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REDEEMING WHITENESS IN THE SHADOW OF INTERNMENT: EARL WARREN, *BROWN*, AND A THEORY OF RACIAL REDEMPTION†

SUMI CHO*

INTRODUCTION

Earl Warren is a civil rights/civil liberties icon. During his reign as Chief Justice of the U.S. Supreme Court from 1953–69, the Court set standards of liberal judicial activism on race issues by which future Courts would be judged. Chief Justice Warren presided over momentous decisions that outlawed segregation in public education¹ and

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¹ See *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954) (declaring separate-but-equal public education to be unconstitutional). *Brown I* is the most famous of such cases, in which Warren played a pivotal role in forging a unanimous 9–0 vote by catering to his southern brethren on the bench who were reluctant to “embarrass” the South. See RICHARD KLUGER, *SIMPLE JUSTICE* 657–99 (1975) [hereinafter KLUGER]. For examples of other significant civil rights cases in which the Warren Court presided, see *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968) (disallowing a “freedom of choice” desegregation plan designed to forestall or subvert integration); *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964) (holding that public school closure in Prince Edward County, Virginia amounted to a denial of equal

public facilities,² invalidated Jim Crow laws designed to prevent African Americans from exercising the vote³ and found anti-miscegenation laws to be unconstitutional.⁴ President Eisenhower came to regret his wayward Republican appointment,⁵ and “Superchief” Warren’s legacy certainly rivals those of Eisenhower and the other presidents of his era. Warren’s tenure, perhaps the most significant since John Marshall’s, is understood in overtly political terms as a “revolution in race relations.”⁶

protection); *Goss v. Board of Educ.*, 373 U.S. 683 (1963) (striking a desegregation plan permitting students to transfer to schools in which their race would be a majority as a pretext for maintaining segregation); *Cooper v. Aaron*, 358 U.S. 1 (1958) (announcing that the Supremacy Clause of the Constitution mandates that state officials desegregate public schools); *Board of Trustees of Univ. of N.C. v. Frasier*, 350 U.S. 979 (1956) (per curiam) (affirming lower court injunction to restrain the University of North Carolina from barring admission to undergraduate students because of race); *Lucy v. Adams*, 350 U.S. 1 (1955) (per curiam) (reinstating injunction that enjoined and restrained officials at University of Alabama from preventing Autherine Lucy from enrolling); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (reading an inherent equal protection clause into the 5th Amendment to declare segregated schools in the District of Columbia as violative of the Constitution). See generally ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* 117–28 (1995) [hereinafter DAVIS & GRAHAM].

² See *Watson v. City of Memphis*, 373 U.S. 526 (1963) (declaring as void, city ordinances prohibiting integrated use of public parks and recreational facilities); *Wright v. Georgia*, 373 U.S. 284 (1963) (reversing breach of peace convictions of six Blacks for playing basketball in a segregated park in Savannah, Georgia, and not dispersing upon orders of local police); *Boydton v. Virginia*, 364 U.S. 454 (1960) (holding that the Interstate Commerce Act prohibited a bus terminal restaurant from refusing service to a Black customer); *Gayle v. Browder*, 352 U.S. 903 (1956) (striking state statutes and local ordinances requiring segregated motor buses under the Fourteenth Amendment); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (striking segregated municipal golf courses as unconstitutional); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (striking city-maintained segregated public beaches as violative of the Fourteenth Amendment). See generally DAVIS & GRAHAM, *supra* note 1, at 138–46.

³ See *Gaston County v. United States*, 395 U.S. 285 (1969) (prohibiting reinstatement of state literacy test under Voting Rights Act of 1965); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (voiding New York election law of English-language reading and writing requirement under Section 4(e) of the Voting Rights Act of 1965); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating state poll taxes as a requirement for voting in state elections); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the Voting Rights Act of 1965 as constitutional under Section 2 of the Fifteenth Amendment); *Louisiana v. United States*, 380 U.S. 145 (1965) (declaring as unconstitutional state “interpretation tests” that required prospective voters to interpret a section of the state or federal constitution to the satisfaction of the registrar of voters); *Tancil v. Woolls*, 379 U.S. 19 (1964) (striking Virginia statutes mandating the maintenance of racial lists of voters and residency certificates); *Anderson v. Martin*, 375 U.S. 399 (1964) (voiding Louisiana law requiring the race of candidates on ballots); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that racial gerrymandering is unconstitutional). See generally DAVIS & GRAHAM, *supra* note 1, at 131–38.

⁴ See *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia statute prohibiting mixed-race marriages).

⁵ See ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 337 (1997) (recording Eisenhower’s comment characterizing his appointment of Warren as Chief Justice as “the biggest damn fool thing I ever did”).

⁶ MORTON HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 3 (1998).

Despite this iconography, there is another less-detailed aspect of Warren's career that looms large in a critical understanding of the Warren Court's race jurisprudence. This aspect predates his work on the Supreme Court, going back to World War II ("WWII") when Warren was Attorney General of California and a gubernatorial candidate in the 1942 elections. During this period, Warren counted himself among California's anti-Asian "native sons and daughters."⁷ In fact, Warren was a key actor in the anti-Asian movement that culminated in the 1942 internment of over 120,000 persons of Japanese ancestry, two-thirds of whom were United States citizens.⁸

This Article details Warren's prominent leadership role in advocating for the internment and the repression of that role by Warren scholars. Further, it contemplates the theoretical significance of this self-imposed historical amnesia and revisionism for civil rights jurisprudence. Part I reviews how representative samples of secondary literature have dealt with Earl Warren's World War II years in California. Part II examines the historical record, focusing on how Warren's political career intersected with the internment of Japanese Americans. Using archival materials and other sources, Part II concentrates on the following areas: 1) Warren's actions as California Attorney General in response to the bombing of Pearl Harbor; 2) the campaign rhetoric and strategy used during his successful bid for Governor in 1942 and 3) his continued activism against Japanese Californians⁹ while Governor.

Part III forwards a "racial redemption" theory to frame this history. I define "racial redemption" as a psycho-social and ideological process through which whiteness maintains its fullest reputational value. In the post-Jim Crow era, the reputational value of whiteness—diminished to the extent it remains implicated in the previous era's blatant racism—is restored by rejecting traditional white racism premised upon biological determinism. I suggest that racial redemption consists of three operations: 1) repudiating white supremacy's "old" regime; 2) burying historical memories of racial subordination and 3) transforming white supremacy into a viable contemporary regime. Part III views Warren's historical legacy and the role of the postwar judiciary through the lens of racial redemption theory, rejecting the uncomplicated heroization of Warren and adopting a more critical

⁷ See *infra* Part II.B.2.b.

⁸ See *infra* Part II.

⁹ I use this term to refer to both immigrants and American citizens of Japanese ancestry living in California at the time. By World War II, approximately two-thirds of the Japanese Californians were citizens. See *infra* note 95 for a fuller explanation of this terminology.

understanding of possible motivations and meanings of his civil rights activism. Let me emphasize: I am not arguing that “but for” Warren’s individual need for redemption from the shame of internment there would have been no Warren Court as we know it. Rather, I contend that the theory of racial redemption provides a potent multi-level narrative which converges Warren’s individual need for redemption, the judiciary’s more structurally functional move to redeem itself from overt forms of white supremacist adjudication and society’s redemption of whiteness in the post-Jim Crow era of race relations.

Part IV concludes by placing redemption theory precisely within this broader picture of postwar racial formation, as part of a pivotal “racial project.”¹⁰ Warren’s individual quest, the judiciary’s institutional move to purge its racially complicit past and society’s assertion of an innocent postwar colorblindness, are parts of a politic of *representation* that underwrites new *structures* of contemporary (colorblind) racial domination. As such, the processes of racial redemption are important animators of now dominant prejudice-based, intentionality-driven approaches to antidiscrimination law and attendant colorblind, individualistic ideologies. In short, many regressive legal racial projects of the recent past are unimaginable absent the racial project to redeem whiteness.

I do not suggest that Warren intentionally meant to contribute to this or any particular racial project (except internment). Rather, I believe that his equivocations regarding his (and society’s) racial past became central to the conditions that permitted the later retrenchment of (reformulated) white supremacy. Nonetheless, one could take this argument a step further and say that Warren himself—directly through his biographers and indirectly through neoconservative and neoliberal mythological invocations of *Brown*—is now but an *effect* of the racial project of redemption that is the dominant lens through which the man and the era are understood.

¹⁰ See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990s 55–56 (2d ed. 1994) (defining racial formation as the socio-historical process by which racial categories are created, inhabited, transformed and destroyed). Omi and Winant define a racial project as “simultaneously an interpretation, representation, or explanation of racial dynamics” combined with a “redistribution of resources along particular racial lines.” *Id.* at 56. For a more in-depth discussion of these concepts, see discussion *infra* Part IV.A.

I. TOWARD CRITICAL RACE JUDICIAL BIOGRAPHY AND LEGAL HISTORY

Secondary sources pertaining to Earl Warren's role in internment include both historical works on internment and judicial biographies of the Chief Justice. Both genres consistently downplay Warren's internment-related activities by employing methods that impede critical race understandings of this historical actor. Before detailing my research on Warren's role in internment, I will review briefly the limitations of the secondary literature that condition both academe's and the general public's understanding of Earl Warren.

A. *Warren and Judicial Biographers—A Fraternity of Admirers?*

Judicial biographies are often "admiring," in part because they are selected or "contracted," by the subject or the subject's family.¹¹ As one scholar has observed, judicial biographies tend to read like "Lives of the Saints"—that is, "respectful, conservative, uncritical and oriented toward explicating the Great Man's Thought . . ."¹² Because a biographer seeks, or already has, close ties to his subject, there may be explicit or subtle pressures for the biographer to self-censor his content in exchange for access to, or approval from, his subject.¹³ Personal or political gain may also be at stake.¹⁴ Indeed, some of the most respected judicial biographies were written by former clerks of the Justices being profiled.¹⁵ While such intimacy with one's subject may afford greater

¹¹ See Gerald Gunther, "Contracted" *Biographies and Other Obstacles to "Truth,"* 70 N.Y.U. L. REV. 697 (1995) (sketching the pitfalls of "contracted" biographies in which biographers are selected by the subject or subject's family, potentially compromising one's "objectivity"). See generally Morton Horwitz, *Commentary*, 70 N.Y.U. L. REV. 714 (1995) (raising the question of whether "admiring biographers" are able to "reveal the warts" of the subject).

¹² Dennis J. Hutchinson, *Judicial Biography: Amicus Curiae*, 70 N.Y.U. L. REV. 723, 724 (1995).

¹³ See *infra* notes 272-77 and accompanying text (discussing Warren's exchange with biographer John D. Weaver).

¹⁴ Scholars have pointed out how political objectives may be pursued through the crafting of biography. See Sarah Barringer Gordon, *Commentary: The Creation of a Usable Judicial Past: Max Lerner, Class Conflict, and the Propagation of Judicial Titans*, 70 N.Y.U. L. REV. 622, 629 (1995) (commenting on Max Lerner's work on Holmes and Brandeis as part of a "self-consciously ambitious and aggressive effort to redefine and redirect American law and politics"); G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576 (1995) (explaining the canonization of Holmes and Brandeis as the biographers' need to endorse "epistemological modernism" and progressive political perspectives).

¹⁵ See, e.g., JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL: A BIOGRAPHY* (1994) (Jeffries clerked for Justice Powell in 1973-74); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* (1982) (White clerked for Chief Justice Warren in 1971-72); MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-61* (1994) (Tushnet clerked for Justice Marshall in 1972-73).

access to confidential documents, it raises the question of perspective. For example, former clerks may be more likely to have a positive view of their subjects and to have an affinity for the institution of the judiciary as a whole, on account of their personal membership in the elite fraternity of Supreme Court clerks.¹⁶

Biographies of Earl Warren, which are often admiring portraits, have no doubt contributed to the repression of Warren's role in internment. Even the most respected biographies on Warren minimize this aspect of his life.¹⁷ Warren biographers employ three common strategies that blunt otherwise careful scholarship and candid assessments of Warren's wartime activities.

