“In the future to any third power”: “Most favored nations,” Personhood, and an Emergent World Order in *Yick Wo v. Hopkins*

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Through a discourse analysis of the 1886 decision of *Yick Wo v. Hopkins*, this Essay critically examines the decision’s capacity to provide terms for reconciling a coming global order with the political protections of the Constitution, especially the protections of the Fourteenth Amendment. That reconciliation involves the protected rights of Chinese launderers in San Francisco. The key terms used in the decision are “person” and “most favored nation,” and the Supreme Court crucially applies these concepts to fit “aliens and subjects of the emperor of China” as well as “China,” respectively. The decision represents a successful test of the equal protection provisions of the Fourteenth Amendment; *Yick Wo* expanded the terms of civil rights protections to encompass not only codified discrimination but also practiced discrimination that occurred even in the absence of explicit racial laws.

This Essay argues that the decision also makes visible a convergence between claims, on the one hand, for the equal protection of the minority groups who have suffered discrimination and, on the other hand, for an assertion of equality between nations who had signed a treaty to ensure that equal treatment. The Angell Treaty between China and the United States, dated November 17, 1880, granted each “most favored nation” status. The right of the petitioners to operate laundries was therefore protected by that compact, and the majority decision explicitly invoked that agreement as well as the Fourteenth Amendment. The equal protection of persons, as such, under the Fourteenth Amendment and of the terms of equality concomitant with “most favored nation” status, come to figure the rationale of the current world order of neoliberalism under globalization. Just as the concept of the equally protected person has been the championed entity of enlightenment liberalism, the concept of the most favored nation is the protected entity of neoliberalism and global trade. By rereading the *Yick Wo* decision within the genealogy of

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INTRODUCTION: REGRETTABLE ACTS

Coming just four years after the passage of the 1882 Chinese Exclusion Act, the *Yick Wo v. Hopkins* decision ruled in favor of the Chinese immigrant laundry workers and against the San Francisco Board of Supervisors. The decision had the potential of being the beginning of improved legal conditions for the Chinese in America. Or, it might have been a progressive anomaly in a long record of political and legislative acts that otherwise “adversely affected people of Chinese origin in the United States because of their ethnicity,” to borrow the phrasing of a June 18, 2012 U.S. House of Representatives resolution. As this House resolution demonstrates, history has provided abundant evidence to convince the House that *Yick Wo* was more likely an anomaly. That is, the House unanimously passed House Resolution 683, “[e]xpressing the regret of the House of Representatives for the passage of laws that adversely affected the Chinese in the United States, including the Chinese Exclusion Act,” a measure made possible through the determined work of Congresswoman Judy Chu, chair of the Congressional Asian Pacific American Caucus (CAPAC).

The 1882 Chinese Exclusion Act was a high-water mark for exclusionary legislation that effectively closed off immigration by Chinese laborers to the United States. It was initially set for a renewable term of ten years and was renewed at the close of its first decade. The 1882 Act and its renewal in 1892 serve as compelling evidence of pervasive anti-Chinese sentiment in United States law and culture. Anti-Chinese sentiment was widespread in that era, and thanks to Representative Chu and CAPAC’s

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1. This term comes from JODI MELAMED, REPRESENT AND DESTROY: RATIONALIZING VIOLENCE IN THE NEW RACIAL CAPITALISM, at xvii, xvi-xviii, 1–4 (2011).
2. “Normal trade relations” is the term that has come to replace the synonymous “most favored nation.”
5. The language of *Yick Wo v. Hopkins* indicates this anti-Chinese sentiment with its recognition of “notorious public and municipal history of the times, indicate a purpose to drive out the Chinese
work, that part of history is now better known in our era. What then could explain how the rights of aliens, who were otherwise ineligible for citizenship and subjected to “adverse” legislation, were defended by the highest court in the land in Yick Wo?

This Essay analyzes the argument, logic, and rhetoric of Yick Wo to consider the significance of a moment when the Supreme Court elaborated on the meaning of equality before the law, even when those before the law were aliens ineligible for citizenship. Despite their lack of citizenship, the petitioners were nevertheless considered “persons” under both the Fourteenth Amendment and the Angell Treaty between the United States and China. In basing its argument on both the Fourteenth Amendment’s equal protection provisions and the Angell Treaty’s invocation of the “most favored nation” clause, Yick Wo represents an early, explicit convergence between notions of geopolitical equality among nations and of the individual equality among persons, irrespective of national or imperial affiliation. In other words, the decision presents a compelling articulation of the symbiotic relationship between notions of national sovereignty in an international order (as articulated by the Angell Treaty) and notions of individual rights (as articulated by the Fourteenth Amendment).

This symbiosis signals a prescient formulation of what we would now recognize as a commitment to tenets of the set of ideas, values, and practices that have come to be called neoliberalism, the set of principles that involve such developments as financial and market liberalization, deregulation, and the management of world order through multilateralism and free trade agreements. While this relationship between national and individual sovereignty may be symbiotic, it is not necessarily symmetrical. We could also assess whether the decision may be understood as primarily based in one argument over the other: we can consider the varying degrees to which national sovereignty served as the basis for claiming protected personhood or whether the concept of personhood provided the terms for respecting national sovereignty.

Indeed, as I will analyze below, the argumentation of the decision itself provides abundant reason to reach the above conclusion of a symbiotic relationship; the bulk of the decision focuses on whether the San Francisco Board of Supervisors violated the civil rights of the defendants guaranteed by the Fourteenth Amendment rather than those Angell Treaty


7. This definition of neoliberalism is adapted from MELAMED, supra note 1.
provisions that resonated with the protections of individual rights protected by the Fourteenth Amendment. This Essay suggests that the Yick Wo decision demonstrates how the convergence between claims for, on one hand, the equal protection of minority groups who have suffered discrimination and, on the other, an assertion of equality between nations who had signed a treaty to ensure that equal treatment, is an early example of the defense of neoliberal globalization. Making such a claim of geopolitical equality in 1886 might seem rather dubious, or at best premature, considering that the Supreme Court decided Yick Wo during the era of the great territorial empires of Great Britain and France, to invoke two of the main global powers of that day, while today, in our formally postcolonial times, neoliberal globalization proceeds from a belief in the world striving to become a level playing field economically and politically. Wide-scale territorial empires have been dismantled. Segregation has been ruled unconstitutional. The exclusion acts have been repealed, and in 2012, even formally regretted by Congress.

From our historical vantage point, we can appreciate Yick Wo as an articulation of the coming world order despite it being an aberration from then dominant ideologies about Asian difference in American culture. The abided-by terms of the Angell Treaty, in the successful testing through Yick Wo, express a laissez-faire geopolitical ideal where the balance of power is maintained through market forces, occasionally enforced through treaties, legislation, and court rulings.

This Essay focuses on what Yick Wo articulated explicitly as well as implicitly, and how it can be interpreted as an emergent form of historical agency that subsequent new social movements would later inherit and make recognizable. That is, these laundry workers can be seen as occupying emergent and liminal spaces that future laborers under globalization routinely occupy. This is of course not to equate late nineteenth-century San Francisco laundrymen to say, Filipina caregivers in Western Europe, call center staff in South Asia, or garment factory workers in export processing zones in the Caribbean. Rather, I make this comparison to recognize how these forms of labor are premised on a conception of the world order that Yick Wo defended.

To consider the decision’s more explicit formulations, the first part examines Yick Wo’s articulation of domestic interests in individual rights, as scholars have perceptively analyzed, and then connects that approach to

the decision with an appreciation of the rationale based on economic ideals that were diplomatically negotiated. In turning to the decision’s more implicit and prescient capacities, the second part considers how the decision serves as a document for recognizing not only arguments for emergent neoliberalism, but also articulations of emergent subjectivities that might constitute pitfalls of neoliberalism in practice. In other words, while the decision is, by its genre and its practical purposes, an expression of dominant legal doctrine, it also can be a lens through which to appreciate perspectives and even historical agency of constituencies that would later become more recognizable. These Chinese launderers in this 1880s case strategically mobilize terms of equality that align a geopolitical commitment to free markets with their individual rights claims as they experienced discrimination in San Francisco. The course of history has made it possible to recognize that the emergent legal, political, economic, and cultural terms and conditions instantiated by the aggrieved Chinese in *Yick Wo* share forms of historical agency that future progressive movements might similarly invoke—a convergence of economic ideals, political principle, and judicial doctrine.  

