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REVISITING *YICK WO V. HOPKINS*

David E. Bernstein*

Professor Jack Chin explains in his provocative article¹ that *Yick Wo v. Hopkins*²—an ancient case with a narrow holding—has been cited as supporting modern constitutional doctrines that the *Yick Wo* Court did not even consider, much less adopt. *Yick Wo* was not a radical civil rights case decades ahead of its time. Rather, as Professor Chin concludes, “*Yick Wo* is entirely consistent with the other jurisprudence of the era: tolerant of racial classifications, sometimes protective of particular fundamental rights, willing to police state interference with matters it regards as exclusively federal.”³

I disagree with Professor Chin, however, about some important interpretive details. In particular:

- Professor Chin claims that *Yick Wo* was fundamentally a “treaty case,” and did not extend constitutional rights to Chinese alien residents of the United States. In fact, *Yick Wo* explicitly stated that the Chinese, as lawful residents of the United States, were entitled to the protections of the Fourteenth Amendment (and the 1866 Civil Rights Act),⁴ independent of the United States’s treaty with China. Moreover, the Court ultimately held that the laundry ordinances as enforced were unconstitutional, not that they violated treaty provisions;
- *Yick Wo* was not, as Professor Chin alleges, an early example of Lochnerian “substantive due process” jurisprudence, but was, at best, a distant cousin to the *Lochner* line of cases;
- Professor Chin is correct that *Yick Wo* was not fundamentally a “race case,” but he neglects the fact that the decision did have a

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1. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. [need first page number].

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

3. Chin, *supra* note 1, at [need pincite, direct quote].

4. Professor Chin apparently mistakes the language of the 1866 Civil Rights Act, codified at the time at section 1977 of the Revised Statutes, for the language of a “statute implementing the treaty” with China.

very important racial component—the Court held that mere racial hostility was not a proper police power justification for otherwise unconstitutional government action;

- although, as Professor Chin points out, *Yick Wo* did not lead the Court to consistently invalidate discriminatory actions by government acting under color of facially neutral legislation, as early as 1912 the Supreme Court interpreted *Yick Wo* as a case banning facially neutral legislation that targeted members of a minority group.

I will elaborate on these points later in this Comment.

Before doing so, it is important to clarify the status of the Supreme Court's equal protection and due process jurisprudence circa 1886. At the time, the Equal Protection Clause primarily banned illicit class legislation,⁵ legislation that contained arbitrary classifications that did not serve a valid police power purpose.⁶ Unlike under modern equal protection doctrine, no tiers of scrutiny existed, and racial classifications did not receive heightened scrutiny.⁷

Yick Wo was a difficult case for the petitioners because their primary argument sounded in class legislation, and constitutional challenges based on class legislation arguments to legislation rarely succeeded before the Supreme Court, for several reasons.⁸ First, the Court interpreted the concept of class legislation narrowly.⁹ For example, in 1888 the Court upheld legislation that imposed liability for injuries to employees only on railroads.¹⁰ Justice Field, writing for a unanimous Court, explained that class legislation must be construed narrowly because almost all legitimate legislation is “partial,” “special,” or “unequal.”¹¹ The law's

5. See *Barbier v. Connolly*, 113 U.S. 27, 32 (1885); *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock & Slaughter-House Co.*, 111 U.S. 746, 758–59 (1883) (Field, J., concurring); *Civil Rights Cases*, 109 U.S. 3, 23–24 (1883).

6. See Richard S. Kay, *The Equal Protection Clause in the Supreme Court: 1873–1903*, 29 *BUFF. L. REV.* 667, 688–89 (1980).

7. The Court treated race discrimination the same as any other category. It stated that the Fourteenth Amendment “extends its protections to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.” *Civil Rights Cases*, 109 U.S. at 24. See generally Kay, *supra* note 6, at 696 (concluding that during this period, “the objection to discrimination on grounds of race may be merely a special case of the objection to classifications not reasonably related to a police power objective”).

8. Indeed, Richard Kay claims that no class legislation claims brought to the Supreme Court succeeded before *Yick Wo*. Kay, *supra* note 6, at 689–95.

