ARTICLES

THE DUALITY OF FEDERALIST NATION-BUILDING: TWO STRAINS OF CHINESE IMMIGRATION CASES REVISITED

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I. INTRODUCTION

The terrorist attacks on September 11, 2001 rekindled the national debate on the status of non-citizen immigrants in the United States.[1] While the ostensible cause of this debate—a massive atrocity committed by non-U.S. citizens—is new, its substance is not.[2] Over a century ago, two cases involving the constitutional status of Chinese immigrants in the United States marked the beginning of the modern constitutional debate over

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[1] *See, e.g.*, Chris Adams et al., *Bush Seeks to Expand Legal Arsenal Against Terrorism: Congress is Eager to Act On Money-Laundering And Wiretap Measures*, WALL ST. J., Sept. 18, 2001, at A24, 2001 WL-WSJ 2875756 (reporting on the Bush Administration's eagerness to expand federal use of wiretaps and money-laundering statutes to track potential foreign terrorists); John Mintz, *Palestinian-Born Man Deported to Jordan; Technician Accused of Immigration Fraud; Lawyer Fears Torture in Amman*, WASH. POST, Nov. 30, 2001, at A29, 2001 WL 30329104 (detailing the outrage surrounding the deportation of a Palestinian-born man from the United States who was suspected of having connections with terrorists).

[2] *See generally* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 1 (1997) (acknowledging that tension among racial and ethnic groups is not a recent development in the United States). *See also* Kenneth Juan Figueroa, Book Note, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408, 420–21 (2002) (comparing the hostility directed at Japanese-Americans following Japan's attack on Pearl Harbor with the animus targeted at Arabs and Muslims since the terrorist attacks of September 11).

immigration.[3] *Yick Wo v. Hopkins* and *Chae Chan Ping v. United States*, also known as the *Chinese Exclusion Case*, each influenced subsequent constitutional developments, although the decisions in these cases were starkly divergent.[4] In the 1886 decision *Yick Wo v. Hopkins*, the Supreme Court unanimously decided to uphold the equal protection claims of two non-citizen Chinese immigrants. The immigrants were arrested for operating laundries without obtaining special consent, despite the prevalence of non-Chinese laundry operators who conducted their businesses in the same manner.[5] Three years later, the Court also unanimously decided the *Chinese Exclusion Case*. Despite the structural similarity and chronological proximity to *Yick Wo*, however, the substantive result of the *Chinese Exclusion Case* was in stark contrast to its predecessor.[6] In the *Chinese Exclusion Case*, the Court affirmed the inherent power of Congress to exclude a non-citizen Chinese immigrant from re-entering the United States.[7] In the earlier case, the non-citizen plaintiffs were treated as equal to American citizens, while in the

[3] Yick Wo v. Hopkins, 118 U.S. 356 (1886); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889). These two cases can also shed light on the role that racism and ethnicity have historically played in both legislative and judicial decisions. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 37–39 (1996) (exposing that although Congress limited racially discriminatory immigration laws in 1965, the prejudicial effects of the Chinese cases have not been overturned by the Supreme Court or Congress). This article focuses specifically on the Chinese because among all of the non-white races, the Chinese had been perceived as "so different" from Americans, even by the most liberal of judges. Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting). *See* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156, 159 (1996) (revealing that even a recognized liberal such as Justice John Marshall Harlan expressed a belief that the Chinese were unable to assimilate and that the presence of the Chinese would pose a danger to the American public). This perceived extreme difference of the Chinese provides us with a better understanding of the immigration laws of the 1880s.

[4] Both *Yick Wo* and the *Chinese Exclusion Case* are still regarded as "good law" by the Supreme Court. Nevertheless, *Yick Wo* has been praised as the pioneer in providing constitutional protection to aliens, while the *Chinese Exclusion Case* is considered one of the worst decisions in Supreme Court history. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 859 (1987) [hereinafter Henkin, *The Constitution and United States Sovereignty*] (lamenting that the doctrine that emerged from the *Chinese Exclusion Case* encouraged "paranoia, xenophobia, and racism"); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 566 (1990) (reiterating that *Yick Wo* left a legacy based on the idea that all individuals—regardless of status—are protected by fundamental human rights).

[5] *Yick Wo*, 118 U.S. at 359.

[6] *Yick Wo* and the *Chinese Exclusion Case* were decided in 1886 and 1889, respectively. The two cases are structurally similar in that they both involve non-citizens seeking judicial redress for alleged violations of their civil rights.

[7] The *Chinese Exclusion Case*, 130 U.S. at 589, 611. *See infra* text accompanying notes 42–45 (discussing the plenary power of Congress to exclude immigrants as stated in the *Chinese Exclusion Case*).

later the Chinese plaintiff was seen as nothing but a pariah, completely subject to the sovereign power of the United States. The focus of this article is how these two cases, so similar on the surface, resulted in such different outcomes. In response to this quandary, the course of nation-building in the United States and its connection to American constitutional law will be examined.[8]

This is certainly not the first analysis of the relationship between *Yick Wo* and the *Chinese Exclusion Case*, nor the first observation of the significance of these cases in the course of American nation-building.[9] Nevertheless, as of yet no such analysis has produced a comprehensive picture.[10] Some scholarship has been devoted to explaining *Yick Wo*'s role in the development of substantive due process and equal protection for resident aliens.[11] By comparison,

[8] For a definition and discussion of the notion of nation-building, see *infra* text accompanying notes 99–101.

[9] *See e.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 121–22, 263–64 (2002) (chronicling the Supreme Court's doctrinal shift toward inherent power).

[10] Professor Cleveland also tries to give a comprehensive account of *Yick Wo* and the *Chinese Exclusion Case* by considering them within the field of immigration. In doing so, however, she still reaches a dichotomous conclusion regarding these two cases. She argues that "*Yick Wo* stands as one of the late-nineteenth-century [Supreme] Court's most powerful affirmations of the liberal, egalitarian vision of the Constitution." Cleveland, *supra* note 9, at 119. However, Professor Cleveland also argues that Justice Field, the authoring Justice in the *Chinese Exclusion Case*, "opened his opinion with an *overtly nativist and ascriptivist* explanation of the government's efforts to regulate Chinese immigration." *Id.* at 129 (emphasis added).

[11] *See, e.g.*, David E. Bernstein, Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 231 (1999) [hereinafter Bernstein, *The Chinese Laundry Cases*] (stating that in *Yick Wo*, the federal court repealed anti-Chinese legislation based on violations of Chinese immigrants' Fourteenth Amendment rights); Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 355 (1995) (arguing that the rights afforded Chinese aliens resulted primarily from the desire of federal jurists to extend the reach of the Fourteenth Amendment to economic liberty, as opposed to an actual fight against state discrimination against the Chinese); David E. Bernstein, *The Supreme Court and "Civil Rights," 1886-1908*, 100 YALE L.J. 725, 743–44 (1990) [hereinafter Bernstein, *Civil Rights*] (contending that the fundamental right of occupational freedom, as expressed in *Yick Wo*, has not survived, while the equal protection tradition of *Yick Wo* lives on). *See also* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 781 n.36 (1985) (arguing that although *Yick Wo* is typically characterized as a race discrimination case, it truly dealt with the right to "pursue an ordinary and harmless calling" as protected by substantive due process). For a discussion of the role that *Yick Wo* played in the protection of non-citizen immigrants, see, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 293–94, 536 n.44 (2d ed. 1996) [hereinafter HENKIN, FOREIGN AFFAIRS] (citing *Yick Wo* as support for the proposition that aliens are entitled to equal protection of the laws under the Fourteenth Amendment); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 61–62 (1996) (stating that *Yick Wo* clearly held that aliens deserved the protections provided for by the Constitution); T. Alexander Aleinikoff, *Federal Regulation of*

scholarly analysis of the *Chinese Exclusion Case* and its progeny has focused on major immigration law and foreign affairs topics such as national security, national independence and Congress's near absolute authority over immigration matters.[12] Independently, the two types of "Chinese immigration cases" have been fully explored and have made significant contributions to fundamental rights, equal protection and foreign affairs jurisprudence.

This article seeks to achieve a comprehensive reading and reconciliation of the two strands of "Chinese immigration cases". This new perspective can enhance our understanding of both American constitutional development in the 1880s and the notion of nation-building.[13] The duality of federalist nation-building provides the cornerstone for this comprehensive overview of *Yick Wo* and the *Chinese Exclusion Case.* The *Yick Wo* decision emerged from the internal dimension of a federalist nation-building era in which the federal government tried to hold its member states at bay. The *Chinese Exclusion Case*, however, expresses both the internal and external dimensions of this nation-building process through its emphasis on national sovereignty.

While Part I of this article briefly summarized the current tendency to separate the analysis of these landmark cases, Part II describes the inadequacy of the traditional dichotomous accounts of *Yick Wo* and the *Chinese Exclusion Case.* From the perspective of constitutional development, these accounts include three defects:

Aliens and the Constitution, 83 AM. J. INT'L L. 862, 864 (1989) [hereinafter Aleinikoff, *Federal Regulation of Aliens*] (indicating that the Court in *Yick Wo* decided that aliens were protected from unfavorable state regulations by the Fourteenth Amendment); Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 974 (1988) (reasoning that *Yick Wo* demonstrated that personhood, not status as a citizen of the United States, is the test to qualify for protection under the Due Process Clause).

[12] *See, e.g.*, HENKIN, FOREIGN AFFAIRS, *supra* note 11, at 16 (reiterating the Court's conclusion in the *Chinese Exclusion Case* that the plenary power of Congress to regulate aliens is derived from the status of the United States as an "independent nation"); NEUMAN, *supra* note 11, at 119 (noting that the *Chinese Exclusion Case* upheld Congress's preclusion of Chinese immigrants from entering or re-entering the United States); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-18, at 972–73 n.43 (3d ed. 2000) (citing the *Chinese Exclusion Case* for the maxim that Congress has virtually unlimited power over immigration issues). *See also* Aleinikoff, *Federal Regulation of Aliens*, *supra* note 11, at 862; T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 11–12 (1990) [hereinafter Aleinikoff, *Citizens and the Constitution*]; Bosniak, *supra* note 11, at 968; Henkin, *The Constitution and United States Sovereignty*, *supra* note 4, at 857; Meredith K. Olafson, Book Note, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 435–36 (1998); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 967 (1993).

[13] *See infra* text accompanying notes 101–29 (analyzing the relationship between the holdings of *Yick Wo* and the *Chinese Exclusion Case* and nation-building).

academic irresponsibility, insufficiency, and complete discontinuity. Therefore, a proper analysis requires an approach from a nation-building perspective.

Part III discusses the course of American nation-building during the 1880s as well as the two-dimensional national buildup of that period. When viewed against the backdrop of American nation-building in the 1880s, *Yick Wo* can be interpreted as a deployment of federal judicial sovereignty.[14] In the same context, the *Chinese Exclusion Case* epitomizes the soaring drive for nation-state sovereignty in the late 19th century.[15] Both demonstrate the trend—popular at the time the cases were decided—of attempting to strengthen the national image of the United States at home and abroad.

II. THE INADEQUACY OF THE DICHOTOMY TENDENCY

Current legal literature tends to deal with *Yick Wo* and the *Chinese Exclusion Case* separately, a trend that shall be referred to as "the dichotomy tendency."[16] Irrespective of the nuanced differences in the various dichotomy strands, the common characteristic is to place these two cases in different categories of constitutional law. In other words, "constitutional law" is the only link between *Yick Wo* and the *Chinese Exclusion Case.* The remainder of this section offers an overview and critique of the tendency among legal scholars to dichotomize these two cases.

A. The Dichotomy Tendency: Two Varieties

Two dichotomous analyses of *Yick Wo* and the *Chinese Exclusion Case* exist: irrelevance and bifurcation.

1. The Irrelevance Perspective

In this analysis, *Yick Wo* and the *Chinese Exclusion Case* are presented as falling into two distinct categories, irrelevant to each other.[17] The former falls in the category of fundamental rights; the

[14] *See infra* text accompanying notes 224–40 (examining the issue of sovereignty with *Yick Wo* and the *Chinese Exclusion Case*).

[15] *Id.*

[16] The following perspectives on *Yick Wo* and the *Chinese Exclusion Case* do not necessarily put the two cases together. To demonstrate the possible problems that are created and ignored by the current approach taken by legal scholars, this article organizes the existing perspectives in a manner which highlights those issues.

[17] *Compare* Joo, *supra* note 11, at 387 (arguing that *Yick Wo*, in addition to being a case

latter resides in the field of governmental power.[18] While *Yick Wo* is viewed as the precursor to the *Lochner* ideal of protecting economic liberty,[19] the *Chinese Exclusion Case* is held up as the cornerstone of the modern plenary power doctrine in the area of foreign affairs.[20] Because of the tenuous relationship between economic regulation (the perspective through which *Yick Wo* is commonly viewed) and foreign affairs (the perspective through which the *Chinese Exclusion Case* is commonly viewed) in American constitutional jurisprudence,[21] this analysis will be termed "the irrelevance version."

a. Yick Wo *as the Antecedent of Economic Liberty*

From the irrelevance perspective, *Yick Wo* is a typical case involving fundamental rights. Nevertheless, the significance of *Yick Wo* to fundamental rights is not comprehensive, but specific. Despite the Court's explicit invocation of the Equal Protection

about Equal Protection, was the first opinion of the Supreme Court to hold an economic regulation unconstitutional under the Due Process Clause), *with* Bernstein, *The Chinese Laundry Cases*, *supra* note 11, at 212, 283–85, 294 (presenting the theory that the Chinese laundry cases, specifically *Yick Wo*, were decided based on the right to labor which is protected by the Fourteenth Amendment). *Cf.* Bernstein, *Civil Rights*, *supra* note 11, at 726 (emphasizing that despite the opinions of the Supreme Court, there was not a true difference between cases concerning economic liberty and those dealing with equal rights). Strictly speaking, the irrelevance version exists as an effect of the writings which argue that *Yick Wo* is the precursor of economic freedom. Given that scholars categorize *Yick Wo* as a case to be examined in relation to the development of substantive due process, the *Chinese Exclusion Case* is absent from their discussions. In Professor Haney López's discussion of the legal restrictions placed on citizenship, the *Chinese Exclusion Case* was discussed, but *Yick Wo* was not addressed. HANEY LÓPEZ, *supra* note 3, at 37–39, 236 n.10.

[18] Fundamental rights and governmental power have been recognized as the two constituent parts of a constitution. *See* ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 5–6 [hereinafter PREUSS, CONSTITUTIONAL REVOLUTION] (Deborah Lucas Schneider trans., 1995) (recognizing that a cohesive nation is one that has a strong, law-making government as well as individual freedoms for the people).

[19] *See* Bernstein, *The Chinese Laundry Cases*, *supra* note 11, at 212 (stating that some of the Chinese laundry cases "anticipated *Lochner's* reasoning and rhetoric"); Joo, *supra* note 11, at 354–56 (arguing that after *Yick Wo*, the Court emphasized economic rights for all American citizens); Bernstein, *Civil Rights*, *supra* note 11, at 727 (averring that the essence of *Yick Wo* was that "[a]n individual of any race had the right to control his labor free from government interference and to be free from discriminatory treatment by the government").

[20] *See* Olafson, *supra* note 12, at 437–38 (linking the power Congress has over foreign affairs and immigration to the notion of national sovereignty); James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 824–25 (1983) (recognizing that the *Chinese Exclusion Case* provided Congress with power over immigration which is limited by the Constitution, public policy, and the interests of justice).

[21] Economic regulation may have to do with foreign affairs inasmuch as the concept of economic regulation extends to "regulat[ing] Commerce with foreign Nations." U.S. CONST. art. I, § 8, cl. 3.

Clause to strike down the disputed municipal ordinance in *Yick Wo*,[22] legal scholarship has tended to overlook this aspect of the case. Thus, *Yick Wo* was the predecessor of cases that examined substantive due process issues irrespective of the Equal Protection Clause.[23]

The plausibility of this irrelevance reading of *Yick Wo* seems to be based on the following rationale. First, the catchall nature of the Equal Protection Clause makes it possible to ignore the Court's opinion concerning the textual foundation of its decisions. Although the Equal Protection Clause coexists with other constitutional provisions, it is more formal than substantive.[24] All equal protection cases simultaneously entail substantive rights.[25] Thus, some legal scholars have found room to establish the irrelevance version of *Yick Wo* outside the purview of equal protection. Ignoring the Court's explicit reference to the Equal Protection Clause in deciding the constitutionality of the municipal regulation at issue, the irrelevance perspective dismisses this aspect of the case as rhetorical and empty. Under the irrelevance perspective, the issue was the Court's due process analysis.[26]

In addition to the structural nature of equal protection, the facts of *Yick Wo* and the Court's reasoning give material support to the irrelevance perspective. The contested right in *Yick Wo* was the right of the plaintiffs to run their laundry free from the arbitrary and unregulated discretion of the Board of Supervisors of San Francisco.[27] This occupational freedom falls into the category of economic liberty.[28] The Court took this position by acknowledging that the disputed ordinance constituted a prohibition of the

[22] Yick Wo v. Hopkins, 118 U.S. 356, 369–70 (1886).

[23] *See* Joo, *supra* note 11, at 387 (noting that *Yick Wo* was the first case to invalidate an economic regulation for violating the Fourteenth Amendment).

[24] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 772–73 & n.109 (1999) (arguing that the Equal Protection Clause was intended to elaborate on due process, not to be a separate idea).

[25] *See generally* Baker v. Carr, 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting) (stating that a determination of the nature of the substantive right must be made before an equal protection analysis can proceed); James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 973–74 (1997) (indicating that an equal protection analysis rests upon "some substantive conception of rights or justice").

[26] *Cf.* Joo, *supra* note 11, at 388 (arguing that *Yick Wo* and other Chinese cases are better described as substantive due process cases).

[27] *Yick Wo*, 118 U.S. at 366.