Rereading the *Yick Wo* decision within a genealogy of globalization reveals the discrepancy between those interests and ideologies that *Yick Wo* stood for and the practical actualization of these ideas in the emergent world order. An ostensible legal triumph like *Yick Wo*, when juxtaposed to the subsequent persistence of the racism the decision ruled unconstitutional, makes evident the need to reframe the issue in ways that may recognize limits to legal remedies. The *Yick Wo* decision is therefore both a crisis for state power and an opportunity to extend it in new ways.

### I. CONVERGENT ARGUMENTS OF *YICK WO V. HOPKINS*

The 1886 U.S. Supreme Court decision in *Yick Wo v. Hopkins* can readily and understandably be interpreted as a triumph of equal protection

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29, 40 (2d ed. 2006).


12. Plotted amidst this history is a resonant moment when the terms of state power had to be articulated in relation to these subjects of China who desired to operate, and in many cases, continue to operate, laundry businesses in 1880s San Francisco. The result of this failure instead embodies concepts that emerged and reemerged at crucial moments in the empire-building of the United States, such as the “domestic dependent nation,” a phrase coined by Justice Marshall in *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831) in the wake of the challenges to the Indian Removal Act, as well as the terms of insularity that needed resolution in *Downes v. Bidwell*, 182 U.S. 244 (1901), in the wake of the extraterritorial expansion of the United States after the Spanish-American War, that occasioned a need for determining the reach and role of U.S. plenary power in its newly acquired territories.

and the defeat of race-based, and nationality-based, discrimination. In the case, city officials charged Yick Wo with violating San Francisco city ordinances concerning the safe operation of laundries. In 1885, he had applied for renewal of his 1884 license from the board of fire wardens that allowed him to operate his laundry. He was turned down despite having operated a laundry business for more than two decades. The ordinance did not explicitly single out the Chinese as subjects to be excluded, yet in actual practice, such discrimination existed. Yick Wo and 200 of his fellow Chinese were denied; yet, all of the petitions for licenses submitted by non-Chinese, except for one, were approved.

The high court ruled that discrimination against the Chinese did in fact emerge, even though they were not singled out in the letter of the law. No reason for the ordinance’s discriminatory impact could be shown apart from an underlying hostility to the Chinese. The discrimination was therefore illegal, and the public administration that enforced it had denied equal protection of the laws, thereby violating the Fourteenth Amendment of the Constitution. Thus, the petitioners’ imprisonment was unlawful and warranted discharge. 14

Commentators have read the decision as a civil rights victory that demonstrated the commitment to equal protection and due process codified in the then new Fourteenth Amendment. 15 Though the regulations did not name any “race and nationality,” they were nevertheless unconstitutional because those ordinances both could be and in fact were applied unequally by the San Francisco Board of Supervisors. 16 The Court quoted the appellate circuit court ruling: “[T]he uncontradicted petition shows that all Chinese applications are, in fact, denied, and those of Caucasians granted; thus in fact, making the discriminations in the administration of the ordinance which its terms permit.” 17 And so the Court found these fire regulations to be the basis for systematically applied discrimination against the petitioners in Yick Wo, all of whom—save one 18—belonged to a “race and nationality” that was the target of “hostility . . . which, in the eye of the

14. Id. at 374.
15. For discussions of Yick Wo as a civil rights victory, see Bob Lee, Orientals: Asian Americans in Popular Culture 74 (1999). See also Nelson, supra note 8, at 189–90; McClain, supra note 9, at 115–124, 177–190 (McClain in particular gives the fullest historical account of the case, as well as important related cases such as Baldwin v. Franks, 120 U.S. 678 (1887), and pertinent statutes such as the Civil Rights Act of 1871); Chang, supra note 9, at 81, 99–100.
17. Id. at 361. Emphasis added.
18. One can only ponder the circumstances of the lone exception, a white woman identified in the decision as “Mrs. Mary Meagles.” Yick Wo states: “It is also admitted ‘that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted.’” Id. at 359.
law, is not justified.”\textsuperscript{19}

The Court then tested whether the Board of Supervisors was “vest[ed]” with “not unusual discretion.”\textsuperscript{20} It examined the nature of the Board’s authority under the ordinances:

There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually to confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only to places, but as to persons . . .

Here the Court emphasized the importance of the concept of the “person” in appreciating where the regulations and the discretion of the Board of Supervisors became problematic. Though the lower court stated that “legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation . . . affects alike all persons similarly situated, is not within the amendment,”\textsuperscript{22} it explained how the particular formulations of the regulations made it possible for the “naked and arbitrary power” to emerge.\textsuperscript{23} In particular, the Court found fault with the aspects of the regulations that were enforced and decided upon “at [the Board’s] mere will and pleasure.”\textsuperscript{24} And such will and pleasure reflected then rampant anti-Chinese sentiment, as the circuit court had already noted:

That [the regulation] does mean prohibition [from laundry businesses], as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events. Can a court be so blind to what must be necessarily known to every intelligent person in the state?\textsuperscript{25}

In other words, the statutes in question sanctioned inequality and effectually protected the “public opinion” (presumably anti-Chinese racism), which he implicitly linked to “notorious events” (presumably including race riots). When \textit{Yick Wo} is viewed as a banner instance of the classic confrontation between freedom in one corner and self-preservation in another, individual liberty appears to have won the day. As Lawrence Goldstone noted, “the Court had ruled that if a law was impartial on its face yet was applied and administered so as to operate as a denial of equal justice, it might indeed be declared in violation of the Fourteenth

\textsuperscript{19} Id. at 374.
\textsuperscript{20} Id. at 366.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 368.
\textsuperscript{23} Id. at 366.
\textsuperscript{24} Id. at 368.
\textsuperscript{25} Id. at 363.
Amendment.26 And the decision itself cited Barbier v. Connolly27 to recognize the validity of Fourteenth Amendment scrutiny in such cases. The case also cited Ah Kow v. Nunan,28 to invoke the history of rights violations—in this case the infamous Pigtail Ordinance—targeting the Chinese in San Francisco, violations that fell afoul of both the Fourteenth Amendment and treaty agreements between China and the United States.

The Court also discussed another concept in addition to equal protection: the most-favored-nation (“MFN”) clause. The MFN clause was first articulated in the 1868 Burlingame Treaty and rearticulated in subsequent treaties, including the Angell Treaty in 1880. This convergence of arguments provided the Court with an opportunity not only to strengthen their equal protection argument with a parallel basis for ruling in favor of Yick Wo but also to provide articulations that weave together treaty-based political principles with the U.S. Constitution.

As far as the Fourteenth Amendment was concerned, the Court had established sufficient grounds to rule in favor of the petitioners, but then proceeded to address whether such aliens fit within the meaning of “persons” under the San Francisco ordinances.29 Yet the Court invoked the Angell Treaty, and, in particular, emphasized the “most favored nation” clause.30 What, we might reasonably ask, would be the point of what could seem like judicial overkill, given the clearly made case for a violation of the prohibitions of the Fourteenth Amendment? What does most-favored-nation have to do with the protection of individual liberties of Chinese immigrant laundry workers? And what does this connection tell us about the resonance between that historical moment and the present day?

Here then is where we might recall the opening point Justice Matthews makes about the Court’s limited jurisdiction as to “the question of whether the plaintiff in error has been denied a right in violation of the constitution, laws, or treaties of the United States.”31 By invoking the MFN clause, the Court sought to align constitutional rights with its treaty obligations. In other words, the Court sought to affirm the constitutionality of the Angell Treaty by extending it to come under the meaning of the Fourteenth Amendment and thus affecting the San Francisco ordinance. As will be discussed below, common personhood ironed out any differences in the way that these violations came to be recognized. The Court stated, “meeting with ill treatment at the hands of any other persons” in the language of treaty converged with “state depriv[ation] of life, liberty, or

26. GOLDSTONE, supra note 9, at 174.
27. 113 U.S. 27 (1885).
30. Yick Wo, 118 U.S. at 368.
31. Id. at 365.
property without due process of law” in the Fourteenth Amendment. \(^{32}\) Constitutional “equal protection” converged with treaty-based entitlements for those of a “most favored nation.”