9. By contrast, many state courts interpreted the ban on class legislation more broadly. *E.g.*, *State v. Loomis*, 22 S.W. 350, 353 (Mo. 1893) (concluding that a law banning mining and manufacturing businesses from paying wages in scrip was unconstitutional class legislation); *State v. Goodwill*, 10 S.E. 285, 288 (W. Va. 1889) (same); *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886) (same); *Ex parte Westerfield*, 55 Cal. 550 (1880) (holding that a law that prohibited baking on Sunday was unconstitutional class legislation).

10. See *Mo. Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888).

11. *Id.* at 209.

discrimination against railroad companies was lawful, according to Justice Field, because railroad work was more dangerous than other jobs.

Field added that special legislation is not illicit class legislation “if all persons brought under its influence are treated alike under the same conditions,”¹² and, in the instant case, all railroads were subject to the same rules.¹³ The principle carried over to the context of racial classifications; laws banning interracial marriage were constitutional, so long as whites who married blacks were subject to the same punishment as blacks who married whites.¹⁴

Not until the dawn of the so-called *Lochner* era in the late 1890s did the Supreme Court’s equal protection jurisprudence grow more robust.¹⁵ Even then, the Court interpreted the concept of class legislation far more narrowly than did many state courts.¹⁶

Class legislation claims also foundered because the Court refused to inquire into legislative motivation. Just a year before *Yick Wo*, in *Soon Hing v. Crowley*,¹⁷ the Court rejected the argument that a law regulating laundries’ hours of operation was unconstitutional because it was intended to harass Chinese-owned laundries. Justice Field explained for the unanimous Court that “the rule in general, with reference to the enactments of all legislative bodies, is that *the courts cannot inquire into the motives of the legislators* in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation”¹⁸ Because the law was facially neutral and operated uniformly, it was not illicit class legislation.¹⁹

Claims that racial classifications in segregation laws amounted to class legislation in cases such as *Plessy v. Ferguson*²⁰ failed because the

12. *Id.*

13. Similarly, a law banning the sale of margarine to benefit dairy farmers, passed constitutional muster because “[t]he statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions, thus recognizing and preserving the principle of equality among those engaged in the same business.” *Powell v. Pennsylvania*, 127 U.S. 678, 687 (1888).

14. *See Pace v. Alabama*, 106 U.S. 583, 585 (1883).

15. *See, e.g., Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 570 (1902) (invalidating an anti-trust law that exempted only farmers and ranchers); *Cotting v. Goddard*, 183 U.S. 79, 114–15 (1901) (Harlan, J., concurring for six Justices) (invalidating a mine inspection law because it applied only to one of the many mining companies in the state); *Gulf, Colo., & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 166 (1897) (invalidating a law that allowed plaintiffs with small claims against railroads to recover fees and costs if the railroad initially refused to pay the claim and then lost at trial); *Kay, supra* note 6.

16. *See* David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *GEO. L.J.* 1 (2003). For example, the Supreme Court upheld laws regulating the payment of wages by mining and railroad companies. *See, e.g., Rail & River Coal Co. v. Yapple*, 236 U.S. 338 (1915) (requiring that coal miners’ pay be based on the prescreened weight of the coal that they produced); *Keokee Consol. Coal Co. v. Taylor*, 234 U.S. 224 (1914) (requiring railroads to pay their employees in orders redeemable for cash, not scrip); *Erie R.R. Co. v. Williams*, 233 U.S. 685 (1914) (requiring railroads to pay their employees semi-monthly and in cash).

17. 113 U.S. 703 (1885).

18. *Id.* at 710–11 (emphasis added).

19. *Id.* at 708–09.

20. 163 U.S. 537 (1896).

Justices believed that racial classifications separating blacks from whites in social life were not arbitrary but reflected “natural” differences among the races.²¹ Moreover, the Court interpreted the Fourteenth Amendment as being concerned primarily with economic rights, such as the right to buy and sell property or to run a business, and to some extent political rights, such as the right to jury service.²² “Mere social rights,” such as the right to be free from segregation, received short shrift.²³

As of 1886 the Court viewed the Due Process Clause, like the Equal Protection Clause, as primarily prohibiting arbitrary “class legislation.” In *Dent v. West Virginia*, the Court explained that “legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates.”²⁴ In the oft-cited case of *Leeper v. Texas*, the Court reiterated that “due process is . . . secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.”²⁵