[28] *See* Bernstein, *The Chinese Laundry Cases*, *supra* note 11, at 294 (noting that the judges in the Chinese laundry cases protected the occupational liberty of the Chinese, despite their own personal prejudices); Bernstein, *Civil Rights*, *supra* note 11, at 726 (explaining that the *Yick Wo* court upheld the plaintiffs' economic rights).

plaintiffs' occupation, and the destruction of the their business and property.[29]

Supporters of the irrelevance version of *Yick Wo* also look for support beyond the text of the Court's opinion. They look to the contemporaneous related opinions of the Court of Appeals for the Ninth Circuit, whose jurisdiction includes San Francisco, where the conduct at issue in *Yick Wo* took place. Based on the fact that the Ninth Circuit Chinese cases generally involved state interference with property or contracts, it is conceivable that *Yick Wo* was a case of the same kind.[30] Furthermore, one of the justices hearing *Yick Wo*, Justice Stephen Field, had been a chief defender of property rights and freedom of contract on the Ninth Circuit before he was appointed to the Supreme Court in 1863.[31] The fact that Field joined the decision in *Yick Wo* suggests that his primary stance on private economic liberty was not compromised by Justice Matthew's opinion. *Yick Wo* is accordingly interpreted by this school as a case of substantive due process instead of one of equal protection.[32]

Other scholars who support the irrelevance perspective have approached the issue from a sociological point of view. According to this view, the rights created by the Civil War Amendments were restricted to blacks. If non-blacks were to benefit, they needed to show that the Civil War Amendments did not intend otherwise.[33] Thus, as the Equal Protection Clause was enacted in response to the atrocities inflicted on blacks by southern states in the years following the Civil War, the argument goes that it did not protect the Chinese.[34] As a consequence, the other major commitment of Reconstruction—free labor—emerged as the chief constitutional protection of non-black people. Along this vein of interpretation,

[29] *See Yick Wo*, 118 U.S. at 368 (noting that the ordinance in question allowed the local government to arbitrarily keep individuals from pursuing their professions).

[30] *See* Joo, *supra* note 11, at 369–70 (contending that the Ninth Circuit judges' decisions in the Chinese cases can be explained as examples of economic rights jurisprudence).

[31] *See id.* at 370 (suggesting that Justice Field used the Chinese civil rights cases to establish his view that the Fourteenth Amendment prohibited state interference with economic rights).

[32] *Id.* (recognizing, however, that *Yick Wo* has been cited for both equal protection and due process principles).

[33] *See* RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 152–53 (1999) (stating that in order to benefit from the Civil War Amendments, Asian-Americans exploited the Amendment's commitment to free labor).

[34] *See id.* (arguing that *Yick Wo* was decided because of a non-racial issue—free labor); *see also* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 34–36 (1986) (illustrating that the Fourteenth Amendment was a response to southern states enacting Black Codes and vagrancy laws designed to deprive blacks of basic liberties enjoyed by whites and northern blacks).

Yick Wo set the example for free labor cases, which were entangled with economic liberty.[35] The plaintiffs' racial identity was simply incidental.[36]

b. The Chinese Exclusion Case *as the Landmark in Foreign Affairs*

According to the irrelevance perspective, the *Chinese Exclusion Case* finds its significance in the constitutional context of governmental power, especially foreign affairs.[37] The Court, in this case, assumed that Congress held plenary power to conduct foreign affairs based on the nationhood and sovereignty of the United States. Since the Court focused on governmental power over foreign affairs, the rights of the plaintiff were effectively ignored.

The Court's opinion is the most visible evidence of this interpretation of the *Chinese Exclusion Case.* For the most part, the Court focused on the power to exclude aliens and the related issue of the constitutional status of treaties.[38] Through the lens of the irrelevance analysis, the plaintiff's claim that his right to liberty had been violated seemed dispensable. In contrast to *Yick Wo*, the Court seemed to hold the position that, insomuch as the claimant was an alien, his rights did not deserve consideration. [39] This shifted the focus to the Federal government's power to exclude aliens.[40] According to the Court, the power to exclude aliens was unlimited and stemmed from the idea that an independent nation

[35] *See* Bernstein, *The Chinese Laundry Cases*, *supra* note 11, at 284 (illustrating that the Chinese laundry cases evidenced the courts' commitment to free labor and natural rights); *see also* Forbath, *supra* note 11, at 781 n.36 (suggesting that what was discriminatorily denied in *Yick Wo* was the right to "pursue an ordinary and harmless calling").

[36] PRIMUS, *supra* note 33, at 153.

[37] *See* TRIBE, *supra* note 12, § 5-18, at 967–68 & n.15, 972–73 & n.43 (discussing government control over immigration issues); Nafziger, *supra* note 20, at 824–25 (noting that the *Chinese Exclusion Case* established Congress's plenary power to exclude aliens and abrogate treaties); Olafson, *supra* note 12, at 438 (explaining that the federal government's absolute power over immigration was secured by the Court in the *Chinese Exclusion Case*).

[38] In the *Chinese Exclusion Case*, one of the strongest claims made by the plaintiff was that the Chinese Exclusion Act of October 1, 1888 was in violation of the Treaty of 1880. Thus, the central issue was whether the Chinese Exclusion Act of 1888 could constitutionally trump the Treaty of 1880. *See* The Chinese Exclusion Case, 130 U.S. 581, 600–01 (1889).

[39] *See id.* at 603 (refusing to examine the plaintiff's rights because he was "not [a citizen] of the United States").

[40] *See id.* (stating, "[t]hat the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy"). Moreover, the Court eliminated any possible controversy by holding that such a power was "exclusive and absolute." *Id.* at 604 (quoting Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

has necessary jurisdiction over its own territory.[41] Put in another way, "[i]f . . . [the United States] could not exclude aliens it would be to that extent subject to the control of another power."[42]

Also worthy of discussion is how the Court in the *Chinese Exclusion Case* granted Congress the power to exclude aliens. Unquestionably, not every Congressional power is enumerated in the text of the Constitution. However, the framers addressed this problem when they incorporated the Necessary and Proper Clause in Article I.[43] With regard to immigration, the power to regulate in general, and to exclude aliens in particular, may be inferred from both the Necessary and Proper Clause and the naturalization power of Article I, section 8, clause 4.[44] Nevertheless, the Court in the *Chinese Exclusion Case* disregarded these constitutional provisions in favor of basing the power to exclude aliens on the precepts of nationhood and sovereignty. A comparison of the Court's construction of sovereignty with the constitutional provision of the Necessary and Proper Clause reveals the impact of this choice. In the Court's opinion, the power to exclude aliens inferred from national sovereignty would know no limits.[45] In contrast, any power based on the Necessary and Proper Clause was not limitless, rather it is constitutional only insofar as the alleged power is "necessary and proper" to the implementation of the invoked authorization specified in Article I.[46] In other words, justifying the power to exclude aliens on the basis of sovereignty rather than on the basis of the Necessary and Proper Clause strengthened Congressional power.

2. The Bifurcation Version

As opposed to the irrelevance version, the bifurcation version

[41] *Id.*

[42] *Id.*

[43] "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. CONST. art I, § 8, cl. 18.

[44] "To establish an uniform Rule of Naturalization." U.S. CONST. art I, § 8, cl. 4. *But see* Cleveland, *supra* note 9, at 81 (arguing that the Naturalization Clause "most clearly addresses questions of citizenship, not admission and expulsion of aliens").

[45] *See* Henkin, *The Constitution and United States Sovereignty*, *supra* note 4, at 859 (stating that the *Chinese Exclusion Case* "ha[s] been taken to mean that there are no constitutional limitations on the power of Congress to regulate immigration"); *see also* TRIBE, *supra* note 12, § 5-3, at 807 (noting that the inherent power doctrine gives Congress largely unlimited power in the realm of foreign affairs).

[46] *See* TRIBE, *supra* note 12, § 5-3, at 798–99 (describing the debate over the Necessary and Proper clause between Hamilton, who interpreted the word "necessary" liberally, and Jefferson, who preferred a stricter interpretation).

places *Yick Wo* and the *Chinese Exclusion Case* into the same doctrinal category of immigration and citizenship.[47] However, this version dichotomizes the cases along the two dimensions of the constitutional status of aliens.[48] While *Yick Wo* was concerned with the internal dimension of the rights of resident aliens guaranteed by the Constitution, the *Chinese Exclusion Case* addressed the external dimension of the admission and exclusion of aliens based on Congress's plenary power to do so.[49] Thus, based on the opposing attitudes towards the treatment of aliens exemplified by these two cases, "the bifurcation version" of the dichotomy narrative is aptly named.

a. Yick Wo *as the Liberal Pioneer*

In contrast to the irrelevance account that distances *Yick Wo* from the Court's explicit reference to the Equal Protection Clause, the bifurcation perspective claims that *Yick Wo* was a pioneer of modern equal protection jurisprudence.[50]

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[47] Aleinikoff, *Federal Regulation of Aliens*, *supra* note 11, at 865–66 (concluding that *Yick Wo*'s descendants continue to give aliens constitutional protection, while those of the *Chinese Exclusion Case* allow federal immigration regulations to be conducted almost without restriction); Bosniak, *supra* note 11, at 968 n.35, 974 n.66 (citing the *Chinese Exclusion Case* in support of the idea that all sovereign nations have the authority to exclude or include non-citizens, and mentioning *Yick Wo* to substantiate the argument that citizenship is not necessary in order for one to be afforded the protections of the Due Process Clause). This doctrinal categorization is built on the Court's highlighting of the plaintiffs' identity at the outset of these two cases. *See* Yick Wo v. Hopkins, 118 U.S. 356, 358 (1886); The Chinese Exclusion Case, 130 U.S. 581, 582 (1889).

[48] According to Professor Aleinikoff, "the two lines of cases . . . reflect conflicting strands in . . . [American] constitutionalism: one concerned with affirming the importance of membership in a national community; the other pursuing a notion of fundamental human rights that protects individuals regardless of their status." Aleinikoff, *Citizens and the Constitution*, *supra* note 12, at 19 (alteration in original). For the equal protection reading of *Yick Wo*, see NEUMAN, *supra* note 11, at 62 (describing how *Yick Wo* unequivocally declared that aliens deserved all of the protections provided by the Equal Protection Clause). *But cf.* Motomura, *supra* note 4, at 583–84 (distinguishing *Yick Wo*, a racial equal protection case, from alien equal protection cases). For a discussion on the current relevance of the *Chinese Exclusion Case*, see NEUMAN, *supra* note 11, at 119–22 (asserting that instead of recognizing immigration control as an enumerated power of Congress, the *Chinese Exclusion Case* treated it as an "extraconstitutional" power intrinsic to nationhood); Aleinikoff, *Federal Regulation of Aliens*, *supra* note 11, at 862–63 (describing the *Chinese Exclusion Case* as "confirm[ing] congressional authority to prevent aliens from entering").

[49] As Professor Aleinikoff points out,

> [a] full description of the constitutional status of aliens at the end of the 19th century would . . . identify two norms: (1) as to matters relating to admission and expulsion, Congress possessed 'plenary' power virtually unfettered by the Constitution; and (2) resident aliens could invoke constitutional protections in situations where citizens would be entitled to such protections . . . .

Aleinikoff, *Federal Regulation of Aliens*, *supra* note 11, at 864–65.

[50] *See* NEUMAN, *supra* note 11, at 62 (declaring that *Yick Wo* "settled" the principle of

This liberal reading of *Yick Wo* finds its support in the text. The Court not only protected the plaintiffs' rights according to the Equal Protection Clause, but it also took steps to advance the progressive idea of equal protection. It acknowledged that "[t]he rights of the petitioners . . . are not less, because they are aliens and subjects of the Emperor of China."[51] In addition, the Court acknowledged that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens."[52] In other words, non-citizens—aliens included—were eligible for protection under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Hence, in the Court's opinion, these two clauses "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."[53] Additionally, the Court held that "[t]he questions we have to consider and decide . . . are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."[54] Moreover, the Court also addressed the concept of equal protection from a historical point of view with respect to the evolution of the Constitution. The Court demonstrated this evolutionary approach by attributing the Equal Protection Clause of the Fourteenth Amendment to "the victorious progress of the race."[55] Thus, the plaintiffs' identity as Chinese immigrants did not affect their constitutional rights to equal protection.

Based on the Court's opinion, the bifurcation version of *Yick Wo* argues that "it is fair to conclude that Congress, in keeping with the American tradition of trying to assimilate those aliens we choose to admit, treats most resident aliens with a considerable degree of concern and respect."[56] Thus, *Yick Wo* portrays the bright side of the status of aliens in 19th century America.[57]

universal protection of the law for "persons within the United States"); SMITH, *supra* note 2, at 441 (claiming that cases such as *Yick Wo* "genuinely served liberal, inclusive positions"); Aleinikoff, *Federal Regulation of Aliens*, *supra* note 11, at 864–65 (acknowledging *Yick Wo*'s holding that aliens were protected by the Fourteenth Amendment, and noting that its legacy was built upon throughout the 20th century); Cleveland, *supra* note 9, at 119 (calling *Yick Wo* one of the Court's "most powerful affirmations of the liberal, egalitarian vision of the Constitution").

[51] *Yick Wo*, 118 U.S. at 368.

[52] *Id*. at 369.

[53] *Id*.

[54] *Id*.

[55] *Id*. at 370.

[56] Aleinikoff, *Federal Regulation of Aliens*, *supra* note 11, at 866.

[57] *See id*. at 864 (noting that the U.S. Supreme Court recognized important rights for

b. The Chinese Exclusion Case *as a Mirror of the Court's Racism*

In the constitutional area of immigration and citizenship, the *Chinese Exclusion Case* has been condemned as one of the most notorious cases of racism.[58] The Court has also been criticized for its unreserved affirmation of Congressional power to exclude aliens.[59]

The text of the Court's opinion in the *Chinese Exclusion Case* supports the charge of racism. The Court reflected the racist atmosphere of the 1880s in validating the restrictive Chinese Exclusion Act of 1888. In its opinion, the Court gave a full account of the widespread racist sentiment against Chinese laborers.[60] The Court discussed California's assertions that the "[o]riental invasion" was detrimental to the material interests of the state, and public morals, claiming Chinese immigrants refused to adopt or adapt to American culture.[61]Mirroring the racist view of west coast citizens, the Court also stated that "[i]t seemed impossible for . . . [the Chinese] to assimilate with our people or to make any change in their habits or modes of living."[62] Thus, in taking this assimilationist stance, the Court adopted Congress's fear of "the presence of foreigners *of a different race* . . . who [would] not *assimilate*."[63]

In addition to its view that the Chinese segregated themselves from Americans, the Court's opinion also revealed its support for imperialism.[64] Although the Chinese Exclusion Act was originally

aliens, regardless of the constitutional law in strict immigration cases).

[58] *See* Aleinikoff, *Citizens and the Constitution*, *supra* note 12, at 11–12 (conceding that tracing the immigration cases to their 19th century roots would be "an embarrassment to constitutional law," and citing the *Chinese Exclusion Case* for upholding the disgraceful laws against the Chinese). *See, e.g.*, Pat K. Chew, *Asian Americans: The "Reticent" Minority and their Paradoxes*, 36 WM. & MARY L. REV. 1, 13–14 (1994) (suggesting that the *Chinese Exclusion Case* reflected the anti-Asian beliefs of some jurists); Cleveland, *supra* note 9, at 124–34 (providing an in-depth discussion of the original Chinese exclusion case, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and criticizing Justice Field for developing and supporting a theory that was not founded in the Constitution); NEUMAN, *supra* note 11, at 119 (suggesting that the *Chinese Exclusion Case* was based on racist beliefs).

[59] *See* Aleinikoff, *Citizens and the Constitution*, *supra* note 12, at 11.

[60] *See The Chinese Exclusion Case*, 130 U.S. at 593–96 (noting that the anti-Chinese sentiment was based primarily on the fact that Chinese laborers would work for far less compensation than American laborers).

[61] *Id.* at 595 (urging that Chinese laborers "remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country").

[62] *Id.*

[63] *Id.* at 606 (emphasis added).

[64] After briefing the facts of this case, the Court stated, "It will serve to present with greater clearness the nature and force of the objections to the act, if a brief statement be

enacted in 1882 and this case occurred in 1888, the context set by Justice Field traced back to 1843 when Congress authorized President Tyler to forge a commercial relationship with China.[65] In narrating the history of the bilateral relations, the Court's opinion essentially resulted in a report of the competition and cooperation among imperialists for their national interests in China.[66] These bilateral relations, starting with American intervention in China, provided the foundation for later treaties and related legislation. Thus, the compassion of the United States toward China until 1888 was directly related to the desire to pursue commercial interests in China.[67] Therefore the benefits Chinese laborers experienced from the pre-1888 legislation were only largess, not rights in nature. When the intrinsic differences of race became visible, the host's good will and friendship vanished.[68] Implicit in the tone set by this frame of reference is a kind of "compassionate racism."

B. Beyond the Dichotomy Tendency Myth

These dichotomous accounts of *Yick Wo* and the *Chinese Exclusion Case* seem plausible because they reflect the reasoning of different legal areas.[69] However, from an epistemological point of view, conceptual categories in jurisprudence are not a priori, but rather are artificially constructed.[70] Thus, the doctrinal categorization cannot be taken as a given, but rather, requires critical reflection.

A cultural study of law exposes that the rule of law is a symbolic

made of the general character of the treaties between the two countries and of the legislation of Congress to carry them into execution." *Id*. at 589.

[65] *See The Chinese Exclusion Case*, 130 U.S. at 590 (indicating that the China/United States treaty was forged in response to a similar treaty between China and England, giving British subjects in China special privileges).

[66] *Id*. at 592 (explaining that it was not until the treaty of 1868 that free migration was encouraged between China and the United States).

[67] *See id*. at 592, 594 (exposing the fact that the first two treaties between the United States and China never discussed emigration or migration between the two nations).

[68] *See id*. at 595 (stating that "[t]he differences of race added greatly to the difficulties. . . .").

[69] *See generally* Alessandro Pizzorusso, *The Law-Making Process as a Juridical and Political Activity*, *in* LAW IN THE MAKING: A COMPARATIVE SURVEY 1, 36–37 (Alessandro Pizzorusso ed., 1988) (stating that the categorization has been a major technique in legal reasoning).

[70] *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 39–40 (2000) (explaining that categories are the result of the human imagination and from "the storehouse of any culture's ways of construing the world"); N.E. Simmonds, *Protestant Jurisprudence and Modern Doctrinal Scholarship*, 60 CAMBRIDGE L.J. 271, 274 (2001) (illustrating that categories are employed to provide a conceptual framework within which doctrinal scholars may consider information).

form through which people in a political community organize their opinions and conduct their lives.[71] Accordingly, there must be a connection between the decisions of courts and the social setting in which they are situated. If the decisions of courts are completely out of tune with their external context, the decisions are problematic. On the other hand, every court decision does not have to be interpreted retrospectively as a whole. Decisions may be divided into several parts to match related areas—which has been the trend in the legal profession.[72] Nevertheless, if interpretations of a case diverge tremendously, the very difference between those readings creates theoretical doubt. Thus, the enormous divergence between traditional interpretations of *Yick Wo* and the *Chinese Exclusion Case*, coupled with the disparity between the dichotomous versions of these cases and their social setting, demonstrates a need to go beyond the dichotomy tendency.

The next section contrasts the two cases and highlights the inadequacy of both dichotomous accounts. First, it will expose the weakness of the dichotomy narratives from both the "responsibility of scholarship" and the "sufficiency of theory" perspective. Then, it will illustrate these dichotomous narratives as a paradigm shift in the development of American constitutional law—the exploration of which makes an alternative view possible.