The constituencies defeated in *Yick Wo* were of little actual consequence politically and economically in the geopolitical contestations that the case brought out in need of resolution. Armed with what appeared to be neutral language that was fair on its face, the city officials felt that their regulations were constitutional. That is, the Chinese were not specifically named as a group to be excluded, as had been a concern in the past. Indeed, no racial, ethnic, gender, or other group was named in the regulations. What ultimately mattered to the court was the discursive production of Chinese difference, even without actually naming the Chinese. The unequal execution of an otherwise non-discriminatory statute was alarming to the justices, so much so that they invoked such charged language as “tyranny” to describe the conduct of San Francisco’s Board of Supervisors.

The decision therefore had the rather remarkable effect of both marking and unmarking Chinese difference. In *People v. Hall*, \(^{33}\) thirty-two years earlier, the lack of legal codification for the status of the Chinese in California or United States law meant civic non-existence for the Chinese. In contrast, in 1886, the lack of legal codification proved to be an opening in the San Francisco statute wherein legal discrimination against the Chinese could be practiced, at least until *Yick Wo*. Despite a continuing ineligibility for citizenship, the Chinese were held to be subject to the protections of the Fourteenth Amendment. They were “persons.” Civically and culturally, they were benevolently assimilated under the global expansion of judicial power, even if they did not have access to citizenship. They and China were decidedly not formally colonized, under the terms of territorial and administrative colonization in the Age of Empire. Nonetheless, in advocating for progressive values, such as equal treatment, these official anti-racisms become the benevolent and progressive face of the nation and the empire, embarked on a mission to save— and implicitly incorporate—a fractious world. \(^{34}\)

While these measures can provide welcome relief for the aggrieved, that relief brings with it a recognition of the ultimate authority of state power and the concomitant incorporation of these subjects and citizens into the new world order of persons who, when

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\(^{32}\) *Id.* at 368–69.

\(^{33}\) *People v. Hall*, 4 Cal. 399 (1854).

\(^{34}\) See *MELAMED, supra* note 1. See *CHANDAN REDDY, FREEDOM WITH VIOLENCE: RACE, SEXUALITY, AND THE US STATE*, 23 (2012). Reddy provides an analysis of ways in which movements both challenged existing state structures and served as an opportunity for the state to demonstrate its capacity to be the guarantor of rights. “[B]y providing alternative contexts for the growing social antagonisms, the civil rights, feminist, and antiwar movements threatened the state’s capacity to mediate those antagonisms. The state’s attempt to produce universality through practices of subjectivity must be read, then, as its response to alternative and mediating contexts.” *Id.*
subjected to United States law, are protected by the Fourteenth Amendment.

II. EQUALITY AND THE IDEA OF THE “MOST FAVORED NATION”

In *Yick Wo*, the Court interpreted that the equal protection provisions of the Fourteenth Amendment have productive resonance with the idea of the “most favored nation.” I argue that these are not parallel arguments that would each protect the rights of Yick Wo, but mutually supporting bases that capture the harmonic convergence of the domestic and geopolitical.

MFN can be a misleading phrase. MFN status means having membership in a community of nations where there is an absence of favor. The MFN relationship entails non-discriminatory treatment between and among parties. The phrase “non-discriminatory” routinely emerges in legislative reports to define MFN and clarify what may result.\(^{35}\) When described in this way, MFN and the anti-discrimination provisions of the Fourteenth Amendment emerge as convergent: the Fourteenth Amendment deals with “persons” and the state, and MFN deals with the interactions between nations and their subjects. As *Yick Wo* points out, in neither case are these protections from discrimination dependent on citizenship.\(^{36}\)

As a concept MFN dates back to the early modern period in intra-European trade agreements, as far back as the twelfth century.\(^{37}\) MFN was an effort to imagine hypothetical third parties that were able to enjoy the same trade relations that two favorably trading nations enjoyed: “in the future to any third power.”\(^{38}\) Robert Snyder’s canonical definition of MFN emphasizes this point:

A most-favored nation clause is a provision, generally inserted in a commercial agreement between two states, which obligates the contracting parties to extend all concessions or favors made by each in the past, or which might be made in the future, to the articles, agents, or instruments of commerce of any other state in such a way that their mutual trade will never be on a less favorable basis than is enjoyed by that state whose commercial relations with each is on the most favorable basis.\(^{39}\)

The same is true today, only on a larger scale and at greater speeds. MFN/”normal trade relations” is an expansionist idea that seeks to

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38. TSUNG-YU SZE, CHINA AND THE MOST-FAVORED-NATION CLAUSE 11 (1925) (quoting CARLOS CALVO, DROIT INTERNATIONAL THEORIQUE (4th ed. 1896)).
legitimatize market expansion by ensuring non-discriminatory treatment towards parties following normal trade relations. Throughout the West’s confrontations with the regions in the process of integration into the developed world that is to say, the historic colonization of territories and subjects, the spread of the market has involved violence, dispossession, and the institutions that perpetrate such acts. Fittingly, colonialism and territorial, or formal, empires have lost their legitimacy.

The liberation from the need for citizenship evokes a spirit of international openness in articulations like the Burlingame Treaty, its spirit captured in the language of the U.S. Commissioners:

Article I. The United States of America and the Emperor of China recognize the mutual benefit which results from the proper intercourse of the citizens and subjects of all nations, and, in order to encourage such intercourse between the two countries, agree that citizens of the United States visiting or residing in China, and subjects of China visiting or residing in the United States, for the purpose of trade, travel, or temporary residence, for the prosecution of teaching, study, or curiosity, shall enjoy in the respective countries all the rights, privileges, immunities, and exemptions which are granted by either country to the citizens and subjects of the most favored nations.

Yet, the United States persisted in making sure that laborers were subject to regulation. Consider how Article II left the doors of migration in U.S. hands:

Article II. Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects, or threatens to affect, the interest of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the Government of the United States may regulate, limit, suspend, or prohibit such coming.

Such articulations made possible the Chinese Exclusion Act of 1882, which exempted from restriction those Chinese who came for “teaching trade, travel, study, and curiosity.” Article III applied to those MFN people who already resided in the US:

Article III. But it is distinctly understood between the contracting parties that all Chinese subjects who, under the faith of existing treaties, have gone into or are now residing in the United States, shall be guaranteed all the protection, rights, immunities, and exemptions to which they are now

40. The field of postcolonial studies abundantly addresses the myriad process through which the so-called civilizing mission of colonialism went from being centrally constitutive of the West to being a history in need of undoing. For example, see generally EDWARD W. SAID, CULTURE AND IMPERIALISM (1994).
41. U.S. DEP’T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 177 (1882).
42. Id. at 177–78.
entitled under the provision of said treaties. 43

Such careful negotiations accounted for the interests in open and closed doors of immigration, particularly those interested in influencing politically sensitive matters like the price of labor and the racial/ethnic composition of the nation. 44 Thus, it is clear that notions of MFN are consistently interwoven with labor migrations, needs, and values.

The United States’ history of segregation, exclusion, and empire-building in the Asia-Pacific region following Yick Wo shows that the Angell Treaty, in all its diplomatic rosininess, did not set the stage for a new age of unity, equality, and “proper intercourse.” 45 Rather, the opposite endured. While borders between the United States and China were ostensibly dismantled by treaties premised on MFN, borders between the public and private spheres, the political and civil spheres, and the social and cultural spheres were reconsolidated. Instead of openness, the notion of separate spheres prevailed and insulated discriminatory practices and treatment from regulation. Despite an ostensible ethos of laissez-faire in the late nineteenth century, the era nevertheless saw the continued ascendance of the exercise of power in the realms of public health, education, and myriad forms of individual and social disciplining. 46 In other words, as Circuit Judge Sawyer noted, an “aggressive . . . public opinion” was laundered as legitimate through the statutes in question.

