Friday, November 8, 2024
9:00 AM – 10:15 PM

Session CLE 103 | Who Can Be a Citizen? Takuji Yamashita to the Present

The Asian Bar Association of Washington (ABAW) presents an examination of AANHPI exclusion, from the historical lens of local civil rights pioneer Takuji Yamashita, to the ever-evolving Asian-American experience in today's post-pandemic world. Takuji Yamashita should have been the first Asian American lawyer in the State of Washington and one of the first in the United States, but he was denied admission to the bar because laws at the time limited both U.S. citizenship and admission to state bars to those who were "white" under the law. His story spans Asian-American legal history – he challenged Washington's requirement that lawyers be "white" before the Washington Supreme Court in 1902 and then before the United States Supreme Court two decades later, he was incarcerated during World War II, and he was posthumously admitted to the bar in 2001. This panel will interweave the story of Mr. Yamashita's life with discussions of major events in AANHPI legal history, including the landmark cases that excluded Asians from citizenship, that prohibited them from owning land, and that upheld their incarceration during World War II, tying this historical perspective to the modern-day issues that the AANHPI community continues to face in the United States today. Annually, the ABAW Student Scholarship Foundation presents its highest student scholarship, the Takuji Yamashita Scholarship, to a Washington law student, and ABAW presents this program in Mr. Yamashita's honor.

Moderators:
Jordan T. Wada, *Associate | Littler Mendelson, P.C.*
Wendy Feng, *Counsel | Seyfarth Shaw LLP*

Speakers:
Prof. Lorraine Bannai, *Professor Emerita | Seattle University School of Law | Director Emerita, Fred T. Korematsu Center for Law and Equity*
Prof. Gabriel "Jack" Chin, *Edward L. Barrett Jr. Chair of Law, Martin Luther King Jr. Professor of Law, and Director of Clinical Legal Education | University of California Davis School of Law*
Stephen Lee, *Member | Law Office of Stephen Chahn Lee, LLC*

NAPABA 2024

SEATTLE, WA | NOVEMBER 7-10

ASIAN BAR ASSOCIATION OF WASHINGTON

Who Can Be a Citizen? Takuji Yamashita to the Present

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Takuji Yamashita

- Born in 1874
- Immigrated to Tacoma in 1893
- Graduated from the University of Washington School of Law in 1902

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Your applicant has no apologies to make for the so-called 'worn-out star-spangled banner argument. He knows of no tribunal to which an argument based upon the Declaration of Independence and the spirit of American institutions could be more appropriately addressed than to the Supreme Court of a free American state.

Respectfully submitted,
TAKUJI YAMASHITA

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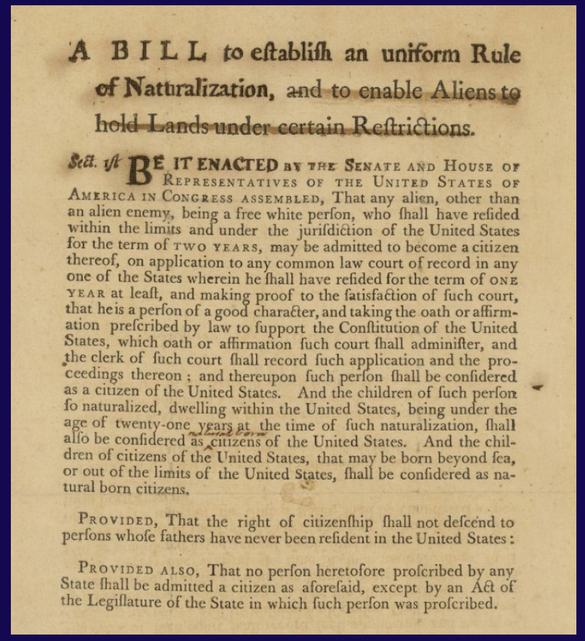
Immigration Act of 1790



A BILL to eſtabliſh an uniform Rule of Naturalization, and to enable Aliens to hold Lands under certain Reſtrictions.

Sect. 1st BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That any alien, other than an alien enemy, being a free white perſon, who ſhall have reſided within the limits and under the juriſdiction of the United States for the term of TWO YEARS, may be admitted to become a citizen thereof, on application to any common law court of record in any one of the States wherein he ſhall have reſided for the term of ONE YEAR at leaſt, and making proof to the ſatisfaction of ſuch court, that he is a perſon of a good character, and taking the oath or affirmation preſcribed by law to ſupport the Conſtitution of the United States, which oath or affirmation ſuch court ſhall adminiſter, and the clerk of ſuch court ſhall record ſuch application and the proceedings thereon; and thereupon ſuch perſon ſhall be conſidered as a citizen of the United States. And the children of ſuch perſon ſo naturalized, dwelling within the United States, being under the age of twenty-one years at the time of ſuch naturalization, ſhall alſo be conſidered as citizens of the United States. And the children of citizens of the United States, that may be born beyond ſea, or out of the limits of the United States, ſhall be conſidered as natural born citizens.

PROVIDED, That the right of citizenſhip ſhall not deſcend to perſons whoſe fathers have never been reſident in the United States:

PROVIDED ALSO, That no perſon heretofore proſcribed by any State ſhall be admitted a citizen as aforeſaid, except by an Act of the Legiſlature of the State in which ſuch perſon was proſcribed.

"Any alien … being a **free white person** … may be admitted to become a citizen …"

Five classifications of race commonly used in 1800s

African

Malay

American

Mongolian

Caucasian

Chicago Public Library, Noah Webster, An American Dictionary of the English Language, 1860

Takuji Yamashita

- Denied admission to the bar because he was not white and thus not eligible to become a citizen or lawyer

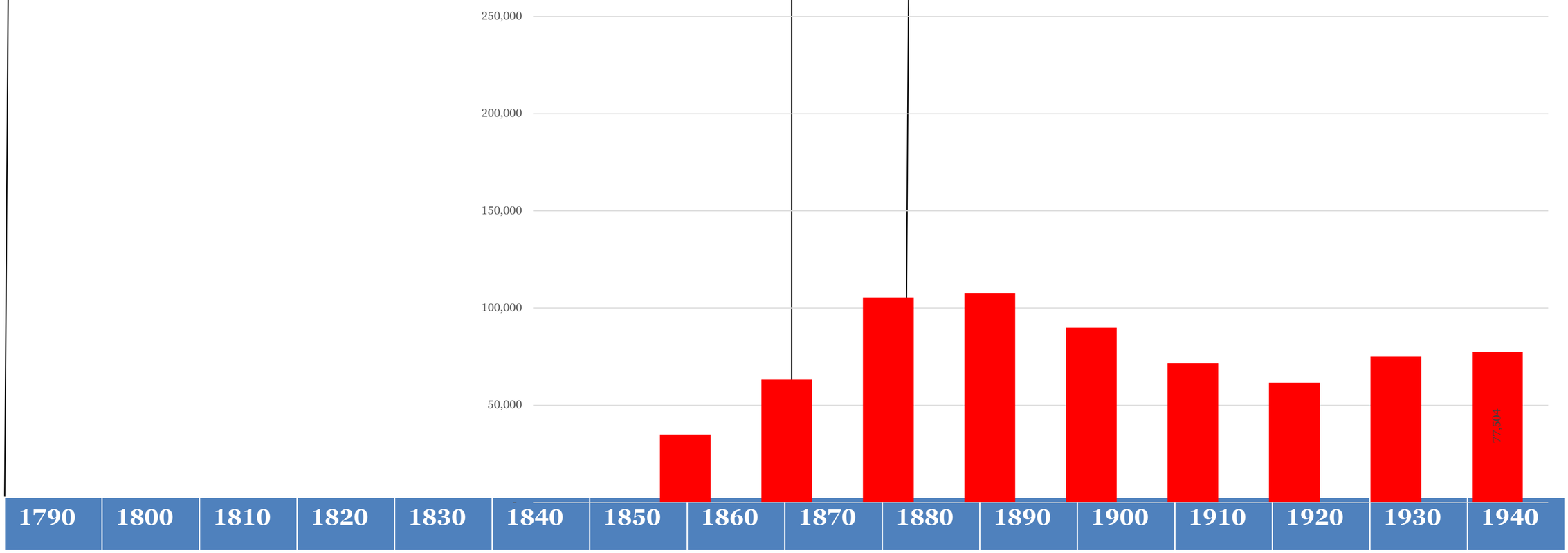
1907 celebration where Yamashita spoke

Restrictions on Asian American immigrants becoming U.S. citizens pre-WWII

1790: Naturalization restricted to "free white persons"

1870: Naturalization restricted to "aliens being free white persons, and to aliens of African nativity and to persons of African descent"

1882: Chinese specifically excluded from naturalization



By Stephen Lee

Restrictions on Asian American immigrants becoming U.S. citizens pre-WWII

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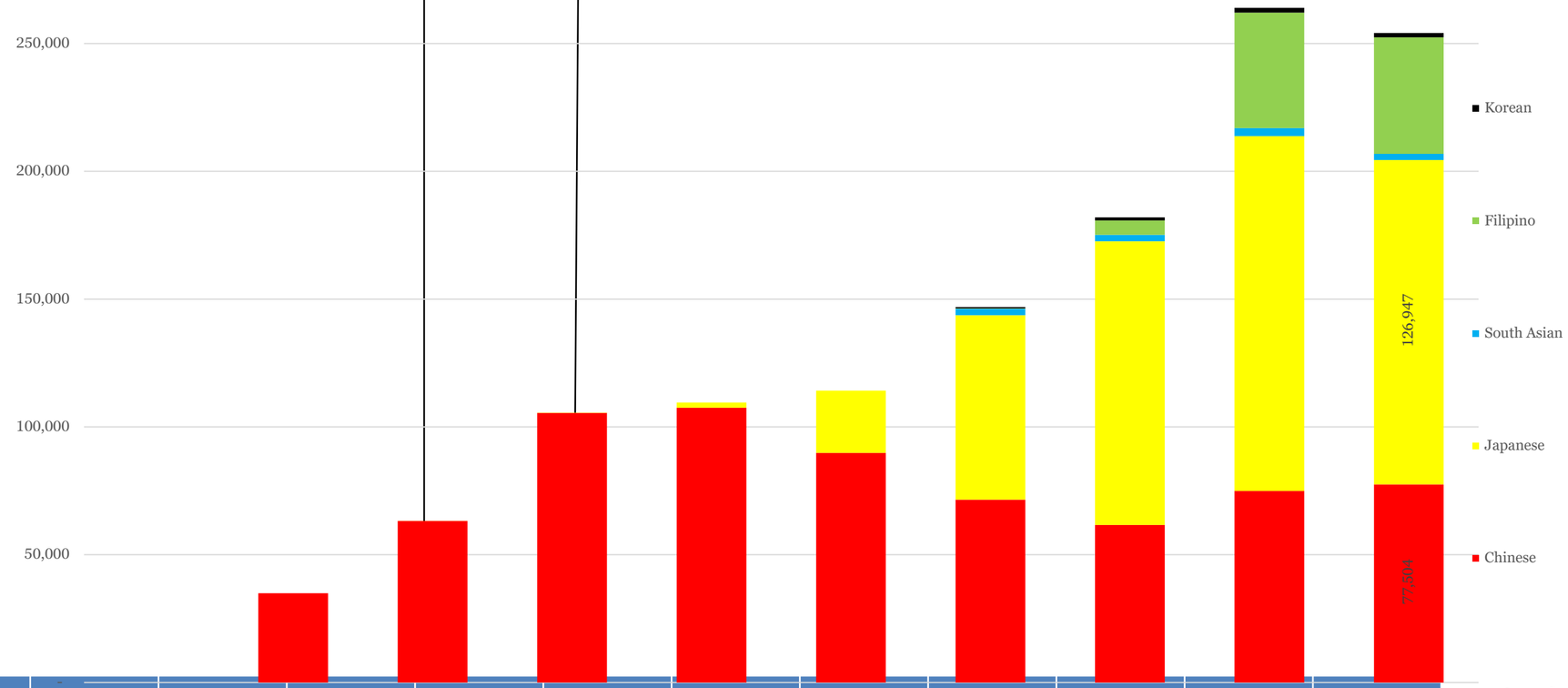

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Alien Land Laws

Prof. Gabriel “Jack” Chin

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Prof. Lorraine Bannai

Japanese American Incarceration

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Prof. Gabriel “Jack” Chin

Who is a citizen? Ozawa, Yamashita, and Thind

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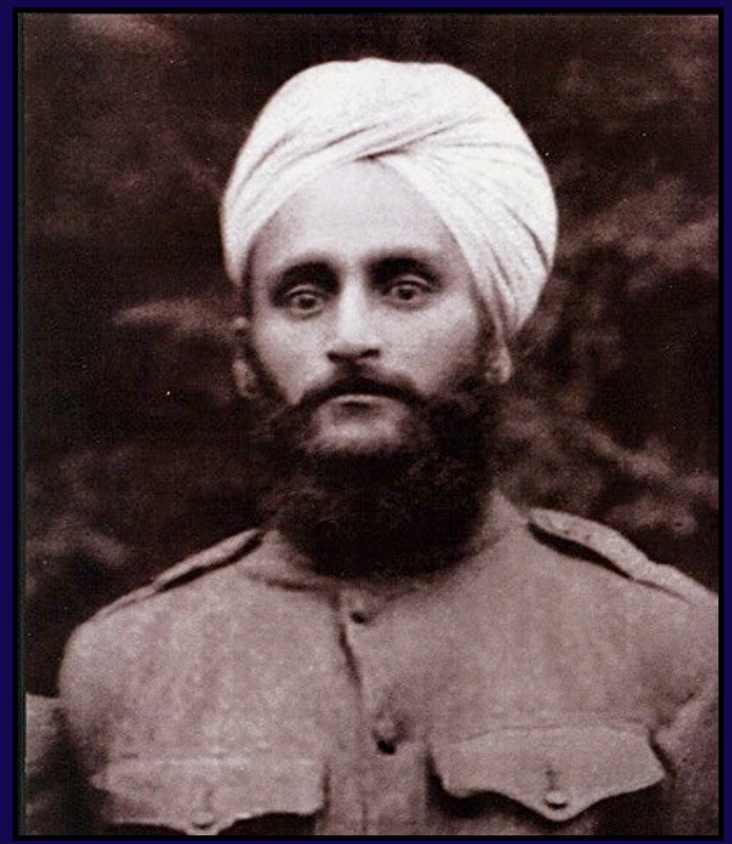
Ozawa

Yamashita

Thind



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Yamashita's Posthumous Induction to Bar

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Prof. Lorraine Bannai

Modern Day Relevance

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ASIAN BAR ASSOCIATION OF WASHINGTON

Thank you!

Prof. Lorraine Bannai

Prof. Gabriel “Jack” Chin

Stephen Lee

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Roth, Robert Isaac
Rupp, Mark William
Rusing, Christopher M.
Russell, Matthew Tyler
Ryan, Renee Pradels

Sams, Tedman Scott
Santel, Patrick F.X.
Saunders, Stacey Melinda
Scannell, John R.
Schensul, Michael J.
Schimpff, Kirsten M
Schornstein, Jay Michael
Schubert, Jennifer Katherine
Schultz, David Moses
Schultz, Nora S.
Shapero, Laurence A.
Shields, Constance Hamilton
Sicilia, Joseph Albert
Siefkes, Michael John
Sigle-Hermosilla, Devra Melina
Silversmith, Jed Michael
Singer, Alan Michael
Smale, Carolyn Renee
Smart, Steven Jon
Smith-Hill, Janice Lee
Smith, Sarah A.
Smith, Sonya R.
Smythe, Sharna M.
Soderman, Jason Einar
Sokol, Jan D.
Sowinski, Karen
Sprunger, Suzanne A.
St. Germain, Thomas Edward
Stallman, Brandon Carl
Stark, Janet Susan
Steel, Gerald Barclay
Stern, Jonathan Gary
Stoker, Kenneth Don
Stovall, Steven Lynn
Strauss, Kenneth W.
Stringer, John
Strong, Helen Francine
Strosky, Beth Marie
Styles, Auria
Sullivan, John C.
Sullivan, Kevin T.

Takahashi, Ken
Thames, Jonathan W.
Thorne, Celeste A.
Tomich-Salinas, Terri L.
Toojian, Jean
Tran, Madeleine
Triplett, Mark

Uribe, Mauricio A.

Volpone, Sarah Ann
Voss, Ellen M.

Wagner, Connie
Walker, Jamie A.
Wallien, Dayle L.
Warfield, Calliste
Weber, James W.
Weber, Matthew B.
White, David Morgan
Wiegand, Jamie L.
Wies, Diane Lieb
Wilkinson, Jeffrey B.
Williams, Teena J.
Willis, Leland Franklin
Willmer, Lisa Sawaya
Wilson, Elisa L.
Wire, Kathleen Marie
Wong, Bruce C.
Wood, Michael I.
Wright, William F.

Yahyavi, Francesca Morvarid
Yeats, Elizabeth
Youn, Joanne C.
Young, Steven D.

Zaike, Karma L.
Zilber, Gayle K.
Zugish, Joshua B.

CEREMONIAL INDUCTION
of
TAKUJI YAMASHITA

to the
Washington State Bar

Held
in the
Courtroom
of the
United States District Court
for the
Western District of Washington

March 1, 2001

Tacoma, Washington

TAKUJI YAMASHITA

INDUCTION OF TAKUJI YAMASHITA

Chief Justice Gerry L. Alexander:

Good afternoon, ladies and gentlemen. My name is Gerry Alexander and I am the chief justice of the Washington Supreme Court. Let me welcome all of you to this session of the Washington Supreme Court in which we will consider a petition by the Washington State Bar Association, joined in by the University of Washington Law School and the Asian Bar Association of Washington, to grant posthumous admission to the Washington State Bar Association to Takuji Yamashita.

Our court is honored to conduct this official court proceeding in Tacoma. As most of you know, the regular venue for our court is the Temple of Justice at the State Capital in Olympia. We are here in Tacoma today, rather than in Olympia, because nature conspired to prevent us from holding court in our lovely courtroom as we had planned. Our building, as you may know, is temporarily closed, as are others on the Capitol Campus, including the Legislative Building. This has come about because our building sustained substantial damage in the earthquake that occurred yesterday. We don't know for certain when we will be able to reoccupy our building. In fact, our courtroom is not so beautiful right now. I can testify to that because I was in it when the quake struck.

Nature's dirty trick could not, however, deter us from performing the task we are happily called upon to perform today. Let me express the thanks of the court to the judges of the United States District Court for the Western District of Washington, particularly Judges Robert Bryan, Frank Burgess, and Jack Tanner, for allowing us to hold our session in this wonderful federal courthouse in Tacoma.

Let me, before we proceed further, introduce the other members of the Washington Supreme Court. I will do that in reverse order of seniority. They are Justices Susan Owens, Tom Chambers, Bobbe Bridge, Faith Ireland, Rich-

ard Sanders, Barbara Madsen, Charles Johnson, and Charles Z. Smith.

I would also like to introduce everyone who is here because you are all important. I can't, of course, do that due to time constraints. I do, though, want to introduce a few people who will not be speaking today. I'm sure I will miss some folks that I should introduce and I would ask my colleagues to let me know if I do.

Let me first introduce Gordon Hirobayashi, a famous pioneer for civil rights. In addition, I'd like to introduce Robert Inouye, Yakima County Superior Court Commissioner; Judge Dean Lum, King County Superior Court; Aaron Owada, North Thurston School Board member; State Representative Luke Esser; Judge Ronald Cox of Division One of the Court of Appeals; James Arima of the Pacific Northwest Council of the Japanese-American Citizens League; Judges Elaine Houghton, Karen Seinfeld and Christine Quinn-Brintnall of Division Two of the Court of Appeals; State Senator Stephen Johnson; State Senator Paul Shin; Yvonne Ward from the Commission on Asian Pacific American Affairs; Harvey Watanabe of the White River Japanese-American Citizens League; Pierce County District Court Commissioner Lisa Worswick; Retired Supreme Court Justice Robert Utter; Washington State Solicitor General Narda Pierce; Karen Yoshitomi of the Pacific Northwest Japanese-American Citizens League; Judge Eileen Kato of the King County District Court; and the Consul General of the nation of Japan, Consul General Fumiko Saiga.

We will now proceed to hear the various presentations that will be made to us today in support of the formal petition of the Washington State Bar Association to grant honorary admission to the bar of Washington to Takuji Yamashita. Before we hear those presentations, let me by way of background put matters in perspective. First, I would note that in 1902 the Washington Supreme Court ruled that Takuji Yamashita should not be admitted to the bar of Washington. Our court made that determination

despite its acknowledgment that Takuji Yamashita was morally and intellectually qualified for admission to the bar. The court's decision is contained in this volume 30 of Washington Reports at page 234.

Today our court is considering a new application to admit Mr. Yamashita to the bar of Washington, albeit posthumously, because Mr. Yamashita is no longer with us. We are not considering a motion to overrule or reverse that earlier decision, nor are we here to indict our forebears on that earlier court. The Washington Supreme Court of 1902 was encumbered by certain statutes passed by the United States Congress and the legislature of Washington, which related to the attainment of citizenship and qualification for the bar that have, fortunately, since been found unconstitutional or repealed. The current court is, therefore, not encumbered by any such statutes and thus we are free to consider the petition before us anew and from a contemporary viewpoint, recognizing that those words in our pledge of allegiance "justice for all" truly mean "all" and not "some."

The first person who will speak in support of the petition for admission is the very distinguished dean of the University of Washington Law School, Roland Hjorth. It is appropriate that Dean Hjorth be the first speaker because it was the University of Washington Law School that first approached me and this court about whether it would be willing to entertain a petition to admit one of its early graduates, Takuji Yamashita, to the bar. We indicated that we would look kindly on such a petition and here we are. Dean Hjorth.

* * *

Dean Roland Hjorth:

May it please this honorable court:

My name is Roland Hjorth. I am the Dean of the University of Washington School of Law and a member of the Washington State Bar Association.

On one wall of the library at the University of Washington School of Law there hangs a composite of portraits of one of the very first graduating classes from our Law School – a class that graduated about 100 years ago.

That photograph has always intrigued me. In a class of ten, it shows one graduate of African descent, one graduate of Asian descent, and two women. For its time and place, the class that graduated 100 years ago was remarkably diverse.

As we planned our celebration of the Centennial of the Law School, it seemed to me and to other members of our faculty that we should study the lives and careers of the graduates of that class. Professor Walter Walsh, of our faculty, and his seminar on legal history undertook that study.

That study led to the amazing story of Takuji Yamashita. It is a story of outstanding courage and perseverance in the face of humiliating obstacles. You will hear later in more detail that, even though he graduated from our Law School and even though he passed the State bar examination, he was not allowed to become a member of the legal profession – because he was born in Japan.

Our pride in the diversity of our first graduating class was thus diluted by the sad knowledge that women and many members of minority groups were denied entry into our profession.

This knowledge led to the idea that the University of Washington School of Law, the Washington State Bar Association and the Asian Bar Association of Washington should petition this court that Takuji Yamashita be admitted posthumously to the Washington State Bar Association.

We cannot think of any better way to celebrate the centennial of the University of Washington School of Law. We bring this matter to the attention of this Court, not only to right a grievous wrong, but also to bear witness that in the next century of the Law School's existence we are

tion. We hold as our highest values the inclusion into our Law School, and into the legal profession, people of all races, genders, creeds and social backgrounds.

And so we ask, not only for the admission of Takuji Yamashita to the Bar, but also for an affirmation of our conviction that invidious discrimination shall never prevent people in this society from receiving justice or from access into this great and honorable profession.

As the chief justice observed, these proceedings were originally to be held in the Temple of Justice in Olympia, Washington. That building could not be used because of the earthquake on Wednesday. By the extraordinary efforts of Paula Littlewood and Deeann Partlow, a majority of invited guests were told of the move to Tacoma. Despite the earthquake and the move, more than 250 people have come to this proceeding. Many of Takuji Yamashita's descendants are here. The oldest grandchild will accept on behalf of the family a certificate of admission of Takuji Yamashita into the Washington Bar.

This proceeding is an outgrowth of the University of Washington Law School's centennial celebration. I cannot think of a more appropriate way to celebrate our values and ideals as a school devoted to training lawyers committed to the advancement of a just society. Thank you.

* * *

Chief Justice Gerry L. Alexander:

I next call on my good friend, the Honorable Ron Mamiya. Judge Mamiya is a very distinguished judge of the municipal court of Seattle. Among other accomplishments, Judge Mamiya is a nationally known authority on the use of interpreters in court proceedings. Judge Mamiya will speak on the life of Takuji Yamashita.

* * *

Judge Ron Mamiya:

Minasama, konichi wa—Justices, ladies and gentlemen,

Takuji Yamashita was born in Ehime Prefecture, Japan in 1874 and, at the age of 18, was recruited by pioneer Tacoma restaurateur Kyuhachi Nishii to study in the United States. Arriving in Tacoma, young Takuji sped through Tacoma High in half the normal four years. In 1899, he was admitted to the second Law School class of the University of Washington. As only the second Japanese student in the UW's first four decades of existence, he soon became better known as the star of the new Law School's moot court and graduated in 1902.

In true lawyer fashion, Yamashita petitioned the Pierce County Superior Court, the then appropriate immigration forum, for naturalization. On May 14, 1902, four days before his law school graduation, Yamashita was naturalized, formally renouncing his Japanese citizenship.

In June, Yamashita and his classmates traveled to Olympia to take the "oral" bar exam. Although Yamashita was a recent Japanese immigrant, the Seattle Times described his bar passage as "highly credible." Having attained the American dream, Yamashita married Ito Nakagawa.

In October, Yamashita was dealt a major career setback. Scant months after his graduation, Yamashita was called to represent himself before our State Supreme Court. Original court records show Yamashita's performance clearly reflected the quality of his education and his substantial aptitude for advocacy. Yamashita argued, in part, that Washington had granted reciprocity to lawyers from foreign states without passing the Washington Bar examination, and even admitted lawyers from sister states that did not require citizenship as a prerequisite.

Unfortunately, the Court was not swayed by Yamashita's arguments. A few days before his 28th birthday, the Court, in a unanimous decision, reasoned, "[racial restriction on naturalization] must be taken to express a settled national will." Yamashita met all other qualifications including bar passage, state residency, and "the requisite learning and

ability qualifying him for admission." The State Supreme Court, gatekeeper to the legal profession, promptly voided Yamashita's naturalization, disqualifying him from the practice of law in Washington. *In re Yamashita*, 30 Wash. 234, 70 P. 482 (1902).

Blocked from his chosen profession, Yamashita turned to a more typical immigrant path: business. For the next 20 years, Yamashita lived with his wife and five of their six children in the Seattle-Bremerton area. Initially bankrolled by his mentor, Nishii, Takuji opened a series of successively larger restaurants on the Seattle waterfront, later turning his attention to ventures in Bremerton, Silverdale and White River, this time himself pioneering in the hotel, oyster and strawberry industries.

After his dreams of a legal career had been crushed, he still believed that justice could be achieved through the judicial process. In 1922, Yamashita challenged another race-based law. The previous year, the state legislature enacted the Alien Land Law, which disqualified Asian aliens from land ownership. Yamashita was aware that direct constitutional challenges had failed. Instead, he attempted to incorporate his real estate holding company. The Secretary of State refused to accept filing of the Articles of Incorporation for the same reason Yamashita was denied permission to practice law two decades before: lack of citizenship. The State Supreme Court declined to order the Secretary of State to accept the filing. In response, Yamashita filed a writ in the United States Supreme Court. The U.S. Supreme Court held that Japanese were ineligible for naturalization under federal law and therefore could not incorporate. Adding insult to injury, the Court cited as authority Yamashita's twenty-year-old state court decision denying his admission to the bar. *Yamashita v. Hinkle*, 260 U.S. 199 (1922).

Following an apparent twenty-year cycle, Yamashita, along with 120,000 persons of Japanese ancestry, was interned at Manzanar and Tule Lake in California (1942) and later (1943) at Minidoka in Idaho. This time, it was not

a matter of a lack of citizenship that sent him there, for citizens and non-citizens alike were incarcerated. It was a matter of race.

Despite his resilience, the internment was the blow that finally weakened his spirit. Unable to pay taxes and bills during the three years of incarceration, the family lost all of its holdings. Now 71 years old, the brilliant scholar returned from the camps to Seattle in 1945, surviving as a housekeeper for a widow in West Seattle. In 1957, after the death of a fifth child, Takuji and his wife, Ito, returned for good to Japan to live with their sole surviving child.

Upon his return, the only visible reminder of his life in America other than photos was something that he had saved for nearly 60 years where it hung proudly on the wall: his law degree from the University of Washington. Takuji died in his hometown two years later.

Through a set of fortuitous circumstances, Yamashita's Last Will and Testament, written in 1893, has been preserved at the University of Washington. True to his lawyering instincts, Yamashita memorialized his thoughts prior to leaving for the United States, giving great insight into his remarkable character, "If my plans to succeed in America fail and I die in a foreign land . . . I will not be bitter. If I become bitter about something, it would be my own intellectual shortcoming."

On balance, Takuji Yamashita's legal career must be regarded as a remarkable achievement. Although he did not win his cases, he embraced the law as a vehicle for justice and pioneered civil rights for Asians.

In recognition of this extraordinary odyssey, the University of Washington Law School, last November 17th, posthumously inducted Takuji Yamashita into its honor society, the Order of the Coif. In addition, the Asian Bar Association of Washington has named an annual law student scholarship in his honor.

No one in our Bar's history can claim such a compelling case for admission. Mr. Yamashita met each and every

requisite to practice our noble profession – he was a law school graduate, a state resident, was deemed fit to take the bar and passed it. That is, all but one – he was not a Caucasian or a person of African descent. His case is even more compelling than the 1973 *Griffiths* case where the U.S. Supreme Court struck down citizenship as a prerequisite to the practice of law. For in that case, Ms. Griffiths refused to renounce her foreign allegiance and had not taken the bar or passed it.

Though long overdue, Mr. Yamashita's admission serves to correct the injustice that he suffered and sends a clear message – that this is a profession of inclusion and not one of exclusivity. More importantly, this is a step in the healing process for what we, as a nation, now recognize as unfair, discriminatory and unconstitutional actions.

Since the rediscovery of Mr. Yamashita's life, ironies abound.

- Just as Takuji faced unexpected roadblocks, we were presented with yesterday's disaster – and yet we move on and did not let those events weaken our resolve to share this momentous event.
- Just as Takuji's odyssey did not go as planned and in 1922 went from the state court to the federal system, neither did any of us expect that we would be in the Federal Courthouse instead of the Temple of Justice in Olympia.
- And lastly, just as Takuji returned to his hometown, we return to the place where he started his American journey – Tacoma.

Takuji Yamashita's odyssey, in many ways, is unparalleled in our history; and yet, the resilience of his human spirit deeply touches each of us. Ninety-nine years ago he was denied his dream; today we are here to celebrate his life.

In closing, I thank all of you for letting Mr. Yamashita's voice again be heard.

Chief Justice Gerry L. Alexander:

We are most honored by the presence of our state's very able attorney general, Christine Gregoire. She will speak on the importance of the justice system.

* * *

Attorney General Christine Gregoire:

Mr. Chief Justice and members of the Court, distinguished guests and friends. May it please the Court, I rise today in the support of the application of Takuji Yamashita to admission to the Washington State Bar Association.

We have an adage in the practice of law and it goes, "Justice delayed is justice denied." That is certainly true in this case. For although we are here today to reverse the actions of our predecessors nearly a century ago and to admit Mr. Yamashita to the State Bar, we cannot undo the great injustice that he suffered. Maybe that's why today I feel both regret and I feel pride. Regret that Mr. Yamashita did not live to see this day, accept our apologies, and receive his rightful admission to the Bar; and pride that as a state we have acknowledged our mistake and, to the extent that it is possible, we are attempting to redress the wrong.

I hope that in some small way our actions today will give a sense of justice to the family of Mr. Yamashita and to all Japanese-Americans who have endured prejudice and racism. The law is a noble calling and Mr. Yamashita was determined to, in his own words, "work for the public good" when he left Japan to come live here in the United States. He, like most of us in the legal profession today, wanted to help people solve problems and saw the justice system as the tool to do that. Unfortunately, the law failed Mr. Yamashita, and the Court and the Attorney General perpetuated the racism and the prejudice of the times. It was that same prejudice fueled by fear that led to the forced internment of 120,000 loyal Japanese-Americans at the outbreak of World War II. Even after the War, people of Asian ancestry who were not born here still could not

become U.S. citizens. These Asian-Americans could not even own property. It is not easy but we must remember. As Senator Dan Inouye has said, this chapter must remain in our collective consciousness as a grave reminder of what we are capable of in a time of crisis and what we must not allow to happen again to any group regardless of race, religion or national origin. While we can look back and criticize the actions and decisions of our State Supreme Court and the Attorney General's Office nearly a century ago, we can also learn from the mistakes of the past and try to correct them whenever we can. What happened to Mr. Yamashita happened here at home, and while we cannot undo what our predecessors did, we can move forward now with a healing process. We can bring closure to this odyssey to become an officer of the court by embracing him here today as our colleague in the Washington State Bar Association. We can keep his spirit alive by talking about the racism and the prejudice that he faced and educating others about his story. By doing this we are helping to prevent another event like this from happening in our state.

Today we honor his memory and the courage of a young man, Takuji Yamashita, who dared to fight for his place in our legal profession and his place in our country. He has only recently been called one of the country's earliest civil rights crusaders as he fought for his rights as a Japanese immigrant in the high court, not once, but twice. It's unfortunate that such an intelligent, thoughtful legal mind wasn't able to practice law in this country that he believed held his dreams. In 1946 while honoring veterans of the Japanese-American 100th Infantry Battalion and 442nd Regimental Combat Team, President Harry S. Truman acknowledged the special burden these loyal Americans bore. "You fought not only the enemy but you fought prejudice and you won. Keep up that fight and we will continue to win, to make this great republic stand for what the Constitution says it stands for, the welfare of all of the people all of the time." Mr. Yamashita never quit that fight for equal justice under the law, and today we can finally say

to him, you won. You won for your family and for your nation and we are grateful to you for all you did to bring us closer to the ideals embodied in our Constitution. But we must also pledge to Mr. Yamashita that we will not give up the struggle for equality that he fought so valiantly for.

I hope the Yamashita family will accept our apologies for the grave injustices done so many years ago, but I hope that you will with us join in his spirit, allow it to live on and be the symbol of the justice system and all that it stands for in this state and this great nation.

Thank you very much.

* * *

Chief Justice Gerry L. Alexander:

Our governor, Gary Locke, was scheduled to be a speaker today. I am sure you can all understand, what with the events of yesterday, why he is unable to be here. He is presently touring the state with federal disaster relief officials and assessing the earthquake damage. I know that he very much wanted to be here and he has expressed his regrets. Representing the governor and his office is his chief of staff, Paul Isaki.

* * *

Paul Isaki:

Mr. Chief Justice, distinguished members of the court, members of the federal bench, members of the Washington State Bar and the Asian Bar Association, it is unfortunate that Governor Locke could not be here himself today to help celebrate this truly impressive occasion. In his stead, unfortunately, you have me and I would, however, like to make a few remarks on the Governor's behalf and actually on my own. There are several ironies with respect to today. We are in Tacoma where Yamashita-san first landed and began his journey here in the United States and in the State of Washington. As I was sitting here listening to his life story, I couldn't help but recall that my maternal grandmother

landed here in Tacoma about the same time and I wonder if perhaps they may have been shipmates. Further ironies: People of Japanese-American dissent who immigrated to the United States at that time all came for the same reason – to seek a better life and to make a contribution as Yamashita-san so eloquently put out in his journal. That he was not successful in attaining the full measure of his objectives is, however, I think, a testimony to the target that he set that others who followed have been able to achieve. That pioneers like Yamashita-san were able to persevere in the face of much obstacle, much difficulty, is, I think, a testimony not only to people of Asian ancestry but to all of the immigrant populations that have come to make this country what it is. So it is really Yamashita-san's spirit which is shared by so many others that we help celebrate today. And that which this country stands for and that we are able to recognize and honor here today is a testimony to the fact that he was right in seeking to be here and to become a part of what we are all celebrating today. So I think we are fortunate to have the opportunity to honor someone who represents actually the aspirations of hundreds of thousands and millions of people who have immigrated to the United States and made a contribution to help make this country what it is.

On behalf of Governor Locke, thank you very much; and I really believe that this is a very significant event today. Thank you.

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Chief Justice Gerry L. Alexander:

It is my high honor to introduce two representatives of the legislative branch of government. I would first call upon Representative Kip Tokuda of the 37th Legislative District in Seattle. He will speak about civil liberties and our next generation.

Representative Kip Tokuda:

Mr. Chief Justice, honored Supreme Court Justices, thank you very much first of all for taking up this matter and thank you too to the University of Washington School of Law, the Asian Bar and the Washington State Bar for posthumously honoring and recognizing the struggle of Mr. Takuji Yamashita in this way.

I would like to mention something: As a four-time legislator now, I have had the privilege of having four legislative assistants. The first legislative assistant was a Chinese-American who then went on, in fact, to clerk for Justice Smith. My second legislative assistant was a Filipino-American who now is an assistant attorney general for Attorney General Gregoire. My third legislative assistant was a Japanese-American who is now an assistant attorney general in the State of Arizona. And my current legislative assistant is a Cambodian-American who has great things in front of her. Now each of these individuals is an attorney, each is an Asian-American, Asian-Pacific Islander, and each is extremely proud of himself or herself; and I mention this because this indeed is the legacy of Mr. Yamashita. Mr. Yamashita, I am sure, is looking down at us very proud, looking at each one of these young people and saying, you know, you did it. And for that reason I am very proud of Mr. Yamashita and thankful for all of his struggles.

I was asked to mention the Civil Liberties Act. Now this was a bill. It was called House Bill 1572 for those of you who are familiar with how the legislative process works. I was a co-prime sponsor of that bill last year, and it passed out and was signed by Governor Locke into law. This law is intended to educate Washington residents about the internment and the military record of Japanese-Americans during World War II as those events relate to other potential civil rights and constitutional abuses. The intent here, of course, is to prevent such injustices in the future as that was experienced by Mr. Yamashita.

But this is a day for Mr. Yamashita and for his family, and I personally thank Yudomo Arigato and just congratulate you for everything that you have known and endured and

experienced about Mr. Yamashita. I thank you very much. So let us take this opportunity today to celebrate and to savor, if you may, this wonderful honoring, but to also learn by its significance, and I very much thank you. You know I am rarely lost for words, but truly I am lost for words at this moment. I am so proud. So thank you for allowing me to a part of this celebration. Thank you again to the Yamashita family.

* * *

Chief Justice Gerry L. Alexander:

We are delighted that State Representative Sharon Tomiko Santos is with us. She serves the 37th District. She will speak of the significance of "shinnen."

* * *

Representative Sharon Tomiko Santos:

Konnichi wa. Watakushi wa Wa-Shingu-Ton shu no gi-in no Santos Sharon Tomiko desu. Kyoo no taisetsu na gishiki no tame ni toi tokoro o taihen yoku irrashaimashita. [*Good afternoon. I am Washington State Representative Sharon Tomiko Santos. I'm very pleased to welcome you to today's very important ceremony.*]

Good afternoon. I'm Sharon Tomiko Santos, State Representative from the 37th Legislative District in Washington State. On behalf of my senior seatmate, the Honorable State Representative Kip Tokuda, and all of the Japanese-American community in the great State of Washington, I am truly honored to join you in celebrating this historic event to posthumously admit Yamashita Takuji to the Washington State Bar.

As all of you know, we would not be here if not for the indomitable human qualities of faith, confidence and perseverance demonstrated by so many, beginning with our honoree Mr. Yamashita.

Today, we recognize the importance of these traits by adopting the idea of *Shinnen* as our theme.

Shinnen means "confidence" or "perseverance" in the Japanese language and is printed, in character, on your programs and invitations. It is also a homonym for "New Year." Both definitions are highly appropriate for this occasion.

First, we are gathered here to pay homage to Takuji Yamashita's unflagging faith in the principles of justice and equality despite his personal experiences with the law. As you have heard, Mr. Yamashita never gave up on America even when it seemed that she had given him up. How many of us would maintain the strength of our convictions under the same circumstances? Yet, as family and friends can testify, Mr. Yamashita continued to uphold his belief in our dearest American values to the end of his days.

It is, perhaps, not a coincidence that one of the characters for his own name represents the word for "government" and "peace." For as every activist knows, there is no peace without justice. And speaking as a State Representative, I believe that the fundamental role of government is to assure both, now and in the future.

Shinnen also describes the efforts of so many in our audience today who, knowing of the injustice done to Mr. Yamashita, worked diligently to preserve and make public his story – even after his death – so that we might one day correct this shameful wrong. Thank you for *your* faith and perseverance in bringing us together today. You have helped to bring us all to that mountaintop of Justice (*Yama no ue*) once described by the great Rev. Dr. Martin Luther King, Jr. who, like Mr. Yamashita, believed in the promise of America.

So, today, we dedicate this occasion to the power of *Shinnen* by declaring a new day, a new year, a new millennium in Washington State where wrongs will be righted, where tolerance will override bigotry, and where history will be made anew. In so doing, I offer you all the traditional Japanese New Year greeting: *Shinnen omedetoo gozaimasu*. Congratulations on this New Year.

In closing, I want to thank the organizers of this ceremony – the Asian Bar Association, the Washington State Bar Association, the University of Washington Law School and, most important, the Washington State Supreme Court – for your efforts to assure that we, in Washington State, will always remember the life and the legacy of Takuji Yamashita, the first Japanese American citizen to pursue the dream of justice for all under the law.

Moo ichido minna-sama ni kyoo no gishiki ni shuseki sare ta koto ni taishite kansha moo oshi agemasu.

[*Again, thank you very much for your participation in this important ceremony.*]

* * *

Chief Justice Gerry L. Alexander:

Ladies and gentlemen, we now come to the official portion of today's hearing, a presentation by the Washington State Bar Association in support of its petition to posthumously grant honorary admission to the bar of the state of Washington to Takuji Yamashita. Under our system of government, a hallmark of which is the doctrine of separation of powers, the Supreme Court, as the highest court of the state, possesses the authority to determine who will be admitted to the bar. We have, however, invested the WSBA with the authority to administer the admission system on a day-to-day basis, under rules adopted by the court. To make a presentation in support of its petition, I call upon the very able and distinguished president of the Washington State Bar, Jan Eric Peterson, of Seattle.

* * *

Jan Eric Peterson:

May it please the Court, Mr. Chief Justice; today is not an ordinary day-to-day function for the State Bar. Recognizing that now, now is always the right time to do the right thing, and, further, in recognition of his superior academic qualifications, and completion of the study of law at the University of Washington School of Law, and successful passage of

the examination for admission to the Bar, and his demonstration of good moral character and an exceptional, actually incredible, commitment to the justice process and the rule of law that would make us all proud to be a lawyer, it is my privilege on behalf of the Washington State Bar Association pursuant to unanimous vote of the Board of Governors to recommend to you and to petition this Court and move for the admission to the Bar of the State of Washington Takuji Yamashita who we have no doubt would have done great service and honor to the profession and this honorable Court. I so move.

Thank you.

* * *

Chief Justice Gerry L. Alexander:

I will now ask each justice of this court to sign the order presented to us by the Washington State Bar Association. I will sign it last.

[Signing of the order]

I did not think very long about which member of this court should respond for the court because one of our colleagues is truly tailor-made for this responsibility. Justice Charles Z. Smith is well known to all. He is at once the associate chief justice of our court and the senior member of the court. More relevant to this proceeding, he has been a lifetime crusader for human rights and for improved relations between people of all races and creeds. He currently co-chairs the Minority and Justice Commission of the state of Washington. In addition, he was for many years chair of the National Consortium of Minority and Justice Commissions. He currently serves, by virtue of a presidential appointment, on the United States Commission on International Religious Freedom. It is my great pleasure to call on my friend and colleague, Justice Charles Z. Smith, to make a response for the court.

Justice Charles Z. Smith:

It is through a multitude of interests that I speak to you. I am a long time member of the Japanese-American Citizens League. I am a member of the Washington State Bar since 1955. I graduated from the University of Washington Law School in 1955. I remain on the faculty of the University of Washington Law School and since 1988 I have been a member of the Washington State Supreme Court. From this posture I say what I will say. It may not please everyone.

In America, the great country that it is, we pride ourselves on all the wonderful things we do. We memorialize it in songs, in legal documents, in sayings, the most notable among which is the Preamble to the Declaration of Independence, which says by my revised version, "We hold these truths to be self evident that all persons are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." I have reduced that to my personal credo which is "truth, justice and freedom." What we do here today is a manifestation of those principles.

As the Chief Justice has pointed out, the *Yamashita* case before the Washington State Supreme Court in 1902 is of permanent historical record in the leather bound book he showed to you. For the lawyers among us–if you don't already know it–the citation is 30 Washington 234 (1902). While it is not our purpose here today to second-guess the Washington State Supreme Court in 1902 in its unanimous decision, nor is it our purpose to justify its decision, I would nevertheless as an academic and as a Supreme Court justice call attention to the fact that the decision in 1902 was correct at the time it was given.

Decisions in law are essentially based upon a domino theory. Mr. Yamashita, the brilliant 27-year-old graduate of the University of Washington Law School in 1902, somehow acquired a certificate of citizenship, United States citizenship, from the Pierce County Superior Court. Before the Washington State Supreme Court was only the question

whether the Pierce County Superior Court had the power or the authority to bestow United States citizenship upon Mr. Yamashita. In a decision which appears to be racist in its content, but recognizing that it was based upon the documents before the court at the time, the Washington State Supreme Court determined that under Washington law in order for a person to become a member of the Bar the person had to be a citizen and that Mr. Yamashita was not. Under federal immigration laws, under the Alien Exclusion Laws, aliens – especially Asians – especially Chinese – especially Japanese – could not become citizens of the United States. The members of our Nikkei community know with me that it was only in recent years that many of our Issei or Japan-born Japanese were able to become citizens of the United States.

In the community we use the term Nikkei which means in general Asians of Japanese ancestry. In the community we have what is called first generation Issei (Japan-born) very few of whom were able to become citizens. Mr. Yamashita was Issei. Then we have Nisei, then Sansei, then Yonsei, first-generation American born, second-generation American born, third-generation American born. But Mr. Yamashita's situation was not unique.

Our United States government has done some terrible things to many of us. I am three generations removed from slavery which was condoned by our United States government. We know from recent years what our government did to our Nikkei in the United States: 120,313 men, women and children were herded up from their homes, taken to stables, taken to concentration camps and kept behind barbed wire fences with guard dogs and treated with humiliation in god-forsaken places with glamorous names like Tule Lake, Minidoka and Manzanar. Mr. Yamashita was in all three of those concentration camps.

Our government at least has the capacity to admit when it is wrong. It took some time through the efforts of the Japanese-American Citizens League to get Congress to pass a bill which we commonly refer to as the Reparations

Bill. And while it is small comfort to those who suffered the indignity of the concentration camps, our government had to pay one billion six hundred thirty-nine million four hundred twenty thousand dollars ($1,639,420.00) in reparations of minimal sums of twenty thousand dollars ($20,000.00) for all men, women and children who were incarcerated in our concentration camps. But this did not happen by accident. The Chief Justice has already identified Gordon Hirabayashi–one of my heroes. Dr. Hirabayashi brought a lawsuit in 1983, 43 years after his conviction for violating the curfew laws imposed by our federal government under Executive Order 9066. It is, I think, good that we are in a United States District Court because Judge Donald H. Voorhees, United States District Court for the Western District of Washington, sitting in Seattle in 1983 concluded after extensive hearings that General John DeWitt was a liar, he was a racist, that he convinced a so-called liberal President Franklin D. Roosevelt to sign Executive Order 9066, and that there was never any justification for what is sometimes euphemistically called relocation or internment.

It was the *Hirabayashi* case decided by Judge Voorhees which was the beginning of the end for our government with reference to its recognition of a historical flaw. The United States Court of Appeals hearing the case on appeal went even further. In 1984 the court not only agreed with Judge Voorhees' District Court decision but cleared the deck entirely to the point at which Gordon Hirabayashi was free of taint because his conviction was based upon a false process engaged in by our United States government which not only affected him but affected all the other Nikkei who were victims of this process.

Now having said that, I think it is high time for us, the courts especially, to do what we can to compensate for this historical evil, this historical wrong. We do not sit here today to overturn a 1902 decision, which I assure you was correct at the time it was written, but we sit here today to say to you that if Mr. Yamashita, age 27 or of whatever age,

would appear before this court today and ask for admission to the Bar of the State of Washington, there would be absolutely no impediment to his admission which we are granting 99 years after the fact.

The University of Washington Law School prides itself on the fact that, certainly with respect to our Nisei, we have graduated in the early years Nisei lawyers who have become members of the Washington Bar: Clarence Arai (1924), Thomas Masuda (1929), William Y. Mimbu (1936), Kenji Ito (1936), Harry Takagi (1939), and George Numata (1943).

In our audience today is a lawyer, the senior Nikkei lawyer in the Washington State Bar. He is not a graduate of the University of Washington Law School simply because he was put in a concentration camp after his first year there. He returned from the camp and graduated from the University of Utah and became a member of the Washington Bar in 1946: Toru Sakahara. (Applause) Toru would you stand up?

And so Mr. Chief Justice, Madame Consul General, and other guests, it is my pleasure to be one of the nine who have signed this order posthumously granting membership in the Washington State Bar to Takuji Yamashita. Thank you very much.

* * *

Chief Justice Gerry L. Alexander:

We have a number of descendents of Takuji Yamashita who are here from as far away as the state of Maine and the nation of Japan. Allow me to call on Satoshi Ichita, president of the Olympia Japanese-American Citizens League, who will introduce them and make other remarks.

* * *

Satoshi Ichita:

Good afternoon and konnichiwa. Today we witnessed a wrong being made right and justice being served. Let me

now introduce the descendents of Takuji Yamashita who are present here today. First, eldest granddaughter, Kobayashi Mitsuko-san. Eldest grandson, Imaizami Masahiro-san. Fourth grandson, Imaizami Takanori-san. Fourth granddaughter, Nishtani Atsuko-san. Fifth granddaughter, Wada Tsuzua-san. Eldest granddaughter, Kobayashi Tazuko-san. And from Maine, Kobayashi Naoto-san and his wife, Betsy-san and their three young sons. And I want to acknowledge another person. If you have seen some of the Japanese translated version of our program today, Tamiko Ward spent a tremendous amount of time converting the English into the Japanese. Especially a person like her who has been here for some time, converting into the Kanji is a really difficult task so thank you. And thank you and welcome.

* * *

Chief Justice Alexander:

I will now ask for Tazuko Kobayashi to make a response for the descendents of Takuji Yamashita.

* * *

Tazuko Kobayashi:

On behalf of the Takuji Yamashita descendants, we would like to express our deepest appreciation to the Justices of the Washington Supreme Court, the Asian Bar Association of Washington, the Washington State Bar Association, and the University of Washington Law School.

Takuji Yamashita was an adult when he departed Japan for the United States. He wrote then, "I would deeply regret if I perish in the United States." With this strong will he studied law at the University of Washington and tried to become a naturalized citizen of the United States. His dream never came true in his lifetime. However, a century later we are sure Takuji in the heaven must be very satisfied with your resolution and really appreciate this ceremonial induction. We will tell him about today's cer-

emony in detail before his grave in Japan. Now Takuji Yamashita has 9 grandchildren, 20 great grandchildren, 18 great great grandchildren in Japan and in the United States. We remember he had been always smiling, tender, and a very good grandpa. We never imagined that he had held such a stubborn belief, a pure mind for justice, and an enduring spirit against several tragedies. Today, we realize that his strong belief had been owed to two things. One was the excellent education at law school at the University of Washington and the other one was his religious life. Takuji gifted us the Holy Bible which he had used in the United States. At the bottom of it we found a phrase extracted by himself from the Gospel According to St. John. We would like to present it to you as it shows us clearly his Shinnen, his belief. That is, "I am the way, the truth and the life." We are very proud and pleased to inherit Takuji's spirit and we wish to succeed it to the next generation in both countries.

Thank you very much.

* * *

Chief Justice Alexander:

I'm going to ask our bailiff to hand to the dean of the law school, Dean Hjorth, a certificate of admission, which is given to every lawyer when they are admitted to the state of Washington. I'm going to ask Dean Hjorth to present this certificate to the representatives of the family of Takuji Yamashita.

[Dean Roland Hjorth presents the certificate]

Let me close by saying I have always loved being a judge. But this is one of those days when a judge gets a special feeling. I earlier mentioned the published 1902 opinion of this court in which Takuji Yamashita was denied admission to the bar of Washington. I want you all to know that the record of this proceeding, the words of those who spoke here today, will be printed in the next volume of the Washington Reports. That report will be published and will be an appropriate postscript to that earlier decision of our court.

Before we adjourn, let me introduce Sue Lean from Olympia who is responsible for preparing the many historical displays that you will see in the reception area that relate to the life and times of Takuji Yamashita.

There will be a reception downstairs to honor the memory of Takuji Yamashita. Court is now adjourned.

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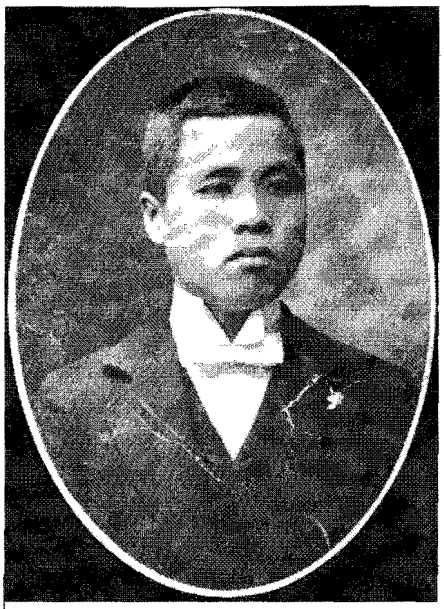
Week 2001
P. 13

Takuji Yamashita

P. 22

Takuji Yamashita

by Steven Goldsmith



A young Yamashita poses for this formal portrait, perhaps taken at the time he attended the UW.

Photos courtesy of UW Library, with permission of the Imaizumi-Yamashita families

Takuji Yamashita is about to become a member of the Washington State Bar Association — 99 years after graduating from law school and passing the bar exam.

The Washington Supreme Court will induct Yamashita on March 1 as an honorary member of the Bar. This admission will be honorary because it is posthumous; Yamashita died four decades ago. A dozen of his very proud descendants from Japan will mingle at the Temple of Justice with Governor Gary Locke, Attorney General Christine Gregoire, several legislators, international news media, and numerous dignitaries from both sides of the Pacific. One by one, the Supreme Court justices will sign the order of admission.

Back in 1902, a different state attorney general and roster of Supreme Court justices rejected, in this very same court, Yamashita's application to practice law. This was despite his excellent academic record at the University of Washington School of Law. The grounds for rejection: he was born in Japan.

At the time, Washington required its attorneys to be U.S. citizens, and according to the prevailing interpretation of federal law, citizenship was available only to those of Caucasian or African decent — not Asians.

Washington required its attorneys to be U.S. citizens, and according to the prevailing interpretation of federal law, citizenship was available only to those of Caucasian or African decent — not Asians.

But Yamashita, a fresh law graduate from a rural Japanese town, boldly argued in Washington's highest court that this denial of citizenship was an affront to the values of "the most enlightened and liberty-loving nation of them all." The state's attorneys responded by mocking Yamashita's "worn out Star Spangled Banner orations." The state won.

So Yamashita went into business instead of law. He became a moderately successful hotelkeeper and strawberry farmer in Kitsap County. But even as a middle-aged businessman, he continued to press for equal rights. In 1922, Yamashita challenged in the U.S. Supreme Court the state's Alien Land Law, which barred "ineligible aliens" — again, in effect, Asians — from owning land. The U.S. ruling was much the same as the Olympia decision of 1902: Congress simply had not seen fit to specifically make Asians eligible for naturalization.

Yamashita's problem, say legal scholars, was in being so far ahead of his time. Not until 1952 could Japanese immigrants become U.S. citizens; not until 1965 did Congress put Asian immigrants on par with Europeans; not until 1966 did Washington voters (on the fourth try) repeal the Alien Land Law; and not until 1973 did the U.S. Supreme Court finally grant aliens the right to practice law in all states.

Though they failed to bring about immediate change, Yamashita's early 20th century challenges established a record of ob-

Yamashita poses in a traditional Japanese robe for this photo, probably taken just before he left for America.

When UW law students were asked to pick a yearbook epigram, Yamashita wrote "Amicus Alienus" (Friendly Foreigner) one year, and "Stranger in a Strange Land" the next.

jection to racial exclusion. His cases are cited in a growing number of publications on naturalization and civil rights.

"In the act of challenging the positive law," said Walter Walsh, UW assistant professor of law, "Yamashita asked us to look for the more fundamental rights that lie underneath."

Walsh's legal-history students are among those who helped save Yamashita from remaining just a footnote in civil rights texts. Moving forward after his courtroom defeats, Yamashita had pursued a quiet and convivial family life in Kitsap County. Then, joining the 110,000 Japanese-Americans interned during World War II, the Yamashitas lost their income and holdings and retreated into even quieter old age. In 1957, Yamashita went to live out what came to be his last two years in his Japanese hometown of Yawatahama, Ehime Prefecture, Shikoku Island.

There he rested until some of his descendants in the 1990s began to reconstruct his record of pioneering defiance. Tacoma historian Ronald Magden added more pieces to the story in researching a 1998 book on the early Puget Sound Japanese community.