1. The Academic Irresponsibility of the Dichotomy Myth

The responsibility of scholars in interpreting judicial decisions in a particular case is different from a practitioner's invocation of that same case. For a practitioner, his reference to a case is done solely for the purposes of appealing to or interpreting from an authoritative position, which is intended to win a suit or other proceeding.[73] The practitioner is fairly justified in appealing to one aspect of a case, even at the expense of another. For a legal scholar,

[71] *See* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 6 (1999) [hereinafter KAHN, THE CULTURAL STUDY OF LAW] (declaring that the "[t]he rule of law is neither a matter of revealed truth nor of natural order . . . [rather] [i]t is a way of organizing a society . . ."); Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141, 156, 160 (2001) (explaining that symbolic legal forms compete with other, non-legal symbolic forms to construct societies as we understand them).

[72] *See* KAHN, THE CULTURAL STUDY OF LAW, *supra* note 71, at 54 (arguing that "[t]he history of law's rule . . . is a collection of interpretive commentaries").

[73] *See* Michele Taruffo, *Institutional Factors Influencing Precedents*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 437, 455 (D. Neil MacCormick & Robert S. Summers eds., 1997) (alluding to the fact that precedents are often quoted by practitioners solely for the purpose of supporting one's position, but not for the purpose of developing supportive arguments).

however, a critical distance from legal practice is necessary in seeking academic objectivity.[74] Legal interpretation is the central work of legal scholarship in both the civil and the common law systems.[75] Indeed, one of the major goals of legal scholarship is to offer a systematic and coherent interpretation of judicial decisions. Although legal interpretation may not secure completely clear or comprehensive categorization of the law, it should not intentionally bring about confusion. Such would constitute irresponsible legal scholarship. Unfortunately, placing *Yick Wo* and the *Chinese Exclusion Case* in dichotomous categories accentuates the lack of cohesion.

The bifurcation and irrelevance perspectives of the *Chinese Exclusion Case* each embrace both governmental power—inherent power in foreign affairs—and human rights—the constitutional status of aliens. However, neither perspective of *Yick Wo* maintains this view. *Yick Wo*, under both the irrelevance and bifurcation perspectives, is interpreted solely from the view of the protection of constitutional rights.

The constitutional rights issue in *Yick Wo* is evaluated differently by the two versions. In the irrelevance version, the Court's intervention to protect the plaintiffs' economic liberty paved the way for the *Lochner* era and set the stage for the coming of industrial expansion.[76] The plaintiffs' Chinese identity was not central to the Court's decision. Rather, the Court's primary concern was finding a way to advance a laissez-faire economic ideology.[77] In other words, the Court decided *Yick Wo* based on the positive influence it would have on economic prosperity and not due to concern for human rights or racial equality. In contrast, the bifurcation point of view identifies *Yick Wo*'s crucial issue as the Court's progressive stance

[74] *See* KAHN, THE CULTURAL STUDY OF LAW, *supra* note 71, at 34 (explaining various methods of framing legal inquiries so that one may "suspend . . . ordinary beliefs and normative commitments" to pursue a neutral study of the law).

[75] For the role of legal interpretation in the Civil Law System found primarily in Europe, see generally FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY (Tony Weir trans., 1995). With respect to the interpretive characteristic of law in the Common Law system, see generally RONALD M. DWORKIN, LAW'S EMPIRE 90–96 (1986).

[76] *See* Bernstein, *The Chinese Laundry Cases*, *supra* note 11, at 212 (arguing that the logic used to decide *Yick Wo*—recognizing the "right to earn a livelihood free from . . . government interference"—presaged the liberty of contract doctrine forged in *Lochner*); Joo, *supra* note 11, at 356 (arguing that *Yick Wo* bridged the gap between a race-based rights approach to equal protection after the *Slaughter-House Cases* and an economic rights approach in *Lochner*).

[77] *See* PRIMUS, *supra* note 33, at 153 (emphasizing the Court's interest in the free labor issue rather than racial equality).

on equal protection.[78] In this sense, the plaintiffs' Chinese identity was a key factor in the Court's analysis. Identifying the true meaning of *Yick Wo* is therefore complicated by the existence of these two contrasting views.

As discussed in the preceding section, the irrelevance reading of *Yick Wo* is built on a disregard for the text in the Court's opinion. The Court's recognition of the significance of the plaintiffs' alien identity within the scope of the Fourteenth Amendment is overlooked. Further, the Court's commentary on the expansive protection granted by the Equal Protection Clause is neglected. This sort of distortion and inconsistency between the irrelevance and bifurcation readings creates doubt about the responsibility of either.

To support these allegations of irresponsibility in the current scholarship regarding *Yick Wo*, the importance of the Court's exploration of equal protection needs to be further addressed. The Court's solid stance on equal protection in *Yick Wo* is evident by the Court's specific attention to the matter.[79] In addition, the institutional structure of the American judicial system supports the protection of equal rights. The Court is obligated to respond to the claims proposed by the opposing parties. Also, the opinions of appellate courts, including the Supreme Court, are structured by inferior courts' disputed decisions.[80] Thus, even if the Court's opinion is ambiguous, it can often be clarified by reading the claims of the two parties and the inferior courts' opinion together. In *Yick Wo*, the plaintiffs' appeals concerned the equal protection issue.[81] The equal protection issue was also relevant in *In re Wo Lee*, one of the two cases appealed to the Supreme Court under the title of *Yick*

[78] *See generally* Aleinikoff, *Federal Regulation of Aliens*, *supra* note 11, at 866.

[79] Justice Matthews, in contradicting the Supreme Court of California's reading of *Barbier v. Connolly*, 113 U.S. 27 (1885), reasoned that a municipality may use its police power to regulate certain actions if similarly situated persons are treated alike; but disparate treatment under the guise of police power violates the Equal Protection clause. *Yick Wo*, 118 U.S. at 367–68.

[80] *See generally* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 37–49 (1981) (discussing the institutional relationship between trial courts and appellate courts).

[81] The plaintiff in *Yick Wo* alleged that,

> [M]ore than one hundred and fifty of . . . [the plaintiff's] countrymen [were] arrested upon the charge of carrying on business without having such special consent, while those who [were] not subjects of China, and who [were] conducting eighty odd laundries under similar conditions, [were] left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of [the] petitioner, and of those of his countrymen similarly situated, [was] greatly impaired, and in many cases practically ruined by this system of oppression to one kind of men and favoritism to all others.

Yick Wo, 118 U.S. at 359.

Wo v. Hopkins.[82] From these two points we can infer that in *Yick Wo*, the Court was concerned with equal protection of the laws and its normative implications.

The preceding proof supports the notion that the irrelevance account of *Yick Wo* is an instance of irresponsible scholarship. This may lead to a confirmation of the bifurcation scenario—*Yick Wo* as the liberal pioneer—despite the skepticism advanced by the current literature on point. The following section will challenge the humanitarian reading of *Yick Wo* under the bifurcation perspective. By putting the dichotomy approach in the broader contemporaneous context, its insufficiency in relation to *Yick Wo* and the *Chinese Exclusion Case* will become apparent.

2. The Insufficiency of the Dichotomy Myth

If the irrelevance reading of *Yick Wo* is academically irresponsible, one could envision that the response from scholars would be to dismiss the irrelevance account of *Yick Wo* and the *Chinese Exclusion Case* in favor of the bifurcation reading. Indeed, from the perspective of immigration rights, the irrelevance reading of the *Chinese Exclusion Case*, categorized as a landmark in the area of foreign affairs, can still find a link to the bifurcation reading.[83] However, a problem arises with regard to the validity of the bifurcation reading of the *Chinese Exclusion Case* in the equal protection context.

According to the bifurcation reading of *Yick Wo* and the *Chinese Exclusion Case*, the former glimmered as the forerunner of equal protection, while the latter was condemned for its inherent racism against Chinese laborers.[84] Both the academic literature on the 1880s and the facts documented in the *Chinese Exclusion Case* showed that widespread racism against Chinese laborers prevailed in the public opinion and therefore prompted Congress's enactment of the Chinese Exclusion Acts.[85] Racism clearly played a major role

[82] In *In re Wo Lee*, the evidence showed that all Chinese applications for laundering permits were denied, while all Caucasian applications were granted. 26 F. 471, 473–74 (C.C.D. Cal. 1886).

[83] Foreign affairs powers can be linked to the issue of immigrant rights since Congress's broad power to regulate immigration is seen as relating to foreign intercourse, "*i.e.*, to foreign relations." *See* HENKIN, FOREIGN AFFAIRS, *supra* note 11, at 70–71.

[84] *See supra* notes 46–66 and accompanying text.

[85] The Chinese Exclusion Case, 130 U.S. 581, 595–96 (1889) (addressing the prevalent animosity and resentment towards the Chinese, resulting in the modification of America's treaty with China in 1880). *See generally* ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 258–65 (1971) (exploring the

in the *Chinese Exclusion Case*.[86] Moreover, judging from the frame of reference set by the Court in the *Chinese Exclusion Case*, a sense of Sinophobia permeated the case and doubtlessly influenced the decision. However, if this is true, how can one account for the Court's benevolent position in *Yick Wo*, also decided in a climate of national Sinophobia? Perhaps the racism seen in the *Chinese Exclusion Case* is only a function of interpretive hindsight. The wording of Justice Field's opinion, however, makes this highly improbable.[87] In essence, even though there was an atmosphere of Sinophobia during the 1880s that influenced the Court's decisions, it is presumably still possible to acknowledge the benevolence of *Yick Wo* due to some factor that distinguishes it from the *Chinese Exclusion Case*. The question then becomes, what is that factor?

If the Court's opinions provide no explicit answer, it becomes necessary to look to external circumstances. There are two possible relevant circumstances: the first is timing; the second is changes in the Court's composition. The response from the temporal point of view might be that there was a shift of public attitude toward Chinese immigrants in the time between the cases. This answer is not entirely satisfactory considering the short interval of three years between *Yick Wo* (1886) and the *Chinese Exclusion Case* (1889). Even if a shift could be imaginable, the facts immediately contradict this supposition. According to the *Chinese Exclusion Case*, both the Treaty of 1880 and the subsequent Chinese Exclusion Acts of the 1880s were the products of contemporaneous widespread Sinophobia.[88] In addition, the *Chinese Exclusion Case* clearly reflected the public's escalating Sinophobia.[89] Thus, it is

general fears of competition with the Chinese labor force and the development of various anti-Chinese movements through the late 19th century).

[86] *See* HANEY LÓPEZ, *supra* note 3, at 37–38 (arguing that "purposeful racial discrimination" is still constitutional because the Chinese Exclusion Case has never been overturned); NEUMAN, *supra* note 11, at 119 (comparing the racist assumptions of *The Insular Cases* (1901) to the racist logic used in the Chinese Exclusion Case); Chew, *supra* note 58, at 13–14 (acknowledging the Chinese Exclusion Act as the first significant immigration policy to use race as the basis for regulating entry and noting the anti-Asian sentiments expressed by some jurists at that time).

[87] *The Chinese Exclusion Case*, 130 U.S. at 595–96 (criticizing the Chinese for their unwillingness to assimilate into American culture, as well as urging that their failure to do so posed a threat to the sanctity of the American culture).

[88] 130 U.S. at 595 (describing the growing hostility present at the California constitutional convention which declared Chinese immigration an "Oriental invasion" and a "menace to our civilization"); *see also* Cleveland, *supra* note 9, at 113 (reiterating rampant anti-Chinese sentiments that were exacerbated by widespread unemployment following drought and economic depression in the 1870s).

[89] *See, e.g.*, LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 9–10 (1995) (indicating that the Chinese were

inconceivable that this Sinophobia—lasting over 30 years—would have ebbed in 1886 and soared again in 1889.[90]

Second, from either the position of legal realism or critical legal studies, the makeup of the Justices of the Supreme Court unquestionably accounts for important swings in judicial doctrines.[91] However, for *Yick Wo* and the *Chinese Exclusion Case*, this theory cannot stand firm in light of statistics. A comparison of the Justices who heard *Yick Wo*, with those participating in the *Chinese Exclusion Case* reveals that six of the eight Justices were holdovers from the *Yick Wo* Court, including the author of the *Chinese Exclusion Case* opinion, Justice Field.[92] The ratio of overlapping personnel was seventy-five percent in these two cases, which, it should be noted, were both unanimous decisions. Personnel changes, therefore, do not account for the outcomes in *Yick Wo* and the *Chinese Exclusion Case.*

Since it seems clear that the divergent outcomes of *Yick Wo* and the *Chinese Exclusion Case* cannot be reconciled through external factors, such as time and personnel, the following section will

blamed for the unstable economy, subjected to racial attack and generally feared as a culture).

[90] In 1884, the Court in *Chew Heong v. United* States did seem to take a more benevolent approach to Chinese immigrants. However according to Justice Field, the difference between the *Chinese Exclusion Case* and *Chew Heong* rested on the Chinese Exclusion Act of Oct. 1, 1888. *The Chinese Exclusion Case*, 130 U.S. at 599. In other words, *Chew Heong* was based only on statutory interpretation, not on an inclination for benevolent treatment of Chinese immigrants. *See* Chew Heong v. United States, 112 U.S. 536 (1884). In this sense, *Chew Heong* cannot be taken as a counter-example to corroborate the proposition that there was less Sinophobia around the middle of 1880s. In contrast, the statutory *ex post facto* punitive regulation of the Chinese Exclusion Act of 1888 was taken for granted. Considering the constitutional hierarchy of the prohibition of *ex post facto* punishment, U.S. CONST. art. I, § 9, cl. 3, the Court's disregard of this issue in the *Chinese Exclusion Case* can only be explained under the veil of statutory interpretation. *See infra* text accompanying notes 191–217.

[91] The doctrinal change from *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625–26 (1869)—holding that paying any debt with United States notes or legal tender is unconstitutional if the debt existed before the passage of the law allowing legal tender—to the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553–54 (1870)—which overruled *Hepburn v. Griswold* to allow legal tender when applied to debts made before passage of the legal tender laws—may only be attributed to the appointment of Justices Strong and Bradley to the Court by President Grant. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 157–58 (1993).

[92] The Justices who participated in *Yick Wo* were Samuel F. Miller, Stephen J. Field, Joseph P. Bradley, Morrison R. Waite, John Marshall Harlan, William Burnham Woods, Stanley Matthews, Samuel Blatchford, and Horace Gray. The Justices who decided the *Chinese Exclusion Case* included Samuel F. Miller, Stephen J. Field, Joseph P. Bradley, John Marshall Harlan, Samuel Blatchford, Horace Gray, Melville W. Fuller, and Lucius Q.C. Lamar. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 176–77 (1994). Justice Matthews died on March 22, 1889, but Justice David J. Brewer did not succeed to his seat until the 1890 session; thus only eight Justices participated in the *Chinese Exclusion Case*. *See* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993, at 230, 253 (Clare Cushman ed., 1993).

instead look to internal factors. Particularly, the focus will be on clues found within the texts of the Court's opinions which could illuminate a reason for the divergence.

3. Janus or Dichotomy?

Since the dichotomous narratives of *Yick Wo* and the *Chinese Exclusion Case* cannot be fully explained by external circumstances, the next approach is to revisit the text itself in search of answers. As the preceding section revealed, there is continuity between the two accounts of the *Chinese Exclusion Case*. The problem is with the discontinuity between the two versions of *Yick Wo*.

The Court in *Yick Wo* made its decision based on equal protection and economic liberty, both of which are protected under the Fourteenth Amendment.[93] The challenge, then, is to find a connection between these two bases and the axis of the *Chinese Exclusion Case*. *Yick Wo* will be addressed here, leaving the *Chinese Exclusion Case* to the next part.

The *Yick Wo* Court was primarily concerned with the property rights dimension of economic liberty, since the plaintiffs' substantive interest was in their freedom of occupation and the use of their property.[94] However, the Court's concern has been incorrectly characterized by the irrelevance reading. It has been characterized as a harbinger of economic liberty in the context of industrial expansion rather than viewed as part of a longstanding emphasis on property rights.[95] This tenuous interpretation suggests that *Yick Wo* was the predecessor of the *Lochner* era, thus discrediting its equal protection influence.[96] While it is reasonable to situate the case within the historical development of industrial capitalism, such an emphasis on subsequent events creates a flawed one-dimensional model.

Protection of property was not a new concept in the 1880s, but rather was a key issue from the inception of the Constitution.[97]

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[93] *See supra* text accompanying notes 24–26.

[94] "The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of *property* for laundry purposes, to which all similarly situated may conform." *Yick Wo*, 118 U.S. at 368 (emphasis added).

[95] *See* Bernstein, *The Chinese Laundry Cases*, *supra* note 11, at 257–58 (indicating that not only did the municipal ordinance at issue in *Yick Wo* unconstitutionally infringe on individuals' property rights it also interfered with an individual's right to participate in a lawful occupation).

[96] *See* Joo, *supra* note 11, at 385.

[97] *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 47–48 (2d ed. 1994)

Thus, interpreting *Yick Wo* as a case of pure economic liberty protected by substantive due process misses the historical developments that preceded it. Simply because *Yick Wo* occurred in the early days of the Gilded Age cannot justify its disassociation from previous constitutional developments.[98] Although the Gilded Age signaled a turn in historical developments, there was not a rupture between it and the preceding Reconstruction Age.[99] Thus, the Equal Protection Clause cannot be fully disregarded through the argument that, "[b]y 1886, when *Yick Wo* was decided, Reconstruction was officially dead . . . . The substantive commitment to the rights of blacks [i.e., equal protection] had faded, but the commitment to rights of labor and contract persisted for another two generations."[100]

Irrespective of the potential problems resulting from the equal protection issue, *Yick Wo* should be placed in the course of its historical development. *Yick Wo*'s treatment of property protection played a role in bridging the 1880s to the previous era, and reinvigorated the old subject of property protection in the emerging era of industrial capitalism. Moreover, in contrast to the longstanding interest in the protection of property, equal protection was still a constitutional novelty in the 1880s. The very fact that equal protection and the protection of property turned up side-by-side in *Yick Wo* highlights the necessity of a historical overview in understanding the 1880s.

Thus, the ostensible distinction between equal protection and protection of property in *Yick Wo* seems more like the two faces of Janus than two halves of a dichotomy.[101] Taking this as a point of departure, the following section turns to constitutional change as a basis for analyzing the dividing interface of *Yick Wo* and seeks to determine whether or not this scenario can also be used to explain

(explaining that at the founding it was very important that there be language in the Constitution which would protect the rights of property owners).