The limits on class legislation imposed by due process were subject to all of the same caveats as described above with regard to equal protection, with one additional caveat: the equality protections of the Due Process Clause were thought to be narrower, if anything, than the protections provided by the Equal Protection Clause.²⁶

There were some inklings that the Court might eventually interpret due process more broadly, as it did during the “*Lochner* era.” In particular, Justice Stephen Field, extending the views he expressed in dissent in the *Slaughter-House Cases*, and foreshadowing *Lochner*, vigorously argued that the right to pursue an occupation free from unreasonable government regulation was a liberty interest protected by the Due Process Clause.²⁷ At this point, however, Field was an outlier, with his views on the scope of due process protections rejected by all of his colleagues in 1888.²⁸ The Supreme Court did not start utilizing the Due Process Clause

21. *Id.* at 551 (“Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences.”).

22. *E.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879).

23. *See Plessy*, 163 U.S. at 552 (“If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.”).

24. 129 U.S. 114, 124 (1889).

25. 139 U.S. 462, 468 (1891).

26. The Supreme Court ultimately held that the Equal Protection Clause was the primary constitutional barrier to class legislation, see *Truax v. Corrigan*, 257 U.S. 312, 333–34 (1921), but some late-nineteenth century opinions suggested that equal protection and due process could be used interchangeably in this regard.

27. *See Powell v. Pennsylvania*, 127 U.S. 678, 691 (1888) (Field, J., dissenting); *In re Quong Woo*, 13 F. 229 (Field, Circuit Justice, C.C.D. Cal. 1882). Professor Chin cites *Quong Woo* as an example of the Supreme Court’s broad, *Lochnerian* interpretation of due process at this time, but that is far too much to read into a solo opinion written by the Court’s most economically libertarian Justice.

28. *Powell*, 127 U.S. 678. And even Field would very likely have vigorously dissented from *Lochner*’s holding that the Due Process Clause banned the government from regulating the hours of

to review purported police power regulations with any vigor until the 1896 term.²⁹ Only then did the idea take hold in Supreme Court jurisprudence that the Clause not only served as a subsidiary guardian against class legislation, but protected fundamental rights, most prominently “liberty of contract,” against state infringement.³⁰

With that in mind, we turn to the opinion in *Yick Wo*. The Court began its opinion distinguishing two previous cases involving the regulation of laundries in which charges of discrimination against the Chinese were raised, *Soon Hing* and *Barbier v. Connolly*.³¹ The California Supreme Court had relied on these precedents in upholding the ordinances at issue in *Yick Wo*. The U.S. Supreme Court distinguished these opinions by noting that they involved a valid police power measure, a law limiting night work in laundries to prevent fires.³² By contrast, the measure involved in *Yick Wo* separated laundry owners into two classes, those who own laundries made of wood and those who own laundries made of brick or stone.³³ The latter was allowed to operate without inhibition, while the former could only operate after receiving permission from the Board of Supervisors based on whatever arbitrary criteria the Supervisors choose to employ, “not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves.”³⁴

The Court then discussed the civil status of the Chinese living as resident aliens in the United States. The Court stated that “the rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China.”³⁵ Professor Chin relies on this language to support his argument that *Yick Wo* held that Chinese aliens have rights only because of the U.S. treaty with China. He contends that “without the treaty, *Yick Wo* would have lost.”³⁶ Professor Chin adds that *Yick Wo* did not hold “that Chinese persons were entitled to the same or similar constitutional protection of their economic rights as were others.”³⁷ This reading of *Yick*

labor of ordinary occupations. Writing for the Court in *Soon Hing v. Crowley*, he dismissed the notion that the Fourteenth Amendment protects “the right of a man to work at all times.” 113 U.S. 703, 709 (1885).

29. See Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71 (2001).

30. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Passing references to constitutional protection of liberty of contract were made in *Frisbie v. United States*, 157 U.S. 160, 165–66 (1895) (Brewer, J.), and *Hooper v. California*, 155 U.S. 648, 661–63 (1895) (Harlan, J., dissenting).

31. 113 U.S. 27 (1885).

32. *Yick Wo v. Hopkins*, 188 U.S. 356, 366–68 (1886).

33. Professor Chin and other commentators, see, e.g., Kay, *supra* note 6, at 689–95, have suggested that this is the essence of the opinion, so it is worth reiterating that at this point the Court is only showing why prior precedents with related facts are not dispositive, not providing the rationale for its ultimate holding.