In 1886, the Chinese were protected “persons” in the eyes of the Fourteenth Amendment and the Angell Treaty. The Court noted that 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.” 47 Given the careful history of distinguishing between laborers and non-laborers in treaties, it is worth noting that the Angell Treaty erected categories of exception:

If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation,

43. Id. at 178.
44. See ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA, 3–10 (1971); see also McCLAIN, supra note 9, at 299.
45. U.S. DEP’T OF STATE, supra note 41, at 177.
and to which they are entitled by treaty.\textsuperscript{48}

The Court’s invocation of the Treaty implicitly labeled “Chinese laborers, or Chinese of any other class” as “persons,” that is, by referring to them not directly as “persons” but as individuals potentially subject to ill treatment by “other persons.”\textsuperscript{49}

At this point the Court quoted the Angell Treaty to amplify and clarify an assertion of Chinese personhood. By also invoking the Fourteenth Amendment and its reference to the category of the “person,” the Court extended its protections to those Chinese within the jurisdiction of the United States:

The Fourteenth Amendment to the constitution is not confined to the protection of citizens. It says: “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.” These provisions 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 the equal protection of the laws is a pledge of the protection of equal laws.\textsuperscript{50}

As the Court pointed out, the law protected “all persons.” More fundamentally, the Court noted the law is empowered with the capacity to protect itself and its equality: “the equal protection of the laws is a pledge of the protection of equal laws.”\textsuperscript{51} The prior allusion to specific language about personhood including Chinese subjects from the Angell Treaty allowed them to establish that Chinese aliens, by reason of being at risk from “ill treatment” by “other persons”, were persons, too. The citizen/alien divide ceased to be a controlling issue because, by extending the meaning of “persons” under the Fourteenth Amendment, Plaintiffs were considered persons under MFN and therefore protected. Either provision would have been adequate for bestowing protections on the Chinese because citizenship was no longer significant. What mattered was whether rights protected by the “constitution, laws, or treaties of the United States” had been violated.

However, widespread equality in geopolitical relations simply did not occur, in part because the modern Age of Empire was well underway by the 1880s.\textsuperscript{52} The Western world continued to demonstrate its unwillingness to recognize “Oriental” persons.\textsuperscript{53} The relationship between the United States and China in the late nineteenth century was not properly colonial in

\textsuperscript{48} Id. (emphasis added).

\textsuperscript{49} Id. at 368–89 (citing Angell Treaty with China, U.S.-China, Nov. 17, 1880, 22 Stat. 827).

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 369.

\textsuperscript{52} See generally E.J. HOBSBAWM, THE AGE OF EMPIRE: 1875-1914 (1987). Hobsbawm provides a magisterial and critical appraisal of the rise of territorial empire, linking empire’s emergence in that period to military and especially economic modes of power.

\textsuperscript{53} For the seminal articulation of this argument, see EDWARD W. SAID, ORIENTALISM (1978).
the terms of that day, meaning territorially integrated as a formally administrated colony, but rather neocolonial, and thereby having presumed independent sovereignty. Neocolonialism is theoretically premised on equal terms of economic and political interaction. But in practice this economic and political equality fails to be realized because of relationships based on economic dependency and unrepayable debt—specifically, relationships that develop from obligations between the developed/financing world and the developing/financed world. Under neocolonialism, these are legitimate relationships because the parties involved are seen to have freely chosen to participate in the global project of economic development. Back in the late 1960s, Thomas McCormick noted, that “[i]n contemporary jargon, the main thrust of America’s commercial policy in China at the turn of the century would be described as ‘neo-colonial’.”

The discourse and the material conditions of the empire become visible through melding MFN with the equal protections of the Fourteenth Amendment. While MFN and equal protection express ideals for respecting sovereignty and upholding rights, neocolonialism has emerged as a critical term for describing the disparity between those stated ideals and their actuality in practice. That convergence is not only conceptual but also historical. MFN and equal protection emerged to serve similar visions of a desirable modernity that not only brings the Enlightenment liberalist notions of equality and freedom to locations such as individual liberties and national sovereignties, but also links them to mutually necessary conditions. Yick Wo provides precisely this articulation in positing a both-and argument for the Constitution and the Angell Treaty as the bases for their ruling.

Globalization is premised on MFN relations. MFN relations are meant to be a normalized status rather than a seemingly exceptional condition even up to the late nineteenth century. The other term for world order in that era was “commercial reciprocity,” imagined as a balance of power made possible by the economic and political intercourse of equals on a level playing field. MFN specifically does not give advantage to those who would be, in vernacular terms, more favored over those who are least or normally favored. If one were to have “most favored person” status, it would sound like one has unequal (more) access to rights, privileges, resources, and opportunities. But what the phrase “most favored” has come to abbreviate is the idea that all parties have the “most favor,” which means no one has any special favor over another.

This understandable confusion over the meaning of MFN has led to

the replacement in 1998 of the term MFN by “normal trade relations” because “the term Most Favorerd Nation status was deceiving since most nations currently [had] this trade status except for a small handful of rogue nations that have been refused this normal trade relationship.” Under “normal trade relations,” the world is divided into the “normal” and the “rogue,” between those who would generally agree to policies concerning trade and tariffs (normal) and those who disagree with such policies (rogue).

In considering how MFN was the basis for Yick Wo’s judgment in favor of San Francisco’s Chinese immigrant laundry workers, we can see how the needs of capitalist development to render China as an MFN intersected with the ideals of the Fourteenth Amendment. Substantial scholarship on Yick Wo has focused on the ways in which the decision upheld individual rights despite a pervasive and widely recognized hostility toward the Chinese workforce in California in the late nineteenth century. The decision is remarkable because it found unconstitutional discrimination in regulations that, in their formulations, appeared to be non-discriminatory:

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.

Yick Wo, the launderer, had been in the clothes-cleaning business for more than two decades before the Supreme Court decision that bears his name. Why then, one might reasonably ask, did that decision emerge at that moment?

The terms of the decision itself exhibit and legitimate incipient globalization by securing the rights of Yick Wo and his compatriots to operate their ostensibly menacing laundries. While U.S. commercial interests in “the China Market” at that time were almost entirely speculative, the promise of seemingly limitless markets, as well as the political principles upon which such expansion relied for legitimation, was not to be surrendered by the ruling in Yick Wo. In this contest, both MFN and the Fourteenth Amendment appropriately triumphed over local municipal sovereignty.

Yick Wo stands as an instance when unjust discrimination, given

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56. NELSON, supra note 8.
57. On the pervasiveness of anti-Chinese and anti-Asian sentiment as manifested in material culture, see generally JOHN KUO WEI TCHEN & DYLAN YEATS, YELLOW PERIL (2007).
sanction by “fair on [their] face” statutes, was officially deemed unjust, thereby calling into question the extent to which “impartial[ity]” actually provides a cover for “aggressive public opinion” that fuels “notorious public events.”

Herein lies a quandary for discourse—legal or otherwise—that seeks to declare and enforce procedural equality under conditions of substantive inequality. The Fourteenth Amendment, particularly Section 1, powerfully puts into discourse the limits of state power to “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.” In principle the, the Fourteenth Amendment can be said to do for persons in the legal-political arena what MFN does for nations in a world envisioned as a space for free trade: providing an arena of activity where agents—whether persons or nations—have free and equal status. The Constitution and the Angell Treaty were thus in compliance with each other without having to extend citizenship to the Chinese. At issue then was how to incorporate China as a trading partner and the Chinese in the United States as constitutionally protected and therefore constitutionally affirming entities. MFN and the “person” emerge to provide the terms for making that incorporation possible, desirable, and defensible. Within the political sphere of a nation-state, the figure of what Lisa Lowe has referred to as the “abstract citizen” legitimates and resolves the contradictions of material inequalities amongst members of a social formation by providing supposed political equality on a level playing field of representative government. In the geopolitical sphere, the notion of MFN similarly legitimates inequalities under the “modern world system” by accepting as valid the terms through which nations interact economically and politically on a supposedly level playing field of global markets for labor and consumers.

Asian Americans have historically been a prominent flashpoint for emerging controversies around belonging through citizenship, national culture, and economic activity. U.S. cultural politics sought to come to

59. Id. at 363.
terms with putatively inassimilable aliens, like the Chinese in California or domesticated native populations, both the indigenous of the New World as well as of the “new possessions” of the United States in the post-1898 era. Their differences troubled the racially homogeneous national culture, yet fueled and encouraged capitalist demands for new markets, labor, and consumers.

Plotted into a genealogy of globalized modernity, the decision in Yick Wo was then both prescient and quite possibly unenforceable. It was prescient for codifying a new notion of the person that has become increasingly ascendant, whether in rationales for international intervention or against it. Because of the laundrymen’s ability to be both beyond and protected by the nation-state, they embody the cosmopolitan subjects of our own age of what anthropologist Aihwa Ong provocatively refers to as “neoliberalism as exception.”