[98] The Gilded Age refers to the years around the 1880s, during which the drive to industrialization climaxed in the United States. There is, however, disagreement as to the beginning and ending years of the Gilded Age. *See, e.g.*, SMITH, *supra* note 2, at 347 (suggesting that the Gilded age lasted from 1876 to 1898); MCCLOSKEY, *supra* note 97, at 67 (indicating that it began in 1865 and ended in 1900).

[99] The Compromise of 1877, which led to the presidency of Rutherford B. Hayes, has been generally deemed as the end of Reconstruction. After 1877, however, there was what has been referred to as a "remnant" stage of Reconstruction that lasted until the 1890s. *See* SMITH, *supra* note 2, at 290.

[100] PRIMUS, *supra* note 33, at 153 n.61.

[101] Janus is the ancient Roman god of doorways and beginnings, often represented by two faces looking in opposite directions. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 715 (College Ed. 1969).

the *Chinese Exclusion Case*.

III. *YICK WO*, THE *CHINESE EXCLUSION CASE*, AND NATION-BUILDING

The analysis of these two cases, up to this point, has revealed that a major problem with the dichotomy scenario lies in its one-dimensional historical outlook.[102] To address this, it is necessary to further analyze historical development in order to create a more comprehensive account of *Yick Wo* and the *Chinese Exclusion Case*.

While the 1880s may have foreshadowed the emergence of industrial capitalism, perspectives on that period should not be so limited. It is more appropriate to view the 1880s both as a link and a watershed in American constitutional development. More specifically, the 1880s may be viewed as a link in the process of American state-building from the time of the Revolutionary War,[103] and as a watershed that filtered out the agitation associated with Reconstruction after the Civil War.[104] Further, within the framework of American state-building, the 1880s were not only symbolic of the progress of industrialization in the United States, but also foreshadowed the coming of American expansionism and the Modern Republic. Thus, to make sense of the different outcomes of *Yick Wo* and the *Chinese Exclusion Case*, the temporal and bi-dimensional features of the 1880s in the course of American state-building must be embraced.

One further note about the concept of American state-building is needed. Despite the difference between the concepts of state-building and nation-building,[105] these two can be used

[102] *See supra* text accompanying notes 22–36 (contending that *Yick Wo* cannot be adequately explained by reference to the protection of economic liberty in the context of industrial expansion).

[103] Professor Stephen Skowronek identifies the period between 1877 and 1920 as a departure from both the institutional development which preceded it and that which followed. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 15 (1982). Specifically, Skowronek divides this period into two stages: the stage of state-building as patchwork, from 1877 to 1900, and the stage of state-building as reconstitution, from 1900 to 1920. *See id*. at 16.

[104] The meaning of the new constitutional regime codified in the Reconstruction amendments, especially the Fourteenth Amendment, had not yet been determined by constitutional dialogue. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 81–104 (1993) [hereinafter, ACKERMAN, FOUNDATIONS] (outlining the history, before and after the Civil War, covering both the political and judicial perspectives of the Reconstruction Amendments).

[105] *See* JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 20 (1996) (discussing state-building as an artificial and orchestrated process creating

interchangeably in this context.[106] In comparison with the rationalistic genre of state-building, however, nation-building has more emotional flavor beyond simply consolidating particular state institutions.[107] Accordingly, the term "nation-building" is used in place of Professor Skowronek's "state-building" to refer to the pivotal pattern of American constitutional developments from 1776 onward. While it might not have been visible in institutional entities, it permeated the public mentality.[108]

To further a comprehensive reading of *Yick Wo* and the *Chinese Exclusion Case*, I will begin with an overview of American constitutional development, beginning in the year 1776, to provide a general framework. Next, I will revisit the 1880s with regard to American nation-building. Ultimately, my purpose is to place *Yick Wo* and the *Chinese Exclusion Case* in a broad historical context to facilitate an understanding of the core meaning running through them.

A. Sovereignty as the Focus of Constitutional Development

American nation-building is a term used to describe an ongoing process.[109] Arguably, it is not clear when the United States achieved sovereignty on the international stage.[110] Putting the

transferable loyalties, in contrast with nation-building as a somewhat more organic creation of identity with and loyalty to a community). *See also* GIANFRANCO POGGI, THE STATE: ITS NATURE, DEVELOPMENT AND PROSPECTS 27 (1990) (explaining that, especially during the nationalist phase, nation-building usually preceded state-building in the historical cycle, and that the existence of the nation became a legitimizing factor for the violent and difficult processes in developing a state).

[106] *Cf.* LINZ & STEPAN, *supra* note 105, at 34 (using the United States as an example of a state-nation; i.e., a multicultural state that in spite of its lack of homogeneity is able to inspire in its citizens a sense of identity and loyalty).

[107] *See id.* at 22 (arguing that nation-building creates certain feelings of loyalty amongst citizens that state-building cannot match); POGGI, *supra* note 105, at 27 (proposing that nation-building embodies a sense of nationalism that will lead to the furtherance of state-building). *Cf.* Cleveland, *supra* note 9, at 261–62 (noting that American nation-building in the late 1800s reflected a reconciliation of the nations so that it could be reestablished as a state).

[108] Professor Skowronek also points out that the early American state was "essential to social order and social development in nineteenth-century America." SKOWRONEK, *supra* note 103, at 19. *See also* GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 61 (2001) (arguing that in the founding era "the term 'nation' ha[d] little to do with organic nationhood").

[109] Woodrow Wilson said: "From the first America has been a nation in the making . . . self-originated, self-constituted, self-confident, self-sustaining . . . ." WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 182 (7th ed. 1997) (1907) [hereinafter WILSON, CONSTITUTIONAL GOVERNMENT].

[110] The Continental Congress began acting in 1774, but independence was not officially recognized by England until the Peace of 1783. Further, it was not until 1789 that the

issue of the precise founding year aside, clarifying and consolidating the ambiguous concept of sovereignty has been a major task for the United States.[111] Adding to the debate are the changed conceptions of sovereignty generated by the Reconstruction Amendments.[112] It seems the debates over the relationships and configuration of the state, national sovereignty and the Constitution comprised the "grammatical" foundation of American nation-building. Yet, to understand the basic structure of this nation-building process, it is necessary to go further. Because the grammatical aspect of the American nation-building story is so familiar, the ensuing subsection is more schematic than analytic. This subsection will be followed by a discussion of the rhetorical aspect of American nation-building known as economic pragmatism.

1. The Grammatical Foundation: State, Sovereignty, and the Constitution

In order to understand the nature of American nation-building, it is necessary to begin with the proposal that the United States did not officially become a nation until after the States ratified the Constitution.[113] Although the modern nation-state is regarded as the crystallization of the Enlightenment ideal of a "politically" created community,[114] nearly all states around the world are more or less built on non-political underpinnings.[115] In this vein, a state

Constitution actually became effective. Arthur J. Jacobson & Bernhard Schlink, *Constitutional Crisis: The German and American Experience*, *in* WEIMAR: A JURISPRUDENCE OF CRISIS 1, 336–37 n.22 (Arthur J. Jacobson & Bernhard Schlink eds., 2000). From a legal perspective, Professor Bruce Ackerman would choose 1783, when the Peace Treaty of Paris was concluded, as the date the United States achieved sovereignty. *See* E-mail from Bruce Ackerman, Sterling Professor of Law and Political Science, Yale Law School, to Ming-sung Kuo, J.S.D. candidate, Yale Law School (Jun. 17, 2002, 09:25 EST) (on file with author).

[111] *See e.g.*, MCCLOSKEY, *supra* note 97, at 43 (discussing the role of the Supreme Court in establishing the "doctrine of national authority").

[112] *See* FLETCHER, *supra* note 108, at 2 (positing that the Reconstruction Amendments changed the definition of popular sovereignty from one based on "voluntary association, individual freedom, and republican élitism" to one grounded in "organic nationhood, equality of all persons, and popular democracy").

[113] *See* Jacobson & Schlink, *supra* note 110, at 336–37, n.22 (proposing various events which might have signaled the formation of the United States, including the ratification of the Constitution in 1789). *Cf.* Michel Rosenfeld, *The European Convention and constitution making in Philadelphia*, 1 INT'L J. CONST. L. 373, 375 (2003) (arguing that the Constitution of the United States preceded the American nation because the American nation was "built over time by successive waves of foreign immigration").

[114] *See* Mark E. Brandon, *Constitutionalism and Constitutional Failure*, *in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 298, 298 (Sotirios A. Barber & Robert P. George eds., 2001) (stating that "constitutions [are often thought of] as devices for creating and holding together a political world").

[115] Usually some fixed physical foundation, like a defined territory or an organic

created of non-political elements is supposed to precede the creation of a constitution.[116]

Nevertheless, the founding of the United States challenged this principle by implementing the political ideals of the Enlightenment.[117] In contrast to the European model—where the modern state preceded the enactment of a constitution—the American state is a direct result of its constitution.[118] This chronological order accounts for the crucial issues that have been entangling the political and constitutional development of the United States since the issuance of the Declaration of Independence in 1776.

In order to better understand the American model of nation-building, it is necessary to examine the relationship between sovereignty and the original Constitution. Unlike the European model, the American Constitution is constitutive, rather than cognitive of sovereignty. In a modern sense, the decisions concerning where sovereignty is to reside represent the founding of a state.[119] If the state was the presupposition of constitution-making, then the portions of the Constitution concerning sovereignty would have aimed to recognize the status quo of the pre-Constitution era. Thus, in the case of American state-founding and constitution-making, the architects of the Constitution must

configuration, such as culture or ethnicity, constitutes the presupposition of state. *See* MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 12–13, 53–61 (1996).

[116] Carl Schmitt's constitutional theory presupposes the precedence of the state to constitution-making. *See* Jan Müller, *Carl Schmitt and the Constitution of Europe*, 21 CARDOZO L. REV. 1777, 1782 (2000) (positing the theory that a political nation could not be formed until the people had united to create a state in which the unifying goal was a "political existence").

[117] *Cf.* Michel Rosenfeld, *Constitution-making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891, 1897–98 (1998) (indicating that France is another example of the "political" construction of the French nation).

[118] *See* supra note 108 and accompanying text**.** *Cf.* SHELDON S. WOLIN, THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION 5 (1989) (arguing that the American state came about simultaneously with the Constitution). Arguably, what may be considered the first American Constitution, the Articles of Confederation, preceded the founding of the United States. ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 77 (7th ed. 1991) (noting that the Articles of Confederation, despite the fact that they preceded the founding of the U.S., were more concerned with relations between the states and did not create the republican form of government associated with the United States). In addition, the Declaration of Independence asserted that the colonies were "free and independent states" and referred to colonists as "'one people.'" *Id.* at 76.

[119] *See e.g.*, PREUSS, CONSTITUTIONAL REVOLUTION *supra* note 18, at 76 (arguing that while a constitution will attempt to place sovereignty with the people, this removes the ability of the people to express their unified opinion through revolution). For the purposes of this article, sovereignty refers to the sovereign power monopolized by the state that is authorized in the name of the people.

have planned for sovereignty. The contemporaneous setting of thirteen "sovereign" colonies, however, complicated the constitutional allocation of sovereignty between the federal and state governments. Specifically, the approach in the original Constitution to the constitutive issue of sovereignty resulted in constructive ambiguity. Thus, it can be said that the original Constitution did not resolve all of the controversies related to sovereignty.[120]

In conjunction with creating an ambiguous jurisdictional relationship between the federal and state governments, the Constitution also ignores the sovereignty-based concept of national citizenship. As with the issue of sovereignty in general, the failure of the Constitution to address national citizenship was due to the lack of a definitive sovereign state.[121]

Based on the policy of constructive ambiguity in the original Constitution, sovereignty issues have created constitutional pitfalls. In addition to constitutional amendments,[122] sovereignty problems were addressed through judicial interpretation of the Constitution. According to the late Professor Robert McCloskey, the Marshall Court invoked the Contracts Clause,[123] the Necessary and Proper

[120] Regardless of the fact that the Constitution was ambiguous with respect to sovereignty, in the years following its ratification, there was a distinct trend toward controlling the states via the federal government. Despite the lack of specification with respect to the jurisdictional relationship between the federal and state governments, it can be inferred that the *telos* of the Constitution leans toward consolidating power in the federal government rather than maintaining the status quo of independent member states. *See* WILSON, CONSTITUTIONAL GOVERNMENT, *supra* note 109, at 178–79 (stating that the old theory of state sovereignty has been replaced by the reality that the federal government has the ability to control the states).

[121] National citizenship is the legal mechanism that gives definition to "the people." *See generally* Maximilian Koessler, *"Subject," "Citizen," "National," and "Permanent Allegiance"*, 56 YALE L.J. 58, 61–62 (1946) (stating that the word "nationality", although legal in nature, indicates that a person or citizen belongs to a particular nation or ethnicity). Neither the Articles of Confederation nor the original Constitution expressly provided for national citizenship. For the issue of citizenship in the Articles of Confederation, see KELLY ET AL., *supra* note 118, at 77 n.1.

[122] The Bill of Rights—Amendments I–X—was initially intended to demarcate the boundary of federal power so as to preserve the power of the states. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, at xii–xiii, 7 (1998) (illustrating that the Bill of Rights was designed to empower the states to protect the people from the possible tyranny of the new federal government). *But see* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 424 (1793) (holding that a state may be sued in the Supreme Court by a private citizen of another state without effect to that states' sovereignty; this was superceded by the Eleventh Amendment); MCCLOSKEY, *supra* note 97, at 22 (indicating that the decision in *Chisholm v. Georgia* was an attempt by the Court to establish its power to rule on issues of constitutionality, thus strengthening the federal government).

[123] *E.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136–39 (1810) (indicating that contracts to which the state is a party are reviewable by the Supreme Court); Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (applying the Contracts Clause of the Constitution to declare a New Hampshire law that modified the charter of Dartmouth College

Clause,[124] and the Commerce Clause,[125] among other things, to maintain the federal rein on the states. Moreover, the Marshall Court augmented "judicial sovereignty" by employing the power to grant a "writ of error", *arguendo*, a power bestowed on the court by Section 25 of the Judiciary Act of 1789.[126]

The fact that the creation of the American Constitution preceded the founding of the United States suggests that the centrality of sovereignty issues in the early days of the republic was presupposed. The Court, intent on expanding its own power, settled the sovereignty disputes between the federal government and the states so as to support the emergence of a national consciousness.[127] The Marshall Court set the example of judicial review as judicial sovereignty for its successors at home and abroad.[128]

2. Rhetoric: Economic Pragmatism

Apart from the grammatical configuration between state, sovereignty, and the Constitution, the substantive rhetoric of American nation-building also emerged in the constitutional development of the early republic.

An examination of the course of nation-building from the Articles of Confederation to the Constitution, reveals that practical needs played an important role in the founding of the Union. Besides the clear necessity of winning the Revolutionary War, economic

unconstitutional). *See also* MCCLOSKEY, *supra* note 97, at 47–50 (examining the use of the Contracts Clause by the Marshall Court as a mechanism for expanding judicial power over the states).

[124] *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408–13 (1819) (interpreting Article I, §8, cl. 18 to allow Congress to execute powers not expressly granted by the Constitution, provided that the end be legitimate and the means not otherwise prohibited). *See also* MCCLOSKEY, *supra* note 97, at 43 (highlighting the significance of the decision in *McCulloch* with respect to federal authority over the states).

[125] *E.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (The Steamboat Monopoly Case) (rendering a New York State law that prevented federally licensed navigators from entering New York waters unconstitutional under the Commerce Clause). *See also* MCCLOSKEY, *supra* note 97, at 45–46 (explaining the Marshall Court's use of the Commerce Clause to expand federal control over the states).

[126] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (affirming the power of the Supreme Court to review the decisions of the highest state court when a federal question is involved). *See* MCCLOSKEY, *supra* note 97, at 39 (stating that the writ of error allowed the Supreme Court to review state court decisions made in the name of federal law).

[127] *See* MCCLOSKEY, *supra* note 97, at 55–56 (explaining that the Marshall Court's rule of national supremacy over states was continued in the succeeding Taney Court).

[128] For the legacy of judicial sovereignty in the United States, see *infra* text accompanying notes 222–39. For the legacy of judicial sovereignty abroad, see generally ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 153–93 (2000) (discussing the role of the European Court of Justice in transforming the European Union as an international organization into a supranational polity).

struggles were extremely influential in focusing attention on strengthening the federal government.[129] A pragmatic mindset with respect to national economic prosperity, commerce and finance, comprised the rhetoric of American nation-building.[130]

Historically, economic pragmatism can be traced back to before the Revolution. The founding of separate colonial Commonwealths in North America indicated that the British legacy of capitalism had been transplanted.[131] Conversely, in the aftermath of the Revolutionary War, individual states seemed driven toward both anarchy and tyranny, out of which developed various measures detrimental to the economy.[132] Until Great Britain recognized the independence of the United States in 1783, the passion for moneymaking had been widespread in American society, although it was not universal.[133] Thus, discovering how to make the setting beneficial to economic growth became a convergent point of public opinion.

In this context, the United States—reconfigured by the Constitution—replaced the Confederation. Subsequently, the nationalistic "lawyer-statesman," Alexander Hamilton, accepted the post of the first Secretary of the Treasury in order to deal with the chaotic economic environment. Thus, under Hamilton's manipulation, the spirit of capitalism integrated with the nationalist sentiment, creating "economic nationalism."[134]

The connection between the concerns of early Americans about economic stability and growth and nation-building was reflected not only in federal policy but also in judicial decisions. Both *McCulloch v. Maryland*,[135] which concerned the interpretation of the Necessary and Proper Clause, and *Fletcher v. Peck*,[136] which concerned the Contracts Clause, had bearing on the development of the infrastructure of a capitalist economy by tilting against state

[129] *See* KELLY ET AL., *supra* note 118, at 82–83 (presenting the many economic failures suffered under the Articles of Confederation).

[130] *See* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 246–47 (1993) (surmising the feelings of Alexander Hamilton and James Madison concerning the need for a strong central government in order to promote economic stability).

[131] *See* LIAH GREENFELD, THE SPIRIT OF CAPITALISM: NATIONALISM AND ECONOMIC GROWTH 364 (2001).

[132] These measures included "[t]he confiscation of property, the paper money schemes, the tender laws, and the various and devices suspending the ordinary means for the recovery of debts." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 404 (1969).

[133] *See id.* at 388.

[134] *See* GREENFELD, *supra* note 131, at 388–98.

[135] 17 U.S. (4 Wheat.) 316 (1819).

[136] 10 U.S. (6 Cranch) 87 (1810).

powers.[137] Thus, the strain of American nation-building via judicial review also reflected the emergence of economic nationalism in the Early Republic.

This rhetoric, as the driving force of American nation-building, found its matrix in economic pragmatism. Economic pragmatism then reconfigured as economic nationalism and advanced the course of American nation-building.