As the 20th century ended, meanwhile, the UW School of Law was preparing to mark its own centennial. The two-year celebration will culminate this summer with the 100th anniversary of the first law school graduation. Yamashita's record fit perfectly with the spirit of the state's public law school, one offering boundless opportunity. Founding Dean John T. Condon welcomed women, Jews, and an immigrant from Barbados, but he did not recruit wallflowers. From Condon's first class, Walter Beals would one day preside over the Nuremburg trials in Germany, and Adella May Parker would make her name as a feminist journalist and legislator. Like Yamashita, they viewed the law as a means to improve the world.

Yamashita's contribution at the new law school — which met downtown until 1903 — was described in a year-end school wrap-up as "commendable." But Japanese faces still were exotic to many Americans. When UW law students were asked to pick a yearbook epigram, Yamashita wrote "Amicus Alienus" (Friendly Foreigner) one year, and "Stranger in a Strange Land" the next.

Four days before receiving his law degree, Yamashita picked up his naturalization papers from the Pierce County Superior Court. The following week, Yamashita rode the train to Olympia with eight classmates to take what was in those days an oral bar exam.

All of them passed. Only Yamashita was denied the chance to become a lawyer. The opportunity to symbolically reverse this injustice has given the University of Washington School of Law an especially meaningful way to celebrate its birthday, and the state an opportunity to look back on the progress it has made in a century.

"It's impossible to undo what happened to Mr. Yamashita," said current state Supreme Court Chief Justice Gerry Alexander. "But it's important for us to make a statement that these things were wrong. It's a step toward healing."

Officially, the court will induct Yamashita in response to a petition from the Asian Bar Association of Washington, the University of Washington School of Law, and the Washington State Bar Association.

Seattle Municipal Judge Ron Mamiya, representing the Asian Bar Association of Washington, said Yamashita's saga of immigrant obstacles mirrors that of his own family and of millions of others who had to contend with anti-Asian laws.

A review of state files from the 1920s shows that then-state Attorney General Lindsey L. Thompson sought to defend the anti-Asian Alien Land Act by networking with local and national exclusionist politicians who made their careers whipping up fears of a "Yellow Peril."

Current Attorney General Christine Gregoire will have a very different role at the March 1 event. She will describe the attorney general's role in the safeguarding of human rights.

The court hearing will begin in the Temple of Justice in Olympia starting at 4:00 p.m., with a live TV feed to the lobby for the anticipated audience overflow. The event is taking place the same day as an annual Olympia visit by Asian-Pacific Islander groups. A reception will be held in the lobby after the hearing.

The 21st century has finally caught up with Takuji Yamashita. The same forum in which the 20th century turned its back on him will honor his memory with the one thing he could not achieve during his lifetime — membership in the Washington State Bar Association.

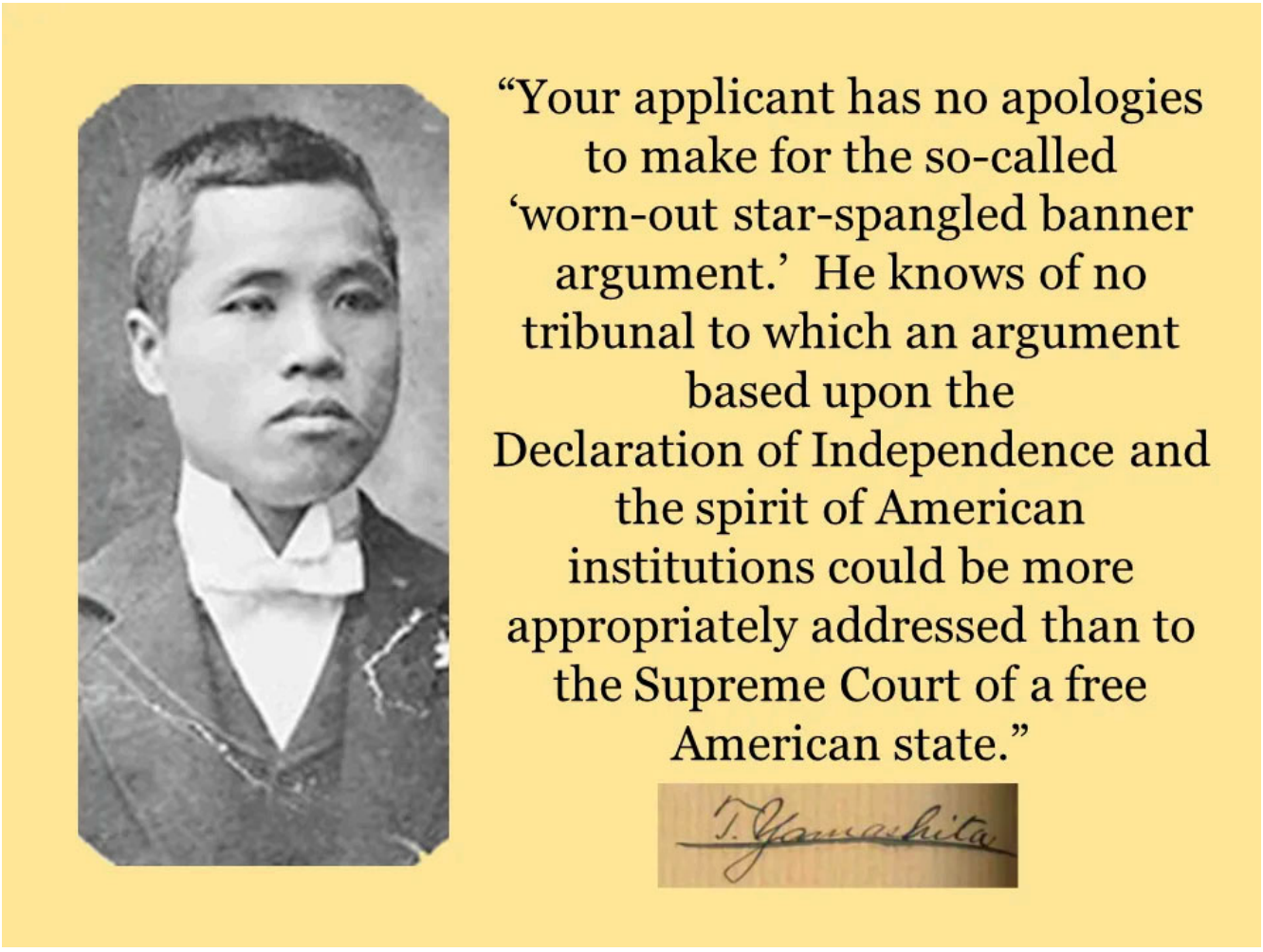
Steven Goldsmith, a longtime reporter with the Seattle Post-Intelligencer, *now writes for the University of Washington Office of News and Information. He is researching a book on Takuji Yamashita.*

5: "No apologies to make for the so-called 'worn-out' star-spangled banner argument"

Takuji Yamashita challenged racial restrictions twice - first at the Washington Supreme Court in 1902 and then at the United States Supreme Court in 1922 - and then was incarcerated during WWII

STEPHEN LEE

MAY 05, 2023



Takuji Yamashita could have been one of the greatest Asian American lawyers, but he never got to be a lawyer – at least, not during his lifetime.

He had come from Japan to the United States when he was a teenager, hoping to bring honor to his family and "work for the public good."

"If my plans to succeed in America fail and I die in a foreign land … I will not be bitter," he wrote before leaving Japan. "If I become bitter about something, it would be my own intellectual shortcoming."

He graduated from the University of Washington's law school, where he had excelled at moot court, and he passed the bar examination.

But when he tried to join the state bar, Washington State's Attorney General invoked federal law preventing people who were not "white" from becoming citizens and dismissed his attempts to invoke American ideals as "worn out star spangled banner orations."

Yamashita, then 27 years old and representing himself, double-downed in his reply brief: "Your applicant has no apologies to make for the so-called 'worn-out star-spangled banner argument.' He knows of no tribunal to which an argument based upon the Declaration of Independence and the spirit of American institutions could be more appropriately addressed than to the Supreme Court of a free American state."

In 1902, the Washington Supreme Court ruled against Yamashita because he was not white.

He then went into business but again faced restrictions because he was not white. Washington's alien land law allowed only U.S. citizens to own land, but he tried getting around this with a legal solution – he formed a corporation. But in 1922, the United States Supreme Court ruled against him when it also decided the case brought by Takao Ozawa.

Despite losing in two high courts, Yamashita persevered in America, working and raising a family.

And then he was incarcerated with other Japanese Americans during World War II, and his family lost everything while they were incarcerated.

This man who showed such promise as a lawyer spent his final working years as a housekeeper. And yet, despite everything Yamashita went through, he "never complained," one friend said. "He was never bitter."

Yamashita never got to see his arguments carry the day, but they eventually did. In 1952, Congress ended all racial restrictions on naturalization. In 1966, Washington voters repealed the restrictions on foreigners owning land. In 1973, the United States Supreme Court held that non-citizens must be allowed the opportunity to become lawyers.

And, in 2001, the Washington Supreme Court heard a new petition to admit Yamashita posthumously to the state bar. "We are free to consider the petition before us anew and from a contemporary viewpoint, recognizing that those words in our pledge of allegiance 'justice of all' truly mean 'all' and not 'some,'" the chief justice said.

This time, the petition was granted.

Sources: One main source for this article is Steven Goldsmith's article, "A Civil Action: UW Law School tries to right a historic wrong" (University of Washington Magazine, December 2000), online here. I also used the March 2001 induction ceremony by the Washington Supreme Court, which were reported and which were provided to me by the court. The Washington Supreme Court's 1902 decision denying Yamashita's petition for admission to the bar is online here.

Comments

RACE, RIGHTS, AND NATIONAL SECURITY

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CHAPTER 2

History

A. Asian Americans: A History of Prejudice and Exclusion

We pride ourselves on being a nation of laws—laws that require fair process before depriving individuals of their liberty, as well as laws that prohibit government actions that harm individuals based on their race, religion, national origin, or membership in another similar class. If that is how we view ourselves, as well as what our laws require, how could we have incarcerated nearly 120,000 Japanese Americans during World War II? What causes us to compromise fundamental ideals and the rule of law upon which this nation was founded?

The answers to these questions are complicated, but in many instances of past injustice against minority communities we see a pattern: a toxic mix in which ignorance about, and hostility against, those communities combine with a perceived threat to security or safety that makes us willing to sacrifice the rule of law. We have seen this happen throughout history. Unpopular minorities are cast as foreign, different, and unassimilable, and, viewing them as dangerous to the well-being of society, government seeks to control, criminalize, or expel them. Perceived need to protect ourselves justifies sacrificing fundamental freedoms and due process. Our fundamental freedoms are no longer fundamental; they are denied to individuals based on stereotype and historical discrimination. When government actors are allowed to act on their prejudices, they act outside of their constitutional authority, which, in turn, severely tests the bulwark of our system of checks and balances in which the legislative, executive, and judicial branches are expected to ensure that no one of them exceeds their constitutional authority. When we allow prejudice and fear to govern decision- and policy-making, we are no longer a country governed by the rule of law.

The Japanese American incarceration provides a powerful example in which the country compromised the rule of law in the name of national security. In order to understand that incarceration, it is essential to understand the historical and political context leading up to it. That context started nearly a century before the Second World War, in the larger history of how Asian peoples arrived in the United States and came to be treated. What follows is a brief summary of Asian

American[1] history prior to World War II, with emphasis on how fear of Asian Americans as a threat to national security led to their exclusion from society and, in the case of Japanese Americans, removal and imprisonment.

The first section, called "Unopen Door," focuses on how Asians were excluded from America, through laws limiting both their immigration and naturalization. The second section, called "Second Class Status," explores the ways in which those Asian Americans who gained admission to the country were still excluded from society. Although this book focuses on the incarceration of persons of Japanese ethnicity, this chapter goes beyond the Japanese American experience. It does so because understanding the experience of other Asian ethnicities, similarly perceived as "Oriental," helps explain how and why the public and its political representatives demanded incarceration and how the courts responded.

B. Unopen Door

1. Immigration

a. A Brief History of Asian Immigration to the United States

Asian American legal history begins with a story of a labor force—needed, but never accepted—that took place within the context of manifest destiny. European settlers viewed America as a terrain to be transformed and claimed physically, culturally, and economically. Yet the various agricultural and industrial projects of the Pacific frontier required an influx of non-European labor. Asians first began to arrive in the United States in substantial numbers in the mid-19th century.

The Chinese experience. Initially, these were Chinese immigrants, almost all adult males, who landed on the shores of Hawai'i and California. Many were pushed out of China, from the Guangdong province, by conditions of war,[2] economic depression, and the declining Qing dynasty. At the same time, they were pulled to America by the hope and promise of economic opportunity. Initially, they were drawn to the United States by the allure of California's Gold Rush. Later, they were recruited as cheap labor—for example, to work the labor-intensive sugar plantations in Hawai'i and to lay down the first inter-continental railroad. As Asian American historian Ronald Takaki states, "They were brought here to serve as an 'internal colony'—non-whites allowed to enter as 'cheap'

[1] A brief terminological note: We use the term "Asian American" broadly to include not only those Asians with U.S. citizenship but all Asians in America—citizens or not—who staked their futures and their children's futures in this country. More precise references to citizenship status are used where appropriate.

[2] ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, 12 (1988) [hereinafter DANIELS, ASIAN AMERICA].

migratory laborers and members of a racially subordinated group, not future citizens of American society."[3] Between 1840 and 1880, approximately 370,000 Chinese arrived in the United States. To get some sense of the relative size of the Chinese population in the West, consider the following numbers: In 1870, the Chinese constituted 29 percent of the population in Idaho, 10 percent in Montana, and 9 percent in California. In California, they amounted to 25 percent of the workforce.[4]

When the economy was booming, the Chinese were treated tolerably—as necessary, indeed useful, workers. The federal government's stance toward Chinese immigration was favorable. In 1868, China and the United States signed the Burlingame Treaty, which recognized the mutual advantage of free migration for the purposes of curiosity and trade and allowed immigrants to become permanent residents.[5] But when the economy collapsed, as it did in 1873-1877 and 1883-1886,[6] White American workers quickly scapegoated the "yellow" invasion of "coolie" labor. They complained that White American labor was debased by the Chinese, who were willing and able to work under horrendous conditions for little pay. Intolerant individuals took matters into their own violent hands. By one count, at least 300 murders of Chinese were documented in the West between 1860 and 1887.[7] One historian notes that 88 Chinese were murdered in California in a single year, 1862.[8] It is not known how many other deaths went unrecorded.

At other times, intolerance was expressed through local civic and political institutions, which attempted to make the lives of the Chinese so miserable that they would leave or not come in the first place. But state and federal courts sometimes struck down these attempts for violating federal treaties with China or trespassing on those foreign affairs and immigration powers reserved exclusively to the federal government. For example, in *Chy Lung v. Freeman*,[9] the U.S. Supreme Court struck down a California immigration statute on federal supremacy grounds. In other words, California was deemed to be meddling in affairs that only the federal government could regulate.[10] Thus, if the anti-

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[3] RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 31 (First Back Bay 1998) (1989).

[4] *See* SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 3 (1991); TAKAKI, *supra*, at 79.

[5] CHAN, *supra*, at 54.

[6] LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 9, 24 (1995).

[7] Robert S. Chang, Toward *an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1255 (1993).

[8] CAREY MCWILLIAMS, FACTORIES IN THE FIELD: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA 68 (2000).

[9] Chy Lung v. Freeman, 92 U.S. 275 (1876).

[10] Key portions of immigration legislation by the State of Arizona, which many viewed as anti-immigrant, were struck down by the U.S. Supreme Court on similar preemption grounds. *See* Arizona v. United States, 567 U.S. 387 (2012).

Chinese movement were to succeed, it had to shift from local and state levels to the federal plane.

In 1882, the movement succeeded in the enactment of the Chinese Exclusion Act,[11] which halted the immigration of Chinese laborers for ten years. The Exclusion Act was arguably the first federal law to restrict immigration on the basis of race.[12] Amendments and expansions of the Exclusion Act—passed in 1884, 1888 (Scott Act), 1892 (Geary Act), 1902, and finally 1904[13]—resulted in the permanent exclusion of Chinese laborers and the summary deportation of Chinese in America found without proper identification. These attempts to stop Chinese immigration generated innumerable *habeas corpus* petitions—requests to release someone unlawfully detained—including two cases discussed below, *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.[14] While federal district courts initially granted a number of these petitions,[15] cases like *Chae Chan Ping* upheld the exclusion of Chinese Americans from immigration, reasoning that the government possessed inherent power to protect the security of the country from the purported "vast hordes crowding in upon us."[16] That reasoning embedded the view of Asian Americans as foreign, unassimilable threats into American jurisprudence. The cases raised fundamental questions about federalism—the vertical division of power between federal and state governments—and separation

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[11] Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.

[12] Professor Leti Volpp considers the Page Act (1875) to be the first such law. The Page Act prevented entry of women suspected to be prostitutes, without directly mentioning race. However, in the preamble, the law's purpose was specified as detecting whether "immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary." *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 465-67 (2005). *See also* Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011).

[13] Act of Jul. 5, 1884, ch. 220, 23 Stat. 115-18 (repealed 1943); Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943); Act of May 5, 1892, ch. 60, 27 Stat. 25-26 (repealed 1943); Act of Apr. 29, 1902, ch. 641, 32 Stat. 176 (repealed 1943); Act of Apr. 27, 1904, ch. 1630, § 5, 33 Stat. 428 (repealed 1943).

[14] Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889) [hereinafter *Chinese Exclusion Case*]. As Professor Robert Chang notes, *Chae Chan Ping v. United States* came to be known as the *Chinese Exclusion Case* and is referred to that way in a number of cases, including in recent decisions. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (2001); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936). Further, while many courts and scholars refer to the case as *Chae Chan Ping v. United States*, Ping is a surname, so the case should be cited as *Ping v. United States*. Robert S. Chang, Whitewashing Precedent: From the Chinese Exclusion Case to *Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1222, n.13 (2018) [hereinafter Chang, Whitewashing Precedent].

[15] For example, between 1882 and 1890, the Northern District of California heard over 7,000 *habeas* cases. Christian G. Fritz, A *Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HISTORY 347, 348 (1988). Between 1888-1890, 86 percent of the petitions were granted. *Id.* at 371.

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

of powers—the horizontal division of power between the judicial as opposed to the political branches (the executive and the legislative).

The Japanese experience. These exclusionary laws had their intended effect, and Chinese immigration abated from the 1880s onward. Employers, especially Hawaiian plantation owners, who had relied on Chinese workers, needed another source of cheap, dependable labor. That source would be another Asian country, Japan. From 1880 to 1910, approximately 400,000 Japanese entered America (including Hawai'i, which was annexed as a territory in 1898).[17] Despite their different ethnicities and nationalities, Japanese and Chinese were viewed by most Americans as fungible, clumped together in a broader, racialized class—the "Oriental." Similar to what happened to the Chinese, resentment against the Japanese grew.

In May 1900, various labor organizations convened the first large-scale protest against Japanese in California.[18] San Francisco Mayor James Duval Phelan addressed the meeting:

> The Japanese are starting the same tide of immigration which we thought we had checked twenty years ago. . . . The Chinese and Japanese are not bona fide citizens. They are not the stuff of which American citizens can be made. . . . Personally we have nothing against Japanese, but as they will not assimilate with us and their social life is so different from ours, let them keep at a respectful distance.[19]

Phelan's complaint that the Japanese did not assimilate with the rest of "us" would continue to echo for decades and be used 40 years later to justify their mass incarceration during World War II.[20] While many Japanese Americans may have congregated because of their common culture, their social isolation was not self-imposed. Instead, racism, discriminatory practices, and laws that denied them from the incidents of full citizenship excluded them from mainstream society.

The popular press warned of the purported "yellow peril" facing the country. In early 1905, a San Francisco Chronicle article, under the headline, "The Japanese Invasion: The Problem of the Hour," predicted that "the brown stream of Japanese immigration" would become a "raging torrent."[21] Headlines in the following months depicted the Issei as a scourge on society: "Crime and Poverty Go Hand in Hand with Asiatic Labor;" "Japanese a Menace to American Women;" "Brown

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[17] CHAN, *supra*, at 3.

[18] ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA, AND THE STRUGGLE FOR JAPANESE EXCLUSION 21 (1966) [hereinafter DANIELS, POLITICS]. Portions of the history of anti-Japanese sentiment are drawn from LORRAINE K. BANNAI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 7-8 (2015).

[19] DANIELS, POLITICS, at 21 (quoting S.F. EXAMINER, May 8, 1900; S.F. CHRONICLE, May 8, 1900).

[20] In 1943, the United States Supreme Court noted that the failure of Japanese Americans to assimilate supported to the argument that they posed a risk of espionage and sabotage during World War II. *See* Hirabayashi v. United States, 320 U.S. 81, 96-98 (1943) [hereinafter *Hirabayashi I*].

[21] DANIELS, POLITICS, at 25 (quoting S.F. CHRONICLE, Feb. 23, 1905).

Men an Evil in the Public Schools;" and "The Yellow Peril– How Japanese Crowd Out the White Race."[22]

In May 1905, delegates from 67 organizations met in San Francisco to form the Japanese and Korean Exclusion League.[23] The League argued for the exclusion of the Japanese as threats to white society and its economic well-being: "[w]e cannot assimilate with them without injury to ourselves . . . [w]e cannot compete with a people having a low standard of civilization, living and wages."[24]

In 1907, the exclusionists won a ban on the further entry of young laborers from Japan.[25] The stage was set in 1906 when the San Francisco School Board ordered Japanese American children into its segregated "Oriental" school,[26] sparking an international crisis with Japan. President Theodore Roosevelt could not casually dismiss Japan's protests because Japan had become a world-class military power. In the end, Roosevelt struck a political compromise with San Francisco: the Japanese pupils would be allowed to attend White American schools in exchange for Roosevelt's promise to decrease Japanese immigration. Roosevelt kept his promise and negotiated in 1907 and 1908 a "Gentlemen's Agreement"[27] that limited the immigration of Japanese laborers, through informal arrangements, without passage of express (and thus more insulting) legislation.

The experience of other Asian groups. Most Asian ethnic groups experienced hostility similar to the Chinese and Japanese immigrants. During the early 1900s, about 7,000 Asian Indians arrived in Hawai'i and the mainland.[28] In early 1908, a mob drove approximately 100 Asian Indian farmworkers out of their camp north of Sacramento, California, and set it on fire.[29] Korean immigrants, whose numbers were about the same,[30] received no better treatment. In an incident in June 1913, 15 Korean immigrants hired to pick fruit on a farm in Hemet, California, were surrounded by a several hundred unemployed Whites who told them to leave.[31] Immigration from the Philippines started in 1900 and continued into the 1930s, for a total of approximately 180,000 persons.[32] In 1928, a mob of 400 beat up dozens

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[22] DANIELS, POLITICS, at 25 (quoting S.F. CHRONICLE, Feb. 23-March 13, 1905).
[23] DANIELS, POLITICS, at 27. The League later became the Asiatic Exclusion League. *See also* Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61, 64 (1947).
[24] DANIELS, POLITICS, at 28 (quoting Asiatic Exclusion League, Proceedings (San Francisco, 1907-12), May 1910, pp.13-14).
[25] DANIELS, POLITICS, at 44.
[26] DANIELS, POLITICS, at 32-34 (quoting Board resolution on p.5 of report of Victor H. Metcalf, Roosevelt's Secretary of Commerce and Labor, U.S. Congress, Senate, *Japanese in the City of San Francisco, Cal.*, 59th Cong., 2d sess., Doc. 147 (Washington, 1907)).
[27] *See* 65 CONG. REC. 6073-74 (1924) (reprinting letter from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes, Apr. 10, 1924) (summarizing terms of the agreement).
[28] CHAN, *supra*, at 3.
[29] CHAN, *supra*, at 52.
[30] CHAN, *supra*, at 3.
[31] CHAN, *supra*, at 52.
[32] CHAN, *supra*, at 3.

of Filipinos and killed one in an attack on the Northern Monterey Filipino Club.[33]

A racial bar to Asian immigrants. Asian immigration largely ended with the Immigration Act of 1917,[34] which excluded immigrants in the Asiatic Barred Zone, encompassing India, Southeast Asia, and the Pacific Islands. Japanese and Chinese laborers had already been excluded under the Gentleman's Agreement and the Chinese Exclusion Act. Migrants from the Philippines were exempt from this exclusion law since they lived under the jurisdiction of the U.S., given that the Philippines was a U.S. insular territory and they were thus classified as U.S. nationals.

Seven years later, Congress took a more drastic step in enacting the Immigration Act of 1924.[35] Significantly, the Act barred entry of all "aliens ineligible for citizenship." Since only Whites, persons of African descent, and certain Mexicans[36] were at that time eligible for citizenship, this law effectively barred entry of Asians. In support of the legislation, V.S. McClatchy, the influential former publisher of the Sacramento Bee stated:

> Of all the races ineligible for citizenship under our law, the Japanese are the least assimilable and the most dangerous to this country. . . . They come here specifically and professedly for the purpose of colonizing and establishing here the proud Yamato race. . . . In pursuit of their intent to colonize this country with that race they seek to secure land and found large families. . . . They have greater energy, greater determination, and greater ambition than the other yellow and brown races ineligible to citizenship, and with the same low standard of living, hours of labor, use of women and child labor, they naturally make more dangerous competitors in an economic way.[37]

The law cut off the substantial stream of Japanese immigration—principally wives and children of male laborers already in the United States—that had continued despite the Gentlemen's Agreement. In 1934, the Tydings-McDuffie Act stripped all Filipinos of national status and declared them aliens, which immediately subjected them to the exclusionary 1924 Act.[38]

At the time of World War II, these Asian ethnicities—Chinese, Japanese, Korean, South Asian, and Filipino—were the only ones present in any appreciable numbers in the United States. All others were kept out.

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[33] CHAN, *supra*, at 53.
[34] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1943).
[35] Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1952).
[36] According to the 1848 Treaty of Guadalupe Hildago, which concluded the United States-Mexican War, those Mexicans who resided on territory ceded to the United States could elect U.S. citizenship. Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.
[37] Hearings before the U.S. Senate Committee on Immigration on S. 2576, 68th Cong., 1st sess., at 5-6 (March 11, 1924, Washington, DC), pp. 5-6, 34 (quoted in DANIELS, POLITICS, at 99).
[38] In exchange, the Act promised Filipino independence 12 years later. Tydings-McDuffie Act, Pub. L. No. 73-127, 48 Stat. 456 (1934).

The modern context. These exclusionary laws did not loosen until the mid-20th century. In 1952, Congress passed the McCarran-Walter Act,[39] which erased some of the color bar from our immigration laws. But explicit racial discrimination against Asians did not end until the comprehensive 1965 immigration law reform,[40] which abolished the 1924 national origins quota system and adopted uniform country quotas for immigration. And that is when the demographics of Asian America begin to change radically, in absolute size and composition. To get some sense of the magnitude of change, consider the following data: in 1965, Asian Americans numbered 1 million; by 2010, they numbered almost 14.7 million (4.8 percent of the national population).[41]

b. Chinese Exclusion

With this brief historical overview, we can now return to examine a set of crucial immigration cases decided in the late 19th century. At that time, the visage of the illegal or unwanted immigrant on the West Coast was distinctly Chinese. As mentioned earlier, the federal government initially looked upon Chinese immigration favorably. Pursuant to the 1868 Burlingame Treaty, Chinese immigrants could freely migrate in and out of the country.[42]

However, after domestic economic and cultural pressures to exclude the Chinese increased, the Burlingame Treaty was renegotiated in 1880 to allow the United States to restrict, but not completely ban, the immigration of laborers. Two years later, Congress exercised the option created by the 1880 renegotiation and passed the Chinese Exclusion Act,[43] which barred entry of laborers for ten years.

Unfortunately for the Chinese exclusionists, the 1882 Act continued to allow those Chinese in the United States as of November 17, 1880—the date the 1880 treaty was signed—to go back and forth freely between the countries. Chinese who were stopped at the border claimed that they had resided in the United States before November 17, 1880. Thus, under the express terms of the 1882 Act, they had the right to reenter.

To close this loophole, in 1884 Congress passed a law that required a specific

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[39] Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

[40] Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

[41] Beginning with the 2000 census, people were given the opportunity to report more than one race. The 14.7 million figure in 2010 measures those reporting only one race, "Asian." For those who marked "Asian" and some other race, the figure rises to 17.3 million (5.6% of the population). Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, U.S. CENSUS BUREAU (Mar. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

[42] Treaty Between the United States of America and the Ta-Tsing Empire, U.S.-China, June 18, 1858, 16 Stat. 739, *available at* http://content.cdlib.org/ark:/13030/hb4m3nb03h/?order=2&brand=calisphere [Burlingame Treaty, also known as the Burlingame-Seward Treaty of 1868].

[43] Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 58 (repealed 1943); Treaty of Commerce and Navigation, U.S.-China, Nov. 17, 1880, 22 Stat. 826.

"reentry certificate"[44] as the sole evidence of having been present in the United States as of the treaty's signing. But this attempted solution failed. Chinese claimed—and it is hard to know what percentage truthfully—that they had resided in the United States as of November 17, 1880, but had departed to China *before* the reentry certificate requirement had been instituted in 1884. Thus they could not possibly possess a certificate that had not existed when they had departed. In *Chew Heong v. United States*,[45] the U.S. Supreme Court accepted this argument and explained that there would be no greater injustice than demanding the impossible.

i. Re-entry certificates

Increasingly irritated by the Chinese immigration problem, in 1888 Congress passed the drastic Scott Act,[46] which barred the reentry of Chinese who had lived in the United States, even if they held a reentry certificate. The validity of the Scott Act was the subject of the following excerpted case.

Chae Chan Ping v. United States
("The Chinese Exclusion Case")

130 U.S. 581 (1889)

Mr. Justice FIELD delivered the opinion of the Court.

The appellant is a subject of the emperor of China, and a laborer by occupation. He resided at San Francisco, Cal., following his occupation, from some time in 1875 until June 2, 1887, when he left for China. . . . On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steam-ship Belgic, which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officers his certificate, and demanded permission to land. The collector of the port refused the permit, solely on the ground that under the act of congress approved October 1, 1888, supplementary to the restriction acts of 1882 and 1884, the certificate had been annulled, and his right to land abrogated, and he had been thereby forbidden again to enter the United States. 25 St. p. 504, c. 1064. * * *

The appeal involves a consideration of the validity of the act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return.

[After discussing prior treaties between the United States and China that expressed "the general desire that the two nations and their peoples should be drawn closer together," the Court addressed the development of a more recent

[44] Act of Jul. 5, 1884, ch. 220, § 6, 23 Stat. 115, 116-17 (repealed 1943).
[45] 112 U.S. 536 (1884).
[46] Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943).

"well-founded apprehension . . . that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there."]

A few words on this point may not be deemed inappropriate here, they being confined to matters of public notoriety, which have frequently been brought to the attention of congress.

The discovery of gold in California in 1848, as is well known, was followed by a large immigration thither from all parts of the world, attracted not only by the hope of gain from the mines, but from the great prices paid for all kinds of labor. The news of the discovery penetrated China, and laborers came from there in great numbers, a few with their own means, but by far the greater number under contract with employers, for whose benefit they worked. These laborers readily secured employment, and, as domestic servants, and in various kinds of outdoor work, proved to be exceedingly useful. For some years little opposition was made to them except when they sought to work in the mines, but, as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field.

The competition steadily increased as the laborers came in crowds on each steamer that arrived from China, or Hong Kong, an adjacent English port. They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.

The differences of race added greatly to the difficulties of the situation. Notwithstanding the favorable provisions of the new articles of the treaty of 1868, by which all the privileges, immunities, and exemptions were extended to subjects of China in the United States which were accorded to citizens or subjects of the most favored nation, they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.

In December, 1878, the convention which framed the present constitution of California, being in session, took this subject up, and memorialized Congress upon it, setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their

immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well-nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the State, without any interest in our country or its institutions; and praying Congress to take measures to prevent their further immigration. This memorial was presented to Congress in February, 1879.

So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific Coast and from private individuals, that Congress was impelled to act on the subject. [The Court related the problem that Chinese immigrants seeking to reenter the country were fraudulently stating they had departed the country prior to May 1882 and thus had no reentry certificate. In response to this problem, Congress passed new legislation on October 1, 1888, which the Court discussed as follows.]

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.["]
>
> "SEC. 2. That no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.["]
>
> "SEC. 4. That all such part or parts of the act to which this is a supplement as are inconsistent herewith are hereby repealed.["]

The validity of this act, as already mentioned, is assailed, as being in effect an expulsion from the country of Chinese laborers in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress. . . . It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of congress. * * *

The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts. * * *

This 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. When once it is established that Congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination. Congress has the power under the

constitution to declare war, and in two instances where the power has been exercised—in the war of 1812 against Great Britain, and in 1846 against Mexico—the propriety and wisdom and justice of its action were vehemently assailed by some of the ablest and best men in the country, but no one doubted the legality of the proceeding, and any imputation by this or any other court of the United States upon the motives of the members of congress who in either case voted for the declaration, would have been justly the cause of animadversion. . . . [T]he province of the courts is to pass upon the validity of laws, not to make them, and when their validity is established, to declare their meaning and apply their provisions. All else lies beyond their domain.

There being nothing in the treaties between China and the United States to impair the validity of the act of congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so, it must be because it was not within the power of congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. * * *

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. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. 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; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make 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 power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract.

Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. * * *

Order affirmed.

Notes & Questions

1. *The Scott Act's impact*. The enforcement of the Scott Act prevented between 20,000 and 30,000 Chinese—who had reasonably relied on their ability to return to America—from reentering the United States. Those with immediate family or more than $1,000 of property in the United States were allowed to return six years later, pursuant to an 1894 treaty.

2. *Race and legal analysis*. Justice Field, who authored the unanimous opinion, made clear that "[t]he differences of race added greatly to the difficulties of the situation." In other words, the Chinese immigration issue was not only about economic competition or political relations between China and the United States. It was also about race.

In providing the history and context of this case, how does the U.S. Supreme Court characterize the Chinese "race"? What are the core qualities of the Chinese, both positive and negative? Pay close attention to the language used and the characteristics emphasized. Does Justice Field rely on any evidence to support his discussion of those characteristics? If not, would there have been any reliable evidence that could support those characteristics?

3. *National security issues*. The U.S. Supreme Court concluded that Congress had the power to enact the Scott Act. Specifically, that power is located in Congress's ability to exclude aliens in the pursuit of national security.

a. *Framing the debate*: Is it odd that an immigration case decided neither during wartime nor under any military urgency is framed in national security terms? In the Court's view, does "national security" encompass more than the protection of the country during time of declared war?

b. *Racial threat*: Try to link up how the Chinese were racialized and the Court's anxieties about national security. What specific aspects about the Chinese make them such potent threats?

c. *Judicial deference to national security assessments*: What is the Court's stance toward reviewing Congressional decisions about national security? Is this a practical, sensible view given the institutional limitations of the judiciary? Recall that courts typically find facts pursuant to an elaborate process, which includes complicated rules of procedure, rules of evidence, and burdens of proof—all driven by the adversarial process of dueling parties. In addition, judges are not military experts, cannot independently investigate facts, and cannot receive information in real time. Keep these factors in mind, for they resurface prominently in the Japanese American incarceration cases.

4. *Have things changed?* To what extent have the racial meanings ascribed to the Chinese or other Asian ethnicities changed after more than a century? For example, are Asian Americans still viewed as forever foreign?[47] Asian Americans frequently comment that they are asked "where are you from?" and the questioner often demands the name of an Asian country. Consider these examples:

- Rush Limbaugh radio program 2011: Rawlein Soberano reported that, when Chinese President Hu Jintao visited Washington in January 2011, conservative radio show host Rush Limbaugh tried to mimic him: "Hu Jintao just got going ching, chong, ching, chong, cha." Several lawmakers and a number of civil rights groups demanded that Limbaugh apologize for what they called blatant racism. Sen. Leland Yee of California, Chairman of the California Senate's Committee on Asian-Pacific Islander Affairs, was one of the first to call Limbaugh for an apology. Less than a week later, Yee reported numerous racially charged death threats,

[47] Thessaly La Force, *Why Do Asian-Americans Remain Largely Unseen in Film and Television?,* N.Y. TIMES: T MAGAZINE (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/t-magazine/asian-american-actors-representation.html (stating, in addressing the lack of Asian Americans in film, "But even if we can prove to you that we are as good as you, the underlying message we get from the culture is that there is something else that separates us.").

including one fax addressed to "Fish Head Leland Yee" that stated in part: "Rush Limbaugh will kick your Chink ass and expose you for the fool you are."[48]

- In May 2018, U.S. Senate candidate Don Blankenship issued a campaign ad attacking Majority Leader Mitch McConnell and his wife Elaine Chao, a Chinese American, saying McConnell has a "China family" and that he created jobs for "China people."[49]
- In March 2018, while testifying at a hearing on funding to preserve World War II Japanese American camps, Interior Secretary Ryan Zinke greeted Rep. Colleen Hanabusa, a fourth-generation Japanese American, with "konnichiwa," the Japanese word for "good afternoon." Zinke's remark was criticized as a flippant and insensitive failure to distinguish between an American of Japanese ancestry and a citizen of Japan.[50]

5. *The importance of process—judicial versus administrative review*. Oftentimes, not surprisingly, the outcomes in cases are influenced not only by the substantive law, but also by the procedure used in deciding the cases: who decides the case and the process governing the way the case is decided. In many of the early immigration cases, an important issue was whether an immigration official's decision about entry was final or whether the decision was reviewable by a court of law. In *Nishimura Ekiu v. United States*,[51] the Commissioner of Immigration of the State of California refused to let a Japanese woman land because he determined that she would become a "public charge." At that time, federal law instructed that "persons likely to become a public charge" be sent back to their country of origin. Nishimura filed a *habeas corpus* petition, which is a request to a court to free the petitioner from illegal governmental detention. She argued that

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[48] Rawlein Soberano, *Leland Yee vs. Rush Limbaugh*, ASIAN AMERICAN PRESS (Feb. 17, 2011), http://aapress.com/editorial/leland-yee-vs-rush-limbaugh/. *See also* Violet Ikonomova, *Detroit Rep. Bettie Cook Scott on Asian opponent: 'Don't vote for the ching-chong!'*, DETROIT METRO TIMES (Aug. 16, 2018, 9:50 PM), https://www.metrotimes.com/news-hits/archives/2018/08/16/detroit-rep-bettie-cook-scott-on-asian-opponent-dont-vote-for-the-ching-chong.

[49] Eric Bradnew, *Blankenship goes after McConnell's 'China family' in new ad*, CNN POLITICS (May 4, 2018, 2:39 AM), https://edition.cnn.com/2018/05/03/politics/don-blankenship-mitch-mcconnell-ad; Anna Chu, *West Virginians thankfully rejected Don Blanketship's racist remarks*, THE HILL (May 14, 2018, 2:30 PM), https://thehill.com/opinion/civil-rights/387585-west-virginians-thankfully-rejected-don-blankenships-racist-remarks.

[50] Michael Livingston, *Zinke denounced for 'konnichiwa' remark during discussion of Japanese Americans internment*, L.A. TIMES (Mar. 16, 2018, 6:05 PM), https://www.latimes.com/nation/la-na-zinke-konnichiwa-20180316-story.html.

[51] Nishimura Ekiu v. United States, 142 U.S. 651 (1892). While Nishimura Ekiu's last name is likely Nishimura and this case should, therefore, probably be referred to as Nishimura v. United States, not Nishimura Ekiu v. United States, it, like other older cases involving Asian parties, is commonly referred to by including the party's full name. We will refer to her case the way it is referred to in the case and by later commentators (with her full name), with due concern, however, that full names were used to emphasize the foreignness of Asians.

she was eligible to enter the United States and that letting the Commissioner of Immigration make the final judgment of whether she was or was not likely to be a "public charge," without any possibility of judicial review, violated her constitutional due process rights.

The U.S. Supreme Court rejected Nishimura's petition. It held that Congress, by statute, had made the Commissioner of Immigration the sole and exclusive judge of whether someone was a "public charge." Moreover, doing so was perfectly constitutional:

> It is not within the province of the judiciary to order that foreigners who had never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within the powers expressly conferred by Congress, are due process of law.[52]

Nishimura Ekiu is an important addition to *Chae Chan Ping*. In *Chae Chan Ping*, the Court held that Congress and the executive branch had power over *substantive* immigration policies, such as whether to exclude Chinese laborers. In *Nishimura Ekiu*, the Court held that Congress and the executive branch also enjoyed power over the fact-finding *procedures* critical to determining whether a person has the right to land under substantive immigration law. Federal power over both substantive and procedural aspects of immigration was exercised in overtly biased ways to prevent immigration of Asians, whether from China or Japan.

ii. Registration certificates

In 1892, the same year *Nishimura Ekiu* was decided, Congress passed the Geary Act,[53] which extended the 1882 Exclusion Act for another ten years. It also created a registration requirement for all Chinese laborers within the United States. Those found without a certificate of residence from the collector of internal revenue bore the burden of demonstrating through "at least one credible white witness" that they were legal residents. The Chinese community engaged in civil disobedience; nationwide only 20 percent (less than 2 percent in San Francisco[54]) complied with the certificate requirements. Three Chinese immigrants challenged the draconian law, resulting in the following case. Two had been arrested for failure to have certificates of residence. The third had applied for a certificate, which was denied because the witnesses he produced were Chinese, not White.[55] All three faced deportation and appealed the denials of their

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[52] *Id.* at 651, 660.
[53] Act of May 5, 1892, ch. 60, § 1, 27 Stat. 25 (repealed 1943).
[54] HIROSHI MOTOMURA, AMERICANS IN WAITING 35 (2006).
[55] Fong Yue Ting v. United States, 149 U.S. 698, 699 (1893).

requests for freedom.

Fong Yue Ting v. United States

149 U.S. 698 (1893)

Mr. Justice GRAY, after stating the facts, delivered the opinion of the Court.

[After discussing Nishimura Ekiu v. United States and Chae Chan Ping v. United States, the Court continued]. The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the constitution. * * *

In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the constitution to the other departments of the government. * * *

In Nishimura Ekiu's case, it was adjudged that, although congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency. * * *

The power of congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides. * * *

This section [6 of the 1892 Act] proceeds to enact that any Chinese laborer within the limits of the United States, who shall neglect, fail or refuse to apply for a certificate of residence within the year, or who shall afterwards be found within the jurisdiction of the United States without such a certificate, "shall be deemed and adjudged to be unlawfully within the United States." The meaning of this clause, as shown by those which follow, is not that this fact shall thereupon be held to be conclusively established against him, but only that the want of a certificate shall be prima facie evidence that he is not entitled to remain in the

United States; for the section goes on to direct that he "may be arrested . . . [and] deported . . . unless he shall establish clearly, to the satisfaction of said judge, that by . . . unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act. * * *

The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, "by at least one credible white witness," may have been the experience of Congress, as mentioned by Mr. Justice Field in Chae Chan Ping's case that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath." And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, "by the oath or affirmation of citizens of the United States." Acts of March 22, 1816, c. 32, § 2, 3 Stat. 259. * * *

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

Mr. Justice BREWER dissenting.

I rest my dissent on three propositions: First, that the persons against whom the penalties of section 6 of the act of 1892 are directed are persons lawfully residing within the United States; secondly, that as such they are within the protection of the Constitution, and secured by its guarantees against oppression

and wrong; and, third, that section 6 deprives them of liberty and imposes punishment without due process of law, and in disregard of constitutional guarantees, especially those found in the 4th, 5th, 6th, and 8th articles of the amendments. * * *

[N]o act has [yet] been passed, denying the right of those laborers who had once lawfully entered the country to remain, and they are here not as travelers or only temporarily. We must take judicial notice of that which is disclosed by the census, and which is also a matter of common knowledge. There are 100,000 and more of these persons living in this country, making their homes here, and striving by their labor to earn a livelihood. They are not travelers, but resident aliens. * * *

These appellants, therefore, are lawfully within the United States, and are here as residents, and not as travelers. They have lived in this country, respectively, since 1879, 1877, and 1874—almost as long a time as some of those who were members of the Congress that passed this act of punishment and expulsion.

That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it, has long been recognized by the law of nations. * * *

It is said that the power here asserted [to deport summarily] is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely as it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as punishment for crime; but among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.

Whatever may be true as to exclusion, and as to that see Chinese Exclusion case and Nishimura Ekiu v. United States, I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. What, it may be asked, is the reason for any difference? The answer is obvious. The constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions; and it may be that the national government, having full control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders, and absolutely forbid aliens to enter. But the constitution has potency everywhere within the limits of our territory, and the powers which the national government

may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the constitution. * * *

I pass, therefore, to the consideration of my third proposition: Section 6 deprives of "life, liberty, and property without due process of law." It imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another. * * *

Once more: Supposing a Chinaman from San Francisco, having obtained a certificate, should go to New York or other place in pursuit of work, and on the way his certificate be lost or destroyed. He is subject to arrest and detention, the cost of which is in the discretion of the court, and judgment of deportation will be suspended a reasonable time to enable him to obtain a duplicate from the officer granting it. In other words, he cannot move about in safety without carrying with him this certificate. The situation was well described by Senator Sherman in the debate in the Senate: "They are here ticket-of-leave men; precisely as, under the Australian law, a convict is allowed to go at large upon a ticket-of-leave, these people are to be allowed to go at large and earn their livelihood, but they must have their tickets-of-leave in their possession." And he added: "This inaugurates in our system of government a new departure; one, I believe, never before practised, although it was suggested in conference that some rules had been adopted in slavery times to secure the peace of society."

It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guarantees of these amendments can be thus ignored in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to? * * *

In the Yick Wo case [(1886)], in which was presented a municipal ordinance, fair on its face, but contrived to work oppression to a few engaged in a single occupation, this court saw no difficulty in finding a constitutional barrier to such injustice. But this greater wrong, by which a hundred thousand people are subject to arrest and forcible deportation from the country, is beyond the reach of the protecting power of the constitution. * * *

In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, Why do they send missionaries here?

Mr. Justice FIELD dissenting.

* * * I had the honor to be the organ of the court in announcing this opinion and judgment [in Chae Chan Ping, affirming Congress's power to exclude Chinese aliens]. I still adhere to the views there expressed in all particulars; but between legislation for the exclusion of Chinese persons—that is, to prevent them from entering the country—and legislation for the deportation of those who have

acquired a residence in the country under a treaty with China, there is a wide and essential difference.

[Justice Field proceeded to criticize the Alien and Sedition Acts of 1798.] I repeat the statement, that in no other instance has the deportation of friendly aliens been advocated as a lawful measure by any department of our government. And it will surprise most people to learn that any such dangerous and despotic power lies in our government—a power which will authorize it to expel at pleasure, in time of peace, the whole body of friendly foreigners of any country domiciled herein by its permission, a power which can be brought into exercise whenever it may suit the pleasure of Congress, and be enforced without regard to the guarantees of the Constitution intended for the protection of the rights of all persons in their liberty and property. Is it possible that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized? * * *

Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens. The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent—and such consent will always be implied when not expressly withheld, and in the case of the Chinese laborers before us was in terms given by the treaty referred to—he becomes subject to all their laws, is amenable to their punishment and entitled to their protection. Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution. To hold that they are subject to any different law or are less protected in any particular than other persons, is in my judgment to ignore the teachings of our history, the practice of our government, and the language of our constitution. * * *

Let us test this doctrine by an illustration. If a foreigner who resides in the country by its consent commits a public offense, is he subject to be cut down, maltreated, imprisoned, or put to death by violence, without accusation made, trial had, and judgment of an established tribunal following the regular forms of judicial procedure? If any rule in the administration of justice is to be omitted or discarded in his case, what rule is it to be? If one rule may lawfully be laid aside in his case, another rule may also be laid aside, and all rules may be discarded. In such instances a rule of evidence may be set aside in one case, a rule of pleading in another; the testimony of eye-witnesses may be rejected and hearsay adopted, or no evidence at all may be received, but simply an inspection of the accused, as is often the case in tribunals of Asiatic countries where personal caprice and not settled rules prevail. That would be to establish a pure, simple, undisguised despotism and tyranny with respect to foreigners resident in the country by its

consent, and such an exercise of power is not permissible under our Constitution. Arbitrary and tyrannical power has no place in our system. * * *

There is no dispute about the power of congress to prevent the landing of aliens in the country; the question is as to the power of Congress to deport them without regard to the guaranties of the Constitution. The statement that in England the power to expel aliens has always been recognized and often exercised, and the only question that has ever been as to this power is whether it could be exercised by the King without the consent of Parliament, is, I think, not strictly accurate. It may be admitted that the power had been exercised by the various governments of Europe. Spain expelled the Moors; England in the reign of Edward I, banished fifteen thousand Jews; and Louis XIV, in 1685, by revoking the Edict of Nantes, which gave religious liberty to Protestants in France, drove out the Huguenots. Nor does such severity of European governments belong only to the distant past. Within three years Russia has banished many thousands of Jews, and apparently intends the expulsion of the whole race—an act of barbarity which has aroused the indignation of all Christendom. . . . [A]ll the instances mentioned have been condemned for their barbarity and cruelty, and no power to perpetuate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the constitution. * * *

The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offence. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, family and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business. * * *

I cannot but regard the decision as a blow against constitutional liberty, when it declares that congress has the right to disregard the guaranties of the Constitution intended for the protection of all men, domiciled in the country with the consent of the government, in their rights of person and property. How far will its legislation go? The unnaturalized resident feels it today, but if Congress can disregard the guaranties with respect to any one domiciled in this country with its consent, it may disregard the guaranties with respect to naturalized citizens. What assurance have we that it may not declare that naturalized citizens of a particular country cannot remain in the United States after a certain day, unless they have in their possession a certificate that they are of good moral character and attached to the principles of our Constitution, which certificate they must obtain from a collector of internal revenue upon the testimony of at least one competent witness of a class or nationality to be designated by the government?

What answer could the naturalized citizen in that case make to his arrest for deportation, which cannot be urged in behalf of the Chinese laborers of today?

Notes & Questions

1. *Understanding the Geary Act*. What precisely did the Geary Act accomplish in substance and in procedure? In what ways did it differ from the Scott Act passed four years earlier?

2. *Substantive power*. One way to challenge a statute is to argue that Congress lacked the constitutional power to enact the statute. Contrary to the states, which enjoy a general "police power," our federal government is a government of "limited powers." Accordingly, for every exercise of federal power, there must be some source of that power in the U.S. Constitution. So, from where did the majority of the U.S. Supreme Court locate Congress's power to *deport* aliens? Is this the same source as the power to *exclude* aliens? What were the dissenting Justices' views on this issue?

3. *Chinese as a race, revisited*. Recall how the Chinese were constructed as a racial group back in *Chae Chan Ping*. We see similar constructions in the majority opinion, but surprisingly different ones in the dissenting opinions. Try to identify relevant language in all three opinions.

a. The puzzling Justice Field: It would be error to think that the dissenters thought that the Chinese were equal to White Americans. For example, although Justice Field dissented in this case, he authored the majority opinion in *Chae Chan Ping*, which shut out tens of thousands of Chinese from reentry. His true feelings about the Chinese were displayed in private correspondence to John Norton Pomeroy in 1882:

> The manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable. If they are permitted to come here, there will be at all times conflicts arising out of the antagonism of the races which would only tend to disturb public order and mar the progress of the country. . . . I belong to the class, who repudiate the doctrine that this country was made for the people of all races. On the contrary, I think it is for our race—the Caucasian race.[56]

What then could explain the following language in Justice Field's dissent?

> As men having our common humanity, [the Chinese] are protected by all the guaranties of the Constitution. To hold that they are subject to any different law or are less protected in any particular than other persons, is in my judgment to ignore the teachings of our history, the

[56] ASIAN AMERICANS AND THE U.S. SUPREME COURT: A DOCUMENTARY HISTORY 81 (Hyung-Chan Kim ed., 1992) (quoting letter from Stephen Field to John Norton Pomeroy, Apr. 14, 1882).

> practice of our government, and the language of our Constitution.[57]

b. *Reconciling* Chae Chan Ping *and the dissents*: In fact, all dissenters in this case joined the unanimous majority in *Chae Chan Ping*. Why might they have had radically disparate responses to the exclusion at issue in *Chae Chan Ping* compared to the deportation at issue in *Fong Yue Ting*? In other words, for the dissenters, is there some moral or practical principle, formal rule of law, or political explanation that distinguished *Chae Chan Ping* from *Fong Yue Ting*? Should legal protections depend so much on whether an individual has gained a physical toehold in the United States, as the dissenters suggested?

4. *Fair process*. In *Fong Yue Ting*, what procedures were envisioned in the deportation process? According to the Court's majority, were these procedures adequate to the task? Again, what did the dissenting Justices think?

In 1903, *Yamataya v. Fisher*[58] (the Japanese Immigrant Case), the Court again addressed the scope of an immigrant's procedural rights. Yamataya had somehow entered the United States but was soon captured by the immigration inspector. The inspector determined that she was a "public charge" and ordered her deported. Yamataya filed a *habeas corpus* petition with the federal district court, in which she argued that she was lawfully in the United States and that the inspector's findings were made without procedural due process (that is, without adequate procedural safeguards for accuracy). On appeal, the U.S. Supreme Court pulled slightly back from its earlier holding in *Nishimura Ekiu*. At least for those persons already in the United States, the Court found that some minimal amount of process is constitutionally required for a deportation hearing. As the Court wrote:

> [I]t is not competent for . . . any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.[59]

Nevertheless, the Court held that Yamataya was given a sufficient opportunity to be heard, despite her lack of legal counsel and her inability to understand English. According to the Court, if her lack of English skills "put her at some disadvantage . . . that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by *habeas corpus*."[60]

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[57] Fong Yue Ting, 149 U.S. at 754 (Field, J. dissenting).
[58] Yamataya v. Fisher, 189 U.S. 86 (1903).
[59] *Id.* at 101.
[60] *Id.* at 102.

5. *Lasting precedent—The plenary power doctrine*. These four cases—*Chae Chan Ping*, *Nishimura Ekiu*, *Fong Yue Ting*, and *Yamataya*—constitute the original case-law foundations of the "plenary power doctrine." As described by immigration scholar Hiroshi Motomura, the

> plenary power doctrine's contours have changed over the years, but in general the doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled.[61]

The government has continued to assert that it has wide latitude on matters involving immigration, relying on precedent developed in the early Chinese exclusion cases. See Chapter 8 for discussion of how cases like *Chae Chin Ping* form the basis for government's national security arguments today, even if the government does not explicitly cite them.[62] Should we be concerned that cases like *Chae Chan Ping* are read to require courts to defer to the government on matters involving immigration or national security? Why?

In sum, these immigration cases are not only important markers in Asian American legal history but are the building blocks of an important, controversial power still exercised by the federal government.

2. Citizenship

Despite the laws that excluded Asians from American shores, many persons of Asian descent gained entry into the United States. To enter the political community, however, they needed citizenship. Citizenship on the federal and state levels determined whether one could vote, hold political office, and have access to courts. There are two principal ways to obtain federal citizenship: by naturalization and by birth on American soil.

a. Naturalization

Article II of the U.S. Constitution delegates to Congress the power to create uniform rules of naturalization.[63] Congress exercised this power in 1790 when it enacted the first federal naturalization statute. This statute restricted naturalization to only "free White persons."[64] But did Asians fit into this category? A pair of cases that reached the U.S. Supreme Court in 1922 and 1923, *Ozawa v. United States* and *United States v. Thind*, provided decisive answers.

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[61] Hiroshi Motomura, Immigration *Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,* 100 YALE L.J. 545, 547 (1990).
[62] *See*, *e.g.,* Chang, Whitewashing Precedent, 68 CASE WESTERN L. REV. 1183.
[63] U.S. CONST. art. II § 8.
[64] Naturalization Act of 1790, ch. 3, 1 STAT. 103 (repealed 1795).

Before turning to these two cases, it may be helpful to consider some current scholarly ideas about race.

Note: Race as a Social Construction

The naturalization cases required courts to determine who was "White." As seen in the prior cases, judges did not distinguish much, if at all, between race as grounded in physical difference and race as grounded in cultural difference. In the so-called "Chinese Exclusion case" of *Chae Chan Ping*, the U.S. Supreme Court complained of "foreigners of a different race in this country, who will not assimilate with us."[65]

Further, the Court did not inquire into the barriers to assimilation faced by Chinese immigrants. Nor was the Court later able to accept that a Japanese immigrant such as Ozawa who had deliberately assimilated himself into White American culture (by speaking English, etc.) could be thought of as "White." Immigrants from Asia were thought to be physically different from, and hence culturally unassimilable to, European immigrants—and that was that. The legal system reinforced the idea that race was the extrapolation of physical differences to seemingly "natural" cultural traits and social hierarchies. While this strand of racial thinking is associated with the 19th century, it persists today under the rubric of "scientific racism."[66]

By the early 20th century, social scientists such as Franz Boas had challenged if not completely discredited this view of race by arguing that culture rather than biology best explained human difference.[67] The scientific project of identifying mutually exclusive racial categories ultimately faltered due to internal illogic. As legal historian Peggy Pascoe points out, "culturalists delighted in pointing out the discrepancies between them, showing that scientific racists could not agree on such seemingly simple matters as how many races there were or what criteria—blood, skin color, hair type—best indicated race."[68] Legal cases testing the meaning of "White" in various federal and state laws highlighted the absurdities of scientific racial classification (such as questions over whether dark-skinned Aryans such as South Asians were "White") as well as the obvious racism embodied in the biological race approach.[69]

The early 21st century approach toward race is arguably dominated by the "social construction" view. That is, race is not largely determined by biology or genetics; instead, race should be understood as a social, historical, and cultural construction, which is the product of human choice. On the one hand, this seems

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[65] *Chinese Exclusion Case*, 130 U.S. at 606.
[66] Edward Burmila, *Scientific Racism Isn't "Back"—It Never Went Away*, THE NATION (Apr. 6, 2018), https://www.thenation.com/article/scientific-racism-isnt-back-it-never-went-away/.
[67] Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 47 (1996).
[68] *Id.* at 54.
[69] *See id.* at n.22.

to be a more sophisticated understanding of race. On the other hand, what does it really mean to be a "social construction?" Isn't everything arguably a social construction—for example, New York, beauty, war? If so, then what is helpful about pointing out that race specifically is a "social construction?" The next excerpt provides greater precision and clarity about this term, albeit through a slightly unexpected framing.