The first strategy, similar to the "Nuremberg defense," acknowledges participation in wartime injustices while downplaying individual agency by suggesting that the subject's decisionmaking process was subordinated to a greater authority. For example, Professor G. Edward White correctly acknowledges Warren's leadership in fomenting hysteria against Japanese Americans, admitting that Warren "engineered one of the most conspicuously racist and repressive governmental acts in American history."¹⁸ Given this historical legacy, it would appear difficult to lessen the significance of such a pivotal event. Immediately following this unflinching assessment, however, White suggests a mitigating context in which Warren "was by no means alone in his efforts or attitudes":

Congress immediately approved Roosevelt's executive order authorizing the evacuation and internment of Japanese and provided criminal penalties for violations of military directives under order. The United States Supreme Court twice sustained constitutional challenges to the relocation program. Among those who defended the program and its constitutionality were Walter Lippmann, Harlan Fiske Stone, Fe-

¹⁶ This demographic homogeneity among the fraternity of former judicial clerks *cum* judicial biographers may further narrow the range of critical interpretations. Recent statistics on the hiring record of Supreme Court clerks reveal that this "fraternity" is not at all diverse along the lines of race or gender. See Tony Mauro, *Only 1 New High Court Clerk Is A Minority*, USA TODAY, Sept. 10, 1998, at 9A (revealing that only one of 34 total Supreme Court law clerks for the coming year is a person of color); Tony Mauro & Aaron Davis, *Clerks Mostly White Men*, USA TODAY, Sept. 10, 1998, at 9A (sidebar) (concluding that out of the 428 law clerks selected by the sitting nine justices, 75% have been men and the vast majority—93%—have been white).

¹⁷ One of the most respected works by a legal scholar was written by one of Warren's former law clerks and University of Virginia law professor G. Edward White. See *supra* note 15. The recent effort by journalist Ed Cray has also received considerable praise and attention. See *generally* CRAY, *supra* note 5.

¹⁸ WHITE, *supra* note 15, at 75.

lix Frankfurter, William O. Douglas, and Hugo Black. Not a single California political leader opposed the decision to evacuate¹⁹

Inexplicably, White does not consider Warren's role in influencing the President, Congress, the Supreme Court, journalists and other politicians. Similarly, Ed Cray's recent biography characterizes Warren as "one of many calling for evacuation,"²⁰ and hardly the most strident.²¹ Moreover, "the clamor for [internment] of all persons of Japanese descent was irresistible."²² In Cray's view, Warren was just another actor capitulating to an irresistible impulse from above.

The second blunting strategy deploys a critique of "presentism"²³ and calls for historical contextualization of behavior a later era condemns as oppressive. In the field of history, a guiding canon is to judge one's subject in the context of his time, by "recreat[ing] the world as it looked to those who lived it,"²⁴ and evaluating historical figures within their era's social, moral and political norms. To do otherwise is presentist—illegitimately assessing historical figures based upon con-

¹⁹ *Id.*; see also BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 15–16 (1983) (pointing out that "if Warren advocated the removal of the Japanese, he was hardly alone. . . . Virtually every politician, labor leader, and newspaper . . . supported the evacuation.").

²⁰ "Evacuation" (like the term "relocation") is a common euphemism for internment. See Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* xxviii (1982) [hereinafter CWRIC] (explaining how the term "evacuee," referring to one who is "removed from his house or community, in a time of war or pressing danger as a protective measure" is a euphemism "[i]n light of the Commission's conclusion that removal was not a military necessity").

²¹ CRAY, *supra* note 5, at 123.

²² *Id.* at 122.

²³ "Presentism" refers to a critical posture that erases the historical contingency of a practice based on a logic that is tested only by contemporary observations. See JUDITH BUTLER, *BODIES THAT MATTER* 223–28 (1993) (describing as "presentist" the conceit of autonomy that one arrives in the world without history and absent power relations, thereby enabling one to reclaim or resignify temporal meanings by virtue of individual will or choice).

²⁴ Laura Kalman, *Commentary: The Wonder of the Warren Court*, 70 N.Y.U. L. REV. 780, 781 (1995); see also John T. Noonan, Jr., *Commentary: The Secular Search for the Sacred*, 70 N.Y.U. L. REV. 642, 643–44 (1995) (observing that a biographer who lives in a different generation from his subject "can assure his complete dominance over the case by showing how the judge's values have become out-of-date" and proclaiming that it "takes a generosity of spirit to see the case as the judge saw it"). But see, e.g., PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 145 (1996) (criticizing "anti-presentist" historians of Thomas Jefferson for their "willingness to distort the historical record to protect Jefferson as a symbol for the modern era"); PETER NOVICK, *THAT NOBLE DREAM* 436 (1988) (describing the political nature of the critique of presentism). Novick explained: "Terms with positive valence ('disinterested,' 'evenhanded') were claimed for one's own camp; those with negative connotations ('present-minded,' 'partisan') were ascribed to one's enemies." NOVICK, *supra*, at 436.

temporary values and goals.²⁵ In Warren biographies, authors contextualize and normalize his anti-Japanese agenda by socio-historically referencing norms of the era that relieve him of individual guilt.²⁶ Bernard Schwartz, for example, acknowledges that by today's standards, Warren's wartime statements were "indefensible."²⁷ Ironically, the biographer then goes on to cite Carey McWilliams²⁸ to explain how Warren "was entrapped to a certain extent by . . . a kind of political environment out of which he came in California."²⁹ "Then, too," Schwartz urges, "we should not forget the situation on the West Coast at the beginning of 1942," noting that Supreme Court Justice Tom C. Clark, then a lawyer in the Department of Justice, asserted that "*you have to live it to understand the feeling Californians had about the people of Japanese descent after Pearl Harbor.*"³⁰

This hermeneutic approach indulges a form of cultural determinism that discounts the role of individual agency and, thus, accountability for the egregious acts of powerful and privileged actors. Such an approach resembles what Robert Cover referred to as the retreat into legal formalism adopted by judges deciding fugitive slave cases.³¹ In both instances, political and moral abdication is rationalized through the methodological dictates of disciplinary and professional power/knowledge practices. For legal historiography, the result is that

²⁵ For a discussion of the alleged problem of presentism within the field of historical biography generally and one author's critique of that problematization, see FINKELMAN, *supra* note 24, at 145.

²⁶ See, e.g., LUTHER A. HUSTON, *PATHWAY TO JUDGMENT: A STUDY OF EARL WARREN* 59 (1966). As Huston comments:

Distrust of the Japanese was ingrained in Warren, as in thousands of other Californians. In 1919 the California Joint Immigration Committee was formed to agitate against the "Yellow Peril," and Warren was a member of two organizations, the Native Sons of the Golden West and the American Legion, which sponsored the Committee. *It was perhaps only natural, therefore,* that when the United States and Japan went to war against each other, Warren became convinced that the Japanese residents of California, whether the native-born Nisei or elderly Japanese born in their native land, were the greatest potential source of sabotage.

Id. (emphasis added).

²⁷ SCHWARTZ, *supra* note 19, at 15.

²⁸ A contemporary of Earl Warren's, Carey McWilliams was one of the few California politicians to condemn internment. Thus, Schwartz' deployment of McWilliams' quote is effective in serving the larger anti-presentist formulation of Warren and insulating himself from the Finkelman-like critiques of the anti-presentist movement. See *supra* note 27 and accompanying text.

²⁹ SCHWARTZ, *supra* note 19, at 15 (citations omitted).

³⁰ *Id.* (emphasis added).

³¹ For the critique of legal formalism in fugitive slave cases, see ROBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* 232-38 (1975) (describing how anti-slavery judges rendering pro-slavery decisions sought to reduce their cognitive dissonance by externalizing their personal responsibility to the "inexorable march of precedent").

“eras” and their “norms” are essentialized as synonymous with the historian’s image of majority culture, rather than understood as fluid and contingent constructs, and subject to contestation. Such anti-presentist approaches cannot, however, explain why other prominent figures, such as Socialist McWilliams and ACLU representative Wayne Collins, actively opposed internment.³² Indeed, by insisting that the reigning societal mores and values of a subject’s era should be taken into account, historians may tend to elide equally constitutive perspectives of societal “out-groups.”³³ A critical race historiography, to the contrary, would ensure that the context of the majority does not trump the context of the minority through the allegedly context-sensitive, anti-presentist critique.

The third blunting strategy posits Warren’s “march toward enlightenment.” This approach interprets past participation in injustice as the bridge to a more evolved awareness. For example, according to even critical biographers, Warren’s unfortunate involvement with internment had a silver lining of consciousness-raising regarding racial justice.³⁴ By pointing out weaknesses in their subject, these biographers are able to appear objective while doing no harm to the reputation of their subject, instead underlining his capacity for growth, change and progress.

As one illustration, upon Warren’s death on July 9, 1974, Carey McWilliams, his Socialist critic and longtime friend, provided a tribute in *The Nation* magazine entitled, *The Education of Earl Warren*. McWilliams began by bluntly reminding the audience that there was “no hint of greatness in the first phase of [Warren’s] career.”³⁵ According to the

³² For McWilliams’ position on the internment, see generally CAREY MCWILLIAMS, *PREJUDICE; JAPANESE AMERICANS: SYMBOL OF RACIAL INTOLERANCE* (1944) [hereinafter MCWILLIAMS, *PREJUDICE*]. For Wayne Collins’ resistance through the courts, see ROGER DANIELS, *CONCENTRATION CAMPS: NORTH AMERICA, JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II* 166 (1971, rev. 1981, updated 1989) [hereinafter DANIELS, *CAMPS*]; PETER IRONS, *JUSTICE AT WAR* (1983); MICHIE WEGLYN, *YEARS OF INFAMY* 64–66, 215–16, 267–68 (1976) (dedicating book to Wayne Collins, “who did more to correct a democracy’s mistake than any other person”).

³³ Historian and legal scholar Anthony R. Miles highlights two negative effects of the anti-presentist move to normalize regressive actions as historically contextualized:

- 1) by treating the subject’s view as generally shared, it narrows our understanding of the full intellectual context in which the decision took place . . . and 2) it suggests the context itself is unimportant, thus devaluing the experiences of those whose lives and history it impacted most heavily and the roles of those whose beliefs/actions/omissions opposed those of the subject.

Letter from Anthony R. Miles, Editor-in-Chief, *Michigan Journal of Race and Law*, to Sumi Cho 2 (Feb. 1, 1999) (on file with the Boston College Law Review).

³⁴ See, e.g., *infra* notes 35–41 and accompanying text. See also HORWITZ, *supra* note 6, at 24.

³⁵ Carey McWilliams, *The Education of Earl Warren*, *NATION*, at 67 (Oct. 12, 1974).

author, he was “perhaps the most influential advocate for mass evacuation of all persons of Japanese descent.”³⁶ The article concluded, however, by observing the “truth about Warren”—that “he grew prodigiously.”³⁷ Noting that Warren eventually discarded the outlook that led him to join the Native Sons of the Golden West, McWilliams closes by paying homage to “a most remarkable American politician who grew to greatness.”³⁸

McWilliams’ tribute made Warren a symbol of the nation’s psyche and character. Like many Americans prior to the civil rights movement in the 1950s and 1960s, Earl Warren displayed bigoted views and held crude prejudices against people of color. Yet, to McWilliams, his greatness lay in his education and enlightenment: “Warren’s career thus stands as a monument to the proposition that politicians have been known to grow in moral insight and social understanding to the point where they will respond . . . to the challenge of new issues and changing times.”³⁹

What better personification of the American spirit and postwar egalitarianism than the Chief Justice, whose first case upon appointment to the bench was *Brown v. Board of Education*? Warren, the nativist politician, was the perfect foil for Warren, the enlightened Chief Justice. This juxtaposition of the two Warrens is the dominant way biographers and historians, sympathetic to Warren, portray the Chief’s California days, if the period is seriously examined at all. Warren is everyman—reflective of the best and worst that America can produce.

While I am not denying the possibility or importance of a subject’s moral, intellectual or political development, I do take issue with the “moral pass” or “clean slate” granted to subjects who engage in regressive actions as long as “progress” in another, implicitly more important realm can be claimed as an outgrowth of the original wrong. Such a rationalizing approach works to make certain categories of problematic behavior invisible. More importantly, for the purposes of this Article, a “march to enlightenment” approach obscures the broader political context of racially redemptive action insofar as it recognizes only personal enlightenment determinants of action rather than larger racial project imperatives.

