YICK WO AND THE CONSTITUTIONAL REGULATION OF CRIMINAL LAW

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Jack Chin's revisionist account[1] of *Yick Wo v. Hopkins* is entirely persuasive, and it is a terrific story of lost history and the effect that this loss had in facilitating a longstanding misunderstanding of a leading post–Civil War constitutional law decision. One of the lessons from Chin's essay reminds us of the limitations of legal doctrine. No plain language can overcome the felt constraints of a time, the boundaries of permissible modes of thought and belief. Anti-Asian bias was so deep during *Yick Wo*'s time and for decades after, it seems implausible, in retrospect and in light of Chin's paper, to have believed that *Yick Wo* deployed equal protection doctrine as a strong anti-bias principle to vindicate race-conscious executive action.

As Chin notes, *Yick Wo* is invoked today mostly in criminal cases (prominently, perhaps infamously, in *United States v. Armstrong*[2]) to stand for the proposition that criminal defendants can win equal protection claims when prosecutors pick and choose who to prosecute based on race. Yet, as Chin and others have noted, *Yick Wo* is not a criminal case in a sense that is meaningful for the Court's equal protection and due process analyses. It was the San Francisco Board of Supervisors's licensing decisions that were the biased executive action at issue, not the prosecutor's charging decisions. Courts in the initial half-century or more after *Yick Wo* understood this, and a valuable part of Chin's account is his analysis of a broad set of cases, now formally abandoned, that held *Yick Wo* inapplicable to criminal cases. Thanks to Chin's work, we can see that the contemporary understanding and invocation of *Yick Wo* has little to do with the opinion the Supreme Court issued in that case. *Yick Wo* is more accurately understood as an early *Lochner*-era case in which the defendants' property rights, namely their right to earn a

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1. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359.

2. 517 U.S. 456 (1996).

living in a lawful occupation, were at issue. In the post-*Lochner* era (post, roughly, the 1930s), the due process doctrine on which *Yick Wo* largely rests fell from favor, and modern equal protection gradually rose. Yet, instead of fading into oblivion as just another outdated *Lochner*-era property rights case, *Yick Wo* was reinterpreted (despite its original meaning) as a decision about equal protection, racial bias, and criminal procedure.

Despite its origins as a property rights decision, *Yick Wo*—and Chin's story of its history—overlaps with and implicitly references another story about criminal law that I would like to draw out briefly, because *Yick Wo* was, literally, a criminal case. Moreover, it was a prosecution for a familiar yet contentious category of crime. One of Chin's central points is that *Yick Wo* was never intended as—and for decades did not function as—a constitutional criminal procedure limit on enforcement discretion. But in addition to standing for the absence of criminal procedure regulation, *Yick Wo* also represents the absence of direct constitutional limits on the scope of substantive criminal law. That absence may seem a modest puzzle, given that Chin discusses a collection of cases in which courts eventually permit *Yick Wo* to govern discretionary enforcement of criminal statutes *if* legislatures have the power to criminalize the underlying conduct, but not if legislatures lack that power with respect to other conduct.

What is the source of the line between what legislatures can criminalize and what they cannot if there is no constitutional law of substantive criminal law? *Yick Wo*, in conjunction with other cases Chin identifies, points to the answer. The Court's protection of property rights under due process doctrine in *Yick Wo* demonstrates one of the doctrines by which the Court *indirectly* regulated legislatures' substantive crime definition. It turns out that courts have many times told legislatures what they can and cannot criminalize, but they have always done so without a hint of a theory of substantive criminal law. As a result, criminal law's reach is, at least as a matter of constitutional law, coextensive with legislatures' general regulatory authority.