B. Sovereignty Contentions in the 1880s

During the 1880s, the country was not breaking away from the turbulence created by the Civil War and Reconstruction. To fully understand the nation-building of the 1880s, it is necessary to examine how the nation reconceptualized the idea of sovereignty during the Civil War and Reconstruction. However, the notion of sovereignty that developed during the 1880s cannot be oversimplified by characterizing the Gilded Age as simply a continuation of the foregoing eras. This would confuse the momentary historical events of the Civil War and Reconstruction with their enduring historical significance. Although the Civil War and Reconstruction have had a long-lasting influence on subsequent historical development, these events cannot dictate the meaning of historical development. Rather, they should be assessed in conjunction with the historical events that followed. To understand the development of sovereignty in the United States, the 1880s must be considered for the role they played in American nation-building as a link between the Civil War and the modern era.[138]

The catalyst for the Civil War was the hostility created by the allocation of jurisdictional powers between the federal and state governments.[139] Thus, the major effect of the Civil War was to restructure the relationship between the two levels of government, resulting in the enhancement of the powers of the federal government.[140] In addition, a clear concept of nationhood resulted

[137] The former bore on the integrity of the banking system, which constituted a major pillar of economic operation. The latter was typical of the protection of private property, which was deemed as the cornerstone of a capitalist economy.

[138] *See* Cleveland, *supra* note 9, at 256–57 (characterizing the Gilded Age as period of rapid industrialization as well as a "period of tremendous insecurity for the American people").

[139] The ultimate provocation of the Civil War was the South's secession from the Union and its subsequent attack on federal forces at Fort Sumter. Emancipation of the slaves did not originally appear as the main concern of President Lincoln. *See* KELLY ET AL., *supra* note 118, at 291–295.

[140] *See* WILSON, CONSTITUTIONAL GOVERNMENT, *supra* note 109, at 178 (noting that after the Civil War, it was clear that the federal government was "the final judge of its own

from the Civil War.[141] While the term "United States" continues to imply a degree of pluralism, the solidarity that is implicit in the word "united" was reinforced after the Civil War. Moreover, the tendency toward "nationalization" was not simply expressed in the public rhetoric, but was also inscribed in the Privileges and Immunities Clause of the newly enacted Fourteenth Amendment.[142] The Thirteenth, Fourteenth and Fifteenth Amendments also reflected the enhancement of federal power through their restraint on state authority. The Civil War Amendments, in effect, recorded the development of a trend toward nationalization, both in the structure of the government and in the psyche of the American public.

The judiciary likewise played a crucial role during the 1880s in shaping the course of American nation-building. Although the *Zeitgeist* of nationalization during the Civil War and Reconstruction was codified in the Constitution, its concrete meaning was not clarified and defined until subsequent cases arose. Thus, if the Civil War and Reconstruction are seen as the impetus for the emergence of the principle of nationalization, the "sedimentation" of the constitutional meaning of nationalization occurred during the 1880s.[143] In the relative tranquility of the 1880s, the nationalistic view of the Civil War materialized.[144] Both *Yick Wo* and the *Chinese Exclusion Case* reflected the Supreme Court's mission to memorialize the constitutional meaning brought about by the Civil War and Reconstruction.

Before presenting an alternative comprehensive reading of *Yick*

powers").

[141] *See* FLETCHER, *supra* note 108, at 57–59 (arguing that the concept of nationhood, along with those of equality and democracy clearly resulted from the Civil War); WOLIN, *supra* note 118, at 80 (positing that the Civil War was the impetus for a developed state consciousness); *see also* FLETCHER, *supra* note 108, at 47 (emphasizing the degree to which Lincoln promoted the notion of nationhood in the Gettysburg Address).

[142] *See* U.S. CONST. amdn. XIV, § 1. The Privileges and Immunities Clause provided, for the first time, that citizens of the several states would have a discrete citizenship of the United States. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872); *see also* Bruce Ackerman, *Ackerman, J., concurring., in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 100, 101 (Jack M. Balkin ed., 2001) (emphasizing that the Fourteenth Amendment made clear that state citizenship was secondary to national citizenship).

[143] *See* Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1487 (1990) (defining the concept of "sedimentation" as the way in which ideas and assumptions become imbedded in our consciousness until they are present without our awareness).

[144] *See* JOHN M. DOBSON, AMERICA'S ASCENT: THE UNITED STATES BECOMES A GREAT POWER, 1880–1914, at 5 (1978) (noting the "independence from international political alliances, . . . great abundance of resources, and [the] blissful freedom from fear" enjoyed by Americans after Reconstruction).

Wo and the *Chinese Exclusion Case*, it is important to consider the role of the 1880s as a watershed in the course of American nation-building. We are better equipped to understand the Court's task of "sedimenting" the idea of nationhood in the 1880s by considering the nature of the Gilded Age. Thus, the remainder of this section focuses on the development of sovereignty in the 1880s. First, the effect of the nationalizing trend on the internal dimension of sovereignty will be addressed. Next, the looming image of the "American Empire"—also a product of the same nationalizing trend—in terms of the external dimension of sovereignty will be discussed. The core implications of the duality of the nationalizing tendency for the nation-building movement will then be analyzed. Finally, an interim conclusion will be drawn to shed light on the unnoticed role of the 1880s in the course of American nation-building.

1. Reinforcing Federal Sovereignty on the Domestic Stage

In the aftermath of the Civil War and Reconstruction, one of the central tasks was to reinforce federal sovereignty. As a matter of historical fact, maintaining the integrity of the Union, instead of abolishing slavery, was the original cause of the Civil War.[145] Therefore, after defeating the renegade Confederate states, the major constitutional concern was to tighten the federal rein on the states.[146]

This mission to enhance the role of the federal government by compromising state powers was in fact launched in the middle, rather than in the wake, of the Civil War. In an attempt to deal with formidable military defiance from the Confederate states, President Lincoln exceeded traditional presidential powers by claiming war powers deduced from the constitution.[147] The notion of war powers derived from Lincoln's desire to preserve the

[145] *See* Cleveland, *supra* note 9, at 261 (affirming that the Civil War was waged over the status of the Union and the supremacy of the national government); *see also* KELLY ET AL., *supra* note 118, at 292–93 (detailing the actions taken by Lincoln directly following secession and noting that his primary aim was to save the nation).

[146] *See* KELLY ET AL., *supra* note 118, at 323 (explaining one theory of reconstruction, the goal of which was to create sufficient control over the states as to guarantee the future security of the Union).

[147] *See* U.S. CONST. art. II, § 2, cl. 1 (providing for the president's role as Commander in Chief); *see also* KELLY ET AL., *supra* note 118, at 293 (noting that in evaluating the graveness of the situation, Lincoln proceeded to "prepare the nation for war without either aid or new authority from Congress"); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 224 (1948) (extolling Lincoln for "assum[ing] unprecedented authority on his own initiative").

Constitution, rather than directly from the text of the Constitution.[148] It is worthy to note that the Constitution is constitutive of the "State" in the United States.[149] Thus, the concept of preservation of the Constitution can be traced to the idea of *Staatsräson*, or "Reason of State."[150] The emergence of *Staatsräson* during the Civil War served to dissolve feudal politics in America.[151] In other words, the drive to retain the Union brought to the forefront the constitutional recognition of the broad implications of war powers, raised public consciousness, and created a constitutional setting for the modern state.

This nationalizing trend, achieved by tightening the federal rein on the states, did not steadily progress, but rather recoiled intermittently. The Reconstruction era, from 1865 to 1876, marked the pinnacle of nationalization, especially during the period of "Radical Congressional Reconstruction" from 1867 through 1876.[152] The federal military occupation of the former Confederacy highlighted the intensity of federal control over the southern states.[153] However, the period of federal dominance was not unending, nor were its effects as comprehensive as had been expected.[154] Once the federal troops withdrew from the South—as a result of the Compromise of 1877—many southern states intransigently resumed and skillfully built up their apartheid regimes.[155] The Gilded Age, which trailed the Reconstruction era, witnessed an ebb in the nationalizing trend resulting, not only from

[148] *See* KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 225 (1957) (defining Lincoln's war powers as "extra-constitutional"); ROSSITER, *supra* note 147, at 224 (illustrating that Lincoln—despite the fact that he may not have had constitutional support for his actions—was prepared to save the union and the government by expanding the traditional notion of the war powers); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1110–11 (2003) (discussing the possibility that Lincoln believed emergency war powers to be available to the executive in times of peril regardless of their legality or their ratification by Congress).

[149] *See supra* text accompanying notes 110–15.

[150] *See* WOLIN, *supra* note 118, at 163 (defining "Reason of State" as a justification, typically in time of war, for extraordinary state action).

[151] *Id.* at 80–81 (arguing that, since the Civil War, the state has defined the terms of American political and social life, eclipsing vestiges of feudalism).

[152] *See* SMITH, *supra* note 2, at 289–90 (summarizing the stages of the Reconstruction era, culminating with Congress taking control from President Johnson and creating an era of "Radical Congressional Reconstruction"). Radical Congressional Reconstruction was the period of Reconstruction largely committed to extending civil rights to blacks.

[153] *See* KELLY ET AL., *supra* note 118, at 337–40 (detailing the Military Reconstruction Acts of 1867).

[154] *See* SMITH, *supra* note 2, at 290 (pointing out that the initial radical reforms ended up being far less radical than originally promised).

[155] *Id.* (admitting that, although it was not an abrupt process, by the 1890s, most Republicans had abandoned hopes of creating civil rights for southern blacks).

the long-lasting struggle between southern diehards and northern radicals, but also from the corruption of federal politics.[156] Nevertheless, the Union's defeat of the Confederacy set the tone for nationalization.

The slowdown of the nationalization trend after Reconstruction, combined with public skepticism toward national politics, did not prove fatal to the federal government's control of the states, though it did force the federal government to change its strategy concerning the maintenance of this control. In lieu of the forceful approaches of the Reconstruction era, the tactics used by the federal government in the 1880s were reminiscent of antebellum judicial sovereignty.[157] The federal claim of judicial sovereignty did not result in the unconditional surrender of states to the federal government. The *Civil Rights Cases* of 1883 are illustrative of this territorial battle waged in the Supreme Court.[158] Although federal judicial sovereignty was not wholly dominant, a persistent course of federal superiority became readily detectable, forging a new path toward nationalization.

In addition to the drive toward nationalization in the aftermath of the Civil War and Reconstruction, social developments in the 1880s also highlighted the realistic needs of nationalization by enhancing the role of the federal government at the cost of the individual states. After the trauma of the Civil War and Reconstruction, the push for judicial sovereignty in the 1880s was in part brought about by a desire to cure heightened social conflict, resulting from increased immigration, urbanization and industrialization.[159] The federal government was forced to gradually cultivate a civil service system to deal with such problems.[160] These developments exposed both the weakness of America's still pre-modern state as well as the

[156] *See* KELLY ET AL. *supra* note 118, at 365–70 (discussing the post-Reconstruction trend of Americans to gravitate, not toward government involvement, but away from it—allowing political bosses and machines to take control and resulting in a public distrust of politics).

[157] *See* SKOWRONEK, *supra* note 103, at 41–42 (characterizing the federal judiciary's jurisprudence in the 1880s as "aggressive" as it increased its control over the other governmental branches).

[158] 109 U.S. 3 (1883). "In the *Civil Rights Cases* the Court . . . sustained traditional boundaries of federalism by limiting national power under the Fourteenth Amendment to remedying state sanctioned deprivations of rights." Michael Les Benedict, *Comment on Guyora Binder, "The Slavery of Emancipation"*, 17 CARDOZO L. REV. 2103, 2103 n.2 (1996).

[159] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 10 (1992).

[160] *See* SKOWRONEK, *supra* note 103, at 49 (noting that increased federal power put such a strain on the delivery of governmental services that the development of a new civil service system was imperative).

necessity of establishing a centralized regulatory regime.[161] Regulatory agencies were created to tackle the complexity of these problems;[162] while law, as an autonomous system, became a guide in the "'search for order.'"[163] The national government managed these contemporaneous social changes in part through regulation of commerce and through the federal judicial annulment of state police power over the private economy.

Both urbanization and industrialization in the 1880s had much bearing on the soaring economic development and nationalization.[164] Further development of the new economy required individual states to concede to centralized regulation in order to create a systematic legal order which would stabilize complex transactional behaviors in the market.[165] The economic component of this new wave of nationalization brought to the forefront the role of the federal judiciary, especially the Supreme Court, because it allowed for the establishment of a systematic legal order.[166] Undeniably, in the face of the notorious connection between business tycoons and the party-state system, the Court, at the apex of a relatively autonomous legal system, did not always perform in concert with federal regulatory politics. The Court often vacillated between two extremes—either supporting the private interests sought by a coalition of politicians and business patrons or maintaining the value-neutral judgments that were perceived as necessary to the flourishing capitalist economy.[167] However, the Court's winding path was nonetheless representative of the judiciary's assertion of federal regulatory policies rather than a federal concession to state claims.[168] With Reconstruction nearing its end, this trend moved in tandem with increasing judicial sovereignty, which acted as an alternative means of achieving nationalization.

Surely, the 1880s pose a formidable obstacle to students seeking

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[161] *See id.* (juxtaposing America's new industrial expansion against social conditions resembling the "Old World" as evidence of the need for civil reform).

[162] *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW: AN INTRODUCTION 72 (rev. ed. 1998) (using the establishment of the Interstate Commerce Commission as an example of the administrative agencies adopted to regulate business).

[163] HORWITZ, *supra* note 159, at 10.

[164] *See* FRIEDMAN, *supra* note 162, at 71–72 (noting that after the Civil War, the age of technology and industry started to accelerate and rule the economy).

[165] *See id.* at 72–73.

[166] *See* KELLY ET AL., *supra* note 118, at 386 (arguing that the emergence of the Supreme Court in this era occurred in order to fill governmental voids left by the other branches).

[167] *See id.* at 397 (showing that the Court did so by regulating and protecting the national economy without consistently favoring corporations).

[168] *See infra* text accompanying notes 222–39 (discussing *Yick Wo* as an example of the Court's tendency to assert federal sovereignty).

to provide a comprehensive account of American nation-building. Nevertheless, some trends can be perceived. In sum, while the robust move toward nationalism that grew from the Civil War and Reconstruction receded in the 1880s, another strand of nationalism—economic nationalism—soon took its place.[169] The economic aspect of this new wave of nationalization moved away from the military battlefield after the fading of Reconstruction and shifted toward the federal judiciary. Thus, the nation-building in the 1880s was adopted from changes initiated in the antebellum period. But the new political economy and social situation complicated this process of nationalization.

2. Emerging American Sovereignty on the International Stage

Although the Spanish-American War of 1898 is generally seen as a watershed in the course of American foreign policy, marking the United States' ascendance as a great power in the world, the traits of American expansionist policy have their roots in the immediate postbellum years.[170] In the late 19th century, the groundwork for the subsequent American ascent on the international stage was laid, revealing expansionist tendencies.[171]

In the years after the Civil War, the United States was engrossed in its internal affairs, particularly in Reconstruction. Having experienced unprecedented violence in the Civil War, the country adopted a policy of demobilization, rather than displaying its muscle to the world.[172] However, throughout the end of the 19th century the policy of territorial expansion had been continuing on the continent. The United States' moral motivation to civilize abroad and desire to acquire a secure stretch of land arose before the Civil

[169] *See* RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877, at 16–17 (1990).

[170] *See* ROBERT H. FERRELL, *Introduction* to AMERICA AS A WORLD POWER, 1872–1945 xv (Robert H. Ferrell ed., 1971) (arguing that the Americans began to shift their national thinking toward becoming an imperialist world power as early as the mid-1880s); *see* MILTON PLESUR, AMERICA'S OUTWARD THRUST: APPROACHES TO FOREIGN AFFAIRS, 1865–1890, at 9–10 (1971) (concluding that American "[a]ppetite for new territory" began to manifest itself during the Gilded Age).

[171] *See* ERNEST R. MAY, IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER 6–8 (2d ed., 1991) (attributing America's ascent onto the international stage, in part, to tremendous domestic economic growth).

[172] *See* DOBSON, *supra* note 144, at 25–26 (explaining that the "disbandment and dispersal" of the military after the Civil War was an indication that domestic affairs would take priority over foreign policy); MAY, *supra* note 171, at 7 (noting that the demobilization of the U.S. military made concern about the international arena "irrelevant" for the time being).

War.[173] Either by the sword or by the purse, the United States had expanded its land from the Gulf of Mexico to the Pacific from the time of Independence to the Civil War.[174] In the years following the Civil War, the United States stretched its hands out, acquiring Alaska and the Midway Islands in 1867.[175] However, the public mood following the end of the Civil War and at the beginning of Reconstruction did not favor expansionism. Rather, the country, in the 1880s, placed most of its attention on industrialization and economic development.[176] This internal preoccupation with economic affairs, in a way, constituted a new wave of outward expansion.

From the nation's inception, economic prosperity and the zeal to advance commercial and trade acts constituted one of the major driving forces of nation-building.[177] Before the 1880s, a spirit of economic nationalism gradually took shape in the course of American nation-building. In addition to Reconstruction efforts, the end of the Civil War saw the nation's leaders resuming the task of developing industry.[178] Seeking to constantly expand markets, the push to develop the U.S. economy was not long confined to the domestic stage alone. With the glut of national production starting in the 1870s, the domestic market gradually reached its limits, urging U.S. companies to seek foreign markets.[179] Various commercial interests abroad encouraged the United States government to get involved in the business of promotion, including the promotion of oil, copper and steel interests.[180] This outward economic thrust brought about a new and more vigorous surge of economic nationalism in the Gilded Age.

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[173] *See* Cleveland, *supra* note 9, at 164–65; *see also* SMITH, *supra* note 2, at 205 (arguing that Manifest Destiny in the 1840s was seen as "God's design for the Anglo-American race" so that Americans could rule over the west and displace "degenerate, despotic, [and] Jesuitical Spanish influences").

[174] *See* DOBSON, *supra* note 144, at 13 (arguing that "[t]erritorial aggrandizement must be considered a dominant tradition in American history"); *see also* Cleveland, *supra* note 9, at 164–65.

[175] Cleveland, *supra* note 9, at 164–65.

[176] *See* PLESUR, *supra* note 170, at 5–6 (illustrating that the prevailing view among America's leaders in the postbellum era was not in favor of expansionism).

[177] *See* KELLY, ET AL., *supra* note 118, at 363 (indicating that, at the end of Reconstruction, economic development was a main issue in the growth of Constitutional politics).

[178] *See id.* (noting that Congressional policies toward industrialization, including revisions to banking and tariffs and the introduction of internal improvement legislation, resumed upon the conclusion of the Civil War).