Jerry Kang, *Cyber-race*

113 HARV. L. REV. 1130, 1138-47 (2000)

Race continues to be a fundamental axis of social, economic, cultural, and political organization. Race affects both the symbolic and material realms of our lives, shaping our self-conceptions and altering our life-chances. Race affects who we befriend, date, and marry. Race affects our purchases. Race affects our vote. Race affects our relationship with law enforcement. How does race structure our lives so powerfully?

Different theories approach this question in different ways to provide different insights. . . . Among possible candidates, one promising method is the social cognitive approach, which is empirically well grounded and has impressive explanatory and critical power. Applying this method, [here is a] descriptive model of racial mechanics: In any social interaction, we map each other into racial categories that trigger associated racial meanings. These meanings influence the terms, nature, and evolution of the interaction. As shorthand, I coin the term "racial schema" to refer to all three elements: (i) racial categories, through which the basic concept of race is understood; (ii) rules of racial mapping, which are used to classify individuals into categories; (iii) racial meanings, which are cognitive beliefs about and affective reactions to the categories.

To elaborate each element, I employ the following fictional stories:

Late-night Walk: After a long conference, I am walking in a strange downtown, late at night, looking for a taxi. I see two people approaching me. From a distance, I ascertain their rough size. From their clothing and body shape, I guess that they are male. As they walk closer, I see that they are Black. For reasons I cannot explain, my heartbeat quickens, and I become anxious, glancing around for other people. I begin taking a few steps to cross to the other side of the street but decide against it. Instead, I grip my briefcase more tightly, closer to my body, then walk at a faster pace. As I pass the Black men, I peek over my shoulder just to make sure that they have walked on by.

Personal Ads: I am searching the personal classifieds for advertisements placed by Asian American women. Thankfully, the ads not only provide racial self-identifications but also state the specific races that the person is willing to date. A friend asks me why I am searching so narrowly. I respond, defensively, with many reasons. Some of the reasons are assumptions about Asian American women—their appearance, their personality, their likely interest in an Asian American man. I say, "I know this is a generalization, but we will probably have

more in common." I also explain that an Asian male/Asian female couple does not raise eyebrows although other matches might.

Race is a familiar concept within our culture. Although most Americans cannot rattle off a crisp definition, we know "race" when we see it. Most people understand race as a biological characteristic, inherited from our parents and manifested in physical appearance. Integral to the concept of race is the typology of racial categories. In fact, the way that many people define race is simply to list categories, such as White, Black, Asian, Latino/a, and American Indian. Sometimes, we are not exactly sure whether a particular category counts as a race as opposed to a nationality, ethnicity, or religion. But we should not be chided for such imprecision because racial categories reflect fickle social conventions, not good science.

Upon encountering an individual, we collect data through our senses to map the individual to a racial category. In the *Late-night Walk*, such racial mapping is based on physical appearance. By looking at the men's skin color, hair, and facial features, I automatically map them into the "African American" racial category. The architecture of a face-to-face interaction permits this classification. . . . Racial mapping can also take place discursively, as in the *Personal Ads*. The advertisement could have been silent on race. . . . But in the marketplace for romance, disclosing race is the current fashion, and neither public morality nor law protests.

Racial mapping triggers racial meanings—cognitive beliefs about and affective reactions to—people in these racial categories. * * *

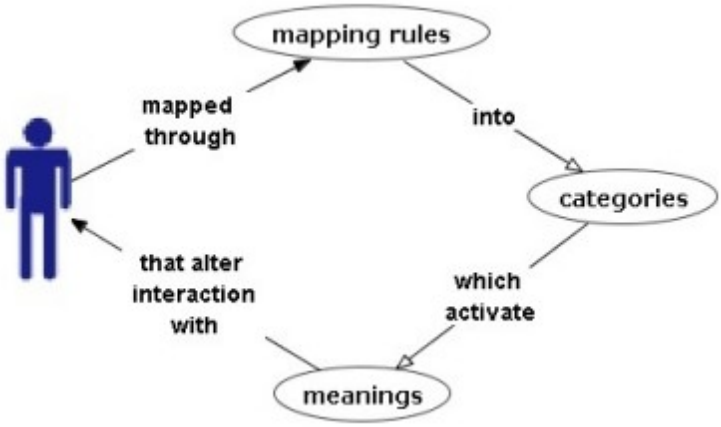
Racial meanings are triggered, often automatically, without self-awareness, and once triggered, they alter our behavior. In some cases, the change seems trivial, as in the *Late-night Walk.* But my change in body language will be noticed by the African American men. If they intended me no harm, my reaction is a palpable insult. . . . In the *Personal Ads*, by focusing narrowly on Asian American female companions, I cut myself off from possible intimacies with women of other races. What would happen if classified advertisements were colorblind, if they operated under a racial veil?

In these ways, racial mechanics alter interpersonal interactions. These microlevel changes accumulate over time and people to produce enduring macro-level effects on our culture, economics, and politics. What is more, racial mechanics may be self-reinforcing. For example, if the racial meanings associated with Black men include aggressiveness, I will react accordingly. Not surprisingly, Black men will perceive these behavioral cues, and, fed up with paying this Black Tax, may convey hostility in their body language or speech, thereby reinforcing my racial meanings.

[T]he description of racial mechanics I offer—because of its simplicity—gives us practical tools with which to solve problems. . . . This social cognitive model also particularizes a fundamental theme of Critical Race Theory that "race is a social construction." "Race," in the sense of its racial categories, is a social construction, which lacks meaningful biological bases; the same is true for the

rules of racial mapping and the social meanings we infuse into racial categories.

Notes & Questions



1. *Racial schema*. The picture below summarizes how racial schemas work:

The basic point is that all the ovals in the diagram—the racial *mapping rules*, the racial *categories* themselves, and the racial *meanings*—are all socially constructed. Human beings, exercising their agency, make them up. Racial schemas and their elements provide us a vocabulary with which to describe cases we have already studied.

2. *Racial meanings*. Consider the first set of cases we read in this chapter, such as *Chae Chan Ping* and *Fong Yue Ting*. One reason why they are interesting is because they bluntly revealed the racial meanings that judges (and much of America) then had about the Chinese people. Can you list these stereotypes and prejudices? Moreover, the judges did not believe that these meanings were due to trivial differences in environment or culture. Rather, they believed them to be inherent, essential, and fundamentally biological. So, when people say, "race is a social construction," quite often they mean to challenge (negative) racial meanings that are assumed to be both accurate and biologically determined.

3. *Racial mapping rules*. The following two opinions, the naturalization cases, are slightly different in that they focus more on the rules by which we classify individuals or entire groups into preexisting racial categories. Again, by demonstrating the arbitrariness or social and historical contingency of these classifications, one can show that "race is a social construction."

4. *Racial categories*. Finally, what about racial categories? Should ethnicities as different as Chinese, Japanese, or South Asian be classified into a single racial category called "Asian"? If so, who decides? Consider also how even the racial

terminology for this category has changed over time: "yellow," "Mongolian," "Asiatic," "Oriental," "Asian," "Asian American," or "Asian Pacific American"?

5. *Richard Posner as a social constructionist?* Judge Richard Posner, typically associated with conservative and libertarian views, addressed whether discrimination on the basis of being Iranian might count as racial discrimination under a civil rights statute, 42 U.S.C. § 1981. He wrote:

> Race, nationality, and ethnicity are sometimes correlated, but they are not synonyms. A racial group as the term is generally used in the United States today is a group having a common ancestry and distinct physical traits. The largest groups are whites, blacks, and East Asians. Iran is a country, not a race, and an "Iranian" is simply a native of Iran. Iranians and other Central Asians are generally regarded as "white," whatever their actual skin color; many Indians, for example, are dark. Some Central Asians are indistinguishable in appearance from Europeans, or from Americans whose ancestors came from Europe, while others (besides Indians), for example Saudi Arabians, would rarely be mistaken for Europeans. Some Iranians, especially if they speak English with an Iranian accent, might, though not dark-skinned, strike some Americans as sufficiently different looking and sounding from the average American of European ancestry to provoke the kind of hostility associated with racism. Yet hostility to an Iranian might instead be based on the fact that Iran is regarded as an enemy of the United States, though most immigrants to the United States from Iran are not friends of the current regime. So one would like to know whether the plaintiff is charging that the discrimination against her is based on politics or on her seeming to be member of a foreign "race." (Her brief is unclear on the point.)[70]

Is this judicial analysis based upon a social constructionist view of race?

As you read the next two cases, reconsider the historical context in the early 20th century. Anti-Asian sentiments abounded. In 1917, the Asiatic Barred Zone ended immigration from various Asian nations such as India. And in 1924 (two years after *Ozawa*, one year after *Thind*), Congress adopted the national origins quota system, which ended nearly all legal Asian immigration.[71]

Ozawa v. United States

260 U.S. 178 (1922)

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The appellant is a person of the Japanese race born in Japan. He applied, on October 16, 1914, to the United States District Court for the Territory of Hawaii to be admitted as a citizen of the United States. His petition was opposed by the

[70] Abdullahi v. Prada USA Corp., 520 F.3d 710, 712 (7th Cir. 2008).
[71] Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159-60 (repealed 1952).

United States District Attorney for the District of Hawaii. Including the period of his residence in Hawaii, appellant had continuously resided in the United States for twenty years. He was a graduate of the Berkeley, California, High School, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home. That he was well qualified by character and education for citizenship is conceded. * * *

These questions for purposes of discussion may be briefly restated:

1. Is the Naturalization Act of June 29, 1906, limited by the provisions of § 2169 of the Revised Statutes of the United States?
2. If so limited, is the appellant eligible to naturalization under that section?

* * * [Ozawa's first argument was that the comprehensive Naturalization Act of 1906 instituted uniform rules of naturalization, without any racial restriction. Although § 2169 of the Revised Statutes did contain a racial restriction, Ozawa argued that by its very terms, that section applied only to Title XXX, of which the 1906 Act was not a part. The Court rejected that argument:] In all of the naturalization acts from 1790 to 1906 the privilege of naturalization was confined to "White persons" (with the addition in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. If Congress in 1906 desired to alter a rule so well and so long established, it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms. . . . We are, therefore, constrained to hold that the Act of 1906 is limited by the provisions of § 2169 of the Revised Statutes.

Second. This brings us to inquire whether, under § 2169, the appellant is eligible to naturalization. * * *

On behalf of the appellant it is urged that we should give to this phrase the meaning which it had in the minds of its original framers in 1790 and that it was employed by them for the sole purpose of excluding the black or African race and the Indians then inhabiting this country. It may be true that these two races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be excluded but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges. * * *

If it be assumed that the opinion of the framers was that the only persons who would fall outside the designation "white" were Negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable

them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be Negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded.

The question then is, Who are comprehended within the phrase "free white persons?" Undoubtedly the word "free" was originally used in recognition of the fact that slavery then existed and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

We have been furnished with elaborate briefs in which the meaning of the words "white person" is discussed with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note the fact that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.

Beginning with the decision of Circuit Judge Sawyer, in In re Ah Yup, 5 Sawy. 155 (1878), the federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race. Among these decisions, see for example: In re Camille, 6 Fed. 256 [(1880)]; In re Saito, 62 Fed. 126 [(1894)]; In re Nian, 6 Utah 259 [(1889)]; In re Kumagai, 163 Fed. 922 [(1908)]; In re Yamashita, 30 Wash. 234, 237 [(1902)]; In re Ellis, 179 Fed. 1002 [(1910)]; In re Mozumdar, 207 Fed. 115, 117 [(1931)]; In re Singh, 257 Fed. 209, 211-212 [(1919)]; and Petition of Charr, 273 Fed. 207 [(1921)]. With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested.

The determination that the words "white person" are synonymous with the words "a person of the Caucasian race" simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words "white person" mean a Caucasian is not to

establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this Court has called, in another connection "the gradual process of judicial inclusion and exclusion."

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.

The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

United States v. Thind

261 U.S. 204 (1923)

Mr. Justice SUTHERLAND delivered the opinion of the Court.

[The central question presented was: "Is a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?"]

Section 2169, Revised Statutes (Comp. St. § 4358), provides that the provisions of the Naturalization Act "shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

If the applicant is a white person within the meaning of this section he is entitled to naturalization; otherwise not. In Ozawa v. United States, we had occasion to consider the application of these words to the case of a cultivated Japanese and were constrained to hold that he was not within their meaning. . . . Following a long line of decisions of the lower Federal courts, we held that the words imported a racial and not an individual test and were meant to indicate only persons of what is popularly known as the Caucasian race. But as there pointed out, the conclusion that the phrase "white persons" and the word "Caucasian" are synonymous does not end the matter. It enabled us to dispose of the problem as it was there presented, since the applicant for citizenship clearly fell outside the zone of debatable ground on the negative side; but the decision still left the question to

be dealt with, in doubtful and different cases, by the "process of judicial inclusion and exclusion." Mere ability on the part of an applicant for naturalization to establish a line of descent from a Caucasian ancestor will not ipso facto and necessarily conclude the inquiry. "Caucasian" is a conventional word of much flexibility, as a study of the literature dealing with racial questions will disclose, and while it and the words "white persons" are treated as synonymous for the purposes of that case, they are not of identical meaning[.] * * *

In the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word "Caucasian" but the words "white persons," and these are words of common speech and not of scientific origin. The word "Caucasian" not only was not employed in the law but was probably wholly unfamiliar to the original framers of the statute in 1790. When we employ it we do so as an aid to the ascertainment of the legislative intent and not as an invariable substitute for the statutory words. Indeed, as used in the science of ethnology, the connotation of the word is by no means clear and the use of it in its scientific sense as an equivalent for the words of the statute, other considerations aside, would simply mean the substitution of one perplexity for another. But in this country, during the last half century especially, the word by common usage has acquired a popular meaning, not clearly defined to be sure, but sufficiently so to enable us to say that its popular as distinguished from its scientific application is of appreciably narrower scope. It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken.

They imply, as we have said, a racial test; but the term "race" is one which, for the practical purposes of the statute, must be applied to a group of living persons *now* possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another. It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either. The question for determination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a

statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons. In 1790 the Adamite theory of creation—which gave a common ancestor to all mankind—was generally accepted, and it is not at all probable that it was intended by the legislators of that day to submit the question of the application of the words "white persons" to the mere test of an indefinitely remote common ancestry, without regard to the extent of the subsequent divergence of the various branches from such common ancestry or from one another.

The eligibility of this applicant for citizenship is based on the sole fact that he is of high caste Hindu stock, born in Punjab, one of the extreme northwestern districts of India, and classified by certain scientific authorities as of the Caucasian or Aryan race. * * *

The term "Aryan" has to do with linguistic and not at all with physical characteristics, and it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin. . . . Our own history has witnessed the adoption of the English tongue by millions of Negroes, whose descendants can never be classified racially with the descendants of white persons notwithstanding both may speak a common root language.

The word "Caucasian" is in scarcely better repute. It is at best a conventional term, with an altogether fortuitous origin,[2] which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example, (The World's Peoples, 24, 28, 307, et seq.) it includes not only the Hindu but some of the Polynesians, (that is the Maori, Tahitians, Samoans, Hawaiians and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.[4]

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[2] Encyclopaedia Britannica (11th Ed.) p. 113: "The ill-chosen name of Caucasian, invented by Blumenbach in allusion to a South Caueasian skull of specially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races. Again, two of the best marked varieties of mankind are the Australians and the Bushmen, neither of whom, however, seems to have a natural place in Blumenbach's series."

[4] Keane himself says that the Caucasic division of the human family is 'in point of fact the most debatable field in the whole range of anthropological studies.' Man: Past and Present, p. 444.

And again: 'Hence it seems to require a strong mental effort to sweep into a single category, however elastic, so many different peoples—Europeans, North Africans, West Asiatics, Iranians, and others all the way to the Indo-Gangetic plains and uplands, whose complexion presents every shade of color, except yellow, from white to the deepest brown or even black.

'But they are grouped together in a single division, because their essential properties are one, . . . their substantial uniformity speaks to the eye that sees below the surface . . . we recognize a common racial stamp in the facial expression, the structure of the hair, partly also the bodily proportions, in all of which points they agree more with each other than with the other main divisions. Even in the case of certain black or very dark races, such as the Bejas, Somali, and a few other Eastern

The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has five races; Keane following Linnaeus, four; Deniker, twenty-nine. The explanation probably is that "the innumerable varieties of mankind run into one another by insensible degrees," and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. * * *

It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under § 2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white.

The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forbears had come. When they extended the privilege of American citizenship to "any alien, being a free white person," it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when § 2169, reenacting the naturalization test of 1790, was adopted; and there is no reason to doubt, with like intent and meaning. * * *

What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

Hamites, we are reminded instinctively more of Europeans or Berbers than of thanks to their more regular features and brighter expression.'

It is not without significance in this connection that Congress, by the Act of February 5, 1917, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the Congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.

Notes & Questions

1. *Doctrinal consistency*. In both *Ozawa* and *Thind*, the Court struggled with the relationship between the word "White" in the naturalization statute and the pseudo-scientific classification "Caucasian." Was the Court's analysis of this relationship the same in both cases?

2. *Legal definition of "race."* After *Ozawa* and *Thind*, what is the judicial definition of "race" under the federal naturalization statute? Is it essentially phenotype (skin color, rough morphology), genotype (genetic ancestry), behavior (culture, traditions), ideology (religion, political beliefs), or some combination of all of these?

3. *Separate but equal.* In both *Ozawa* and *Thind*, the Court declared that it meant no disrespect in concluding that Japanese and Indians are not White and thus ineligible for naturalization. For example, in *Ozawa*, the Court stated: "Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved."[72]

Similarly, in *Thind*, the Court announced:

> It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize[s] it and reject[s] the thought of assimilation.[73]

Why did the Court include these disclaimers? Should it matter whether denying naturalization to Ozawa and Thind had nothing to do with racial inferiority? Given the earlier case law involving persons of Asian descent, does it seem truthful to say that the naturalization laws were not motivated by an assumption of racial inferiority?

4. *Tails I win, heads you lose*. Note the legal arguments regarding assimilation that Takao Ozawa made on his own behalf. Could he have provided

[72] Ozawa v. United States, 260 U.S. 178, 198 (1922).
[73] United States v. Thind, 261 U.S. 204, 215 (1923).

any additional evidence that would have persuaded the Court of his sincere desire to reject being Japanese in favor of being American? Or was Ozawa's intent to be American fundamentally irrelevant?

In his argument to be classified as White, Ozawa emphasized that

> [i]n name, General Benedict Arnold was an American, but at heart he was a traitor. In name, I am not an American, but at heart I am a true American. I set forth the following facts which will sufficiently prove this. (1) I did not report my name, my marriage, or the names of my children to the Japanese Consulate in Honolulu; notwithstanding all Japanese subjects are requested to do so. These matters were reported to the American government. (2) I do not have any connection with any Japanese churches or schools, or any Japanese organizations here or elsewhere. (3) I am sending my children to an American church and American school in place of a Japanese one. (4) Most of the time I use the American (English) language at home, so that my children cannot speak the Japanese language. (5) I educated myself in American schools for nearly eleven years by supporting myself. (6) I have lived continuously within the United States for over twenty-eight years. (7) I chose as my wife one educated in American schools . . . instead of one educated in Japan. (8) I have steadily prepared to return the kindness which our Uncle Sam has extended me . . . so it is my honest hope to do something good to the United States before I bid a farewell to this world.[74]

These arguments were to no avail. Later, in the wartime incarceration cases, the U.S. Supreme Court would rely on evidence of Japanese schools in the United States and Japanese education abroad as indicia of possible disloyalty.[75] Why would the judiciary ignore such evidence (*i.e.,* not sending one's children to Japanese schools in the United States) in the context of naturalization but rely on such evidence (*i.e.,* sending one's children to Japanese schools in the United States) in the context of the incarceration? Do these pose indistinguishable legal questions?

5. *Hard cases then—Armenians*. If you think that persons of Japanese and Indian descent are easy cases (in other words, they are clearly not White), what do you think about Armenians? In *In re Halladjian*,[76] the United States contended that the Armenian petitioners belonged to the "Yellow" race. The court showed remarkably sophisticated skepticism about the very existence of a European or Yellow race. Nonetheless, when push came to shove, it found persuasive what it considered to be unanimous ethnographic consensus that Armenians were White. Interestingly, the court also appealed to the original meaning of the term "White"

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[74] IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 56-57 (1996) (quoting from Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case*, 4 AMERASIA 1, 11 (1977)).
[75] *Hirabayashi I*, 320 U.S. at 97.
[76] 174 F. 834 (C.C.D. Mass. 1909).

in the naturalization statute. It concluded as follows:

> From all these illustrations, which have been taken almost at random, it appears that the word "white" has been used in colonial practice, in the federal statutes, and in the publication of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where "French neutrals" are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the act of 1790 Congress did not concern itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a Negro or an Indian was classed as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, "white" is still the catch-all word which includes all persons not otherwise classified.[77]

What does this passage suggest about how society constructs and manipulates racial categories? Can a whole race of people pass from White to non-White? Can you think of examples of the reverse transformation?

6. *Removing the racial bar*. Eventually, naturalization rights were granted to Asians in the mid-20th century. They were extended in 1943 to Chinese,[78] in 1946 to Asian Indians and Filipinos,[79] and in 1952 (McCarran-Walter Act) to all other Asians.[80] The granting of these naturalization rights was prompted at least partly, perhaps mostly, by the political context of World War II and the Cold War. In World War II, China was an important ally, whereas Japan was an enemy. In its propaganda, Japan highlighted how persons of Asian descent were mistreated in America. It grew increasingly difficult for the United States to rebut such claims when federal law clearly exhibited racism against Asians, including its allied Chinese. When signing the 1943 Chinese Repealer (which repealed the Chinese

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[77] *Id.* at 843-44.
[78] Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.
[79] Luce-Celler Act of 1946, ch. 534, 60 Stat. 416 (amending Nationality Act of 1940).
[80] Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); DANIELS, *supra*, at 162-98.

Exclusion Acts and allowed Chinese to naturalize), President Franklin Roosevelt made clear that doing so was "important in the cause of winning the war."[81]

b. Citizenship via Birth

Although the racial bar on naturalization was lifted only in the 1940s and 50s, U.S. citizens of Asian descent existed prior to the mid-20th century. This was due to another path to citizenship: birthright citizenship. The first sentence of the Fourteenth Amendment of the U.S. Constitution reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Remarkably, the original Constitution failed to define a concept as fundamental as citizenship.[82] It was not until the ratification of the Fourteenth Amendment after the Civil War that "citizenship" was introduced constitutionally.

To understand its significance, one must understand this clause's relationship to the infamous *Dred Scott v. Sanford.*[83] Scott, whose slavery status was at issue, claimed that he became a free man by being brought into the free territory of Illinois. He sued for freedom in federal court. Federal courts, however, are courts of limited subject matter jurisdiction. They can only hear certain types or cases outlined in Article III of the Constitution and in various federal statutes. Subject matter jurisdiction in this case was alleged on diversity of citizenship (*i.e.,* a citizen of one state was suing a citizen of another state).[84] Scott claimed to be a citizen of Illinois, the defendant Sanford a citizen of New York.

The U.S. Supreme Court ruled that no subject matter jurisdiction existed because no African American person such as Scott could be a "citizen" as understood in the Constitution. After this threshold ruling that the Court lacked power to decide this case, the Court did not have to go any further. Indeed, courts generally refrain from addressing issues that are unnecessary to deciding a case. The Court reached the merits of the dispute anyway, striking down the Missouri Compromise.

The Civil War raged from 1861 to 1865. At its end, Reconstruction began. One legal element of Reconstruction was the passage of the Civil Rights Act of 1866.[85]

The Act made clear that a human being such as Scott was a U.S. citizen by virtue of his birth on American soil. For fear that the Act would be deemed

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[81] *See* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600; DANIELS, *supra*, at 196.

[82] The original document addressed citizenship in three places: Article I's length of citizenship requirement for Congresspersons (U.S. CONST. art. I, §§ 2, 3); and Article II's natural-born citizenship requirement for the President (U.S. CONST. art. II, § 1); Article II's delegation to Congress the power to create uniform rules of naturalization (U.S. CONST. art. II, § 8).

[83] Dred Scott v. Sanford, 60 U.S. 393 (1856).

[84] This jurisdictional basis is currently codified in 28 U.S.C. § 1332 (2006).

[85] Civil Rights Act of 1866, 14 Stat. 27.

unconstitutional, among other reasons, the Fourteenth Amendment was crafted and ratified in 1868.[86]

Although the wording concerning citizenship by birth was changed slightly from the Civil Rights Act to the Fourteenth Amendment, the purpose was the same. How, then, would this clause be applied to Asians? Would Asians born on American soil be allowed to join the political community?

United States v. Wong Kim Ark

169 U.S. 649 (1898)

Mr. Justice GRAY, after stating the case, delivered the opinion of the Court.

Wong Kim Ark was born in 1873 in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicile and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom.

In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about 21 years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress,

[86] U.S. CONST. amend XIV, §§ 1, 5. The relevant portions of the Fourteenth Amendment are:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

known as the "Chinese Exclusion Acts," prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him. * * *

V.

In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The civil rights act, passed at the first session of the Thirty-Ninth congress, began by enacting that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." * * *

The first section of the fourteenth amendment of the constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." . . . Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Dred Scott v. Sandford, (1857); and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in . . . The Slaughterhouse Cases. * * *

Mr. Justice Miller, delivering the [Slaughterhouse] opinion of the majority of the court, after observing that the thirteenth, fourteenth, and fifteenth articles of amendment of the constitution were all addressed to the grievances of the negro race, and were designed to remedy them, continued as follows: "We do not say that no one else but the negro can share in this protection. Both the language and spirit of these Articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth articles, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the states, which properly and necessarily fall within the protection of these

articles, that protection will apply, though the party interested may not be of African descent." * * *

The only adjudication that has been made by this court upon the meaning of the clause, "and subject to the jurisdiction thereof," in the leading provision of the fourteenth amendment, is Elk v. Wilkins, 112 U.S. 94, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.

That decision was placed upon the grounds [that] . . . "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations." * * *

The decision in Elk v. Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent, not in the diplomatic service of a foreign country. * * *

The foregoing considerations and authorities irresistibly lead us to these conclusions: The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. * * *

To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

VI.

* * * Chinese persons, born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States. * * *

In Yick Wo v. Hopkins, the decision was that an ordinance of the city of San Francisco [discriminated against] natives of China, still subjects of the emperor of China, but domiciled in the United States * * * was contrary to the fourteenth amendment of the constitution. Mr. Justice Matthews, in delivering the opinion of the court, said: "The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China." "The fourteenth amendment to the constitution is not confined to the protection of citizens. It says, 'Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . . [Further, i]t is accordingly enacted by section 1977 of the Revised Statutes that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens.'" * * *

The decision in Yick Wo v. Hopkins, indeed, did not directly pass upon the effect of [the words "subject to the jurisdiction thereof" in the first clause of] the fourteenth amendment, but turned upon subsequent provisions of the same section. But, as already observed, it is impossible to attribute to the words, "subject to the jurisdiction thereof" (that is to say, of the United States), at the beginning, a less comprehensive meaning than to the words "within its jurisdiction" (that is, of the state), at the end of the same section; or to hold that persons, who are indisputably "within the jurisdiction" of the state, are not "subject to the jurisdiction" of the nation.

During the debates in the Senate in January and February, 1866, upon the Civil Rights Bill, Mr. Trumbull, the chairman of the committee which reported the bill, moved to amend the first sentence thereof so as to read, "All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color." Mr. Cowan, of Pennsylvania, asked, "Whether it will not have the effect of naturalizing the children of Chinese and Gypsies, born in this country?" Mr. Trumbull answered, "Undoubtedly;" and asked, "Is not the child born in this country of German parents a citizen?" Mr. Cowan replied, "The children of German parents are citizens; but Germans are not Chinese." Mr. Trumbull rejoined: "The law makes no such distinction; and the child of an Asiatic is just as much a citizen as the child of a

European. “Mr. Reverdy Johnson suggested that the words, “without distinction of color,” should be omitted as unnecessary; and said: “The amendment, as it stands, is that all persons born in the United States, and not subject to a foreign power, shall, by virtue of birth, be citizens. To that I am willing to consent; and that comprehends all persons, without any reference to race or color, who may be so born.” And Mr. Trumbull agreed that striking out those words would make no difference in the meaning, but thought it better that they should be retained, to remove all possible doubt.

The fourteenth amendment of the constitution, as originally framed by the house of representatives, lacked the opening sentence. When it came before the Senate in May, 1866, Mr. Howard, of Michigan, moved to amend by prefixing the sentence in its present form, (less the words “or naturalized,”) and reading, “All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Mr. Cowan objected, upon the ground that the Mongolian race ought to be excluded, and said, “Is the child of the Chinese immigrant in California a citizen?” “I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow citizens regard them. I have no doubt that now they are useful, and I have no doubt that within proper restraints, allowing that State and the other Pacific States to manage them as they may see fit, they may be useful; but I would not tie their hands by the Constitution of the United States as to prevent them hereafter from dealing with them as in their wisdom they see fit.” Mr. Conness, of California, replied: “The proposition before us relates simply, in that respect, to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the Nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States. . . . We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the constitution of the United States to be entitled to civil rights and to equal protection before the law with others.” It does not appear to have been suggested, in either house of congress, that children born in the United States of Chinese parents would not come within the terms and effect of the leading sentence of the fourteenth amendment.

Doubtless, the intention of the congress which framed, and of the states which adopted, this amendment of the constitution, must be sought in the words of the Amendment, and the debates in congress are not admissible as evidence to control the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves, and are, at the least, interesting as showing that the application of the Amendment to the Chinese race was considered and not overlooked. * * *

The power of naturalization, vested in Congress by the Constitution, is a

power to confer citizenship, not a power to take it away. . . . The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship. * * *

VII.

Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. * * *

Order affirmed.

Mr. Chief Justice FULLER, with whom concurred Mr. Justice HARLAN, dissenting.

* * * [The opinion begins with commentators on the law of nations, rejecting the notion that a child's place of birth should determine his citizenship: "[T]he true bond which connects the child with the body politic is not the matter of in inanimate piece of land, but the moral relations of his parentage. . . . The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction."] * * *

[I]n Elk v. Wilkins, 112 U.S. 94, 101, [the Court said that the phrase "subject to the jurisdiction thereof," is] not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance[.]"

To be "completely subject" to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government.

Now I take it that the children of aliens, whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country.

Generally speaking, I understand the subjects of the emperor of China—that ancient empire, with its history of thousands of years and its unknown continuity in belief, transitions, and government, in spite of revolutions and changes of dynasty—to be bound to him by every conception of duty and by every principle of their religion, of which filial piety is the first and greatest commandment; and formerly, perhaps still, their penal laws denounced the severest penalties on those who renounced their country and allegiance, and their abettors, and, in effect, held

the relatives at home of Chinese in foreign lands as hostages for their loyalty. And . . . they seem in the United States to have remained pilgrims and sojourners as all their fathers were. At all events, they have never been allowed by our laws to acquire our nationality, and, except in sporadic instances, do not appear ever to have desired to do so.

The fourteenth amendment was not designed to accord citizenship to persons so situated, and to cut off the legislative power from dealing with the subject.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of a country is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

But can the persons expelled be subjected to "cruel and unusual punishments" in the process of expulsion, as would be the case if children born to them in this country were separated from them on their departure, because citizens of the United States? Was it intended by this amendment to tear up parental relations by the roots? * * *

It is not to be admitted that the children of persons so situated [the Chinese] become citizens by the accident of birth. On the contrary, I am of opinion that the president and senate by treaty, and the congress by legislation, have the power, notwithstanding the fourteenth amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship upon children born to them while in this country under such consent, in spite of treaty and statute.

In other words, the fourteenth amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens.

Tested by this rule, Wong Kim Ark never became and is not a citizen of the United States, and the order of the district court should be reversed.

I am authorized to say that Mr. Justice Harlan concurs in this dissent.

Notes & Questions

1. *Interpreting text*. Both the majority and dissenting opinions seek to discern the Fourteenth Amendment's declaration that "citizens" include "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." What this phrase means may turn on the interpretive methodology used to divine its meaning. Consider, for example, how judges interpret statutes passed by legislatures. Often, they rely on the plain language of the statutory text (referred to as the plain-meaning approach). Another method looks at other court decisions interpreting the same statute (known as judicial precedent). Courts also sometimes rely on statements of record made during the legislature's deliberations prior to

enacting the statute into law (known as legislative history). They will additionally try to interpret statutes to further the social policies that they think underlie the particular legislation and to avoid undesirable policy consequences.

At issue here is not a statute but a constitutional amendment, which might lend itself to still other methods of interpretation. For example, some judges embrace various forms of originalism—that the meaning of a constitutional provision is fixed at the date at which the provision was adopted and does not change. Other judges opt for various forms of interpretivism—that the meaning of constitutional provisions, especially vague phrases that gesture to values and ideals, must always be interpreted in context, which include evolving social, economic, and political norms and conditions. In this case, which interpretive methodology (or methodologies) did the Court emphasize?

2. *The dissent*. In your own words, articulate the main argument that the dissenting Justices had against Wong Kim Ark's claim to citizenship. As a factual matter, it was uncontested that Wong Kim Ark was born on American soil. But why then was he not subject to the jurisdiction of the United States?

3. *Continuing challenges to citizenship*. You might think that Wong Kim Ark settled the issue of birthright citizenship once and for all. But whenever xenophobia crests, the matter resurfaces. For instance, during World War II, the Native Sons of the Golden West petitioned to strike from the voter rolls all persons born in the United States to Japanese alien parents.[87] Indeed, according to historian Greg Robinson, the "openly expressed purpose [of the Native Sons of the Golden West] was to erase the citizenship of all Asian Americans, as descendants of 'immigrants ineligible to citizenship.'"[88] At this time, anti-Japanese sentiments were rabid, and the incarceration had already begun. The district court rejected the plaintiff's request on the clear authority of *Wong Kim Ark.*

4. *Current debates*. Citizenship by birth has been challenged even more recently. For example, H.R. 1868, the "Birthright Citizenship Act of 2009," introduced by Georgia House Representative Nathan Deal proposed to amend the Immigration and Nationality Act so as to limit the number of individuals who would qualify for birthright citizenship. Specifically, the Act would have restricted birthright citizenship to individuals whose parents are either "(1) a citizen or national of the United States; (2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or (3) an alien performing active service in the armed forces."[89]

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[87] *See* Regan v. King, 49 F. Supp. 222 (N.D. Cal. 1942), *aff'd*, 134 F.2d 413 (9th Cir. 1942).
[88] Greg Robinson, *When Birthright Citizenship Was Last "Reconsidered": Regan v. King and Asian Americans*, THE FACULTY LOUNGE (Aug. 9, 2010, 10:48 AM), http://www.thefacultylounge.org/2010/08/when-birthright-citizenship-was-last-reconsidered-regan-v-king-and-asian-americans-1.html.
[89] *Id.*

Supporters of the measure alleged economic rationales. For instance, then House Minority Leader John Boehner argued that a change to the Constitution is worth considering because "[i]n certain parts of our country, clearly our schools, our hospitals are being overrun by illegal immigrants—a lot of whom came here just so their children could become U.S. citizens."[90]

On October 30, 2018, President Trump announced his plan to issue an executive order doing away with birthright citizenship to children of undocumented immigrants.[91] Vice President Mike Pence defended the president's actions: "We all know what the 14th Amendment says. We all cherish the language of the 14th Amendment," Pence said, "But the Supreme Court of the United States has never ruled on whether or not the language of the 14th Amendment, subject to the jurisdiction thereof, applies specifically to people who are in the country illegally."[92]

If you were deciding this issue, and based on existing precedent, would you conclude that the Fourteenth Amendment guarantees citizenship to all children born on U.S. soil, regardless of the citizenship status of their parents? Would your decision be different if there was proof that such a limit is necessary to preserve our country's resources? Would your decision be different if there was evidence that such a limit was grounded in hostility against Mexican immigrants?

C. Second Class Status

So far, we have discussed how Asians, viewed as unassimilable, undesirable foreigners, faced partially closed doors to America by being physically excluded at the border and politically excluded from the community of equal citizenship. Many Asians still managed to find their way into the United States, however, and to set down roots through work, play, marriage, education, and civic life. This section addresses just some of the ways in which Asian Americans were discriminated against in their daily lives and excluded from full participation in American society.

1. Alien Land Laws

From early on, Asian immigrants were barred from owning land. Early land laws passed in the 19th century targeted the Chinese. For example, the 1859

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[90] *Boehner: End to Birthright Citizenship 'Worth Considering'*, FOX NEWS (Aug. 8, 2010), http://www.foxnews.com/politics/2010/08/08/boehner-end-birthright-citizenship-worth-considering/.

[91] Adam Liptak, *Trump's Birthright Citizenship Proposal Is at Odds with Legal Consensus*, N.Y. TIMES (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/us/politics/birthright-citizenship-executive-order-trump.html.

[92] Caitlyn Oprysko & Ted Hesson, *Trump announces plan to end birthright citizenship by executive order*, POLITICO (Oct. 30, 2018), https://www.politico.com/story/2018/10/30/trump-end-birthright-citizenship-947962.

Oregon Constitution stated explicitly: "No Chinaman, not a resident of the state at the adoption of [this] Constitution, shall ever hold any real estate or mining claim."[93] In 1879, the California Constitution extended land rights to aliens who were of the "white race or of African descent" but left the rights of those ineligible for citizenship unprotected by the state constitution.[94] Similarly, motivated by anti-Chinese sentiment, the territorial legislature of Washington in 1886 ensured broad property rights to aliens except to those aliens incapable of becoming citizens.[95]

But the most important judicial opinions addressing Asians and the right to own property arise from the Japanese experience. In the early 20th century in California, Japanese Americans enjoyed great success in certain forms of intensive truck farming. As they purchased more land and flourished economically, White American resentment began to increase. From 1907 to 1911, the California legislature considered numerous bills to constrain alien ownership of land. Political pressure from Presidents Theodore Roosevelt and William Howard Taft kept the bills from being enacted into law. However, by 1913, the resentment had grown too strong for then President Woodrow Wilson to stop the passage of California's alien land law.

The 1913 California statute thus became the first alien land law in the nation motivated by anti-Japanese sentiments.[96] The law granted all aliens eligible for citizenship plenary property rights but permitted aliens ineligible for citizenship (that is, those who could not be naturalized as "free White persons") to enjoy only those property rights guaranteed by treaty. Not coincidentally, the Treaty of 1911 between the United States and Japan made no mention of protecting the agricultural property rights of the Japanese residing in the United States.

To get some sense of the motivations of the alien land law, consider the public comments of Attorney General Ulysses S. Webb, one of the authors of the law, in a 1913 speech before the Commonwealth Club of San Francisco:

> The fundamental basis of all legislation upon this subject, State and Federal, has been, and is, race undesirability. It is unimportant and foreign to the question under discussion whether a particular race is inferior. The simple and single question is, is the race desirable? [The alien land law] seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land. And it seeks to limit the numbers who will come by limiting the opportunities for their activity

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[93] Mark L. Lazarus III*, An Historical Analysis of Alien Land Law: Washington Territory & State* 1853-1889, 12 U. PUGET SOUND L. REV. 197, 217 (1989) (quoting OR. CONST. art. XV, § 8 (1859, repealed 1946)).

[94] *See id.* at 216 (quoting CAL. CONST. art. I, § 17 (1879, amended 1954, repealed 1974)).

[95] When Washington joined the Union in 1889, its constitution severely constrained ownership of property by aliens except by those who in good faith had declared their intention to become citizens. One commentator has argued, however, that this provision was less motivated by race than by the general fear of nonresident alien land holdings. *See id.* at 232-33.

[96] California Alien Land Law of 1913, Gen. Laws Cal. Act 261 (repealed by Cal. Civ. Code § 671 (West); TAKAKI, *supra*, at 206-07.

> here when they arrive.[97]

In addition to racial undesirability, naked economic self-interest also played an important role. Consider, again, the comments Webb made to the U.S. Supreme Court in his brief in *Frick v. Webb*:[98]

> It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship,—in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer.[99]

In 1920, Californians voted by popular initiative to close certain loopholes left open in the 1913 law.[100] Legal scholar Keith Aoki noted that this initiative "passed with a decisive majority in every county in California," and "barred guardianships and trusteeships in the name of 'aliens ineligible to citizenship,' . . . barred all leases of agricultural land, barred corporations with a majority of shareholders who were 'aliens ineligible to citizenship' from owning agricultural land and classified sharecropping contracts as 'interests in land.'" It drastically reduced Japanese-owned acreage.[101]

By 1925, Arizona (1917), Louisiana (1921), Washington (1921),[102] New Mexico (1922), Idaho, Montana, Oregon (1923), and Kansas (1925) had all passed alien land laws. The U.S. Supreme Court upheld the constitutionality of these land laws in *Terrace v. Thompson*, 263 U.S. 197 (1923).

Adding insult to injury—escheat actions: While Japanese Americans were incarcerated during World War II, three more states passed alien land laws—Utah, Wyoming, and Arkansas. The Arkansas legislature did not bother using the code phrase "aliens ineligible for citizenship." Instead, they stated bluntly that "no Japanese or a descendent of a Japanese shall ever purchase or hold title to any lands in the State of Arkansas."[103] Moreover, many states' attorneys general commenced escheat actions—lawsuits to revert real property to state ownership because of the lack of a lawful owner—while Japanese American owners were locked up in distant camps.

These alien land laws would not be struck down or repealed until after World War II, when the U.S. Supreme Court signaled constitutional concerns about them in the 1948 decision of *Oyama v. California*.[104]

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[97] Ulysses S. Webb, Speech at the Commonwealth Club of San Francisco (Aug. 9, 1913), quoted in Oyama v. California, 332 U.S. 633, 657 (1948) (Murphy, J., concurring).
[98] 263 U.S. 326 (1923).
[99] Dudley O. McGovney, The *Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7, 49 (1947).
[100] *See* California Initiative Nov. 2, 1920, 1921 Cal. Stat. lxxxii.
[101] Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Pre-lude to Internment*," 19 B.C. THIRD WORLD L.J. 37, 57 (1998); 40 B.C. L. REV. 37, 57, 59 (1998).
[102] The 1921 Act closed various loopholes in the 1889 state constitution. As to the 1921 statute, there is no doubt that the "Japanese problem" was foremost in the legislators' minds.
[103] *See* McGovney, *supra*, at 8 (quoting Ark. Acts. 1943, p.75).
[104] 332 U.S. 633 (1948).

In *Oyama*, the Court struck down a California law that created a presumption of intending to evade escheat actions if an alien "ineligible for citizenship" (*i.e.,* Japanese parent) bought land and transferred it to a citizen (child). The Court focused on the rights not of the alien father but of the citizen son, and held that his equal protection rights had been violated. The Court did not, however, strike down the alien land law in its entirety. It ruled only on this evidentiary presumption, which harmed citizens.

Noting this attitudinal shift, various state courts in California, Montana, and Oregon started to strike down their alien land laws as violating federal equal protection rights of aliens.[105] Also, in 1952, Congress removed the racial bar on naturalization, which declawed legal discrimination against "aliens ineligible for citizenship." Interestingly, Washington state did not repeal its law until 1966, through a ballot initiative won by an underwhelming majority vote of 430,984 (50.94 percent) to 415,082 (49.06 percent).[106]

The early 21st century has seen the repeal of several states' alien land laws. Working in conjunction with teams of students, Professor Gabriel "Jack" Chin authored recommendations for the repeal of such laws in Florida, New Mexico, Wyoming, and Kansas. While the recommendations passed in Wyoming, New Mexico, and Kansas, Florida voters rejected the recommendation when it appeared on the ballot in 2008.[107]

2. Anti-Miscegenation Statutes

At various points, as many as 38 states had anti-miscegenation statutes prohibiting interracial marriage.[108] As Professor Rachel Moran explains, anti-miscegenation statutes "confirmed [the] status [of Asians] as unassimilable foreigners" and grew out of fear that Asian men would covet white women.[109] The statutes were based on the view of Asian Americans as unclean and diseased: "Chinese were assumed by most of the delegates [at the California State Constitutional Convention] to be full of filth and disease. . . . American institutions and culture would be overwhelmed by the habits of people thought to be sexually

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[105] *See, e.g.,* Sei Fujii v. State, 242 P.2d 617 (Cal. 1952); State v. Oakland, 287 P.2d 39 (Mont. 1955); Kenji Namba v. McCourt, 204 P.2d 569 (Or. 1949).

[106] *Elections Search—Results, November 1966 General*, WASHINGTON SECRETARY OF STATE, http://www.sos.wa.gov/elections/results_report.aspx?e=45&c=&c2=&t=&t2=5&p=&p2=&y= (last visited May 22, 2020).

[107] Lydia Lum, *Asian American Students Help Right Historical Wrong*, DIVERSE: ISSUES IN HIGHER EDUCATION (Mar. 26, 2015), https://diverseeducation.com/article/71114/.

[108] *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 92, map (2009).

[109] RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 17, 18, 36 (2001); *see also* Hrishi Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 ASIAN L.J. 14–16 (2002).

promiscuous, perverse, lascivious, and immoral."[110] And advocates of the laws feared the "mongrel" children that would result from a union between races: "Were the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result of that amalgamation would be a hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth.'" [111]

It was not until the 1967 case of *Loving v. Virginia*, 388 U.S. 1 (1967), that the Supreme Court struck down anti-miscegenation statutes as invalid under the federal Constitution.

3. Segregated Schools

School segregation meant that Japanese American children could not learn next to White Americans, or, more important, they could not take advantage of educational resources reserved solely for White Americans. California law allowed school boards to "exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent."[112] In May of 1905, the San Francisco School Board announced plans to place Chinese and Japanese students in separate schools, "not only for the purpose of relieving the congestion . . . in our schools, but also for the higher end that our children should not be placed in any position where the youthful impressions may be affected by association with persons of the Mongolian race."[113]

In 1927, Gong Lum brought suit after his nine-year-old, American-born daughter, Martha Lum, was denied entry to a white school in the Rosedale consolidated school district in Mississippi.[114] The Court affirmed her exclusion, based on its line of cases approving "separate, but equal" schools for blacks:

> Most of the cases cited [including Plessy v. Ferguson] arose, it is true, over the establishment of separate schools as between white pupils and black pupils; but we cannot think that the question is any different, or that any different result can be reached, assuming the cases above cited

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[110] Leti Volpp, American Mestizo: Filipinos and *Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 802 (1999).

[111] Eunhye Kwon, Interracial Marriages Among Asian Americans in the U.S. West, 1880-1954, 47 (2011) (unpublished Ph.D. dissertation, University of Florida) (quoting John Miller, chairman of the Committee on the Chinese, Debates and Proceedings of the Constitutional Convention of the State of California, 1878-9 (Sacramento, State Office, 1880), 1: 632).

[112] Cal. Pol. Code § 1662 (1872), *available at* https://archive.org/details/codeofstateofcal00cali/page/348.

[113] David Brudnoy, *Race and the San Francisco School Board Incident: Contemporary Evaluations*, 50 CAL. HIST. Q. 295, 296 (1971) (quoting John P. Young, *The Support of the Anti-Oriental Movement*, 34 Annals Am. Acad. Pol. & Soc. Sci. 231, 236 (1989)). As mentioned earlier, the school board's actions led to an international incident in which Roosevelt had to appease both the angered Japanese government and the exclusionists at home. The exclusionists eventually won the end of the entry of laborers from Japan.

[114] Gong Lum v. Rice, 275 U.S. 78, 87 (1927).

> to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment.[115]

4. Inability to Act as Witnesses

Racist rules of evidence meant that Asian immigrants could not testify against White Americans in a court of law. In the 1854 case of *People v. Hall*, the California Supreme Court held that Chinese witnesses could not testify against a white murder defendant under a statute that provided "No Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man."[116] Like the other legislation discussed in this chapter, these laws were also grounded in racist attitudes about immigrants and communities of color. The purpose of the statutes barring testimony from Chinese, the court noted, was to "throw around the citizen a protection for life and property, which could only be secured by removing him above the corrupting influences of degraded castes."[117] The court warned:

> The same rule which would admit them to testify would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.
>
> This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.
>
> The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.[118]

Arizona's law was broader than California, prohibiting any "black or mulato, [sic] or Indian, Mongolian or Asiatic" from testifying against a white person.[119]

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[115] *Id.*

[116] People v. Hall, 4 Cal. 399 (1854) (quoting Act concerning Crimes and Punishments, 1850 Cal. Stat. 240, § 14 (repealed by CAL. CIV. PROC. CODE § 18 (West 1872))).

[117] *Id.* at 403.

[118] *Id.* at 404-05.

[119] Gabriel J. Chin, *"A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 UC IRVINE L. REV. 965, 969 (2013) (quoting Act of Nov. 10, 1864, § 14, 1865 Howell Code Az. 50, 50 (repealed 1871)).

The inability of Asian Americans to testify against Whites made it difficult, if not impossible, to enforce the few rights they formally possessed.

The Voting Rights Act of 1870 put an end to the exclusion of Asians as witnesses, stating that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . give evidence . . . as is enjoyed by white citizens."[120]

5. Other Forms of Discrimination and Exclusion

Asian Americans were discriminated against, isolated, vilified, and excluded from participation in numerous other ways. Because Asian immigrants were barred from citizenship, they were unable to vote. And Asian immigrants and their American citizen children experienced discrimination in just about every aspect of their daily lives, including in housing, employment, and places of public accommodation.

Fred Korematsu, who challenged the orders removing Japanese Americans from the West Coast, recalled:

> In high school, [I] felt equal, but on the outside, going out in public, after school, people stare at you because I'm different. I'm Asian, so they assumed I'm not an American and that I come from Japan. Restaurants would refuse to serve me and places would refuse to give you a haircut. I had to go to Chinatown, and that was the only place that would give you a haircut. And when I'd go there, there'd be 20 people waiting, all Asians, to get a haircut.[121]

6. Forever Foreign

After reading the early history of discriminatory laws discussed in this chapter, think about whether the racist stereotypes upon which they were based persist. If so, do they continue to infect government policy? How?

As this book is being written in 2020, there has been a significant increase in attacks on Asian Americans by people who identify them and China as causing the COVID-19 coronavirus pandemic. Those attacks include demeaning, racist, and threatening statements and assaults. "Asian Americans across the country said they were afraid—to go grocery shopping, to travel alone on subways or buses, to let their children go outside."[122] On May 13, 2020, the nonprofit group Stop AAPI Hate stated that it received over 1,700 reports from Asian Americans of

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[120] *Id.* at 969-70 (quoting Voting Rights Act of 1870, ch. 144, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981(a) (2006)).

[121] Fred Korematsu, address to public school, transcribed for *Of Civil Wrongs and Rights: The Fred Korematsu Story*, documentary, produced by Eric Paul Fournier and Ken Korematsu.

[122] Sabrina Tavernise & Richard A. Oppel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html.

coronavirus discrimination in the two months since it started a reporting center.[123] Incidents reported in the popular press included the following:

- On March 9, 2020, 26-year-old Yuanyuan Zhu was walking to her gym in San Francisco, California, when she saw a man yell an expletive about China and then scream at a passing bus to "run them over." He then spit on her. After hiding herself in a corner, she quietly cried.[124]
- A 16-year-old was attacked at his school in the San Fernando Valley in California by bullies who accused him of having the virus.[125]
- After an Asian woman pressed an elevator button with her elbow, a man in the elevator said, "Don't bring that Chink virus here."[126]
- In late March, Tony Yan and his wife Lisa Li found their Yakima, Washington, restaurant vandalized. Spray-painted outside was, "Take the corona Back you chink."[127]

On March 16, 2020, President Trump began to refer to the COVID-19 virus as a "Chinese virus," although public health experts explicitly warned against naming viruses after geographic locations or groups of people.[128] Despite his later statement that he did not intend to disparage Asian Americans,[129] he continued to be questioned about stereotyping, and hostility against, them.[130]

Professor Grace Kao observed, "With something like COVID-19, where

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[123] Chinese for Affirmative Action and Asian Pacific Policy & Planning Council, Press Release, May 13, 2020, *available at* http://www.asianpacificpolicyandplanningcouncil.org/wp-content/uploads/Press_Release_5_13_20.pdf.

[124] Tavernise & Oppel, *supra*.

[125] Christina Capatides, *Bullies attack Asian American teen at school, accusing him of having coronavirus*, CBS NEWS (Feb. 14, 2020), https://www.cbsnews.com/news/coronavirus-bullies-attack-asian-teen-los-angeles-accusing-him-of-having-coronavirus/.

[126] @RealElizabethHo, Twitter (Mar. 12, 2020, 8:21 PM), https://twitter.com/RealElizabethHo/status/1238304263467446272; Cathy Park Hong, *The Slur I Never Expected to Hear in 2020*, N.Y. TIMES MAG. (Apr. 12, 2020), https://www.nytimes.com/2020/04/12/magazine/asian-american-discrimination-coronavirus.html.

[127] Sheng Peng, *Smashed windows and racist graffiti: Vandals target Asian Americans amid coronavirus*, NBC NEWS (Apr. 10, 2020), https://www.nbcnews.com/news/asian-america/smashed-windows-racist-graffiti-vandals-target-asian-americans-amid-coronavirus-n1180556.

[128] Austa Somvichian-Clausen, *Trump's use of the term "Chinese Virus" for coronavirus hurts Asian Americans, says expert*, THE HILL (Mar. 25, 2020), https://thehill.com/changing-america/respect/diversity-inclusion/489464-trumps-use-of-the-term-chinese-virus-for.

[129] *Id.*

[130] Oliver Darcy, *Trump abruptly ends press conference after contentious exchange with reporters*, CNN BUSINESS (May 12, 2020), https://www.cnn.com/2020/05/11/media/trump-press-briefing-weijia-jian-kaitlan-collins/index.html (reporting that when Asian American reporter Weijia Jiang asked President Trump why he saw coronavirus testing as a global competition given that 80,000 Americans had died, he responded, "Maybe that's a question you should ask China. . . . Don't ask me. Ask China that question, OK?").

everyone is scared of catching it, Asian Americans become the physical embodiment of disease, so we're seen with great suspicion. I'm a little scared to go outside, frankly, especially if I start coughing."[131]

Is this type of race-based hostility always present—at times overt, but always just under the surface? What kinds of abusive actions—private or governmental—might be triggered by the stereotype of Asian Americans as dangerous and forever foreign?

D. Some Early Asian American Success as Civil Rights Plaintiffs

Asian immigrants were successful in fighting discrimination in some cases. Starting in 1873, as a large number of Chinese immigrants established small laundries, the City of San Francisco passed ordinances targeting them. By 1900, the census reported that 25 percent of all employed Chinese males in the United States were launderers, with 18 percent in agriculture and 14 percent working as household servants.[132] These laundry ordinances were worded neutrally, without specific mention of the Chinese. For example, they taxed all laundries that did not use a horse and wagon, or they required all laundries made of wooden structures to undergo special licensing procedures. In practice, however, these facially neutral ordinances were crafted specifically to harass the Chinese and were enforced accordingly.

Some of these ordinances were accepted as reasonable exercises of a state's police power. For example, in *Soon Hing v. Crowley*,[133] the U.S. Supreme Court addressed an ordinance that required laundries to close at night. The Court accepted the general rule as one enacted without racial animus, and found that it was a reasonable police regulation for the city's safety and welfare.

Another such ordinance, which required all laundries housed in wooden buildings to receive a license from the San Francisco board of supervisors, was the subject of the well-known *Yick Wo v. Hopkins* case.[134] The Court held that enforcement of the ordinance violated the Equal Protection Clause of the Fourteenth Amendment:

> [B]oth petitioners have complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will

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[131] Somvichian-Clausen, *supra*.
[132] 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, 359 (1995).
[133] Soon Hing v. Crowley, 113 U.S. 703 (1885).
[134] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

> of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. . . . [W]hile this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution.[135]

You might wonder how the plaintiffs in *Yick Wo* were able to mount a legal challenge all the way up to the U.S. Supreme Court. In fact, a laundry guild called the Tung Hing Tong provided the resources. This guild regulated the Chinese laundries and by 1885 represented 300 of them. The guild retained prominent, well-paid, White American attorneys to argue their cases, a tactic that flustered the city's attorneys. Consider, for example, the briefing of the case in the Court. *Yick Wo*'s brief was a lean 13 pages. The city's brief was a meandering 111 pages with the following apologia and accusations:

> Were it not for the wealth and power of the Tung Hing Tong and the brilliant talent of opposing counsel, this argument should have been much shorter. It is not the fault of the respondent that the petitioner has hung the dragon flag of the Chinese empire over his door, and dared the municipality of San Francisco to touch it. . . . Strip this case of its imported features; disconnect it with the Tung Hing Tong; remove the disturbing elements of luminaries of the law of superior ability distributing themselves on . . . pages of printed matter, and we might have submitted our case without briefs and without argument.