Yick Wo and his codefendant, Wo Lee, were convicted of misdemeanors that carried significant punishments; both served jail time for operating laundries without the Board's consent. In a sense, that is an odd crime. It looks like an ordinary licensing regime, although Chin notes that Yick Wo and Wo Lee had complied with separate health and fire safety ordinances and this additional requirement of Board approval seems designed specifically to create a means to deny Chinese businesses a license. Jail seems a harsh sanction for running an unlicensed business, especially one that had passed safety inspections. But both the type of crime and the punishment were in fact common; this sort of regulatory crime has a history in American criminal law that precedes the Constitution.

The early decades of the American republic continued earlier English and colonial practices of employing criminal law routinely as a means of local regulation. Criminal regulations targeted everything from navigation rules (which, *inter alia*, limited the size of wharfs built on private land adjacent to public waterways[3]) to fire prevention, including building codes and tight governance on gunpowder transport and storage. Such provisions often were punishable by substantial fines and prison terms, especially in some urban areas such as New York.[4] These forms of regulation were part of a large and well established category of public nuisance that justified a range of significant criminal penalties.[5]

Landowners were prosecuted for such offenses as constructing a wooden building (rather than brick) in violation of fire codes;[6] for erecting a building too close to a highway; for a range of economic activity relating to weights and measures, food purity, price controls, and limits on sales outside of designated markets; for obstructing roads by parking wagons while they were loaded; and for removing sand from privately owned beaches.[7] The licensing ordinance that Yick Wo and Wo Lee violated may have been designed to be a tool of anti-Chinese discrimination, but its basic form—a criminally enforceable regulation barring ordinary business activities or land use without government permission—was a long-established practice by 1880.

This broad tradition of government regulation of business—and of much else in personal and social life besides[8]—was, until at least the Civil War, a widely accepted exercise of state police power. When one Cyrus Alger built a private wharf on his property along Boston harbor in violation of wharf-limit lines set out by the Massachusetts legislature, the affirmance of his conviction prompted an influential statement of the police power by one of the great jurists of the mid-nineteenth century, Massachusetts Chief Justice Lemuel Shaw:

> We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however

3. *See, e.g.*, Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851).

4. *See* Laws of the State of New York, 2 vols. (Albany, N.Y. 1813), 2 (1813), c. 86 (R.L.), 363–70; A DIGEST OF THE LAWS OF NEW JERSEY, 1709–1861, at 300 (John T. Nixon ed., 3d ed. 1861). For a general discussion, see WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 57–58 (1996).

5. *See, e.g.*, Fisher v. McGirr, 1 Gray 1 (Mass. 1854) (describing and approving criminal sanctions for gunpowder regulation). For a general discussion, see NOVAK, *supra* note 4, at 61.

6. Respublica v. Duquet, 2 Yeates 493, 499 (Pa. 1799); *see* NOVAK, *supra* note 4, at 67, nn.85–86.

7. *See* NOVAK, *supra* note 4, at 87–97; *see, e.g.*, REV. CODE OF VA., ch. 137, (1819) (vending unwholesome food and drink); REV. CODE OF VA., ch. 138 (defining crimes against public trade: forestalling—barring purchase of goods that are on their way to market; regrating—barring resale of goods within four miles of their place of purchase; engrossing—forbidding purchase of large amounts of goods for resale). *See generally* NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW (Boston, Cummings, Hilliard & Co. 1823). *See, e.g.*, DANE, *supra* vol. 6, at 728–55 and vol. 7, at 33–111 (describing standard crimes of the early nineteenth century).

8. *See, e.g.*, Mayo v. Wilson, 1 N.H. 53 (1817) (upholding a civil challenge to an arrest under a criminal statute that prohibited traveling or working unnecessarily on Sundays).

> absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. [All] social and conventional rights[] are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature . . . may think necessary and expedient.
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> The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth . . . .
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> It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise.[9]

When San Francisco enacted its laundry ordinances in 1880, it was acting within this long tradition of police power regulation. As in other states, California's constitution explicitly provided that its municipalities "may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."[10] Four years earlier, Thomas Cooley, the influential judge and treatise writer, described in his *Treatise on the Law of Taxation* the prevailing understanding of licenses that were intended to regulate or prohibit activity rather than to raise revenue. "A license is a privilege granted by the state," Cooley noted, that

> confer[s] authority to do something which without the grant would be illegal . . . . But the thing to be done may be something lawful in itself, and only prohibited for the purposes of the license; that is to say, prohibited in order to compel the taking out of a license. This is always the case where that which was not licensed was not unlawful at common law.[11]

Cooley situated such licenses within the "inherent" sovereign authority "usually spoken of as police power," which included the power to impose levies not to raise revenue but for "the regulation of relative rights, privileges and duties as between individuals, to the conservation of order in

9. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84–86 (1851).

10. CAL. CONST. art. 11, § 11 (1851). The state Consolidation Act of 1856 empowered municipalities specifically to regulate the traditional range of health, safety, and police power matters.

11. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS 596–97 (2d ed. Chicago, Callaghan & Co. 1886).

the political society, to the encouragement of industry, and the discouragement of pernicious employments."[12]

Cooley summarized the prevailing understanding of government power over ordinary commercial activity through the first three-quarters of the nineteenth century. A license was not a simple registration procedure and it was not limited to occupations requiring special skill or endeavors posing special dangers. Any lawful activity, such as running a laundry, could be made the subject of licensing regulation, which meant any lawful business could be declared criminal activity when pursued without a license. Yick Wo had run a California laundry for two decades before San Francisco enacted its 1880 ordinance. Yet with that regulation his livelihood, unless specifically authorized, became a crime.

San Francisco's presumption in its ordinance, resting on Cooley's and Shaw's premises, was that it could regulate or prohibit any sort of commercial activity; it could declare any occupation a privilege that can be pursued only with state permission. Upon gaining statehood in 1850, California joined the practice of earlier states by enacting "license to trade" statutes. With some variations in detail, such laws made it unlawful to engage in basic economic transactions without a license.[13] Nearly everything, especially everything in the commercial realm, was subject to regulation, and criminalization, under the police power. Until roughly Reconstruction and the emergence of the *Lochner* era in the Court's constitutional jurisprudence, there were no constitutional limits on what could be criminalized.

While the San Francisco ordinance fit unexceptionally into this long pedigree of police power regulation, the Supreme Court's decision in *Yick Wo* was in the first wave of cases to mark a break with this longstanding assumption about the scope of legislative power. As such, it may have taken San Francisco officials by surprise. *Yick Wo* was a relatively early case in the *Lochner*[14] era of economic regulation by the Court.

As Chin notes, the Court viewed Yick Wo's laundry business as a constitutionally protected property right, a reading of the Due Process Clause that solidified in subsequent decades to provide a substantive right "to earn [a] livelihood by any lawful calling; to pursue any livelihood or avocation."[15] This protection was something new; previously legislatures regulated all sorts of commercial endeavors without judicial interference. However it is properly understood,[16] the *Lochner*-era

12. *Id.* at 586.

13. *See* NOVAK, *supra* note 4, at 90–91.

14. Lochner v. New York, 198 U.S. 45 (1905).

15. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897), *quoted in* Chin, *supra* note 1, at 1365.

16. I will not try to mediate here the ongoing disagreements about the meaning of the Court's *Lochner*-era jurisprudence. Whether the Court was enacting its own version of social Darwinism and laissez-faire economics, enforcing a principle of neutrality against class-based legislation, or motivated primarily by a principle of fundamental liberty—arguments from recent scholarship—does not matter

Court marked a rejection of the broad understanding of the police power articulated by such leading lights as Shaw and Cooley that had been widely adopted by state courts for several decades. The conventional wisdom Cooley was summarizing in 1876 was, by 1886, no longer the unchallenged, or even the dominant, view of state power over commerce.