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

35. *Id.* at 368.

36. Chin, *supra* note 1, at [need pincite, direct quote].

37. *Id.* at [need pincite, direct quote].

Wo is inconsistent both with the text of the opinion, and the understanding of contemporary commentators.

While the Court did cite the treaty with China, it also specifically asserted that the Equal Protection and Due Process Clauses of the Fourteenth Amendment are “universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality,” and added that the 1866 Civil Rights Act (section 1971 of the Revised Statutes) requires that “all persons” shall have the same civil rights as whites.³⁸ And, in 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. In 1893, retired Justice Samuel Miller, who was on the Court when *Yick Wo* was decided, cited the case for the proposition that the Fourteenth Amendment’s guarantees extend “to all persons within the territorial jurisdiction of the United States, without regard to race, color, or nationality.”³⁹ Other contemporary commentators made the same point.⁴⁰ Justice Miller specifically added that under *Yick Wo*, legal Chinese residents of the United States, whether in the United States temporarily or permanently, were entitled to full constitutional protection.⁴¹

Having established that under treaty, statute, and the Constitution, Chinese resident aliens have the same right to operate laundries as white citizens, the *Yick Wo* Court addressed the specific issues at hand. The Court explained the petitioners’ argument was that the relevant ordinances were void for two reasons. First, they were void on “their face, as being within the prohibitions of the [F]ourteenth [A]mendment.”⁴² Second, “they [we]re void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances.”⁴³ (Note that these are both constitutional, not treaty, claims.)

The Court first considered the facial challenge, which involved the standardless, arbitrary authority vested in the Board of Supervisors to grant or deny licenses to proprietors of wooden laundries. The Court, citing both equal protection and due process considerations (though explicitly citing neither clause of the Fourteenth Amendment at this point) exclaimed that “the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoy-

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

39. SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 660 (1893).

40. See, e.g., 2 JOHN W. BURGESS, COMPARATIVE CONSTITUTIONAL LAW 211 (1891); CHRISTOPHER STUART PATTERSON, UNITED STATES AND THE STATES UNDER THE CONSTITUTION 265 (1888).

41. MILLER, *supra* note 39.

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

43. *Id.*

ment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.”⁴⁴

Despite this famous aphorism, and an extensive discussion of the facial infirmities of the laundry ordinances, the Court declined to rule on the petitioners’ facial challenge. The Court stated that given the facts of the case, it was not “obliged to pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration.”⁴⁵ The Court’s lengthy discussion of the standardless discretion provided to the Supervisors in awarding laundry licenses must be seen as (unusually influential) dicta.

The actual holding of the case was the Court’s ruling on equal protection grounds in favor of the petitioners’ as-applied challenge. The petitioners showed to the Court’s satisfaction that no Chinese owners of wooden laundries were able to procure licenses, while almost all white license applicants succeeded:

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.⁴⁶

As Professor Chin points out,⁴⁷ this holding is not race specific. The Court’s language could just as well be applied in favor of any other litigant who had been treated unfairly in the administration of a civil statute that affected a right protected by the Fourteenth Amendment, such as the right to operate a socially useful business such as a laundry.

There is, however, additional language in this case that does speak to race. Professor Chin dismisses the significance of this language,⁴⁸ but

44. *Id.*

45. *Id.* at 373.

46. *Id.* at 373–74.

47. Chin, *supra* note 1, at [need pincite, sentence preceding fn.97].

48. After noting that this language “leaves room for the argument that the case broke new ground by holding that racial discrimination as a general matter ‘is not justified,’” Professor Chin concludes that *Yick Wo* did not ultimately speak to race discrimination at all. *Id.* at [need pincite, direct quote].

it was actually crucial to the holding. Despite widespread virulent hostility to Chinese immigrants,⁴⁹ *Yick Wo* explicitly rejected racial or ethnic hostility as a valid police power rationale for otherwise illicit discrimination by government. Justice Matthews wrote: “[T]he 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 [F]ourteenth [A]mendment of the [C]onstitution.*”⁵⁰ So, while the Court did not rule for the Chinese because of their race, it also explicitly declined to hold against the Chinese because of their race, though more likely to enforce federal authority over the states than out of sympathy for the Chinese litigants.⁵¹

Because the Court for the next several decades was not sympathetic to claims of discrimination by racial and ethnic minorities, the federal, state, and local governments found ways to lawfully discriminate against them over that time, with only rare intervention by the Court. But the principle that mere racial hostility could not justify discriminatory legislation depriving individuals of their constitutional rights was never overruled. This principle played a crucial role in important precedents such as *Buchanan v. Warley*,⁵² issued as the Court gradually became less inclined to defer to discriminatory legislation.⁵³

The alien land law cases cited by Professor Chin are not to the contrary. Professor Chin writes that “the Court’s determination in *Bu-*

49. See generally CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1996); David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

50. *Yick Wo*, 118 U.S. at 374 (emphasis added).