[179] *See* Matthew Frye Jacobson, BARBARIAN VIRTUES: THE UNITED STATES ENCOUNTERS FOREIGN PEOPLES AT HOME AND ABROAD, 1876–1917, at 18–19 (2000) (contending that while modern theorists debate the truthfulness of America's overproduction, mere talk of such overproduction led to a perceived need to secure foreign markets).

[180] MAY, *supra* note 171, at 9.

Ultimately, the United States made substantial gains in the pursuit of becoming a world power and needed to take forceful action to continue on this path. In order to open up international markets in Asia and the Pacific Islands and to simultaneously protect new business interests abroad, the United States had to build itself into a great sea power.[181] Beginning in the 1870s, with the support of the U.S. Navy, the United States steadily built up a presence in the Samoan Islands and Hawaii. Moreover, "[b]eginning in the early 1880s Congress authorized . . . the construction of big-gun steel warships."[182] The United States thus began its ascent toward achieving status as a great world power.

In addition to these new economic interests propelling the United States onto the international stage, the surge of national pride—a result, in part, of military build up—was also a factor in the nation's new focus on international matters. Based largely on the combined concepts of religion, morality, and chauvinism, the United States refocused its attention outward. Employing a puritan legacy of "Manifest Destiny" and absorbing contemporary social Darwinism, the United States claimed that it was chosen by God to implement His will.[183] With God on its side, the leaders of the United States presumed that the nation had an entitlement in the world arena. The U.S. leaders also felt that America's democratic traditions and the abolition of slavery made the United States morally superior to the old European monarchies following the Civil War.[184] This moralistic presumption contributed to America's bold global involvement in international affairs starting in the 1880s.[185]

After the global spread of American religious and economic interests, combined with the symbolic presence of the United States Navy around the world, a sense of chauvinistic national prestige emerged. This prompted the reformation of consular services and the modernization of the Department of State, which are the most conspicuous symbols of the modern state.[186] Consequently, the

[181] *See, e.g.,* CAPTAIN A.T. MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY, 1660–1783, at 22 (1890) (discussing the influence that sea power has upon a nation's strength and wealth).

[182] MAY, *supra* note 171, at 7.

[183] *See* DOBSON, *supra* note 144, at 17–19 (presenting a detailed account of the underlying themes associated with America's employment of Manifest Destiny).

[184] *See id.* at 18–19 (discussing the "missionary attitude" embraced by Americans who were eager to "civilize" the rest of the world).

[185] *See id.*; *see also* Cleveland, *supra* note 9, at 262–63 (positing that the American annexation of Puerto Rico, Guam, and the Philippines was inspired by America's particular sense of moral superiority over the inhabitants of their newly acquired land).

[186] *See* PLESUR, *supra* note 170, at 37–44, 47–50 (discussing the calamities of the early

establishment of those very symbols of modern state authority solidified the new sense of national prestige and further inspired the United States' expansion onto the international stage.

Undeniably, wars demarcated new eras throughout the course of American history. Both the end of the Civil War in 1865 and the Spanish-American War in 1898 marked major shifts in the course of American nation-building. The end of the Civil War signaled the peak of American nation-building and its cementing of a clear national consciousness.[187] The Spanish-American War not only marked the climax of American imperialism but also foretold the coming of a new age, in which the United States would dominate as a world power.[188] Nevertheless, the period between 1865 and 1898 was a transition period in which the United States evolved from a nascent nation-state to a great international power. The combination of economic needs, military buildup, religious zeal, and national prestige drove the United States, as a strong sovereign nation, onto the international stage.[189] In sum, "[h]aving put both the Civil War and Reconstruction behind it, the nation confidently sought recognition as one of the great Western powers and was willing to join in the scramble to colonize weaker peoples to achieve that goal."[190]

3. Implications of an Aggressive, Two-Pronged Nation-Building Effort

The preceding analyses of the two dimensions of American nation-building in the 1880s clearly show an attempt by the United States to polish its image as a modern sovereign nation. This attempt is reflected in both the enhancement of federal governing powers at home and in the assertion of American national interests abroad. Before focusing on the two strains of Chinese immigration

post-Civil War State Department and consular service, and the subsequent reformation of both).

[187] *See* FLETCHER, *supra* note 108, at 2–4 (noting Lincoln's reference in the Gettysburg Address to a "nation under God" and inferring from that a shift from "peoplehood to nationhood").

[188] *See* MAY, *supra* note 171, at 269–70 (likening the United States' domination of the world to a greatness "thrust upon" a nation that was paradoxically isolationist in its actions). *But cf.* DOBSON, *supra* note 144, at 87–88 (noting that the Spanish-American War was not a startling departure from America's foreign policy goals in the 1880s and may have been a mere continuation of an already begun pattern of international relations).

[189] *See* DOBSON, *supra* note 144, at 10 (arguing that the arrogance of American rhetoric regarding foreign affairs had more effect on its success on the international stage than any actual imperial power).

[190] NEUMAN, *supra* note 11, at 84.

cases, it is necessary to address the issue of immigration in the United States in the 1880s.

Understanding immigration is necessary to understanding the self-image of a political community.[191] Immigration is "[t]he act of entering a country with the intention of settling there permanently."[192] Immigrants, whether they acquire formal citizenship or not, generally change the status quo of their host political community.[193] Existing social, economic, cultural, and even political situations change as a consequence of immigration. In the face of this kind of challenge, tension builds between the host political community and the immigrants.[194]

Two primary responses from the host political community often occur. First, there may be an effort to maintain the purity of the existing political community through separation and exclusion, whether it is *de jure* or *de facto*.[195] This particular response generally results from a sense of difference or "us versus them" consciousness. The other response is to assimilate immigrants based upon a sense of the host political community's superiority.[196] This response also originates in a sense of difference; however, unlike separation and exclusion, with assimilation the host members generally believe in the transformability of the immigrants' identity and the ultimate possibility of achieving sameness.[197] These two possible responses to immigration provide the lens through which the self-image of the political community and its policy toward other issues may be viewed. Pushed to the logical limits, exclusion and assimilation can be extended to symbolize the two strands of traditional policies toward the solidification of the political community.

The Gilded Age foreshadowed the transition of the United States

[191] *See* Bosniak, *supra* note 11, at 963 (identifying the concepts of "border regulation" and "internal community membership" as inherent in the concept of a community).

[192] BLACK'S LAW DICTIONARY 752 (7th ed. 1999).

[193] *See* Bosniak, *supra* note 11, at 964 (detailing the differing accommodations made for immigrants and balancing of rights and opportunities that the host community must provide to new immigrants).

[194] *See* Mary Fulbrook & David Cesarani, *Conclusion*, *in* CITIZENSHIP, NATIONALITY AND MIGRATION IN EUROPE 209, 214–17 (David Cesarani & Mary Fulbrook eds., 1996) (illustrating the problems faced by immigrants when they attempt to live in a new community).

[195] *See* Bernhard Giesen, *National Identity and Citizenship: The Cases of Germany and France*, *in* EUROPEAN CITIZENSHIP BETWEEN NATIONAL LEGACIES AND POSTNATIONAL PROJECTS 36, 37–41 (Klaus Eder & Bernhard Giesen eds., 2001) (explaining the challenges faced by those seeking citizenship in a new community).

[196] *See id.* at 43–45 (describing the universalist approach to outsiders, which is to force them to acquire learning and education in a manner prescribed by the universalism).

[197] *See id.* at 37–38.

from a regional, pre-modern federation to a modern federal nation-state and global power. Along with the emergence of a national self-consciousness, an image of the American political community developed on the basis of ascriptivism.[198] Regardless, what merits special note is that ascriptivism also reconfigured the demarcation between the internal and the external. As a result, the two faces of aggressive nation-building in the Gilded Age seemed to converge on policy areas concerning the demarcation of the political community. Moreover, immigration stands as a paradigm for the effect of ascriptivism on the interface of domestic and foreign affairs.[199] However, before addressing the implications of the political community image in *Yick Wo* and the *Chinese Exclusion Case*, an investigation of an analogous area corroborates the influence of the ascriptivist Zeitgeist of the 1880s on the boundary between the internal and external—Native Americans.

The federal government's treatment of Native Americans in the antebellum period epitomized its policy of excluding a particular group from the body politic in an attempt to strengthen the image of the American political community.[200] According to the Constitution of 1787, Native Americans were not included as part of "[W]e the People of the United States," although the soil they inhabited was geographically within the boundaries of the United States.[201] The exclusion of Native Americans from American politics was the first implication that those residing within the country could be "foreign to the United States in a domestic sense."[202] This constitutional

[198] *See* SMITH, *supra* note 2, at 386–87 (illustrating how the reforming vision of the Women's Christian Temperance Union, under Francis Willard, was an example of the appeal of ascriptive ideologies).

[199] In the Gilded Age, the United States adopted a series of restrictive measures, including the Chinese Exclusion Acts and subsequent expulsion policy. *See* SMITH, *supra* note 2, at 357–71.

[200] *See* CATHERINE A. HOLLAND, THE BODY POLITIC: FOUNDINGS, CITIZENSHIP, AND DIFFERENCE IN THE AMERICAN POLITICAL IMAGINATION 29–30 (2001) (discussing Jefferson's role in early American federal policies of exclusion toward Native Americans).

[201] According to Article I, Section 2, clause 3, untaxed Indians were not included in deciding the number of representatives of each state. Representatives signify an expression of the sovereignty inherent in "We the People." Thus, that Native Americans played such a small role in the determination of representation implies that Native Americans were not constitutionally included in the body of "We the People."

[202] Downes v. Bidwell, 182 U.S. 244, 341–42 (1901) (White, J., concurring) (coining the term "[f]oreign in a domestic sense" to refer to the special status of unincorporated territories within the United States). According to Justice White, unincorporated territories, like Puerto Rico, are under the umbrella of American sovereignty. However, due to their ethnic and cultural particularity these territories were "unincorporated" and therefore their inhabitants could not be entitled to constitutional rights and could not equally assume constitutional obligations. *Id*. In this article, the term is used to describe the special treatment of Native Americans in the antebellum era.

trick was further employed both by the judicial and the political branch. The Native Americans were initially treated as heathen and alien people by the English settlers, and seen as deserving only "war, conquest, and treaty negotiations."[203] As a result, in a legal sense Native American tribes were regarded as foreign nations even after the enactment of the Constitution.[204]

By regarding Indian tribes as foreign nations, however, Native Americans recognized neither their parity with, nor independence from, the United States. Rather than keeping their status as foreign nations, in *Cherokee Nation v. Georgia*, the Court coined the term "domestic dependent nations" to define the status of Native Americans within the United States.[205] To the Court, the relationship between Native Americans and the federal government was like that of "ward[s] to [their] guardian."[206] Native Americans were considered to be "under the sovereignty and dominion of the United States."[207] The Court spoke of the Native Americans in such a way as suggest the potential threat they posed to the territorial integrity of the United States."[208]

Despite the prior refusal to grant Native Americans citizenship, after the end of the Civil War, federal policies and attitudes towards Native Americans gradually shifted to become more assimilationist.[209] With the close of the Civil War in 1865, Congress sought to prevent another war as it aggressively pushed through its sweeping Reconstruction policy in the South.[210] In 1867 Congress created the Indian Peace Commission to recommend how to end the Plains Indian War.[211] In reaction to the proposal from Congress, the federal government adopted the assimilationist attitude by ceasing to negotiate with Indian tribes as sovereigns thereby assimilating them into the dominant society.[212] In 1871, Congress passed an

[203] KELLY ET AL., *supra* note 118, at 381.

[204] Cleveland, *supra* note 9, at 26–27 (noting that, although the United States did not grant Native Americans the same respect due to European countries, their status as a threat to domestic security pushed them outside the scope of the American polity).

[205] 30 U.S. (5 Pet.) 1, 17 (1831).

[206] *Id*.

[207] *Id*.

[208] *See id*. (stating that "any attempt to acquire the[] lands [of the Native Americans], or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility")

[209] *See* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 71–72 (1989) (detailing the first postbellum steps taken by the U.S. government to assimilate Native Americans).

[210] *See* KELLY ET AL., *supra* note 118, at 335.

[211] O'BRIEN, *supra* note 209 at 71.

[212] *Id*. *But see*. Cleveland, *supra* note 9, at 50 n.298 (noting that "[t]he [e]xecutive branch continued to pursue federal-Indian relations through executive agreements until 1919, when

appropriations law preventing the federal government from making further treaties with Indian tribes. The Appropriations Act of 1871 was "the first legal groundwork necessary to begin assimilationist lawmaking."[213]

The assimilationist attitude toward Native Americans in the Gilded Age paralleled the trend of nationalization in general. After eliminating the status of the Indian tribes as sovereign entities in treaty-making practices, the federal government pushed forward to claim its sovereignty over the tribal lands. In 1885, Congress enacted the Major Crimes Act to extend federal criminal jurisdiction with respect to major crimes over Indians living on reservations.[214] The assimilationist policy toward Native Americans in the movement of consolidating the American political community culminated in the General Allotment Act of 1887 (Dawes Act)[215]

The Dawes Act did, however, retain some traces of exclusionism. The Act granted citizenship only to those Native Americans who received allotments and those who had separated from their tribe and adopted the habits of "civilized life."[216] The far-reaching intent of this policy was to break up the traditional relationship between the Native American tribes and for Native Americans to adjust to American customs and ideals.[217] Unassimilated Native Americans were regarded as external to American society and, therefore, were to be excluded from the American political community.

Overall the U.S. policies towards Native Americans in the 1880s reflected the ideology of American ascriptivism and the desire to "convert" Native Americans in an effort to firmly set out the modern construction of a sovereign nation.[218] Under the dominance of American ascriptivism, constructing and maintaining a uniform and powerful American community by virtue of exclusion and

Congress prohibited the practice").

[213] O'BRIEN, *supra* note 209, at 71.

[214] 18 U.S.C. §1153 (2000). The statute covered several serious crimes, including murder, manslaughter, assault with intent to kill, arson, burglary and larceny.

[215] 25 U.S.C. 331–34, 339, 341–42, 348–49, 354, 381 (2000); *see* Cleveland, *supra* note 9, at 54–56 (noting that the Dawes Act allowed the government to allot tribal lands without consent, expanded allotment policies beyond the Five Civilized Tribes and extended state and federal jurisdiction over Native Americans). Such policies continued to gain momentum. In 1890, for example, "Oklahoma Territory was organized in that part of the Indian land where white settlement was heaviest." *See* KELLY ET AL., *supra* note 118, at 382.

[216] SMITH, *supra* note 2, at 392–93.

[217] *See* Cleveland, *supra* note 9, at 55 (noting a statement in the 1889 Annual Report of the Commissioner of Indian Affairs that "tribal relations should be broken up . . . and the family and the autonomy of the individual substituted); *see also* FRANCIS PAUL PRUCHA, THE INDIANS IN AMERICAN SOCIETY: FROM THE REVOLUTIONARY WAR TO THE PRESENT 24 (1985).

[218] *See* SMITH, *supra* note 2, at 390–93.

assimilation became one of the central tasks of the 1880s. The relationship and choice between exclusion and assimilation relied on an elusive ideal of what was and was not to be included in the concept of the American nation.[219] This elusiveness is reflected in the federal policies toward Native Americans in the 1880s, especially in the Dawes Act. The impact of this on immigration will be further addressed in the subsequent analysis of *Yick Wo* and the *Chinese Exclusion Case.*

4. Recovering the Gilded Age in American Nation-Building

The height of the Gilded Age appears to be an interlude between two constitutional moments: The Civil War and the New Deal. As a result, its status in the course of constitutional development has not been properly recognized.[220] Nevertheless, the literature of political science and political sociology concerning the emergence of the modern American state focuses heavily on the Gilded Age. The following analysis attempts to bridge these two periods.

To say that the Gilded Age was critical to American nation-building does not mean that the entire structure of the modern American state took shape during this period. While the Gilded Age carried on and refined the nationalization trend launched in the wake of the Civil War, this post-Civil War constitutional regime did not redefine the relationship between state and society. The given constitutional norms regulating the relationship between the people and the government, like freedom of contract, did not open themselves up to alteration during the 1880s. Instead, the great transformation of the role of the federal government from that of a night watchman to that of an interventionist occurred as a result of the New Deal.[221]

Overall, the Gilded Age, particularly the 1880s, played a critical

[219] For a discussion of the relationship between territoriality and the sense of belonging, see ANTHONY D. SMITH, NATIONS AND NATIONALISM IN A GLOBAL ERA 56 (1995) (exploring the factors that contribute to a nation's sense of what is "theirs"); *see also* POGGI, *supra* note 105, at 26.

[220] *See generally* William J. Novak, *The Legal Origins of the Modern American State, in* LOOKING BACK AT LAW'S CENTURY 249 (Austin Sarat et al. eds., 2002) (concentrating on the transformation of the American system of governance between the end of Reconstruction and the beginning of the New Deal, and the implications of such transformation on social and economic functions).

[221] *See* ACKERMAN, FOUNDATIONS, *supra* note 104, at 140–41 (contrasting the Founders' concern over maintaining limited government with the New Deal's notion of an interventionist government); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 255–61 (1998) (illuminating the impact of New Deal intervention and its transformative effect on not only the national government but also upon the Supreme Court).

role in both constitutional development and in the course of American nation-building. However, it would be far-fetched to say that the modern image of the American state—the welfare state—took root in the Gilded Age. Elucidating both the significance and limitations of the Gilded Age, in terms of American nation-building, provides a clearer lens through which to re-examine *Yick Wo* and the *Chinese Exclusion Case*.

C. A Comprehensive Account, Delivered by Sovereignty

The development of American nation-building provides context for both *Yick Wo* and the *Chinese Exclusion Case*. While the two cases are often treated separately, a common approach to both is possible. In contrast to the conventional dichotomous treatment of the two cases, both should be viewed within the larger context of the 1880s.

This new and more comprehensive perspective on *Yick Wo* and the *Chinese Exclusion Case* is built upon text and structure. It combs the text of the two cases looking for the respective discursive patterns in both, arguing that the discovery of these patterns bespeaks the tone of American nation-building in the Gilded Age. Such an analysis responds to specific points that the conventional dichotomous accounts of these two cases have left untouched. Based on a broad scheme of nation-building, an outline is drawn for the structural connection between the two cases.

After providing a new reading of *Yick Wo* and the *Chinese Exclusion Case*, this section concludes with a suggestion of a new approach implied in the comprehensive reading of these two cases. This approach moves beyond the traditional confines of the cases and addresses the relationship between the protection of human rights and the notion of sovereignty. This suggests a new dimension of constitutional law that has historically received little attention.