The *Lochner*-era Court developed a new, critical perspective of police power that provided a basis for striking down a range of police power legislation it deemed to infringe on property rights or contractual liberty, particularly when the legislation seemed to favor one group over another (employees over employers, existing businesses over new ones,[17] bakers over miners,[18] union over nonunion workers[19]) without sufficient justification. In addition to these equality distinctions, *Lochner*-era due process doctrine also required courts to distinguish permissible from impermissible endeavors, or more specifically, inherently lawful and worthy occupations from unlawful and deleterious ones.

Due process review of property and contract interests provided the first significant constraint on legislative definition of substantive criminal law. *Lochner*-era due process doctrine was the first significant intrusion by courts into legislatures' power to criminalize any activity in the name of the public welfare. The Court employed substantive due process doctrine in a variety of ways to strike down legislative crime definition. In cases such as *Adair v. United States*,[20] it followed the familiar pattern of overturning a statute as "class legislation" that unreasonably favored one group over another. The statute under which Adair was indicted made it a crime for a common carrier to discriminate against, threaten, or fire any employee because of his union membership. The Court held that "[t]he classification is unreasonable," because it "confer[s] privileges upon union labor that are not conferred upon non-union labor," and thereby "union labor is preferred against non-union labor."[21] Criticism of such classification distinctions was a central feature of *Lochner*-era jurisprudence.[22] Seven years later, in *Traux v. Raich*,[23] the Court struck down a state law that forbade businesses from employing foreign-born workers at more than twenty percent of their workforce. Again, the distinction between lawful immigrants and citizens was found to be an unjustified distinction that arbitrarily favored one group over another.

The second basis on which the Court limited the scope of criminal law required that it assess the normative worth of various occupations.

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much for my present, limited purposes. For a recent summary of scholarly debate and a thorough account of the era's due process and equal protection cases, see Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005).

17. *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).
18. *See Lochner*, 198 U.S. 45.
19. *See* Coppage v. Kansas, 236 U.S. 1 (1915).
20. 208 U.S. 161 (1908).
21. *Id.* at 179.
22. *See* Cushman, *supra* note 16, at 883–944.
23. 239 U.S. 33 (1915).

Those, such as Yick Wo's laundry business, that were "a business harmless in itself and useful to the community"[24] were in a protected sphere of liberty and property rights less subject to regulation and protected by greater judicial scrutiny. A similar emphasis on universal access to running lawful businesses explained the outcome in *Louis K. Liggett Co. v. Baldridge*,[25] where the Court struck down a state law, enforced with criminal penalties, that permitted only licensed pharmacists to own pharmacy businesses. In contrast, occupations such as saloon ownership in *Crowley v. Christensen*[26] were subject to regulation that could include complete prohibition because "the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority . . . may prescribe."[27]

Due process doctrine, then, did not really entitle anyone "to pursue any livelihood or avocation." The catch was a livelihood by any *lawful* calling. On Cooley's statement of the conventional wisdom, circa 1876, the lawfulness of occupations depended on whether the state had chosen to regulate the activity by licensure. But *Yick Wo* and other cases in the *Lochner*-era line of due process decisions no longer left the lawfulness determination about any given occupation solely to legislatures (or, as a California court put in a typical statement of the 1890s, "the caprice of a majority, or any number, of those owning property surrounding that which [a business person] desires to use"[28]). Instead, courts took on the task of sorting lawful livelihoods from unlawful ones and drew distinctions between, for instance, the business of laundries and that of liquor sales.