Against the background of this historical and contextual summary, the next two chapters detail the legal rationales for the wartime incarceration of West Coast Japanese Americans.

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[135] *Id.* at 374.

Race and Citizenship in U.S. Law, in RACE, RACISM, AND THE LAW HANDBOOK (Edward Elgar Publishing, Aziza Ahmed & Guy Uriel-Charles, editors)

Gabriel J. Chin*

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Citizenship is commonly presumed to come with a set of rights and entitlements that will be enforced and protected by the courts.[1] For people of color, however, possession of U.S. citizenship did not always protect against state oppression. To touch on some dismal examples,[2] the federal government incarcerated Japanese American citizens during World War II,[3] and coerced many into renouncing their citizenship;[4] deported Mexican American citizens in the 1930s and 1950s;[5] and many states denied Native American[6] and African American citizens the right to vote.[7] If a right exists only if it has some chance of being enforced, under the law in

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[1] *See, e.g.,* Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 3–4 (2018) ("Citizenship is an indeterminate and shifting concept. Theorists who have wrestled with the meaning of citizenship fundamentally disagree about its core components and acknowledge that citizenship's essential meaning shifts over time. On a practical level, the term citizenship has been used to describe a number of different concepts. It often signifies legally-bestowed nationality; that is, a rights-bearing status guaranteeing a particular bundle of state-sponsored rights, protections, and benefits. But it also refers to a performative status associated with certain social, political or economic behaviors, and an affective relationship to the state and its members.")

[2] PAULI MURRAY, STATES LAWS ON RACE AND COLOR (1951; Davison Douglas, ed. Reprint 1997) is an important compendium of race law in the mid twentieth century.

[3] ERIC K. YAMAMOTO, LORRAINE BANNAI & MARGARET CHON, RACE, RIGHTS, AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION (3rd ed. 2020); *see also* Kansas v. Hendricks, 521 U.S. 346, 356–57 (1997) ("Although freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," Foucha v. Louisiana, 504 U.S. 71, 80 (1992), that liberty interest is not absolute.")

[4] Eric L. Muller, *The Japanese American Cases – A Bigger Disaster Than We Realized*, 49 HOW. L.J. 417, 451 (2006) ("The judiciary met the government's defense with what can only be described as a howl of outrage, and judges penned opinions that savaged not just the efforts to sustain the renunciations, but the government's entire program of exclusion and incarceration."); Natsu Taylor Saito, *Interning the "Non-Alien" Other: The Illusory Protections of Citizenship*, 68 LAW & CONTEMP. PROBS. 173, 180 (Spr. 2005) ("After the war, about 5,400 asked for restoration of U.S. citizenship on the ground that their renunciations had been obtained under duress. In a process that took years, federal courts eventually agreed and most regained their citizenship.")

[5] Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444 (2019); Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1 (2005).

[6] *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731 (2016).

[7] Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008); *see also* Minor v. Happersett, 88 U.S. 162, 176 (1874) ("Under

effect as this is written, citizens of color have no practical right to be free from racial profiling.[8] Even in the face of these denials of equal rights of citizenship, becoming a citizen, even for people of color, constitutes a potential lifeline.[9] Citizens can petition for redress of grievances,[10] seek refuge by travelling to a part of the United States which is less hostile,[11] and insist on the right to enter the United States[12] or not to be deported,[13] in principle at least.[14]

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these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.")

[8] Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010); *see also* Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882 (2015).

[9] Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien"*, 46 WASHBURN L.J. 263, 266 (2007) ("Lack of formal citizenship places the noncitizen, in the worst cases, into conditions that closely resemble slavery.") The Supreme Court has held that while the death penalty may be imposed for desertion from the armed forces during wartime, it unconstitutional to expatriate a service member. Loss of citizenship is worse because "the expatriate has lost the right to have rights." Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality).

[10] McDonald v. City of Chicago, Ill., 561 U.S. 742, 755 (2010).

[11] Saenz v. Roe, 526 U.S. 489, 502 (1999). *But see* David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781 (1998).

[12] Worthy v. United States, 328 F.2d 386, 394 (5th Cir. 1964) ("We think it is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil.") *See generally* Timothy Lovelace Jr., *William Worthy's Passport: Travel Restrictions and the Cold War Struggle for Civil and Human Rights*, 103 J. AM. HIST. 107 (2016). Defendant William Worthy Jr., a civil rights activist and reporter for the *Baltimore Afro-American*, was successfully represented by William Kunstler in this case. Margalit Fox, *William Worthy, a Reporter Drawn to Forbidden Datelines, Dies at 92*, N.Y. TIMES, May 17, 2014 https://www.nytimes.com/2014/05/18/us/william-worthy-a-reporter-drawn-to-forbidden-datelines-dies-at-92.html

[13] Dessouki v. Attorney Gen. of United States, 915 F.3d 964, 967 (3d Cir. 2019) ("The Executive cannot deport a citizen."); United States v. Wong, 94 F. 832, 834 (D. Vt. 1899) ("If citizens, they cannot be lawfully deported"); United States v. Valentine, 288 F. Supp. 957, 980 (D. Puerto Rico 1968) ("The only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States; a citizen cannot be either deported or denied reentry.").

[14] Unfortunately, U.S. citizens, often people of color, are regularly detained and deported. Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2017 (2013) ("Yet race remains profoundly present in the adjudication of contemporary citizenship claims. The vast majority of recent cases that have come to light regarding deportations of citizens have involved individuals deported to Latin America and the Caribbean, and in particular to Mexico."); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 682 (2011) (noting "the presumption of U.S. citizenship on the part of those born abroad to U.S.-born parents who seem White, and the presumption of foreign citizenship for similarly situated children of U.S. parents who are racialized as non-White"); *see also* Amanda Frost, *Learning from Our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U. L. REV. 769, 777 (2015) ("ICE issued 834 detainers against U.S. citizens between FY 2008 and FY 2012, which led to U.S. citizens being held in custody for longer than they would have otherwise because ICE erroneously believed they had violated immigration laws."); LAURA BINGHAM, UNMAKING AMERICANS: INSECURE CITIZENSHIP IN THE UNITED

This chapter discusses the history of the law of acquisition and loss of U.S. citizenship.[15] Its conclusion is that the law of granting, denying, and removing citizenship as a full partner in the architecture of white supremacy.

Historically, nations have granted citizenship based on birth in the nation's territory (jus soli), or based on birth to parents who are already citizens (jus sanguinis). The United States employed both methods. Those born in the United States are generally birthright citizens. Through the naturalization power,[16] Congress has granted citizenship by descent, to children born overseas of some U.S. citizen parents or to non-citizen women who married U.S. citizen men. Congress also authorizes naturalization of some individuals who have immigrated to the United States. Since the Civil War, service in the U.S. Armed Forces have been rewarded with special naturalization privileges. Congress has also naturalized groups of people by treaty or statute, such as members of Indian tribes, and citizens of formerly separate jurisdictions, such as Hawaii or Texas, upon or after their incorporation into the United States. Congress also created a category of non-citizen, non-alien "nationals," who were natives or citizens of colonial possessions like the Philippines or the Canal Zone.[17] Until the 1960s, Congress also exercised broad powers to denaturalize or expatriate persons who were naturalized or birthright citizens based on, for example, marriage to noncitizens or voting in foreign elections.

In every context in which the United States granted, shaped, denied, or deprived people of the status as citizen, race has been an outcome-determinative consideration. This chapter outlines the ways in which that occurred.

I. Birthright Citizenship

A. Birth in the United States

STATES (Open Society Institute 2019) https://www.justiceinitiative.org/publications/unmaking-americans; ACLU FLORIDA, CITIZENS ON HOLD: A LOOK AT ICE'S FLAWED DETAINER SYSTEM IN MIAMI-DADE COUNTY (Mar. 20, 2019) https://www.aclufl.org/sites/default/files/field_documents/aclufl_report_-_citizens_on_hold_-_a_look_at_ices_flawed_detainer_system_in_miami-dade_county.pdf; David J. Bier, *U.S. Citizens Targeted by ICE*, CATO INSTITUTE IMMIGRATION RESEARCH AND POLICY BRIEF NO. 8 August 29, 2018 https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-8.pdf Professor Eisha Jain argues that the history of racialized enforcement established a tradition which continues today. Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794 (2022).

[15] *See generally* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (2005). For an international view of this question, see David Scott FitzGerald, *The History of Racialized Citizenship* 129, *in* THE OXFORD HANDBOOK OF CITIZENSHIP (Ayelet Shachar et al. eds., 2020).

[16] U.S. CONST., Art. I, § 8, cl. 4 ("[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States")

[17] A native of American Samoa still receives the status of "national" at birth. 8 U.S.C. § 1408; Fitisemanu v. United States, 1 F.4th 862 (10th Cir.), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).

The Constitution as adopted contemplated that there would be citizens of the United States, and, indeed, that only "natural born citizens" could become President. However, nowhere did the Constitution define "citizens" or explain who they were or how they would acquire that status. Instead, the matter was determined by common law. Clearly, citizens of states on July 4, 1776 who remained in the United States and adhered to its government became citizens of the United States,[18] at least if they were white.[19] As for those born after Independence, U.S. courts followed a leading English precedent, *Calvin's Case*,[20] and held that it was "established, with a few exceptions not requiring our present notice, that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born."[21] The Supreme Court, following *Calvin's Case*, recognized that the children born of foreign diplomats and enemy troops in hostile occupation were not citizens.[22]

The notorious *Dred Scott* case[23] addressed whether race would constitute another exception. Dred Scott had been born enslaved in the United States and sued for his freedom based on his residence in free states and territories. The Court, through Chief Justice Roger Brooke Taney, held that he had no right to sue based on diversity of citizenship because as a

[18] Inhabitants of Calais v. Inhabitants of Marshfield, 30 Me. 511, 517 (1849) ("In the United States it is the established doctrine, that those who remained in the country after the declaration of its independence, in 1776, and adhered to its government, became citizens of the United States."); Inhabitants of Manchester v. Inhabitants of Bos., 16 Mass. 230, 235 (1819) ("The term, citizens of the United States, must be understood to intend those who were citizens of a state, as such, after the union had commenced, and the several states had assumed their sovereignties. Before that period there was no citizen of the United States."); Peck v. Young., 1841 WL 4311 (N.Y. 1841) ("upon the separation of this country from the crown of Great Britain, in 1776, every British-born subject who was domiciled in the United States, and who did not continue to adhere to the former government, and elect at the termination of our revolutionary struggle to continue his allegiance to that government, and to retire from this country, became a citizen of the new government").

[19] Boyd v. Nebraska, 143 U.S. 135, 163 (1892) ("All white persons or persons of European descent who were born in any of the colonies, or resided or had been adopted there, before 1776, and had adhered to the cause of independence up to July 4, 1776, were by the declaration invested with the privileges of citizenship. U.S. v. Ritchie, 17 How. 525, 539; Inglis v. Trustees, 3 Pet. 99.")

[20] Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case (1608), 9 YALE J.L. & HUMAN. 73 (1997).

[21] Gardner v. Ward, 2 Mass. 244 (1805). *See also* United States v. Rhodes, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (Swayne, Circuit Justice) ("All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons. 2 Kent, Comm. 1; Calvin's Case, 7 Coke, 1; 1 Bl. Comm. 366; Lynch v. Clarke, 1 Sand. Ch. 583."); Munro v. Merch., 28 N.Y. 9, 24 (1863) ("The plaintiff is not an alien. He was born in this country, and under the present government. That fact alone, irrespective of, or rather despite, all other considerations, makes him a native born citizen.")

[22] United States v. Wong Kim Ark, 169 U.S. 649, 656 (1898).

[23] *See* DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 346-54 (1978); PAUL FINKELMAN, *DRED SCOTT V. SANDFORD*: A BRIEF HISTORY WITH DOCUMENTS (2nd ed. 2016).

person of African descent, though born in the United States, he was not, and could never be, a citizen.

The Court began with the point that "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives."[24] Recounting the history of the founding period, the Chief Justice concluded that African Americans were not part of the people and thus were not citizens:

> In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.[25]

The reason:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. [26]

Justice Curtis dissented, and proved to be the superior historian, explaining that in some states persons of African descent did enjoy the rights of citizens.[27] Nevertheless, the Chief Justice's views were the law.[28]

If not made citizens by birth in the United States, could persons of African ancestry be naturalized, if and when Congress changed its attitude towards them? Though not presented by the case, the Court nevertheless reached out to answer this question definitively and negatively. The naturalization power is "confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States,

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[24] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857), superseded (1868).

[25] *Id*. at 407.

[26] *Id*. at 407.

[27] *Id*. at 572-73 (Curtis J., dissenting). *See also* Paul Finkelman, *The First Civil Rights Movement: Black Rights in the Age of the Revolution and Chief Justice Taney's Originalism in* Dred Scott*,* 24 U. PA. J. CONST. L. 676 (2022).

[28] Some courts, even at the time, rejected the odious *Dred Scott* analysis. *Opinion of the Supreme Judicial Court*., 44 Me. 507, 515–16 (1857) (concluding that "our constitution does not discriminate between the different races of people which constitute the inhabitants of our state; but that the term, 'citizens of the United States,' . . . applies as well to free colored persons of African descent as to persons descended from white ancestors.")

who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class."[29]

After the Civil War, the citizenship clause of Section 1 of the Fourteenth Amendment made citizens of African Americans born in the United States: "All persons born or naturalized in the United States, and subject to the jurisdiction, thereof, are citizens of the United States and of the state wherein they reside."[30] "The first sentence of § 1 of the Fourteenth Amendment, the spirit of which pervades all of the Civil War Amendments, was obviously designed to overrule *Dred Scott v. Sandford*, and to ensure that the constitutional concept of citizenship with all attendant rights and privileges would henceforth embrace."[31] Chief Justice Roberts has written that "*Dred Scott*'s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox."[32] Importantly, though, neither Chief Justice Roberts nor any other justices have claimed that *Dred Scott* was overruled by the Court; that is, there has been no judicial holding that the slave system was imposed not on some kidnapped unfortunate strangers and their descendants, but on our fellow citizens.[33]

Indeed, enactment of the Fourteenth Amendment did not mark the end of the question of the relationship between race and birthright citizenship. In 1884 in *Elk v. Wilkins*, the Court held that members of Indian tribes born in tribal relations were not birthright citizens because they were not sufficiently "subject to the jurisdiction" of the United States. The Court explained:

> The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of

[29] 60 U.S. at 417 (Taney, C.J.).

[30] Afroyim v. Rusk, 387 U.S. 253, 262-63 (1967) ("The Civil Rights Act of 1866, 14 Stat. 27, had already granted citizenship to all persons born in the United States, but Congress and the states included a citizenship guarantee in the Fourteenth Amendment so it could not be taken away with ordinary legislation.")

[31] Bell v. Maryland, 378 U.S. 226, 300–01 (1964) (Goldberg J., concurring).

[32] Obergefell v. Hodges, 576 U.S. 644, 696 (2015) (Roberts, C.J., dissenting).

[33] Thus, while purporting not to rely on *Dred Scott*, in 1872 the Michigan Supreme Court held that enslaved persons born in the United States and who fled to Canada to escape slavery were not citizens, and therefore, their Canadian-born child was, likewise, not a citizen. People *ex rel.* Hedgman v. Bd. of Registration of Detroit, First Ward, 26 Mich. 51, 56 (1872) ("It follows, therefore, that the parents of the relator were never citizens of the United States prior to the adoption of the fourteenth amendment.") By contrast, by seating Hiram Revels a formerly enslaved person, as a Senator from Mississippi, the Senate determined that Mr. Revels had been a citizen for the requisite period 9-year period required by the Constitution. Accordingly, the Senate essentially determined that the Fourteenth Amendment's rejection of *Dred Scott* operated retroactively, and Black people born in the United States would be treated as citizens from birth, even if they were born before the Fourteenth Amendment became effective. Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2005).

particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life.[34]

Justice John Marshall Harlan dissented, but in terms consistent with Chief Justice Taney's claims in *Dred Scott*. "At the adoption of the constitution there were," Justice Harlan argued, "in many of the states, Indians, not members of any tribe, who constituted a part of the people for whose benefit the state governments were established."[35] Tribal members, at least, were not part of the people of the United States.

Congress responded by passing a law granting citizenship to tribal members in Elk's situation.[36] Nevertheless, like *Dred Scott*, *Elk v. Wilkins* apparently remains good law.[37] The U.S. Code for, example, at 8 U.S.C. § 1401(a) grants citizenship to "a person born in the United States, and subject to the jurisdiction thereof." The next section, 8 U.S.C. § 1401(b), grants citizenship at birth to "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe," seemingly acquiescing to the idea that the fourteenth amendment, standing alone, does not grant citizenship to Indians born in the United States.

The next test of birthright citizenship, again arising in response to the racial politics of the time, came with respect to Chinese migrants. Anti-Chinese political sentiment crystalized in the Chinese Exclusion Act of 1882,[38] which provided, among other things, that Chinese could not become naturalized citizens.[39] The U.S. Department of Justice, notwithstanding the citizenship clause of the Fourteenth Amendment, argued that Chinese born in the United States were not birthright citizens; in this they were supported and opposed by dueling law review articles.[40]

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[34] Elk v. Wilkins, 112 U.S. 94, 100 (1884). *See generally* Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185 (2016); Leti Volpp, *The Indigenous as Alien*, 5 UC IRVINE L. REV. 289 (2015).

[35] 112 U.S. at 112 (Harlan J., dissenting).

[36] Act of Feb. 8, 1887, 24 Stat. 388, § 6 ("every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States.")

[37] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978) ("Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments. See Elk v. Wilkins, 112 U.S. 94 (1884).")

[38] Act of May 6, 1882, 22 Stat. 58. *See* Gabriel J. Chin & Paul Finkelman, *The "Free White Persons" Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. *** (2024).

[39] 22 Stat. at 61, § 14,

[40] *Compare* D. H. Pingrey, *Citizens, Their Rights and Immunities*, 36 AM. L. REG. 539, 540 (1888) ("So a Chinese, born of alien parents within the dominion and jurisdiction of the United States, who reside therein, and not engaged in any diplomatic official capacity, under the Chinese government, is a citizen of the United States."); *with* George D. Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831, 834

Some American-born Chinese had to file habeas corpus petitions to be allowed to re-enter the United States after journeys overseas.[41] Finally, after a U.S. District Judge granted a writ of habeas corpus to Wong Kim Ark, whom the government stipulated had been born on Sacramento Street in San Francisco in 1873,[42] the government appealed to the Supreme Court. A brief signed by the Solicitor General—for some reason there were two briefs bearing his name-- echoed *Dred Scott*'s link between citizenship and whiteness:

> For the most persuasive reasons we have refused citizenship to Chinese subjects; and yet, as to their offspring, who are just as obnoxious, and to whom the same reasons for exclusion apply with equal force, we are told that we must accept them as fellow-citizens, and that, too, because of the mere accident of birth. There certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage. Are Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth? If so, then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having.[43]

Despite this plea to keep America only for the descendants of the patriots, the Court, 6-2, affirmed Wong Kim Ark's U.S. citizenship, relying on *Calvin's Case* and the many federal and decisions and other authorities applying it,[44] and the debates over the Fourteenth Amendment, in

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(1884) ("Their children born upon American soil are Chinese from their very birth in all respects, just as much so as though they had been born and reared in China; they inherit the same prejudices, the same customs, habits, and methods of their ancestors; in short, they are subject to the same civilization and adhere to it with as much tenacity as did their forefathers. Now it is evident that such persons are utterly unfit, wholly incompetent, to exercise the important privileges of an American citizen, a title which it was the aim of our ancestors to make as proud as that of king; and yet under the common-law rule they would be citizens."); Prentiss Webster, *Acquisition of Citizenship*, 23 AM. L. REV. 759, 772 (1889) (commenting on *In re* Chin King, 35 F. 354, 355 (C.C.D. Or. 1888): "Suppose that China has a similar rule [of citizenship by parental descent], certainly the positions of the United States and China would be the same in this regard; and under this rule Chin King would be held to be a citizen of China when in China, and a citizen of the United States when in the United States, if the rule jure soli is to govern. Certainly such an anomaly cannot be considered.")

[41] *E.g., In re* Wy Shing, 36 F. 553 (C.C.N.D. Cal. 1888); *In re* Yung Sing Hee, 36 F. 437 (C.C.D. Or. 1888); *In re* Chin King, 35 F. 354 (C.C.D. Or. 1888); *In re* Look Tin Sing, 21 F. 905 (C.C.D. Cal. 1884) (Field, Justice).

[42] *In re* Wong Kim Ark, 71 F. 382, 383 (N.D. Cal. 1896), *aff'd sub nom*. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[43] *See* Brief on Behalf of the Appellant (United States) at 34, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 95–904).

[44] 169 U.S. at 655-66.

which members of Congress stated that it would grant citizenship to Chinese, among others.[45] In a striking example of Derrick Bell's interest convergence thesis,[46] the Court also noted that "[t]o hold that the fourteenth amendment . . . excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens."[47]

Justice Harlan joined Chief Justice Fuller's dissent. Although justly celebrated as "the great dissenter," perhaps Harlan did not write for himself because in *Elk v. Wilkins*, in arguing for the citizenship of Indians, he had taken the position that the Fourteenth Amendment applied to persons "of whatever race," including, quoting President Johnson's veto message, "the Chinese of the Pacific states."[48] While they agreed that "[u]ndoubtedly, all persons born in a country are presumptively citizens thereof,"[49] the presumption was rebutted when children "were born of aliens whose residence was merely temporary, either in fact or in point of law."[50] Accordingly, the Fourteenth Amendment applied to "all persons born in the United States of parents permanently residing here, and susceptible of becoming citizens, and not prevented there from by treaty or statute."[51] The dissent approved of racial restrictions on naturalization,[52] and cited with apparent approval Chief Justice Taney's view of citizenship in *Dred Scott*.[53]

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[45] *Id*. at 697-99. *See also* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2220 & nn. 10-12 (2021) (citing debates).

[46] Derrick A. Bell Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.")

[47] 169 U.S. at 694.

[48] Elk v. Wilkins, 112 U.S. 94, 114, 116 (1884) (Harlan J., dissenting). *See also* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

[49] 169 U.S. at 718 (Fuller, C.J., dissenting).

[50] *Id*. at 729.

[51] *Id*. at 731.

[52] *Id*. at 729 ("Nor would a naturalization law excepting persons of a certain race and their children be invalid, unless the amendment has abridged the power of naturalization.")

[53] *Id*. at 717 ("The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty.") (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857)).

The dissent was clearly motivated, at least in part, by policy concerns about Chinese people as fellow citizens. The dissent quoted *Fong Yue Ting v. United States*,[54] which upheld a registration requirement for Chinese migrants only, enforced by the threat of deportation, based on the following conclusions of the Chinese experience in the United States:

> the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests.[55]

The dissent concluded that "It is not to be admitted that the children of persons so situated become citizens by the accident of birth."[56]

B. Birth in the "Territories" and Noncitizen Nationals

Other people of color unquestionably born "subject to the jurisdiction" of the United States, did not become U.S. citizens despite *Wong Kim Ark*. The U.S. acquired Puerto Rico, the Philippines, and Guam from Spain at the end of the Spanish-American war in 1898, and that same year annexed Hawaii. Some of these possessions were deemed not to be part of the "United States" for purposes of various provisions of the Constitution, including the citizenship clause of the Fourteenth Amendment. In a series of Supreme Court decisions called the Insular Cases, the Supreme Court held that "the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories."[57]

Downes v. Bidwell[58] involved whether Puerto Rico was the "United States" for purposes of taxation, but the Court broadly explored the status of unincorporated territories, and whether they could be excluded from the definition of "United States" for general constitutional purposes. Justice Brown answered the question by reasoning that unless the government could deny citizenship to members of undesirable races, the American people might not agree to acquire imperial colonies at all:

[54] Fong Yue Ting v. United States, 149 U. S. 698, 717 (1892).

[55] 169 U.S. at 731 (quoting 149 U.S. at 717). The Court's observation that the Chinese did not assimilate was ungenerous, to say the least, given the discrimination against them.

[56] 169 U.S. at 731.

[57] Boumediene v. Bush, 553 U.S. 723, 756 (2008).

[58] 182 U.S. 244 (1901).

> the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.[59]

In prior acquisitions of territory, including Alaska, Florida and Louisiana, Brown found "an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto."[60] He concluded:

> in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.[61]

Justice White wrote for himself and three others to create a majority with Brown. White quoted with approval an international law treatise guiding the behavior of conquerors: "if the conquered are a fierce, savage, and restless people, he may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their 'impetuosity, and to keep them under subjection.'"[62] He explained that the United States might want to acquire "an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons" yet it would be nonsensical for the acquisition to mandate "the immediate bestowal of citizenship on those absolutely unfit to receive it."[63]

The four dissenters insisted that the Constitution applied, but did not disagree about the issue of citizenship: "Much discussion was had at the bar in respect of the citizenship of the

[59] *Id*. at 279–80.

[60] *Id*. at 280.

[61] *Id*. at 282.

[62] *Id*. at 302 (White J., concurring).

[63] *Id*. at 306.

inhabitants of [Puerto Rico], but we are not required to consider that subject at large in these cases. It will be time enough to seek a ford when, if ever, we are brought to the stream."[64]

What status would people enjoy who were under the exclusive jurisdiction of the United States, yet resident in territory not deemed part of the United States? The racist vision of Chief Justice Taney's decision in *Dred Scott* suggested the answer, denying that persons of African descent were citizens, yet recognizing that they were not "foreigners," or "aliens."[65] To create a pigeonhole for noncitizen, non-aliens, the law created the category of noncitizen national.[66] In 1904, the Court held that Puerto Ricans, whether or not citizens, were at least not "aliens" and thus could enter the continental United States.[67]

The continuing validity of the Insular Cases, and hence the lawfulness of creating non-citizen nationals in unincorporated territories,[68] are being challenged in the courts. In 2005, the D.C. Circuit denied a claim by certain residents of American Samoa that they were entitled to birthright citizenship.[69] In 2021, the Tenth Circuit agreed.[70] However, Justice Gorsuch has opined forcefully that the Insular Cases should be overruled, so the question may yet reach the Supreme Court.[71] Nevertheless, recognition of the category of noncitizen nationals in the 21st century cannot be chalked up solely to traditional racism. In the litigation, the people of

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[64] *Id*. at 365 (Fuller, C.J., dissenting).

[65] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857), superseded (1868).

[66] Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORD. L. REV. 1673, 1674 (2017); Dudley O. McGovney, *Our Non-citizen Nationals, Who Are They?*, 22 CAL. L. REV. 593 (1934).

[67] Gonzales v. Williams, 192 U.S. 1, 12–13 (1904). The historical and current status of Puerto Rico is discussed in Guy-Uriel Charles & Luis Fuentes-Rohwer, *No Voice, No Exit, but Loyalty? Puerto Rico and Constitutional Obligation*, 26 MICH. J. RACE & L. 133, 140 (2021).

[68] 8 U.S.C. § 1408 (identifying class who "shall be nationals, but not citizens, of the United States at birth").

[69] Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015).

[70] Fitisemanu v. United States, 1 F.4th 862 (10th Cir.), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).

[71] Justice Gorsuch wrote:

> A century ago in the Insular Cases, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.

United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch J., concurring). *See also* Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) ("we need not consider the request by some of the parties that we overrule the much-criticized 'Insular Cases' and their progeny.")

American Samoa themselves are divided on the question of whether they should automatically be citizens.[72]

C. The Restrictionist Dream of Restoring *Dred Scott*

Although proposals never came dangerously close to passing, in the Jim Crow era, some believers in white supremacy proposed denying birthright citizenship to children whose parents were racially undesirable.[73] In the modern era, immigration restrictionists cling to the dissent in *Wong Kim Ark*, such as former law professor and Trump January 6, 2021 advisor John Eastman who argued in 2020 in *Newsweek* that Kamala Harris was not eligible to be President or Vice President based on her birth in the United States to noncitizen parents.[74] The most significant debate has been with respect to the children of undocumented noncitizens. Some contend that as lawbreakers, they are not "subject to the jurisdiction" of the United States. Scholars Peter Schuck and Rogers Smith argued in their 1985 book *Citizenship Without Consent*[75] that as the Framers of the Constitution intended membership in the political community to be consensual, and that the citizenship clause was never intended to apply to undocumented migrants, a category which, they contend, did not exist in the United States in 1868.

Among the challenges facing these arguments are the fact that the Supreme Court has held that the children of unauthorized migrants, born in this country, are U.S. citizens,[76] and that the court has held that people without legal immigration status are nevertheless "subject to the jurisdiction" of the United States for purposes of the Fourteenth Amendment.[77] Scholars,

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[72] Rose Cuison-Villazor, *Rejecting Citizenship*, 120 MICH. L. REV. 1033, 1044-46 (2022).

[73] Raymond Leslie Buell, *Against the Yellow Peril*, 2 FOR. AFF. 295, 297 (1923) ("leaders in the anti-Japanese movement propose a constitutional amendment which would exclude from American citizenship children of parents themselves ineligible. But such an amendment would violate the historic belief of this country that children born under our institutions can comprehend their purpose sufficiently well to exercise the duties of citizenship."). *See also* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, *** (1981).

[74] John Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK, Aug. 12, 2020 https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483. For a definitive rebuttal, see Margaret Stock & Nahal Kazemi, *The Non-Controversy Over Birthright Citizenship: Defending the Original Understanding of Jus Soli Citizenship*, 24 CHAP. L. REV. 1 (2020).

[75] PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLICY (1985). *But see* Chin & Finkelman, *supra* note 45 (outlining contrary arguments).

[76] I.N.S. v. Rios-Pineda, 471 U.S. 444, 446 (1985) ("By that time, respondent wife had given birth to a child, who, born in the United States, was a citizen of this country.")

[77] Plyler v. Doe, 457 U.S. 202, 212 n.10 (1982) ("As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the

likewise, have rejected the claim as inconsistent with the intent behind the Fourteenth Amendment.[78] African Americans were not part of the political community, according to *Dred Scott*, nor were Chinese immigrants, who could never become citizens, but the Fourteenth Amendment as interpreted by *Wong Kim Ark* made their children citizens anyway. In in addition, there were unquestionably undocumented noncitizens in the United States in 1868, namely, those brought here in violation of the prohibition on the slave trade.[79] Yet, there is little question that the Framers of the Fourteenth Amendment intended to grant them citizenship.[80]

II. Naturalization

Federal laws granting citizenship are exceedingly important because, to date, courts have not recognized citizenship by natural law nor, since enactment of the Fourteenth Amendment, under common law. The Supreme Court has stated: "[t]he Fourteenth Amendment . . . contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law."[81] Indeed, there is something akin to a presumption against citizenship. The Supreme Court has stated: "it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect. This Court has often stated that doubts 'should be resolved in favor of the United States and against the claimant.'"[82] Federal statutes providing for naturalization have traditionally turned on race.

A. Individual Naturalization

One count in the indictments of King George III in the Declaration of Independence was that "He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations

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United States was lawful, and resident aliens whose entry was unlawful. *See* C. Bouvé, Exclusion and Expulsion of Aliens in the United States 425–427 (1912).")

[78] Margaret D. Stock, *American Birthright Citizenship Rules and the Exclusion of "Outsiders" from the Political Community* 179, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017).

[79] Gerald L. Neuman, *Back to* Dred Scott, 24 SAN DIEGO L. REV. 485, 498-99 (1987). *See also* Chin & Finkelman, *supra* note 45.

[80] *Id*.

[81] United States v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898). *See also* Fedorenko v. United States, 449 U.S. 490, 506 (1981) ("[T]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship 'illegally procured,' and naturalization that is unlawfully procured can be set aside.")

[82] Berenyi v. Dist. Dir., I.N.S., 385 U.S. 630, 637 (1967) (citing United States v. Macintosh, 283 U.S. 605, 626 (1931)).

hither, and raising the conditions of new Appropriations of Lands."[83] It is not surprising, for a people whose independence was driven in part by a desire to invite new members, that one of the first acts of the first Congress was to pass a naturalization law. The Naturalization Act of 1790 was signed by George Washington as President, Vice President John Adams as President of the Senate, and Thomas Jefferson as Secretary of State. It granted the privilege of naturalization to "free white persons."[84]

In *Dred Scott*, Chief Justice Taney found the statute significant in defining the contours and composition of the People of the United States: "the language of the law above quoted, shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government."[85] Twentieth century, pre-*Brown* Courts did not disagree. In rejecting the petition of a Japanese American to naturalize, a unanimous Court called racial restriction "a rule in force from the beginning of the government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions."[86] Racial limitation on naturalized citizenship remained part of U.S. law until 1952.[87]

The main general statutory relaxation of racial ineligibility in the 19th Century was the 1870 inclusion of persons of African nativity and descent. During Reconstruction, Congress considered and explicitly rejected eliminating the racial requirement.[88] In creating the Revised Statutes of 1873, the first official codification of U.S. law, the revisors inadvertently omitted the racial restriction. The next year, Congress restored it.[89] Clearly, racial restriction on naturalized citizenship was an intentional, considered decision.[90]

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[83] 1 Stat. 1, 2 (1776).

[84] Act of Mar. 26, 1790, 1 Stat. 103, § 1.

[85] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 419–20 (1857), superseded (1868).

[86] Ozawa v. United States, 260 U.S. 178, 194 (1922).

[87] IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th Ann. ed. 2016). *See also, e.g.,* Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013); Ariela Gross, *"Of Portuguese Origin": Litigating Identity and Citizenship Among the "Little Races" in Nineteenth-Century America*, 25 L. & HIST. REV. 467 (2007).

[88] In the Senate, Senator Charles Sumner of Massachusetts moved to amend the naturalization law "by striking out the word 'white' wherever it occurs, so that in naturalization, there shall be no distinction of race or color." CONG. GLOBE, 41st Cong., 2d Sess. 5121. The motion was voted down, 22-23. *Id*. at 5123. On reconsideration, it failed 14-30. *Id*. at 5176.

[89] Ozawa v. United States, 260 U.S. 178, 195 (1922) ("It is true that in the first edition of the Revised Statutes of 1873 the words in brackets, 'being free white persons, and to aliens' were omitted, but this was clearly an error of the compilers and was corrected by the subsequent legislation of 1875 (18 Stat. 316, 318).")

[90] And it is not necessarily the case that inclusion of persons of African nativity and descent was meant to be highly meaningful. In explaining the limited relaxation during Reconstruction, one judge explained:

Another possible exception was the Treaty of Guadalupe Hildago (1848), which allowed Mexicans in territory ceded to the United States to elect U.S. citizenship without limitation of race.[91] A leading court U.S. District Court decision held "that citizens of Mexico are eligible to American citizenship, and may be individually naturalized by complying with the provisions of our laws."[92] However, in the reported decisions, at least, there was little question that Asians were ineligible. More than a few Asians did obtain naturalization certificates, but when challenged courts uniformly held them invalid.[93] In 1923, a unanimous Supreme Court explained: "Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not."[94]

Citizenship and eligibility to citizenship were important for a range of reasons. The Immigration Act of 1924 perfected the exclusion of Asians from immigration by tying the right to immigrate to racial eligibility for naturalization.[95] Many benefits, licenses and jobs were limited to citizens, or to those who had taken the first step in becoming a citizen by filing a formal judicial Declaration of Intention to naturalize.[96] Because of the importance of declarant status—in many states declarants could vote, for example—an elaborate jurisprudence of the

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> However, there is this to be said in excuse for this seeming inconsistency: the negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them.

In re Camille, 6 F. 256, 258 (C.C.D. Or. 1880)

[91] *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico*, 9 Stat. 922, 929 Art. VIII (Feb. 2, 1848) (giving Mexican citizens in ceded territories the right to "retain the title and rights of Mexican citizens, or acquire those of citizens of the United States.")

[92] *In re* Rodriguez, 81 F. 337, 354 (W.D. Tex. 1897). *See* Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337 (2007).

[93] *See In re* Chang, 24 P. 156, 157 (Cal. 1890) ("We are therefore of opinion that the certificate of naturalization presented in this case was issued without authority of law, and is void; it being conceded that the holder of it is a person of Mongolian nativity."), *abrogated* 344 P.3d 288 (Cal. 2015). *See also In re* Yamashita, 70 P. 482, 482 (Wash. 1902) ("A judgment void upon its face may be attacked at any time and in any proceeding, and the same may be disregarded.")

[94] Terrace v. Thompson, 263 U.S. 197, 220 (1923).

[95] Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162 (repealed 1952). *See generally* A. Warner Parker, *The Ineligible to Citizenship Provisions of the Immigration Act of 1924*, 19 AM. J. INT'L L. 23 (1925).

[96] HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271 (2020).

validity of declarations developed. Courts were clear that someone who could not ultimately naturalize could not validly declare their intention to do so.[97]

Not surprisingly, naturalization law has given special consideration to veterans of the U.S. Armed Forces, particularly in wartime. Typically, the reward is a relaxation of the required period of residency in the United States. However, the racial restrictions on naturalization generally were not relaxed, and courts regularly held veterans of disfavored races to be ineligible for citizenship.[98] In 1925, the Supreme Court denied the naturalization petition of a Japanese American veteran of the U.S. Coast Guard in World War I, explaining: "as it has long been the national policy to maintain the distinction of color and race, radical change is not lightly to be deemed to have been intended."[99] Chief Justice Taft dissented without opinion.[100]

"Filipinos, not being 'free white persons' or 'of African nativity,' were not eligible to citizenship of the United States" by naturalization,[101] although a special exception was made for Filipino veterans.[102] During World War II, people in the Philippines, then a U.S. commonwealth, were induced to fight in or with the U.S. Armed Forces based on the promise of a path to citizenship.[103] Few were actually able to naturalize, in part because the officials necessary to process applications were not posted to the Philippines at the end of the war. In *I.N.S. v. Pangilinan*,[104] the Court held that under no theory could a U.S. court grant citizenship based on claims that the promise had been breached. However, in 1990—45 years after the end of World War II--Congress granted Filipino veterans a new window of time to naturalize.[105]

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[97] 100 B.U. L. REV. at 1283.

[98] Deenesh Sohoni & Amin Vafa, *The Fight to Be American: Military Naturalization and Asian Citizenship*, 17 ASIAN AM. L.J. 119, 119 (2010); *see also* Darlene Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400 (2000).

[99] Toyota v. United States, 268 U.S. 402, 412 (1925).

[100] *Id*.

[101] United States v. Javier, 22 F.2d 879, 880 (D.C. Cir. 1927).

[102] Roque Espiritu De La Ysla v. United States, 77 F.2d 988, 989 (9th Cir. 1935).

[103] Antonio Raimundo, Note, *The Filipino Veterans Equity Movement: A Case Study in Reparations Theory*, 98 CAL. L. REV. 575, 589 (2010).

[104] I.N.S. v. Pangilinan, 486 U.S. 875, 885 (1988) ("Neither by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations.") *See* Kevin Pimentel, *To* Yick Wo, *Thanks for Nothing!: Citizenship for Filipino Veterans*, 4 MICH. J. RACE & L. 459, 390 (1999) (discussing *Pangilinan*).

[105] Raimundo, *supra* note 103, at 602 n.245 (citing Pub. L. No. 101-649, § 405, 104 Stat. 4978 (1990)).

At least in part for geopolitical reasons, Congress eliminated racial restrictions in the mid-twentieth century.[106] Persons of races native to the Western Hemisphere became eligible for naturalization in 1940, persons of Chinese ancestry in 1943, Asian Indians and Filipinos in 1946, and Guamians in 1950. In 1952, Japanese people were the main or perhaps only group of ineligibles. That year, naturalization was placed on a race-neutral basis for the first time in U.S. history.[107]

B. Collective Naturalization

In addition to granting citizenship to specific people based on individual application, Congress has also made citizens of categories or groups of people. As the Supreme Court explained, discussing the grant of citizenship to the people of the Nebraska territory upon statehood, "the instances of collective naturalization, by treaty or by statute, are numerous."[108]

In the *Dred Scott* era, collective naturalizations often discriminated, at least in effect. For example, the constitution of the Republic of Texas drew a strict race line, granting citizenship to "all persons, (Africans, or descendants of Africans, and Indians excepted) who were residing in Texas on the day of the Declaration of Independence," and offered naturalization only to "free white persons."[109] When Texas was admitted to the Union in 1845, "[t]hose who were citizens of the state became citizens of the United States, while aliens were relegated for naturalization to the laws of the United States on that subject."[110] Of course, that Congress ratified Texas' discriminatory citizenship policy was hardly surprising when its own laws drew the same race line.[111]

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[106] Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988). *See also* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 280-300 (1996).

[107] 8 U.S.C. § 1422 ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.") (added by Immigration and Nationality Act of 1952, ch. 477, title III, ch. 2, § 311, 66 Stat. 239; Pub. L. 100–525, § 9(t)).

[108] Boyd v. Nebraska, 143 U.S. 135, 162 (1892).

[109] Tex. Const., Gen. Provs., §§ 6 & 10 (1836) (available at https://tarlton.law.utexas.edu/constitutions).

[110] Contzen v. United States, 179 U.S. 191, 195 (1900).

[111] Nebraska offers another example of the effect of race on collective naturalization. The Nebraska Supreme Court held in 1891 that a candidate for governor was not made a citizen merely by being a resident of the territory when it was admitted to the Union. One reason was that such a principle "would make the Chinese residing in the Dakotas, Montana, and Washington when those states were admitted into the Union citizens of the United States, while the courts have uniformly held that the Chinese were not proper subjects for naturalization under our present laws." State v. Boyd, 48 N.W. 739, 750 (Neb. 1891). The U.S. Supreme Court reversed, but without rejecting the principle. The high court found that Congress granted citizenship to the class of persons entitled to vote under Nebraska's constitution, namely, "white citizens of the United States, and white persons of foreign birth who had declared their intention to become such." Boyd v. Nebraska, 143 U.S. 135, 175 (1892). Although Congress invalidated the racial restrictions (Act of Feb. 9, 1867, 14 Stat. 391, 392 § 3), functionally, they remained. Of course, those who were already "citizens of the United States" would not benefit from naturalization, so only noncitizens who had "declared their intention" to naturalize stood to gain. Because only "free white persons" could naturalize, only they could be bona fide declarants. *See* Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for*

Some collective naturalizations were more egalitarian. For example, the Republic of Hawaii granted birthright citizenship without discrimination based on race. It imposed strict requirements for naturalization,[112] but again without a racial limitation.[113] Accordingly, when Congress granted citizenship to all citizens of Hawaii,[114] non-whites became U.S. citizens.[115] However, Hawaii residents who were not already citizens of Hawaii by birth or naturalization did not become U.S. citizens upon annexation by the United States. This group was comprised of immigrants to Hawaii who had not yet naturalized. Alfred S. Hartwell was an important legal figure in Hawaii for decades before and after annexation; he explained that granting citizenship to Hawaiian citizens, but not mere residents "leaves out nearly all of the Asiatics, who form a large part of the population."[116] That is, as unnaturalized immigrants, many Asian people remained noncitizens of Hawaii and, having become subject to the jurisdiction of the United States, they had missed their window of opportunity to become citizens.

Many Indian tribes were collectively naturalized by statute or treaty. A major example is the Indian Citizenship Act of 1924,[117] which granted citizenship to all who did not have it, and provided for citizenship of all members of Indian tribes born in the United States in the future. 1924 is a suspicious moment for a racially egalitarian law, being, as it was, the enactment year of the Immigration Act of 1924, which perfected Asian Exclusion by banning immigration of aliens ineligible to citizenship, and created the racist, antisemitic, and anti-Catholic national origins quota system.

A persuasive explanation comes from legal scholar and former Seneca Nation of Indians President Robert Odawi Porter, who proposed that the government "sought to 'civilize' Indians through a four-pronged attack that served as a kind of Four Horsemen of the Indian Apocalypse:

White Noncitizens, 100 B.U. L. REV. 1271, 1283–84 & nn. 59-60 (2020). Accordingly, only white people benefitted from the collective naturalization of the electors of Nebraska.

[112] Jon M. Van Dyke, *Population, Voting, and Citizenship in the Kingdom of Hawai'i*, 28 U. HAW. L. REV. 81, 92–93 (2005).

[113] Wong Foong v. United States, 69 F.2d 681, 682 (9th Cir. 1934) ("The father, Wong Ping, was naturalized as a citizen of the kingdom of Hawaii on August 29, 1892"); Van Dyke, 28 U. HAW. L. REV. at 90–91 ("By 1893, a total of 3239 foreigners had become naturalized, including 1105 Americans, 763 Chinese, 596 British, 242 Portuguese, 230 Germans, 47 French, 68 other Europeans, 136 Pacific Islanders, 27 South Americans, 3 Japanese, and 25 others.").

[114] Act of Apr. 30, 1900, 31 Stat. 141.

[115] Wong Kam Wo v. Dulles, 236 F.2d 622, 624 (9th Cir. 1956) ("The father, Wong Tin, was born in Honolulu, Republic of Hawaii, on November 25, 1893. He went to China four years later. On April 30, 1900, he acquired United States citizenship by virtue of § 4 of the Hawaii Organic Act."); Ching Hong Yuk v. United States, 23 F.2d 174, 174 (9th Cir. 1927) (finding Chinese person born in Hawaii in 1896 to be a U.S. citizen).

[116] Alfred S. Hartwell, *The Organization of a Territorial Government for Hawaii*, 9 YALE L.J. 107, 112 (1899).

[117] Act of June 2, 1924, 43 Stat. 253.

convert the Indians to Christianity, force Indian children to obtain Western education, allot tribal common lands to individual Indians, and extend to the Indians American citizenship."[118] On this account, the collective naturalization of Indians is less a recognition of human equality, and more part of an effort to obliterate the distinctive community, culture, and government of native peoples.

III. Derivative Citizenship

In addition to individual and collective naturalizations, U.S. law sometimes granted citizenship to children based on the U.S. citizenship of one or both parents (jus sanguinis), or to women based on marriage to a male U.S. citizen.[119] In both cases, racial and gender considerations gave rise to important limitations.

A. Children of U.S. Citizens Born Abroad

Beginning with the first citizenship statutes, some children born abroad to U.S. citizens have been granted birthright citizenship.[120] Although there were many proposals to deny citizenship to the foreign-born children of non-white U.S. citizens, none ever became law. Accordingly, for example, the China-born children of U.S. citizens of Chinese ancestry were a significant source of immigration during the exclusion era.[121] In spite of concern that some were admitted based on false claims of paternity, the law remained facially neutral. Here and in other instances, a systematically racist policy stopped short of going as far as the most racist Americans desired.

Nevertheless, the law was shaped by racial concerns. For decades, the law imposed special rules on the grant of citizenship to children born out of wedlock to U.S. citizen fathers.[122] In a series of cases, the Court upheld some of these restrictions,[123] before striking down a more lenient residence requirement for U.S. citizen mothers who had out of wedlock children

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[118] Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 108–09 (1999).

[119] U.S. law now offers special immigration privileges to male or female spouses of U.S. citizens, and an accelerated path to citizenship. 8 U.S.C. § 1430(a). However, U.S. law never offered the automatic citizenship discussed here to noncitizen spouses of U.S. citizen women.

[120] *See* Ch. 3, 1 Stat. 103.

[121] *See* ESTELLE T. LAU, PAPER FAMILIES: IDENTITY, IMMIGRATION ADMINISTRATION, AND CHINESE EXCLUSION (2006).

[122] 8 U.S.C. § 1409.

[123] Nguyen v. I.N.S., 533 U.S. 53 (2001); Miller v. Albright, 523 U.S. 420 (1998).

overseas.[124] Professor Kristin Collins' research has shown that Congress feared that "American citizens of Chinese or Mexican descent would leave the United States, return to China or Mexico, and have children who 'are born citizens of the United States.'"[125] Although naturalization is now on a race-neutral basis,

> the marriage and legitimation requirements in the jus sanguinis citizenship statute--by then recodified in the 1952 Immigration and Nationality Act--continued to serve as a race-salient limitation on the recognition of American soldiers' foreign-born children as citizens. Soldiers' interracial marriages were no longer illegal (or presumed illegal) under state law, but military officials continued to discourage soldiers from marrying local women in many of the Asian countries where American troops were stationed.[126]

Amerasian children of U.S. service members in Vietnam, the Philippines, and elsewhere in Asia experienced particular hardships.[127]

B. Invented Requirements

Immigration administrators sometimes invented requirements for acquisition or retention of U.S. citizenship, and sought to deport or exclude from the United States people who did not satisfy them. These requirements did not always have a racial component; for example, in 1939, the Supreme Court unanimously rejected an administrative claim that a birthright citizen had become expatriated by moving out of the country as a minor.[128] Some requirements were associated with race. For example, in 1915, immigration authorities enacted a rule that foreign

[124] Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

[125] Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2195 (2014).

[126] *Id*. at 2211. *See also* Blanche Bong Cook, *Johnny Appleseed: Citizenship Transmission Laws and A White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the "WHP") or Johnny and the WHP*, 31 YALE J.L. & FEMINISM 57, 83 (2019); Rose Cuison Villazor, *The Other* Loving: *Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011).

[127] *See* MaryKim DeMonaco, Note*, Disorderly Departure: An Analysis of the United States Policy Toward Amerasian Immigration*, 15 BROOK. J. INT'L L. 641, 641 (1989); Trúe Doan, Note, *Bringing the Aliens Home: The Influence of False Narratives on Judicial Decision Making in the Amerasian Context*, 24 ASIAN AM. L.J. 69 (2017); Bonnie Kae Grover, Note, *Aren't These Our Children? Vietnamese Amerasian Resettlement and Restitution*, 2 VA. J. SOC. POL'Y & L. 247 (1995); Ranjana Natarajan, Note, *Amerasians and Gender-Based Equal Protection Under U.S. Citizenship Law*, 30 COLUM. HUM. RTS. L. REV. 123 (1998).

[128] Perkins v. Elg, 307 U.S. 325, 329 (1939) ("As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.")

born children of U.S; citizens of Chinese ancestry were not citizens. Federal courts and the U.S. Attorney General invalidated this effort.[129]

C. Wives of American Citizens

From 1855 to 1922, the law provided that a noncitizen woman who married a U.S. citizen shall be a citizen if she "might herself be lawfully naturalized."[130] The Court explained that "[t]he terms, 'who might lawfully be naturalized under the existing laws,' only limit the application of the law to free white women."[131] Accordingly, Asian women did not become citizens upon marriage to a U.S. citizen.[132] Chinese wives of American citizens were allowed to immigrate, notwithstanding the exclusion laws,[133] until the Immigration Act of 1924 was construed to bar them.[134]

IV. Expatriation and Denaturalization, and Procedure

In 1967, the modern era of expatriation law began when the Court "reject[ed] the idea . . . that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent."[135] Before then,

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[129] Gabriel J. Chin et. al., Chevron *and Citizenship*, 52 UC DAVIS L. REV. 145, 165 (2018).

[130] Act of Feb. 10, 1855, 19 Stat. 604. *See generally* MARTHA MABIE GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965 (2005).

[131] Kelly v. Owen, 74 U.S. 496, 498 (1868). After the right of naturalization was extended to persons of African nativity and descent in 1870, women of that background could also benefit. *See also* United States v. Tod, 285 F. 523, 528 (2d Cir. 1922) ("This construction limited the effect of the statute to those aliens who belonged to the class or race which might be lawfully naturalized, and did not refer to any of the other provisions of the naturalization laws, as to residence or moral character, or to any of the provisions of the immigration laws relating to the exclusion or deportation of aliens."); Dorto v. Clark, 300 F. 568, 571 (D.R.I. 1924) ("Because she was a wife of an American citizen, she was granted citizenship if not debarred by race"), *aff'd sub nom.* United States v. Dorto, 5 F.2d 596 (1st Cir. 1925).

[132] Chung Fook v. White, 287 F. 533, 534 (9th Cir. 1923) ("Lee Shee, being incapable of naturalization, remained an alien notwithstanding her marriage to a citizen of the United States"), *aff'd*, 264 U.S. 44 (1924) ("Lee Shee, his wife, is an alien Chinese woman, ineligible for naturalization").

[133] Tsoi Sim v. United States, 116 F. 920, 925 (9th Cir. 1902) ("The wife has the right to live with her husband; enjoy his society; receive his support and maintenance and all the comforts and privileges of the marriage relations.")

[134] Chang Chan v. Nagle, 268 U.S. 346, 353 (1925) ("The applicants should be refused admission if found to be Chinese wives of American citizens."); Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882-1924*, 27 L. & SOC. INQUIRY 271, 299 (2002).

[135] Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

Congress had freely enacted and enforced laws expatriating birthright citizens and denaturalizing persons who had acquired citizenship in other ways. Denaturalization is making a comeback in the United States, based on claims that individuals obtained citizenship without being eligible or contrary to law,[136] but citizenship is nevertheless much more secure in the last half century than it was before.

As noted above, between 1855 and 1922, U.S. law granted citizenship to foreign wives of U.S. citizen men if they were racially eligible to citizenship. In a mirror image of this patriarchal policy, between 1907 and 1922 federal law stripped U.S. citizen women of citizenship if they married foreign men.[137] In 1922—that is, shortly after passage of the Nineteenth Amendment—the law was changed, but continued to expatriate female citizens who married male aliens ineligible to citizenship.[138] Given the anti-miscegenation laws applicable to Asians in many states, U.S. citizen women of Asian ancestry were allowed to marry, or in any event, most likely to marry, Asian men. If married to a noncitizen, they were expatriated.[139] Congress eliminated expatriation in 1931, and allowed women who had lost citizenship to regain it.[140] Nevertheless, some women fell through the cracks.[141]

Another difficulty was procedural. A person of color not only had to be a citizen, he or she had to persuade the authorities of that fact. In a case where a person claimed to have been born in Hawaii, a panel of the Ninth Circuit rather directly chided a district court and immigration authorities for rejecting uncontradicted testimony:

> In certain communities prejudices are said to exist favoring the integrity of testimony of white persons, particularly the so-called 'Nordics,' against the red-skinned Indian, the yellow Chinese and Japanese, the dark-complexioned Mediterranean, and darker African. Though its reassertion be trite, we take judicial notice that neither the sense of color nor historical racial antagonisms afford criteria of integrity of the mind.[142]

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[136] Cassandra Burke Robertson & Irina D. Manta, (*Un)civil Denaturalization*, 94 N.Y.U. L. REV. 402, 403 (2019).

[137] Mackenzie v. Hare, 239 U.S. 299, 307 (1915) (upholding Act of Mar. 2, 1907, § 3, 34 Stat. 1228).

[138] Act of Sept. 22, 1922 (Cable Act), ch. 411, § 3, 42 Stat. 1022.

[139] Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 406 (2005).

[140] Act of Mar. 3, 1931, ch. 442, §4(a), 46 Stat. 1511, 1511-12 (1931).

[141] *See, e.g.,* United States v. Dang Mew Wan Lum, 88 F.2d 88, 89 (9th Cir. 1937).

[142] Lau Hu Yuen v. United States, 85 F.2d 327, 330 (9th Cir. 1936) (Denman J. joined by Garrecht and Wilbur).

In other cases, though, the same panel of judges upheld findings that a claim to have been born in Hawaii was false.[143]

In a series of cases, the Supreme Court upheld the authority of administrative officers to finally determine claims of citizenship by those seeking admission at the border: "It is established . . . that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed,-as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts."[144] In *Ng Fung Ho v. White*,[145] however, the Court held that deportation from the interior of the United States required a judicial trial:

> To deport one who so claims to be a citizen obviously deprives him of liberty . . . It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.[146]

Notwithstanding such cases on the books, the reports of U.S. citizens being detained and deported, almost always people of color, continue unabated.[147]

Conclusion

In the United States, just as race has always been associated with social status, race has always been associated with legal status, and it has always shaped the law of citizenship itself. Before the Thirteenth Amendment, southern courts often ruled that "[e]very negro is, by a rule of evidence well established in this part of the country, prima facie to be considered as a slave."[148] Even today, the Supreme Court holds that "[t]he likelihood that any given person of Mexican

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[143] Ho Gou Chong v. United States, 77 F.2d 497, 497 (9th Cir. 1935) (Wilbur J., joined by Garrecht and Denman); *see also, e.g.,* Lau Ah Yew v. Dulles, 257 F.2d 744, 746 (9th Cir. 1958) ("The trier of fact need not accept uncontradicted testimony when good reasons appear for rejecting it.")

[144] United States v. Ju Toy, 198 U.S. 253, 262 (1905) (citing United States v. Sing Tuck, 194 U. S. 161, 167 (1904); Lem Moon Sing v. United States, 158 U. S. 538, 546, 547 (1895)); U.S. *ex rel.* Medeiros v. Watkins, 166 F.2d 897, 899 (2d Cir. 1948) ("the administrative determination on the question of citizenship in an exclusion proceeding is conclusive so long as a fair hearing was had and there has been no application of an erroneous rule of law.")

[145] Ng Fung Ho v. White, 259 U.S. 276 (1922).

[146] *Id*. at 284–85.

[147] *See supra* note 14 and accompanying text.

[148] Mandeville v. Cookenderfer, 16 F. Cas. 580, 582 (C.C.D.D.C. 1827); *see also* Hudgins v. Wright, 11 Va. 134, 141 (1806) ("In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.")

ancestry is an alien is high enough to make Mexican appearance a relevant factor."[149] Asians in the United States were presumptively deportable during the exclusion era. White people, though, were presumed to be citizens: "It is true that the burden of proving alienage rests upon the government. For the statutory provision which puts upon the person arrested in deportation proceedings the burden of establishing his right to remain in this country applies only to persons of the Chinese race and in other cases."[150] Because of the longstanding, close association of race and citizenship in U.S. law and policy, it is hardly surprising that some non-whites are treated as perpetual foreigners, even if born here, and citizens under blackletter law.[151]

[149] United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975); Muniz-Muniz v. United States Border Patrol, 869 F.3d 442, 447–48 (6th Cir. 2017) (Merritt J., concurring) ("I read this as forbidding use of Hispanic appearance as the basis for an arrest, but not as a basis for taking such a fact into account when deciding whether to conduct an investigation.")