1. *Yick Wo* Symbolizing the Federal Judicial Sovereignty

As shown in Part I, the Equal Protection Clause was the clear textual basis on which the Court struck down the municipal regulation at issue in *Yick Wo*. The more important issue, however, is whether the concept of sovereignty was overlooked in *Yick Wo*.

The Court supported the proposition that the concept of nation-building played a key role in *Yick Wo*. Upon addressing the issue of whether the Equal Protection Clause applied to non-citizens, the Court turned to addressing "the nature and the theory of our

institutions of government."[222] The Court addressed the issue of sovereignty when it stated:

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while *sovereign powers* are delegated to the agencies of government, *sovereignty* itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power.[223]

A distinction between sovereignty and power may be drawn from this quotation.[224] Sovereignty is above the law and resides with "the people" while power is controlled by "the law."

After setting a normative hierarchy between power and sovereignty, the Court implicitly touched upon the relationship between the Constitution and sovereignty. The Court acknowledged that "the authority of final decision" must always be "lodged somewhere, and in some person or body."[225] Nevertheless, according to the Court, the same authority of final decision must also submit to "the fundamental rights to life, liberty, and the pursuit of happiness" because such rights are "secured by [the] maxims of constitutional law."[226] In line with the Court's logic, it may be deduced that the Constitution was considered the key to sovereignty, trumping all opposing powers.

Related to the arguments on sovereignty is the Court's posture on the role of the Constitution. Here again the Equal Protection Clause is relevant. The Court reveals the particular normative meaning of the Equal Protection Clause by looking into how it took root in the Constitution. In the Court's view, the maxims of the Constitution that secure fundamental rights are "the monuments showing the victorious progress of *the race* in securing to men the blessings of civilization under the reign of just and equal laws."[227] This statement reflects a progressive vision of the Constitution. The Constitution, in effect, records the struggle of "the race," that is, the People of the United States. What is more important is that the

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[222] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[223] *Id*. at 370 (emphasis added).

[224] *See* Cleveland, *supra* note 9, at 121 (illustrating that while Justice Matthews references sovereignty and sovereign powers, he fails to address the differences between the two concepts); *see also* WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS 635 (1889) (maintaining that while statesmen have long held the concept of sovereignty to be divisible, abstract legal analysis holds the opposite view and considers sovereignty to be indivisible).

[225] *Yick Wo*, 118 U.S. at 370.

[226] *Id*.

[227] *Id*. (emphasis added).

culmination of the progressive course of the American people resulted in "just and equal laws." In sum, the Court gave a suggestive account of the relationship between the Equal Protection Clause and the progressive development of the American People, albeit with textual parsimony.[228]

The reasons that the Court articulated the normative meaning and historical origin of the Equal Protection Clause cannot be explained away by a simple invocation of the doctrinal distinction between *ratio decidendi* and *obiter dictum*.[229] On the contrary, an overview of the Court's decisions reveals that the Court always speaks in some discursive pattern, thus explaining why the Court has historically played a central role in the construct of the American community.[230] By taking into account the historical setting of the 1880s, the connection between the Court's decision and the course of American nation-building becomes clear. Distanced from the Civil War and Reconstruction, the 1880s allowed for a fleshing out of the meanings of those constitutional norms brought about by the constitutional moment of the 1860s. The Court assumed a mission of elaboration. The core of such a mission sought to link the Equal Protection Clause to the evolution of the nation.

The proposition that *Yick Wo* is reflective of post-Civil War nation-building gains additional support from two aspects distinct from the wording of the Court's opinion. While it may be argued that it is straining too far to put the problem of federalism and sovereignty on the table, it seems clear that the Court itself intentionally focused on those very issues. Moreover, simply because federalism centers on the relationship between the federal and state governments does not mean that local governments cannot be brought into the framework of sovereignty. On the contrary, the place that local governments hold within the

[228] *See* Ackerman, *supra* note 126, at 103–04 (stressing that the Privileges and Immunities Clause of the Fourteenth Amendment in turn incorporated the principle of equal protection).

[229] *See generally* Geoffrey Marshall, *What is Binding in a Precedent, in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 503, 505–06 (D. Neil MacCormick & Robert S. Summers eds., 1997) (defining *ratio decidendi* as that which is legally relevant and *obiter dictum* as all else that is stated in a court's opinion).

[230] *See* Paul W. Kahn, *Independence and Responsibility in the Judicial Role, in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 73, 81–86 (Irwin P. Stotzky ed., 1993) (describing a public narrative of law extending down from judicial decision allowing the public to collectively identify itself therein); Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1643 (1989) (maintaining that the term of law is reversible, thus transcending any one individual's life and serving instead to connect law to a larger sense of nature).

governmental system as a whole indicates the tendency to consolidate the concept of sovereignty by transferring powers from local governments to the federal government.[231]

It is also possible to discern the principle of the Court's decisions—as it pertains to the struggle over sovereignty between the federal and state governments—by looking further at decisions of other federal courts. Considering the nature of the issues in *Yick Wo*, the rulings of the Ninth Circuit Court of Appeals become particularly illuminating. The late 1880s saw the Ninth Circuit upholding numerous Fourteenth Amendment challenges to state and local laws specifically intended to discourage Chinese immigration.[232] This tendency of the Ninth Circuit is further highlighted by contrasting the proclivities of state courts within the same region. Facing similar issues, the California state courts more often than not upheld restrictive state and local regulations of Chinese immigrants.[233] Thus, the federal courts, including the *Yick Wo* court, diverged significantly from state courts with respect to the issue of Chinese immigration in the 1880s.[234]

Even so, in the year preceding *Yick Wo*, the Supreme Court ruled against the Chinese petitioner in another Chinese laundry case, *Soon Hing v. Crowley*.[235] External changes in the country between 1885 and 1886 account for this divergence; such changes also speak directly to the role of federal judicial sovereignty in the post-Civil War period. In late 1885 and early 1886, brutal anti-Chinese riots broke out throughout the West.[236] In the wake of the militancy of

[231] *See* Kim Economides, *Law and Geography: New Frontiers*, *in* LEGAL FRONTIERS 180, 188 (Philip A. Thomas ed., 1996) (explaining the theory stated in G.L. Clark, *Law, the state and the spatial integration of the United States*, 13 ENVIRONMENT AND PLANNING A 1197, 1198 (1981), that the U.S. Supreme Court has reduced local autonomy in an attempt to promote "spatial homogeneity" and "integration").

[232] These cases include In re Quong Woo, 13 F. 229 (C.C.D. Cal. 1882); In re Ah Chong, 2 F. 733 (C.C.D. Cal. 1880); In re Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880); Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546); and In re Ah Fong, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102). *See* Joo, *supra* note 11, at 353–54.

[233] *See, e.g.*, Ex parte Wong Wing, 138 P. 695 (Cal. 1914); Ex parte Quong Wo, 118 P. 714 (Cal. 1911); In re Hang Kie, 10 P. 327 (Cal. 1886); In re Yick Wo, 9 P. 139 (Cal. 1885); Sam Kee v. Wilde, 183 P. 164 (Cal. Dist. Ct. App. 1919); Ex parte San Chung 105 P. 609 (Cal. Dist. Ct. App. 1909).

[234] *See* Bernstein, *The Chinese Laundry Cases*, *supra* note 11, at 271–72 (noting that federal courts tended to view these cases as litigation over economic rights); Joo, *supra* note 11, at 369–70 (confirming that, unlike California's Supreme Court, the "relatively new federal courts" of the West Coast often upheld attacks on anti-Chinese laws based on the Equal Protection Clause).

[235] 113 U.S. 703 (1885). *See also* Barbier v. Connolly, 113 U.S. 27, 30 (1885) (holding that the ordinance in question was purely a police regulation which lay within the purview of the municipality).

[236] *See* Bernstein, *The Chinese Laundry Cases*, *supra* note 11, at 274 (postulating that the

Reconstruction and the Civil War, sporadic riots were reminiscent of the tumultuous moments of the Civil War and Reconstruction era. These riots signaled a clear challenge to federal authority inasmuch as they defied federal policies.[237] Thus, in contrast to the California state courts, the benevolent attitude of the federal courts toward Chinese immigration cases under the Fourteenth Amendment suggests that federal judges sought to preserve the power that the national government successfully gained during the Civil War.[238] In sum, the tendency of the Court to rule in favor of consolidating federal sovereignty in post-Civil War nation-building had much bearing on *Yick Wo*.

This new nation-building thesis stands in direct contrast to other readings of *Yick Wo*. First, a nation-building thesis is complementary rather than contradictory; the key is the mentality of economic nationalism in the Gilded Age. The irrelevance reading of *Yick Wo* stresses its connection to subsequent economic industrialization. Nevertheless, as argued in the preceding section, economic nationalism set the tone for American nation-building since its independence. Thus, post-Civil War federal protection of economic freedom not only contributed to building the uniform legal infrastructure necessary for developing its capitalist economy, but also continued the course of its nation-building.[239] In this sense, a nation-building thesis broadens the temporal horizon of *Yick Wo* as set out by the irrelevance readings. Accordingly, *Yick Wo* is linked to the *Chinese Exclusion Case* inasmuch as the latter was built on the language of national sovereignty.

The bifurcation reading of *Yick Wo*—as a liberal pioneer in the area of immigration—will be addressed in the final subsection. The following subsection will discuss the more explicit and general framework of immigration law set out by the *Chinese Exclusion Case*, and will place it within an analytical framework.

Yick Wo Court may have used its decision in the case to resist a perceived threat to federal sovereignty).

[237] *See id*. (noting that the rioters sought to drive out aliens who were under federal protection).

[238] *See id*. at 272 (explaining that the "[f]ederal judges felt obligated to assert federal authority over immigration and to establish the federal government's authority to enforce the Fourteenth Amendment").

[239] *See* PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 23 (1998) (maintaining that during the Gilded Age, the "larger legal system . . . was committed to a very broad definition of individual and governmental sovereignty"). Private property is the crucial legal mechanism of the infrastructure necessary for a capitalist economic system. Accordingly, the concept of protecting private property, i.e. individual sovereignty, corresponded to the dramatic economic expansion during the Gilded Age.

2. The *Chinese Exclusion Case* and the Sovereign Nation-State

The relationship between the *Chinese Exclusion Case* and sovereignty has been well-demonstrated by the irrelevance reading of this case.[240] The Court's reasoning in the *Chinese Exclusion Case*, which allowed for the trumping of an existing treaty by a subsequent statute is considered the foundation of the plenary power doctrine in foreign affairs.[241] The conception of national sovereignty suggests an attitude of self-affirmation in the 1880s.

The Court validated the Chinese Exclusion Act of 1888 by resorting to the concept of national sovereignty.[242] It is one thing to appeal to the power that is explicitly granted by constitutional clauses, while it is quite another to ignore constitutional principles outright. Granting that the plaintiff in the *Chinese Exclusion Case* was not entitled to equal protection because of his non-citizen status, there remained the issue that the Chinese Exclusion Act of 1888 *arguendo* contravened the *Ex Post Facto* Clause of Article I of the U.S. Constitution.[243] The plaintiff, leaving for his homeland China in 1887, carried the requisite valid certificate and obeyed the other procedural requirements that were provided by law to govern the reentry of Chinese laborers. Despite compliance, the customs collector at the San Francisco Port refused him reentry because of the new Exclusion Act of 1888, which went into effect one week before the plaintiff arrived back in the territorial waters of the United States.[244] This is paradigmatic of the *ex post facto* laws

[240] *See supra* text accompanying notes 37–46 (demonstrating that the *Chinese Exclusion Case* has significance regarding the constitutional area of governmental power and foreign affairs).

[241] The plenary power doctrine provides the backbone for our constitutional tradition affecting foreign affairs. *See supra* note 12 and accompanying text.

[242] The Court's construction of sovereignty was a political concept with no bearing on morality. After assigning the external sovereign power to the political department, the Court added that "[t]his court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct." The Chinese Exclusion Case, 130 U.S. 581, 602–03 (1889).

[243] U.S. CONST. art I, § 9, cl.3. *See* OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 302 (1993) (noting that Justice Field felt troubled by the retroactive aspect of the 1888 statute). Despite the applicability of the *Ex Post Facto* Clause in this case, the plaintiff raised the issue of procedural due process caused by the retroactive aspect of the Chinese Exclusion Act of 1888; however the plea did not draw the Court's attention. *See* Cleveland, *supra* note 9 at 125 n.874.

[244] *See The Chinese Exclusion Case*, 130 U.S. at 582. The concept of territorial waters was not legally unimaginable in the 1880s. In fact, the ancient precursor of the concept of territorial waters traced back to the thirteenth century. *See* SEKHAR GHOSH, LAW OF THE TERRITORIAL SEA: EVOLUTION AND DEVELOPMENT 15 (1988). Nevertheless, the modern concept of territorial waters coexisted with the idea that the freedom of the sea was the product of the law of nations of the seventeenth century. *See* MILNER S. BALL, THE LAW OF

prohibited by the Constitution.[245] The fact that the Court paid no heed to this possible constitutional controversy indicates that its construction of national sovereignty took precedence over the explicit rules of the Constitution.[246] This concept of national sovereignty goes to the very heart of sovereignty's construction.[247]

To gain a full sense of the Court's concept of national sovereignty, we need to examine the outline the Court set out in addressing the *Chinese Exclusion Case*. First, the Court's temporal point of reference corresponded to that of American nation-building in the1880s. As shown in Part II, the timeframe the Court set up for the *Chinese Exclusion Case* traced back to the mid-1840s when the United States undertook imperialist ventures in China.[248] This casts light on the Court's image of sovereignty.[249] The Mexican-American War of 1848 finalized the map of the United States and resulted in the Manifest Destiny doctrine.[250] Judging from the Court's conscious sketching of the timeframe and its language of national sovereignty, it is plausible that the Court implicitly connected the 1880s to the 1840s when it decided the *Chinese Exclusion Case*. In other words, the Court's association of the *Chinese Exclusion Case* with the expansionist 1840s era revealed not only its awareness of the relationship between the United States and China, but also its sense of how the United States thought of itself in its approach to foreign affairs.[251]

THE SEA, FEDERAL-STATE RELATIONS AND THE EXTENSION OF THE TERRITORIAL SEA 4 (1978). Secretary of State Thomas Jefferson, in 1793, claimed a three-mile territorial sea in notes delivered to British and French Ministers. *See id*. at 5–6. It is thus beyond any doubt that the plaintiff in the *Chinese Exclusion Case* entered the territorial jurisdiction of the United States, even though he was offshore.

[245] The Court's doctrinal stance on Art. I, § 9, cl.3 is that its scope is limited to criminal punishment. *See* TRIBE, *supra* note 12, § 8-1, at 1336–37.

[246] *See* Cleveland, *supra* note 9, at 130–32.

[247] This extra-constitutional exposition of the concept of sovereignty, which would trump the normative values in the Constitution, foreshadows Carl Schmitt's construction of the emergency power of the Weimar Constitution, Article 48. *See* John P. McCormick, *The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers*, *in* LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 217, 230–41 (David Dyzenhaus ed., 1998).

[248] *See supra* text accompanying notes 70–73 (demonstrating that until 1888, the United States had great interest and compassion towards China).

[249] *See* SMITH, *supra* note 2, at 205–06 (illustrating America's intention and success in expanding its sovereignty in the 1840s).

[250] *See* SMITH, *supra* note 2, at 205–06 (illustrating America's intention and success in expanding its sovereignty).

[251] *See* PLESUR, CREATING AN AMERICAN EMPIRE, 1865–1914, at 1–2 (Milton Plesur ed., 1971) (noting that the elites in the Gilded Age advocated for a strong presence of the United States on the international stage despite a contrary opinion among the general public). It merits pointing out that the author of the case, Justice Stephen Field, was an example of a Jacksonian with roots in Jacksonian Democracy whose legacy with respect to foreign affairs

The sovereignty and nation-building implications of the *Chinese Exclusion Case* were not restricted to the area of foreign affairs—i.e., the external dimension as indicated by the irrelevance account. The *Chinese Exclusion Case* also sheds light on the internal dimension of American nation-building. First, the Court's concept of national sovereignty is reminiscent of federalist dualism. The Court distinguished the internal and external dimensions of the United States as a sovereign nation by arguing that "[w]hile under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation . . . ."[252] The Court then proceeded to illustrate the sovereign powers needed to substantiate the nation's "absolute independence and security throughout its entire territory."[253] Among those prerogatives illustrated are "[t]he powers to . . . suppress insurrection [and] secure republican governments to the States . . . ."[254] The Court's definition of sovereignty—by reflecting the course of American nation-building from the antebellum era to the 1880s—consisted of taking into account the antebellum republican arguments for the abolition of slavery, the post-Civil War justification for military Reconstruction, and the incorporation of the guarantee of the republican form of state government.

After discussing the substance of the internal dimension of sovereignty, the Court turned to the sovereignty issues arising under federalism. The Court cited Justice Marshall's articulation of a federalist concept of the sovereign nation in *Cohens v. Virginia*.[255] Justice Marshall stated "[t]hat the United States form[s], for many, and for most important purposes, a single nation . . . ."[256] He further stated that, "the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union."[257] On the contrary, however, "[t]hese

corresponded with his tone in the *Chinese Exclusion Case*. *See* PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 7 (1997).

[252] The Chinese Exclusion Case, 130 U.S. 581, 604 (1889).

[253] *Id*.

[254] *Id*.

[255] *See The Chinese Exclusion Case*, 130 U.S. at 604 (citing *Cohens v. Viginia*, 19 U.S. (6 Wheat.) 264, 413 (1821)) (intending to show support for the idea that the United States is a single, independent nation which must provide security throughout its land).

[256] Justice Marshall proceeded to point out that for the purposes of war, making peace, all commercial regulations and in many other respects, the American people are "one people." *Id*.

[257] *Id*.

States are constituent parts of the United States."[258] This reflects the duality of the federalist scheme of national sovereignty.

Although the Court accepted Justice Marshall's antebellum view of the federalist scheme of national sovereignty, the Court's next citation in the *Chinese Exclusion Case* reflected the transformation in the perception of national sovereignty that arose from the process of American nation-building. The Court recognized the importance of uniformity in the construction of national sovereignty by invoking Justice Bradley's opinion in the *Legal Tender Cases*.[259] Concurring with Justice Strong's validation of the Legal Tender Acts, Justice Bradley asserted that "the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality."[260] As a corollary of this nature, the federal government has jurisdiction over areas that would "require uniformity of regulations and laws."[261] The emphasis that the Court placed on the concept of uniformity and the nature of the legal tender issue in the late 1860s—which brought about the *Legal Tender Cases* in 1870 that epitomized the transition to a modern state—suggests that the domestic trends of post-Civil War nation-building also resounded in the *Chinese Exclusion Case*.[262]

After setting forth its general construction of national sovereignty in a federalist nation, the Court went on to address the particular issue involved in the *Chinese Exclusion Case*. Initially, the Court tied the issue of Chinese immigration to the independence of a sovereign nation. The Court stated that encroachment upon and aggression against the sovereignty of a nation may occur in two forms. The first comes from "the foreign nation acting in its national character"[263] The second conceivable form of foreign encroachment and aggression is from "vast hordes of . . . people

[258] *Id*. at 605.