Yet the formulations of Yick Wo were also possibly unenforceable because being beyond the nation-state, particularly at a moment of incipient and exceptional neoliberalism before NGOs and WikiLeaks, meant occupying a space neither recognized nor recognizable. True, the federal government, in the present case, was well within its power to curtail the “naked and arbitrary power” of the San Francisco Board of Supervisors. The slippery slope of the varieties of “other persons” who might be seen as similarly practicing “ill treatment” opened up a potential Pandora’s box of rogues to discipline. That they are or are not members of the political community of the United States, i.e., citizens, was not the issue. In this case, the categories of “person” and “citizen” were at issue in determining the scope and limits of the law and the Constitution; “person” emerged as the more privileged and inherently widespread category of existence.

64. “New possessions” was a common and frequently celebratory phrase used when discussing the newly acquired post-1898 locations for the United States. See generally TRUMBELL WHITE, OUR NEW POSSESSIONS (1898).


66. Although it is a centuries-old idea, cosmopolitanism has experienced a resurgence in the contemporary period, as both a celebration and critique of globality. See generally COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION (Pheng Cheah & Bruce Robbins eds., 1998); GLOBALIZATION, THE NATION-STATE, AND THE CITIZEN (Alan Reid et al. eds., 2010).


69. Meanwhile, the nation-state was also undergoing and resisting transformations in the Age of Empire, in the territorial sense, as well as the coming age of what Walter LaFeber presciently called “the new empire” that the United States was creating in the closing decades of the nineteenth century, forged out of a rapidly closing frontier and visions of a rapidly expanding market for both exports and
These conceptions of citizens and persons became crucial in defining the relations between states in the coming world order. MFN and, as I suggest in the conclusion, the repression of the regrettable histories (as critiqued by HR 683 “Expressing the regret of the House of Representatives for the passage of laws that adversely affected the Chinese in the United States, including the Chinese Exclusion Act”), as well as ongoing fact of “domestic dependent nations,” were necessary to legitimate the emergence of neoliberal globalization.

III. *Yick Wo* AND THE AGE OF EMPIRE

After the decision in *Yick Wo*, the laundry workers went from aliens, not favored and ineligible for naturalized citizenship, to a category we might call “most favored persons.” After legal and diplomatic developments, they were made into protected “persons” unencumbered by the citizen/alien divide. The capacity of this conception of freedom to be bestowed “in the future to any third power” literally sets the terms for the global expansion of economies. The maligned Chinese in California are examples of such a third power. To what extent that protection set the stage for the future is less clear. But—and this “but” is of paramount significance to Asian American history—these protected persons were nevertheless subjected to the laborer/non-laborer divide that was fundamental to the rationale and implementation of the Chinese Exclusion Act.

Identity, in relation to the labor market, would not be readily cast aside in the recognition of personhood. The normalcy of “normal trade relations” was produced by the ascendance of valorized and now constitutionally-protected personhood for this group of launderers in late nineteenth-century San Francisco. While the trajectory of this normalcy necessarily produces “rogues”—in this case, the San Francisco Board of Supervisors—when viewed in the history of contestations over category crises for those faced with incorporation to the United States, other deviant entities emerge as crucial to the legitimation of a world composed of “most favored nations.”

One notable example is the “domestic dependent nation,” a consequential entity articulated by Justice Marshall in *Cherokee Nation v.*

cheap labor. See generally WALTER LAFEBER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSIONISM, 1860-1898 (1963). This is not to deny the historic and ongoing importance of struggles around citizenship and exclusion. For an elaboration on the centrality of the idea and practice of the citizenship for Asian Americans, see generally MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2013); LISA LOWE, IMMIGRANTS ACTS: ON ASIAN AMERICAN CULTURAL POLITICS; (1996).

70. See SAXTON, supra note 44, at 177–78: “The restriction was to take effect ninety days from the date of signature. The new law applied to Chinese laborers, skilled and unskilled, from any foreign port, and was to be enforced by penalties of fine and imprisonment of shipmasters found in violation and by forfeiture of vessels.” See also TAKAKI, supra note 6, at 14.
State of Georgia. And it was remobilized and adapted by the Court in Downes v. Bidwell. That is, a “domestic dependent nation” and an insular possession are contained social formations that are foreign in terms of domestic policy, but domestic in terms of foreign policy. The concept emerged as a way of describing U.S. expansion at the turn of the century without quite calling the new sites within its spheres of influence “colonies.” Other attempts to reckon with the prospect of colonial status include “associated free state” (or “Estado Libre Asociado,” a term used for Porto Rico, for example) and “unincorporated territory” (a term used for Guam as well as Porto Rico, for example).

Revisionist history has made it possible to see the limitations of that non-imperialist narrative and to articulate alternative accounts of what happened and why. These insights can be brought to bear on what is at stake in rethinking the significance of the Yick Wo decision. In particular, scholarship in critical race theory has critiqued fallacies of equal protection that have emerged in the wake of unmet ends of civil rights struggles. Those disappointments have revealed historical and previously unrecognized interests served by even the most well-intentioned efforts at realizing equality through the championing of civil rights. Similarly, the work of postcolonial studies has been instrumental in critiquing unmet ends of anticolonial nation-states and the terms of world order in the aftermath of colonialism. The fallacies of geopolitical relations that go under the name MFN, yet more resemble neocolonialism, could be more akin to

71. 30 U.S. 1 (1831) (determining the legal and political status of Cherokees in relation to the federal government).
72. 182 U.S. 244 (1901) (determining the applicability of the Constitution to regulate trade in the newly acquired territory of Porto Rico).
74. See generally WILLIAM APPLEMAN WILLIAMS, EMPIRE AS A WAY OF LIFE (1980).
75. The seminal article in this regard is Derrick Bell’s interpretation of Brown v. Board of Education. See Bell, supra note 11.
76. Gayatri Spivak pointedly articulates this critical take on “so-called decolonization”: “The contemporary international division of labor is a displacement of the divided field of nineteenth-century territorial imperialism. Put simply, a group of countries, generally first-world, are in the position of investing capital; another group, generally third-world, provide the field for investment, both through the comprador indigenous capitalists and their ill-protected and shifting labor force. In the interest of maintaining the circulation and growth of industrial capital (and of the concomitant task of administration within nineteenth-century territorial imperialism), transportation, law, and standardized education systems were developed – even as local industries were destroyed, land distribution was rearranged, and raw material was transferred to the colonizing country. With so-called decolonization, the growth of multinational capital, and the relief of the administrative charge, ‘development’ does not
“domestic dependent nation.” Insights from both Critical Race Theory (CRT) and postcolonial studies shed light on what the legal victory in Yick Wo may mean when put in the context of the demands for a conception of the nation-state as progressively inclusive rather than racially exclusionary. Asian immigrants transformed from a “Heathen Chinese” and a “yellow peril” industrial reserve army to a model minority that legitimated state power through their famously “quiet” Americanization and touted economic prosperity in spite of this legacy of institutionalized exclusion and colonial conquest.

With late capitalist deindustrialization, a leading anxiety of developed world workers in an international labor market is the flight of jobs to the developing world. No longer are such jobs limited to heavy manufacturing as service-based economies, especially in a digital age, prove mobile and flexible. They are, thus, easily hired and dismissed as the needs of the market dictate. With the continuation of late capitalist deindustrialization in the developed, or overdeveloped, world, politicians also now court the anxieties of even white-collar workers by conjuring visions of outsourcing of their labor. Not only is the factory worker in the rust belt a casualty of flexible economies, but also the cubicled technologists of corporate America, those subcontracted beyond America. The indignity of a worker being asked to train his or her replacement under threat of loss of benefits is something genuinely diabolical, conjuring images of the robber barons of old. For example, a decade ago, at the Democratic National Convention, John Kerry, in his speech accepting the nomination for the presidency, asked in terms that already now may seem dated for their attempt to check something very difficult to arrest: “What does it mean when workers I’ve met had to train their foreign replacements?”

The new industrial reserve army is composed of workers of a different skill set. Now Americans read of the code-writers who can telecommute to Silicon Valley from Bangalore. Kerry also told the Convention in Boston:

We’re told that outsourcing jobs is good for America. We’re told that new jobs that pay $9,000 less than the jobs that have been lost is the best we can do. They say this is the best economy we’ve ever had. And they say

now involve wholesale legislation and establishing of educational systems in a comparable way. This impedes the growth of consumerism in comprador countries.” Gayatri Chakravorty Spivak, Can the Subaltern Speak? in MARXISM AND THE INTERPRETATION OF CULTURE 287 (Cary Nelson & Lawrence Grossberg eds., 1988).