Thus, over time, courts had to draw distinctions like those the Colorado Supreme Court drew in the years leading to *Dwyer v. Colorado*, where it held that operating a dance hall fits in to *Crowley*'s category of businesses that can be banned or highly regulated, because "uncontrolled, their tendency is to weaken morals and breed disorder and indolence."[29] The Colorado court had already sorted butcher shops, artesian water vendors, and ticket brokers into the "lawful occupation" category that are subject only to reasonable, nondiscriminatory regulation—the category into which Yick Wo's laundry fit.[30] Beyond following common law traditions about the nature of some activities such as prostitution, gambling, and alcohol sales, courts typically cited little basis for these distinctions other than assertions about the dangers posed to health or morals. The political nature of those decisions gives rise to the same criticism

24. Crowley v. Christensen, 137 U.S. 86, 94 (1890).
25. 278 U.S. 105 (1928).
26. 137 U.S. 86.
27. *Id.* at 94.
28. *Ex parte* Sing Lee, 31 P. 245, 247 (Cal. 1892).
29. 261 P. 858, 859 (Colo. 1927).
30. *See id.* at 858.

the *Lochner* Court faced in policing legislative regulation on other bases such as unjustified classifications among various commercial or occupational groups.

The due process doctrine of the *Lochner* era was the first time the Court carved out a meaningful doctrine that told legislatures they could not criminalize certain conduct; Yick Wo was lucky that laundries fell on the lawful-occupation side of the doctrinal divide. Yet, even as the Supreme Court, and the lower courts following it, took on a more rigorous role in checking legislatures' exercises of police power, even as they took on contentious substantive decisions about lawful and unlawful (or useful and less-useful) occupations (or reasonable versus unreasonable classifications among groups), courts never defined limits for criminal law *per se*. The Court never defined those limits in terms of *criminalization*; it defined the limits of what legislatures could *regulate* by whatever means, civil or criminal. And that has been the case for the 120 years since *Yick Wo*.

The Supreme Court eventually abandoned rigorous due process regulation of legislatures' economic regulation; in that long shift from the *Lochner* to the post-*Lochner* era of constitutional jurisprudence fits Chin's account of *Yick Wo*'s reinvention from a property case to a criminal procedure case. But *Lochner*-style due process doctrine was not the Court's only means to set some parameters for substantive criminal law. The Court has defined, through other means, large segments of social and personal life that cannot be criminalized, as it expanded First Amendment doctrine (cases such as *Brandenburg v. Ohio*[31] and *Cohen v. California*[32] struck down criminalization of speech), equal protection doctrine (*Loving v. Virginia*[33] struck down the felony of interracial marriage), and the privacy doctrine (*Griswold v. Connecticut*[34] struck down the crime of contraceptive distribution, and *Lawrence v. Texas*[35] barred the criminalization of private homosexual sex, and probably all private consensual sex), to name three important bodies of doctrine. But the Court has always done so by saying that the government cannot *regulate* such activity regardless of the legal tools used to do so, rather than by defining a realm for criminal law that is constitutionally distinctive from civil law.

When scholars complain today about overcriminalization, this absence of any constitutional regulation of crime definition is one explanation for that state of affairs.[36] Criminal law scholars generally lament that courts have done little to restrict legislatures' ability to criminalize con-

31. 395 U.S. 444 (1969) (criminal syndicalism statute violates the First Amendment).
32. 403 U.S. 15 (1971).
33. 388 U.S. 1 (1967).
34. 381 U.S. 479 (1965).
35. 539 U.S. 558 (2003).
36. For an overview of those complaints, see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223–33 (2007).

duct that is not plausibly morally blameworthy, that is not distinctive from the subjects of small-scale civil regulation.[37] That freedom has allowed legislatures to overstuff criminal codes with redundant, petty, sometimes silly offenses, or at least offenses that ought to be subjects of civil, rather than criminal, sanction.[38] In the context of that complaint, *Yick Wo* should be recognized as merely one instance in a long tradition of criminal law's use as a tool for enforcing licensing rules and other regulation over innocuous commercial conduct that long preceded that case and that continues today. This is why, as long as enforcement is not as unabashedly biased as San Francisco's was in Yick Wo's case, we still have statutes equivalent to the one that put Yick Wo in jail for doing laundry without a license.

37. For an influential articulation of that complaint, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 592–95 (2001) (arguing for the benefits of open-ended judicial review of criminal law).

38. *See* Brown, *supra* note 36, at 223–33.