[259] *See id*. at 605 (citing Knox v. Lee (The Legal Tender Cases), 79 U.S. (12 Wall.) 457, 555 (1870)).

[260] *Id*.

[261] *Id*. (asserting that certain areas of regulation and law can be efficiently administered only by the national government).

[262] Another part of the Court's citation of Justice Bradley's opinion in the *Legal Tender Cases* links the *Chinese Exclusion Case* to the institutional characteristic of the American nation-building process. Following his emphasis on uniformity, Justice Bradley referred to the role of the judiciary in maintaining national sovereignty. *See id*. (explaining that the judiciary's role in maintaining national sovereignty is governed by its enumerated powers to "decide controversies between the States, and between their respective citizens, as well as questions of national concern").

[263] *The Chinese Exclusion Case*, 130 U.S. at 606.

crowding in upon us."[264] In the Court's view, contemporary Chinese immigrants constituted the second kind of threat to the independence of the United States. Chinese immigrants were seen to be of "a different race," which was perceived as difficult to assimilate into American culture.[265] The Court departed from the construction of national sovereignty to the assimilationist vein of racism, in which the bifurcation reading of the *Chinese Exclusion Case* has gained ground.[266]

What merits special attention is the Court's implicit association of Chinese immigration with the notion of membership in a political community. The Court characterized the government's power to exclude Chinese immigrants, albeit in violation of the existing treaty, as part of the right of a sovereign nation to "give security against foreign aggression and encroachment."[267] A further corollary is that "[e]very society possesses the undoubted right to determine who shall compose its members."[268] In the *Chinese Exclusion Case*, the United States' membership policy was polarized on the two extremes of assimilation and exclusion. Chinese immigrants were susceptible to exclusion simply because of their resistance to assimilation. Nevertheless, the polarization of assimilation and exclusion in immigration policy alludes to the tenuousness of the distinction between the internal and external in the concept of sovereignty.

The flexibility and indispensability of the distinction between the internal and the external in the discourse of sovereignty very much reflects the nature of national sovereignty. More than thirty years before Schmitt's definition of sovereignty,[269] the Court's opinion in the *Chinese Exclusion Case* sensed the indefinable nature of

[264] *Id*.

[265] *Id*.

[266] *See supra* text accompanying notes 58–68 (demonstrating that the Court not only acknowledged the racism that was directed at the Chinese, but also furthered its ideology by upholding the Chinese Exclusion Act of 1888).

[267] *The Chinese Exclusion Case*, 130 U.S. at 606. The Court held that Congress is vested with the sovereign power to determine who shall be excluded from the United States, and that power cannot be surrendered to a treaty. *Id*.

[268] *Id*. at 607 (citing to Secretary of State Marcy in a letter to Mr. Fay, minister to Switzerland, dated March, 1856). The Court thus concluded that every nation has the unlimited power to decide who may become members of its political community. *Id*. at 606.

[269] "Sovereign is he who *decides* on the exception." CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., MIT Press 1985) (1922) (emphasis added). The Court went on to state that, "[i]f the government of the country of which the foreigners excluded are subjects is dissatisfied . . . it can make a complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy." *The Chinese Exclusion Case*, 130 U.S. at 606.

sovereignty with a Hobbesian aphorism.

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. . . . The government, possessing the powers which are to be exercised for protection and security, is clothed with authority *to determine the occasion* on which the powers shall be called forth.[270]

Ultimately, the *Chinese Exclusion Case* not only reflected the international dimension of nation-building in the 1880s but also reflected the nature of its domestic dimension. The intersection of the internal and external dimensions of national sovereignty in the *Chinese Exclusion Case* is reflective of the nature of immigration. Nevertheless, the complete absence of "rights talk" from this case bears on a fundamental issue of constitutional jurisprudence.[271] In other words, the primary tension between the constitutional protection of human rights and national sovereignty is unearthed in the legal realm of immigration. This issue is addressed in the following section as a coda to the comprehensive reading of *Yick Wo* and the *Chinese Exclusion Case*.

3. The Ambiguous Relation between Rights and Sovereignty

If immigration is considerably influenced by concern for national sovereignty in constitutional law as discussed in the preceding section, does this imply that the bifurcation reading of *Yick Wo* as a liberal pioneer of the constitutional protection of aliens is futile because it was an anomaly? Not necessarily. To answer this question, we must start with the tension pointed out in the concluding paragraph of my discussion of the *Chinese Exclusion Case*.

The *Chinese Exclusion Case* appears to completely ignore the rights of the plaintiff that were violated by the Chinese Exclusion Act of 1888. This could have been the result of omnipresent nationalist feelings and racist attitudes particularly directed at Chinese immigrants.[272] In contrast, the plaintiffs of *Yick Wo*, who were also overwhelmed by the same Sinophobic mentality in the

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[270] *The Chinese Exclusion Case*, 130 U.S. at 606 (emphasis added).

[271] *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (coining the term "rights talk").

[272] *See supra* text accompanying notes 58–63.

1880s, found shelter in the Fourteenth Amendment. The *Yick Wo* Court highlighted the text of the Due Process and Equal Protection Clauses and stated that their applicability extended to aliens.[273] In hindsight, this stance seems to be the precursor of universal human rights and should be hailed as a victory of the Enlightenment.[274] If so, what is the explanation for the different balancing between sovereignty and rights in *Yick Wo* and the *Chinese Exclusion Case*?

The different balances between *Yick Wo* and the *Chinese Exclusion Case* reveal the equivocal relationship between the protection of human rights and national sovereignty, and the vulnerability of the universal discourse on rights. As previously discussed in my account of *Yick Wo*, the Court followed the foregoing universal justification of non-citizens, who were also entitled to the equal protection and due process provided for in the Fourteenth Amendment, with the addition of a genesis of this redemption.[275] According to this genealogical view, the equal protection and due process rights were the blessings of the American "race."[276] In other words, the sanctuary that the plaintiffs in *Yick Wo* gained from the Fourteenth Amendment was considered under the command of the American people, which constituted the foundation of national sovereignty. Accordingly, the constitutional protection given to aliens derived from the will of the American people.[277] If we focused only on *Yick Wo*, we could conclude that the Court would choose human rights even at the risk of compromising national sovereignty. Nevertheless, when we take a broader view, history presents a different landscape. The *Chinese Exclusion Case* shattered this wishful optimism. The liberal nature of rights set out in *Yick Wo* does not always trump national sovereignty. Instead, it may be argued that rights can be extended to non-citizen immigrants only so long as they are the product of American sovereignty.

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[273] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that the Due Process and Equal Protection Clauses apply to all persons, regardless of race, nationality, or citizenship).

[274] See Ulrich K. Preuss, *The Force, Frailty, and Future of Human Rights under Globalization*, 1 THEORETICAL INQUIRES IN LAW 283, 295–98 (2000), *available at* http://www.bepress.com/til/default/vol1/iss2/art2 for a discussion of the relationship between universal human rights and the Enlightenment.

[275] *See supra* text accompanying notes 222–34.

[276] *Yick Wo*, 118 U.S. at 370.

[277] In addition to the strictly procedural character of the Due Process and Equal Protection Clauses, Section one of the Fourteenth Amendment also provides substantive protection to privileges and immunities immanent in citizenship. *See* AMAR, *supra* note 122, at 166. The different effects of procedural and substantive rights also reveal the weakness of universal human rights and corroborate the dominance of the popular sovereignty of the United States in giving constitutional protection to non-citizens.

Perhaps this tension may be explained away because the aliens in *Yick Wo* had entered legally. Even setting the *Chinese Exclusion Case* aside, however, the history of immigration in the United States would still not be pristine. For example, in the *Chinese Expulsion Case* of 1893,[278] the plaintiff, Fong Yue Ting, was also a lawful resident alien like the plaintiffs in *Yick Wo*. In other words, the plausibility of the distinction based on the legality of immigrants flounders beyond the narrow confines of *Yick Wo* and the *Chinese Exclusion Case*.

One plausible way to distinguish *Yick Wo* from the *Chinese Expulsion Case* is to argue that *Yick Wo* focused on the power of states over lawful resident aliens, while the *Chinese Expulsion Case* bore on Congress's power to expel aliens, which was part of the plenary power inherent in national sovereignty.[279] A consequence of this analysis is to categorize *Yick Wo* as a case concerning the power-sharing between the federal and state or local governments, while the *Chinese Expulsion Case* and the *Chinese Exclusion Case* fall into the category of inherent power.

In the *Chinese Expulsion Case*, Justice Stephen Field authored a dissent, yet he delivered the majority opinion in the *Chinese Exclusion Case*. Although both cases dealt with the treatment of aliens, Justice Field's two opinions provided drastically different outcomes because of the distinction he drew between expulsion and exclusion.[280] The difference, for Justice Field, was that in the *Chinese Exclusion Case*, Chae Chang Ping had remained offshore, while in the *Chinese Expulsion Case*, Fong Yue Ting had come onto United States soil.[281] But even if Chae Chang Ping had entered the territorial waters of the United States, nothing would have been decided differently. According to Justice Field's dissent in the *Chinese Expulsion Case*, even the federal government did not have plenary power over the regulation of immigration.[282]

[278] Fong Yue Ting v. United States, 149 U.S. 698, 746 (1893) (Field, J., dissenting) (distinguishing the power to exclude aliens, which is based on national sovereignty, from the power to deport lawful residents, which Field characterizes as far more "hostil[e]"). Justice Field's distinction between exclusion and deportation or expulsion is invoked here to denote this case as the *Chinese Expulsion Case* for the purpose of contrasting it with the familiar *Chinese Exclusion Case*.

[279] *See* Scaperlanda, *supra* note 12, at 981–82.

[280] *See Fong Yue Ting*, 149 U.S. at 746 (Field, J., dissenting) (stating that the power of the government to exclude foreigners—to deny them entry—had "never [been] denied"; however, the power to deport lawful resident aliens without reason had "never been asserted").

[281] *See id.* (Field, J., dissenting) (criticizing the majority's decision to deport the plaintiff in this case).

[282] It has also been argued that Justice Field's positional change was due to "his oncoming senility." *See* Cleveland, *supra* note 9, at 148.

Spatial relations not only define the boundary between the internal and the external—the distinction of which is essential to the discourse of national sovereignty[283]—but also demarcate the line between exclusion and expulsion. In line with this logic, the essence of *Yick Wo* was not only the jurisdictional relationship between the federal and state or local governments, but also the importance of residing within the territory of the United States in cases concerning immigration.[284]

Justice Field's dissent in the *Chinese Expulsion Case* highlighted a crucial aspect of immigration in constitutional law—the protection of aliens. Is it possible to embrace the Court's holding in the *Chinese Expulsion Case* based on the logic of Justice Field's dissent? Can Chinese immigrants domiciled within the territory of the Unites States still be "excluded" rather than "expelled?" The answer is yes, and this accords with the internal-external distinction set forth by Justice Field. What differs is that the dividing line depends on personal identity rather than on a territorial border. The consequence of this new line is to raze the sanctuary established in *Yick Wo* because the line along personal identity contradicts the *Yick Wo* Court's universal tone on the constitutional protection of aliens.

The multiplicity of the conceivable internal-external distinctions signaled the ability of these distinctions to strike a balance between the protection of human rights and national sovereignty in immigration. National sovereignty has been tied to the concept of community.[285] The internal-external distinction on which the discourse of national sovereignty has centered is needed for the construction of the political community because it constitutes the criteria of membership. Pushed to this extreme, the limitation of universal human rights is exposed and the potential of sovereignty looms large.[286] Unless our image of communities, especially the political community, could create a paradigm shift, universalism of human rights cannot be sustained if national sovereignty is pushed to its extreme.[287]

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[283] *See supra* notes 252–58 and accompanying text (discussing the relationship between territoriality and national sovereignty).

[284] *See* Bosniak, *supra* note 11, at 979 (stating that aliens have certain rights under the Constitution and within domestic courts).

[285] *See id*. at 961 (stating that even within the internal relations, the application of such regulations have differed).

[286] *See generally* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., 1998) (discussing the fragile position of human beings in the face of various kinds of coined distinctions, which is characteristic of sovereignty).

[287] Current literature on the notions of post-national or transnational citizenship largely

Perhaps a clearer distinction between the internal and the external may be based upon territorial demarcation. Professor Linda S. Bosniak argues that "certain incidents of membership attach to persons *territorially present* in the country . . . ."[288] This assertion, however, should be viewed with a degree of skepticism. The physical line demarcating the boundaries of the United States emerged as the result of human imagination rather than by natural consequence. The *Chinese Exclusion Case* exemplifies the tenuousness and ambiguity of the concept of territorial boundaries.[289] Indistinct spatial sites—territorial waters and vessels to name two—are particularly illustrative of the internal-external relationship.

Yick Wo and the *Chinese Exclusion Case* reveal the omnipresent role played by the internal-external distinction in the 1880s, in which the United States was building an image of a sovereign nation on both the domestic and the international stages.[290] Although a line separating the internal from the external distinguishes these Chinese immigration cases, it is important to remain cautious about the variability of such a fault line. This imagined line constantly exists, though manages to elude prediction. The internal-external distinction can explain a great deal in hindsight, but there are immense difficulties in foreseeing when and where the distinction will emerge. This is the contribution that the area of immigration makes to constitutionalism as it clarifies the ambiguous relationship between the protection of human rights and national sovereignty.[291]

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constructs avant-garde theses from different phenomena in the world. Yet these do not address the peripheral but insidious possibilities. *See* SEYLA BENHABIB, TRANSFORMATIONS OF CITIZENSHIP: DILEMMAS OF THE NATION STATE IN THE ERA OF GLOBALIZATION (2001); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1995); YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 447 (1999) (asserting that citizenship is established through a formal political community).

[288] Bosniak, *supra* note 11, at 974.

[289] The plaintiff in the *Chinese Exclusion Case* arrived at the Port of San Francisco but did not land. *See The Chinese Exclusion Case*, 130 U.S. at 582 (describing the plaintiff's arrival and the details of the immigration process in place at the time of his arrival).

[290] *See supra* notes 138–221 and accompanying text (reviewing the developing sovereignty of the United States during the 1880s).

[291] The contribution of peripheral phenomena to scholarship is illuminated by Justice Holmes:

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

IV. CONCLUSION

As compared to current continental European legal scholarship and American political science scholarship at the turn of the 20th century, current American legal scholarship pays little attention to the role of the state in constitutional development.[292] Accordingly, broadening our vision to include the role of the state in terms of constitutional development serves to enrich our current constitutional scholarship. This is relevant not because of its contributions to comparative research or because of pure academic interest; rather, its legitimacy rests on the very premise underlying the construction of the Unites States. The United States is more of a political construct than one of cultural heritage or ethnic ties.[293] Thus, the state, as the central image of a modern political construct, has historically played a tremendous role in the course of American constitutional development. *Yick Wo* and the *Chinese Exclusion Case*, when placed in an analytic framework of American nation-building, are illustrative of the inclusion of the role of the state in the scholarship of constitutional law.

Through the lens of history, the economy and the judiciary have played a role in the course of American nation-building. These two dimensions influenced the general development of the American constitutional landscape in the 1880s in particular. As a transitional period in the wake of the turbulent Civil War and Reconstruction, the 1880s exhibited the dual ambitions of consolidating the ideal of a nation in a federalist scheme and also burnishing its image as a national sovereign in the imperialist era. This presupposition is crucial when reading *Yick Wo* and the *Chinese Exclusion Case*.

Finally, by placing both *Yick Wo* and the *Chinese Exclusion Case* in an analytic framework set by the course of American nation-

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 61, 478 (1897).

[292] From a comparative law perspective, the discipline concerning the role of the ontological state in constitutional development is known as *allemeine Staatslehre* (theory of the state) or *Staatsrechtswissenshhaft* or *Staatsrechtslehre* (state law theory) in German jurisprudence. These concepts may be roughly grouped into the field of political science in the United States. *See* KENNETH H.F. DYSON, THE STATE TRADITION IN WESTERN EUROPE: A STUDY OF AN IDEA AND INSTITUTION 107–17 (1980). *See also* David Dyzenhaus, *Introduction: Why Carl Schmitt?*, *in* LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 1 (David Dyzenhaus ed., 1998) (noting the difficulty in translating this concept into English).

[293] *See* KELLY ET AL., *supra* note 118, at 78 (noting that at the nation's inception, various economic criteria were considered as bases for popular representation). *Cf.* PREUSS, *supra* note 19, at 59 (establishing that social conditions were critical and even delayed the political goal of achieving a constitution).

building, a suggestion is made to further explore three more dimensions: first, for the backward-looking dimension, a new theory holds that the *Chinese Exclusion Case* and *Yick Wo* resulted from the reconstruction of sovereignty implicit in the constitutional structure. Furthermore, the two dimensions of sovereignty were the epitome of American nation-building in the 1880s. This can be a helpful guide for scholars examining the jurisprudence of the Supreme Court during that period.

Second, for the future-oriented dimension, reconstructing *Yick Wo* through the historical lens of American nation-building reveals the dynamics of polity and economy. There exists a relationship between regulating economic interests and defining the image of the state that casts light on the roles of the economy and the state in future constitutional developments. Economy may know no limits, but it can also be a powerful ally of nationalism to redefine national boundaries, rather than serving to bring about a borderless utopia.

Finally, for the dimension of "[t]heory of the state" (*Staatsrechtswissenschaft*),[294] the constitutional jurisprudence of these two cases and the discourse of sovereignty illustrate the particular relationship between constitution-making and state-founding in the United States. Because the American Constitution preceded the founding of the United States, the original constitutional structure did not have a clear mechanism dealing with sovereignty. Thus, issues concerning sovereignty were to emerge in subsequent constitutional operations. Still, this characteristic of the configuration of sovereignty, state, and constitution in the United States serves to shed light on the *avant-garde* experiments of constitutional transformation, sovereignty reconstruction, and the development of the concept of community, all of which remain in progress.[295]

[294] *See* Dyzenhaus, *supra* note 292, at 1.

[295] The course of European integration is the most noticeable case. Professor Weiler develops a futurist picture of the relationship between sovereignty, constitution and state. *See generally* J.H.H. WEILER, THE CONSTITUTION OF EUROPE (1999). For the effort to compare the experiences of American federalist nation-building and European integration by the judiciary, see LESLIE FRIEDMAN GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT (2001).