77. On the rise of technology outsourcing and the new (de)worlding of the world that this outsourcing produces, see generally A. ANEESH, VIRTUAL MIGRANTS: THE PROGRAMMING OF GLOBALIZATION (2006).


that anyone who thinks otherwise is a pessimist. Well, here is our answer: Working voters, anxious about the nation hemorrhaging jobs as well as immigrants filling the ones left, would understandably then fret over the porosity of the nation-state under the new flexibilities of capitalism.

Despite the proliferation of images of workers in Asia staffing the new high-tech sweatshops, much of the history of Asian immigration to the United States and its territories is a history of outsourcing in reverse. From the transcontinental railroad to the sugar plantations of Hawaii to the fish canneries in the Pacific Northwest, Asian immigration has been directly connected to the need for so-called cheap labor. The myth of the sojourner legitimated the idea that these waves of migrants were in the United States temporarily, only long enough to make a sum of money that would go much farther back in Guangdong. The sojourner was the convenient foil to the settler, as well as families, who built social and political institutions in the mythicized transformation of frontier wilderness into the civilized world.

This sojourner trend continues with the continued flow of overseas foreign workers (“OFWs”) and domestic workers, not only to and from the developed world, but also between any location that is more rapidly developing than the place they must still call home, and to which they send as much of their wages as they can to support the unemployed and underemployed members of what has been called the “split households” of “transnational families.” Filipina domestics have become an increasingly visible paradigmatic manifestation of these migrations and remittances. These workers enable and enrich the host countries by providing low-cost child and elder care for middle-class workers in developed countries while having a status that minimally impacts the coffers of the receiving state, constructing what Rhacel Parreñas has referred to as the “international division of reproductive labor.” Most notably, these women will perform their jobs for, say, Dutch, Italian, American, Japanese, or Singaporean families, and then return “home” with no entitlement to benefits that workers based in the receiving country would presumably expect.

80. Kerry, supra note 78.
81. The value—or perhaps more precisely, the price—of labor comes to be set by the availability of workers in the labor market. Historically and in the contemporary moment, this condition has tightly bound immigration policy to labor concerns. See generally LABOR MIGRATION UNDER CAPITALISM: ASIAN WORKERS IN THE UNITED STATES BEFORE WORLD WAR II (Edna Bonacich & Lucie Cheng eds., 1984); SAXTON, supra note 44; CHRIS FRIDAY, ORGANIZING ASIAN AMERICAN LABOR: THE PACIFIC COAST CANNED-SALMON INDUSTRY, 1870–1942 (1994); DOROTHY FUJITA-RONY, AMERICAN WORKERS, COLONIAL POWER: PHILIPPINE SEATTLE AND THE TRANS-PACIFIC WEST, 1919-1941 (2003).
83. See PARREÑAS, supra note 82, at 61–79.
these forms of reproductive labor taken care of, the First World families can send more members, usually women liberated from performing unpaid reproductive labor for with their own households, into the far more profitable sector of productive labor. The net savings are layered multiple times for the developed world, as such costs as retirement benefits for workers and public education expenses for their children are never claimed by these guest workers. 84

Global gender inequities fuel and are fueled by these economic relations while, back in the sending country, unemployed husbands can be fully and comfortably supported. It may be hard not to conclude that a global constant seems to be that masculinity is defined by the unwillingness to clean up after yourself. The wages in the developed world cover the cost of living with enough left over to support family “back home” including the hiring of caregivers for the OFWs’ own children. The ostensibly free flow of money and persons is what makes this situation both possible and legitimate. This particularly system has been called the “care chain” or the “chain of love.”

In nineteenth-century America, “free white labor” and politicians serving their interests notoriously unified to drive out the various menaces driving down the cost of labor, whether recently emancipated slaves, immigrants from the Pacific Rim or South of the border or Southern or Eastern Europe. 85 Any current constituency in the developed world that has been displaced by today’s labor force of domestics has yet to make itself known. They remain currently unrecognized or, in the language of postcolonial historiography, the subaltern, i.e., those recalcitrant elements under colonialism who are ultimately irreconcilable to the dictates of both colonial and postcolonial modernity. As an unorganized and unrepresented constituency, they must therefore exist as non-secular millennial movements or other agents of the irrational. 86

Subaltern may be a useful category to invoke to understand the critical implications of the subjectivity of the petitioners in Yick Wo. In other words, if the Chinese were seen to be a new formation of recognized personhood, what accounts for the continued abjection of the Chinese in America? The convergence of migration, labor markets, and geopolitical relations produced subjects who tested the capabilities of the market to legitimate exploitation and the sovereign power of the nation-state to

85. See California’s “An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California,” also known as the Anti-Coolie Act of 1862. See, e.g., Saxton, supra note 44; Jacobson, supra note 65.
86. See Spivak, supra note 76.
address those practices. “Most favored nation” status fundamentally emerged as a vehicle for legitimating illegitimate inequalities, while real and imagined “third powers” remain, as some contend, structurally disadvantaged to compete in the global marketplace.

What then are the lessons of Yick Wo, if the discourse of the decision is understood not only as a triumph of equal protections but also as a defense of “most favored nation” status and a normalizing of trade relations? In our historical moment, scholars and other commentators have suggested that economic globalization, like that possibly idealized in Yick Wo, has come to mean the displacement of the nation-state from its undisputed status as the sovereignty in the last instance. This concept continues to be the basis for and agent of legitimate violence, including but not limited to the waging of war. The borderless global village is inhabited by agnostic, urbanized globetrotters who labor and consume in the service of late capitalism, unencumbered by national dictates and even multilateralism. Like many other idealized social categories, it is unclear whether anyone or anything can occupy that space in practice. If one is outside of this order, one is either backward and underdeveloped or overdeveloped and decadent. At worst, one is branded a rogue.

Debates over the meaning of globalization have predominantly been about the actual as well as the imagined fate of the nation-state. Scholars in a variety of disciplines have assessed the extent to which the nation-state has indeed fallen into diminished significance or whether it may actually be strengthened by its purported demise. As is the case when the decline of any object is at issue, one is reminded of its lingering force as the dominant way of thinking, even if it may be on the wane.

Yick Wo’s discursive convergence of sovereign nation and sovereign person provides us with an attempt to simultaneously imagine a new world...

87. See Lochner v. New York, 198 U.S. 45 (1905). This is the landmark case for these questions in the U.S. context.
88. See Rosa Spinks, Campaign Hero: Vandana Shiva, anti-GM activist and head of Navdanya, ECOLOGIST, (Oct. 19, 2011), http://www.theecologist.org/campaigning/campaigning_the_basics/1097080/campaign_hero_vandana_shiva_antigm_activist_and_head_of_navdanya.html. For instance, arguments for third world debt forgiveness are premised on this idea. And the work of activists such as Vandana Shiva, who critique the system of multinational corporations, such as Monsanto and their patenting/copyrighting of seeds, point to these structures that not only maintain the status quo but also widen the gap between those with wealth and power and those without.
90. Max Weber concisely defined the state as “a relation of men dominating men, a relation supported by means of legitimate (i.e., considered to be legitimate) violence.” Max Weber, Politics as a Vocation from MAX WEBER: ESSAYS IN SOCIOLOGY, 77 (1946); see generally BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1996) (discussing the intimate connection between national consciousness and submission to/veneration of violence and mortal sacrifice on behalf of the nation).
91. See generally CULTURES OF GLOBALIZATION (POST-CONTEMPORARY INTERVENTIONS) (Fredric Jameson & Masao Miyoshi eds., 1998).
order of functional sameness—by recognizing inherent personhood—that nevertheless conserves forms of difference that national identity and global capitalism have found both profitable and constitutive. In imagining a condition of political, economic, and cultural existence that affirms and is affirmed by constitutional protectedness and non-discriminatory inter-state relations, the “person” emerged as the category of the future. If the person was the category of the future, the category that seemed to wane was the citizen. History has shown that has not been the case, evidenced by the material and ideological stakes of, for instance, pathways to citizenship for those who would be directly impacted by the Development, Relief, and Education for Alien Minors (“DREAM”) Act (proposed legislation to provide naturalization opportunities for undocumented students and enlisted persons who immigrated to the United States in childhood).92