[150] U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923).

[151] *See, e.g.,* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence As Crimes of Passion*, 92 CAL. L. REV. 1259, 1312 (2004) ("the claims of loyalty and disloyalty attending post-September 11 violence reinforce the construction of some racial communities as "perpetual foreigners," incapable of full assimilation into the United States, or in any event, undesirable as citizens because of their questionable loyalties."); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/national Imagination*, 85 CAL. L. REV. 1395, 1397 (1997) ("Some immigrants are able to "pass" while others (and sometimes even their U.S.-born descendants) remain perpetual foreigners."); Angela P. Harris, E*quality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1949 (2000) ("Meanwhile, painted as perpetual "foreigners" threatening to overrun the West, Asian Americans have continued to be a population vulnerable to expressions of nativist hysteria"); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 678 (2000) ("Because ninety percent of the persons deported from the country are Latin American when closer to half of the undocumented population is Latino, race profiling in immigration enforcement helps reinforce and legitimate this inaccurate stereotype of Latinos as perpetual "foreigners.""); Volpp, *supra* note 139, at 453 ("The long delay in allowing Asians to naturalize as U.S. citizens was predicated upon the perception of Asian Americans as perpetual foreigners, disinterested in mainstream American democratic processes and incapable of participation in republican citizenship.").

DRED SCOTT AND ASIAN AMERICANS

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Gabriel J. Chin*

Abstract

Chief Justice Taney's 1857 opinion in Dred Scott v. Sandford *is justly infamous for its holdings that African Americans could never be citizens, that Congress was powerless to prohibit slavery in the territories, and for its proclamation that persons of African ancestry "had no rights which the white man was bound to respect." For all of the interest in and attention to* Dred Scott*, however, no scholar has previously analyzed* United States v. Dow*, an 1840 decision of Chief Justice Taney in a Circuit Court trial which is apparently the first federal decision to articulate a broad theoretical basis for White supremacy.* Dow *identified Whites as the "master" race, and it explained that only those of European origin were either welcomed or allowed to be members of the political community in the colonies. Non-Whites such as members of* Dow's *race, Taney explained, could be reduced to slavery, and therefore their rights continued to be subject to absolute legislative discretion.* Dow*, however, was not a person of African descent, he was Malay, from the Philippines. Chief Justice Taney's employment in* Dow *of legal reasoning which he would later apply in* Dred Scott *suggests that* Dred Scott *should be regarded as pertinent to all people of color, not only African Americans. This understanding of* Dred Scott *helps explain the revival of Taney's reputation during the Jim Crow era after Reconstruction. Courts declined to invalidate restrictions with respect to a broad range of civil rights on citizens and immigrants of African, Indian, Asian, and Mexican ancestry to which Whites were not subject. Indeed, Whites could not be subject to them, unless it is conceivable that under the U.S. Constitution, the law could provide, for example, that all races would be ineligible to testify or vote because of their race. Accordingly, even after Reconstruction, just as* Dred Scott *and* Dow *contemplated, the White race remained the master race, in the sense that they were the exclusive holder of truly inalienable rights.*

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Introduction

"Perhaps no legal case in American history is as famous--or as infamous--as *Dred Scott v. Sandford*."[1] Cass Sunstein called *Dred Scott*[2] "probably the most important case in the history of the Supreme Court of the United States. Indeed, it was probably the most important constitutional case in the history of any nation and any court."[3] Chief Justice Roger Brooke Taney became notorious for his holdings that Congress had no power to prevent the spread of legal slavery in United States territories, and that no person of African descent could be a citizen, based on a conclusion that at the founding, they were "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."[4] After more than 150 years, the decision still draws intense academic attention.[5] Some historians have suggested that *Dred Scott* was a cause of the Civil War.[6]

This article proposes that a landmark opinion shedding light on the meaning of *Dred Scott* has been overlooked and remained unanalyzed until now. *Dred Scott*—or at least the reasoning of *Dred Scott*-- was not solely about the status of enslaved African Americans. *United*

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[1] Paul Finkelman, *The* Dred Scott *Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1 (1996).

[2] 60 U.S. 393 (1857).

[3] Cass R. Sunstein, *The* Dred Scott *Case*, 1 GREEN BAG 2d 39 (1997).

[4] 60 U.S. at 407.

[5] *See, e.g.,* Lea VanderVelde & Sandhya Subramanian, *Mrs*. Dred Scott, 106 YALE L.J. 1033 (1997) ("*Dred Scott v. Sandford* stands in infamy in American constitutional law and the history of the Supreme Court."). There is of course a voluminous literature on the case. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS: IT'S SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS (2d ed. 2016); Jennifer M. Chacón, *Citizenship and Family: Revisiting* Dred Scott, 27 WASH. U. J.L. & POL'Y 45 (2008); Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 PEPP. L. REV. 13 (2011); Paul Finkelman, *Was* Dred Scott *Correctly Decided? An "Expert Report" for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1221 (2008); Paul Finkelman*, Coming to Terms with* Dred Scott: *A Response to Daniel A. Farber*, 39 PEPP. L. REV. 49 (2011); Mark A. Graber, Dred Scott *As A Centrist Decision*, 83 N.C. L. REV. 1229, 1230 (2005); Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271 (1997); Scott W. Howe, *Atoning* for Dred Scott *and* Plessy *While Substantially Abolishing the Death Penalty*, 95 WASH. L. REV. 737 (2020); Louise Weinberg, Dred Scott *and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007).

[6] FEHRENBACHER, *supra*, at 457 ("Clearly, the *Dred Scott* decision by itself did not have a convulsive effect on sectional politics, but it became one of the elements in an explosive compound."); Paul Finkelman, Scott v. Sandford: *The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 3 (2007) ("Though surely an exaggeration, it has been said that the case caused the Civil War. While other forces caused secession and the War, *Dred Scott* surely played a role in the timing of both."); Henry A. Foster, *Did the Decision in the* Dred Scott Case *Lead to the Civil War?*, 52 AM. L. REV. 875 (1918); Louise Weinberg, Dred Scott *and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 98 (2007) ("[I]n the crisis of 1860 *Dred Scott* had in fact become the lynchpin of Southern policy and the focus of Northern protests.").

States v. Dow[7] is an 1840 decision by Chief Justice Taney written as he presided over a trial in the U.S. Circuit Court. *Dow,* touched on by courts and scholars only rarely and in passing,[8] analyzed the same historical and legal issues that he would confront in *Dred Scott* 17 years later: Which race was "master" and which others were sufficiently "inferior" that they might be enslaved, which race was worthy of participation in the political community, and which people among the world's nations were "civilized." In *Dow*, Chief Justice Taney held that the defendant was not a "Christian white person" and thus was not entitled to the protections afforded that class under the law of evidence. Accordingly, for a crime for which a White person could not have been charged for lack of evidence,[9] Dow was condemned to death (though ultimately pardoned).[10] In its holding that *Dow*'s freedom was a question of state law, the opinion accurately mapped the future: Even with respect to citizens of color, the rights of non-whites were subject to the political will of the dominant race. However, Dow was not African. He was "Malay," from the Philippines.

In a certain sense, *Dred Scott*'s continued prominence requires explanation. Decided in 1857, some of its holdings were not merely rendered moot but definitively rejected and reversed no later than 1868 with the ratification of the Fourteenth Amendment. Contrary to *Dred Scott*, African Americans were citizens.[11] Because the Thirteenth Amendment wholly abolished slavery, the Constitution unquestionably prohibited slavery in the Territories.[12] *Dred Scott* was deeply racist, but there are many such texts from equally prominent leaders.

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[7] United States v. Dow, 25 F. Cas. 901 (C.C.D. Md. 1840).

[8] *Dow* has been cited in the legal literature only a handful of times, usually in a footnote. *See* Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 30 MO. L. REV. 471, 476 (1966); Andrew T. Fede, *Not the Most Insignificant Justice: Reconsidering Justice Gabriel Duvall's Slavery Law Opinions Favoring Liberty*, 42 J. SUP. CT. HIST. 7, 21 & n.77 (2017); Stephen A. Siegel, *Federal Government's Power to Enact Color--Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 515 n.238 (1997); Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOWARD L.J. 133, 153 n.70 (1999); Book Notices, 5 W. JURIST 477, 478 (1871) (reviewing edition of Taney's "many valuable and important decisions" including "the *United States v. Dow*, on the competency of the testimony of negroes, and the status of the Malay race" and noting that "[w]hen we shall, as a nation, recover our own equilibrium, and learn to make necessary and just allowances for the bias of education and surroundings, we will place Roger Brooke Taney in the front line of jurists of the nineteenth century, either English or American.")

[9] *See, e.g.,* United States v. Beddo, 24 F. Cas. 1061, 1062 (C.C.D.D.C. 1835) ("the United States, finding that there were no witnesses for the prosecution other than free negroes and mulattoes born of colored women, ordered a nolle prosequi to be entered with the leave of the court")

[10] 25 F. Cas. at 905.

[11] U.S. Const., Amend. XIV, § 1 (1868) ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside")

[12] U.S. Const. Amend. XII, § 1 (1866) ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.")

Reading *Dow* and *Dred Scott* together illuminates the meaning of the latter and helps explain its continuing relevance. *Dow* and *Dred Scott* were the first federal cases articulating a political theory of race and racial status in the United States.[13] The Constitution, of course functioned to protect slavery, but it did not use the words "slavery," "African," or "Negro," some have argued, in an effort to minimize the appearance of constitutional approval or involvement.[14] No federal cases had articulated a comprehensive theory of racial hierarchy.[15] *Dow* and *Dred Scott* together outlined the rights of all races, at least as contemplated at the time. In that sense, *Dred Scott* was not about slavery alone, as critical as that issue was. It also addressed free people of color, including but not limited to persons of African ancestry, and recognized state authority to determine their status and rights, even if they were, in a technical legal sense, citizens. To this extent, *Dred Scott* remains important because it outlined a constitutional and historical theory of White supremacy that was influential for a century after Reconstruction, and has not yet been fully resolved. Indeed, *Dred Scott* continues to resonate for some; on White

[13] There is another antecedent, Attorney General Taney's 1832 opinion, official but unpublished, evaluating the lawfulness of a South Carolina statute excluding sailors of color from South Carolina ports. In upholding the provision, Taney explored the citizenship and political position of persons of African ancestry in the United States in ways reminiscent of his later work. H. Jefferson Powell, *Attorney General Taney & The South Carolina Police Bill*, 5 GREEN BAG 2D 75 (2001).

[14] *Compare* Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 424 (1999) ("The Constitution of 1787 was a proslavery document, designed to prevent any national assault on slavery, while at the same time structured to protect the interests of slaveowners at the expense of African Americans and their antislavery white allies."); J.M. Balkin;, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1707 (1997) ("One of the great debates of the first half of the nineteenth century was the extent to which the Constitution protected the institution of slavery. Although the Constitution made oblique references to slavery at several places, the protection of slavery was very much built into its structure."); *with* James Boyd White, *Constructing A Constitution: "Original Intention" in the Slave Cases*, 47 MD. L. REV. 239, 268 (1987) ("the absence in the Constitution of any talk about race, and the oblique references to slavery, could be read very differently from the way Taney suggests: not as pointing to views so deeply and obviously held that they need not be expressed, but as a deliberate attempt to escape from those views. The enormous gap between the race-free language of the Constitution and the kinds of social facts to which Taney points would then have a shouting significance. Of course, Blacks, slave or free, were systematically degraded, and in ways we could not or would not change overnight; but this fact was inconsistent with our ideals for ourselves, and in writing the Constitution as we did we chose not to perpetuate or confirm those aspects of our lives, but to disapprove them."); Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 243 n.29 (2004) (Noting view of Justice Chase that "The framers of the Constitution sought to prevent the federal government from having anything to do with slavery, and they carefully avoided conferring any constitutional powers on the federal government to support slavery. A state could either establish slavery or not, as it saw fit. As slavery was wholly a matter of state law, the federal government possessed no constitutional power to abolish slavery in the states in which it existed; but neither could the federal government enforce slavery in the states that refused to recognize it.")

[15] The Federalist Papers touched on some issues regarding slavery, but did not make a comprehensive case for or against white supremacy. James Oakes, *"The Compromising Expedient": Justifying A Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2048 (1996) ("A concordance to The Federalist Papers lists twenty references to the words slave, slavery, and slaves. James Madison wrote nineteen of them. His most extended discussion appeared in The Federalist No. 54. He also made a brief case for the slave trade clause in The Federalist No. 42 and an even briefer reference in No. 38.")

supremacist websites like Stormfront.org, it remains the law of the land in the hopes and imaginations of many.

In addition to political theory, *Dow* and *Dred Scott* also outlined legal doctrine which could bring into operation the racial hierarchy they envisioned. Part of that doctrine was that legal principles flowing from slave law could, in the discretion of the states, apply to free people of color just as they did to enslaved persons.

Finally, *Dow* makes clear that anti-Chinese movement in the Pacific Coast jurisdictions starting in the 1860s was not the beginning of inclusion of Asians in U.S. race law. Supreme Court cases like *Fong Yue Ting v. United States*,[16] in 1893, upholding race-based deportation, and *Lum v. Rice*,[17] in 1927, approving Mississippi's assignment of a Chinese student to a segregated school, along with all other members of the "brown, yellow, and black races"[18] were not post-Reconstruction innovations, belatedly finding a place for Asians in a nation where the law had been employed to make Whites supreme over Blacks.[19] Instead, Taney's ready application to Asians in 1840 of law regulating free people of color suggests that from the very beginning of this country, White supremacy was a complete, comprehensive, and operational jurisprudence, at least to those like Chief Justice Taney who made and applied the law.

Dow and *Dred Scott* make clear that there was, and had to be, a master race. To be sure, there was controversy over the words of the Declaration of Independence that "all men are created equal, and endowed by their creator with the inalienable right to life, liberty, and the pursuit of happiness." Perhaps this phrase sowed the seeds of liberty for all that might develop in the fulness of time as abolitionists including Frederick Douglass and Lysander Spooner argued;[20] perhaps instead it enshrined White supremacy. But interpreted broadly or narrowly, if the United States was a republic that had thrown off monarchy, racial subordination of Whites became a logical impossibility, because some group had to be the holder of inalienable rights.

As will be shown, under United States law, non-Whites could be, for example, denied the rights to vote, own property, or testify against Whites. But only in a dictatorship or monarchy could people of color and Whites, that is, everyone, be denied the rights to vote, own property, and testify. People of color might be deported from the United States on the basis of race, but

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[16] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[17] Lum v. Rice, 275 U.S. 78, 82 (1927).

[18] *Id.* at 82.

[19] For example, the great historian Oscar Handlin wrote: "By the end of the [nineteenth] century the pattern of racist practices and ideas seemed fully developed: the Orientals were to be totally excluded; the Negroes were to live in a segregated enclave; the Indians were to be confined to reservations as permanent wards of the nation. . ." OSCAR HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE 48 (1957). His point was insightful, and correct as far as it went. But the legal foundation had been laid before.

[20] *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era 2005-06*, 94 CAL. L. REV. 1323, 1353 (2006).

only if the nation were to be emptied out entirely could the law seek to deport or expatriate everyone on the basis of race. Unless everyone was to be potentially a slave and no one secure in the inalienable rights of citizenship, choices had to be made: (1) race-based classifications had to be prohibited, (2) slavery had to be prohibited and citizenship made universal, or (3) there had to be a race exempt from enslavement and denial of some basic rights of citizenship. *Dred Scott* and *Dow* explained that U.S. law elected the third possibility.

Dred Scott remained vital after Reconstruction, because its main point was not the denial of citizenship, as cruel and wrong as that decision was. Being native-born, not being an "alien," Dred Scott probably was a national of the United States in the international law sense of the term.[21] Even had he been deemed a citizen, that would have availed him nothing except the opportunity to sue for freedom in a federal court and lose. Citizenship hardly impeded many forms of segregation. Even the right of U.S. citizens not to be deported was valuable only to a point, given the power of Congress to expatriate, and the practice of extralegal deportation. As *Dred Scott* and *Dow* held, the states were allowed to arrange their internal affairs, including the status of residents, largely as they pleased. Neither the states nor the federal government was burdened by a meaningful prohibition on racial discrimination until the Civil Rights Revolution of the 1960s.

Part I discusses *United States v. Dow* in relation to *Dred Scott*. Together, they identified civilized Christian nations populated by members of the White race who sent their people to what became the United States, and formed the political community there. As a White Christian nation, people of other races or religions were not encouraged to immigrate to the United States, and if they did were not allowed to participate in government. Africans, Indians, and Malays, and other races which could be enslaved by law, were not part of the People of the United States.

Part II discusses application of the theory of *Dred Scott* to free people of color. Courts, scholars, and the press, including the African American press, did not consider *Dred Scott* to have been repudiated. At least after the end of Reconstruction, they frequently claimed that free people of color had no rights the White man was bound to respect. They had a point. Even when possessed of legal citizenship, people of color could be disenfranchised, denied the right to own property, denied the right to testify, segregated in various contexts, and arbitrarily deprived of their liberty. On the other hand, given the self-conception of the United States as a free republic, it is not conceivable that Whites along with people of color could have been deprived of liberty or property because of their race, so that say, no one could, vote, testify, or own property. The legal regime *Dow* and *Dred Scott* had mapped was in place until the Second Reconstruction of the 1960s.

[21] For international law purposes, one who owes allegiance or is subject to protection by another country is a "national" of that country. *See, e.g.,* Lauritzen v. Larsen, 345 U.S. 571, 587 (1953) ("A state is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.") (citation omitted).

I. *Dow* and *Dred Scott*

In 1840, 17 years before he decided *Dred Scott*, Chief Justice Roger Brooke Taney as Circuit Justice faced another case in which he had to determine the legal relationship between the races.[22] Sailor Lorenzo Dow was accused of murder on the high seas of William Langdon, captain of the *Frances*,[23] a U.S.-flag vessel, and tried in the Circuit Court for the District of Maryland, the Chief Justice presiding as trial judge. "At the time of the murder, the captain was the only White person on board; the crew consisted of the Malay, three negroes, and one mulatto; two of the negroes were natives of Philadelphia, and one a native of the state of Delaware; the mulatto was a native of the British province of Nova Scotia; they were all free."[24]

Under the law at the time, federal judges applied state rules of evidence at trial.[25] Chief Justice Taney understood Maryland law to provide that "negroes and mulattoes, free or slave, are not competent witnesses, in any case wherein a Christian White person is concerned; but they are competent witnesses against all other persons."[26] The witnesses against Dow were free persons of African ancestry. The evidence showed that Dow "was a native of the town of Manilla, in one of the Philippine Islands; that his parents were both Malays, living in that town, and subjects of the queen of Spain; that they were Christians, and that the prisoner was baptized and educated in the Christian religion, and had always professed to be a Christian."[27] Dow claimed the exemption of the evidence rule, insisting that persons of African ancestry could not testify against him. Chief Justice Taney understood that in ruling on the objection "[t]he only question is, whether he is to be regarded as a Christian white person?"[28]

In an opinion as prolix and convoluted as *Dred Scott* would later be, Chief Justice Taney explained why he answered the question in the negative. He had three reasons. First, anticipating

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[22] United States v. Dow, 25 F. Cas. 901, 902 (C.C.D. Md. 1840).

[23] *Murder on the High Seas*, BURLINGTON FREE PRESS (Vt.), Feb. 21, 1840, at 4; *Sentence of Death*, MORNING HERALD (NY), May 21, 1840, at 1.

[24] 25 F. Cas. at 902.

[25] Vance v. Campbell, 66 U.S. 427, 430 (1861) ("The thirty-fourth section of the judiciary act provides that the laws of the several States, with the exceptions there stated, shall be regarded as rules of decision in trials at common law in the courts of the United States. This section has been construed to include the rules of evidence prescribed by the laws of the State in all civil cases at common law not within the exceptions therein mentioned."); United States v. Reid, 53 U.S. 361, 366 (1851) ("the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed"), *overruled in part by* Rosen v. United States, 245 U.S. 467 (1918).

[26] 25 F. Cas. at 902.

[27] *Id*.

[28] *Id*. at 903.

the scientific racism embraced by later Supreme Court jurisprudence,[29] the Chief Justice noted that "the Malays have never been ranked by any writer among the white races."[30]

Second, Taney explained that Dow was not White because when Maryland was founded, Dow would not have been desired as a member of the political community, nor have been invited to participate in it. The basis for the doctrine of testimonial exclusion was not "the differences, moral or physical, which have been supposed to exist between the different races of mankind; the law was made for practical purposes, and grew out of the political and social condition of the colony." In particular, only White Christian men were granted political power, and only they were invited to immigrate:

> The colonists were all of the white race, and all professed the Christian religion; from the situation of the world at that time, no persons but white men professing the Christian religion could be expected to emigrate to Maryland; and if any person of a different color, or professing a different religion, had come into the colony, he would not, at that time, have been recognized as an equal by the colonists, or deemed worthy of participating with them in the privileges of this community. The only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized, were the white Christian nations of Europe; and certainly emigrants were not expected or desired from any other quarter.[31]

A third and final consideration was that some races were susceptible to enslavement by the White race. Chief Justice Taney explained that the origin of testimonial disqualification of enslavable races was the potential risk to Whites: "Christian white men could not be reduced to slavery, or held as slaves in the colony; but they might, according to the laws of the colony, lawfully hold in slavery negroes or mulattoes, or Indians. The white race did not admit individuals of either of the other races to political or social equality; they were regarded and treated as inferiors, of whom it was lawful, under certain circumstances, to make slaves. These three races existing in the same territory, one possessing all the power, and holding the other two in a state of subjection and degradation, it was natural, that feelings should be created by such a

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[29] *See, e.g.,* Ozawa v. United States, 260 U.S. 178, 198 (1922) ("The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold."). For further discussion of the pseudo-scientific racial ideology in the United States, see IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2017); YELLOW PERIL!: AN ARCHIVE OF ANTI-ASIAN FEAR, ch. 3 (John Kuo Wei Tchen & Dylan Yeats, eds. 2014).

[30] 25 F. Cas. at 903. *See also id*. ("But it is admitted, that he is a Malay; and the Malays are not white men, and have never been classed with the white race.")

[31] *Id*. at 903; *id*. ("The political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government granted by the charter.")

state of things, that would make it dangerous for the white population to receive as witnesses against themselves the members of the two races which it had thus degraded."[32]

How was enslavability relevant, how did a person of Malay ancestry fit into this structure? Chief Justice Taney found that enslavability supported treatment of a Filipino as non-White: "In Maryland, they were certainly regarded as belonging to one of those races of whom it was lawful to make slaves, and who, according to the laws of England and of the colony, were legitimate objects of the slave trade."[33] Chief Justice Taney derived this conclusion from his own historical research into a terse Maryland decision rejecting a freedom suit. The entire reported decision in *Mary v. Vestry of Williams & Mary's Parish* is: "Madagascar being a country where the slave trade is practised, and this being a country where slavery is tolerated, it is incumbent on the petitioner to show her ancestor was free in her own country to entitle her to freedom. The petition was dismissed."[34]

Taney expanded on the meaning of the case:

> This case is not fully stated in the report; I have examined the original papers. It was proved that the mother of the petitioner was a yellow woman with straight black hair, and that she was not of the negro race, and the testimony shows that it was upon this fact that the petitioner chiefly relied; she was undoubtedly a Malay, according to the description in the evidence. The court said that as Madagascar was a country where the slave trade is practised, the petitioner must show that her ancestor was free in her own country, in order to entitle her to freedom here. Now, it is well known that the Malay race form a part of the population of Madagascar; and consequently, under this decision, may be held in slavery in this state, if they were slaves in their own country, and when imported here as slaves, they are presumed to have been slaves in their own country, till the contrary appears.[35]

Taney concluded that because "Malays might lawfully be held in slavery in the colony of Maryland, and consequently, are not embraced by the description of white men as mentioned in the act of 1717, and the testimony offered is not excluded by that law."[36] China and other Asian nations then had lawful chattel slavery and the slave trade.[37]

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[32] *Id*.

[33] *Id*. at 903–04.

[34] Mary v. Vestry of Williams & Mary's Par., 3 H. & McH. 501, 502, 1796 WL 636 (Md. Gen. 1796).

[35] 25 F. Cas. at 903 (citations omitted).

[36] *Id*. at 904.

[37] Angela Schottenhammer, *Slaves and Forms of Slavery in Late Imperial China (Seventeenth to Early Twentieth Centuries)*, 24 SLAVERY & ABOLITION (2) 143 (2003); Pamela Kyle Crossley, *Slavery in Early Modern China*,186 *in* 3 THE CAMBRIDGE WORLD HISTORY OF SLAVERY: AD 1420–AD 1804 (David Eltis & Stanley L. Engerman eds. 2011); Anderson v. Poindexter, 6 Ohio St. 622, 674 (1856) (Brinkerhoff J., concurring) ("If it were so, then a Greek

Importantly, the Chief Justice Taney's reasoning did not classify as enslavable, and hence non-white, only individuals who were actually enslaved. Indeed, in the antebellum period, not only were some people of African ancestry not enslaved, free African Americans could sometimes themselves own human property.[38] Nevertheless, Maryland, in common with other slave states,[39] disqualified even free members of an enslavable race from testifying against Whites. Dow himself was free, and from Manila, not Madagascar. But those facts were irrelevant: Taney found enslavement of completely unrelated strangers of his race, at some other time and place, was a relevant factor in measuring Dow's status in the United States.

Note that because there was slavery of particular races, not, say, individuals because of misconduct, it became a logical impossibility to enslave a White person because of race. "White slavery" in U.S. law was "a revolting crime"[40] rather than a possibly legitimate labor arrangement in a system where degradation of one meant potential degradation of all. Whites were, Taney explained in *Dow*, in what is apparently the first use of the term in any federal or state decision, "the race of which the masters were composed,"[41] that is, the master race.[42] Taney

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or Asiatic, held in slavery in Turkey, would, on his arrival in Europe or Ohio, be deemed a slave, and there subject to be treated as mere property; and this, too, in contravention of the laws of England and Ohio."). Of course, which races were enslavable was a matter of state law. Phillis v. Lewis, 1 Del. Cas. 417, 418 (Com. Pl. 1796) ("There is no law which recognizes slaves of any other description, nor any custom which has allowed others to be held in slavery. The law would warrant us to say that a Negro or mulatto might be a slave, but we know of no authority which would justify us in expressing the same opinion as to any other description of people.")

[38] Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers As Social Engineers*, 47 STAN. L. REV. 161, 209 n.73 (1994) (citing inter alia CARTER G. WOODSON, FREE NEGRO OWNERS OF SLAVES IN THE UNITED STATES IN 1830, at v (1924) (pointing out that "a considerable number of Negroes were slave owners themselves, and in some cases controlled large plantations). However, "[t]he majority of Negro owners of slaves had some personal interest in their property. Frequently the husband purchased his wife or vice versa; or the slaves were the children of a free father who had purchased his wife; or they were other relatives or friends who had been rescued from the worst features of the institution by some affluent free Negro. There were instances . . . in which free Negroes had a real economic interest in the institution of slavery and held slaves in order to improve their own economic status." A. Leon Higginbotham, Jr., *"Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 66 n.91 (1991) (quoting JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 144 (6th ed. 1988)).

[39] Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 451 (1986) ("The most important due process right -- to testify in court without racial restrictions -- was available to blacks in all but four northern states by 1860. This contrasts with the South where only in Louisiana did free blacks have an unfettered right to testify against whites.")

[40] Rogers v. Desportes, 268 F. 308, 317 (4th Cir. 1920).

[41] 25 F. Cas. at 903.

[42] John Howard, soon to become a Confederate lawyer, later argued before Chief Justice Taney using the term, contending that slaves could "are punishable by the statute law, yet in a mode, and to an extent, that recognizes no rights of any character in themselves, but, on the contrary, demonstrates the absolute legal dominion and supremacy of the master race, and the absolute subjection of the slave." *Argument of Counsel in* United States v. Amy, 24 F. Cas. 792, 794 (C.C.D. Va. 1859) (Taney, Circuit Justice). The term was later used in connection with slavery. GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 61 (1971) (quoting the speech of William Yancey) ("Your fathers and my fathers built this government on two ideas: the first is that the white race is the citizen, and the master race, and the

admitted evidence of non-white witnesses, and Dow was convicted.[43] After a new trial granted based on a defect in the indictment, Dow was convicted again, sentenced to death, but pardoned.[44]

Dred Scott raised important issues about the power of Congress to prohibit slavery in the territories which were not at issue in the *Dow* case. But *Dred Scott* like *Dow* also mapped a vision of racial status in the political community. *Dred Scott* was a freedom suit, brought in federal court after a similar suit in Missouri state courts failed.[45] The argument made, more or less, three claims, each of which was necessary for Dred Scott to get relief: (1) Dred Scott was a U.S. citizen resident in the State of Missouri, so he could invoke the federal court's diversity jurisdiction to sue his purported owner, a resident of New York, for freedom and damages; (2) though admittedly born enslaved, he had become free by living in Illinois or the Northwest Territory where the law prohibited slavery; and (3) that such freedom continued upon his return to Missouri.

Chief Justice Taney's opinion rejected each proposition: (1) As a person of African descent, Dred Scott could never be a citizen, whether born enslaved or free; (2) congressional prohibition on slavery in the Northwest territory was unconstitutional, and could not result in freedom because that would take slaveowners' property without due process of law, and (3) whether an enslaved person became free after living in a free state or territory was a matter of state law, which had been conclusively decided adversely to Dred Scott in the courts of Missouri.

As Jamal Greene explained, the third point alone sufficed to explain the outcome of the case:

> it is easy to defend the result in the case--a loss for Scott--under then-existing precedents and legal norms. In *Strader v. Graham*, decided six years before *Dred Scott*, Taney had written (in dicta) that the laws of the domiciliary state--not those of a state or territory of

white man is the equal of every other white man. The second idea is that the Negro is the inferior race."); Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 41 n.62 (1942) ("The vastness of the gulf between slave status and minority status should nevertheless not be overlooked. At this distance it is not easy to envisage the full extent of the human subjugation which this country has known. But the words of Chief Justice Taney, writing for the Court in *Dred Scott v. Sandford*, 19 How. 393, 404-405, 407-408 (U. S. 1857), warn against the easy assumption that the idea of a master race is wholly alien to American tradition").

[43] 25 F. Cas. at 904.

[44] *Id*. at 905.

[45] Although the Missouri courts held that Scott was a slave, it was, they explained, for his benefit. Scott v. Emerson, 15 Mo. 576, 587 (1852) ("As to the consequences of slavery, they are much more hurtful to the master than the slave. There is no comparison between the slave in the United States and the cruel, uncivilized negro in Africa. When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence and instruction in religious truths are considered, and the means now employed to restore them to the country from which they have been torn, bearing with them the blessings of civilized life, we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God, who makes the evil passions of men subservient to His own glory, a means of placing that unhappy race within the pale of civilized nations.").

prior residence or inhabitation--conclusively determined whether someone was slave or free.[46]

For its part, *Strader* recognized that "[e]very state has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution."[47]

Strader addressed not the general distribution of rights, property, and obligation, but the particular and significant state authority to determine that individuals or races were to be enslaved. Of course, after the Thirteenth Amendment, states could not impose slavery, with the significant exception of enslavement as punishment for crime. But *Dow* and *Strader* anticipated the aggressively states' rights doctrinal conclusion of *Dred Scott*, that the federal Constitution left states the authority to determine personal status.

Criticism of *Dred Scott* turned in large part on its rhetoric as well as its doctrine. Jack Balkin and Sandy Levinson wrote of *Dred Scott* that "its most notorious single passage is Taney's declaration that '[Negroes were] beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . .'"[48] *Dow* made clear that Malays and by extension other non-Whites could be enslaved if state law so provided. To the extent that slaves had no rights that the White man was bound to respect, the cases were complementary. Before emancipation and abolition, Lorenzo Dow and Dred Scott seemed to be in the same boat.

Although *Dred Scott* did not cite *Dow*, Taney's opinion in *Dred Scott* borrowed from *Dow*'s second rationale, emphasizing African Americans' exclusion from political participation. Taney explained that "[t]he words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives."[49] The Taney decision in *Dred Scott* like *Dow* relied

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[46] Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 408–09 (2011).

[47] Strader v. Graham, 51 U.S. 82, 93–94 (1850). *See generally* Robert G. Schwemm, Strader v. Graham*: Kentucky's Contribution to National Slavery Litigation and the* Dred Scott *Decision*, 97 KY. L.J. 353 (2009).

[48] Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 58 (2007).

[49] Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857). *See also id.* at 406–07 ("It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded."); *id*. at 416 ("The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the

on identification of the foreigners who were welcomed to this country as evidence of racial status. The Court pointed to the Naturalization Act of 1790, which "confines the right of becoming citizens '*to aliens being free white persons*'" this language "shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government."[50] *Dow* makes clear that this language excludes not only people of African descent, but all non-whites.

In *Dow*, Taney explained that the defendant and other Malays would have been excluded from political participation for a good reason: "The only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized, were the white Christian nations of Europe; and certainly emigrants were not expected or desired from any other quarter."[51] *Dred Scott*, too drew on Taney's judgments about the collective wisdom of the civilized world. Taney explained that the broad language of the Declaration of Independence "would not in any part of

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sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens.")

[50] *Id*. at 419–20 (italics in original). Justice Woodbury's earlier comment that "[t]he progress of civilization and commerce, and the whole character of our institutions and laws, are more and more friendly to foreigners, regarding them more as brethren, of one blood and origin, and hope, rather than barbarians and enemies" must be regarded as limited to immigrants of European "blood." Taylor v. Carpenter, 23 F. Cas. 744, 749–50 (C.C.D. Mass. 1846) (Woodbury, Circuit Justice).

[51] United States v. Dow, 25 F. Cas. 901, 903 (C.C.D. Md. 1840); *id*. ("The political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government granted by the charter.") There is much other evidence in the cases of the judicial view of the uncongeniality of other races to American liberty. Wilcocks v. Phillips, 29 F. Cas. 1198, 1200 (C.C.E.D. Pa. 1843) (Baldwin, Circuit Justice) ("China is a country with which, as yet, we have had no treaties nor any diplomatick intercourse; and nearly all that we know of its government, laws and institutions, is derived from the relations of merchants, missionaries, and other persons who have been there. It would be too much, in the late or even in the present condition of that country, to require a party to produce certified copies of its statutes. The nation, it is well known, is isolated and peculiar; and we know of no way in which access could be had to its records. These are facts which, in a case so notorious, the court will judicially notice."); Siemssen v. Bofer, 6 Cal. 250, 252–53 (1856) ("To assert the proposition that the President and Senate are above the Constitution in this particular, and that they may do in this behalf what the President and both Houses of Congress cannot do, would be destructive of the government; for, under the cover of a resort to the treaty-making power, every outrage and injustice which illiberality can conceive, or fanaticism execute, may be perpetrated. By a treaty with England, her free black citizens may be introduced into South Carolina and other slave States of the Union, contrary to the police regulations of those States. The Asiatic, and the convicts of the penal colonies of the South Pacific, may be introduced into California on the same footing as the intelligent and virtuous population of the more favored portions of Europe; and every branch of trade, agriculture, commerce and manufactures, may be prostrated at the feet of this unconstitutional mastodon. Nay, more; by a treaty of amity and friendship with the Emperor Soulouque, of Hayti, every slave in the Southern States may be emancipated, and turned loose upon their present masters."); State v. Foreman, 16 Tenn. 256, 270–71 (1835) ("The tribes found inland have passed under the dominion, and melted away under the influence and superior powers, mental and moral, of the white man, as did the savages of Europe, Asia, and Africa pass under the dominion of the Romans, and as will him of Australasia, Africa, and the Rocky Mountains be compelled to submit to the stroke of fate sooner or later--to accept a master or perish. It is the destiny of man. Ignorance and division cannot stand before science and combination, nor can the civilized community exist by the side of a savage foe.")

the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery."[52] This was "the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted."[53] Resort to the views

[52] Dred Scott v. Sandford, 60 U.S. 393, 410 (1857). As many scholars and others have noted, Taney was a poor historian and legal analyst, at least in *Dred Scott*. His errors were highlighted in a remarkable decision of the Maine Supreme Court within weeks of *Dred Scott* rejecting the Court's conclusions and holding the opposite: "[i]t is therefore demonstrable, by recurring to the constitution of this state, that those who framed the constitution, and the people by whom it was adopted, regarded free colored persons (natives) as citizens of the United States, and entitled to the right of suffrage." *Opinion of Judge Appleton*, 44 Me. 521, 574 (1857). The Maine court drew on the dissents by Justices McLean and Curtis. They failed to persuade Taney, but protect the honor and reputation of the colonies and states which made Blacks citizens. *Id*. at 533 (McLean J., dissenting) ("In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida."); *id*. at 582 (Curtis J., dissenting) ("It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.")

[53] Dred Scott v. Sandford, 60 U.S. 393, 407 (1857).

of the "Christian" and "civilized" nations as authority was common in this era in slave trade cases,[54] Indian property cases,[55] and others.[56]

Finally, as in *Dow*, *Dred Scott* concluded that because some persons of African descent were enslaved, the rule of non-citizenship based on enslavement and degradation applied to all members of the race. The status or situation of individual people, the specific litigants, was irrelevant.

Dred Scott contains some language inconsistent with the argument that it was about all non-whites. *Dred Scott* emphasized that its reasoning "applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. . . . the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves."[57] In particular *Dred Scott* distinguished the situation of Indians.[58]

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[54] Chief Justice Marshall, for example, explained why he upheld the general legality of the slave trade:

> That the course of opinion on the slave trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world with whom we have most intercourse, have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt. It has claimed all the sanction which could be derived from long usage, and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.

The Antelope, 23 U.S. 66, 114–15 (1825).

[55] Martin v. Waddell's Lessee, 41 U.S. 367, 409 (1842) (Taney, C.J.) (noting that "according to the principles of international law, as understood by the then civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants.")

[56] Dinsman v. Wilkes, 53 U.S. 390, 405 (1851) (Taney, C.J.) (in an action for wrongful punishment of a Marine, explaining "from whatever motives he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people, it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect; and that he did not suffer for the want of those necessaries which the humanity of civilized countries always provides even for the hardened offender."); United States v. Percheman, 32 U.S. 51, 86–87 (1833) (Marshall, C.J.) ("it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.")

[57] Dred Scott v. Sandford, 60 U.S. 393, 403 (1857).

[58] *Id*. at 403-04. *See* Addie C. Rolnick, *The Promise of* Mancari: *Indian Political Rights As Racial Remedy*, 86 N.Y.U. L. REV. 958, 977 (2011) ("The Court's opinion in *Dred Scott* exemplifies not only how both groups were

Although the Court would hold even after the Fourteenth Amendment that Indians born in tribal relations were not birthright citizens,[59] there was also no question in *Dred Scott* that they could be naturalized.[60]

Do these passages demonstrate that *Dred Scott* was solely about the degraded status of persons of African descent? One test of the accuracy of Taney's limitation is to examine whether Asians born in the United States prior to the Fourteenth Amendment would have enjoyed birthright citizenship.

One legal question in *Dred Scott*, eligibility to sue or be sued in diversity, was not in doubt with respect to Malays or other Asians. Foreign-born Asians were citizens or subjects of foreign states who could invoke federal jurisdiction.[61] On the other hand, because they were not White, Asians could not become citizens by naturalization.[62] The open question, before and after the Fourteenth Amendment, was whether Asians born in the United States were citizens.

Before the Fourteenth Amendment, the Supreme Court regarded the question as undecided; under *Dred Scott* "all white persons, at least"[63] born in the United States were citizens. In the 1880s and 1890s, notwithstanding the Fourteenth Amendment, the government repeatedly excluded U.S.-born persons of Chinese ancestry at the border on the ground that they were not citizens; they were admitted only after resort to the courts.[64] The citizenship of U.S.-

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excluded from U.S. citizenship, but also how the particular racial stereotypes associated with each group led the Court to cast their exclusions differently.")

[59] Elk v. Wilkins, 112 U.S. 94 (1884). *See generally* Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185 (2016).

[60] 60 U.S. at 404 ("But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.")

[61] U.S. Const., Art. III, § 2 (diversity jurisdiction extends to cases and controversies "between a state, or the citizens thereof, and foreign States, Citizens, or Subjects.") *See* Hinckley v. Byrne, 12 F. Cas. 194, 196 (C.C.D. Cal. 1867) ("Admitting the facts as affirmatively stated in the plea, the court has jurisdiction, because the plaintiff is a citizen of the state of Massachusetts, and the defendants, Soo Chung, Hip Hing and Kroning, are subjects of a foreign state."); Fisher v. Consequa, 9 F. Cas. 120 (C.C.D. Pa. 1809) (Washington, Circuit Justice) (upholding jurisdiction over "Hong merchant at Canton"). U.S.-born Indians, however, were not aliens for diversity jurisdiction purposes. Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831) ("The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.")

[62] *See infra* note 50, and accompanying text.

[63] United States v. Wong Kim Ark, 169 U.S. 649, 674–75 (1898).

[64] *See In re* Wy Shing, 36 F. 553, 553 (C.C.N.D. Cal. 1888); *In re* Yung Sing Hee, 36 F. 437, 438 (C.C.D. Or. 1888); *Ex parte* Chin King, 35 F. 354, 355 (C.C.D. Or. 1888); *In re* Look Tin Sing, 21 F. 905, 905 (C.C.D. Cal. 1884) (Field, Circuit Justice).

born persons of Chinese ancestry divided the post-Reconstruction law review writers. Some argued that the language of the Fourteenth Amendment plainly made them citizens,[65] while others contended that the children of Chinese born here were not citizens because not fully "subject to the jurisdiction" of the United States.[66]

Finally, in 1898, there was a Supreme Court test. The Department of Justice argued to the justices that "Chinese children born in this country" did not "share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth," and if they did "then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having."[67]

Nevertheless, in *Wong Kim Ark v. United States*[68] the Court found that American-born Chinese were U.S. citizens. Among other considerations it found persuasive, the Court noted that if China's claim of citizenship to children born overseas meant they were not U.S. citizens "would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other

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[65] *See* D. H. Pingrey, *Citizens Their Rights and Immunities*, 36 AM. L. REG. 539, 540 (1888) ("So a Chinese, born of alien parents within the dominion and jurisdiction of the United States, who reside therein, and not engaged in any diplomatic official capacity, under the Chinese government, is a citizen of the United States."); Thomas P. Stoney, *Citizenship*, 34 AM. L. REG. 1, 7 (1886) ("The court [in *Look Tin Sing*, *supra*] could have made no other decision under the constitution. The child when born was absolutely and completely subject to the jurisdiction of the United States, and so were his parents, if at the time they were both in this country.")

[66] *See* George D. Collins, *Citizenship by Birth*, 29 AM. L. REV. 385, 391-92 (1895) ("the children born in California, of Chinese parents, are at the moment of birth subject to a foreign power, China claiming as subjects the children born abroad of Chinese parents"); George D. Collins, *Are Persons Born within the United States Ipso Facto Citizens Thereof*, 18 AM. L. REV. 831, 834 (1884) ("Their children born upon American soil are Chinese from their very birth in all respects, just as much so as though they had been born and reared in China; they inherit the same prejudices, the same customs, habits, and methods of their ancestors; in short, they are subject to the same civilization and adhere to it with as much tenacity as did their forefathers. Now it is evident that such persons are utterly unfit, wholly incompetent, to exercise the important privileges of an American citizen, a title which it was the aim of our ancestors to make as proud as that of king; and yet under the common-law rule they would be citizens."); Prentiss Webster, *Acquisition of Citizenship*, 23 AM. L. REV. 759, 772 (1889) (commenting on Ex parte Chin King, 35 F. 354, 355 (C.C.D. Or. 1888): "Suppose that China has a similar rule [of citizenship by parental descent], certainly the positions of the United States and China would be the same in this regard; and under this rule Chin King would be held to be a citizen of China when in China, and a citizen of the United States when in the United States, if the rule jure soli is to govern. Certainly such an anomaly cannot be considered.") Scholar Collins would become embroiled in a notorious bigamy/perjury case which went to the U.S. Supreme Court and led to his disbarment and imprisonment. *In re* Collins, 206 P. 990, 993 (Cal. 1922); *In re* Collins, 90 P. 827, 829 (Cal. 1907), *aff'd sub nom*. Collins v. O'Neil, 214 U.S. 113 (1909).

[67] *See* Brief for the United States at 34, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 95-904), *reprinted in* 14 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES SUPREME COURT: CONSTITUTIONAL LAW 37 (Philip B. Kurland & Gerhard Casper eds., 1975).

[68] United States v. Wong Kim Ark, 169 U.S. 649 (1898), *aff'g In re* Wong Kim Ark, 71 F. 382 (N.D. Cal. 1896).

European parentage, who have always been considered and treated as citizens of the United States."[69]

But *Wong Kim Ark* required reargument, suggesting the difficulty of the issue. The ultimate decision was not unanimous. Chief Justice Fuller and Justice Harlan dissented, explaining:

> Considering the circumstances surrounding the framing of the constitution, I submit that it is unreasonable to conclude that 'natural born citizen' applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible to the presidency . . . .[70]

Remarkably, then, decades after the Fourteenth Amendment became law, a justice noted for his dedication to civil rights could conclude that Asians born in in the U.S. were not citizens.

If the question had arisen before enactment of the Fourteenth Amendment, it is certainly plausible that other members of the *Dred Scott* majority would have agreed with Fuller, a dissenter in *Fong Yue Ting*, and Harlan, the great dissenter himself, that formerly enslavable unnaturalized Asians and their children were not part of the people of the United States. This view is consistent with the with what may be the central conclusion of *Dred Scott*: "citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government," language foreshadowed by *Dow*'s conclusion that "[t]he political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government granted by the charter." Unless Asians were regarded as civilized white Christians, and if *Dow* was right that Asians would not have been part of the political community, much of the logic of *Dred Scott* applied to them with full force, including its reasoning about ineligibility for birthright citizenship.

II. *Dred Scott* and the Jurisprudence of Free People of Color

From a modern perspective, after 1868 *Dred Scott* seemed as dead as the Whig party. Chief Justice Taney had gone to his reward, African Americans had been made citizens by virtue of the Fourteenth Amendment, and the Thirteenth Amendment abolished slavery. Yet, *Dred Scott*'s embrace of *Strader*, like *Dow*'s recognition of state evidence rules, meant that the principle of the case remained at issue where there was a contest over the legal regulation of the rights of non-whites. This may explain the post-Reconstruction revival of both interest in *Dred Scott*, and in Taney's reputation.

Justice Harlan's famous dissent in *Plessy v. Ferguson* predicted that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in

[69] 169 U.S. at 694.

[70] *Id*. at 715 (Fuller, C.J., joined by Harlan J., dissenting).

the *Dred Scott* Case."[71] There was wisdom in recognizing the deep connection between the cases.[72] Yet, during Jim Crow, *Dred Scott* was hardly anathema to courts. The Supreme Court uncritically relied on it in support of originalism[73] and territorial powers.[74] In 1913, the Kentucky Supreme Court concluded that state pension payments to Confederate veterans were valid public expenditures in part based on northern opposition to *Dred Scott*--as well as, among other things, to the fact that state funds were used to erect "[m]onuments . . . to Generals John C. Breckenridge, John H. Morgan, and other distinguished Confederates."[75]

Jim Crow-era law reviews were effusive about Taney's jurisprudential excellence, not only in general, but with respect to *Dred Scott* itself. A former Confederate wrote in 1912: "notwithstanding the calumny and abuse which were heaped upon the Chief Justice because of his decision in the *Dred Scott* case, as far as we have been able to discover, not one statement of fact or principle of law as set forth by him in that opinion has ever been successfully

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[71] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan J., dissenting), *overruled by* Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954).

[72] And this passage suggests the possibility of a certain overlap in the views of Harlan and Taney about white supremacy: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." *Id*. at 559. In fairness to Harlan, it is perfectly possible to read this as racial flattery rather than a genuine prediction.

[73] The Court stated:

> as said by Mr. Chief Justice Taney in *Scott v. Sandford*, 19 How. 393, 426
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> 'It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'

South Carolina v. United States, 199 U.S. 437, 449 (1905).

[74] De Lima v. Bidwell, 182 U.S. 1, 196 (1901) ("But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief Justice Taney in the *Dred Scott* Case.").

[75] Bosworth v. Harp, 157 S.W. 1084, 1086–87 (Ky. 1913). *See also* Ex parte Reynolds, 20 F. Cas. 582, 584 (C.C.W.D. Ark. 1879) ("The supreme court of the United States again gave its views of the status of the Indian in the case of *Dred Scott v. Sandford*, 19 How. [60 U. S.] 403."); *In re* Silkman, 84 N.Y.S. 1025, 1031 (App. Div. 1903) (Woodward J., concurring) ("The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing," say the court in *Dred Scott v. Sandford*, 19 How. 404. "They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.")

controverted."[76] In 1923, F. Dumont Smith, a prominent Kansas lawyer wrote *The Story of the Constitution*[77] for the ABA, a nationally-distributed pamphlet which told "the story of our race," declaring that "[n]o racial history is more romantic or fascinating."[78] That year, in the *Texas Law Review* he defended Taney's view of history, observing: "The experience of one hundred and fifty years since that time [the framing of the Constitution] has shown us that the Negro in the mass will never be fitted for citizenship."[79] Another lawyer wrote that "[t]he decision in the *Dred Scott* case was sound in principle. When the tumult of anger and outrage, engendered by the slavery question had passed away, and judges were confronted with the principles announced by that decision, they did not disregard it."[80] Many other journals punished defenses of Taney's reputation and the decision.[81] To be sure, others suggested *Dred Scott* was wrongly decided, but even they tended to be diplomatic.[82]

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[76] George L. Christian, *Roger Brooke Taney*, 46 AM. L. REV. 1, 14 (1912).

[77] F. DUMONT SMITH, THE STORY OF THE CONSTITUTION (ABA Citizenship Comm. 1923), https://babel.hathitrust.org/cgi/pt?id=njp.32101065096768&view=1up&seq=1&q1=race

[78] *Id*. at 12.

[79] F. Dumont Smith, *Roger Brooke Taney*, 1 TEX. L. REV. 261, 271 (1922-1923).

[80] Morris M. Cohn, *The* Dred Scott *Case in the Light of Later Events*, 18 VA. L. REG. 401, 409 (1912).

[81] *See, e.g.,* Henry K. Braley, *Roger Brooke Taney, Chief Justice of the United States*, 22 GREEN BAG 149, 164 (1910) ("One by one the imputations cast upon him have been shown to have been groundless, by Tyler, Curtis, Reverdy Johnson, Clarkson N. Potter, Blaine, Carson, James Ford Rhodes, Professor Mikell and others, until the eclipse of this malign influence has passed from off his fame, and in the firmament of our jurisprudence his reputation as a great jurist and upright judge glows with steady radiance."); Horace H. Hagan, Dred Scott *Decision*, 15 GEO. L.J. 95, 112 (1927) ("Everywhere the brazen and infamous lie was spread that the Court, speaking through the Chief Justice, had decided that the Negro had no rights which the white man was bound to respect."); *id*. at 114 ("At the present time, the clouds of misrepresentation and misunderstanding that have so long hovered around the great Chief Justice have almost entirely disappeared. The magnificence of Taney's contribution to the judicial annals of our country is no longer a matter of dispute."); Monroe Johnson, *Taney and Lincoln*, 16 A.B.A. J. 499, 499 (1930) ("The public was content to accept, without question, the newspaper version; whereas a reading of the opinion, itself, would have shown that Taney had not stated his own views regarding the status of the negro but had merely described the conditions which he believed to have existed at the time of the adoption of the Constitution."); *Taney, Roger B.*, 2 CHI. L. TIMES 317, 326 (1888) ("Much has been said about the *Dred Scott* case, and the Chief Justice has been assailed in the bitterest manner. It has been said that his name would go down to posterity covered with infamy. But the fact is, that in rendering the decision in regard to the political status of the plaintiff, he voiced the sentiment of the then majority of the American people.")

[82] *See, e.g.,* Henry S. Barker, *The* Dred Scott *Case*, 3 KY. L.J. 1, 10 (1914) ("Surely it cannot be truthfully said in the light of these facts that. at the time of the Declaration of Independence and the formation of the Constitution, slavery was viewed by the civilized world as being altogether right and expedient, and that negroes had no rights which the white man was bound to respect."); Charles Noble Gregory, *Great Judicial Character Roger Brooke Taney*, 18 YALE L.J. 10, 21 (1908-1909) ("One may accord to Taney's opinion logic and learning, but one cannot concede to it an enlightened and forward looking spirit. He was seventy-nine years old when he wrote this opinion, and that he should seek to crystalize the views of the past, rather than the feeling of the present or the conviction of the future, was natural to his age and his origin. At a like age we will be equally incapable of changing our views as to the ownership in horses and cattle if the world, in its advance, ever recognizes, as I sometimes hope it will, their inalienable rights."); Francis R. Jones, *Roger Brooke Taney*, 14 GREEN BAG 1, 7 (1902) ("It is not a pleasant thing to criticise a great magistrate for unjudicial conduct, but I have seen no explanation, and can conceive of none, which

To many Americans, including African Americans, *Dred Scott* had not been repudiated by the Civil War or Reconstruction. After the Civil War, many commentators, both supporters of racial classifications and opponents, described as akin to *Dred Scott* discrimination against African Americans, of course, but also against Chinese and Indians. Typical is an editorial in the African American newspaper *The Appeal* following the Supreme Court's holding that racial deportation of noncitizens is permissible:

> The popular expression 'This is a white man's country' is an extension of Judge Taney's notorious dictum 'Negroes have no rights that white men are bound to respect.' As thus amplified, the dictum includes the Chinaman and Indian as well as the Afro-American, and the Chinese Exclusion Bill is an instance of its practical application.[83]

Other notable examples include Mark Twain's discussion of violence against Chinese in 1860s California,[84] judicial decisions addressing anti-Chinese legislation,[85] debates in Congress and

satisfactorily explains his attitude and conduct in the *Dred Scott* case."); Walter George Smith, *Roger Brooke Taney*, 47 AM. L. REG. 201 (1899) ("He was even known to stop a child and help her with her bucket of water in the streets of Washington when he was in high position and she but a slave, the child of a despised race. [But] [l]et it be finally admitted, in the light of history, that, with intentions too pure and lofty to be doubted, six Justices of the Supreme Court committed an error, and with their chief must bear the responsibility to a greater or less extent. The majority went aside from the true path and fell into a pit. Their conclusions were riddled by the inexorable logic of Curtis and McLean, and served no other purpose than to make a solemn warning to their successors.").

[83] *Editorial*, THE APPEAL: A NATIONAL AFRICAN AMERICAN NEWSPAPER (MN), June 18, 1892, at 2.

[84] Mark Twain, *Disgraceful Prosecution of a Boy*, in THE GALAXY 722, 723 (May 1870) ("It was in this way that the boy found out that a Chinaman had no rights that any man was bound to respect; that he had no sorrows that any man was bound to pity; that neither his life nor his liberty was worth the purchase of a penny when a white man needed a scapegoat; that nobody loved Chinamen, nobody befriended them, nobody spared them suffering when it was convenient to inflict it; everybody, individuals, communities, the majesty of the State itself, joined in hating, abusing, and persecuting these humble strangers.")
https://babel.hathitrust.org/cgi/pt?id=pst.000066654452&view=1up&seq=749

[85] The Stockton Laundry Case, 26 F. 611, 612–13 (C.C.D. Cal. 1886) ("Indeed, if this ordinance be valid, it is difficult to perceive what rights the people of California have which a municipal corporation is bound to respect. Of course, no one can in fact doubt the purpose of this ordinance. It means, 'The Chinese must go;' and, in order that they shall go, it is made to encroach upon one of the most sacred rights of citizens of the state of California,— of the Caucasian race as well as upon the rights of the Mongolian."); Chapman v. Toy Long, 5 F. Cas. 497, 499 (C.C.D. Or. 1876) (discussing "'the heathen Chinee,' who appear to have no rights on Poorman creek that a miner is bound to respect.")

state legislative bodies,[86] African American newspaper discussion of *Lum v. Rice*,[87] upholding segregation of Chinese students in Mississippi,[88] and Harvard Law Professor Zechariah Chafee Jr.'s analysis of the due process rights of Chinese immigrants under federal law.[89] Later

[86] 19 CONG. REC. 8984 (1888) (Remarks of Sen. Randall L. Gibson) (Senators supporting Chinese Exclusion "have, in effect, invoked the Senate to re-enact the *Dred Scott* decision, and to take the ground with respect to the Chinese race upon which that famous decision rested in respect to the colored people in this country. They who hold with the Declaration of Independence, that all men are created free and equal, find themselves under an imperious necessity, political and social, of their people to adapt their doctrine to the exclusion of the Chinese race."); DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878 720 (1878-1879) (remarks of Eli Blackmer) ("While I am anxious to do all that is legal, I do believe that even the Chinaman, obnoxious as lie is, has some rights that the white man is bound to respect.") Another possible reference came in the Virginia Constitutional Convention of 1901-02: "What about John Chinaman under the protecting agis of the Constitution of the United States? If he has any rights on earth except to wash clothes and smoke opium I do not know what they are. (Laughter.)" REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA, HELD IN THE CITY OF RICHMOND, June 12, 1901, to June 26, 1902 (1906).