At the conclusion of his work, Professor White contrasts Warren’s “racial prejudices against Orientals” with his authorship of *Brown v.*

³⁶ *Id.* at 68.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

Board of Education.⁴⁰ To White, Warren's "discovery" of the importance of civil rights and civil liberties in postwar America was emblematic of the journey of many other Americans who rethought their racial attitudes in the late forties and fifties. Warren's transformation from an anti-Asian Native Son of the Golden West to a liberal icon for racial equality "was a testament to the ideological adjustments required of those who believed that twentieth-century American society should be marked by continuous progress."⁴¹ In other words, internment was again but a necessary learning experience that would inform Warren's more enlightened days on the bench. This modernist, bildungsroman-like narrative of moral growth toward greatness is possible *because*, not in spite of, Warren's advocacy of internment.

The Nuremberg defense, the anti-presentist approach and the march to enlightenment are the three dominant lenses through which judicial biographers construe Earl Warren's involvement with internment. As a result, his wartime civil rights/civil liberties record has been distorted and obscured. By obscuring the past, judicial biographers frustrate the emergence of new understandings of the Warren Court vis-à-vis postwar race relations and equality jurisprudence. In this sense, these three methods may actually reflect *contemporary* racial projects within academe. As historian John Hope Franklin commented, the study of Reconstruction "can provide a fairly clear notion of the problems confronting the periods in which the historians lived but not always as clear a picture of Reconstruction itself."⁴² Similarly, the existing judicial biographies of Warren's World War II involvement with Japanese Californians may—ironically for anti-presentists—tell us more about the political and social tenor of the biographer's life and times than about the subject's relationship to Japanese Californians.

B. *Internment Historians: The Forgiving Canon of Causation*

Many of the earliest historical works on internment grapple with the issue of causation but pay little attention to the role of California's then-Attorney General.⁴³ One early effort by a team of scholars from the University of California at Berkeley attempted to reconstruct the

⁴⁰ WHITE, *supra* note 15, at 368.

⁴¹ *Id.* at 368–69.

⁴² John Hope Franklin, *Mirror for Americans: A Century of Reconstruction History*, in RACE AND HISTORY: SELECTED ESSAYS, 1938–1988, at 384, 397 (1989).

⁴³ See generally DANIELS, CAMPS, *supra* note 32, at 71; MORTON GRODZINS, AMERICANS BETRAYED: POLITICS AND JAPANESE EVACUATION (1949); JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 200–01 (1954).

causes of internment in the Japanese American Evacuation and Resettlement Study ("JAERS").⁴⁴ One part of this team, led by Jacobus tenBroek, was ahead of its time in rejecting the "myth of military necessity" as a rationale for internment.⁴⁵ Nevertheless, the group adopted a rather extreme proximate causation requirement to assess Warren's responsibility for internment.⁴⁶ According to this approach, Warren should not be held accountable for internment absent conclusive proof that he had publicly advocated internment prior to the issuance of Executive Order ("E.O.") 9066, the internment order issued by President Roosevelt on February 19, 1942:

California's Attorney General in 1942, Earl Warren, has been charged by several writers with great if not crucial influence in promoting evacuation. However, an examination of the evidence fails to sustain the many allegations against him; and in particular there remains no proof that Warren ever publicly declared himself in favor of mass evacuation prior to mid-February.⁴⁷

There are at least two problems with this narrow definition of accountability. First, the Berkeley team uses February 19, 1942 (the date President Roosevelt signed the executive order) as its reference point for accountability. Elsewhere, however, they conclude that the Supreme Court was perhaps most to blame for internment because it failed to strike the executive orders as unconstitutional in *Hirabayashi*⁴⁸ and *Korematsu*.⁴⁹ Had the Court done so, the scholars surmise, "the Japanese American episode would have lived in history as nothing worse than a military blunder."⁵⁰ But if the apportioning of blame for

⁴⁴ JAERS is perhaps patterned after the extensive (in both time and resources) Carnegie Foundation-funded study of Gunnar Myrdal's *An American Dilemma*. See *infra* note 252. JAERS began its work in February of 1942 and worked through July of 1948, with substantial funding from the University of California (approximately \$36,000), the Rockefeller Foundation (\$39,000) and the Columbia Foundation (\$30,000). See TENBROEK, *supra* note 43, at ix.

⁴⁵ See TENBROEK, *supra* note 43, at 327 (concluding that even without hindsight, the "weakness of the case for military necessity was spotlighted rather than concealed by General DeWitt's Final Report, which is a flimsy tissue of misstatements, preposterous absurdities, patently fallacious reasoning, unacknowledged quotations . . .").

⁴⁶ Critics of the tenBroek effort, such as historian Roger Daniels, would later note that the tenBroek team did not include a professional historian among its scholars. DANIELS, CAMPS, *supra* note 32, at 71.

⁴⁷ TENBROEK, *supra* note 43, at 200 (citations omitted).

⁴⁸ *Hirabayashi v. United States*, 320 U.S. 81 (1943) (rejecting challenge to military curfew violation in deference to wartime national security decisionmaking).

⁴⁹ *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding Civilian Exclusion Order #34 as constitutional due to "military necessity").

⁵⁰ TENBROEK, *supra* note 43, at 332.

internment extends to the Supreme Court for its decisions in *Hirabayashi* and *Korematsu*, then certainly the time frame for evaluating Warren's responsibility should be extended to, at the least, the date of the *Hirabayashi* decision in 1943.⁵¹ If this date is used, Warren's responsibility for the internment is enhanced.⁵²

In addition to the narrow timeline problem, the JAERS failed to consider overlap between the societal and governmental units it assesses to determine responsibility. That is, it does not consider that an actor from one unit may have influenced the attitudes and actions of actors in other units. The historical evidence will reveal that Warren was both informing, and informed by, other segments of society, the polity, the military and the judiciary.⁵³

I should make clear that my goal is not to prove that Warren was a leading cause of internment. I will detail Warren's internment past not so much to "expose" it and force a revision of the causal theories of internment, but to reflect upon why this past is downplayed significantly in judicial biography and historiography and what this obscured past means for understanding contemporary racial and constitutional jurisprudence. I suggest one reason that Warren's individual record in this episode is finessed is to defend his activist Court against regressive political and academic forces advocating judicial restraint and a return to the previous era's worship of process theory.⁵⁴ The use

⁵¹ See discussion *infra* Part II.

⁵² See discussion *infra* Part II.

⁵³ See discussion *infra* Part II.A.

⁵⁴ In a recent book review of Morton Horwitz' *The Warren Court and the Pursuit of Justice*, R.B. Bernstein characterizes G. Edward White, Bernard Schwartz and Ed Cray as "admiring biographers" who have attempted to "stem the tide of denigration" aimed at Warren and the Warren Court by "right-wing politicians and legal scholars." R.B. Bernstein, *Raise High the Faded Banner*, H-Net Book Review, H-Law@h-net.msu.edu (Oct. 1998). Among these conservative scholars, Bernstein counts Raoul Berger, Earl M. Maltz, Christopher Wolfe, Philip Kurland, and Alexander Bickel for their attacks on the Warren Court's judicial activism. See *id.*

For a concise description of the conflict between legal process theorists and the Warren Court, see Stephen M. Feldman, *From Modernism to Postmodernism in American Legal Thought: The Significance of the Warren Court*, in *THE WARREN COURT: A RETROSPECTIVE* 324, 340-48 (Bernard Schwartz ed., 1996) [hereinafter *THE WARREN COURT*]. For a review of legal process theory, see Akhil Reed Amar, *Law Story: Hart and Wechsler's The Federal Courts and the Federal System*, 102 HARV. L. REV. 688, 691-92 (1989) (identifying works in 1953 and 1954 as constituting the "golden age" of legal process scholarship); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 619-29 (1991) (describing the legal process school as emphasizing that "the process by which judges reach decisions distinguishes adjudication from other decisionmaking and is the source of its legitimacy"). Some key works in this genre include Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (addressing the adjudication process); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (discussing the ability and right of Congress to regulate issues of jurisdiction within the federal courts and its tension with constitutional government); Herbert Wechsler, *Toward Neutral*

of biographical interventionism, however, also underwrites the problematic liberal “triumphalism” that sees the Warren Court as the final chapter in the civil rights struggle.⁵⁵

II. THE OTHER WARREN: CALIFORNIA’S NATIVE SON

Morton Horwitz observes that of the Warren Court’s seven liberal members, “six grew up in extremely poor families.”⁵⁶ This, he suggests, might explain why the liberal band of “outsiders” had a greater affinity for the underdog and downtrodden.⁵⁷ Warren’s childhood in Bakersfield, California may have inclined him to the Progressivism that formed during the first decade of the 20th century.⁵⁸ Drawing strength from the working and middle-classes, Progressivism challenged elite economic and political monopolies. Its emphasis on honesty, anticorruption, public versus special interests and public accountability resonated with Warren’s upbringing and early experiences.⁵⁹ His Bakersfield childhood, though, did not escape the anti-Asian sentiment of California Progressives.⁶⁰ In California, Progressives were as decidedly

Principles of Constitutional Law, 73 HARV. L. REV. 1, 15 (1959) (arguing that judges must base their decisions on “analysis and reasons quite transcending the immediate result . . .”).

⁵⁵ Mark Tushnet cautions against celebrating the Warren Court’s “triumphalism”:

There are lots of different ways of understanding the Supreme Court in any particular period. What seems to me likely to lead us wrong is the triumphalism about *Brown*. What *Brown* did was to articulate this tremendous vision that nobody did anything about. And because it was articulated, therefore, you didn’t have to do anything about it.

Mark Tushnet, *Transcript: Members of the Warren Court in Judicial Biography*, 70 N.Y.U. L. REV. 791, 808 (1995). John Hope Franklin also cautions against using history to bolster one’s political perspective. See Franklin, *supra* note 42, at 396 (arguing that such a subordination of historiography to the political arena “is a major reason for our not having a better general account of what actually occurred during Reconstruction”).

⁵⁶ HORWITZ, *supra* note 6, at 13. Professor Horwitz identifies the seven “outsider” liberal members of the Warren Court as Brennan (Roman Catholic, from a family of eight children), Goldberg (Jewish, from a family of eight children), Fortas (Jewish), Marshall (African American), Warren (white Protestant from poor family), Douglas (white Protestant whose father had a “low social position”) and Black (white evangelical Protestant with an eccentric, alcoholic father). Of the seven liberals, Horwitz identifies all but Brennan as coming from “extremely poor families.” *Id.*

⁵⁷ See *id.*

⁵⁸ See WHITE, *supra* note 15, at 18.

⁵⁹ See *id.* at 18–20.

⁶⁰ In Warren’s hometown, for example, there were no names of Asian Californians in the local directory. Instead, the entry would read “Oriental” prior to listing the address. See *id.* at 35. In high school, Warren’s debate team at Kern County High School regularly squared off over the rights of Japanese in the United States, arguing whether they should be segregated in schools or permitted to become citizens. See JOHN D. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 108 (1967).

anti-Asian as they were anti-monopoly, equating the Japanese immigrant presence in their state with a form of alien tyranny.⁶¹ One Warren biographer observed that "Orientalist racism and 'reform' were compatible values for California Progressives."⁶²

Scholars have documented California's long tradition of anti-Asian legislation, violence and intolerance. Prior to World War II, discrimination against Asian Pacific Americans across ethnicities was legal, overt and widespread.⁶³ Early immigrants of Asian and Pacific descent were considered non-white and socially undesirable. A number of laws were passed to harass, restrict, stigmatize and eventually exclude each Asian Pacific ethnic group from the United States. Outright exclusion and discriminatory quotas in immigration laws,⁶⁴ racial restrictions on naturalization rights and property ownership,⁶⁵ anti-mis-

⁶¹ Progressive leader Chester Rowell's comments reflect Progressive thought on the Japanese, albeit a more refined version. But because his comments were *relatively* moderate, he would sometimes be attacked by fellow progressives as being "pro-Jap."

It is for the white peoples to resolve [the problem] and the brown peoples to accept the permanent physical separation of their races. But . . . it is for Californians to treat them justly, and for Easterners to be sympathetic and Japanese forbearing if occasionally they fail to do so.

ROGER DANIELS, *THE POLITICS OF PREJUDICE* 49 n.15 (1962) [hereinafter DANIELS, *POLITICS*]. See also GEORGE E. MOWRY, *THE CALIFORNIA PROGRESSIVES* 154 (1951).