Nevertheless, a question that seems to be answered by the decision is: who comes after the citizen?93 Judging from Yick Wo, it seems to be the “person” referred to in the Fourteenth Amendment. Yet that “person” was also found in the considerably less-remembered Angell Treaty.94 The “person” is a figure we might think of as the citizen of the world, and as such becomes the bearer of rights and privileges that supersede that of the citizen of the nation-state. These unlikely Celestials became a sort of model minority, legitimating federal power over state and municipal bodies.95 The Yick Wo decision animates a revealing dialectic: the guarantees of the Fourteenth Amendment are upheld by a treaty, which is upheld by the Fourteenth Amendment, therein upheld by the treaty, upheld by the amendment and so on ad infinitum. Despite this dialectical relationship, it is not hard to see that the amendment continues to be far more important in legal history and the legal present. So to assert a dialectical relationship emphasizes the important role of the treaty, out of the shadows of history that has generally shined a spotlight on the amendment. It is safe to say that few remember the Angell Treaty and its related diplomatic lineages and descendants. But, in economic development history, the ideals upon which the treaty is premised and for which it served as a protector resonate immensely with myriad discourses that continue to dictate development

93. “Who comes after the subject?” was a question addressed by a group of philosophers over two decades ago to some leading social theorists. One of the most incisive and direct responses to that question was articulated by Etienne Balibar when he bluntly said, “The citizen comes after the subject.” Balibar further elaborated on this transition by describing the historical moment that witnessed this event: the French Revolution. “The citizen is the subject who rises up.” Etienne Balibar, The Citizen Subject, in WHO COMES AFTER THE SUBJECT 33–57 (Eduardo Cadava ed., 1991).
policy in the aftermath of colonialism.

The personhood that both the Fourteenth Amendment and the Angell Treaty envision and theoretically realize is one of a post-racial and decolonized order. Despite the currency of model minority renderings of Asian difference and Asian American sameness under multiculturalism, Asian racialization in U.S. culture has historically not led to the championing of their rights, as it did for the petitioners in Yick Wo. Quite the opposite; it has actually marked the more recent history of Asian Americans in law and politics, as perceptions of group-defining achievement have meant that Asian Americans have been defined by their quiet prosperity and a history of quiet minority rights advocacy, resulting in the model minority myth. Indeed, Asian racialization has, for much of the history of the United States before and since Yick Wo, been the basis for exclusion. The Chinese Exclusion Act of 1882 was regularly renewed every ten years and eventually became the Asian Exclusion Act in 1923. This would not be repealed until 1943, as a gesture of good will to allies in the war against fascism. The quotas stood at an unimpressive 105 immigrants per sending country per year. The Immigration and Nationality Act of 1965 would be the more significant action.

It would be easy to chart a course of progress against racism if one used Yick Wo as a contrast to the previous three decades. Back in 1854, the California Supreme Court in People v. Hall, determined that Chinese immigrants—"whose mendacity is proverbial; a race nature has marked as inferior, as their history has shown,"—were ineligible to give testimony in court and thereby "swear away the life of a citizen." Such a ruling was largely consistent with mainstream American views of Oriental otherness and reflective of their civic exclusion at that time. In addition, notions of the gold-mining Chinese as an industrial reserve army, ready to be mobilized, were relatively non-existent as mass organized transcontinental railroad construction was not yet underway. The ruling by California’s high court nevertheless branded the Chinese as “an anomalous spectacle.” In reaching their decision, the court effectively deemed Chinese immigrants “black, mulatto, or Indian,” as well as “not white” since the law had not yet unambiguously placed the Chinese in a category of exclusion from civic

96. This term became especially widespread during the first Obama campaign and presidency. It also calls to mind prominent moments in civil rights, from being judged by the “content of one’s character” to Justice Harlan’s notion that “our constitution is colorblind.” Martin Luther King Jr., I Have a Dream Speech (Aug. 28, 1963); Plessy v. Ferguson, 163 US 537 (1986) (Harlan, J., dissenting).
98. 4 Cal. 399 (holding that Chinese are ineligible to give testimony in court).
99. Id. at 405.
100. Id.
representation.101 A category crisis about the civic status of the Chinese was therefore solved, as the terms of Chinese difference in the eyes of the law had not been codified as it had for the aforementioned racial groups. For the racism that led to the People v. Hall ruling, the risk was that a lack of legal-racial codification could mean that Chinese could testify since they were not explicitly excluded by name. People v. Hall changed that, so both explicitly codified as well as practiced discrimination would proceed. The Chinese in the United States and its territories were already subjected to lynch mobs and purges that would persist. And they were eventually banned from entering the United States after the 1882 Chinese Exclusion Act, which wound its way through the Congress amidst the famous choruses of “The Chinese Must Go!”102 Yet in 1886, another category crisis emerged with Yick Wo, this time around ambiguities of codified equality before the practiced discrimination in its enforcement. The U.S. Supreme Court defended the right of Chinese immigrant laundry workers to operate their newly controversial businesses in the apparently tinderbox city of San Francisco. The Chinese in post-1882 San Francisco remained a group of alien persons ineligible for citizenship. And after 1898, further entry of more Chinese laborers to the continental United States was explicitly outlawed, including even those already residing in U.S. territories such as Hawaii. Another category crisis is solved, as the Chinese remained ineligible for citizenship, while principles of political freedom and free trade, especially the equal protection of persons and of MFN, also achieved robust endorsement through the decision. Even with this legal victory, as well as before it, terrorizing mob campaigns purged the Chinese or relegated the Chinese to overcrowded slums. Nevertheless, the high court in 1886 championed the Chinese as those who stood up against the “evil eyes,” “unequal hands,” and “essence of slavery”103 of San Francisco’s Board of Supervisors, by refusing to accept the denial of their equal Constitutional protections and their membership in a treaty-backed most favored nation.

CONCLUSION: YICK WO AS AN EXERCISE OF OFFICIAL ANTI-RACISM

#69

Detained in this wooden house for several tens of days, It is because of the Mexican exclusion law which implicates me. It’s a pity heroes have no way of exercising their prowess. I can only await the word so that I can snap Zu’s whip. From now on, I am departing far from this building.

101. Id. at 399.
All of my fellow villagers are rejoicing with me. Don’t say that everything within is Western styled. Even if it is built of jade, it has turned into a cage. 

[Anonymous poem carved into the wall of the Angel Island Detention Center, c. 1910–1940, translated] 104

To conclude, I return to H.R. 683, the congressional resolution successfully adopted in July 2012 through the work of Representative Judy Chu, to consider its implications alongside those of Yick Wo and related historical developments in abiding by the “most favored nation” status and concomitant personhood. The victory for the defendants in Yick Wo v. Hopkins is, like H.R. 683, an expression of resistance and a demand for official recognition. In speaking to and through some of the highest manifestations of state power—Supreme Court and Congress—the decision and the resolution traffic in what Jodi Melamed and others have critically referred to as “official anti-racisms” and other forms of civil rights-based representation that look to and empower the state as the ultimate guarantor of rights and, indeed, of personhood. 105 H.R. 683 looked back to the 1868 Burlingame Treaty as a laudable moment when “the free movement of the Chinese people to, from, and within the United States made China a ‘most favored nation’”. 106 In the wake of the Burlingame Treaty there was an erosion of that freedom of movement beginning from President Rutherford B. Hayes’s 1878 renegotiation of the Treaty and the 1879 Fifteen Passenger Bill (that was eventually vetoed by Hayes), to the various iterations of Chinese Exclusion acts, most notably in 1882. 107 Congress would not begin to effectively repeal the Acts until the middle of World War II. 108 H.R. 683 is an important reminder of this history.

