from past experience, to prevent the possibility of their assimilation with our people. And thoughtful persons, looking at the millions which crowd the opposite shores of the Pacific, and the possibility at no distant day of their pouring over in vast hordes among us, giving rise to fierce antagonisms of race, hope that some way may be devised to prevent their further immigration. We feel the force and importance of these considerations; but the remedy for the apprehended evil is to be sought from the general government, where, except in certain special cases, all power over the subject lies.

12 F. Cas. 252, 256 (Field, Circuit Justice, C.C.D. Cal. 1879) (No. 6646).

82. FREUND, *supra* note 64, at 726 ("The states are bound in their treatment of aliens partly by the international obligations of the United States, partly by the provisions of the federal constitution.").

Second, because they granted particular people particular rights, they did not have the intrinsic malleability of the Fourteenth Amendment.

Treaties, not the Equal Protection Clause, were the alien's path to gaining the right to real property over the state's objection. As the Supreme Court explained in 1890, as people increasingly immigrated to foreign countries, "the removal of their disability from alienage to hold, transfer, and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement."⁸³

Chinese obtained rights to real property by this route. In *Gandolfo v. Hartman*,⁸⁴ which in 1892 anticipated *Shelley v. Kraemer*,⁸⁵ the court held that a restrictive covenant preventing Chinese people from leasing property could not be enforced in a court of the United States because it was "in contravention of one of its treaties"⁸⁶ as well as in violation of the Equal Protection Clause. Other cases also make the point.⁸⁷

In addition, treaties, at least potentially, offered less room for discrimination than the Fourteenth Amendment, which allowed classifications if reasonable.⁸⁸ If the treaty in *Yick Wo* applied, Chinese in America were entitled to "the same" treatment as the most favored aliens, not mere exemption from unreasonable discrimination.⁸⁹ Thus, even though reasonable grounds for differentiation were sufficient to justify a classification under the Equal Protection Clause, a treaty provision (or § 1981)

83. *Geofroy v. Riggs*, 133 U.S. 258, 266–67 (1889); see, e.g., *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 198 (1876) ("If a treaty . . . removed such disability, and secured to them the right so to take and hold such property, . . . it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions."); see also, e.g., 48 U.S.C. § 1501 (2000) (stating that the prohibition on alien land ownership in territories "shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to citizens or subjects of foreign countries"); Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 915 (1959) (noting that treaties may cover such things as "the right of the nationals of another country to own land, to establish a local pawn shop, [and] to practice a profession").

84. 49 F. 181 (C.C.S.D. Cal. 1892).

85. 334 U.S. 1 (1948).

86. *Gandolfo*, 49 F. at 183.

87. See *Lee v. Boise Development Co.*, 122 P. 851, 853 (Idaho 1912) (rejecting claim that "plaintiffs, being Mongolian aliens, could not hold a lease interest in real estate. . . . under the treaty of the United States with China, it is expressly provided that citizens of the Chinese Empire . . . shall be granted the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens and subjects of the most favored nation") (citing, *inter alia*, *Gandolfo* and *Yick Wo*).

88. *Ex parte Spinney*, 10 Nev. 323 (1875) (while recognizing "inherent privileges of the citizens of a free country is the right to pursue a lawful calling in a lawful manner," and that the Fourteenth Amendment prohibits "arbitrary discriminations" upholding medical licensing exemption requiring ten years practice as reasonable); FREUND, *supra* note 64, at 744 ("[T]he greater degree of danger peculiar to a group will justify its being singled out for police restraint."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 706 (Melville M. Begelew ed., 5th ed. 1891) ("[T]here may be discriminations between classes of persons where reasons exist which make them necessary or advisable.").

89. So too did § 1981, which, though justified by the Fourteenth Amendment, was not required by it—the statute could have prohibited discrimination unreasonable under the Fourteenth Amendment rather than mandating "the same rights."

could simply preclude consideration of the reasonableness of discrimination. Perhaps for this reason, courts protecting Chinese rights in the *Yick Wo* era frequently cited the treaty along with the Fourteenth Amendment.⁹⁰

In *Yick Wo v. Hopkins*,⁹¹ the Court alluded to the treaty only twice, in the first sentence of the opinion and as the first source of authority in holding that the rights of Chinese were not less than citizens.⁹² In addition, the laundrymen's brief prominently relied on the treaty,⁹³ and it was mentioned five times in the Circuit Court decision.⁹⁴ The Supreme Court's decision has the feel of a flat prohibition against discrimination against the Chinese, as if it had been absolutely foreclosed, rather than through examination of the question whether discrimination against the class was supported by valid reasons.

Citing *Yick Wo*, Ernst Freund wrote that it is not "competent for the states to deprive resident aliens of any privileges accorded to foreigners by the comity of nations, or to discriminate against them where equal treatment is guaranteed by treaty."⁹⁵ A federal trial court explained in 1887 that in *Yick Wo*, San Francisco "showed a hostility of race and nationality towards a class whom we were bound by treaty to protect."⁹⁶ Admittedly, it is not possible to determine what the Justices were actually thinking when they decided *Yick Wo*. But based on the opinion and surrounding law, it is reasonable to conclude that the treaty was necessary to the outcome, by preventing consideration of facts which

90. See, e.g., *In re Ah Chong*, 2 F. 733, 737 (C.C.D. Cal. 1880) ("The act is clearly unconstitutional, and a violation of the treaty in discriminating against the Chinese and in favor of aliens of the Caucasian race in all other respects similarly situated."); see also W.P. PRENTICE, *POLICE POWER ARISING UNDER THE LAW OF OVERRULING NECESSITY* 59 n.4 (1894) ("[H]ostile and discriminating legislation by a State against persons of any class, sect, creed, or nation is forbidden by the Constitution and cannot interfere with the treaty rights of the Chinese."); D.H. Pingrey, *A Legal View of Racial Discrimination*, 39 AM. L. REG. 69, 99 (1891) ("[A] state law making it an offense for any officer, director, or agent of a corporation to employ a Chinese, violates treaty rights with China, and is void. It is also in conflict with the Fourteenth Amendment.").