⁶² For example, as the Progressive "organ of reform," the CALIFORNIA WEEKLY advocated for the Alien Land Law of 1909, urging the state legislature to "limit Mongolian ownership of soil to a space four feet by six [because] a white population and a brown population, regardless of nationality or ideals, can never occupy the same soil together with advantage to either." WHITE, *supra* note 15, at 19 (citations omitted).

⁶³ For excellent historical overviews of discrimination against Asian Pacific Americans, see generally SUCHENG CHAN, *ASIAN AMERICANS, AN INTERPRETIVE HISTORY* (1991) [hereinafter CHAN, *ASIAN AMERICANS*]; RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989). In legal scholarship, see generally ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* (1998); *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* (Hyung-chan Kim ed., 1992) [hereinafter SUPREME COURT]; HYUNG-CHAN KIM, *A LEGAL HISTORY OF ASIAN AMERICANS, 1790-1990* (1994); CHARLES McCLAIN, JR., *THE SEARCH FOR EQUALITY, THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994).

⁶⁴ For Asian Pacific American immigration history, see generally ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, (Sucheng Chan ed., 1991) [hereinafter ENTRY DENIED]; BILL HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990* (1993); JOAN JENSEN, *PASSAGE FROM INDIA: ASIAN INDIAN IMMIGRANTS IN NORTH AMERICA* (1988); U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* (1980); Chin Kim & Bok Lim Kim, *Asian Immigrants in American Law: A Look at the Past and the Challenge Which Remains*, 26 AM. U. L. REV. 373 (1977).

⁶⁵ See FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS* 38-51, 73-89, 117-23 (1981); IAN HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); YUJI ICHIOKA, *THE ISSEI: THE WORLD OF THE FIRST GENERATION JAPANESE IMMIGRANTS, 1885-1924*, at 226-43 (1988); JAMES KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* (1978); TAKAKI, *supra* note 63, at 203-12, 411-14; Keith Aoki, *No Right to Own?: The*

cegenation laws,⁶⁶ segregated schools⁶⁷ and non-protection from racial violence⁶⁸ were some of the most serious legal barriers and injustices Asian Pacific Americans faced through the middle of the twentieth century. This anti-Asian tradition underscored the Progressivism with which Warren would identify during his political career.

Warren found a political mentor and lifelong hero in Hiram Johnson, the Progressives' choice for California Governor in 1910 and a leader in the passage of the 1913 Alien Land Law.⁶⁹ In his memoirs, Warren associated his political views most closely to those of Johnson's Progressivism, shunning other labels: "I did not care to be categorized as either a liberal or a conservative. . . . I believed in the progressivism of Hiram Johnson, who had broken the power of predatory interests" ⁷⁰ Nowhere in his memoirs does Warren attempt to distance

Early-Twentieth Century "Alien Land Laws" As a Prelude to Internment, in this issue, at 37; Elizabeth Hull, *Naturalization and Denaturalization*, in SUPREME COURT, *supra* note 63, at 403; Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case*, 4 AMERASIA 1 (1977); Karen Leonard, *The Pahkar Singh Murders: A Punjabi Response to California's Alien Land Law*, 11 AMERASIA 75 (1984); Jeff H. Lesser, *Always "Outsiders": Asians, Naturalization, and the Supreme Court*, 12 AMERASIA 83 (1985-86); Dudley McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947); Thomas Stuen, *Asian Americans and Their Rights for Land Ownership*, in SUPREME COURT, *supra* note 64, at 603.

⁶⁶ See generally JAMES LOEWEN, *THE MISSISSIPPI CHINESE, BETWEEN BLACK AND WHITE* (1971); UCLA Asian American Studies Center Staff, *Anti-Miscegenation Laws and the Filipino*, in LETTERS IN EXILE, AN INTRODUCTORY READER ON THE HISTORY OF FILIPINOS IN AMERICA (Jesse Quinsaat et al. eds., 1976) [hereinafter LETTERS IN EXILE].

⁶⁷ See CHUMAN, *supra* note 65, at 19-37; GARY Y. OKIHIRO, *MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE* 159-62 (1994).

⁶⁸ For a more detailed discussion of anti-Chinese violence, see SUCHENG CHAN, *THIS BITTERSWEET SOIL: THE CHINESE IN CALIFORNIA AGRICULTURE, 1860-1910*, at 370-86 (1986) [hereinafter CHAN, *BITTERSWEET SOIL*]; SHIH-SHAN HENRY TSAI, *CHINA AND THE OVERSEAS CHINESE IN THE UNITED STATES, 1868-1911*, at 72-80 (1983); John Wunder, *Anti-Chinese Violence in the American West, 1850-1910*, in LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST 212 (John McLaren et al. eds., 1992); see also John Hayakawa Torok, *On the Intersections of Violence, Racial Nativism, Law and White Supremacy* (paper presented at Critical Race Theory workshop, 1994, on file with author).

On other anti-Asian violence, see CHAN, *ASIAN AMERICANS*, *supra* note 63, at 52 (Asian Indian); ICHIOKA, *supra* note 65, at 251 (recording violence against Japanese issei farmworkers); JENSEN, *supra* note 64, at 53-54 (documenting anti-Asian Indian violence); HOWARD DE WITT, *ANTI-FILIPINO MOVEMENTS IN CALIFORNIA: A HISTORY, BIBLIOGRAPHY AND STUDY GUIDE* 46-66 (1976) (detailing anti-Filipino violence); Emory Bogardus, *Anti-Filipino Race Riots*, reprinted in LETTERS IN EXILE, *supra* note 65, at 51-62 (discussing anti-Filipino race riots); Jerry Kang, Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926 (1993).

⁶⁹ See WHITE, *supra* note 15, at 21. Although Johnson initially resisted the anti-Japanese hysteria in California during an attempt to pass an earlier version of the alien land law in 1911, after realizing how politically damaging his defense of basic rights for Japanese immigrants was, he emerged as a leading spokesperson for restriction and exclusion of the Japanese for the remainder of his political career. See DANIELS, *POLITICS*, *supra* note 61, at 49-64, 95-100. For the language of the 1913 Alien Land Law, see 1913 Cal. Stat. 113.

⁷⁰ EARL WARREN, *THE MEMOIRS OF EARL WARREN* 171 (1977).

himself from, or even discuss, Johnson's or the Progressives' approach to the Japanese in California. Later, as a Senator from California, Johnson joined leading anti-Japanese crusader V.S. McClatchy in organizing the "Executive Committee of the Western States"—a lofty name for a steering committee of one senator and one representative each from the eleven western states, designed to guide anti-Japanese legislation through Congress.⁷¹ Carey McWilliams noted that Johnson was "very anti-Oriental," and that "Warren greatly respected Johnson, and . . . from this source . . . Warren sort of had this [anti-Oriental] point of view."⁷²

Throughout his years in California politics when he held positions as clerk of the California Assembly Judiciary Committee (1918–19), Deputy District Attorney of Alameda County (1920–26), District Attorney of Alameda County (1926–38), state Republican Party chair (1934–38), Attorney General (1938–42) and finally Governor (1942–53), Warren was true to his party's vision of assisting the disadvantaged and the outsider. Like many nativist California Progressives, however, he believed that governmental largesse should be bestowed selectively—not universally, so as to promote an ideal vision of California that excluded "undesirable" persons, ideologies and cultures.⁷³ With this ideological background and training in mind, I will examine in greater detail three areas of activity from 1942–45: 1) Warren's civil defense planning as Attorney General; 2) his gubernatorial campaign; and 3) his role as Governor.

A. *The Activist Attorney General*

Scholars have identified California Attorney General Warren as the "single most powerful voice for the [internment] decision"⁷⁴ and "one of the individuals most responsible for bringing the relocation

⁷¹ See DANIELS, CAMPS, *supra* note 32, at 96.

⁷² Earl Warren Project, *The Internment*, Carey McWilliams Interview at 29, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981 [hereinafter McWilliams Interview].

⁷³ See WHITE, *supra* note 15, at 102. White contends that during his 1938 attorney general campaign, Warren moved away from a selective definition of minority rights to a more universalistic one, conceptualizing majoritarian government as a "protector of minority rights." But White concedes that while Warren may have departed from the early Progressive thinking as early as 1938, he later departed from his conceptualization of universalistic protection of minority rights in the "Japanese relocation." See *id.* at 103.

⁷⁴ CHUMAN, *supra* note 65, at 151. Chuman concludes that "it can be taken with reasonable certainty, that the statement of Attorney General Warren on February 21, 1942 provided the single most powerful voice for the ultimate decision of the United States government to remove all persons of Japanese ancestry from the Western Defense Command." *Id.*

program into being.⁷⁵ Others, however, have disputed this characterization, declaring that “there remains no proof that Warren ever publicly declared himself in favor of mass evacuation prior to mid-February [1942],”⁷⁶ and concluding that Warren’s “minor role” has been overemphasized due to his later prominence.⁷⁷ The following sections synthesize archival materials and other sources to capture a more comprehensive record of Warren’s involvement with internment efforts.⁷⁸

1. Redlining the Yellow Menace

Two days after the December 7, 1941, Pearl Harbor attack, Secretary of the Navy Frank Knox toured the devastated site and put into circulation unfounded rumors that Japanese Hawaiian saboteurs were responsible for “the most effective fifth-column⁷⁹ work that’s come out of this war.”⁸⁰ Although Knox’s allegations were never verified, his words carried considerable weight.⁸¹ Newspapers in California sensationalized his comments with headlines that read: “Secretary of Navy

⁷⁵ WHITE, *supra* note 15, at 74. White further notes that Warren was able to influence important military and federal policymakers and from January, 1942 on, was “a persistent advocate of some form of evacuation, and his skillful marshaling of arguments, some of them spurious and others based primarily on racial prejudice, significantly contributed to the decision to intern and evacuate the Japanese.” *Id.*; see also Earl Warren Project, Interviewers’ Introduction at xviii, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981 (quoting Mike Masaoka as saying that “probably more than any single person . . . Earl Warren influenced the Executive decision to authorize and carry out the mass military evacuation and exclusion of all persons of Japanese origin from all of California”).

⁷⁶ TENBROEK, *supra* note 43, at 200 (arguing that Warren’s [February 21, 1942] Tolan Committee testimony “could not have influenced DeWitt,” that Warren’s February 7th comments before the Joint Immigration Committee were not made public and that there is “no evidence one way or the other as to what Warren’s sentiment was on February 11th when he accompanied Mayor Bowron of Los Angeles in a personal call on DeWitt”).

⁷⁷ See DANIELS, CAMPS, *supra* note 32, at 51–52 (acknowledging that Warren “did add his voice, but it was not yet a very strong one and it is almost inconceivable that, had any other politician held his post, essentially the same result would not have ensued”); see also McWilliams Interview, *supra* note 72, at 29.

⁷⁸ Internment histories and biographies of Warren tend to offer partial coverage of Warren’s wartime role, often a few paragraphs or pages at most. This Article attempts to bring together the various secondary sources supplemented with primary research to re-examine the extent of the Attorney General’s influence.

⁷⁹ According to Peter Irons, the term “fifth column” referring to subversive activities originates in the Spanish Civil War. One observer allegedly commented that General Franco “had four military columns marching on Madrid and a ‘fifth column’ of civilian sympathizers already within the Capital.” IRONS, *supra* note 32, at 21.

⁸⁰ CWRIC, *supra* note 20, at 55.

⁸¹ Roger Daniels explains Knox’s comments as the result of “deep felt anti-Japanese prejudices” and a desire to maintain the public faith in the navy by shifting blame for the attack on Pearl Harbor to espionage activity. See DANIELS, CAMPS, *supra* note 32, at 36.

Blames Fifth Columnists for the Raid," "Fifth Column Prepared Attack" and "Fifth Column Treachery Told."⁸² On January 25, a committee chaired by Supreme Court Justice Owen J. Roberts released a report on the investigation into the Pearl Harbor attack.⁸³ Like Knox, the Roberts report insinuated that Japanese Hawaiian spies had aided the Pearl Harbor attack by collecting and transmitting information on island military and naval installations to the Japanese Empire.⁸⁴ The Roberts report stirred the anxious imagination of the public. Soon, no tale of treachery was too outrageous for public consumption.⁸⁵ Moreover, politicians urging restrictive measures against *issei*⁸⁶ and *nisei*⁸⁷ on the West Coast now had an official report at their disposal.⁸⁸

On January 29, four days following the publication of the Roberts report, Warren met with army officers and considered their concerns: because it was difficult to determine whether residents of Japanese ancestry were alien or citizen and because it was even more difficult to assess their loyalty to the United States, the close proximity of these people to key military facilities posed a distinct security threat.⁸⁹ What state laws, the army officers asked Warren, were available to "break up this proximity?"⁹⁰ Upon reflection, the Attorney General concluded that stricter enforcement of the state's Alien Land Law might provide a partial solution.⁹¹ Under the nativist-inspired Alien Land Law of 1920,

⁸² CWRIC, *supra* note 20, at 56; TENBROEK, *supra* note 43, at 70.