[87] 275 U.S. 78 (1927).

[88] *Running True to Form*, PITT. COURIER, Dec.10, 1927, at A8 ("Standing above all law and all legislatures, the United States Supreme Court has ever been the bulwark of conservatism. In 1857 it informed the world that "A Negro has no rights that a white man is bound to respect,' and in 1927, it tells a Chinese citizen the same thing in a decision handed down by Chief Justice Taft on November 21."); *see also* Kelly Miller, *Chinese in Negro Schools*, N.Y. AMSTERDAM NEWS, Dec. 7, 1927, at 20 ("A taste of *Dred Scott* is still in the mouths of the people.")

[89] ZECHARIAH CHAFEE JR., FREEDOM OF SPEECH 255 (1920) ("It is all very well to say that only Communist citizens run this risk anyway, and that they and Chinese citizens have 'no rights that a white man is bound to respect.'"). Other notable commentators compared the Chinese Exclusion laws to the fugitive slave laws. Edward S. Corwin, *Constitutional Law in 1921-1922*, 16 AM. POL. SCI. REV. 612 n.54 (1922) ("The position of such Chinese is akin to that of people of color who were arrested as fugitive slaves, before the Civil War. See Prigg v. Pa., 16 Pet. 539."); Henry S. Cohn & Harvey Gee, *"No, No, No, No!": Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1, 94 (2003) (discussing Senator Joseph Roswell Hawley who stated of the Chinese Exclusion Act: "It reads as if it came from the dark ages. It reads like the old fugitive-slave law.") (13 CONG. REC. 3264 (1882)).

Nineteenth and early Twentieth Century newspapers[90] and scholarship[91] routinely invoked *Dred Scott* in the context of Chinese.[92]

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[90] *Hard on the Chinese*, HAW. STAR, Dec. 10, 1900, at 1 ("Judging from the present unfriendly attitude of the Americans it looks as if the Chinese, even in Hawaii, are 'up against it.' In fact they are almost as badly off as was the negro in the fifties when the Dred Scott decision was handed down, practically holding that a negro had no rights which a white man was bound to respect."); *The Early Courts*, L.A. HERALD, Jan. 6, 1899, at 4 ("At that early period in the judicial history of California the dictum of the supreme court of the United States, given by Judge Taney in the Dred Scott case, that a slave had no rights which a white man was bound to respect, was quite commonly held in California with regard to the Chinese. It was quite difficult to convict any white man who should kill a Chinaman."); *Gone to the Jury*, L.A. HERALD, Apr. 16, 1898, at 12 ("The real question at issue was . . . whether a Chinaman has any rights under the laws of the country that a man in a policeman's uniform is bound to respect."); *They Will Fight.: Chinese Raise A Protective Fund And Retain A Lawyer*, L.A. TIMES, May 4, 1897 ("Frank F. Davis, attorney for the Chinaman, took the stand that the whole case was an outcropping of the too-common feeling that a Chinaman was a dog, with no rights that anyone was bound to respect."); *Pan-Presbyterian Council: The Clergyman Who Saved Mrs. Grimason's Life Publicly Thanked*, N.Y. TIMES, Sept. 27, 1892, at 2 (noting that Dr. Robert J. George "said the record of the United States in regard to the Chinese was as infamous as the Dred Scott decision. How could they talk of Christianizing Chinamen when they would not let them come into the country?"); *No Law for the Chinese*, 2 PUB. OP. 498 1887 ("it appears that the Chinaman in this country who is not a citizen has no rights which the white man is bound to respect."); *Editorial Notes*, THE WEEKLY ARGUS (Rock Island IL), Mar. 18, 1886, at 2 ("The storm now raging has been brewing ever since Dennis Kearney uttered the ominous threat 'The Chinese must go.' Professional 'agitators' . . . have added fuel to the flames from time, until a sentiment has been fulminated in the breasts of many toiling laborers that Chinamen have few if any rights a white man is bound to respect."); *The Anti-Chinese Crusade*, DAILY ARGUS (Rock Island IL), Mar. 23, 1877, at 2 ("It was long a standing reproach to the national character that there was one section of the union where a negro had no rights a white man was bound to respect. That reproach has been exchanged for another. On the Pacific coast the members of a race as much above the African as the African is above the gorilla are actually denied the right to live and work."); *A Brutal Outrage: Has a Chinaman Any Rights Which an American Citizen of Foreign Birth Is Bound to Respect?--A Policeman Who Believed Not*, CHI. DAILY TRIB., Nov 23, 1873, at 16; *Chinese Charity*, WATERTOWN WEEKLY REPUB., Nov. 22, 1871, at 2 ("The Chinese are, according to the Los Angeles creed, but an inferior race, fit to be mobbed, persecuted and murdered, with no rights which a white man is bound to respect, and this is the way they prove it."); *A Perjured Jury--Killing Chinamen no Murder*, S.F. CHRON., Jun. 10, 1871, at 2 ("The fact that a sworn jury, in the face of incontrovertible facts, could perjure themselves to shield one of their own blood from the consequences of crime, is a terrible commentary on the lessons which have been taught by those who say that the Chinese have no rights which the white man is bound to respect."); *Will Discussion Do Good?*, TRINITY WEEKLY J., Sept. 17, 1870, at 2 ("The outcry against the Chinese made by politicians is but a repetition of the old cry that 'the black man had no rights, that the white man was bound to respect.'"); *The New Dodge*, JACKSON STANDARD, June 9, 1870 at 2 ("It is a cardinal point in the California Democratic creed that 'a Chinaman has no rights that a white man is bound to respect,' as it has heretofore been the 'infallible dogma' of Democrats, everywhere, that the 'negro had no rights that the white man was bound to respect.'"); *Murder Tolerated and Encouraged*, STOCKTON DAILY INDEPENDENT, May 6, 1870, at 2 (attributing murder of Chinese person in part to "the idea that no other race has rights that Caucasians are bound to respect"); *San Francisco: Black Made White by the Supreme Court of California, A Chinaman has no Rights which a Negro is Bound to Respect*, CHI. TRIB., Feb. 2, 1869; *Persistent Brutality*, THE DAILY MORNING CHRONICLE (S.F.), Nov. 18, 1868, at 2 ("The majority of the [police] force are probably of the opinion that 'Chaynaymin and naygurs' have no rights that white ruffians are bound to respect."); *Chinamen in the Cars*, DAILY DRAMATIC CHRON. (S.F.), July 3, 1868, at 2 ("It is a fact not generally known by San Franciscans, that over in Oakland, Chinamen have 'rights which whites are bound to respect.'").

[91] NAJIA AARIM-HERIOT, CHINESE IMMIGRANTS, AFRICAN AMERICANS, AND RACIAL ANXIETY IN THE UNITED STATES, 1848-82, 38 (2003) ("Or, as a forty-niner stated in 1852, Americans were confident that the Chinese had 'no rights that a white man [was] bound to respect.'"); MARY R. COOLIDGE, CHINESE IMMIGRATION 258-59 (1909) ("the tradition that a Chinaman had no rights which white men were bound to respect was being established" in 1860s); 4 THEODORE HENRY HITTELL, HISTORY OF CALIFORNIA 618 (1898) ("They seems to have a notion that the Chinese were not human beings and had no rights which anybody was bound to or ought to respect.") https://books.google.com/books?id=zLw-

Indians were also said to be subject to *Dred Scott*. Many have called the Court's 1903 decision in *Lone Wolf v. Hitchcock*[93] the *Dred Scott* of federal Indian law.[94] *Lone Wolf* held "that Congress could unilaterally abrogate tribal treaty rights and exchange their territory for allotments and money."[95] The year it was decided, Senator Matthew Quay called *Lone Wolf* "the Dred Scott decision No.2, except that in this case the victim is red instead of black. It practically

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AAAAYAAJ&newbks=1&newbks_redir=0&dq=chinese%20rights%20white%20bound%20to%20respect%20California&pg=PA618#v=onepage&q=chinese%20rights%20white%20bound%20to%20respect%20California&f=false; AARON M. POWELL, PERSONAL REMINISCENCES OF THE ANTI-SLAVERY AND OTHER REFORMS AND REFORMERS 273 (1899) ("We are sending missionaries abroad to China, but what are we teaching by example in America with reference to the Chinese except the Godless doctrine that they have no rights which we are bound to respect?"); S. WELLS WILLIAMS, CHINESE IMMIGRATION 46 (1879) ("The laws of California declare that the Chinese are Indians and aliens, and her legislators have treated them as if they had no rights which we were bound to respect."); Morris M. Cohn, *The* Dred Scott *Case in the Light of Later Events*, 46 AM. L. REV. 548, 557 (1912) (noting that Pacific Coast states "have, notwithstanding the lessons in liberty taught by the civil war, found ways to carry through legislation, in the halls of Congress, which put the contention of the judges in the Dred Scott case entirely in the shade, and make slavery a lesser evil."); *Constitutional, but Evil*, 1 AM. LAWYER 4 (1893) (noting that *Fong Yue Ting v. United States* "with its dissentient accompaniment reminds one forcibly of the event of the *Dred Scott* decision by the same court."). Some contemporary scholars make the same point. *See* ROBERT G. LEE, ORIENTALS: ASIAN AMERICANS IN POPULAR CULTURE 49 (1999) ("In California, . . . until a year after the Federal Civil Rights Bill in 1868, a Chinaman had no rights that the man was bound to respect."); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2522–23 (2007) ("Asiatic exclusion was the most complete race-based legal exclusion from citizenship since *Dred Scott* and was instituted, significantly, in the 1880s, after the Fourteenth Amendment nullified *Dred Scott*."); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 68 (2002) ("The Chinese Exclusion Case, sometimes called the *Dred Scott* decision for Asians, rivals the Japanese internment cases for harshness and injustice.").

[92] Relatedly, some authorities referred to Western treatment of China in a similar way. 2 HOSEA BALLOU MORSE, THE INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE: THE PERIOD OF SUBMISSION 1861-1893 357 (1917) (citing *Dred Scott*; "It is only on the ground that an Asiatic nation has no rights which the white man is bound to respect that the Course of France is to be explained.") https://archive.org/details/internationalrel02mors/page/356/mode/2up/search/bound+to+respect *Papers relating to the foreign relations of the United States*, H.R. EX. DOC. 42-1 pt 1 86 (1871) ("Foreigners residing here are much too prone to exhibit by acts, if not by words, their belief in the doctrine that 'a Chinaman has no rights that a white man is bound to respect.'"). *See also* W.E.B. DUBOIS, W.E.B. DUBOIS ON ASIA: CROSSING THE WORLD COLOR LINE 37 (2005) (speaking of the U.N., "[t]here will be six hundred million colored and black folk inhabiting colonies owned by white nations, who will have no rights that white people are bound to respect.")

[93] 187 U.S. 553 (1903).

[94] Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73, 86 n.3 (2002) ("The day *Lone Wolf* was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians' Dred Scott decision." quoting Sioux Nation of Indians v. U.S., 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd, sub nom.* U.S. v. Sioux Nation of Indians, 448 U.S. 371 (1980). Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 182 (2002); Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 484 (1994); Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451, 480 n. 190 (1995)); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 221 (1984) ("*Lone Wolf v. Hitchcock* . . . has been called 'the Indians' *Dred Scott* decision'")

[95] Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 630 (2009).

inculcates the doctrine that the red man has no rights which the white man is bound to respect, and, that no treaty or contract made with him is binding."[96]

Although Asian "coolies" were for practical purposes enslaved in parts of the Americas such as Cuba,[97] and the story of Indian slavery in the Americas is now beginning to be told,[98] in the United States, African slavery is a unique historical crime. So too, in a different way, is the brutality and treachery associated with treatment of Indian nations by the United States.

Nevertheless, there is a perfectly reasonable argument that the allusions to *Dred Scott* in connection with Indians and Asians were neither metaphorical nor hyperbolic. In this era, authors in leading law reviews argued that the Reconstruction Amendments were void, or, at the very least, bad policy.[99] Gilbert Thomas Stephenson's 1910 book *Race Distinction in American Law* took nearly 400 pages to catalog the ways in which U.S. law accepted the invitation to classify on the basis of race.[100] He explained "[a]ttention will be directed not only to the Negro but to other races in the United States-the Mongolian in the Far West and the Indian in the Southwest."[101] Pauli Murray's 1950 masterpiece *States Laws on Race and Color* was almost twice as long.[102] *Dred Scott* seemed to be right, that with only limited exceptions, states had the authority to regulate the status of their citizens, including along racial lines.

Whites were a majority in most states of the Union. In the former Confederate states where African Americans were a majority, or even a substantial minority, they were

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[96] *Id*. at 237 (citing DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 116 (1997) (citing 36 CONG. REC. 2024 (1903)).

[97] MOON-HO JUNG, COOLIES AND CANE: RACE, LABOR AND SUGAR IN THE AGE OF EMANCIPATION 4 (2006); ELLIOTT YOUNG, ALIEN NATION: CHINESE IMMIGRATION IN THE AMERICAS FROM THE COOLIE ERA THROUGH WORLD WAR II 94 (2014).

[98] ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA (2016).

[99] *See* Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169, 178 (1910); John R. Dos Passos, *The Negro Question*, 12 YALE L.J. 467, 472 (1903) (proposing to "plac[e] in the hands of the individual States the power to control the question, to determine and announce who shall and who shall not be entitled to vote within their respective borders. This means a retrograde movement in our constitutional history. It means we must retrace our steps and undo organic legislation which was hastily enacted after the rebellion; to take back that which was given."). For a contemporary evaluation of these arguments, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

[100] GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW (1910).

[101] *Id*. at 6-7 ("Most of the discussion will necessarily be of the distinctions between Caucasians and Negroes, but as distinctions applicable to Mongolians and Indians arise, the will be mentioned to show that race consciousness is not confined to any one section or race.") https://archive.org/details/racedistinction00stepgoog

[102] PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (1950) (Davison Douglas ed., reprint 1997).

disenfranchised.[103] Accordingly, in all cases, Whites made rules to govern themselves, but also decided the status of people of color. As *Dow* suggested, in the century after reconstruction Whites were the master race, as *Dred Scott* held, Whites constituted the sovereignty in government. This power was deployed.

The point of what follows is not to recount every form of discrimination against people of color, nor to deny significant variation across jurisdictions and over time. Indeed, as some states enforced segregation, others passed civil rights laws.[104] Nor is it to contend that non-White groups suffered identically, or equally, or to propose a metric for comparative injury. Finally, "private" discrimination, often extending to disfavored White groups such as Southern and Eastern Europeans. Discrimination against religious minorities including Jews, Jehovah's Witnesses, Latter Day Saints, was an additional category of injustice. What follows is designed to suggest that Chief Justice Taney's theory that the states and federal government had broad authority to regulate people of color, including citizens of color, prevailed until the Civil Rights era. Certain basic techniques of discrimination were deployed against all nonwhite groups.

Citizenship. Under *Dred Scott* and other legal rules, people of color were denied the right to become U.S. citizens, before and after the Civil War.[105] Even after Reconstruction, Congress could expatriate birthright U.S. citizens—resulting in their exclusion from the United States and potentially rendering them stateless--for race-based reasons, such as marriage to a noncitizen of a

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[103] Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 66 (2008) (noting African American majority population in 1880 in Louisiana, Mississippi, and South Carolina, and that they were over 40% of the population in Alabama, Florida, Georgia, and Virginia).

[104] Paul Finkelman, *The Hidden History of Northern Civil Rights Law and the Villainous Supreme Court, 1875-1915*, 79 U. PITT. L. REV. 357 (2018).

[105] Even after the Fourteenth Amendment, Indians born in the United States in tribal relations were held not to be citizens. Elk v. Wilkins, 112 U.S. 94 (1884). The Naturalization Act of 1790, in effect as amended until 1952, restricted naturalization to "free white persons." 1 Stat. 103. Ah Hee v. Crippen, 19 Cal. 491, 497 (1861) (Field, C.J.) ("The plaintiff is a Chinaman, and, of course, is not a citizen of the United States, or entitled to become such under any existing legislation of Congress"). Persons of African nativity and descent were allowed to naturalize in 1870. But in an opinion denying an Indian the right to naturalize one judge explained that this was merely symbolic:

> there is this to be said in excuse for this seeming inconsistency: the negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them.

In re Camille, 6 F. 256, 257–58 (C.C.D. Or. 1880) (discussing 16 Stat. 256; 2169 Rev. St.). After much consideration, a judge found that a Mexican applicant was entitled to naturalize, but it was clearly a decision based on legislative intent rather than constitutional right. *In re* Rodriguez, 81 F. 337, 354–55 (W.D. Tex. 1897) ("whatever may be the status of the applicant viewed solely from the standpoint of the ethnologist, he is embraced within the spirit and intent of our laws upon naturalization, and his application should be granted").

disfavored race.[106] More fundamentally, even if citizens, people of color were potentially subject to a range of racial discriminations.

Testimonial Disqualification. Testimonial disqualification, the legal question at issue in *Dow*, was an important form of discrimination. In various jurisdictions, Indians, African Americans, and Asians were prohibited from testifying against Whites.[107] In the Civil Rights Act of 1866, Congress legislatively invalidated these laws by providing that all persons an equal right "give evidence."[108] But after Congress prohibited Chinese from testifying in certain Chinese Exclusion cases, in 1893 the Supreme Court upheld the testimonial disqualification on a broad ground: "The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of congress, which congress may, at its discretion, modify or repeal."[109] Thus, the specific holding of *Dow* remained good law, as a constitutional matter. There was no inherent right of people of color, even if citizens, to testify.

Testimonial incapacity made people vulnerable to rape, robbery, murder, and other crimes without recourse. It also justified other discrimination. For example, in 1862, Congress considered removing a restricting on carrying of mail to "free white persons" in place since 1802.[110] Opponents objected that race neutrality would extend employment

> not only to blacks, but also to the Indian tribes, civilized and uncivilized, and to the Chinese, who have come in such large numbers to the Pacific coast. These last are not recognized there as entitled to the rights and privileges of free white persons; but the

[106] *See* Inaba v. Nagle, 36 F.2d 481, 481 (9th Cir. 1929) (although "appellant is a native-born citizen of the United States" she "lost her citizenship by reason of her marriage to an alien ineligible to citizenship."); Ex parte (Ng) Fung Sing, 6 F.2d 670, 670 (W.D. Wash. 1925) ("Racially the petitioner is Chinese (yellow race); politically she was born a member of the citizenry of the United States. Citizenship is a political status, and may be defined and the privilege limited by the Congress. The Congress has, no doubt, power to say what act shall expatriate a citizen and forfeit right to 'protection abroad,' and prescribe prerequisites for resumption of citizenship. Petitioner has no vested right in the act, supra.")

[107] Gabriel J. Chin, *"A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 UC IRVINE L. REV. 965 (2013); Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209 (1993); *Social or Race Disqualification*, § 716, at 22-24, *in* BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, II TREATISE ON THE LAW OF EVIDENCE (1904). *See, e.g.,* Dupree v. State, 33 Ala. 380, 387 (1859) ("Negroes, mulattoes, Indians, and all persons of mixed blood descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, must not be witnesses in any cause, civil or criminal, except for or against each other."); People v. Hall, 4 Cal. 399, 399 (1854) (holding that statute providing "no Indian or Negro shall be allowed to testify as a witness in any action or proceeding in which a White person is a party" excluded Chinese testimony).

[108] 42 U.S.C. § 1981.

[109] Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893).

[110] Act of May 3, 1802, §, 2 Stat. 189, 191, Amended by Act of Apr. 30, 1810, § 4, 2 Stat. 592, 594, amended by Act of Mar. 3, 1825, § 4, 4 Stat. 102, 104.

> effect of this bill would be, as I say, to make officers of Government, as mail carriers, of all these classes of persons who obtain contracts of the Department.[111]

In addition to the problem of principle, this could have created a practical difficulty: "in some of the States Indians and negroes, and in California and Oregon the Chinese also, are not allowed by the statutes of the State to give testimony in the courts against white persons. . . . when you repeal the law of 1825, and allow persons to be mail contractors who are not legal witnesses, they could not testify against a thief who robbed the mails before their eyes; and you thus impair the security of our mail-bags and their contents."[112] This argument sufficed to kill the proposal.

Racial Disenfranchisement. States also had no obligation to allow citizens to vote.[113] Before Reconstruction, explicit racial discrimination was common.[114] After 1870, the Fifteenth Amendment prohibited racial discrimination against citizens with respect to the right to vote. But Congress consciously decided to allow discrimination against Chinese and other non-Whites; in an era when many states allowed non-citizens to vote, under the Fifteenth Amendment particular races of noncitizens could be enfranchised or not.[115] States sometimes successfully

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[111] CONG. GLOBE, 37th Cong., 2d Sess. 2231 (1862).

[112] *Id.*

[113] In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), the Court famously held that native-born women, though citizens, could be denied the right to vote.

[114] Thus, the California constitution in effect in 1864 enfranchised

> Every white male citizen of the United States, and every white male citizen of Mexico who shall have elected to become a citizen of the United States under the treaty of peace exchanged and ratified at Queretaro on the 30th day of May, 1848, of the age of twenty-one years, who shall have been a resident of the State six months next preceding the election, . . . provided, that nothing herein contained shall be construed to prevent the Legislature, by a two-thirds concurrent vote, from admitting to the right of suffrage Indians or the descendants of Indians, in such special cases as such a proportion of the legislative body shall deem just and proper.

Bourland v. Hildreth, 26 Cal. 161, 178 (1864) (quoting Cal. Const., Art. II, § 1). United States v. Lucero, 1869-NMSC-003, ¶ 21, 1 N.M. 422, 439 ("On the sixteenth of February, 1854, the legislative assembly of New Mexico passed the following act, section 70: "That the pueblo Indians of this territory for the present, and until they shall be declared by the congress of the United States to have the right, are excluded from the privilege of voting at the popular elections of the territory, except in the elections for overseers of ditches to which they belong, and in the elections proper to their own pueblos to elect their officers according to their ancient customs.").

[115] *See* Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J. L. & PUB. POL. 223 (1994); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55 (1996).

disenfranchised Indians on various pretexts.[116] Mexican Americans were disenfranchised by the Texas White primary, among other laws.[117]

In addition, the Supreme Court approved disenfranchisement of African Americans under authority of a legal principle which would have systematic application beyond voting and beyond African Americans. At the turn of the 20th Century, the Supreme Court held that states were free to enact laws with the intent to disenfranchise nonwhites, or disadvantage them in any other way, so long as the laws were facially neutral, and challengers could not prove they were discriminatorily applied.

A leading U.S. Supreme Court case involved the Mississippi Constitution of 1890, which, the Mississippi Supreme Court explained, had been drafted by a convention which

> swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites,—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.[118]

Jurors had to be voters in Mississippi, so all-White civil and criminal juries were a consequence of electoral disenfranchisement.

The Mississippi Supreme Court's candor regarding it's the state's intent to discriminate is starting to the modern ear, but the Court was right to be confident that its frankness would be

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[116] Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965*, 5 NEV. L.J. 126, 135 (2004) ("From 1924 to 1956 many western states would deny Indians the right to vote. Despite the changes brought about by the Fourteenth and Fifteenth Amendments, the Constitution still granted the states great autonomy with regards to suffrage, and until the Voting Rights Act of 1965, states had almost unlimited power to make rules for franchise. The states used this unlimited power to exclude Indian citizens from voting. Using poll taxes, literacy tests, English language tests, and refusing to place polling places in or near Indian communities, western states were successful in their efforts to prevent Indians from voting."); *see, e.g., In re* Liquor Election in Beltrami Cty., 163 N.W. 988, 989 (Minn. 1917) ("That these 52 mixed and full blood Indians were not citizens, and as such entitled to vote, because they were born within the territorial limits of Minnesota, must be considered settled.") (citing, inter alia, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Elk v. Wilkins, 112 U. S. 94 (1884)).

[117] Orville Vernon Burton, *Tempering Society's Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy*, 76 LA. L. REV. 1, 12 (2015); *see also* Michael C. Campbell, *Politics, Prisons, and Law Enforcement: An Examination of the Emergence of "Law and Order" Politics in Texas*, 45 LAW & SOC'Y REV. 631, 638 (2011) (noting that the Texas redemption constitutional convention "explicitly targeted the political disenfranchisement of Blacks, Mexicans, and Native Americans").

[118] Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896).

legally unproblematic. Mississippian Henry Williams was sentenced to death after being charged by an all-White grand jury and convicted by an all-White petit jury. On review, the U.S. Supreme Court unanimously held that the motives of the Mississippi constitutional convention in structuring its laws to deny African Americans the right to vote were entirely irrelevant. After quoting the language of Mississippi Supreme Court above, the U.S. Supreme Court explained:

> nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done 'within the field of permissible action under the limitations imposed by the federal constitution,' and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the state.[119]

Laws enacted with a discriminatory motivation could be invalidated in a particular case based on proof of discriminatory enforcement. But after *Yick Wo v. Hopkins*[120] warned of this possibility, discriminators had every reason to be discreet. For example, in 1970, after legal doctrine had changed, California invalidated its literacy test for voting, noting that one of the reasons is that it had been enacted to prevent U.S.-born Chinese from voting.[121] But no successful challenge had been brought to the law in the decades it had been in effect.

Miscegenation Laws. People of color were prohibited from marrying White persons, a policy which not only reinforced racist principles[122] but profited the state through escheat as

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[119] Williams v. Mississippi, 170 U.S. 213, 222 (1898), *aff'g* 20 So. 1023, 1023 (Miss. 1896) (citing Dixon v. State, 20 So. 839 (Miss. 1896)) . For discussions of the history of judicial review of legislative motive, see Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1 (2016); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008). Under more recent doctrine, a law enacted with a discriminatory motive and continuing to have a discriminatory effect is unconstitutional. Hunter v. Underwood, 471 U.S. 222 (1985).

[120] 118 U.S. 356 (1886).

[121] Castro v. California, 466 P.2d 244, 248 n.11 (Cal. 1970) ("The Constitution adopted in 1879 excluded 'natives of China' from voting. In 1891 the children of those thus excluded were nearing voting age and, since the Chinese tended to retain their language and customs, partly as a response to intense discrimination, the proposed literacy test would serve to prevent them from voting as well.")

[122] Strauder v. West Va., 100 U.S. 303, 308 (1879) ("The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."), abrogated in part on other grounds by Taylor v. Louisiana, 419 U.S. 522 (1975); Terrace v. Thompson, 263 U.S. 197, 220 (1923) ("But it is not to be supposed that [Acts of Congress] defining eligibility [for naturalization] are arbitrary or unsupported by reasonable consideration of public policy. The state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not."); Brunson v. Bd. of Trustees of Sch. Dist. No. 1 of Clarendon Cty., S.C., 429 F.2d 820, 825 (4th Cir. 1970) ("Certainly *Brown* had to do with the equalization of educational opportunity; but it stands for much more. Brown articulated the truth that *Plessy* chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are inferior and not to be associated with. By condemning the practice as 'inherently unequal,' the Court, at long last, expunged the

spouses and out-of-wedlock children were deemed legal strangers and denied inheritance.[123] An Oregon statute, upheld by its supreme court, made it a crime for "any white person male, or female, to intermarry with any Negro, Chinese, or any person having one–fourth or more negro, Chinese, or Kanaka blood, or any person having more than one–half Indian blood."[124] Arizona law provided that "[t]he marriage of persons of Caucasian blood, or their descendants, with Negroes, Hindus, Mongolians, members of the Malay race, or Indians, and their descendants, shall be null and void."[125] Mexicans were not specified in formal anti-miscegenation legislation,[126] although "whatever the law, registrars often informally denied marriage licenses to Mexicans who looked too dark to marry a White person."[127]

Segregation. Citizens of color could be subject to segregation in schools and other places.[128] After passage of the Fourteenth Amendment, the Nevada Supreme Court upheld a

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constitutional principle of black inferiority and white supremacy introduced by *Dred Scott*, and ordered the dismantling of the 'impassible barrier' upheld by that case.")

[123] *In re* Shun T. Takahashi's Estate, 129 P.2d 217, 219 (Mont. 1942) ("Marriage between a Japanese and a white person is prohibited in this state."); *In re* Walker's Estate, 46 P. 67, 68 (Ariz. 1896) (Indian spouse and child could not inherit; "[i]t is readily seen that this pretended marriage, if it had been a marriage in fact, was illegal and void, and imposed no obligation on either party thereto."); *see also In re* Morgan's Estate, 265 P. 241, 244 (Cal. 1928) ("The evidence shows that the father was a white person and that the two women, whom we are asked to presume that he married, were mulattoes. It has been the law of this state from its earliest days, and long before either Annie Morgan or Susan O. Casey was born, that a marriage between a white person and a mulatto was illegal. In the absence of any evidence to the contrary, we must presume that the laws of the state of Mississippi and Louisiana are and were the same. With an express statutory inhibition against a marriage between persons of these two races, no presumption can be indulged in that this law was violated and a marriage entered into between these parties.")

[124] *In re* Paquet's Estate, 200 P. 911, 913 (Or. 1921).

[125] State v. Pass, 121 P.2d 882, 882 (Ariz. 1942). *See* Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 352 (2007); Karen M. Woods, *Law Making: A "Wicked and Mischievous Connection": The Origins of Indian-White Miscegenation Law*, 23 LEGAL STUD. F. 37 (1999).

[126] Dean Moran reports that:

> By treaty, former Mexican citizens enjoyed the full privileges of American citizenship, so anti-miscegenation laws never formally prohibited mixed marriages with Anglos. Yet, the subordinated status of Mexicans in their new home country led to a steep drop in the number of intermarriages.

Rachel F. Moran, *Love with A Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex, and Marriage*, 32 HOFSTRA L. REV. 1663, 1670 (2004). In invalidating California's anti-miscegenation statute, the California Supreme Court reported that the law does not "set up 'Mexicans' as a separate category, although some authorities consider Mexico to be populated at least in part by persons who are a mixture of 'white' and 'Indian.'" Perez v. Lippold, 198 P.2d 17, 22–23 (Cal. 1948).

[127] Moran, *supra* note 126.

[128] Smith v. State, 46 S.W. 566, 570 (Tenn. 1898) ("No good reason can be perceived why such legislation is objectionable, or why it might not even be extended. If California or any of the states of the West should take a like view as to intermixture of their Chinese population with that of native or white people in public conveyances, it

statute providing that "Negroes, Mongolians and Indians shall not be admitted into the public schools, but the board of trustees may establish a separate school for their education, and use the public school funds for the support of the same."[129] While segregation of African American students was the most systematic, Indian,[130] Mexican,[131] and Asian[132] pupils were also excluded from White schools.

Property Ownership. People of color were restricted in their rights to own property. All were subject to restrictive covenants which, in 1926, seemed to have been upheld by a unanimous Supreme Court.[133] A typical covenant provided "that no part of said premises shall ever he conveyed, transferred, let or demised to any person or persons of African, Mexican, Mongolian or Indian descent."[134] Of course, as *Lone Wolf* held, tribal possession of reservations was subject to the authority of Congress to determine that it was time for Indians to relocate, and

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seems clear that for the same reasons they might enact the same laws, and, indeed, yet others, for the separation of other races who might be hostile or prejudiced towards each other.")

[129] State v. Duffy, 7 Nev. 342, 346 (1872).

[130] Sing v. Sitka Sch. Bd., 7 Alaska 616, 624 (D. Alaska 1927) (upholding segregation of Indians; "it seems to be well settled law, by numerous decisions, that the Fourteenth Amendment to the Constitution of the United States does not guarantee to the colored races a community of rights with the white race, and that it is within the power of the state to establish separate schools for the colored race, but that such schools must be on an equal plane with those maintained for the white race."); Goins v. Bd. of Trustees of Indian Normal Training Sch. at Pembroke, 86 S.E. 629, 630 (N.C. 1915) (discussing statute proving that "Croatan Indians * * * shall have separate schools for their children, school committees of their own race and color, and shall be allowed to select teachers of their own choice").

[131] Westminster Sch. Dist. of Orange Cty. v. Mendez, 161 F.2d 774 (9th Cir. 1947) (invalidating segregation of Mexican American students not authorized by California law). Other courts had disagreed about whether segregation was lawful only if authorized by statute. *Compare* People ex rel. King v. Gallagher, 93 N.Y. 438, 450 (1883) (upholding regulation segregating African American students in spite of absence of statutory authorization, as there was for Indian students) *with* Crawford v. Dist. Sch. Bd. for Sch. Dist. No. 7, in Klamath Cty., 137 P. 217, 221 (Or. 1913) ("There is no statute in this state expressly granting authority to school boards to establish separate schools for black or red children, and to exclude the colored children from the schools intended for white children; nor can this power be implied from any power that has been granted to school boards.")

[132] California's path was particularly tortuous. It first authorized separate schools for African American and Indian children. Ward v. Flood, 48 Cal. 36, 48 (1874). In 1885, the California Supreme Court held that there was no authority to entirely exclude Chinese children. Tape v. Hurley, 6 P. 129, 130 (Cal. 1885). The legislature then authorized separate schools for white and Asian children. Wong Him v. Callahan, 119 F. 381, 381 (C.C.N.D. Cal. 1902). Under that law, segregation of African Americans was unauthorized. Wysinger v. Crookshank, 23 P. 54, 56 (Cal. 1890). Segregation was later authorized for Indian as well as Asian children. Piper v. Big Pine Sch. Dist. of Inyo Cty., 226 P. 926, 928 (Cal. 1924).

[133] Corrigan v. Buckley, 271 U.S. 323 (1926).

[134] McRae v. Lois Grunow Mem'l Clinic, 14 P.2d 478, 479 (Ariz. 1932). On the other hand, where there was no valid covenant, an owner could sell to anyone. State Realty Co. v. Wood, 57 S.E.2d 102, 103 (Va. 1950) ("There is no limitation or restriction upon the seller to select a purchaser from any racial, social or religious group. He is free to sell to any one - to an Eskimo, Chinaman, Buddhist, Mohammedan or Communist.")

their land made available to others.[135] Asian immigrants were subject to laws prohibiting "aliens ineligible to citizenship" from owning land,[136] and their U.S.-born citizen children were subject to restrictions on ownership designed to prevent ineligible noncitizens from controlling real property.[137]

Physical Liberty. In very different ways, the bodily liberty of members of each of these groups was subject to arbitrary termination. In connection with the displacement authorized by *Lone Wolf*, of course, many Indians were forced to move. In a later period, Indian children were removed from their homes and sent to boarding schools.[138] If the perpetrators had been communists or nonwhite, these schools might well have been called reeducation camps.

Before the Civil War, African Americans, free and enslaved, were subject to decades of discussion about whether it would be best for the United States to deport them to a colony, although few, other than enslaved persons unlawfully brought to the United States by slave traders, were forcibly removed.[139] Free people of color, north and south, were susceptible to kidnapping and sale into slavery.[140] While the United States abandoned the colonization project, afterwards, particularly in the former confederate states, African Americans were subject to a criminal justice system corrupted to force them into involuntary servitude.[141] Although vague

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[135] *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2007).

[136] Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947).

[137] Oyama v. California, 332 U.S. 633 (1948); Rose Cuison Villazor, *Rediscovering* Oyama v. California: *At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010).

[138] DENISE K. LAJIMODIERE, STRINGING ROSARIES: THE HISTORY, THE UNFORGIVABLE, AND THE HEALING OF NORTHERN PLAINS AMERICAN INDIAN BOARDING SCHOOL SURVIVORS (2019); DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928 (1995); Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45 (2006).

[139] NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN RECOLONIZATION (Beverley C. Tomek & Matthew J. Hetrick, eds. 2017); P.J. STAUDENRAUS, THE AFRICAN COLONIZATION MOVEMENT 1816-1865 (1961).

[140] *See* JONATHAN DANIEL WELLS, THE KIDNAPPING CLUB: WALL STREET, SLAVERY, AND RESISTANCE ON THE EVE OF THE CIVIL WAR (2020).

[141] Stratacos v. State, 748 S.E.2d 828, 833 (Ga. 2013) ("Georgia's labor contract act was just one of many Jim Crow statutory schemes that used criminal sanctions, or the threat of criminal sanctions, to coerce African–Americans into providing labor. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE–ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2009)."); *see also* Jackson v. City & Cty. of Denver, 124 P.2d 240, 241 (Colo. 1942) (affirming conviction of black and white unmarried couple for cohabiting; finding it a violation of an ordinance providing "A vagrant within the meaning and provisions of this article shall be deemed to be * * * any person who shall lead an * * * immoral * * * course of life.").

laws like vagrancy statutes were most often turned against African Americans, Indians,[142] Asians,[143] and members of other groups were also caught up.[144]

During World War II, "citizen and alien Japanese alike" were incarcerated in camps.[145] Asian immigrants were also potentially subject to race-based deportation at the pleasure of Congress: "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein."[146] In order to carry out Asian Exclusion, Asian appearance was made probable cause to arrest, and a sufficient ground to impose the burden of proving lawful presence on the Asian.[147] Although the weight of immigration policy fell most harshly on Asians, immigration laws also discriminated against African[148] and some Indian[149] noncitizens.

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[142] Chauncey Shafter Goodrich, *The Legal Status of the California Indian*, 14 CALIF. L. REV. 83, 93 (1926) (discussing vagrancy statute applicable solely to Indians).

[143] Ex parte Tom Wong, 10 P.2d 797, 798 (Cal. Ct. App. 1932) (affirming conviction under statute providing that "[e]very person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him * * * is a vagrant and is punishable, * * *"); Territory v. Moritaro, 16 Haw. 267, 268 (1904) ("The evidence shows that some thirty Japanese were arrested on suspicion, being held on charges of vagrancy and other charges.").

[144] *See generally* United States v. James, 952 F.3d 429, 434 (3d Cir. 2020) (noting that vagrancy laws "invited selective enforcement by police officers, judges, and juries, with the burden commonly falling on disfavored racial and social groups. *See* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 15-20, 115-27 (2016).")

[145] Hirabayashi v. United States, 320 U.S. 81, 91 (1943).

[146] Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 336 (1909) (quoting Wong Wing v. United States, 163 U. S. 228, 237 (1896)).

[147] Gabriel J. Chin, "*A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 UC IRVINE L. REV. 965, 979 n.79 (2013) (discussing Morrison v. California, 291 U.S. 82, 89 (1934) (quoting Chin Bak Kan v. United States, 186 U.S. 193, 200 (1902) ("The inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.")).

[148] Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994).

[149] American Indians born in Canada have a right under the Jay Treaty—the treaty ending the Revolutionary War—to free passage into the United States, but U.S. law imposes a blood quantum requirement, limiting the ability of such persons to marry or adopt. Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. REV. 301 (2009). In addition, Mexicans are treated differently: "[t]ransborder tribes that straddle the U.S.-Mexico border do not benefit from the Jay Treaty or section 289 of the INA." Leti Volpp, *The Indigenous As Alien*, 5 UC IRVINE L. REV. 289, 325, n.147 (2015).

The power of race-based removal was sometimes exercised even more vigorously against Mexicans than it had been against the Asians for whom the doctrine was invented.[150] In the 1930s and the 1950s, in combined federal-state operations called the "Mexican repatriation" and "Operation Wetback," "citizen and alien Mexicans alike" were sent to Mexico to reduce their economic competition domestic workers.[151] More recently, the Supreme Court held that, in immigration enforcement, "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" in making a forcible stop to investigate their status.[152] Even today, U.S. citizens, mostly, apparently, non-White, are regularly detained as noncitizens, and sometimes deported, through casual administrative procedures.[153]

Citizens of Color and the Master Race. Undoubtedly, the Civil Rights Revolution of the 1960s substantially changed the status and day-to-day lives of millions of people of color in the United States. But during the Jim Crow era, states and the federal government had broad power to regulate the rights and status of people of color in ways which would have been inconceivable with respect to Whites as a class. The point is illustrated two of the most important federal

[150] A U.S. District Court recently found that the main immigration crimes in U.S. law were enacted with an anti-Mexican animus. United States v. Carrillo-Lopez, No. 320CR00026MMDWGC, 2021 WL 3667330, at *5 (D. Nev. Aug. 18, 2021) ("the evidence Carrillo-Lopez provides demonstrating the animus which tainted the Act of 1929, along with other proffered evidence contemporaneous with the INA's enactment in 1952, is sufficient for Carrillo-Lopez to meet his burden that discriminatory intent was a motivating factor of both the 1929 and 1952 enactments.") See also Eric S. Fish, Race, History, and Immigration Crimes (April 15, 2021). Iowa Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3827488.

[151] *See* Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444 (2019); Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1 (2005).

[152] United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975). It is not difficult to combine ethnic appearance along with other factors such as language, dress, and location, to corroborate the "evidence" that a nonwhite person could well be an unauthorized migrant. *See, e.g.,* Lee v. Immigration & Naturalization Serv., 590 F.2d 497, 502 (3d Cir. 1979) (citing *Brignoni-Ponce*, "the men's conversation in Chinese, their mode of dress and their proximity to the China Inn, a known employer of illegal aliens in the past, aroused an initial suspicion in Hughes' mind that the two men might be illegal aliens employed at that restaurant").

[153] *See, e.g.,* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2017 (2013) ("Yet race remains profoundly present in the adjudication of contemporary citizenship claims. The vast majority of recent cases that have come to light regarding deportations of citizens have involved individuals deported to Latin America and the Caribbean, and in particular to Mexico."); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 682 (2011) (noting "the presumption of U.S. citizenship on the part of those born abroad to U.S.-born parents who seem White, and the presumption of foreign citizenship for similarly situated children of U.S. parents who are racialized as non-White"); ACLU FLORIDA, CITIZENS ON HOLD: A LOOK AT ICE'S FLAWED DETAINER SYSTEM IN MIAMI-DADE COUNTY (Mar. 20, 2019) https://www.aclufl.org/sites/default/files/field_documents/aclufl_report_-_citizens_on_hold_-_a_look_at_ices_flawed_detainer_system_in_miami-dade_county.pdf; David J. Bier, *U.S. Citizens Targeted by ICE*, CATO INSTITUTE IMMIGRATION RESEARCH AND POLICY BRIEF NO. 8 August 29, 2018 https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-8.pdf For reports from the Northwestern Deportation Research Clinic, see https://deportation-research.buffett.northwestern.edu/us-citizens/index.html

statutes protecting civil rights, the Civil Rights Act of 1866,[154] and the Enforcement Act of 1870,[155] which operated by granting a set of enumerated rights to the protected classes to the same extent "as is enjoyed by white citizens."[156] For all people to have "equal rights" and for people of color to enjoy the same rights as "white citizens" were the same thing.

To be sure, throughout American history, individual White persons and families also suffered accident, misfortune, and unfair treatment at the hands of the government and others. Yet, one searches in vain for examples of systematic denial of citizenship, deportation, deprivation of property, disenfranchisement, or other degradation of White people, based on race alone, because they were White people. As Chief Justice Taney wrote, from the earliest colonial precursors of the United States until modern times, White people as a race held the sovereignty in government, and they had the power to share the blessings of liberty with people of color, or not, partially or completely. No race or group ever held any similar power over White people.

Conclusion

By 1964, Chief Justice Taney's vision of the political structure of the United States and the places of the races in it was in the process of destruction. Nevertheless, he had proved to be prescient; the states did have the right to determine the status of their residents, and people of color could be put at the bottom. Taney's vision was reflected in 1964 by a Mississippi Supreme Court decision unanimously upholding the convictions of a group of Freedom Riders who attacked by mob.[157] The court at least implicitly recognized the right of the police to order people of color out of public accommodations, rather ordering out White mobs or stopping them from rioting. In their decision, the court offered a revealing description of the history of the relationships between the races:

> This Court, like everyone else, is somewhat conversant with historical facts. Hence it knows that slavery, as a legal institution, existed in this country from the earliest Colonial days. That status continued unabated even after the Declaration of Independence was

[154] Act of Apr. 9, 1866, § 1, 14 Stat. 27.

[155] Act of May 31, 1870, § 16, 16 Stat. 140.

[156] 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."); 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.") *See* Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421 (2021).

[157] Knight v. State, 161 So. 2d 521 (Miss. 1964), *cert. granted, judgment rev'd sub nom*. Thomas v. Mississippi, 380 U.S. 524 (1965). While *Knight* was reversed, that fact was not recognized by Westlaw until decades later, and *Knight* was treated as valid authority, for example, in *Hunter v. State*, 489 So. 2d 1086, 1088 (Miss. 1986), where the court cited Knight with approval in an opinion authored by Justice Roy Noble Lee, son of *Knight* author Chief Justice Percy Mercer Lee.

> proclaimed to the world in 1776 and thereafter beyond the adoption of the Constitution itself.[158]

The court explained that the Civil War and Reconstruction had no effect: "Even after the newly freed slaves were enfranchised, there was little difference thereafter in the racial attitudes insofar as social intercourse and acceptance were concerned. . . . Even the Great Crusader for Freedom and the Emancipator of the Slaves recognized that these differences placed a severe limitation on the full measure of freedom for them."[159] But for some reason, northern courts and civil rights protesters complained: "The cry by certain groups for conformity to their beliefs rings out endlessly over the land through the various media of communications."[160] However, agitators would have to face reality:

> Large numbers of people, in this broad land, are steeped in their customs, practices, mores and traditions. In many instances, their beliefs go as deep or deeper than religion itself. . . . From the lessons of history, it has been learned that 'though the mills of the gods grind slowly, yet they grind exceeding small' and that human nature makes little change from day to day, month to month, year to year, and century to century.[161]

The faith of Dred Scott and Lorenzo Dow had proved to be irrelevant, and a century later, an elected court, presumably familiar with the political views of the voters of Mississippi, candidly admitted that racial considerations were more important than religion, and to challenge that was to war with human nature itself.

Chief Justice Taney's jurisprudence, and vision for America, left much to be desired from a modern perspective. Yet, as an historian, and as legal realist describing the law as it actually was, his work is entitled to attention. As a descriptive matter, *Dow*, *Strader*, and *Dred Scott* articulated the law of the United States not only before, but for at least a century after the Civil War. Taney's work makes clear that like African Americans, Asian, Native Americans and other non-whites had no rights the law was bound to respect.

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[158] 161 So.2d at 522-23.

[159] *Id*. at 523.

[160] *Id*.

[161] *Id*.

NO RIGHT TO OWN?: THE EARLY TWENTIETH-CENTURY "ALIEN LAND LAWS" AS A PRELUDE TO INTERNMENT

KEITH AOKI*

The past is never dead. It's not even past.[1]

It was a long time before we began to understand exploitation . . . . It is possible that the struggles now taking place and the local, regional and discontinuous theories that derive from these struggles and that are indissociable from them stand at the threshold of our discovery of the manner in which power is exercised.[2]

Race relations [in the American West] parallel the distribution of property, the application of labor and capital to make the property productive, and the allocation of profit. Western history has been an ongoing competition for legitimacy—for the right to claim for oneself and sometimes for one's group the status of legitimate beneficiary of western resources. This intersection of ethnic diversity with property allocation unifies western history.[3]

This Article recounts briefly the history and effects of the "Alien Land Laws" enacted in western states in the second and third decades of the twentieth century.[4] These laws linked the virulent nineteenth-century Sinophobia that culminated in the 1882 Chinese Exclusion Act

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* Associate Professor, University of Oregon School of Law, visiting, Boston College Law School, 1998–1999. Special thanks to the Civil Liberties Public Education Fund that provided support for this project and to Professor Sumi Cho who very ably organized and administered it. Thanks are also due to Steve Bender, David Bogen, Garrett Epps, Anthony Paul Farley, Ibrahim Gassama, Richard Huber, Tom Joo, Lisa Kloppenberg, Jim O'Fallon, Joseph Singer, John Hayakawa Torok, Leti Volpp, Eric Yamamoto and Fred Yen for their comments and criticisms. Thanks also to the research assistance of Jan Malia Harada and Gayle S. Chang. I would like to dedicate this piece to the memory of my paternal grandparents, Fukuma and Kanei Aoki, early-twentieth century Issei immigrants from Kochi prefecture on the island of Shikoku who lived and farmed near Woodland, California in Yolo County, and to my parents, Kenneth Kenzo Aoki, born on Ryer Island, California and a Nisei internee in the Gila River Canal #1 Relocation Camp in Arizona and my mother Agnes Asako Asakawa Aoki, a Kibei born in Hawaii in the 1920s.

[1] WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

[2] Michel Foucault, *Intellectuals and Power*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 205, 215 (Donald F. Bouchard ed., 1977).

[3] PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 27 (1987).

[4] Some were legislatively enacted and some were passed by popular initiative. Note also that these were repeatedly upheld judicially. *See, e.g.*, Frick v. Webb, 263 U.S. 326, 331–32, 333, 334

with the mass internment of Japanese Americans in the mid-twentieth century. Initially, these laws barred "aliens ineligible to citizenship" from owning fee simple title in agricultural land and prohibited leases for such land lasting longer than three years.[5] Ultimately, the ownership bar expanded to include all "real property," a term broad enough to encompass sharecropping contracts and shares of stock in corporations owning agricultural land as legally cognizable interests in land, and therefore, off-limits to alien ownership.

The salient point of these laws was their strongly racialist basis[6]—"aliens ineligible to citizenship" was a disingenuous euphemism de-

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(1923) (upholding bar on land ownership by corporations or other business organizations with majority of shares owned by "aliens ineligible to citizenship"); Webb v. O'Brien, 263 U.S. 313, 316 (1923) (upholding 1920 California Alien Land Law classification of "cropping contracts" as "interests in land" and therefore beyond reach of "aliens ineligible to citizenship"); Porterfield v. Webb, 263 U.S. 225, 231, 232, 233 (1923) (upholding constitutionality of California's 1920 Alien Land Law); Terrace v. Thompson, 263 U.S. 197, 211, 216–17 (1923) (upholding validity of Washington's 1921 Alien Land Law). These laws were passed in response to growing numbers of Japanese immigrants as they began to compete in the agricultural land markets and were increasingly viewed as a threat to valuable "American" natural resources. Increasingly harsh versions of these Alien Land Laws were enacted during the 1920s and were upheld as constitutional. *See generally* Thomas E. Stuen, *Asian Americans and Their Rights for Land Ownership, in* ASIAN AMERICANS AND THE SUPREME COURT 603, 605 (Hyung-Chan Kim ed., 1992).

[5] Additional variations included prohibitions on holding land in trust or in guardianship for minor children, bars to land ownership by corporations or partnerships with more than half their shares held by "aliens ineligible to citizenship" and prohibitions of alien trustees for land held in trust for native-born children. *See* WASH. CONST. art. II, § 33 (repealed 1966); Act of Mar. 8, 1921, ch. 50, §§ 1–10, 1921 Wash. Laws 156 (repealed 1967); Act of Mar. 10, 1923, ch. 70, §§ 1–2, 1923 Wash. Laws 220 (repealed 1967); Act of Mar. 19, 1937, ch. 220, § 1, 1937 Wash. Laws 1092 (repealed 1967); California Initiative, Nov. 2, 1920, §§ 1–14, 1921 Cal. Stat. lxxxiii, as amended; *see also* Oyama v. California, 332 U.S. 633 (1948); Morrison v. California, 291 U.S. 82 (1934); Cockrill v. California, 268 U.S. 258 (1925); *Porterfield*, 263 U.S. at 231, 232, 233 (upholding California's Alien Land Law); *Terrace*, 263 U.S. at 211, 216–17 (upholding Washington's Alien Land Law); Thomas A. Bailey, *California, Japan, and the Alien Land Legislation of 1913*, 1 PAC. HIST. REV. 36 (1932), *reprinted in* 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 104 (Charles McClain ed., 1994); Raymond L. Buell, *Some Legal Aspects of the Japanese Question*, 17 AM. J. INT'L L. 29 (1923); M. Browning Carrott, *Prejudice Goes to Court: The Japanese and the Supreme Court in the 1920s*, 62 CAL. HIST. 122 (1983), *reprinted in* 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 128 (Charles McClain ed., 1994); Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61 (1947); Richard A. Goater, *Civil Rights and Anti-Japanese Discrimination*, 18 U. CIN. L. REV. 81 (1949); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947); Thomas R. Powell, *Alien Land Cases in United States Supreme Court*, 12 CAL. L. REV. 259 (1924); Earl H. Pritchard, *The Japanese Exclusion Bill of 1924*, 2 RES. STUD. OF ST. C. WASH. 65 (1930), *reprinted in* 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 91 (Charles McClain ed., 1994); *The Japanese Problem in Oregon*, 24 OR. L. REV. 208 (1945); Theodore S. Woolsey, *The California-Japanese Question*, 15 AM. J. INT'L L. 55 (1921).

[6] There are unsettling parallels between the racialized immigration discourse of the late-nineteenth century and contemporary debates over American federal and state immigration policy.

signed to disguise the fact that the targets of such laws were first-generation Japanese immigrants, or "Issei."[7] The objective of these laws was to prevent racialized "others,"[8] (who were also foreigners)—non-white Japanese barred from naturalized U.S. citizenship[9]—from assert-

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See generally Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996); Kevin R. Johnson, *"Aliens" and the U.S. Immigration Law: The Social Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 5 (1997); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1885)*, 93 COLUM. L. REV. 1833 (1993); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

[7] This Article uses the terms "Issei" (first generation), "Nisei" (second generation) and "Sansei" (third generation) to describe the generations of Japanese in America that immigrated during the relatively narrow time period between 1885 and 1924. *See generally* DARREL MONTERO, JAPANESE AMERICANS: CHANGING PATTERNS OF ETHNIC AFFILIATION OVER THREE GENERATIONS 8 (1980) ("The Japanese are the only ethnic group to emphasize geogenerational distinctions by a separate nomenclature and a belief in the unique character structure of each generational group.").

[8] This Article uses concepts like "racialization" and "racial formation" as devices both to organize and interpret historical materials. *See generally* GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (1986); Neil Gotanda, *A Critique of "Our Constitution Is Color Blind"*, 44 STAN. L. REV. 1, 32–34 (1991) (discussing historical co-evolution of slavery and ideological structure of racial categories showing that race is not scientific, "race is socially constructed" and race classification has a history as a badge of enslaveability). On the Mexican experience in California see RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (1981); MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY (1979); ALBERT CAMARILLO, CHICANOS IN A CHANGING SOCIETY: FROM MEXICAN PUEBLOS TO AMERICAN BARRIOS IN SANTA BARBARA AND SOUTHERN CALIFORNIA, 1848–1930 (1979). For a general overview of the Asian immigrant experience on the West Coast, see SUCHENG CHAN, THIS BITTER-SWEET SOIL: THE CHINESE IN CALIFORNIA AGRICULTURE, 1860–1910 (1986) [hereinafter CHAN I]; ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION (2d ed. 1977); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: HISTORY OF ASIAN AMERICANS (1989). On the California Indians, see RAMON A. GUTIERREZ, WHEN JESUS CAME THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY AND POWER IN NEW MEXICO, 1500–1846 (1991); ROBERT F. HEIZER, THE DESTRUCTION OF THE CALIFORNIA INDIANS (1984); EDWARD SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533–1960 (1962). On the experience of racial minorities in California, see KENNETH G. GOODE, CALIFORNIA'S BLACK PIONEERS: A BRIEF HISTORICAL SURVEY (1974); ROBERT F. HEIZER & ALAN J. ALMQUIST, THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920 (1971); REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981); RUDOLPH M. LAPP, BLACKS IN GOLD RUSH CALIFORNIA (1977); LIMERICK, *supra* note 3.

[9] The first U.S. naturalization law provided that only "free white persons" could become naturalized citizens. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103. The ability to become a naturalized citizen was extended in 1870 to "aliens of African nativity and to persons of African descent." Act

ing the "right to own," a fundamental stick in the proverbial "bundle of sticks" U.S. property regime, and related sticks such as the "right to rent" and the "right to devise" property by bequest.[10]

These laws were driven in large part by a xenophobic paranoia that John Higham has called "racial nativism."[11] This "racial nativism" depended upon the existence in the popular U.S. imagination of a racial "link" between the reviled Chinese immigrants of the nineteenth century[12] and Japanese immigrants of the late-nineteenth and early-twentieth centuries. This link partially erased a specific nationality of these immigrants, conflating a generalized Asiatic "foreign-ness" marked by racial difference.

Initially, many Chinese immigrants were drawn to work gold mines during the 1850s. White miners and politicians in mid-century California, however, sought to tax and otherwise make it difficult for Chinese

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of July 14, 1870, ch. 254, § 7, 16 Stat. 254; *see generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 37–47 (1996); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

[10] *See generally* JESSE DUKEMINIER & JAMES KRIER, PROPERTY 86 (3rd ed. 1993) ("For lawyers, if not lay people, property is an abstraction. It refers not to things, material or otherwise, but to rights or relationships among people with respect to things."); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996) (noting that conventional "bundle of rights" formulation combines Wesley Hohfeld's and A.M. Honoré's analysis of property rights; discussing various views of the "bundle of rights"). A.M. Honoré describes eleven "standard incidents" that constitute property ownership in western market economies. They are:

(1) the right to exclusive possession;
(2) the right to personal use and enjoyment;
(3) the right to manage use by others;
(4) the right to income from the property, including income from use by others;
(5) the right to the capital value, including alienation, consumption, waste or destruction;
(6) the right to security (that is, immunity from expropriation);
(7) the power of transmissibility by gift, devise, or descent;
(8) the lack of any term on these rights;
(9) the duty to refrain from using the object in ways that harm others;
(10) the liability of execution for repayment of debts; and
(11) residual rights on the reversion of lapsed ownership held by others.