The anonymous poem at the beginning of this Section (c. 1910–1940), etched into the wall of the Angel Island Detention Center, discovered by a park ranger and then collected and published in 1980, exists as a form of recovered complex historical agency for a population mainly known for being subjected to exclusion and their efforts to manipulate immigration regulations through being “paper sons.” 109 From these lines we can partially

107. This history is recounted in the language of H.R. 683 itself.
108. See id. On the legislative history of the repeal of Chinese and Asian exclusion, see Gotanda, supra note 97 (discussing the legislative history of the repeal of Chinese and Asian exclusion).
109. For the history of Angel Island Detention Center and Chinese immigrants, see Him Mark Lai, Genny Lim, and Judy Yung, Island: Poetry and History of Chinese Immigrants on Angel Island, 1910–1940 (San Francisco: Chinese Culture Foundation, 1980). Genny Lim is also the author of one of the most important plays in the history of the Asian American theatre called Paper Angels, dramatizing the
access and speculate on the desires as well as the political conditions of those subject to this legislative history. Referring to “the Mexican exclusion law,” the speaker of the poem is aware of the tangled diplomatic and legislative conditions under which he is attempting, and at the moment failing, to make his way in the world. The poem also captures a sense of literal and figurative arrest that both fuels the speaker’s desire for change and critically illustrates the deviation of his reality from his desires. The sentiment and subjectivity that the poem expresses provides access to forms of resistance through cultural production, and therefore access to what we might call unofficial anti-racisms that emerge from sites outside of normal political and legal processes. Whether official or not, the aftermath of his unmet desires set conditions that, about a century later, made HR 683 compelling enough to achieve unanimous adoption by the House of Representatives.

In the 2012 House Resolution, along with the treaty history between the United States and China that it invokes, the phrase “most favored nation” expresses the agreed-upon relationship between these two sovereign powers and their freely moving subjects. Though the phrase “most favored nation” is directly cited from nineteenth-century diplomatic discourse, the ideas and ideals that it represents live on in the conceptions of geopolitical relations premised on principles designed to ensure notions of a free market and the rule of law. That ideal is particularly manifested in the adopted resolution as the free movement and the protection of persons possessed of “all rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.”

This Essay has drawn attention to the emergence of this idea and its attempts at realization and enforcement by considering a key discursive moment when MFN played an important role in a Supreme Court decision to also uphold equal protection and due process under the Fourteenth Amendment.

H.R. 683 can be seen as an outcome of needed historical revisionism by the Asian American movement through the achievement of one of the most formal manifestations of historical representation that U.S. political culture provides—unanimous congressional recognition and regret. With such revisionism, the flawed “mirror” to the past” that Ronald Takaki has written of might then be able to reflect the present in its diversities, instead of engendering a “psychic disequilibrium” that might result from “look[ing] into a mirror and s[eeing] nothing.”

The nation’s official regret is in part a contemporary manifestation of historical agency that did

strategies and conditions of the “paper sons” who sought to convince immigration officials that they were the offspring of Chinese in the United States. The play was published in Unbroken Thread: Anthology of Plays by Asian American Women (Amherst: U of Mass Press, 1993).


not, in its own time, achieve satisfactory recognition. This regret in our
time sets the terms for the recovery of now legible historical agency that
was, in its own time, understood as adequately represented through the
forms of political and cultural representation. These forms of representation
were presumed not only to be adequate to the tasks at hand but also as
legitimately total: including the courts, the legislature, the marketplace, and
diplomatic channels, but not needing naturalized citizenship. By invoking
terms of the Fourteenth Amendment, this constitutionally protected totality
rested upon the notion that the Chinese are persons. Also, by
simultaneously invoking the Angell Treaty, the decision demonstrated how
personhood and “most favored nation” status are dialectically produced.
From the Burlingame Treaty to Yick Wo, personhood comes to have
actionable meaning because of connection to a recognized community of
“most favored nations” who deal with each other on equal terms.

To understand this aberration as something other than arrival at the
promised land of equality, “most favored nation” status emerged as the
main protection against the practice of racist discrimination, sanctioned by
U.S. municipal codes. As discussed above, Fourteenth Amendment clauses
were the ostensible reason for the sanctity of the equal protection and due
process to which Yick Wo and other “persons” were entitled. The “person”
seems to have emerged as the protected entity, no longer just the citizen.
The age of going beyond the nation-state seemed to be upon us in the
1880s.

The 1886 decision draws on and extends discourse used to make sense of
and therefore legitimate inequalities, that is to say, discourse to reconcile
post-Enlightenment liberalism nevertheless with the demands of empire,
the dictates of exclusion nevertheless with a vision of a coming world order
of most favored nations of equally protected persons. The emergence of
MFN and its eventual transformation into “normal trade relations” can then
serve as a useful means of recognizing these attempts at such
reconciliation.

In the history and study of MFN and the United States, China has long
been the test case. From the Burlingame Treaty of 1868 to contemporary
debates over working conditions and reported human rights violations of
the People’s Republic, the export and labor markets of China are legendary.
The labor market/export market divide has marked a rift between labor and
capital in U.S. history, between producers and consumers. Globalization
marks the overcoming of that classed difference through triumphal
consumerism. In the latter half of the nineteenth century, Charles Crocker,
Leland Stanford, and other captains of industry all wanted cheap labor, in
whatever form that kept it cheap. And thus emerged the Open Door policy
and associated initiatives and principles in United States diplomatic
history.\textsuperscript{112} From the standpoint of immigration, Dennis Kearney and the White Labor movement wanted closed doors to the United States, with 1882 was a high water mark for the influence of anti-Chinese sentiment on immigration policy, with the Chinese Exclusion Act.\textsuperscript{113} 1886, the year when \textit{Yick Wo} was handed down, must be seen in light of that effective closure of the United States to Chinese labor. Even when they could enter, they were not eligible to become naturalized citizens. So the decision in \textit{Yick Wo} does little to alarm the legions of xenophobes. For all their vilification for various vices and diseases, the Chinese were also seen as an unsustainable minority, unable to reproduce itself through conventional nuclear families due to the wide gender imbalance.\textsuperscript{114}

\textbf{CODA}

Toward exploring the implications of the new world order that \textit{Yick Wo} envisions, we can look to prior and future efforts to come to terms with the incorporation of difference. That is, it may then be instructive to frame the decision amidst a tradition of national and imperial projects that needed to legitimate a long history of settler colonialism as well as new developments in extraterritorial expansion. \textit{Cherokee Nation v. Georgia}\textsuperscript{115} and the Insular Cases (especially \textit{Downes v. Bidwell}\textsuperscript{116}) can shed light on the failures of MFN to be a guiding principle when formal colonialism is involved. Chief Justice Marshall offered the following rationale for \textit{not} recognizing Cherokee nationhood:

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.\textsuperscript{117}

The petitioners become the radically disempowered entity of the

\textsuperscript{112} WILLIAM APPLEMAN WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY 229–243, 306–312 (1959, rev. 1972). The Open Door Policy in diplomatic history describes the conception of China as a space kept open for commercial and industrial interests; that is, not claimed by and for particular powers.

\textsuperscript{113} See SAXTON, supra note 44, at 117–26, 177–78.

\textsuperscript{114} SHAH, supra note 46.

\textsuperscript{115} 30 U.S. 1 (1831).

\textsuperscript{116} 182 U.S. 244 (1901).

\textsuperscript{117} \textit{Cherokee Nation}, 30 U.S. at 1.
“domestic dependent nation,” an overtly inferior status, socially, politically, and otherwise. “Domestic dependent nation” is a status that gives all authority to the United States for sovereignty but very little—not really—in terms of rights and privileges of belonging. “Domestic dependent nation” basically means that we choose not to fully absorb or eliminate you, discursively and literally, at this time. “Domestic dependent nation” is quite overtly a form of second-class citizenship, which may not be so difficult to legitimate for a then slaveholding society.

And by 1901, with the United States trying to figure out what to do with its new colony-like possessions, an echo of “domestic dependent nation” status came back. “Insular” status operated both as a relationship between social units as well as subjects: colonies of the colonized and an empire of colonizers.

The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico.¹¹⁸

A liminal formulation emerges again to describe constituencies that demand new categories, whether they are United States-residing subjects of China whose rights are protected by the Constitution or not-quite-foreign national formations represented by, dependent upon, and even possessed by the United States. Has such a liminal status become paradigmatic rather than exceptional in the contemporary period? Perhaps this is so, as MFN “normal trade relations” are marshaled in efforts to produce subjects and social formations that abide by a system of procedural—but not substantive—equality. At such locations, civil society purportedly converges with economic globalization resulting in a world order that, in the words of the Angell Treaty, “recognize[s] the mutual benefit which results from the proper intercourse of the citizens and subjects of all nations.” These “citizens and subjects of all nations” came to be recognized as an inclusive conception of “persons” in *Yick Wo*, congruent with the notion of person as found in the Fourteenth Amendment. Reading between the lines of this rhetoric may help us to recognize transitions and transformations in empire, not only in uneasy territorial acquisitions but

¹¹⁸. *See Downes*, 182 U.S. at 244.