⁸³ See DANIELS, CAMPS, *supra* note 32, at 49-50.

⁸⁴ See CWRIC, *supra* note 20, at 57; DANIELS, CAMPS, *supra* note 32, at 49.

⁸⁵ Two vivid examples of apocryphal stories that circulated are: 1) that the hands of Japanese pilots who had been shot down during the raid had University of California class rings on the pilots' fingers and 2) that the night prior to the attack, Japanese Hawaiian sugar cane workers had cut the cane into arrow patterns which pointed the Japanese pilots toward Pearl Harbor. See DANIELS, CAMPS, *supra* note 32, at 50.

⁸⁶ *Issei* is a Japanese word that refers to first-generation immigrants. See EVELYN NAKANO GLENN, *ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE* 8 (1986).

⁸⁷ *Nisei* refers to second-generation offspring of the *issei*. See *id.*

⁸⁸ See DANIELS, CAMPS, *supra* note 32, at 50.

⁸⁹ Assistant Attorney General Warren Olney, III, references that in "the very first meetings that we in the attorney general's office had with army officers following Pearl Harbor" they discussed ways to remove Japanese residents from sensitive military areas. The meeting clearly predated the February 2 conference Warren convened to carry out the plan devised with army officials. The January 29 discussion is one of the only ones reported between Warren and "army officials" prior to February 2 to discuss Japanese Californians, and is thus the likely conferral referred to by Olney. See Warren Olney, III, *Law Enforcement and Judicial Administration in the Earl Warren Era*, at 228, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981.

⁹⁰ *Id.*

⁹¹ See *id.* On alien land laws, their origins, content and impact on Japanese Californians, see generally Aoki, *supra* note 65. See also CHUMAN, *supra* note 65; ICHIOKA, *supra* note 65, at 226-43 (analyzing alien land law litigation); Stuen, *supra* note 65, at 603.

property in the control of an alien ineligible for citizenship would be forfeited to the state through escheat actions.⁹² Warren also told General John DeWitt, commander of the Western Defense Command, that he favored mass evacuation of the Japanese Californians.⁹³ On January 30, the day after his conversation with DeWitt, Attorney General Warren declared that “the Japanese situation as it exists in California today may well be the Achilles heel of the entire civilian defense effort. Unless something is done, it may bring about a repetition of Pearl Harbor.”⁹⁴

To facilitate the escheat actions he had discussed with General DeWitt, Warren convened a statewide conference of over one hundred district attorneys and law enforcement officials in San Francisco on February 2, 1942, to coordinate the campaign against Japanese Californians⁹⁵ county-by-county.⁹⁶ One federal official in attendance recalled that the Attorney General opened the meeting by cautioning against hysteria, “but then proceeded to outline his remarks in such a fashion as to encourage hysterical thinking.”⁹⁷

⁹² See Aoki, *supra* note 65, at 59.

⁹³ See CRAY, *supra* note 5, at 119 (stating that “General DeWitt reported to Washington by telephone on January 29 that Warren favored a mass evacuation”); DANIELS, CAMPS, *supra* note 32, at 51 (reporting that Warren “was in thorough agreement with his rival that the Japanese ought to be removed”); BILL SEVERN, MR. CHIEF JUSTICE: EARL WARREN 83–84 (1969) (noting that at a January 29 meeting with General DeWitt and U.S. Attorney General Francis Biddle, Warren agreed with the others that “the Japanese population should be removed from the state of California”).

⁹⁴ LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 142 (1967); see also BENJAMIN RINGER, “WE THE PEOPLE” AND OTHERS: DUALITY AND AMERICA’S TREATMENT OF ITS RACIAL MINORITIES 865 (1983).

⁹⁵ As noted *supra* note 9, I use the term “Japanese Californians” to refer to both the first generation immigrant issei Japanese in California who were not permitted to become U.S. citizens by virtue of the racial bar to citizenship under the Naturalization Law of 1790, and the California-born second generation nisei citizens. Both the issei and nisei were targeted as groups for internment. The term “Japanese Californians” is less awkward than referring to the groups of internees as “Japanese and Japanese Americans” or “issei and nisei.” It also avoids reinforcing the alien-citizen distinction produced by white supremacist naturalization laws.

⁹⁶ See Olney, *supra* note 89, at 228.

⁹⁷ DANIEL, CAMPS, *supra* note 32, at 62. At the meeting, Warren briefed the law enforcement officers on the insurgent dangers posed by Japanese Californians:

[T]he Japanese as an entire race of people, men, women, and children alike—especially United States citizens of Japanese ancestry—[are] poised to take disloyal action against the United States at any moment, to move to commit acts of sabotage, espionage, and disloyalty upon some mysterious signal to be issued to them by the Japanese enemy.

CHUMAN, *supra* note 65, at 150–51. Not surprisingly, one district attorney from Los Angeles “worked himself into such a state of hysteria” that he had to be “called to order by Mr. Warren.” DANIELS, CAMPS, *supra* note 32, at 62. Another high official was overheard saying that “he favored shooting on sight all Japanese residents of the state.” *Id.*

It was agreed that each county official in charge of locating all Japanese-occupied land would forward the information to Warren's office, which would then share it with the army.⁹⁸ The Attorney General executed this mission with the precision of a military operation, using large scale maps of each reporting county drawn to uniform scale.⁹⁹ He instructed his subordinates that "[a]ll property which is owned, controlled or occupied by persons of the Japanese race, whether citizens or not, should be marked on the maps in red."¹⁰⁰ He also asked each county official to designate "important installations" so that proximity of Japanese Californians could be easily compared.¹⁰¹

From these maps, Warren concluded that the "distribution of the Japanese population appears to manifest something more than coincidence."¹⁰² He hypothesized that the Japanese Californians were "ideally

⁹⁸ See, e.g., Olney, *supra* note 89, at 228.

⁹⁹ See *id.* Warren followed up the meeting request with a letter to the district attorneys and police soliciting their opinions to the following three questions:

(1) What in your opinion is the extent of the danger, by way of sabotage and fifth-column activities in your jurisdiction and in the State as a whole, arising from the presence of enemy aliens?

(2) Do you believe that the danger can be adequately controlled by treating all enemy aliens alike, regardless of nationality, or do you believe that we should differentiate among them as to nationality?

(3) What protective measures do you believe should be taken with reference to each nationality or with reference to enemy aliens as a whole in order to eliminate the danger of sabotage and fifth-column activities?

National Defense Migration: Hearings Before the House of Representatives Select Comm. Investigating Nat'l Defense Migration, H.R. Res. 113, 77th Cong., Part 29, 10965, 10989-90 (1942) [hereinafter *Tolan Committee Hearings*] (Exhibit B—Letter from Law Enforcement Officers to Earl Warren, California Attorney General on the Enemy Alien Problem; Letter from Thomas Whelan, District Attorney for County of San Luis Obispo to Earl Warren, California Attorney General).

As just one example of Warren's obsession with thoroughness on the tracking of Japanese-owned or controlled property, Warren urged district attorneys to cross-check their information with the following local and regional officials:

1. County Assessor
2. City Assessor
3. County Agricultural Commissioner
4. Sheriff
5. Chiefs of Police

6. Such other sources of information as are known to you to be reliable, such as land departments of oil companies with large holdings in the oil fields, public utilities serving your County, or concerns engaged in businesses requiring them to be familiar with the occupants of various tracts, such as dealers in farm implements, fertilizers, insecticides, etc.

Letter from Earl Warren, California Attorney General to the Honorable James B. Kavanaugh, District Attorney of San Bernardino County 2-3 (Mar. 6, 1942) [hereinafter Letter, Mar. 6, 1942].

¹⁰⁰ Letter, Mar. 6, 1942, *supra* note 99, at 2.

¹⁰¹ See *id.* at 1.

¹⁰² Earl Warren, Testimony Before the House of Representatives Select Committee Investi-

situated with reference to points of strategic importance, to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them be inclined to do so."¹⁰³ The Attorney General presented his maps and conclusions in testimony before the House of Representatives Select Committee Investigating National Defense Migration ("Tolan Committee"), which convened in San Francisco on February 21 to address concerns regarding civil defense and Japanese Americans.¹⁰⁴

a. *Warren's Tolan Committee Testimony*

There were several problems with the methods and conclusions forwarded by Warren to the Tolan Committee. First, the definitions of strategic "military installations" and "proximity" were so vague and overbroad that it would have been difficult to locate any significant cluster of residents *outside* an area of strategic military importance. Officials in Warren's office "worked by rule of thumb" and "without any definition" of a "military installation" and "without any defined limitation" of "proximity."¹⁰⁵ In his letter to state officials, Warren defined strategic areas to include "power plants, radio stations, factories and industrial plants, oil and gas wells, power lines, bridges and tunnels, airports and the like,"¹⁰⁶ as well as the "[c]ity hall, gas plant, hospital, water reservoir, water plant, . . . freight yards, power substations, sewer plant, telephone exchange and war industries."¹⁰⁷ Certainly, as a postwar internment commission concluded, if another immigrant farming group had been mapped in a similar fashion, it would likely have produced "an equally alarming and meaningless pattern."¹⁰⁸

In addition, the methodology for measuring strategic residencies was inconsistent and prejudicial toward Japanese Californians. The Attorney General's desire to drive Japanese Californians off their lands biased the sampling tactics in the project. For example, Warren's sample concentrated only on Japanese Californian *rural land holders*.¹⁰⁹

gating National Defense Migration at 5 (Mar. 11, 1942) (Earl Warren Papers, Bancroft Library) [hereinafter Warren Testimony]; see also *Tolan Committee Hearings*, *supra* note 99, at 10974.

¹⁰³ Warren Testimony, *supra* note 102, at 5.

¹⁰⁴ See *Tolan Committee Hearings*, *supra* note 99, at 10973–11023; see also CWRIC, *supra* note 20, at 95–98.

¹⁰⁵ GRODZINS, *supra* note 43, at 156.

¹⁰⁶ For a sample letter identifying these strategic installations, see Letter Mar. 6, 1942, *supra* note 99, at 1–2.

¹⁰⁷ *Id.* at 2.

¹⁰⁸ CWRIC, *supra* note 20, at 98.

¹⁰⁹ See GRODZINS, *supra* note 43, at 156.

Even among rural Japanese Californians, however, many lived in non-farm areas or on plots operated by non-Japanese that were not included on the maps.¹¹⁰ Moreover, Warren's study completely ignored the vast majority of Japanese Californians who were non-rural dwellers. As a result, one scholar estimates that the redlining project captured at best only about one-third of the state's Japanese population, thus grossly distorting the empirical case for the alleged strategic residency conspiracy.¹¹¹

Another bias was the sample's exclusion of "most coastal defenses and war industries" from the list of strategic installations.¹¹² Few Japanese Californians owned land in these coastal areas. Thus, the exclusion of such low-residency regions from the mapping project upwardly biased the alleged concentration of strategic residencies observed.¹¹³ The one coastal area where Japanese Californians owned a significant amount of land, Santa Barbara County, was included in Warren's report.¹¹⁴

Further, Warren's study provided no comparative analysis that would have assessed the data concerning Japanese Californians living near strategic areas in light of data concerning those who did not.¹¹⁵ Indeed, those deemed to be "in the vicinity" of military installations were simply listed in Warren's Tolan testimony, devoid of any comparative context. Moreover, there was no control group against which the percentage of Japanese Californians living "in the vicinity" of strategic installations could be measured.¹¹⁶ Thus, taking the Santa Barbara statistics as an example, even if ten percent of the Japanese Californian population in the county were close to strategic installations, these

¹¹⁰ See *id.*

¹¹¹ See *id.* at 157.

¹¹² *Id.*

¹¹³ See *id.*

¹¹⁴ See discussion *infra* notes 127–28 and accompanying text. As detailed *infra* notes 133–34, Warren's uncontextualized Santa Barbara findings were highlighted and copied verbatim by General DeWitt in his Final Report to President Roosevelt as a primary example of strategic deployment of Japanese Californian residencies.