See A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 112–28 (A.G. Guest ed., 1961). *See generally* LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18–20 (1977). *But see* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

[11] JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 132 (2d ed. 1988). Higham uses the term "racial nativism" to examine the "intersection of racial attitudes with nationalistic ones . . . [here] the extension to European nationalities of that sense of absolute difference which already divided white Americans from people of other colors." *Id.*

[12] *See* Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 33–35 (1996).

to work prime mining sites. To the extent that they began working spent mines, they remained largely out of sight from mainstream white California society, segregated in back country areas.[13] To the extent that Chinese laborers impinged on mid-nineteenth century America legal consciousness, they were classified as "non-white" and were denied privileges and entitlements that such subordinate status suggests.[14] According to prevailing social perceptions, mid-nineteenth century Chinese immigrants were viewed as utterly inassimilable, "foreign" others,[15] posing a variety of threats to the health of the white American polity. They were often characterized as dangers to the public health, both literally and metaphorically.[16] Bias notwithstanding, as the Southern Pacific Railroad began building the transcontinental railroad dur-

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[13] *See* CHAN I, *supra* note 8, at 76; *see also* GUNTHER BARTH, BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES, 1850–1870, at 115 (1964) (describing Chinese miners working in deserted and desolate mining sites). *See generally* Sucheng Chan, *Chinese Livelihood in Rural California: The Impact of Economic Change, 1860–1880*, 53 PAC. HIST. REV. 273, 280–83 (1984) (discussing locations and types of Chinese gold mining claims in California).

[14] *See* Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, *quoted in* Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CAL. L. REV. 529, 549 n.113 (1984) ("No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person."); People v. Hall, 4 Cal. 399, 399, 404–05 (1854); *see also* BENJAMIN B. RINGER, "WE THE PEOPLE" AND OTHERS: DUALITY AND AMERICA'S TREATMENT OF ITS RACIAL MINORITIES 582–83 (1983). California enacted various versions of onerous and racially-targeted foreign miners taxes from 1850 through 1870 designed to drive Chinese miners from working rural gold mines. This legislative animus, when coupled with extra-legal anti-Chinese mob violence drove Chinese miners out of the mining industry into containment zones in large urban centers. *See* HYUNG-CHAN KIM, A LEGAL HISTORY OF ASIAN AMERICANS 1790–1990, at 47–48 (1994); *see also* Chinese Police Tax, ch. 339, 1862 Cal. Stat. 462 (repealed 1939) (also entitled "An Act to protect Free White Labor Against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California"); Act of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194 (repealed 1955) (requiring $50 payment from each passenger ineligible to become a citizen). *See generally* ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1971).

[15] Strict containment policies were enforced against Chinese immigrants, limiting them to specific geographic, employment, educational and social zones by means of zoning, anti-miscegenation laws, licensing requirements and the establishment of segregated schools. *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (successful challenge to facially neutral law intended to drive Chinese laundries out of business); CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 224–30 (1994) (describing attempt by San Francisco Board of Supervisors to make it illegal for Chinese to live or do business outside of a narrowly circumscribed "Chinatown"); Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of American Law, in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943, at 3, 12 (Sucheng Chan ed., 1991) (discussing that between 1870 and 1880, San Francisco passed 14 separate ordinances designed to encumber and discourage Chinese laundries from competing with white-owned businesses).

[16] *See* JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 19, 21 (1968). As tenBroek et al. explain:

> The most significant feature of the Chinese stereotype—and the most meaningful

ing the 1850s and 1860s, demand for cheap labor became a powerful draw for Chinese immigrants who worked at considerably lower rates than white laborers.[17]

After completion of the transcontinental railroad, however, many Chinese laborers began migrating to urban centers. Even though they remained spatially segregated in Chinatowns and largely cabined in certain non-manufacturing labor market niches, the Chinese began impinging on popular consciousness.[18] Accordingly, during the late 1860s and 1870s, the Chinese were negatively constructed by politi-

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> . . . was that which became familiar as the "yellow peril." From the beginning it was alleged that the Chinese had only hatred for American institutions, that their sole loyalty was to the homeland and the emperor. Their entrance into the states was seen as an "invasion" and their motive ultimate conquest of the country by infiltration and subversion; behind those already here were the masses of Asia, eyeing the North American continent. . . . The basic charges against the Chinese—of unscrupulous competition, moral degradation, treacherous character, and subversive intent—were elaborated over the latter half of the century with such variety and force that it is difficult not to conclude that they found wide acceptance in the public opinion of California. . . . To this general hostility [to dark-skinned minorities] were soon added the specific apprehensions of the workingman and the grievances of special-interest groups; and the developing issue was seized upon and boldly exploited by politicians, journalists, and writers of fiction . . . [forming] a distinctive stereotype which for large numbers of Californians became inseparable from reality.

Id.

[17] *See generally id.* at 18. Widespread racial stereotypes mixed with class antagonisms towards such non-unionized "ratebusters":

> The principal charge of the unions, that Chinese labor drove white workers from employment, found wide expression in stories, poems, and plays as well as in political utterances, and by grace of dramatic license became associated with insinuations of stealth and treachery. Thus an 1880 novel, *Almond-Eyed*, portrayed the invasion of a California town by hordes of Chinese who, besides driving white workers into starvation, introduced an epidemic of smallpox. The San Francisco *Chronicle* voiced a similar suggestion: "Who have built a filthy nest of iniquity and rottenness in our very midst? The Chinese. Who fill our workshops to the exclusion of white labor? The Chinese. Who drive away white labor by their stealthy but successful competition? The Chinese."

Id.

[18] *See* TAKAKI, *supra* note 8, at 101 ("Like blacks, the Chinese were described as heathen, morally inferior, savage, childlike, and lustful. Chinese women were condemned as a 'depraved class,' and their depravity was associated with their physical appearance, which seemed to show 'but a slight removal from the African race.'"); TENBROEK ET AL., *supra* note 16, at 103 ("In 1879 President Rutherford Hayes placed the 'Chinese Problem' within the broad context of race in American society. The 'present Chinese invasion,' he argued, was 'pernicious and should be discouraged. Our experience in dealing with the weaker races—the Negroes and Indians . . .—is not encouraging. . . . I would consider with favor any suitable measures to discourage the Chinese from coming to our shores.' In the exclusionist imagination, however, the 'strangers' from Asia seemed to pose a greater threat than did blacks and Indians. Unlike blacks, the Chinese were seen as intelligent and competitive; unlike Indians, they represented an increasing rather than a decreasing population.").

cians, labor leaders and the media, each of whom actively deployed degrading racial stereotypes for assorted self-interested and sundry purposes.[19] While some large agriculturalists and railroad magnates may have initially favored open Chinese immigration policies because they needed cheap, easily exploitable labor, counterforces such as the nascent labor union movement on the West Coast began to denounce vehemently the use of "unfree" labor, such as the Chinese, by big "Capital."[20] These harsh criticisms were particularly resonant during the nationwide economic depression of the mid-1870s.[21] Ultimately, in spite of the unquenchable appetite for cheap labor to develop the West, politicians from the western states made alliance with southern politicians to secure passage of the federal Chinese Exclusion Act of 1882.[22]

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[19] *See generally* SAXTON, *supra* note 14, at 258–59. Saxton reports that:

> [i]n California . . . [the white workforce was] drawn together by a sense of frustration and dispossession that was common to all. . . . Despite their [internal] differences, they believed that a greater distance separated them from the Chinese. These two psychological factors—frustration and consciousness of non-Chineseness—welded the non-Chinese labor force into a bloc that would deeply modify the politics and social relationships of the Far West. Here . . . the organizational pattern was horizontal: the workers, the producers, the dispossessed joined in self-defense against non-producers, exploiters and monopolists. And since these producers viewed the Chinese as tools of monopoly, they considered themselves under attack on two fronts, or more aptly, from above and below. But when they struck back, they generally struck at the Chinese.

Id.

[20] *See* TAKAKI, *supra* note 8, at 98–99. In the 1870s, a North Adams, Massachusetts shoe factory owner brought in Chinese workers from San Francisco to bust demands of newly organized white laborers for higher wages. Ronald Takaki quotes a report about the effects of imported Chinese laborers on newly-organized shoe workers: "If for no other purpose than the breakup of the incipient step toward labor combinations and 'Trade Unions' . . . the advent of Chinese labor should be hailed with warm welcome." Frank Norton, *Our Labor System and the Chinese*, SCRIBNER'S MONTHLY, May 1871, at 70, *quoted in* TAKAKI, *supra* note 8, at 98–99.

[21] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 512 (1988) ("By 1876, over half the nation's railroads had defaulted on their bonds and were in the hands of receivers. . . . By the end of 1874, nearly half the nation's iron furnaces had suspended operation. Not until 1878, a year that saw more than 10,000 businesses fail, did the depression reach bottom.").

[22] *See* The Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58 (1882). *See generally* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 589, 609 (1889) (upholding constitutionality of 1882 Chinese Exclusion Act, as amended in 1888); TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 3 (1994). Almaguer suggests that:

> [T]he material structuring of racialized group relationships . . . are best understood as unfolding within the context of the capitalist transformations of [California] and the ensuing competition between various ethnic populations for group position within the social structure. . . . The particular success of European-American men in securing a privileged social status was typically exacted through contentious,

While Chinese immigration to the U.S. tailed off dramatically following 1882, degrading stereotypes left a lasting impression on the American imagination.[23] Because, in part, many Chinese laborers viewed themselves as "sojourners" in the United States, hoping ultimately to return to China with wealth acquired through hard labor, and also due partially to restrictive U.S. policies toward the immigration of Chinese women (and strict enforcement of anti-miscegenation laws),[24] there were relatively low levels of Chinese family formation within the United States during the mid- to late-nineteenth century.

Unlike nineteenth-century China, Japan, following the entry of Commodore Perry in 1853, had single-mindedly set its sights on becoming a major military and industrial power. During the 1870s and 1880s, through a variety of onerous taxation schemes and land ownership reforms meant to end swiftly the feudal economy (although primogeniture was a curious holdover), many former Japanese farmers were driven off agricultural land they had cultivated for generations.[25]

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racialized struggles with Mexicans, native Americans, and Asian immigrants over land ownership or labor market position.

Id. See generally SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 39 (1991) [hereinafter CHAN II] (discussing arrival of Japanese in late 1880s/90s and fact that they often took types of work Chinese had done and accepted low wages); Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOC. REV. 547, 551 (1972) (discussing Japanese workers' acceptance of low wages and long hours, sometimes resulting in displacement of non-Japanese workers). Exclusion of Chinese immigrants was authorized by the 1882 Chinese Exclusion Act and its subsequent renewals, at 10-year intervals, until 1902. In 1904, Chinese were excluded indefinitely until 1943, when U.S. immigration laws were modified to allow Chinese immigrants, in order to reflect the fact that China was a U.S. ally during World War II. *See* Edna Bonacich, *Some Basic Facts: Patterns of Immigration and Exclusion, in* LABOR IMMIGRATION UNDER CAPITALISM: ASIAN WORKERS IN THE UNITED STATES BEFORE WORLD WAR II, at 60, 74 (Lucie Cheng & Edna Bonacich eds., 1984).

[23] *See* Aoki, *supra* note 12.

[24] *See, e.g.*, Act of Mar. 3, 1875, ch. 141, § 1, 18 Stat. 477 (requiring U.S. consul or consul-general of embarkation port for "any subject of China, Japan, or any Oriental country" immigrating to the United States to ascertain whether such immigrant has "entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes").

[25] *See* DAVID J. O'BRIEN & STEPHEN S. FUGITA, THE JAPANESE AMERICAN EXPERIENCE 10–11 (1991). *See generally* Alan Moriyama, *The Causes of Emigration: The Background of Japanese Emigration to Hawaii, 1885–1894, in* LABOR IMMIGRATION UNDER CAPITALISM: ASIAN WORKERS IN THE UNITED STATES BEFORE WORLD WAR II 248 (Lucie Cheng & Edna Bonacich eds., 1984). O'Brien and Fugita describe some of the pressures pushing Japanese farmers off their land in Japan:

> [T]o support the newly adopted Western-style industrialization, the Japanese government in 1873 substantially increased land taxes, shifting from the traditional method of taxing a percentage of crops produced to a new method of calculating taxes based on the value of the land itself. This placed a disproportionately heavy burden on farmers, with the result that between 1883 and 1890, 367,000 farmers

When the Japanese government reversed its former no-emigration policy of the 1880s, increasing numbers of Japanese immigrated to work on the sugar cane plantations of Hawaii,[26] which remained a sovereign nation until 1898, and to the West Coast of the United States, where their entry was not barred by the 1882 Chinese Exclusion Act. This development was fortuitous in some ways for nascent California agribusiness, which during the 1880s and 1890s began shifting from raising corn and grain crops to more intensive agricultural crops such as vegetables and citrus fruits.[27] The introduction of the refrigerated railroad car and the now completed network of transcontinental railroads opened national markets for California agriculturalists, sparking their need for a growing supply of cheap agricultural labor.[28] This need was initially fulfilled by the largely rural population of Japanese immigrants along the West Coast.[29]

> were pushed off the land. . . . In addition, government spending to suppress the Satsuma Rebellion in 1877 and to finance the Sino-Japanese War of 1894–95 created inflationary pressures which further reduced farmers' incomes. Moreover, the opening up of Japanese markets to foreign goods at a time when the Japanese themselves were under-industrialized and thus unable to compete effectively resulted in a substantial trade deficit which the government dealt with by circulating more money, thus stimulating inflation even more. The economic pressures described forced many small farmers to seek alternative ways of bolstering sagging family incomes. . . . [Some farmers,] following the traditional practice of *dekasegi rodo*, made the decision to leave home temporarily and work in distant places. . . . [M]igration from the countryside to foreign lands, with the clear intent of staying temporarily and then returning home, was therefore a logical extension of the *dekasegi rodo* tradition.

O'BRIEN & FUGITA, *supra*, at 10–11; *see also* PAUL R. SPICKARD, JAPANESE AMERICANS: THE FORMATION AND TRANSFORMATIONS OF AN ETHNIC GROUP 27 (1996) ("Mindful of [the abuses visited earlier on Chinese immigrants to the U.S.] the Japanese government had carefully tried to control who went abroad and to monitor their behavior and reception in the United States. . . . Japan was trying to avoid China's quasi-colonial fate and guarding its own international image as it sought to enter the growing world market economy: the Japanese government did not want overseas Japanese to be perceived as a problem in their host countries.").

[26] *See generally* GARY OKIHIRO, CANE FIRES: THE ANTI-JAPANESE MOVEMENT IN HAWAII, 1865–1945 (1991).

[27] *See* TAKAKI, *supra* note 8, at 189; *see also* YAMATO ICHIHASHI, JAPANESE IN THE UNITED STATES 163 (1969); LINDA TAMURA, THE HOOD RIVER ISSEI: AN ORAL HISTORY OF JAPANESE SETTLERS IN OREGON'S HOOD RIVER VALLEY 19–22 (1993); Masakazu Iwata, *The Japanese Immigrants in California Agriculture*, 36 AGRIC. HIST. 25, 27 (1962).

[28] *See supra* note 17 and accompanying text.

[29] In California in 1890, there were approximately 1000 Japanese immigrants concentrated primarily in San Francisco, Sacramento and the San Joaquin Valley, but by 1900, the number of Japanese on the West Coast of the United States had jumped ten-fold to approximately 10,151. *See* ALMAGUER, *supra* note 22, at 184. By contrast, the U.S. Census of 1880 counted only 148 people of Japanese descent in the United States. *See* O'BRIEN & FUGITA, *supra* note 25, at 137. *See generally* ICHIHASHI, *supra* note 27, at 163; YUJI ICHIOKA, THE ISSEI: THE WORLD OF THE FIRST GENERATION JAPANESE IMMIGRANTS, 1885–1924 (1988); HARRY H.L. KITANO, JAPANESE AMERI-

While mid-nineteenth century Chinese immigrants in the United States were sometimes viewed as an "invasion," they were seen as akin to an "invasion" by a contagion that, once within the body politic, begins to eat away the nation from within. The political entity, namely the nation of China, was not perceived as an imminent military threat to the national military security of the United States. The logic of the Chinese Exclusion Act of 1882 purported to choke off the source of the foreign contagion and drive those Chinese already here back to their homes, thereby restoring the integrity and health of the American body politic.[30] By contrast, from the turn of the century onward, the Japanese were seen as threats to the American body politic from both within and without.[31] They were seen as threats from within to

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CANS: THE EVOLUTION OF A SUBCULTURE 16–18 (1976); TAMURA, *supra* note 27, at 19–22; Iwata, *supra* note 27, at 25, 27. O'Brien and Fugita discuss the demographics of the arriving Japanese:

> The vast majority of Japanese who immigrated to Hawaii and the West Coast of the United States came from four southwestern prefectures, Hiroshima, Yamaguchi, Fukuoka, and Kumamoto. Contrary to what we might expect, these were not the poorest areas of Japan during that period. . . . These prefectures did . . . have an experienced agricultural labor force, part of which was prompted to emigrate through active recruiting by labor contractors.

O'BRIEN & FUGITA, *supra* note 25, at 15. Lauren Kessler makes a parallel observation:

> Unlike the Chinese who came before them, many of whom came from the destitute peasantry, Japanese immigrants tended to be from the comparatively prosperous farming class. They were accustomed to owning land and making their living from it. In America, land ownership was a goal for many. Thus land—and who had a right to own it—became a focus for California nativists, who saw their national efforts at exclusion at least temporarily stymied by what they considered the far too moderate gentleman's agreement.

LAUREN KESSLER, STUBBORN TWIG 66 (1993).

[30] With regard to immigration from outside the United States, a delegate to the 1878 California Constitutional Convention proposed a state law to bar "all further immigration to this State of Chinese ineligible to become citizens of the United States." The rationale for this state prohibition on Chinese immigration to California was to

> protect its people from moral and physical infection from abroad. . . . [I]f under its police and quasi-commercial powers, it can shut its ports to smallpox and contagious fevers, to leprosy and elephantiasis, to foreign convicts and foreign paupers, why, I ask you, has it not the power to deny the hospitality of its territory to a race, who are slowly, but surely and insidiously, substituting themselves for our own people? . . . Are the institutions of the country founded on so flimsy a basis that States may invoke the highest and exercise the most sweeping powers to quarantine a few unfortunate passengers afflicted with disease, but . . . they cannot deny the entrance to their ports of swarms of Asiatics, whose presence in their midst is fraught with evils compared with which a plague is the acme of blissful visitation.

RINGER, *supra* note 14, at 590 (quoting 1 CALIFORNIA CONSTITUTIONAL CONVENTION DEBATES, at 627).

[31] Initially, the Japanese were linked in the popular imagination to the Chinese. Anti-Asian sentiment was on the rise as the expiration date for the Chinese Exclusion Act approached in 1902. California Labor Unions began lobbying Congress to exclude Chinese immigration in-

the extent that stereotypes once attached to the Chinese (i.e., unfair competitors and ineradicably foreign) were easily transferred from one group of immigrants to another. The Japanese, however, were also perceived as a threat from without. Japan's growing industrial strength, its imperial military aspirations in the Pacific and the defeat of Russia in 1905,[32] collectively enticed American politicians to inscribe on Japanese immigrants an image of disloyalty and allegiance to a threatening foreign military power. They were portrayed as an imminent fifth column threat within the United States waiting to be activated at the emperor's command[33]—the plowshares of Japanese immigrant farmers transforming themselves into swords at the whim of a foreign power.

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definitely as well as for the explicit exclusion of Japanese immigrants. In 1900, then-Governor Henry T. Gage testified before Congress that "the peril from Chinese labor finds a similar danger in the unrestricted importation of Japanese laborers." RINGER, *supra* note 14, at 687 (citing S. Doc. No. 633 (1911)). This anti-Japanese agitation did not go completely unanswered, as evidenced in Roger Daniels' description of an Issei counter-demonstration at the November 1901 Chinese Exclusion Convention that met in San Francisco, attended by "a thousand delegates," of whom approximately "eight hundred were trade unionists":

> [O]n entering the hall, [the delegates] had to pass through a small group of Issei who were handing out leaflets protesting against any move to exclude Japanese. One of the Issei even made an "aggressive and flamboyant" speech in what must have been fairly good English. . . . The burden of the message on the leaflet was that it was all right to exclude Chinese, but not Japanese, and the Issei speaker, a local Japanese editor, insisted that his people were the equals of Americans. . . . In half a century of anti-Chinese agitation no such counter-demonstration had occurred; what advocacy the Chinese enjoyed was furnished by their Caucasian supporters, mostly missionaries and businessmen. But the Japanese, both immigrants and visitors, would in the years to come constantly organize demonstrations and meetings of their own and, with their white backers, make thousands of speeches and publish dozens of books and pamphlets answering the exclusionists.

DANIELS, *supra* note 8, at 23.

[32] The Japanese victory over Russia only heightened the anti-Japanese paranoia in segments of the U.S. population:

> The sweeping Japanese victories in the Russo-Japanese War strongly reinforced [yellow peril] propaganda, inspiring rumors in the United States that resident Japanese were spies and soldiers in disguise, representing the first wave of a "peaceful invasion" which threatened to overrun the country. . . . For more than two decades after the Russo-Japanese War, the possibility of war with Japan was regularly kept before the American public, with many declaring it to be inevitable. . . . In 1907 the fear of war with Japan was general throughout America. A number of diplomats warned openly that Japan was on the point of attack; even the cautious *New York Times* considered the conflict all but inevitable, and a *Literary Digest* survey found the belief to be widespread . . . .

TENBROEK ET AL., *supra* note 16, at 25–27. "[B]y 1910 the war scare had been revived by a new rash of invasion rumors, which were aggravated by the Japanese annexation of Korea." *Id.* at 27.

[33] In a February 1905 article entitled "THE JAPANESE INVASION, THE PROBLEM OF THE HOUR," the headlines of the *San Francisco Chronicle* announced the

This simmering paranoia about the double-edged threat of Japan and Japanese immigrants erupted in 1905, spurred by a decision by the San Francisco School Board to segregate Japanese pupils in the school system from white pupils.[34] While implementation of this policy was delayed by the catastrophic San Francisco earthquake of 1906, the Japanese government reacted with immediate protest when it was finally implemented during the fall of 1906.[35] Japan's government filed a formal protest with President Theodore Roosevelt, who initially sought to mollify Japan's anger by seeking to have the San Francisco School Board rescind its segregation order. Roosevelt, however, had underes-

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> advance of the Japanese army toward Mukden. . . . [The *Chronicle*] asserted that at least 100,000 of the "little brown men" were here already, that they were "no more assimilable than the Chinese," and that they undercut white labor . . . [warning that] "once the war with Russia is over, the brown stream of Japanese immigration" will become a "raging torrent."

DANIELS, *supra* note 8, at 25. The *San Francisco Chronicle* was owned by conservative Republican publisher Michael H. de Young, who, some have speculated, may have hoped to draw working-class readers away from the *Chronicle*'s competitor, Hearst's *Examiner*. *See id.*

[34] In 1905, the *San Francisco Chronicle*, the Union Labor Party, the Japanese and Korean Exclusion League, the Coast Seaman's Union and the San Francisco Building Trades Council all pushed for segregation of Japanese pupils. In May 1905, acting pursuant to a state law that granted the School Board discretion to establish segregated educational facilities for Chinese, Indian and Mongolian children, the Board passed a resolution classifying Japanese school children as "Mongolian," and therefore required to attend separate schools from white children:

> Resolved that the Board of Education is determined in its efforts to effect the establishment of separate schools for Chinese and Japanese pupils [to relieve school crowding and] . . . for the higher end that our children should not be placed in any position where their youthful impressions may be affected by associations with pupils of the Mongolian race.

Quoted in Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, 37 POL. SCI. Q. 605, 623 (1922) [hereinafter Buell I], *reprinted in* 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 25 (Charles McClain ed., 1994); *see also* Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States II*, 38 POL. SCI. Q. 57, 57–81 (1923) [hereinafter Buell II], *reprinted in* 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 59–83 (Charles McClain ed., 1994).

[35] *See* Buell I, *supra* note 34, at 624. As Buell notes, the crisis quickly became international in scope:

> Aroused by this school order, the secretary of the Japanese Association of America immediately protested to the School Board. Upon its refusal to modify the order, the secretary sent word to the newspapers in Japan. And it was the frenzied outbursts of Japanese opinion against a measure which it considered to be a treaty violation and a national insult, that first attracted the attention of the city of San Francisco to the act of its own authorities. The views of the Japanese government were brought to the attention of Washington by a telegram from Ambassador Wright in Tokyo to Secretary [of State] Root. . . . Two days later Ambassador Aoki formally protested against the school measure . . . on the ground that it denied rights expressly conferred by the [U.S.-Japan] Treaty of 1894.

Id.

timated the depth of anti-Japanese sentiment that had been building steadily on the West Coast, particularly in San Francisco.[36] Ultimately, after much negotiation and effort, Roosevelt was able to persuade Republican state politicians to prevail upon the recalcitrant School Board to rescind its segregation order on the condition that Roosevelt would press the Japanese government for a definitive agreement restricting Japanese immigration to the United States.[37] In late 1906 through early 1907, Roosevelt and the Japanese government negotiated and entered into an unpublished agreement, the "Gentleman's

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[36] *See generally* Buell I, *supra* note 34, at 628 ("[T]he [Asiatic] Exclusion League would have nothing to do with a diplomatic form of settlement; it demanded an ironclad exclusion law. Moreover, its feelings were deeply hurt by the intrusions of the federal government into what it considered a purely municipal affair."). In December 1906, in a message to Congress, with geopolitics clearly on his mind, Roosevelt said:

> It is the sure mark of a low civilization . . . to abuse or discriminate against, or in any way humiliate such stranger who has come here lawfully and who is conducting himself properly. . . . [Hostility towards the Japanese] is sporadic and is limited to a very few places. Nevertheless, it is most discreditable to us as a people, and it may be fraught with the gravest consequences to the nation. . . . [H]ere and there a most unworthy feeling has manifested itself toward the Japanese—the feeling that has been shown in shutting them out from the common schools in San Francisco, and in mutterings against them in one or two other places, because of their efficiency as workers. To shut them out from the public schools is a wicked absurdity . . . .

Quoted in RINGER, *supra* note 14, at 694–95; *see also* Extract from President Theodore Roosevelt's Message to Congress Concerning the Japanese Question (Dec. 3, 1906), *in* ELIOT GRINNELL MEARS, RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST: THEIR LEGAL AND ECONOMIC STATUS 438–42 (1927). *But see* Letter from Theodore Roosevelt to Philander C. Knox (Feb. 8, 1909), *in* 6 THE LETTERS OF THEODORE ROOSEVELT 1511 (Elting E. Morison ed., 1951) ("To permit the Japanese to come in large numbers into this country would be to cause a race problem and invite and insure a race contest."). Daniels relates that:

> [after this speech] Roosevelt never again publicly proposed naturalization for the Japanese. . . . Roosevelt knew well that anti-Japanese feeling was not limited to San Francisco and "one or two other places"; he knew also that Southern opinion would support the West on any racial matter. Since there is no evidence that he ever made the slightest effort to have this proposal implemented—and certainly there were men in Congress who would have introduced such a bill had the President so requested—it is reasonable to assume that Roosevelt made it chiefly for Japanese consumption and in order to have an advanced position from which to retreat in his dealings with California.

DANIELS, *supra* note 8, at 39.

[37] *See* Buell I, *supra* note 34, at 629–31. Buell summarizes the solution agreed upon:

> (1) that the School Board would rescind its resolution ordering the Japanese children to attend the Oriental School; (2) that the President would prevent Japanese in Hawaii, Canada and Mexico from entering the United States on passports issued by Japan only to those destinations; (3) that the President would undertake to restrict Japanese emigration coming directly to the United States from Japan, by diplomatic means; (4) that the federal government would withdraw the suits instituted to test the constitutionality of the California school law.

Agreement," in which the Japanese government agreed to screen and restrict the emigration of Japanese nationals to the American shores.[38] Thus, the international crisis that was sparked by the San Francisco School Board's segregation order was temporarily averted.[39]

The costs of the "Gentleman's Agreement," however, were evident almost immediately.[40] For example, the "Gentleman's Agreement" permitted the wives of "settled agriculturalists" to immigrate to the United States to join their spouses. From 1907 to 1913, increasing numbers of

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Id. at 631.

[38] *See id.* at 634. As Buell records:

> The press reported an interchange of notes at the end of December and the first of January, 1908, after which, on January 25, Washington pronounced the position of Japan toward immigration "satisfactory." In all probability, these notes confirmed the "Gentleman's Agreement," by which Japan undertook voluntarily, and upon her own responsibility to restrict emigration to the United States. . . . Although the agreement with the United States was apparently negotiated in January, 1908, the first official announcement of it did not appear until the annual report, July, 1908, of the United States Commissioner-General of Immigration.

Id. at 634–35; *see also* FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS 35–36 (1976). Chuman relates the version of the "Gentleman's Agreement" reported in the U.S. annual immigration report of 1908:

> [The] understanding contemplates that the Japanese Government shall issue passports to the continental United States only to such of its subjects as are non-laborers or are laborers who, in coming to the continent, seek to resume a formerly acquired domicile, to join a parent, wife, or children residing there, or to assume active control of an already possessed interest in a farming enterprise in this country; so that the three classes of laborers entitled to receive passports have come to be designated as "relatives," "former residents," and "settled agriculturalists."

CHUMAN, *supra*, at 35.

[39] *See* DANIELS, *supra* note 8, at 41. Daniels suggests that:

> [w]hen Roosevelt found that he had underestimated the temper of the Californians, and that his message was resulting in more rather than less agitation in California, he and Root revamped their plans. Three things had to be accomplished before the restriction of Japanese immigration could be effected: the San Francisco segregation order had to be revoked by one means or another; the California legislature had to be restrained from passing further discriminatory legislation; and a bill had to be passed by Congress giving the President power to restrict Japanese immigration from intermediate points such as Hawaii, Mexico and Canada. All these preconditions were related; the executive order limiting intermediary immigration was to be offered to the Californians as a sort of prize for good behavior, and it would not be proclaimed until the segregation order was revoked and all anti-Japanese measures in the California legislature were killed.

Id.

[40] Daniels observes that:

> The Gentleman's Agreement was represented to the Californians as exclusion. Had Roosevelt and Root realized that under its terms thousands of Japanese women would come to the United States, they might never have sought it; having done so, they made a blunder of the first magnitude by failing to foresee its consequences. The State Department, hypnotized by statistics which began to show more Japanese

Japanese women entered the United States under this "exemption," thereby stimulating family formation among Japanese immigrants.[41] While this first generation of Japanese immigrants was barred from naturalization because of a provision in the first U.S. immigration law that restricted naturalized citizenship to "free white persons,"[42] and an emerging line of racial prerequisite cases holding that Japanese, Chi-

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> emigration than immigration, refused for many years to recognize what Californians quickly discovered: Japanese women were joining their husbands and having babies. That these babies were citizens of the United States made no difference to Californians, most of whom insisted that "a Jap was a Jap," no matter where he was born. . . . It soon became an article of faith with the exclusionists that they had been betrayed by their own diplomats, who, in turn, were held to be mere dupes of the perfidious Japanese.

Id. at 44–45.

[41] *See generally* CHAN II, *supra* note 22, at 54; George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875–1882*, 6 J. OF AM. ETHNIC HIST. No. 1, 28 (1986). Spickard describes the immigration of Japanese women as "picture brides" in this period:

> The picture bride phenomenon was simple and filled with human drama. To save money or avoid exposing himself to the Japanese military draft by going home, an Issei man working in America would write home and have relatives arrange a bride. He would send money and presents for her and her family, along with a picture of himself that showed him at his best—sometimes even better than his best. He would send her courtship letters describing the success he was having and the wonderful life they would lead together in America. She would send letters and pictures, too, and he would send a ticket. There might or might not be a proxy wedding in Japan before the bride boarded the ship. On disembarking in Seattle or San Francisco, she met the man she had agreed to marry. . . . Although proxy weddings had been legally recognized in prior years, through most of this period American state governments no longer recognized proxy wedding ceremonies. As a result, some husbands married their wives at dockside, or in religious or civil ceremonies a few days later. Some wives, feeling defrauded, insisted on returning home. Some swapped husbands on the dock; others were swapped by the men who had paid their passage. . . . It is worth noting that . . . the picture bride arrangement was not all that different from the way people had been getting married in Japan for some generations . . . [and] Japanese Americans were not the only ones in America marrying in such a way: there were also Chinese picture brides and Italian picture brides.

SPICKARD, *supra* note 25, at 34–35. In a 1912 report, the U.S. Commissioner-General of Immigration wrote that allowing photograph brides into the United States:

> must necessarily result in constituting a large, native-born Japanese population, persons who, because of their birth on American soil, will be regarded as American citizens, although their parents cannot be naturalized, and who, nevertheless, will be considered (and will probably consider themselves) subjects of the Empire of Japan under the laws of that country, which hold that children born abroad of parents who are Japanese subjects are themselves subjects of the Japanese Empire.

RINGER, *supra* note 14, at 713; *see also id.* at 712–13.

[42] On March 26, 1790, the U.S. Congress passed a "Uniform Rule of Naturalization" that set three preconditions for naturalization of resident aliens: (1) a required residency period of two (later changed to five) years; (2) proof of "good character" and (3) that a person seeking naturalization be a "free white person." *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

nese and other Asians were not "white" for purposes of naturalization, the children of such immigrants were not so barred. Under an 1898 Supreme Court decision, children of immigrants born on U.S. soil were U.S. citizens.[43] Politicians and other white Californians felt that the federal government had sold them out in the "Gentlemen's Agreement" for the sake of being able to negotiate smoothly and sign[44] the 1911 U.S.-Japan Treaty of Commerce and Navigation.[45]

The California interests vis-à-vis Japanese farmers shifted during this period.[46] Initially, smaller agriculturalists desired Japanese agricultural laborers, who tended to be viewed as reliable, hard-working and could be paid less than the relatively few white agricultural laborers. Large-scale agricultural interests also found much that was useful in the Japanese agricultural labor force in the first years of the twentieth

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[43] *See* United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

[44] The California Assembly reacted with outrage at the apparent caving in to federal power and tried enacting numerous Jim Crow-like laws against the Japanese, banning them from public transportation and barring Japanese students over 10 years of age from attending schools with white students. Roosevelt communicated to Governor James N. Gillett that he should halt these legislative moves or their "compromise" would fall through and Gillett would never get exclusion of Japanese immigrants from California. Governor Gillett intervened and dampened the anti-Japanese legislative activity. *See* RINGER, *supra* note 14, at 700.

[45] *See* Treaty of Commerce and Navigation, Feb. 21, 1911, U.S.-Japan, art. I, 37 Stat. 1504. The treaty provided that:

> [t]he citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

Id.

[46] Daniels sums up the changing attitude of employers toward the Japanese farm laborers and farmers:

> [E]mployers welcomed [the] early Issei recruits to the ranks of American agriculture, particularly since the Chinese, abetted by their rapidly diminishing numbers, were trying to raise wages. Within a few years the growers were singing a different tune. Around the turn of the century business conditions improved, both in California and the nation, and the decline in number of the Chinese laborers became even more noticeable. At the same time, Japanese labor began to serve notice that it would not long be content with the lowest rung of the economic ladder. Although the earliest recorded strike of Japanese agricultural laborers occurred in 1891, strikes do not seem to have become a frequent tactic until 1903. A standard device was to wait until the fruit was ripe on the trees and then insist upon renegotiating the contract. The growers protested that this was unethical, since a contract was a contract, and remembered that the Chinese, to their credit, had never done such things. . . . From about . . . 1903, we begin to hear invidious comparisons of the two races from agriculturists, almost always to the detriment of the Japanese.

DANIELS, *supra* note 8, at 9.

century.[47] To their chagrin, however, both groups eventually found that Japanese agricultural labor was not as compliant as the Chinese labor force had been thirty years earlier. Furthermore, smaller agriculturalists, who may have been appreciative of the agricultural skills of immigrant Japanese as long as they were laborers, looked upon them with increasing suspicion and distrust as they climbed the labor ladder from laborers to sharecroppers to tenant farmers and, finally, to farm owners in direct competition with those who had formerly been their employers.[48]

Japanese agricultural laborers in the early-twentieth century tended to be better educated than their Chinese predecessors because the late nineteenth-century Meiji Restoration mandated an elementary

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[47] Daniels notes that the economic interests of many of the largest growers would also later cause them to oppose the Alien Land Laws:

> Also in opposition [to possible anti-Japanese laws] were a few large-scale farmers like Lea A. Phillips, whose California Delta Farms, Inc., controlled 65,000 acres and had profitable relations with Japanese laborers and tenants. As Chester Rowell noted, the holders of such views were a "minority . . . in California, but those who hold [them] own a great deal of California." Business and labor were now again in their usual polar positions . . . [with] their attitudes dictated by what they believed was their enlightened self-interest.

Id. at 48. Observations by tenBroek et al., however, reveal the conflict between the attitudes and interests of the large growers and the small farmers concerning the Japanese:

> The large-scale corporation agriculturalist, interested primarily in the maintenance of a cheap and steady labor force, generally favored the Japanese as workers and had little fear of their competitive operations as independent farmers. But the majority of California farmers . . . fell into two less prosperous categories, both vigorously opposed to Japanese encroachment on the land: (1) the farmer who did all his own work and whose product came into competition with that of other farmers who could undersell him if their labor was worth less, and (2) the working farmer who was a part-time employer, and therefore interested in hiring cheap and efficient labor.

TENBROEK ET AL., *supra* note 16, at 52–53.

[48] Those Japanese that managed to obtain enough capital to purchase land and become small farmers themselves were seen as active threats to white small farmers. One anti-Japanese horticulturist wrote in 1907:

> [The Japanese] are cunning—even tricky. They have no scruples about violating a contract or agreement when it is to their advantage to do so. They of all are far short of giving satisfaction as laborers in the service of Americans. This is partly due to their racial pride and self-consciousness of their own importance. They are great imitators and tireless in their efforts to acquire knowledge that will enable them to become contractors. . . . They are not long content to work for others; their ambition is to do business on their own account. While they have no organized unions as we know them, they are clannish and have such a complete understanding among themselves that they can act promptly and in unison in an emergency.

G.H. Hecke, *The Pacific Coast Labor Question, From the Standpoint of a Horticulturalist, in* PROCEEDINGS OF THE THIRTY-THIRD FRUIT-GROWERS' CONVENTION OF THE STATE OF CALIFORNIA 69–70 (1908), *cited in* ALMAGUER, *supra* note 22, at 186.

education for all Japanese subjects. Thus, they came to the United States possessing a modicum of agricultural knowledge and skills that made them increasingly useful as California agriculture turned toward intensive agricultural crops.[49] In addition, the Japanese managed to establish a relatively integral "enclave economy," which, while segregated racially from white society, mirrored mainstream social and economic institutions, providing an economic and cultural safety net for Issei, albeit a thin one.[50] Many Japanese agricultural laborers would underbid other labor groups until they gained a significant portion of the workforce, at which point they would insist on higher wages and better working conditions or threaten slowdowns and strikes.[51] The rising solidarity of the Japanese agricultural workforce was met with resistance both by white management and, ironically, by white labor leaders such as the American Federation of Labor's Samuel Gompers who rejected any outreach to Asian laborers.[52] Likewise, many of the

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[49] *See* ICHIHASHI, *supra* note 27, at 163; LAWRENCE J. JELINEK, HARVEST EMPIRE: A HISTORY OF CALIFORNIA AGRICULTURE 68–69 (2d ed. 1982); *see also* TAMURA, *supra* note 27, at 19–22; Iwata, *supra* note 27, at 27. Takaki chronicles the rapid success of the Japanese farmers:

> By 1909, significantly, 6,000 Japanese had become farmers. . . . In 1910, . . . of the total Japanese farm acreage, 37,898 acres were under contract, 50,400 under share, 89,464 under lease, and 16,980 under ownership. . . . [The many Japanese fruit and vegetable farmers] concentrated on short-term crops like berries and truck vegetables. As early as 1910, they produced 70 percent of California's strawberries, and by 1940 they grew 95 percent of the state's fresh snap beans, 67 percent of its fresh tomatoes, 95 percent of its spring and summer celery, 44 percent of its onions, and 40 percent of its fresh green peas. . . . In 1920 the agricultural production of Japanese farms was valued at $67 million—approximately 10 percent of the total value of California's crops.

TAKAKI, *supra* note 8, at 188–91.

[50] *See generally* O'BRIEN & FUGITA, *supra* note 25, at 19; TAKAKI, *supra* note 8, at 188.

[51] *See generally* O'BRIEN & FUGITA, *supra* note 25, at 19–20; SPICKARD, *supra* note 25, at 18, 21. O'Brien and Fugita explain the advantage of the Japanese labor contracting system:

> A factor which permitted Japanese farm laborers to be more aggressive toward the farmers they worked for was the interpersonal nature of their labor contractor system. As was the case with other ethnic groups, Japanese labor contractors sometimes took advantage of their fellow countrymen—e.g., by assessing daily commissions, charging "translation-office fees," selling expensive provisions, charging for remitting money to Japan, and withholding a medical fee . . . . But because they were embedded in other social relationships with the same individuals in the Japanese community, the more serious forms of exploitation would result in ostracism from the community. This tended to reduce exploitation substantially. The labor contractor-worker relationship was also supported by the traditional Japanese principal of ieomoto . . . , which emphasized the obligations of superiors towards subordinates as much as those of lower echelon persons to their superiors.

O'BRIEN & FUGITA, *supra* note 25, at 19–20.

[52] *See, e.g.*, TAKAKI, *supra* note 8, at 200 ("Tragically for the American labor movement, Gompers had drawn a color line for Asians. Earlier he had led the movement against the Chinese.

leading San Francisco Socialists such as Jack London eschewed labor solidarity in favor of racial solidarity with "white labor." Thus, by the second decade of the twentieth century, these labor interests and the interests of Japanese agricultural labor had parted ways.

By 1911, anti-Japanese media, opportunistic politicians and small-to-medium agriculturalists in counties where Japanese land ownership had increased steadily since the "Gentleman's Agreement" combined to begin drafting what eventually became the 1913 California Alien Land Law. That law barred "aliens ineligible to citizenship" from owning fee simple absolute interest in agricultural property or from entering into leases for such land longer than three years.[53] Land acquired in violation of the statute would, following successful completion of an escheat action by the California State Attorney General, escheat to the state. The 1913 Act was carefully crafted so as not to incur federal judicial or legislative ire.[54] Although the Act disingenuously used the

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Again, in 1903, under Gomper's leadership, the American Federation of Labor turned away from the possibility of class solidarity."); *see also* DANIELS, *supra* note 8, at 22 ("In December [1900] the American Federation of Labor, meeting in Louisville, Kentucky, declared that 'the Pacific Coast and inter-mountain states are suffering severely from Chinese and Japanese cheap coolie labor' and asked Congress to 'reenact the Chinese exclusion law, including in its provision all Mongolian labor.'"); GARY Y. OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 158 (1994); Tomás Almaguer, *The 1903 Oxnard Sugar Beet Workers' Strike, in* PEOPLES OF COLOR IN THE AMERICAN WEST 300, 307 (Sucheng Chan et al. eds., 1994).

[53] *See generally* ICHIHASHI, *supra* note 27, at 274–75; RINGER, *supra* note 14, at 731. Ichihashi quotes Ulysses S. Webb, California's Attorney General and co-drafter of the Alien Land Law in an address before the Commonwealth Club of San Francisco on August 9, 1913 concerning the intent of the statute:

> The fundamental basis of all legislation upon this subject, State and Federal, has been, and is, race undesirability. It is unimportant and foreign to the question under discussion whether a particular race is inferior. The simple and single question is, is the race desirable . . . . [The Alien Land Law] seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land. And it seeks to limit the numbers who will come by limiting the opportunities for their activity here when they arrive.

ICHIHASHI, *supra* note 27, at 275. Webb's definition of undesirability was "efficient." *See* Brief by Ulysses S. Webb in Porterfield v. Webb, 263 U.S. 225 (1923), *cited in Oyama*, 332 U.S. at 657 n.10 ("The fundamental question is not one of race discrimination [but] . . . of recognizing the obvious fact that the American farm, with its historical associations of cultivation, environment and including the home life of its occupants, can not exist in competition with a farm developed by Orientals with their totally different standards and ideas of cultivation of the soil, of living and social conditions. If the Oriental farmer is the more efficient, from the standpoint of soil production, there is just not much greater certainty of an economic conflict which it is the duty of statesmen to avoid."); *see also* DANIELS, *supra* note 8, at 55.

[54] *See* Buell II, *supra* note 34, at 63; Herbert P. Le Pore, *Prelude to Prejudice: Hiram Johnson, Woodrow Wilson and the California Alien Land Law Controversy of 1913*, 61 S. CAL. Q. 99, 103–08 (1979), *reprinted in* 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 265 (Charles McClain ed., 1994). Roger Daniels notes that:

phrase "aliens ineligible to citizenship" to describe those it was dispossessing and explicitly stated that it was meant to honor the language of the 1911 U.S.-Japan Treaty, a treaty that did not mention rights to own agricultural land, the 1913 Alien Land Act was meant as a direct attack on the Japanese agricultural community within California. While nativist politicians could claim they had taken decisive action against the Japanese, the reality was that the 1913 Alien Land Law was subject to easy and widespread evasion. In fact, Japanese land holdings within California actually increased from 1913 to 1920, the peak pre-war year for Japanese land holdings in California. Japanese farmers were able to place land in trusts and guardianship for their American-born children, form agricultural land-holding corporations, put land in the name of friends and American-born relatives or enter into three-year leases that were simply renewed for another three years at lease's end.

By 1920, however, it had become widely known that Japanese land holdings had increased despite the 1913 law.[55] Following the end of World War I, the American Legion and other veterans' organizations entered the equation, weighing in on the "Japanese Problem" in California and reinforcing the growing sense of disquiet over the rise of Japan as a threat to U.S. interests in the Pacific.[56] The American Legion

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> Another argument used to justify action by California was the fact that in Japan no alien could hold land. . . . Theodore Roosevelt used this hypothetical justification as early as 1905. It was specious on three counts. First, the Japanese law applied to all foreigners alike and the Japanese naturalization laws were nondiscriminatory; second, in Japan a foreigner could get a nine-hundred-and-ninety-nine-year lease (such leaseholders paid all the taxes on the property); and, third, American legal treatment of resident aliens had almost always been identical, without regard to their national origin, and any invidious departure from that precedent could rightly be regarded as discrimination.

DANIELS, *supra* note 8, at 51.

[55] In fact, Japanese landholdings in California increased from 1913 to 1920. In 1910 the figures for Japanese ownership, lease, sharecropping and contracting were 17,035 acres owned, 89,466 acres leased, 50,400 acres sharecropped and 37,898 acres contracted for a total of 194,799 acres. *See* Iwata, *supra* note 27, at 30. By 1920 the figures were 74,769 acres owned, 192,150 acres leased, 121,000 acres sharecropped and 70,137 acres contracted for a total of 458,056 acres. *See id.* The Alien Land Laws, however, became more effective at dispossessing Japanese farmland owners after 1923 when various loopholes were closed.

[56] *See generally* DANIELS, *supra* note 8, at 77. Daniels reports that:

> In the years immediately after the war, the real rather than the imagined acts of the Japanese government were of growing concern to many Americans. The continued subjugation of Korea; the Twenty-one demands upon China; the Shantung question; the friction between Japanese and American troops in Siberia; the insistent Japanese demands for racial equality, raised at Versailles and later at Geneva; the persistent and erroneous belief, before 1922, that the Anglo-Japanese alliance was somehow aimed at the United States: these were some of the issues that caused friction between the two countries. When these were added to the hostile feeling

combined forces with more established nativist politicians, small agricultural interests and virulent anti-Japanese media interests such as the McClatchy and Hearst newspaper chains. In 1920, newly resurgent anti-Japanese activists managed to secure a ballot initiative designed to close off the loopholes of the 1913 Alien Land Law.[57] The 1920 Initiative barred guardianships and trusteeships in the name of "aliens ineligible to citizenship" who would be prohibited from owning such properties, barred all leases of agricultural land, barred corporations with a majority of shareholders who were "aliens ineligible to citizenship" from owning agricultural land and classified sharecropping contracts as "interests in land," making them off-limits to first-generation Japanese.[58] The 1920 Initiative amendment to the 1913 Alien Land Law passed with a decisive majority in every county in California.

> toward Japan already created by the war scares and the yellow peril propaganda, it was not difficult to convince many non-Californians that Japan was, as V.S. McClatchy put it, "the Germany of Asia."

Id.

[57] In September 1919, the Asiatic Exclusion League was revived by the California State Grange, which had been relatively quiescent since 1909. *See generally* CHUMAN, *supra* note 38, at 78; TENBROEK ET AL., *supra* note 16, at 54–55, 57. Other California farm organizations also agitated against the Japanese at this time. TENBROEK ET AL. report that:

> [T]he California State Farm Bureau Federation . . . by 1920 had attracted a membership of twenty thousand farmers—largely through its early and shrewd manipulation of the "Japanese Problem." . . . As early as December 1919, the Magnolia-Mulberry Farm Center of Imperial Valley passed resolutions calling for the total exclusion of Japanese, Hindus and Mohammedans. In a letter to Governor Stephens, a spokesman for the group warned that "if something is not done in the way of legislation to bar these races, it will be only a comparatively short time until they have crowded out the white race from the most fertile parts of California." . . . The immediate goal of the Farm Bureau agitation was attained in 1920 when the voters of California approved the initiative amendment to the Alien Land Law . . . . Credit for the victory was quickly claimed by farmers and their organizations, one spokesman declaring that "this legislation is a farmer's movement . . . . There was practically no division of opinion among country people who have to compete with the Japs."

TENBROEK ET AL., *supra* note 16, at 51, 53.

[58] *See* California Initiative November 2, 1920, §§ 1–14, 1921 Cal. Stat. lxxxii. The initiative measure adopted November 2, 1920 had the following provisions:

> Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.
>
> Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Id. §§ 1, 2. Sections three and four provided that:

> Any company, association or corporation . . . of which a majority of the members are aliens other than those specified in section one . . . or in which a majority of the issued capital stock is owned by such aliens may acquire, possess, enjoy and convey real property, or any interest therein, . . . in the manner and to the extent and for the purposes prescribed by any treaty now existing. . . . Hereafter [ineligible] aliens . . . may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty . . . and not otherwise.
>
> Sec. 4. Hereafter no alien mentioned in section two hereof and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. . . . [T]he superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court . . . [t]hat facts exist which would make the guardian ineligible to appointment in the first instance. . . .

Id. §§ 3, 4. Section 5(a) of the initiative provided that:

> The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

Id. § 5(a). Section 5(b) provided that:

> Annually . . . every such trustee must file . . . a verified written report showing: . . . An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

Id. § 5(b).

Section 6 provided for court-ordered sale and distribution of proceeds when, "by reason of the provisions of this act, heir . . . cannot take real property . . . or membership or shares of stock in a company, association or corporation." *Id.* § 6.

Section 7 provided for the escheat of property acquired in fee by any ineligible alien and that "[n]o alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt." *Id.* § 7. Section 8 of the 1920 initiative further provided that:

> Any leasehold or other interest in real property less than the fee, hereafter acquired in violations of the provisions of this act by any [ineligible] alien . . . or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California. . . . Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California.

Id. § 8. Section 9 provided that:

> Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed . . . shall escheat to the state if the property interest involved is of such a character that an [ineligible] alien . . . is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

Unlike the 1913 Alien Land Law, the 1920 Initiative had significant material effects. Japanese-owned acreage declined relatively dramatically between 1920 and 1925. In 1923 and 1927, the California legislature added additional amendments to the 1920 Initiative, making escheat effective immediately upon the conclusion of a transaction involving agricultural land with an "alien ineligible to citizenship," rather than at the successful conclusion of an escheat action by the State Attorney General (a citizen buyer could lose one's property thus acquired). The Amendments also required "aliens ineligible to citizenship" to sell inherited property or it would escheat to the state, made escheat actions commencible by the County District Attorney, barred "aliens ineligible to citizenship" from owning stock in a corporation that owned agricultural land and created a rebuttable presumption that any real estate transaction involving an "alien ineligible to citizenship" was to be treated as a criminal conspiracy to evade the Alien Land Law. As a result of these enactments, increasing Japanese land ownership was arrested after 1920 in California and the Alien Land Laws remained on the books even though relatively few escheat actions were brought between 1913 and 1940.[59]

> A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:
> (a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof. . . .
> The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Id. § 9; *see also* CHUMAN, *supra* note 38, at 87. Section 10 of the 1920 initiative added criminal penalties for violations of the statute:

> If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

California Initiative November 2, 1920, § 10, 1921 Cal. Stat. lxxxiii, lxxxv.

[59] Masao Suzuki suggests that:

> [A]lmost all of the prosecutions of the Alien Land Law were aimed at Japanese and other Asian Americans, so that while the law may not have been enforced for whites who wanted to rent farmland to Japanese, it certainly was for Japanese Americans who wanted to buy land. One can also question whether it was nondiscriminators who wanted to rent or sell to Japanese farmers. Higgs himself documents discrimination in the farm rental market where Japanese were paying higher rents than whites. . . . The Alien Land Laws probably served to reinforce price discrimination in the rental and sales markets, as landowners knew that the Japanese were in a weak (legal) position to begin with. There is support for [the] suggestion that competition with Japanese immigrant farmers led to discrimination. While farmers

Among the escheat actions brought, however, were a group of cases challenging the 1920 California Initiative as well as a similar law passed by the Washington legislature in 1921.[60] In deciding these four cases,[61] the Supreme Court sent a stark message to the nation, and California in particular, that the Alien Land Laws clearly passed constitutional muster. Moreover, in the words of Justice Pierce Butler, the enactments were eminently justified:

> It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within

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had kept quiet when Japanese were mainly farm laborers, they were more outspoken when Japanese immigrants moved into farming.

MASAO SUZUKI, THE IMPACT OF ALIEN LAND LAWS AND THE ECONOMIC STATUS OF JAPANESE IMMIGRANTS BEFORE WORLD WAR II, at 22 (June 23, 1998) (unpublished draft on file with author); *see also* Robert Higgs, *Landless by Law: The Japanese Immigrants in California Agriculture to 1941*, 38 J. OF ECON. HIST. 205, 223 (1978).

Ichioka also comments on the negative effects of the earlier 1913 law:

> It would be wrong, however, to claim that the [1913 California Alien Land] law had no negative effects. In 1917 Chiba Toyoji, managing director of the Japanese Agricultural Association, presented a perceptive critique. According to his analysis, in the few cases in which landowners died with deeds still in their names, their land sold for 30 to 40 percent less than the going market value at public auctions. The three-year leasing limitation discouraged many farmers from cultivating fruit, grapes, and other crops which required a longer investment of money, time and labor. On the other hand, it encouraged "speculative" agriculture in one-year crops. Moreover, given the uncertain future of Japanese farmers, it also reinforced their desire to return to Japan as soon as possible, causing many to neglect their housing and physical environment. Finally, and most important, the 1913 Alien Land Law forced all Japanese to live with the stigma of being aliens ineligible to citizenship and subject to discriminatory treatment.

Yuji Ichioka, *Japanese Immigrant Response to the 1920 Alien Land Law*, 58 AGRIC. HIST. 157, 162–63 (1984), *reprinted in* 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 229 (Charles McClain ed., 1994).

[60] *See* Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 627 (1976). Under the first Washington Alien Land Law, which was enacted by the territorial legislature in 1864, aliens could acquire, hold and convey lands. A later version of Washington's Alien Land Law, however, deprived land ownership rights to aliens incapable of becoming citizens. *See* Mark L. Lazarus III, *An Historical Analysis of Alien Land Law: Washington Territory & State 1853-1889*, 12 U. PUGET SOUND L. REV. 197, 205, 220 (1989).

[61] In 1923, litigants tested the Alien Land Laws. Four cases reached the U.S. Supreme Court that year. On November 12, 1923, the U.S. Supreme Court issued two opinions. The first was *Terrace v. Thompson*, 263 U.S. 197 (1923), which tested the validity of the 1921 Washington law that prohibited land ownership in the State of Washington by aliens who had not declared their good faith intention to become citizens or who could not declare their intention because they were ineligible for citizenship. The second was *Porterfield v. Webb*, 263 U.S. 225 (1923), which challenged the more draconian 1920 Ballot Initiative Amendment to the 1913 California Alien Land Law.

In *Terrace*, a citizen wished to lease land in King County, Washington to a Japanese alien. They brought suit, seeking to enjoin enforcement of the 1921 Washington Alien Land Law which precluded "aliens unable to declare their good faith intention to become a citizen" from owning agricultural lands within Washington. *Porterfield* involved a fact pattern similar to *Terrace*. Porterfield, a citizen, wanted to lease land to Mizuno, a Japanese alien. In *Porterfield*, the U.S. Supreme Court upheld the validity of the 1920 ballot initiative amendment, rejecting the argument that it did not make the same distinction that the Washington State Alien Land Law had between aliens who did not declare their intention to become citizens and those who were ineligible. The *Porterfield* Court found that the difference between the California and Washington Land Laws was neither arbitrary nor unreasonable. In *Webb v. O'Brien*, 263 U.S. 313 (1923), decided on November 19, 1923, O'Brien, a citizen, wanted to enter a cropping contract with Inouye, a Japanese alien. This contract would permit Inouye to plant, cultivate and harvest crops on ten acres of land that O'Brien owned for a period of four years. Inouye would retain one-half of the crops as well as the right to house himself and persons working for him on O'Brien's land. O'Brien and Inouye won at the district court level because cropping contracts were not explicitly included under the 1920 Alien Land Law. Attorney General Ulysses S. Webb appealed.