51. My view that *Yick Wo* in general, and the unanimity of the opinion in particular, can be explained in part by federalism concerns is elaborated upon in Bernstein, *supra* note 49, at 274–76. If the Court had wished to rule in favor of the Board of Supervisors, it had ample “cover” to do so. While the Court adopted the Petitioner’s claim that eighty non-Chinese owners of wooden laundries were granted permits, the government’s brief claimed that only two permits had been issued to laundry owners of wooden laundries, albeit both to whites. The government also argued that it had a plausible police power reason for denying the Chinese laundry permits—their laundries, unlike white laundries, had wooden rooftop scaffolding that presented a special fire hazard. Brief for Respondents in Error, *Yick Wo v. Hopkins*, 1885 WL 18153 at *1–2, *13–14, *20, *41. Given the Justices’ unanimous willingness to accept pretexts for anti-Chinese laundry regulations a year earlier in *Soon Hing v. Crowley*, it seems likely that the unanimous opinion in *Yick Wo* must be explained by something other than an “internalist” account of legal doctrine. My suspicion is 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.

52. 245 U.S. 60, 81 (1917); see David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 83 GEO. L.J. 1253, 1270–71 (2005); David E. Bernstein, *Philip Sober Restraining Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 799 (1998); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 593, 626–40 (2004). For additional cases holding, implicitly or explicitly, that deprivations of liberty could not be justified by prejudice based on race or ethnicity, see *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

53. See Bernstein & Somin, *supra* note 52 (discussing the Court’s issuance of several surprisingly relatively liberal opinions regarding the rights of African-Americans in the 1910s).

chanan v. Warley [that African-Americans had the right to buy and sell property] was answered the opposite way for Asians.”⁵⁴ But the underlying basis for the alien land law decisions was that states could, consistent with longstanding federal and state policy favoring citizens and aliens committed to becoming citizens, discriminate with regard to land ownership *against aliens ineligible for citizenship, not that they 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 regard to land ownership,⁵⁵ and I am not aware of any cases holding that states could discriminate with regard to land ownership against American citizens of Asian descent.⁵⁶

Further evidence that Professor Chin understates *Yick Wo*’s status as a case prohibiting racial discrimination in certain contexts can be found in the extremely pertinent 1912 case of *Quong Wing v. Kirkendall*,⁵⁷ not discussed by Professor Chin. *Quong Wing* not only treated *Yick Wo* as a race case, but expanded its meaning to ban facially neutral laws that have discriminatory intent, implicitly rejecting the Court’s analysis in *Soon Hing v. Crowley*.

In *Quong Wing*, the Court rejected a class-legislation challenge to a Montana laundry tax that exempted both steam laundries and laundries operated by women. The petitioner had relied solely on the argument that the law arbitrarily differentiated among laundries for tax purposes. Justice Holmes, writing for the Court, *sua sponte* raised the possibility that the law was unconstitutional under *Yick Wo* because it targeted Chinese laundries for special taxation:

Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese, which would be a discrimination that the Constitution does not allow. *Yick Wo v. Hopkins*. It is a matter of common observation that hand laundry work is a widespread occupation of Chinamen in this country, while, on the other hand, it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case.⁵⁸

54. Chin, *supra* note 1, at [need pincite, direct quote].

55. See, e.g., *Terrace v. Thompson*, 263 U.S. 197 (1923) (“Appellants’ contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation.”).

56. Moreover, given *Buchanan v. Warley* and later cases to the same effect, such as *Harmon v. Tyler*, 273 U.S. 668 (1927) and *Richmond v. Deans*, 281 U.S. 704 (1930), to accept Professor Chin’s understanding of the relationship between *Buchanan* and the alien land law cases, 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 than to the rights of persons of Asian descent to own any land whatsoever.