¹¹⁵ The most cited example of purposeful migration of Japanese Californians involved Santa Barbara County, where the 1940 census revealed 2187 citizens and aliens of Japanese ancestry, and 441 heads of household. See GRODZINS, *supra* note 43, at 157–58. Of the 136 land holdings by Japanese Californians in the county, only 46 were within two miles of strategic installations (excluding highways). Extrapolating an average of 4.7 persons per household, the alleged strategic concentration involved approximately 216 persons, or 10% of the Japanese Californian population in the county. See *id.* In other words, 90% of Japanese Californians in Santa Barbara county did not live near strategic installations, yet Santa Barbara was considered the primary example of purposeful suspicious migration. See *id.* at 158.

¹¹⁶ See *id.* at 158–59.

figures have little significance unless they were compared to other groups, such as citizens and aliens of German or Italian ancestry.¹¹⁷ The absence of such comparative frameworks from the study strongly indicates that Warren and his team intended to concoct a “scientific” basis for the removal program.

In addition to the methodological defects of the study, Warren’s suggestion that Japanese Californians had conspired to live near designated strategic locations ignored the common sense understanding and history of land use and development. For example, the alarm expressed over Japanese residing near airports¹¹⁸ obscured the fact that the *issei* had made their homes in these now-sensitive locations long before airports existed. As a former naval intelligence captain remarked, “[a] lot of Japanese had been living in such areas while the Wright Brothers were still flying kites.”¹¹⁹ Warren also ignored the historical basis for settlement patterns around railroads. In an appen-

¹¹⁷ See GRODZINS, *supra* note 43, at 158–59. According to Grodzins, at least 10% of the Italian Californian population lived in “sensitive areas.” See *id.* at 159.

¹¹⁸ For example, Warren’s Exhibit A appended to his Tolan Committee testimony consisted of a laundry list of Japanese residency “immediately adjacent” to his designated strategic areas. Below, I have excerpted his mention of residencies near various airports throughout the county-by-county appendix:

Japs adjacent to new Livermore Military Airport (Alameda).

Japs in vicinity of Oakland Airport (Alameda).

Japs adjacent to Chico airport (Butte).

A tremendous dispersal of Japanese throughout the Fresno area, with innumerable roads giving access to . . . Chandler Airport, and Hammond Field Airport (Fresno).

Japanese adjacent to airport at Ukiah (Mendocino).

Japs close to Mather Field (Sacramento).

Japs close to McClellan Field (Sacramento).

Japs adjacent to Navy airport at Reem Field (San Diego).

Japs in the vicinity of three Consolidated Aircraft plants (San Diego).

Japs overlooking municipal airport (San Diego).

Japs adjacent to Stockton Field, United States Army airport (San Joaquin).

Japs adjacent to Belmont Airport (San Mateo).

Japs in vicinity of San Carlos airport (San Mateo).

Japs adjacent to Stanford airport (Santa Clara).

Moffett Field surrounded by Japs on three sides (Santa Clara).

Number of Japs within 2 miles of Petaluma Airport (Sonoma).

Tolan Committee Hearings, *supra* note 99, at 10982–87 (testimony of Earl Warren, Attorney General of California).

¹¹⁹ ALLAN R. BOSWORTH, *AMERICA’S CONCENTRATION CAMPS 77* (1967). For the author’s biographical information as a former journalist and naval intelligence officer, see *id.* at 6. For further comment on the non-conspiratorial historical context of Japanese Californian settlement patterns, see DANIELS, *CAMPS*, *supra* note 32, at 76 (noting that “[i]t was also true, though Warren did not mention it, that the Japanese had been in most of these areas long before there were any aircraft factories, but this fact was easy to ignore”). Along the same lines, Captain Bosworth further observed that “Californians conveniently forgot that the *Issei* had settled and farmed Signal Hill years before oil was discovered there; they forgot that the truck farms around Inglewood and

dix to his Tolan Committee report, Warren included references to Japanese Californians who resided near railroads, presumably to facilitate sabotage of the railways.¹²⁰ It was common knowledge, however, that some issei immigrants from an earlier period, who had worked for the railroads, were paid in grants of cheap, undesirable land along the noisy right of way.¹²¹ Similarly, there was nothing conspiratorial about Japanese Californian proximities to water conduits, given the irrigation demands of truck farming.¹²²

In his presentation before the Tolan Committee, Warren voiced suspicion of the presence of Japanese Californian farming land beneath power lines.¹²³ According to Carey McWilliams, however,

Nothing whatever was strange about it, because the power companies had to condemn the right of way, you see, when they built a big power line. Nobody else was *interested* in taking these little pinches of land. Nobody else could do anything with them but the Japanese. It was completely innocent. There was *nothing* sinister about it, you see.¹²⁴

Historically, Japanese immigrants to California had been denied access to fertile lands. Legal and social limitations on their ability to hold land restricted them to marginal tracts in remote areas around abandoned lands, often near industrial areas or lake dams,

Hawthorne antedated the aircraft plants or the Los Angeles Municipal Airport." BOSWORTH, *supra*, at 77; see also Brief of Japanese American Citizens League, *Amicus Curiae* at 21–22, *Korematsu v. United States*, 323 U.S. 214 (1944), available in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Philip B. Kurland & Gerhard Casper eds., 1975) (noting that the Tolan Committee concluded that "the main geographic pattern of Japanese population in California was pretty well fixed by 1910," and that the Japanese were carrying on their livelihoods long before the sites "were ever considered for defense installments"); Earl Warren Project, Decision and Exodus, Edward Ennis Interview at 15, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981 [hereinafter Ennis Interview] (stating that "title records in California will show that the Japanese occupied these areas long before they were considered by the government for airports or anything else").

¹²⁰ See *Tolan Committee Hearings*, *supra* note 99, at 10982–87 (Exhibit A—Particular Points Where Japanese are Immediately Adjacent to Strategic Points in Counties in California).

¹²¹ See BOSWORTH, *supra* note 119, at 76.

¹²² See GRODZINS, *supra* note 43, at 156.

¹²³ As Carey McWilliams recollected Warren's presentation:

[Warren] said that he thought it very significant that beneath these power lines . . . you could find, here, there and elsewhere, the small plots of produce farming. And they just happened to be farmed by Japanese. You know, "Very strange, isn't it, gentlemen, that they should be farming here."

McWilliams Interview, *supra* note 72, at 29.

¹²⁴ *Id.* For a similar conclusion, see BOSWORTH, *supra* note 119, at 77 (asking rhetorically, "if a man could afford better land, would he want to live under a power line?").

reservoirs, electronic transmission stations, railroad switchyards, etc.¹²⁵ In a cruel irony, however, the issei's eventual success in reclaiming these unwanted areas turned their original disadvantage into the basis for Warren's racial conspiracy theory.¹²⁶

Warren made particularly good use of the rare instances when Japanese had access to desirable coastal lands, such as in Santa Barbara County.¹²⁷ Then District Attorney for Santa Barbara County, Percy Heckendorf, had a mundane explanation for the pattern: issei had

¹²⁵This is the argument made by former Supreme Court Justice Tom Clark, who during World War II was an ambitious Department of Justice official who was advocating mass internment:

[T]he problem, I think, was largely an economic one. Like other Orientals, the Japanese suffered statutory restrictions in California for many years. As a consequence, land was not available to them. . . .

So when they could not get land or lease it, they would try to find abandoned land around places where no one else would work, such as lake dams, reservoirs, and high installation wires, or electrical transmission stations or even in switchyards, outside cities and in rural areas.

Earl Warren Project, Decision and Exodus, Tom Clark Interview at 3-4, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981 [hereinafter Clark Interview]; see also GRODZINS, *supra* note 43, at 159 (observing that residential segregation operated to concentrate Japanese immigrants "in the less desirable industrial areas").

¹²⁶See Clark Interview, *supra* note 125, at 3-4; see also GRODZINS, *supra* note 43, at 159. As Clark explained:

They would till this land—that is what's left of it. They would usually have to move rocks and bushes and weeds out. Before long, they would have a pretty good vegetable garden.

Then when the crop was in, people would say, "Well the rascals have got the best gardens in the world" or "They're located below the dam, or the high tension wire station, or in the switchyard in order to carry out sabotage. That's why they're there." But, as a matter of fact, they had been there for years and had tilled a little plot of ground to make both ends meet.

Clark Interview, *supra* note 125, at 4.

¹²⁷See *Tolan Committee Hearings*, *supra* note 99, at 10111-12 (Exhibit A). In his Exhibit A to the Tolán Committee detailing Japanese proximity to strategic points, Santa Barbara County was the only county in which Warren described in paragraph form, the distribution of Japanese:

In the city of Santa Maria the following Japanese-owned parcels are located in the vicinity of strategic points: 60, 61, and 63 are adjacent to the principal highway; 58, 102, and 53 are close to a gas storage plant and power substation; 65 is next to a hospital; 56 is next to the water reservoir and water works; 56 and 96 are close to the United States airport and the latter tract is also close to a hospital.

The Santa Maria oil field is practically surrounded by Japanese-occupied lands on the north side, and on parcel No. 113 there are Japanese actually living within the oil fields.

. . . .

Japanese lands in the vicinity of Lompoc completely cover the only entrance to Camp Cook where the only armored division of the Army on the coast will be shortly located. The road to Camp Cook passes through the city of Lompoc and all traffic to and from the camp must pass under the scrutiny of several Japanese occupants

originally settled there because it was close to the sea and the temperature was cool: the ideal environment for immigrant farmers to cultivate vegetables and seeds.¹²⁸ At the time, however, Warren suggested that the immigrants had settled near the coast to abet an eventual program of sabotage.

In sum, the problems with Warren's mapping project were so numerous that they rendered it little more than propaganda designed to serve the land dispossession/removal objectives of the Attorney General. The vague and overbroad definition of key terms and the weaknesses in methodology rendered the findings of the massive research project statistically insignificant. Finally, the misreading of historical, economic and social contexts of land holding and settlement undermined the conclusions of a racial conspiracy theory that glibly found such patterns reflecting "more than mere coincidence."¹²⁹

b. *The Significance of Warren's Mapping Project*

Commentators have downplayed the importance of Warren's mapping project.¹³⁰ The project, they argue, had no effect on the internment decision because Warren presented his Tolan Committee testimony two days after Roosevelt had signed E.O. 9066. Despite the timing of the hearings, however, Warren's office met with army officials prior to the Tolan hearings and had been in regular communication with them, during which time the Attorney General undoubtedly shared the preconceptions later embodied in the study's conclusions.¹³¹

on various tracts of land. Those Japs are also immediately adjacent to the Camp Cook water wells. They can, with very little difficulty, block the entrance to Camp Cook since the southern end of the camp is extremely mountainous and completely impassable and the northern end is almost the same by reason of mountains and barrancas with perpendicular sides, some of which are 50 and 60 feet deep.

Warren Testimony, *supra* note 102, at 10985.

¹²⁸ See Earl Warren Project, *The Internment*, Percy Heckendorf Interview at 8, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981 [hereinafter, Heckendorf Interview].

¹²⁹ See *supra* note 102 and accompanying text for Warren's "more than mere coincidence" conclusion.

¹³⁰ See TENBROEK, *supra* note 43, at 200.

¹³¹ Warren met with DeWitt before and after the conference he convened to gather the geographic evidence. See Victor Hansen, *My Association with Earl Warren*, at 4 (1975), an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981 (stating that DeWitt solicited the support of west coast congressional representatives and governors); Olney, *supra* note 89, at 228; *supra* notes 93-94 and accompanying text. For further insight into the close working relationship between DeWitt and Warren, see *infra* notes 133-34, 137 and accompanying text.

Indeed, in drafting his Final Report¹³² advocating internment to President Roosevelt, DeWitt borrowed liberally from Warren's mapping project.¹³³

Whether the maps provided a substantive evidentiary basis to justify Roosevelt's signing of E.O. 9066 may be the wrong question, or at least one too narrowly drawn. In fact, the mapping project was instrumental in at least three significant outcomes.