O'Brien confronted the U.S. Supreme Court with the question of whether a "cropping contract" between an American citizen and an "alien ineligible to citizenship" was a contract of employment or the transfer of an interest in land. If the answer was that such an arrangement was an employment contract, then it did not constitute a transfer of a real property interest. Alternately, if the answer was that such arrangements were "more" than a mere employment contract, then they could constitute conveyances of property interests in land and would therefore be prohibited under the 1920 California Act.

The Supreme Court held that while a cropping contract gave no legal interest in land, such an agreement gave "use, control, and benefit of land . . . substantially similar to that granted to a lessee" and consequently, the agreement was prohibited under the Act. *O'Brien*, 263 U.S. at 324. In an opinion again penned by Justice Pierce Butler, the Court reasoned:

> [This cropping contract] is more than a contract of employment, and that, if executed, it will give to Inouye a right to use and to have or share in the benefit of the land for agricultural purposes. . . . The term of the proposed contract, the measure of control and dominion over the land which is necessarily involved in the performance of such a contract, the cropper's right to have housing for himself and to have his employees live on the land, and his obligation to accept one-half the crops as his only return for tilling the land clearly distinguish the arrangement from one of mere employment. . . . Conceivably, by use of such contracts, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety. . . . We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders.

Id. at 322–24. Note here, as in *Terrace*, the suggestion that a foreign threat from without (rising Japanese military strength) was embodied by Japanese immigrants within. The Court here continued its steadfast categorical move to underwrite the states' power to legislate to protect itself from this imagined dual-edged threat. Perhaps more significantly, this case illustrates the erosion of the late *Lochner*-era jurisprudence that protected the formal equality of contracting parties in the private sphere and disfavored legislative intervention into such arrangements.

Finally, in *Frick v. Webb*, 263 U.S. 326 (1923), decided November 19, 1923, the U.S. Supreme Court upheld the 1920 Initiative Act's bar on "aliens ineligible to citizenship" from owning majority stock in corporations established to work agricultural lands, despite arguments that stock ownership was guaranteed by the U.S.-Japan Treaty of 1911. Frick, a U.S. citizen, and Satow, a Japanese alien, sought injunctive relief in federal court to enjoin California Attorney General Ulysses S. Webb and the San Francisco District Attorney, Matthew Brady, from enforcing the Alien Land Law. Frick held 28 shares in the Merced Farm Company, which held 2200 acres of California farmland and wanted to transfer them to Satow. Again, Justice Butler upheld the Alien Land Law:

> its boundaries. If one incapable of citizenship may lease or own real estate, *it is within the realm of possibility, that every foot of land within the state might pass to the ownership or possession of non-citizens.*
>
> . . . .
>
> In the case before us, the thing forbidden . . . is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The *quality* and *allegiance* of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself.[62]

While the Alien Land Laws and the judicial opinions that upheld them were an important component of the nativist fervor that gripped the American legal imagination during the 1920s, they were merely a prelude to the enactment of the severe federal Immigration Act of 1924 that excluded immigration from Japan as well as southern and eastern Europe. The 1924 Immigration Act represented the nexus of waning early nineteenth-century attitudes toward open immigration that provided new labor for vital economic enterprises and waxing American anxiety over racial and ethnic "others." By the mid-1920s the latter attitude had clearly carried the day.

While the import of the Alien Land Laws are evident on a symbolic level—the creation and maintenance of a class unable to hold land unambiguously sends a message about the status of members of that class as less than worthy—the Alien Land Laws had a more subtle but equally invidious effect.[63] The Alien Land Laws served as a material prelude to the internment of Japanese Americans by weakening the structure of the agricultural opportunity "ladder" faced by Japanese immigrants entering this country at the beginning of the century. The

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> [California] may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens. The right "to carry on trade" given by the [1911 U.S.-Japan] treaty does not give the privilege to acquire the stock [of such a corporation]. To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties.

Frick, 263 U.S. at 334.

In these four cases, the Alien Land Laws of Washington and California were upheld and, at least momentarily, Justice Butler managed to make distinctions between the constitutionally guaranteed "right to work" and "freedom of contract" and a prohibition on transfers of interests in land (including indirect ownership of stock) made by the California Legislature without seeing any contradiction at all.

[62] *Terrace*, 263 U.S. at 220, 221 (quoting in part the court below) (emphasis added).

[63] *See* Aoki, *supra* note 12; Ichioka, *supra* note 59, at 162–63.

"ladder" had four "rungs." First, Japanese immigrants could become agricultural laborers, toiling for wages. Second, a Japanese laborer might convince a landowner to enter into a sharecropping contract, that is, the landowner would provide housing, tools and other materials necessary to farm, in exchange for a share of profits on the crop. If the Japanese sharecropper had a successful season, so too did the landowner. Third, a Japanese agricultural laborer or sharecropper who managed to save enough money might enter into a direct lease for a parcel of farmland, paying rent and keeping profits from crops for himself. Finally, the goal of laborers, sharecroppers and tenants was to become landowners—to save and borrow enough money to purchase land outright.

The Alien Land Law of 1913 placed the fourth rung legally out of reach of Japanese immigrants. The 1920 Initiative, by closing off the numerous loopholes discussed above, not only prohibited ownership of agricultural land, but leases and sharecropping contracts as well. Although the leasing and sharecropping prohibition was evaded in part by employing Japanese immigrants as "managers" (though to a lesser degree than under the 1913 Act), the net effect was to push Japanese immigrant farmers further down the agricultural labor "ladder."

A loophole that was still open to Japanese immigrants, albeit one made increasingly difficult to utilize, was the ability of children of Issei, as American citizens, to own property. During the late 1920s and 1930s, many such Nisei reached the age of majority and as such were able to gain title to purchased agricultural land. Throughout the 1920s, the California legislature, however, continued placing legislative obstacles in the path of Japanese land ownership by creating a legal presumption that transactions with "aliens ineligible to citizenship" were criminal conspiracies. This presumption placed burdens on persons who were potentially "aliens ineligible to citizenship" to prove they were citizens before a real estate transaction could be consummated. The legislature also provided for immediate escheat to the state (rather than on successful initiation and completion of an escheat proceeding by the state attorney general) in any transaction involving an "alien ineligible to citizenship." These and other devices created serious obstacles to a citizen Nisei's attempt to acquire land.[64]

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[64] On the role of racially structured hierarchies of inequality, see Stuart Hall, *New Ethnicities, in* 'RACE', CULTURE AND DIFFERENCE 252 (James Donald & Ali Rattansi eds., 1992). Hall suggests that:

By the eve of World War II in California, Japanese immigrant farmers were poised for a major fall. Those who did not own land outright were in some ambiguous sort of tenant/cropper/manager relationship with landowners. Following the evacuation order and subsequent internment, landowners would look elsewhere to find the rents and labor that had been supplied by Japanese immigrants.[65] All of the labor Japanese immigrants had put into cultivating land which they were forbidden to own was gone. Following the war, many of the internees who had been landowners were able to return to their properties that had been cared for by family friends. Internees who were landless by law, however, lost virtually everything. During the post-war era, Congress enacted a restrictively worded and extremely limited "Japanese-American Evacuation Claims Act of 1948"[66] that paid a maximum of $2500 per claim for documented damages arising from the 1941 Evacuation Order. It has been estimated that, at best, ten cents on the dollar was paid.[67]

The mood of the federal courts toward Japanese Americans shifted in the post-war era. In the *Oyama* case in 1948, the U.S. Supreme Court overturned a provision of the 1920 California Land Law that forbid an "alien ineligible to citizenship" from being a guardian for an American-born minor child.[68] The provision was overturned on the ground that it denied minor children who were U.S. citizens the equal protection of the law because a citizen child of a Japanese immigrant could not have property administered by a parent guardian as would a minor citizen with a citizen parent. While the holding in *Oyama* was narrow, the eloquent concurrence by Justice Murphy[69] recounting the unjust treatment of Japanese and Japanese Americans

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> [Specific] events, relations, [and] structures do have conditions of existence and real effects, outside the sphere of the discursive. . . . [H]ow things are represented and the "machineries" and regimes of representation in a culture do play a *constitutive* and not merely a reflexive, after-the-event, role. This gives questions of culture and ideology, and the scenarios of representation—subjectivity, identity, politics—a formative, not merely an expressive, place in the constitution of social and political life.

Id. at 253–54.

[65] *See infra* notes 83, 84 and accompanying text (noting that federal government instituted Bracero Program in 1942, which sought to import Mexican labor into California to meet demand for agricultural labor made more acute by evacuation and internment of Japanese Americans in early to mid 1942).

[66] Japanese-American Evacuation Claims Act of 1948, Pub. L. No. 80-886, 62 Stat. 1231 (1948).

[67] *See* CHUMAN, *supra* note 38, at 242–43 (estimating economic losses to internees and costs of internment to U.S. government to be more than $700,000,000).

[68] *See Oyama*, 332 U.S. at 633.

[69] *See id.* at 673 (Murphy, J., concurring).

foreshadowed the *Brown* era's chastened racial jurisprudence in contemporaneous cases such as *Sweatt v. Painter*[70] and *Shelley v. Kraemer*.[71]

In 1948, the voters of California also rejected Proposition 151, which would have amended and re-ratified the 1920 Alien Land Law and all subsequent legislative amendments. On the federal and state legislative level as well as on the judicial and the "court of popular opinion," the end of World War II had wrought significant changes in mainstream America's attitude toward Japanese Americans.[72]

The Alien Land Laws are significant on a number of levels. First, they span a remarkable period of time in American legal consciousness, enacted in the heyday of the *Lochner*[73] era—the mode of judicial reasoning that valorized substantive due process exemplified by freedom of contract, private property as a welcome evolution from feudalism and the smothering authority of the state—and lasting to the dawn of the *Brown v. Board of Education*[74] era in the late 1940s.

The Alien Land Laws invite us to consider what it means that during the height of the *Lochner* era, the Supreme Court was willing to endorse state intervention into both the private labor and real estate markets, such that even U.S. citizens had *no right to sell* to "aliens ineligible to citizenship" any more than such aliens had no right to buy. These laws were in remarkable tension with the prevailing, late *Lochner*-era, legal consciousness that held, under the rubric of "substantive due process," private property and freedom of contract as sacrosanct. On both superficial and deeper levels, the Alien Land Laws contradicted the idea of sharply separate public and private spheres, for the legislatures enacting these laws were intervening in "private" market arrangements as surely as the New York legislature had intervened (illegitimately, in the eyes of the *Lochner* Court) in prescribing the maximum hours a bakery employee could work. The different results in the Supreme Court's decisions to overturn state intervention in bakery employee contracts in *Lochner*, but to uphold state intervention in alien land contracts, may best be explained by the factors of the "race" and "nationality," of the Issei, making them susceptible to characterization as a threat to public health, welfare and morals, and, therefore, within the legitimate scope of the state's police power.

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[70] 339 U.S. 629 (1950).

[71] 334 U.S. 1 (1948).

[72] *See* CHUMAN, *supra* note 38, at 202–03.

[73] *See* Lochner v. New York, 198 U.S. 45 (1905). *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 33–39 (1993) (discussing *Lochner* era's valorization of "private property" and "freedom of contract").

[74] *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

The Supreme Court of the day valued the primacy of laissez-faire market allocations as self-evidently superior to the workings of feudal centralized decisions. Why, then, did they embrace the Alien Land Laws, whose roots stretch back to the feudal, strictly hierarchical legal system of eleventh-century England, and whose presumptive validity is premised on the transcendental sovereignty of the monarch?[75] This was, after all, the same Supreme Court that decided *Coppage v. Kansas*[76] striking down the Kansas legislature's attempt to outlaw "yellow dog" labor contracts for strike-breaking purposes as illegitimate interference with the "right to labor" and "freedom of contract."

At the very least, the Alien Land Laws suggest that the answer lies in unresolved American attitudes, deeply implicated in our legal system, based on conflicting notions of "nation" and "race." The limits of the *Lochner*-era vision of freedom of contract and private property ended abruptly at the boundary of the nation-state and its abilities to subject citizens and non-citizens to concepts of "race." While the concepts were constructed in the private sphere of economic and social relations, they were also ratified by the power of the state.

While the Alien Land Laws were generally ineffective at dispossessing Japanese farmers from 1913 to 1920,[77] they were much more effective after 1920. Furthermore, they set the stage for the internment and dispossession of Japanese and Japanese Americans during World War II. The Alien Land Laws ideologically affirmed the "foreign-ness," and hence, "disloyalty" of the Issei and their American citizen children,

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[75] *See* Calvin's Case, 77 Eng. Rep. 377 (K.B. 1609). The ancient English rationale for alien land ownership disability was articulated in *Calvin's Case*:

> It followeth next in course to set down the reasons, wherefore an alien born is not capable of inheritance within England, and that he is not for three reasons. 1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm (the sinews of war, and ornaments of peace) should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm. . . . [F]irst, it tends to destruction *tempore belli*, for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth, as was excellently shadowed by the Trojan horse in Virgil's . . . Aeneid, where a very few men in the heart of the city did more mischief in a few hours, than ten thousand men without the walls in ten years. Secondly, *tempore pacis*, for so might many aliens born get a great part of the inheritance and freehold of the realm, whereof there should follow a failure of justice . . . for that aliens born cannot be returned of juries . . . for the trial of issues between the King and the subject, or between subject and subject.

Id. at 399.

[76] 236 U.S. 1, 26 (1915).

[77] *See* VALERIE J. MATSUMOTO, FARMING THE HOME PLACE 25 (1993) ("Nevertheless, as Roger Daniels has suggested, [the Alien Land Laws] have had greater psychological than economic impact since by 1920 many *Issei* had already acquired the title in land in the names of their *Nisei* children.").

positioning them to be racial scapegoats in the wake of Pearl Harbor. To the extent that many white owners held land in trust for Japanese immigrants, the Issei were effectively occupants at sufferance. These laws created a category of persons existing at sufferance of their white neighbors—as well as the state attorney general and county district attorneys—a "caste" of less-than-worthy persons occupying land at the pleasure of white "owners."[78] This symbolic dispossession and material

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[78] *See generally* TAKAKI, *supra* note 8, at 206. Takaki explains some of the circumvention needed to continue farming:

> To circumvent the [Alien Land] laws, many farmers entered into unwritten arrangements with white landlords. The farmer would actually lease the land but would appear to serve as a salaried manager. . . . Issei farmers also evaded the law by "borrowing the names" of American citizens. L.M. Landsborough, for example, purchased six lots of land for Japanese farmers with the deeds in his name. . . . An Issei farmer explained [how many Issei purchased land in the name of Nisei relatives] . . . "I asked a Nisei nearby to be the nominal owner of the land, and pretended that I worked for the boy. I presume about 80% or 90% of the Japanese farmers in the Auburn district quietly went about their business in this way." . . . [H]e realized that all of them would be helpless if the law were strictly applied. . . . An Issei woman said that her son was the nominal owner of the family's farm: "Every time some kind of difficulty arose we had to pay a lawyer's fee to go through the legal process. . . . Every day was insecure like this, and whenever we had unfamiliar white visitors, I was scared to death suspecting that they might have come to investigate our land."

See id. O'Brien and Fugita give a parallel description of the methods of circumventing the Alien Land Laws:

> [T]he Japanese were able to get around the 1913 [California] law and continue farming because of the wide legal loopholes. Some Issei put the land in the name of their American-born children and made themselves their guardians. Or they placed land in the name of legal-age children, usually Hawaiian-born Nisei, some of whom were just beginning to reach their majority, or less often used the name of sympathetic white friends. Some Issei created dummy corporations which had a majority of American citizen shareholders. . . . If there were two children, the lawyer, and the Issei farmer and his wife, citizens would outnumber the "aliens ineligible for citizenship."

O'BRIEN & FUGITA, *supra* note 25, at 24. At least some politicians understood that this circumvention was likely:

> Johnson . . . knew well that Japanese land tenure in California would not be seriously affected by [the 1913 Law]. In effect, the Alien Land Law limited leases of agricultural land to Japanese to maximum terms of three years and barred further land purchases by Japanese aliens. It was quite simple for the attorneys who represented Japanese interests in California to evade the intent of this law, as Californians were soon to discover. One of Johnson's chief advisers pointed this out to him before the bill had been drafted. "It will be perfectly easy," wrote Chester Rowell, "to evade the law by transferring to [a] local representative enough stock to make fifty-one per cent of it ostensibly held by American citizens." For the growing number of Issei who had American-born children, it was even simpler: they merely had the stock or title vested in their citizen children, whose legal guardianship they naturally assumed.

DANIELS, *supra* note 8, at 63.

deprivation laid the ideological, legal and cultural foundation for the mass physical dispossession, evacuation and internment of Japanese and Japanese Americans on the West Coast in 1942.

The significance of the Alien Land Laws went beyond their immediate effects on landowning and agricultural practices of Japanese immigrant farmers. The Alien Land Laws provided a bridge that sustained the virulent anti-Asian animus that linked the Chinese Exclusion Act of 1882 with the internment of Japanese-American citizens pursuant to Executive Order 9066. Transferring and generalizing anti-Chinese sentiments to all Asian immigrants gave degrading stereotypical tropes an extended and unfortunate shelf life. Even if the Alien Land Laws were, in many cases, symbolic xenophobic iterations of a nativist impulse, dispossessing in reality far fewer Japanese immigrants than they theoretically (and legally) were capable of, they did, without doubt, foreshadow the mass internment and practical dispossession of Japanese-American citizens during World War II. As Neil Gotanda has pointed out, the internment cannot be understood as the isolated action of a small number of renegade racists. To the contrary, it was the tragic symptom of systematic and institutionalized racism.[79] Understanding the Alien Land Laws empowers us to comprehend the depth and scope of the practices and institutionalized subordination that helped make the racial scapegoating of the internment possible. The Alien Land Laws allowed, promoted and indeed encouraged a linkage between race, nationality and denial of civil rights that culminated in the internment of Japanese Americans. Accordingly, the denial of civil rights to Asian immigrants "ineligible for citizenship" under Alien Land Laws paved the way for the denial of civil rights to Japanese-American citizens under Executive Order 9066 only two decades later. The inescapable lesson to be drawn is that the denial of basic rights such as due process and property ownership of non-citizens may be a step toward the cavalier denial of civil rights to citizens.

A second point is that the Alien Land Laws demonstrate a deep contradiction at the heart of our concepts of property, citizenship and nationhood. Prevailing liberal and civic republican visions of property

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[79] Angela Oh observes that:

> The fact that "racial undesirability" was the real basis for the alien land laws that prohibited Asian Americans to gain ownership of real property is no longer subject to serious debate. But more disturbing and troublesome is knowing how many times lawyers, government officials and judges acted in complicity with such odious interpretations of the law.

Angela Oh, *Foreword* to HYUNG-CHAN KIM, A LEGAL HISTORY OF ASIAN AMERICANS 1790–1990, at x (1994).

ownership rest on the notions that owning property, in some important way, ties an individual's fate to the fate of the larger polity, giving him or her a stake in important political controversies of the day, as well as providing a valuable shield against the state and other private parties. What does it mean that an entire group such as the Issei and their minor children could be dispossessed—incompletely, but dispossessed nonetheless—from the citizen's prerogative of property ownership, especially when such disenfranchisement turns on membership in a reviled racial group? Against this backdrop, what do recent anti-immigrant federal and state measures mean for the future of American democracy? Consider that until the arrival of large numbers of immigrants of non-English descent, the electoral franchise was often extended to non-citizen immigrants who resided in a particular area.[80]

Third, the Alien Land Laws remind us of the linkage between global political, economic and social phenomena and localized material conflicts such as those that drove the struggles between California's ascendant agribusiness and the nascent California labor movement. Local struggles that are pressurized by global conflict become particularly explosive when they are fueled by long-standing racial antagonisms, entrenched racial hierarchies or white supremacist ideology.

In contending that the Alien Land Laws should be properly understood as an essential prelude to internment, this Article questions a model of analyzing racism that equates "racism" with "irrationality" and locates racism as an aberration within human consciousness. In varying degrees, various accounts of the internment of Japanese Americans incorporate aspects of this view of racism, assigning blame to renegade "bad actors" such as Lt. DeWitt or persons in the War Department who deliberately withheld, or lied about, information regarding the nature of the threat posed by Japanese Americans on the West Coast. Peter Irons' "Justice at War" is an excellent example of this genre.[81] It is not that Professor Irons is wrong, for there were indeed many instances of individual racial animus in high and low places. It is just that his account may be incomplete.[82] This Article advances a model of racism put forth by Neil Gotanda in which racism is not defined as irrational, but structural and, in important ways, may be

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[80] *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1404 (1993) (quoting Rosberg's suggestion that the move away from allowing noncitizens to vote may have been due to arrival of large numbers of non-English-descent immigrants "who were thought incapable of ready assimilation").

[81] *See* PETER IRONS, JUSTICE AT WAR (1983).

[82] *See* Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of* JUSTICE AT WAR, 85 COLUM. L. REV. 1186, 1187–88 (1985) (criticizing shortcomings of Irons' approach).

seen as the epitome of rationality on the systemic level, if the goal is to ensure the continued domination—access to power and resources—of a superordinate racial group over a subordinate group on a racial basis. Under the Gotanda model, racism is not an aberration within a deviant individual's consciousness, but is located in the material world: who has control of what, who may exclude whom from valuable resources and privileges, such as particular types of jobs, education and agricultural land. By questioning the view that the internment was the result of a few misguided or racially malevolent individuals, this Article suggests that lessons to be learned from the Alien Land Laws, the internment of Japanese Americans and the 1989 Apology and Redress to interned Japanese Americans should not be triumphalist paeans to the vindicatory power of the "Rule of Law." Instead, the lesson may be a no less useful—if less sanguine—critique of how little we have learned from the internment. For example, beginning in 1942, the U.S. government engaged in the Bracero Program to import thousands of Mexican laborers to replace the decimated Japanese agricultural labor ranks.[83] In the 1950s, the government engaged in Operation Wetback to deport many of the same Mexican laborers brought in by the Bracero program who attempted to stay in America.[84] In the 1960s, the FBI waged a literal domestic war against the Black Panthers and other black nationalist groups, whose leaders were either dead, imprisoned or discredited by the end of the decade.[85] From the 1970s onward, domestic race relations have had to grapple with the internal repercussions of U.S.-backed military adventurism abroad, whether in Southeast Asia, Central America or the Middle East, including the influx of immigrants who have been rapidly and differentially racialized within the United States. In the 1980s and 1990s, we have seen the internment and incarceration without due process of Cubans and Central American refugees in Guantanamo Bay[86] and Texas by the Immigration and Naturalization Service ("INS").[87] We have witnessed the interdiction and "hearings" at sea of Haitian boat persons by the

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[83] *See* Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, *in* THE LATINO/A CONDITION: *A CRITICAL READER* 77, 80–82 (Richard Delgado & Jean Stefancic eds., 1998).

[84] *See id.* at 83; Michael A. Olivas, *My Grandfather's Stories and Immigration Law*, *in* THE LATINO/A CONDITION: *A CRITICAL READER* 257 (Richard Delgado & Jean Stefancic eds., 1998).

[85] *See, e.g.*, WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WAR AGAINST DOMESTIC DISSENT 91–164 (1990); HUEY P. NEWTON, WAR AGAINST THE PANTHERS: A STUDY OF REPRESSION IN AMERICA (1996).

[86] *See* Jonathan Wachs, *Recent Development: The Need to Define the International Legal Status of Cubans Detained at Guantanamo*, 11 AM. U. J. INT'L L. & POL'Y 79 (1996).

[87] *See* Olivas, *supra* note 84, at 258.

INS,[88] the congressional passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[89] and the passage of Proposition 187 in California in 1994, which represented the darker side of direct democracy by mandating the withdrawal of many basic social services for undocumented non-citizens.[90]

Perhaps we have yet to learn the lessons of the Alien Land Laws and the internment of Japanese Americans because as George Santayana said, "those who cannot remember the past are condemned to repeat it."[91] It is only through willful and selective amnesia that highly formalistic and abstract arguments about "reverse racism" and "color blindness" can achieve even the slightest plausibility. There is an important difference between acknowleging the burdens of history and ignoring them, between recognizing and seeking to remedy the harms of racism and pretending that racism no longer exists. The history of the Alien Land Laws and the internment of Japanese Americans may not only be a lesson about the dangers of overzealous wartime hysteria and racial scapegoating. It may also be a lesson that long before World War II loomed on the horizon, our legal system, from the U.S. Supreme Court to the U.S. Congress to various state legislatures and courts, vigorously produced and upheld laws that distributed power and resources—from the ability to own agricultural land to the ability to become a naturalized citizen—on an invidiously racial basis. The experience of the Alien Land Laws reveals the deep moral indeterminacy of our legal and political structures, including such foundational concepts as "private property" and "freedom of contract," as they have been applied disadvantageously at many different times and places to

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[88] *See id.* (reporting that as of 1990, only six of over 20,000 Haitian boat persons had been granted asylum); Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 SMU L. REV. 189 (1994); *see also* Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (upholding return of Haitians seeking refuge from political violence without determining whether they might be entitled to refugee status with the United States); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994).

[89] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996); *see also* The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

[90] *See* Linda S. Bosniak, *Undocumented Immigrants and the National Imagination*, *in* THE LATINO/A CONDITION: *A CRITICAL READER* 99 (Richard Delgado & Jean Stefancic eds., 1998); Kevin R. Johnson, *Immigration Politics, Popular Democracy, and California's Proposition 187*, *in* THE LATINO/A CONDITION: *A CRITICAL READER* 110 (Richard Delgado & Jean Stefancic eds., 1998).

[91] George Santayana, *The Life of Reason*, *quoted in* FAMILIAR QUOTATIONS 588 (Justin Kaplan ed., 1992).

different racial and ethnic groups in our history. By confronting that indeterminacy squarely, that is, acknowledging how apparently neutral forms and legal rules may at times carry terrible political freight, we are enabled to critique, judge and indeed, learn from our complex, rich, but very troubled past of race relations within the United States.

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THE 2023 ALIEN LAND LAWS AND HISTORICAL AMNESIA

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THE 2023 ALIEN LAND LAWS AND HISTORICAL AMNESIA

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INTRODUCTION

Thank you *Western New England Law Review*, Andrew Loin (Editor-in-Chief), and Dean Zelda Harris for inviting me to participate in this incredibly powerful conference.[1] I have learned so much from the speakers and panel discussions today. It truly is an honor to be part of this symposium.

Since I am one of the last speakers of the day, I thought that I would begin my talk by connecting my lecture with Richard Rothstein's *The Color of Law*.[2] As a property law and race scholar, I am a big fan of Rothstein's work and I consider his book, *The Color of Law*, one of the most influential books of our time. In fact, years ago, I purchased extra copies of *The Color of Law* and distributed them to some of my students at the end of the semester. One of the points that I most appreciate about *The Color of Law* is Rothstein's claim that ongoing wealth inequality today stems not entirely from *de facto segregation*, but also from *de jure segregation* perpetrated by federal, state, and local governments.[3]

Essentially, in his book, *The Color of Law* as well as in his forthcoming book that he just talked about, *Just Action*,[4] Rothstein seeks to reorient our collective memory. Thinking about collective memory is critical. Scholars who write in the field of socio-legal inquiry of law and memory remind us that our memories of laws—what we remember or not remember about them—influence the creation, enforcement, and interpretation of new laws.[5] In other words, Rothstein asks us not to forget

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1. This lecture was given on October 13, 2023, as part of the *Western New England Law Review*'s annual symposium. These remarks have been lightly edited and sourced to assist the reader.

2. *See generally*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) [hereinafter THE COLOR OF LAW].

3. *Id.* at VII–VIII.

4. RICHARD ROTHSTEIN & LEAH ROTHSTEIN, JUST ACTION: HOW TO CHALLENGE SEGREGATION ENACTED UNDER THE COLOR OF LAW (2023).

5. Austin Sarat & Thomas R. Kearns, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, *in* HISTORY, MEMORY, AND THE LAW 1, 12 (1999).

about what happened in the past, because they are part of our shared history, and they have contemporary effects.[6]

My lecture today similarly encourages us to remember the past, and to consider the effect that they have today. The title of my talk is *2023 Alien Land Laws and Historical Amnesia*, and it will explore the intersection of immigration, citizenship, and race that I am seeing right now in several alien laws that have been enacted in various states.

By new alien land laws, I am referring to laws such as the one passed in Florida in May 2023, which prohibit Chinese people from owning land.[7] Unfortunately, Florida is not alone. Alabama,[8] Indiana,[9] and Montana[10] have passed similar laws and there are multiple bills under consideration that have been proposed in other states.[11] A lawsuit has been filed against the Florida law and, in full disclosure, I am part of a team writing an amicus brief, which includes Professor Gabriel "Jack" Chin of the University of California Davis School of Law whom you heard from earlier, Professor Bob Chang of Seattle University School of Law, and pro bono lawyers from Foley Hoag that is supporting the challenge to Florida's Alien Land Law, or S.B. 264.[12]

I argue today that these laws are reminiscent of alien land laws in the 1920s that denied persons who were "ineligible to citizenship" from owning land.[13] The phrase "ineligible for citizenship" or "ineligible to citizenship" was a euphemism for the denial of Asian immigrants from being able to naturalize and become U.S. citizens.[14] Persons who were deemed ineligible to citizenship, mainly Asians, were also racially barred

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6. *See* THE COLOR OF LAW, *supra* note 2.

7. S.B. 264, 2023 Leg., 125th Reg. Sess. (Fla. 2023) (codified as amended at FLA. STAT. §§ 692.201–692.205).

8. H.B. 379, 2023 Leg., Reg. Sess. (Ala. 2023) (codified as amended at ALA. CODE § 35-1-1.1 (2023)).

9. S.B. 477, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023) (codified as amended at IND. CODE §§ 1-1-16-1–1-1-16-11).

10. S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023) (codified as amended at MONT. CODE. ANN. § 35-30-103 (2023)).

11. *Alien Land Bill Scan*, APA JUSTICE (Oct. 20, 2023), https://www.apajustice.org/uploads/1/1/5/7/115708039/20231020_alienlandbillscan.pdf [https://perma.cc/5AXR-QDPJ].

12. *See ACLU Applauds Appeals Court Decision Halting Enforcement of Florida Law That Bans Many Immigrants from China and Other Countries From Buying Homes*, ACLU, (Feb. 1, 2024) https://www.aclu.org/press-releases/aclu-applauds-appeals-court-decision-halting-enforcement-of-florida-law-that-bans-many-immigrants-from-china-and-other-countries-from-buying-homes [https://perma.cc/C7KG-T9R9].

13. *See* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 38–40 (1998); *see also*, Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and* Citizenship, 87 WASH. U. L. REV. 979, 991 n.44 (2010).

14. *See* Aoki, *supra* note 13, at 38 ("aliens ineligible to citizenship" was a disingenuous euphemism de-signed to disguise the fact that the targets of such laws were first-generation Japanese immigrants).

from immigrating to the United States.[15] To make matters worse, those Asian immigrants who were already in the United States and not racially eligible for naturalization found themselves prohibited from owning land in several states.[16] Together, these laws shaped the racial makeup of our country and attributed to the 'perpetual foreignness' stereotype of Asian Americans today.[17] Importantly, the alien land laws that were passed this year, including in Florida, suggests that this part of our history seems to have been forgotten.

With the balance of my time, I'll divide my remarks into three parts. First, I will briefly explain how immigration, citizenship, and race intersected to influence the racial and citizenship makeup of the United States. Second, I will discuss the alien land laws of the 1920s and the cases that challenged them. As I will emphasize in that part of my remarks, the U.S. Supreme Court in four cases in 1923 upheld these alien land laws, but since then, states have repealed those laws and equal protection jurisprudence has developed such that these laws would be considered racially discriminatory today.[18] Finally, I will return to Florida's alien land law and share with you some of the arguments that are publicly available with respect to the challenge of this law. Overall, I argue that both the passage of the law and the District Court's opinion, which allowed the law to be enforced, demonstrate historical amnesia about the earlier alien land laws of the 1920s.[19] The dangers of not remembering our past means that the same mistakes are being made again today.

I. IMMIGRATION, RACE, AND CITIZENSHIP

Florida's alien land law provides a valuable jumping-off point to talk about how race, immigration, and citizenship intersect.[20] As I will soon discuss, the convergence among these three is not new. Between 1790 and 1965, Congress limited immigration and citizenship on the basis of race.

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15. *See* Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 Case W. Res. L. Rev. 1183, 1205 (2018) (stating that "[t]hough nothing at the time prevented the federal government from specifying Asians . . . by name, the legislation effected Asian exclusion through a facially neutral term: "[n]o alien ineligible to citizenship shall be admitted to the United States.").

16. *See, e.g.*, Aoki, *supra*, note 13, at 56–59 (discussing California's Alien Land Law, which denied persons not eligible to citizenship from owning land in the state); *see also* Gabriel J. Chin, *Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497, 503 (2001).

17. Neil G. Ruiz et al., *Asian Americans and the 'Forever Foreigner' Stereotype*, PEW RSCH. CTR. (Nov. 30, 2023), https://www.pewresearch.org/race-ethnicity/2023/11/30/asian-americans-and-the-forever-foreigner-stereotype/ [https://perma.cc/NJ5F-8NH9].

18. *See infra* Part.II.

19. *See infra* Part III.

20. *See generally* S.B. 264, 2023 Leg., 125th Reg. Sess. (Fla. 2023) (codified as amended at FLA. STAT. §§ 692.201–692.205).

A. *Citizenship*

At the outset, Congress intended that citizenship by naturalization would be reserved only for those persons deemed to be desirable immigrants. And race was a critical qualification for naturalization. One of the first statutes passed by Congress was the 1790 Naturalization Act, which provided that only "free white person[s]" would be eligible for naturalization.[21] Although Congress subsequently amended the naturalization statute in 1870 after the passage of the Civil Rights Amendments to provide that aliens of that "aliens of African nativity and . . . persons of African descent" would be eligible for citizenship, it continued to deny the right of naturalization to all other immigrants (with some exceptions) until 1952.[22]

The Supreme Court later confirmed that only those persons who were white or of African descent were eligible for naturalization.[23] In *Ozawa v. United States*, the Supreme Court upheld the denial of naturalization of a Japanese immigrant because he was not white.[24] Relying on what the Court said were "numerous scientific authorities," the Court concluded that Japanese were "clearly of a race which is not Caucasian."[25] But then, just three months later, in *Thind v. United States*, a "high caste Hindu" whom the Court acknowledged was considered "Aryan or Caucasian" was nevertheless not white for purposes of the naturalization laws.[26] The Supreme Court explained that "we must not fail to keep in mind that [the Naturalization Act of 1870] does not employ the word 'Caucasian,' but the words 'white persons,' and these are words of common speech and not of scientific origin."[27] The Court continued, "[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today."[28]

Thus, instead of relying on "scientific authorities" to interpret the meaning of "free white persons" as the Supreme Court purported to do in *Ozawa* just three months earlier,[29] the Court in *Thind* instead interpreted the phrase using "words of familiar speech" and based on what the

21. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Naturalization Act of 1802, ch. 28, § 1, 2 Stat. 153.

22. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (1870).

23. *See generally* Ozawa v. United States, 260 U.S. 178 (1922).

24. *Id.* at 198.

25. *Id.*

26. United States v. Thind, 261 U.S. 204, 210–15 (1923).

27. *Id.* at 208.

28. *Id.* at 209.

29. *Ozawa*, 260 U.S. at 196–97.

"original framers of the law intended to include, [particularly] only [those] whom they knew as white."[30] Specifically, the Court explained:

> The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to "any alien being a free white person," it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind.[31]

This racial bar on citizenship would not be repealed until 1952 although Congress allowed some Asian groups to be eligible for naturalization in the 1940s.[32]

Thus, from the earliest days of the United States, Congress deployed citizenship laws to restrict the right of naturalization to white immigrants. But Congress had other, more direct methods, of restricting the entry of nonwhite immigrants from coming to the United States—by using immigration law. Let me therefore turn to a discussion on the convergence of immigration law and race.

B. *Immigration*

Many attending the symposium today are likely familiar with the 1882 Chinese Exclusion Act[33] but might not be as familiar with the 1875 Page Act,[34] which barred the entry of immigrants entering the United States for "lewd and immoral purposes." This law was directed at Chinese women who were stereotyped as prostitutes.[35] The Page Act served as the precursor to the 1882 Chinese Exclusion Act, which explicitly barred the entry of Chinese laborers for ten years.[36] The Supreme Court in the 1889 case of *Ping v. United States* upheld the constitutionality of this statute, stating that Congress had the power to exclude "the presence of foreigners of a different race in this country, who will not assimilate with us, [and who are deemed] to be dangerous to its peace and security."[37] *Ping* is still on the books and to this day, and gets cited for the proposition that Congress has plenary authority over immigration law.[38]

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30. *Thind*, 261 U.S. at 213.

31. *Id.*

32. *See* OFFICE OF THE HISTORIAN, *Repeal of the Chinese Exclusion Act, 1943*, https://history.state.gov/milestones/1937-1945/chinese-exclusion-act-repeal [https://perma.cc/ND4F-7Q5P]; *see also* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1277); Villazor, *supra* note 13 at 1011.

33. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

34. Page Act, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

35. Kerry Adams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005).

36. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

37. Ping v. United States, 130 U.S. 581, 606 (1889).

38. Ahilan Arulanantham, *Reversing Racist Precedent*, 113 GEO. L. J. (forthcoming

Congress did not stop with the 1882 statute. In 1917, Congress extended the bar against Chinese to all immigrants coming from the Asiatic Barred Zone.[39] Japanese immigrants were able to continue immigrating to the United States if their government allowed them to leave.[40] But in 1924, Congress passed a law that provided that persons who were "ineligible for citizenship" were not admissible to the United States.[41] This meant that Japanese and all those who remained racially not allowed to naturalize were refused the ability to immigrate to the United States in the first instance.

Congress's goal of limiting immigration was not limited to Asians, however. For example, in the 1920s, Congress imposed national origins quotas that restricted the number of immigrants from eastern and southern Europe from entering the United States.[42] But immigration restrictions against Asians continued until the mid-1960s.

To be sure, in 1952, Congress overhauled the country's immigration laws and repealed the racial restriction on citizenship.[43] However, it imposed racial quotas of 100 immigrants per Asian country and therefore effectively continued to restrict their entry on the basis of race.[44] It was not until 1965, that Congress repealed the national origins quotas that had continued to deny the admission of Asian immigrants.[45] In sum, both through immigration laws and citizenship laws, Congress used race to limit the presence and political membership of Asian immigrants and other immigrants who were deemed undesirable.

II. ALIEN LAND LAWS

The previous discussion of race-restrictive immigration and citizenship laws provide useful background for the next part of my talk, alien land laws. As I next discuss, these laws became the basis for discriminating against Asian immigrants from owning land. In the early

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39. Barred Zone Act, H.R. 10384, 64th Cong. (1917). The Johnson-Reed Act, Pub. L. 68-139, 43 Stat. 153 (1924) (repealed 1952); *see also*, IMMIGRATION HISTORY, *Immigration Act of 1917 (Barred Zone Act)*, https://immigrationhistory.org/item/1917-barred-zone-act/ [https://perma.cc/KQ8M-5YLF].

40. *Gentlemen's Agreement*, HISTORY, https://www.history.com/topics/immigration/gentlemens-agreement (Apr. 5, 2022) [https://perma.cc/8P5S-JGV7].

41. The Johnson-Reed Act, Pub. L. 68-139, 43 Stat. 153 (1924) (repealed 1952); *see also* Villazor, *supra* note 13, at 991 n. 44.

42. *See generally* Barred Zone Act, H.R. 10384, 64th Cong. (1917); The Johnson-Reed Act, Pub. L. 68-139, 43 Stat. 153 (1924) (repealed 1952); *see also*, Brief for Respondents as Amici Curiae at 20, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965).

43. *See generally* Immigration and Nationality (McCarran-Walter) Act of 1952, ch. 477, § 403, 66 Stat. 163.

44. *Id.*

45. Immigration and Nationality Act of 1965 (Hart-Celler Act), Pub. L. 89-236, 79 Stat. 911.

1900s, several states including Arizona, California, Florida, Idaho, Kansas, Louisiana, Minnesota, Missouri, Montana, Oregon New Mexico, Texas, Washington, and Wyoming passed laws that proscribed persons who were "ineligible to citizenship" under federal citizenship laws from owning land.[46]

I wrote a law review article about California's Alien Land Law and thus, I will focus on that law.[47] In 1913, white farmers who felt threatened by Japanese farmers convinced the state legislature to pass the state's law and prohibit them from owning land. State political leaders understood that this law would help deter Japanese immigrants from staying and working in California. As the Attorney General of California stated in his support of the 1913 Alien Land Law,

> [i]t is unimportant and foreign to the question under discussion, whether a particular race is inferior. The simple and single question is, is the race desirable. . . . It [the law] seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land."[48]

Not satisfied with the 1913 Alien Land Law, California voters in 1920 passed an initiative that made the state's alien land more restrictive by prohibiting leaseholds of agricultural lands, preventing corporations from owning land, and prohibiting placing agricultural lands in guardianships or trusteeships.[49] Again, the targeted group of the law was Japanese persons.

Constitutional challenges were brought, not only against California's Alien Land law, but also Washington state's Alien Land law on equal protection grounds, among other arguments. Four of these cases reached the Supreme Court in 1923, which upheld the constitutionality of both California and Washington alien land laws.[50] *Terrace v. Thompson*, which recognized the constitutionality of Washington's alien land law, is the leading case.[51] Washington's Alien Land law prohibited persons who

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46. *See* Aoki, *supra* note 13, at 37–38.

47. Villazor, *supra* note 13, at 1012.

48. Oyama v. California, 332 U.S. 633, 657 (Murphey, J., concurring) (quoting Ulysses S. Webb at a speech before the Commonwealth Club of San Francisco on August 9, 1913, one of the authors of the Alien Land Law and California's Attorney General).

49. *See* 1920 Alien Land Law, California Initiative (Nov. 2, 1920); Aoki, *supra* note 13, at 56–57, 59; FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS 49–50 (1976); Greg Robinson & Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29, 34 (2005).

50. Terrace v. Thompson, 263 U.S. 197, 222 (1923) (affirming Washington's alien land law); Porterfield v. Webb, 263 U.S. 225, 233 (1923) (upholding California's alien land law); Webb v. O'Brien, 263 U.S. 313, 322-24 (1923) (affirming California's alien land law); Frick v. Webb, 263 U.S. 326, 333-34 (1923) (affirming California's alien land law).

51. *See generally* Terrace v. Thompson, 263 U.S. 197 (1923).

have not declared in good faith to become U.S. citizens from owning land.[52] A U.S. citizen farmer, Mr. Terrace, wanted to lease land to Mr. Nakatsuka, a Japanese farmer. Mr. Terrace argued that Washington's Alien Land law deprived him of his due process and equal protection right to lease his property to the Japanese farmer.[53] As noted earlier, Japanese were not eligible to naturalize and thus, Mr. Nakatsuka could not have filed a good faith intention to become a U.S. citizen.[54]

The Supreme Court disagreed with Mr. Terrace's argument that he was deprived of equal protection of the law.[55] Although the Court recognized *Yick Wo v. Hopkins*,[56] had held that the Fourteenth Amendment's Equal Protection Clause protects against "arbitrary and capricious or unjustly discriminatory action of the State,"[57] it nevertheless opined that Washington's Alien Land Law was constitutional.[58]

First, the Court held that the Fourteenth Amendment did "not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution."[59] The state, according to the Court, has "wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people."[60] Further, the Court explained that "each state, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders."[61]

Second, the Court emphasized that "[t]he classification is based on eligibility and purpose to naturalize" and that "[t]he state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable."[62] Because the law applied to "[a]ll persons of whatever . . . color or race who have not declared their intention in good faith to become citizens[,]" the law did not violate the Equal Protection Clause.[63] In other words, the Supreme Court in *Terrace v. Thompson* allowed a state to rely on congressional law that denied eligibility for citizenship as the basis for denying Japanese immigrants the ability to own or lease land.[64]

52. *Id.* at 212.
53. *Id.* at 211–12.
54. *Id.* at 219.
55. *Id.* at 220–21.
56. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
57. *Terrace*, 263 U.S. at 216.
58. *Id.* at 224.
59. *Id.* at 217.
60. *Id.*
61. *Id.*
62. *Id.* at 220.
63. *Id.*
64. *See id.* at 197.

Twenty-five years later, a new challenge was brought to California's Alien Land law and, this time, it was partially successful. In *Oyama v. California*, two Japanese Americans, a father who was not eligible for citizenship and his son, a U.S. citizen at birth, challenged the law on equal protection grounds.[65] This time, the U.S. Supreme Court agreed that there was a constitutional violation but its holding was limited only to the U.S. citizen son.[66] Specifically, the majority held that California discriminated against the U.S. citizen son "solely on his parents' country of origin" and the law did not have "the compelling justification . . . [was] needed to sustain discrimination of that nature."[67] As a U.S. citizen, the Court held that the statute created a statutory presumption that the property that had been purchased for him by his father and placed under his name was not a bona fide gift to him at all.[68] By contrast, other U.S. citizens, whose parents were not Japanese nationals, did not have their gifts questioned. As such, the Alien Land law violated the son's rights under the equal protection clause.[69] Having decided the law's application to U.S. citizens, the Court opted not to address the constitutionality of the Alien Land law as applied to the father, who was not eligible for citizenship.[70]

Notably, the Justices who wrote concurring opinions would have struck down California's Alien Land law.[71] Justice Murphy for example pointed out that the law was intended to exclude Japanese from owning and using the land and that the Equal Protection Clause applied to *persons*, which included persons who were not racially eligible for citizenship.[72]

Although *Oyama* did not fully strike down California's Alien Land law, it did lead to the end of the state's enforcement of the law.[73] Just a few months after the Court decided *Oyama*, California voters rejected an initiative that would have amended the law and four years later, California's Supreme Court in *Fuji v. State* struck down the law as unconstitutional.[74] Other states also eventually repealed their alien land laws.[75] Thus, for decades, alien land laws, which relied on racially discriminatory citizenship laws that have since been repealed, have long been deemed unconstitutional.

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65. Oyama v. California, 332 U.S. 633, 635 (1948).

66. *Id.* at 640.

67. *Id.*

68. *Id.* at 646–47.

69. *Id.*

70. *Id.* at 647.

71. *See id.* at 647–50 (Black, J., Douglas, J., Murphy, J., and Rutledge, J., concurring).

72. *Id.* at 647 (Murphy, J., concurring).

73. Namba v. McCourt, 204 P.2d 569, 577 (Or. 1949) (stating that Oyama v. California "in fact, ended the Alien Land Law").

74. Aoki, *supra* note 13, at 64; Fujii v. State, 242 P.2d 617 (Cal. 1952).

75. *See* Fujii v. State, 242 P.2d 617 (Cal. 1952).

III. THE NEW ALIEN LAND LAWS

Having written my article on *Oyama* thirteen years ago now,[76] I had thought that alien land laws were a thing of the past. I was wrong. I now turn to the third and final part of my lecture—a discussion of today's alien land laws. Seventy-five years since *Oyama* and nearly one-hundred years since *Terrace*, Florida passed a new alien land law. On May 28, 2023, Florida's Governor, Governor Ron DeSantis signed S.B. 264 into law. S.B. 264 imposes new restrictions on persons and entities from "foreign [countries] of concern," defined as China, Russia, Iran, North Korea, Cuba, Venezuela and Syria.[77] First, S.B. 264 proscribes "foreign principals" from owning or acquiring agricultural land or real property within ten miles of any "military installation" or "critical infrastructure facility" in Florida.[78] "Foreign principals" include individuals whose domicile is in a "foreign country of concern" and who are not U.S. citizens or lawful permanent residents.[79] An exception is allowed for foreign principals who are "natural person[s]" with a valid non-tourist visa or who have been granted asylum to purchase one residential real property if the property is less than two acres in size and not within five miles of a military installation.[80] Persons who currently own land, as well as new buyers of land who fall within the definition of "foreign principal," would be required to register their property with Florida's Department of Economic Opportunity.[81]

Second, S.B. 264 prohibits the "[p]urchase or acquisition of real property by the People's Republic of China."[82] It also prohibits Chinese political and corporate entities, and "[a]ny person who is domiciled in the People's Republic of China and who is not a citizen or lawful permanent resident of the United States" from purchasing or owning any real property in the State.[83] An exception is also provided for persons with a valid non-tourist visa or those who have been granted asylum.[84] Importantly, the failure to comply with the restrictions and registration requirements may result in civil penalties, including a fine of $1,000 for each day that registration is delayed and forfeiture of any real property owned or acquired in violation of the statute.[85]

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76. *See generally* Villazor, *supra* note 13.

77. S.B. 264, 125th Reg. Sess. (Fla. 2023) (codified as amended at FLA. STAT. § 287.138 (2023)).

78. FLA. STAT. §§ 692.202–692.203(1) (2023).

79. FLA. STAT. § 692.201(4)(a) (2023).

80. FLA. STAT. § 692.203 (2023).

81. *Id.*

82. FLA. STAT. § 692.204 (2023).

83. *Id.*

84. *See id.* § 692.204 (2)(b).

85. *Id.*

In signing the law, Governor DeSantis explained:

> Florida is taking action to stand against the United States' greatest geopolitical threat—the Chinese Communist Party . . . I'm proud to sign this legislation to stop the purchase of our farmland and land near our military bases and critical infrastructure by Chinese agents, to stop sensitive digital data from being stored in China, and to stop CCP influence in our education system from grade school to grad school. We are following through on our commitment to crack down on Communist China.[86]

Given the discriminatory nature of the law, a lawsuit was brought to preliminary enjoin its enforcement: four Chinese individuals residing in Florida and a real estate brokerage that regularly engages in business with Chinese clients filed a motion to preliminarily enjoin the statute.[87] They argued that the law is unconstitutional because it violates the "equal protection and due process guarantees under the U.S. Constitution."[88] The plaintiffs also argued that the law "intrudes on the federal government's power to superintend foreign affairs, foreign investment, and national security; and it recalls the wrongful animus of similar state laws from decades past—laws that were eventually struck down by courts or repealed by legislatures."[89] With respect to their equal protection argument, the Plaintiffs relied on *Oyama v. California* and argued that "[a]s a result of the *Oyama* decision and other developments in equal protection case law, most of the country's Alien Land Laws were repealed or struck down in the 1950s."[90]

As I mentioned earlier, I am part of a team that is supporting the constitutional challenge. In our brief, we argued that the Florida law is unconstitutional.[91] As we wrote, "[r]ace-based alien land laws like Florida's are stains on American history. Since the mid-twentieth century, these laws aimed at curtailing the rights of Asian persons have historically been struck down as invidiously discriminatory."[92] Our goal is to provide

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86. *Governor Ron DeSantis Cracks Down on Communist China*, FLA. GOVERNOR RON DESANTIS (May 8, 2023), https://www.flgov.com/2023/05/08/governor-ron-desantis-cracks-down-on-communist-china/ [https://perma.cc/9KG8-2XT8].

87. CBS Miami, *Federal Judge Refuses to Block Florida's Chinese Land Ownership Law*, CBS NEWS (Aug. 18, 2023, 8:01 AM), https://www.cbsnews.com/miami/news/federal-judge-refuses-to-block-floridas-chinese-land-ownership-law/ [https://perma.cc/8PKM-FA3C].

88. Complaint at 2–3, Shen v. Simpson, No. 4:23-CV-208 (N.D. Fla. Tallahassee Div., May 22, 2023).

89. Complaint at 3, Shen v. Simpson, No. 4:23-CV-208 (N.D. Fla. Tallahassee Div., May 22, 2023).

90. Complaint at 4, Shen v. Simpson, No. 4:23-CV-208 (N.D. Fla. Tallahassee Div., May 22, 2023).

91. Brief of Racial Just. Ctrs., Affinity Bar and Pro. Ass'ns, and Civ. Rts. Advoc. Orgs. in Support of Plaintiffs' Motion for Preliminary Injunction, Shen v. Simpson, No. 4:23-CV-208-AW-MAF (N.D. Fla. Tallahassee Div., Jun. 13, 2023).

92. *Id.* at 4.

historical background and show that first, "alien land laws have a history of promoting discrimination against Asian persons and have been deemed unconstitutional for well over seventy-five years," and second, "Florida's Law repeats history by scapegoating and discriminating against Asian persons under the guise of national security."[93]

The United States also submitted an amicus brief contending similar equal protection arguments as well as stating that the alien land law violates the Fair Housing Act.[94] The state countered that SB 264 is not unconstitutional, primarily relying on *Terrace v. Thompson*, which it said the plaintiffs and amici ignored.[95] Indeed, the state disagreed with the argument that "developments in equal protection law" and that even if that were true, the district court was obligated "to follow Supreme Court precedent that 'has direct application in a case,' and leave to [the Supreme Court] 'the prerogative of overruling its own decisions,' regardless of whether 'precedent is in tension with some other line of decisions.'"[96]

Other states filed an amicus brief in support of Florida, including Idaho, Arkansas, Georgia, Indiana, Mississippi, Missouri, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, and Utah.[97] They contended that,

> The people of Florida have determined that some of their most important land resources should be safeguarded from foreign principals of countries that have demonstrated hostility to their health and welfare. In so doing, they have acted well within their power. Real property law has always been the domain of states. And it is unexceptional that the people of a state get to decide how the land within their state is going to be used. Florida's limitations on unfriendly foreign governments and their actors are not unconstitutional or otherwise unlawful. They are a standard way that states have long protected their citizens.[98]

As if the decades-old cases of *Oyama* and subsequent equal protection cases did not exist, on August 17, 2023, the district court denied

93. *Id.*

94. Statement of Int. of the U.S. in Support of Plaintiffs' Motion for Preliminary Injunction, Shen v. Simpson, No. 4:23-CV-208-AW-MAF (N.D. Fla. Tallahassee Div., Aug. 17, 2023).

95. Defendants' Corrected Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, Shen v. Simpson, No. 4:23-CV-208-AW-MAF, 2023 WL 5517253 (N.D. Fla. Aug. 17, 2023).

96. *Id* at 16–17.

97. Brief of Amici Curiae Idaho et al. in Opposition to Plaintiffs' Motion for Preliminary Injunction, No. 4:23-cv-208-AW-MAF (N.D. Fla. Aug. 17, 2023).

98. Brief of Amici Curiae Idaho, Ark., Ga., Ind., Miss., Mo., Mont., N.H., N.D., S.C., S.D., and Utah in Opposition to Plaintiffs' Motion for Preliminary Injunction at 1, Shen v. Simpson, No. 4:23-CV-208-AW-MAF (N.D. Fla. Tallahassee Div., Jul. 7, 2023).

the motion for preliminary injunction.[99] The court held that the law "does not discriminate against noncitizens based on 'the particular country in which one was born.'"[100] Instead, the court found that the challenged law is "facially neutral as to race and national origin. It would apply to a person of Chinese descent domiciled in China the same way it would apply to a person not of Chinese descent domiciled in China. And its application would never turn on a person's race."[101]

The court did recognize that SB 264 "facially classify by alienage" but then noted that "the question is whether the alienage classification warrants strict scrutiny."[102] Crucially, the court held that "[b]inding Supreme Court precedent controls this issue. Relying on *Terrace v. Thompson*, the court ruled that the Fourteenth Amendment did not divest states of the 'power to deny to aliens the right to own land within [their] borders.'"[103]

Disappointingly, the court further explained that "[t]he law challenged here is entitled to like deference. Like the statutes at issue in the *Terrace* cases, Florida enacted the challenged law under states' long-recognized 'power to deny to aliens the right to own land within [their] borders.'"[104]

CONCLUSION

As Florida's SB 264 demonstrates, we are once again facing discriminatory alien land laws. When I published my article in 2010 about the *Oyama* case and California's alien land laws, I believed that we had moved past that part of our racial history.[105] It turns out I was mistaken as states like Florida and others today have decided to bring those laws back.

Richard Rothstein encouraged us in *The Color of Law* to recognize our historical past. We must do so today as well in looking at these states like Florida in the newly passed alien land laws. Florida's alien land law, as we wrote in our amicus brief, "is a law that under the pretext of national security will invite another era of anti-Asian sentiment and result in discrimination against all Asian persons."[106]

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99. Order Denying Preliminary Injuction Motion, Shen v. Simpson, No. 4:23-CV-208-AW-MAF, 2023 WL 5517253 (N.D. Fla. Aug. 17, 2023).

100. Order Denying Preliminary Injunction at 18, Shen v. Simpson, No. 4:23-CV-208-AW-MAF (N.D. Fla. Tallahassee Div., August 17, 2023).

101. *Id.*

102. *Id.* at 19.

103. *Id.*

104. *Id.* at 21.

105. *See generally* Villazor, *supra* note 13.

106. Brief of Racial Just. Ctrs., Affinity Bar and Pro. Ass'ns, and Civ. Rts. Advoc. Orgs. in Support of Plaintiffs' Motion for Preliminary Injunction at 16, Shen v. Simpson, No. 4:23-CV-208-AW-MAF (N.D. Fla. Tallahassee Div., Jun. 13, 2023). A few months after I delivered

this lecture, the U.S. Court of Appeals for the Eleventh Circuit reversed the district court and issued a ruling enjoining the enforcement of SB 264. *See* Yifan Shen v. Commissioner, No. 23-12737, 2024 U.S. App. LEXIS 2346, at *3 (11th Cir. Feb. 2, 2024) (holding that the plaintiffs "have shown a substantial likelihood of success on their claim that" the SB 264 is preempted by federal law). Judge Abudu, in a concurring opinion, wrote that the plaintiffs have also shown a substantial likelihood of success that SB 264 violates the Equal Protection Clause. *Id.* at *5 (Abudu, J., concurring).