91. 118 U.S. 356 (1886).

92. *Id.* at 365 ("[O]ur jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States."); *id.* at 368–69.

93. Chin, *supra* note 1, at 1373 n.97.

94. *In re Wo Lee*, 26 F. 471, 475 (C.C.D. Cal. 1886) ("[D]oes it not disclose a case of violation of the provisions of the Fourteenth Amendment . . . and of the treaty between the United States and China in more than one particular?"); *id.* ("[T]here is discrimination, and a violation of other highly important rights secured by the Fourteenth Amendment and the treaty."); *id.* at 476.

95. FREUND, *supra* note 64, at 727, n.42; see also *id.* at 729 (foreign policy considerations prevent states from barring aliens from common occupations; "[t]he federal adjudications in the matter of discrimination against Chinese in the laundry business, while involving also treaty rights, seem to support this position").

96. *In re Hoover*, 30 F. 51, 54 (S.D. Ga. 1887); see also *Baker v. Portland*, 2 F. Cas. 472, 475 (Field, Circuit Justice, C.C.D. Or. 1879) (No. 777) ("But the fact is, the anti-Chinese legislation of the Pacific coast is but a poorly disguised attempt on the part of the state to evade and set aside the treaty with China, and thereby nullify an act of the national government. Between this and 'the firing on Fort Sumter,' by South Carolina, there is the difference of the direct and indirect—and nothing more.").

otherwise could have justified the discrimination under the Fourteenth Amendment.

II. SYSTEMATIC IMPLICATIONS OF *YICK WO*

The claim in *Doubts* is that *Yick Wo* is a doctrinal disappointment. The point of Darryl Brown's response, *Yick Wo and the Constitutional Regulation of Criminal Law*⁹⁷ is more sobering still. With industrialization and immigration after the Civil War, more human activities and more humans were subject to government regulation. As Brown explains, constitutionally, the power to regulate included the power to regulate by any means, from education and gentle persuasion to criminalization. In addition, proportionality of punishment and discriminatory legislative motivation were largely beyond legal scrutiny.⁹⁸ Accordingly, legislatures could draft laws targeting disfavored groups, perhaps groups without the vote such as women and minorities, and set the penalties for violations arbitrarily. *Yick Wo* suggested that aliens' property could not be taken without due process. However, if the law criminalized possession or use of the property, then there would be no property interest, as is demonstrated with respect to rifles and shotguns in *Patsone v. Pennsylvania* and with land in *Porterfield v. Webb*.

While the full panoply of criminal procedures applied to aliens and citizens alike,⁹⁹ if one were guilty of being an alien in charge of a pool hall, that the facts had to be proved in a certain way in a certain forum was no impediment to conviction. The grim implication of Professor Brown's comment is that even under the most optimistic view of *Yick Wo*, whatever restriction on discriminatory administration of the laws it imposed was likely to be ineffectual in light of the room left for discriminatory structuring of laws and penalties.

Although the doctrine held out the possibility of the worst case scenario, and in some times and places it was as bad as it could be, the United States is not a nation of racial segregation as it was in 1886. Lenese Herbert's comment, *On Precedent and Progeny: A Response to Professor Gabriel J. Chin's Doubts About Yick Wo*,¹⁰⁰ suggests that whatever its doctrinal limitations or the complexities of its motivation, *Yick Wo* has triumphed. The ideas behind contemporary decisions like *Pace v. Alabama*, *Chae Chan Ping v. United States*, and *Plessy v. Ferguson* have been rejected, while *Yick Wo*'s most optimistic reading is the law of the land; the prosecution of people based on race now violates the Constitution.

97. Brown, *supra* note 10.

98. Brown, *supra* note 10, at 1412.

99. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896).

100. Herbert, *supra* note 12.

No. 5] UNEXPLAINABLE ON GROUNDS OF RACE — REPLY 1457

If, doctrinally, *Yick Wo* was misread to support that position in the 1950s and 1960s, it nevertheless helped to achieve that result. With the same narrow view of *Yick Wo*'s holding, one could criticize *Yick Wo* as creating a false picture of historical solicitude of minority rights; minority rights were trampled upon except when the majority had good reasons to acknowledge them. Alternatively, one could be grateful that *Yick Wo* was there as a tool that could be deployed after World War II when the courts were willing to consider rejection of segregation on the merits. Professor Herbert makes a persuasive case that we should be grateful. It is hard to argue that the cause of justice would have been advanced had the case never been decided.

CONCLUSION

Clearly, “mundane” was the wrong word to use in connection with *Yick Wo*. As these four creative and informed comments make clear, whatever the holding of the case, mundane or not, *Yick Wo* is a fascinating decision.