First, the mapping project provided military and legal rationales for internment. General DeWitt adopted almost verbatim, but without attribution, the geographic distribution argument Warren had made before the Tolan Committee.¹³⁴ The passages he borrowed, emphasizing the strategic deployment of Japanese Californians along the West Coast, formed DeWitt's main justification for the issuance of E.O. 9066.¹³⁵ In *Hirabayashi v. United States*,¹³⁶ the project would provide a shadowy legal rationale for upholding the curfew order.¹³⁷ There, the Court observed that Japanese were concentrated in California and

¹³² See FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942, submitted by Lt. Gen. J.L. DeWitt to the Chief of Staff (U.S. Dep't of War, June 5, 1943) [hereinafter FINAL REPORT].

¹³³ Warren's Tolan Committee testimony on Japanese Californian strategic residencies in Santa Maria Valley and Santa Barbara appear almost verbatim in DeWitt's final report. Compare FINAL REPORT, *supra* note 132, at 9–10, and Warren's Tolan Committee Testimony, *supra* note 99, at 10974.

¹³⁴ GRODZINS, *supra* note 43, at 284–85 (revealing in side-by-side panels of text, the unattributed, verbatim adoption by DeWitt of Warren's Tolan Committee testimony on Santa Barbara land holding patterns of Japanese Californians); see also CWRIC, *supra* note 20, at 98 (comparing FINAL REPORT, *supra* note 132, at 9–10 with Warren Testimony, *supra* note 102, at 10974); CRAY, *supra* note 5, at 123 (reporting how the maps and Warren's paraphrased arguments became part of DeWitt's justification for internment).

¹³⁵ See CWRIC, *supra* note 20, at 98 (concluding that Warren's Tolan Committee presentation arguments advocating internment were shared in advance with DeWitt and "became the central justifications presented by DeWitt for issuing the Executive Order").

¹³⁶ 320 U.S. 81 (1943).

¹³⁷ Irons strongly infers from the record that Warren's Tolan Committee testimony on the alleged subversive activities and strategic residency conspiracies among Japanese Californians made its way into the arguments and deliberations in the *Hirabayashi* case through the unethically authored Western States amicus brief. See IRONS, *supra* note 32, at 212–18. Peter Irons details the close working relationship between the offices of General DeWitt and the California Attorney General that likely resulted in Warren's study being disseminated to the *Hirabayashi* Court. See *id.* DeWitt's Final Report was not officially available for arguments in the *Hirabayashi* case, but Irons plausibly explains how Warren played a key role, through his connections and testimony, in inserting the disinformation of the Final Report into the Western States' amicus brief, contrary to legal ethics and procedure. Captain Herbert Wenig had served from 1939 to July of 1942 as a key assistant to Attorney General Warren, providing his boss with the legal and factual research that comprised the basis for Warren's Tolan Committee testimony. After Warren was elected Governor, Wenig joined General DeWitt's legal staff and served informally as a liaison between the Army and the newly-elected California Attorney General, Robert Kenny. Under this arrangement, Wenig supervised and wrote the Western States' brief without disclosing his status to the

Washington—two states significantly responsible for aircraft production and shipbuilding.¹³⁸ In his concurring opinion, Justice Douglas emphasized the “real” threat of Japanese invasion of the West Coast by referencing the presence of “many thousands of aliens and citizens of Japanese ancestry in or near to the key points along the coast line.”¹³⁹ This presence, Douglas noted, had aroused “special concern” among “those charged with the defense of the country.”¹⁴⁰

Second, Warren’s mapping project influenced important members of the media. The mapping project so impacted renowned newspaperman Walter Lippmann that it formed the basis for Lippmann’s influential February 12 syndicated column on the military necessity of internment.¹⁴¹ Former District Attorney Heckendorf recalled a meeting in Montecito that he attended with then-Assistant Attorney General Tom Clark, Warren and Lippmann. After Warren presented one of the maps highlighting Japanese proximity to various installations, Heckendorf noted that “Mr. Lippmann showed great interest in the map and the significant things that were shown on it.”¹⁴² In a letter to Warren, Heckendorf wrote that he had no doubt that “the presidential order [E.O. 9066] stems back to the article written by Lippmann following the talk by you [Warren].”¹⁴³ Historians have noted the wide reach of

Justice Department or Supreme Court. As a party to the lawsuit, the United States (including the War Department of which DeWitt’s office was a part) should not have had any role in preparing an amicus brief. *See id.* at 212–13.

¹³⁸ *See id.* at 95–96 (finding that evidence provides a reasonable belief of a threat to war production by sabotage and espionage due to concentration of Japanese in California and Washington—two key states for aircraft production and shipbuilding).

¹³⁹ *Id.* at 105 (Douglas, J., concurring).

¹⁴⁰ *Id.*

¹⁴¹ In his column, Lippmann wrote in part:

[T]he Pacific Coast is in imminent danger of a combined attack from within and from without. . . . It is [true] . . . that since the outbreak of the Japanese war there has been no important sabotage on Pacific Coast. From what we know about the fifth column in Europe, this is not, as some have liked to think, a sign that there is nothing to be feared. It is . . . some part of it may at any moment be a battlefield. Nobody’s constitutional rights include the rights to reside and do business on a battlefield. And nobody ought to be on a battlefield who has no good reason for being there.

BOSWORTH, *supra* note 119, at 60–61 (quoting Lippmann’s Feb. 12, 1942 article in the *New York Herald Tribune*). Note the adoption by Lippmann of two of the arguments generated by Warren: 1) the “no sabotage is evidence of sabotage” line of analysis discussed *infra* note 181; and 2) the geographic distribution/strategic installations analysis reflected in Lippmann’s understanding of the Pacific Coast as battlefield/combat zone.

¹⁴² Heckendorf Interview, *supra* note 128, at 5.

¹⁴³ *Id.* at i. Although there is no date given by Heckendorf for the dinner at which these conversations with Lippmann took place, from context it seems clear that they preceded Lippmann’s February 12, 1942, column.

the Lippmann column as influencing other journalists,¹⁴⁴ military and governmental officials¹⁴⁵ and even President Roosevelt.¹⁴⁶

Third, the intensive research and documentation led to a dramatic proliferation of escheat actions under the Alien Land Law. Touted as “one of the biggest land grabs”¹⁴⁷ in California, accelerated enforcement of the anti-Asian statute resulted in seventy-three out of the seventy-six escheat actions between 1912–1946 being targeted at Japanese Californians.¹⁴⁸ Eighty percent of the seventy-three escheat proceedings were initiated after the Pearl Harbor attack while Warren was either Attorney General or Governor.¹⁴⁹

According to his second-in-command, Warren used his discretion to enforce the largely symbolic Alien Land Law¹⁵⁰ even beyond the scope suggested by army officials. After escheat proceedings for lands adjacent to military installations were completed, the Attorney General’s office expanded the program to general enforcement of the Alien Land Law, “with the resulting escheat of large land areas without

¹⁴⁴ Columnist Westbrook Pegler translated Lippmann’s words for those who may have missed the reference to Japanese Californians:

Do you get what he says? This is a high-grade fellow with a heavy sense of responsibility. . . . The Japanese in California should be under armed guard to the last man and woman right now—and to hell with habeas corpus until the danger is over. . . . If it isn’t true, we can take it out on Lippmann, but on his reputation I will bet it is all true.

DANIELS, CAMPS, *supra* note 32, at 68 (quoting Pegler’s February 15, 1942 column that ran in the *Washington Post* among other newspapers).

¹⁴⁵ *Id.* Lippmann’s and Pegler’s columns were circulated among the top Army brass in Washington. In the War Department, Army Chief of Staff George C. Marshall forwarded Lippmann’s column to Secretary of War, Henry L. Stimson, who passed it on to Assistant Secretary of War, John J. McCloy. *See id.*

¹⁴⁶ *See id.* Daniels suggests that Lippmann’s column carried substantial weight in President Roosevelt’s decision to issue E.O. 9066. *See id.* at 67–68 (stating that Lippmann’s February 12, 1942 column was “much more influential” on the President than lobbying efforts of New Dealers urging a more democratic approach to Japanese Americans).

¹⁴⁷ Larry Tajiri characterized the escheat actions as “one of the biggest land grabs in history . . . in California.” AUDRIE GIRDNER & ANNE LOFTIS, *THE GREAT BETRAYAL: THE EVACUATION OF THE JAPANESE-AMERICANS DURING WORLD WAR II* 429 (1969) (citing Larry Tajiri, *Pacific Citizen*, Feb. 2, 1946). The value of 5135 farms owned by Japanese Californians was estimated at \$66 million in 1940. *See id.*

¹⁴⁸ *See* CHUMAN, *supra* note 65, at 202.

¹⁴⁹ *See id.* at 201–02; RINGER, *supra* note 94 at 910.

¹⁵⁰ The Alien Land Law passed by California in 1913 was largely symbolic because of its ineffectiveness, non-enforcement and resistance thereto by Japanese immigrants to California. *See generally* Aoki, *supra* note 65, at 37. Professor Aoki notes that the 1913 Alien Land Law was easy to sidestep by placing land in trusts and guardianship in the names of the U.S.-born children, relatives or friends of the issei, by forming land-holding corporations, or by entering into a series of three-year lease contracts. *See id.* at 56. But the Alien Land Law of 1920 was amended to foreclose guardianships, trusteeships, leases and sharecropping. Despite the loopholes in the 1913

regard to whether they were or were not near military or other important installations.”¹⁵¹ Moreover, Warren knew that district attorneys around the state were interested in purchasing these lands made valuable by the issei.¹⁵² Under the guise of national security, the Attorney General’s office aggressively filed an unprecedented twenty escheat actions in 1942 alone.¹⁵³

Even if, as tenBroek argues, Warren’s mapping project did not “cause” President Roosevelt to sign E.O. 9066, Warren’s role in influencing the order must be reassessed. Not only was his mapping project the basis for the vigorous enforcement of the Alien Land Laws, but it also impacted the writings of influential journalists and the Supreme Court.¹⁵⁴ In sum, the mapping project played a far greater role than has been previously suggested in internment histories and Warren biographies.

2. Advocating Internment

Between February 7 and February 19, 1942, when the order was issued, Warren continued to press for restrictive measures against Japanese Californians. On February 7, he appeared before the California Joint Immigration Committee (“CJIC”), the successor organization to the Japanese Exclusion League, the group responsible for pushing through Congress the nativist, quota-based Immigration Law of 1924.¹⁵⁵

law, relatively few escheat actions were brought by the California Attorney General between 1913 and 1920, nor were violations vigorously pursued between 1920–1940. *See id.* at 59. Nevertheless, despite the low number of escheat actions initiated, the 1920 law had a far more significant deterrent impact than the 1913 law, as Japanese-owned acreage declined “relatively dramatically” after 1920 according to Professor Aoki. *See id.*

¹⁵¹ Olney, *supra* note 89, at 229.

¹⁵² *See, e.g.*, Letter from Tom Scott, District Attorney for Kern County, to Earl Warren, California Attorney General (Mar. 26, 1942) (Earl Warren Papers, Bancroft Library) (noting interest of Bakersfield attorney, W.E. James, who suggested that purchasing lands under escheat proceedings would be “rather valuable in post war times . . . and it might be possible to even get \$25,000 or more now for this forty-two acre tract”). Similarly, Warren’s successor as Attorney General Robert Kenny reluctantly inherited the escheatment actions and was “constantly reminded of his duty to carry out the law by persons who stood to profit from the forced sale of Japanese-owned land acting through local district attorneys.” GIRDNER & LOFTIS, *supra* note 147, at 429.

¹⁵³ *See* CHUMAN, *supra* note 65, at 201.

¹⁵⁴ Daniels suggests that the Lippmann article carried substantial weight with the President. *See supra* note 146. Oral histories with Warren’s contemporaries also affirm the significance celebrated columnist Walter Lippmann attached to the Attorney General’s research of Japanese Californian land occupancies. *See supra* notes 141–46 and accompanying text. On the Supreme Court’s embrace of Warren’s strategic residencies analysis, *see supra* notes 138–40 and accompanying text.