57. 223 U.S. 59 (1912).

58. *Id.* at 63 (citation partially omitted). Justice Holmes’s suggestion is surprising, given that he tended to be unsympathetic to claims of discrimination by minorities, even by the standards of the day. See G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 335, 341–42 (1993).

The Court remanded the case to the state trial court, where Quong Wing provided evidence that the tax on male owners of hand laundries affected only Chinese laundrymen. The district court then declared the statute unconstitutional. The state supreme court reluctantly affirmed, expressing its displeasure with “the doctrine announced in *Yick Wo v. Hopkins*.”⁵⁹

At this point, we can address Professor Chin’s claim that “*Yick Wo* is an early example of the substantive due process jurisprudence of the *Lochner* era, using the Fourteenth Amendment to protect economic rights.”⁶⁰ As we have seen, equal protection and due process protections were far narrower in 1886 than they became during the *Lochner* era. Nevertheless, there are some commonalities between *Lochner*-era jurisprudence and the Court’s opinion in *Yick Wo*—judicial concerns about arbitrary interferences with property rights, the Supreme Court’s willingness to limit the scope of the police power, and judicial hostility to class legislation.⁶¹ But unlike typical *Lochner*-era cases, in which the Court invalidated laws as facially invalid as violations of property rights or liberty of contract, or as class legislation, the *Yick Wo* Court avoided ruling on the petitioners’ facial challenge and instead invalidated the laundry ordinances at issue because they were applied in a discriminatory manner.

To the extent the Supreme Court addressed the petitioner’s facial challenge in its extensive dicta, the Court clearly thought that the underlying problem was what today we would refer to as a violation of procedural due process, that arbitrary discretion was vested in the Board of Supervisors to grant or deny laundry licenses.⁶² By contrast, the underlying constitutional issue in *Lochner* and associated cases was that the laws in question violated *substantive* rights. So, despite some surface com-

59. *Quong Wing v. Kirkendall*, 130 P. 2 (Mont. 1913). For a more detailed discussion of *Quong Wing*, see David E. Bernstein, *Two Asian Laundry Cases*, 24 J. SUP. CT. HIST. 95 (1999).

60. Chin, *supra* note 1, at [need pincite, direct quote]. Professor Chin cites Professor Joo, whose claim is actually more modest: “[T]he *Yick Wo* line of cases, although primarily based on the rhetoric of equal protection, embodies the main characteristics of *Lochner*-era substantive due process jurisprudence with regard to economic rights.” 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, 356 (1995).

61. The extent to which opposition to class legislation motivated the “substantive due process” cases of the *Lochner* era is a subject of dispute among scholars. See, e.g., Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 883 (2005) (reviewing the controversy).

62. The matter is complicated, however, by the Court’s apparent belief that denial of procedural due process with regard to property rights amounted to a “substantive” taking of property without just compensation. See *Dobbins v. Los Angeles*, 195 U.S. 223, 239 (1904). This is an illustration of the danger of applying modern concepts such as “substantive due process” anachronistically. Due process was not formally divided into substantive and procedural components until after the New Deal era. Previously, the Due Process Clause was thought to bar arbitrary interferences with property and liberty, regardless of how accomplished.

monalities, reading *Lochner* backwards into *Yick Wo*, or thinking of *Yick Wo* as an important precursor of *Lochner*, is an anachronistic error.⁶³

In short, Professor Chin's revisionism is a useful corrective to the whiggish view that interprets *Yick Wo* as a surprisingly modern civil rights decision in an era of rampant hostility to racial minorities. But Professor Chin's revisionism goes too far, in that he downplays or ignores the elements of the *Yick Wo* opinion that, however haltingly or modestly, advanced equality under the Constitution—the Court's holding that resident aliens, including Chinese resident aliens, were entitled to the full protections of the Fourteenth Amendment; the Court's unwillingness to countenance racial hostility as a valid police power justification for discriminatory economic legislation; and the Court's willingness, as early as 1912, to interpret *Yick Wo* as prohibiting legislation intending to discriminate against ethnic minorities.

63. I've made this mistake in previous writings. See David Bernstein, Note, *The Supreme Court and "Civil Rights," 1886–1908*, 100 *YALE L.J.* 725 (1990).