¹⁵⁵ *See* DANIELS, POLITICS, *supra* note 61, at 105 (explaining how the Japanese Exclusion

Sensing an opportunity presented by the war, one CJIC officer bluntly stated, "This is our time to get things done that we have been trying to get done for a quarter of a century."¹⁵⁶ Before this receptive audience, Warren suggested that the military could remove "any or all Japanese" from combat zones.¹⁵⁷ He also cast suspicion on Japanese Californians by asserting that Japanese had not supplied information to law enforcement officials regarding sabotage by other Japanese even though this contradicted his statements, made just five days earlier, to over one hundred law enforcement officers.¹⁵⁸

On February 11, Warren, along with Los Angeles Mayor Fletcher Bowron and Department of Justice lawyer Tom Clark, met with General DeWitt. Warren's defenders have argued that there is "no evidence one way or the other as to what Warren's sentiment was on February 11."¹⁵⁹ At least one scholar, however, suggests that the lack of a record on Warren's position at the meeting was by design.¹⁶⁰ As Katcher relates Bowron's recollections, "Before we met [with DeWitt], Warren, Clark and I got together and it was decided that I speak for the three of us on the situation."¹⁶¹ Mayor Bowron would later testify before the Dies Special Committee on Un-American Activities regarding the political pressure the trio brought to bear on General DeWitt's decisionmaking:

I may say that I was quite active in getting the Japanese out of Los Angeles and its environs. I held various conferences with Tom Clark . . . together with . . . then Attorney General, now Governor Warren[;] we held a long conference with General DeWitt relative to the situation, *and I hope we were somewhat helpful in General DeWitt making his decision.*¹⁶²

On February 14, three days following the meeting with Bowron, Clark and Warren, General DeWitt forwarded his Final Recommen-

League had dissolved after the success of 1924, and how the same groups and individuals behind the League formed the CJIC, including the Native Sons of the Golden West, the American League, the American Federation of Labor, the Grange and V.S. McClatchy).

¹⁵⁶ RINGER, *supra* note 94, at 859.

¹⁵⁷ WHITE, *supra* note 15, at 72 (quoting Warren from February 7, 1942 meeting of the CJIC).

¹⁵⁸ See *id.* at 71-72. At the February 7, 1942 statewide conference of sheriffs and district attorneys, Warren answered a question on whether any Japanese had provided information about possible fifth column activities by other Japanese in California. He replied that "five or six [California sheriffs and district attorneys] . . . said some individuals had dropped in to give them some information." *Id.* at 71; see also GRODZINS, *supra* note 43, at 97-98 (comparing minutes from February 2, 1942 and February 7, 1942 meetings at which Warren gave contradictory statements on Japanese Californians' cooperativeness on information gathering).

¹⁵⁹ TENBROEK, *supra* note 43, at 201.

¹⁶⁰ See KATCHER, *supra* note 94, at 144.

¹⁶¹ *Id.*; see also CHUMAN, *supra* note 65, at 150.

¹⁶² MCWILLIAMS, PREJUDICE, *supra* note 32, at 116 (emphasis in the original).

dations to the President, advocating mass internment of "all persons of Japanese ancestry."¹⁶³ In the words of internment historian Peter Irons, "West Coast politicians, especially California . . . Attorney General Earl Warren, had influenced General DeWitt to press for the evacuation and internment of Japanese Americans in 1942."¹⁶⁴

In sum, by the time Roosevelt signed E.O. 9066 on February 19, 1942, Warren had organized a methodologically flawed research project to map disloyalty. He also had worked closely with key actors in the military, Congress, local and state politics and the media, pressing steadily, and often behind the scenes, for drastic action against Japanese Californians. Having established this clear record on "civil defense," Warren set his sights on higher office—the California governorship. In an attempt to distinguish his record from that of the incumbent governor, his campaign would boast of his treatment of Japanese Californians.

B. *The Bid for Governor*

1. Crafting the Campaign

After Warren's initial protestations,¹⁶⁵ he eventually agreed to run for Governor, citing incumbent Governor Culbert Olson's response to Pearl Harbor as his main motivation.¹⁶⁶ Incensed that Governor Olson's civil defense plan included no role for the Attorney General, Warren set out to "instruct and organize the public offices of the State in the technique of fifth column, sabotage, and modern warfare" so that the state's civil defense would be prepared "whenever the inevitable occurred."¹⁶⁷ Warren, the Republican challenger, announced his candidacy on April 10, 1942. According to one biographer, his campaign was "corny," "old-fashioned flag waving."¹⁶⁸ Capitalizing on wartime

¹⁶³ See BOSWORTH, *supra* note 119, at 65 (reporting on General DeWitt's Final Recommendations promoting the removal of "Japanese and other subversive persons" from the West Coast); WHITE, *supra* note 15, at 72.

¹⁶⁴ IRONS, *supra* note 32, at 268.

¹⁶⁵ See KATCHER, *supra* note 94, at 158. Following the February 11 meeting with Los Angeles Mayor Bowron and Tom Clark, Warren had dinner with Bowron at the members-only Bohemian Club in San Francisco. At the dinner, the two politicians negotiated over which of them would be the Republican challenger for Governor. Bowron rejected Warren's solicitations, stating his intent to fulfill his campaign promise to finish his term of office. "I'm not a candidate," Bowron protested. "You're the man to run against [Governor] Olson." *Id.*

¹⁶⁶ See Notes for TIME Interview 1 (undated), Earl Warren Papers, California State Archives, File 3640:535 (Earl Warren-1942 Gubernatorial Campaign: Press, Misc.) [hereinafter TIME Interview] (declaring that he "would not be a candidate today if the present state administration had shown any capacity for leadership in this problem either before or after Pearl Harbor").

¹⁶⁷ *Id.*

¹⁶⁸ See KATCHER, *supra* note 94, at 161. These campaign themes were designed by Warren.

fears and anxieties, full page campaign ads proclaimed “This is War!” and “Nero Fiddled and Rome Burned, It must not happen here.”¹⁶⁹

America’s war with Japan and the West Coast’s war against Japanese Californians provided Warren with the compelling bipartisan appeal that would sweep him into office—no small feat for a Republican candidate in a state with a Democratic majority.¹⁷⁰ Under the lofty theme of “leadership—not politics,” the campaign played heavily on the anti-Japanese sentiment that pervaded the state.¹⁷¹ Warren used the Japanese wartime threat to reach across traditional Republican-Democratic party lines. “I believe that you recognized, as did I, that with the attack on Pearl Harbor, party differences became relatively unimportant.”¹⁷² Like the statewide Republican party platform for the election, Warren’s campaign conflated enemy Japanese with Japanese Californians, decrying the Japanese threat and trumpeting Warren’s role in interning Japanese Californians.¹⁷³ In this sense, “patriotism” was the key distinction between the two candidates¹⁷⁴—a patriotism that was

As Murray Chotiner, campaign manager to Richard Nixon commented, Warren “remained his own campaign manager” who “set the tone and philosophy of his campaign” and “made, or approved, every major decision.” *Id.* at 164.

¹⁶⁹ Advertisement from unidentified newspaper (undated), Earl Warren Papers, California State Archives, File 3640:482 (Earl Warren, 1942: Gubernatorial Campaign, Newspapers).

¹⁷⁰ At the time of the 1942 election, registered Democrats outnumbered Republicans by more than one million in the state of California. Moreover, President Roosevelt’s overwhelming popularity convincingly carried the state for the Democrats for the third time in 1940. See KATCHER, *supra* note 94, at 157.

¹⁷¹ Warren traveled extensively with his master of ceremonies and sometime “hatchet man,” actor Leo Carillo. Carillo consistently “opened” for Warren’s campaign appearances. The actor conflated enemy Japanese with Japanese Californians by forwarding the unifying campaign theme of the Japanese threat in one breath and trumpeting Warren’s role in interning Japanese Californians in the next. See *id.* at 162 (noting Carillo’s role in “returning to the theme of danger from the Japanese and praising Warren for having been responsible for their evacuation”).

¹⁷² *Id.* at 161.

¹⁷³ California’s Republican Party that year would develop its platform around the theme of leadership during crisis, with a special emphasis on the yellow threat from within and without. The platform read in part:

In distant lands our boys are facing the Yellow Horde that seeks to overrun and trample civilization and liberty wherever it exists. At home we are threatened with enemies from within as well as from without. For the first time in the history of our Golden State, California finds itself in the front trenches [sic] of a combat zone.

Platform of the Republican Party of the State of California 1 (adopted Sept. 17, 1942), Earl Warren Papers, California State Archives, File 3640:535 (Earl Warren-1942 Gubernatorial Campaign: Press, Misc.) [hereinafter *Party Platform*]. It is highly unlikely that Warren did not endorse the state Republican platform as the top candidate of the ticket and former state Republican party chair.

¹⁷⁴ Katcher notes that Warren’s conflicts with Governor Olson redounded to the challenger’s benefit:

racially-loaded and defined by the Attorney General's active part in internment.

Warren's campaign contrasted his "constructive leadership" with Governor Olson's "mismanagement" and "bungling" response to Pearl Harbor.¹⁷⁵ Warren's role in initiating the mapping project became a central example of his patriotic leadership, and he boasted of the project's foresight and critical evidence-gathering role in effecting internment.¹⁷⁶ His campaign literature emphasized how in February of 1942, while Governor Olson was receiving "delegations of Japs at Sacramento" and intimating that "evacuation was unnecessary,"¹⁷⁷ Warren "saw the menace when it was only a shadow on the horizon" and "went to work quietly and did something about it,"¹⁷⁸ by "supplying Federal authorities with factual data necessary for the prompt evacuation of the Japanese from California."¹⁷⁹

Throughout his campaign, Warren played up the fears of the enemy lurking within. "[T]he fact that we have as yet experienced no sabotage," he reasoned before an audience of Kiwanis International, "is merely evidence that the saboteurs are under discipline and are merely awaiting the zero hour when they should strike."¹⁸⁰

Warren was the originator of the "no sabotage as proof of impending sabotage" line of argument that he first articulated at the February 2, 1942 meeting of state law enforcement officials.¹⁸¹ This bizarre argu-

It was on this issue of "patriotism" that Warren took his public positions. . . .

[I]n his conflicts with the Governor, he had shown strength, determination, American Legion patriotism, and reasonableness. There had been no quarrel over the Japanese evacuation, but here Warren had been active, while Olson had been quiescent.

All this tended to Warren's political benefit. His "image" had grown while Olson's had diminished.

KATCHER, *supra* note 94, at 157.

¹⁷⁵ See, e.g., *Campaign Pamphlet: California Indicts Governor Olson: The Truth about California's Home Defense* (undated), Earl Warren Papers, California State Archives, File 3640:457 (Earl Warren, 1942: Gubernatorial Campaign, Issues) [hereinafter *Campaign Pamphlet: California Indicts Governor Olson*] (pamphlet indicting Olson "for his visionless, obstructive, bungling record of politics and mismanagement in all matters pertaining to the defense of our State and nation both before and after Pearl Harbor," and praising Warren for his "constructive leadership").

¹⁷⁶ See *infra* notes 177-79 and accompanying text.

¹⁷⁷ *Campaign Ad: Before and After Pearl Harbor* (undated), Earl Warren Papers, California State Archives, File 3640:457 (Earl Warren, 1942: Gubernatorial Campaign, Issues) [hereinafter *Campaign Ad: Before and After Pearl Harbor*].

¹⁷⁸ *Campaign Pamphlet: California Indicts Governor Olson*, *supra* note 175.

¹⁷⁹ *Campaign Ad: Before and After Pearl Harbor*, *supra* note 177.

¹⁸⁰ *Warren Tells of Sabotage Peril Facing Pacific Coast*, L.A. TIMES, Oct. 17, 1942, Earl Warren Papers, California State Archives, File 3640:491 (Earl Warren, 1942: Gubernatorial Campaign, Newspapers) [hereinafter *Warren Tells of Sabotage Peril*].

¹⁸¹ See GRODZINS, *supra* note 43, at 402 (tracing the origins of the concerted sabotage thesis

ment was widely adopted by politicians, journalists, and military and government officials urging internment.¹⁸² The candidate reinforced his “zero hour” conspiracy theory by sharing the results of his research: that one-third of Japanese Californians were aliens living in proximity to military installations and vital war industries.¹⁸³ Moreover, Warren used the state’s proximity to Japan to stress that enemy saboteurs might land on the West Coast at any time, even after internment.¹⁸⁴ On one occasion, Warren dramatically read from a 1940 book published in

back to the February 2, 1942 meeting and its “chief exponent,” Earl Warren). At the February 2, 1942 meeting, Warren laid out his thesis:

It seems to me that it is quite significant that in this great state of ours we have had no fifth-column activities and no sabotage reported. It looks very much to me as though it is a studied effort not to have any until the zero hour arrives That was the history of Pearl Harbor. I can’t help believing that the same thing is planned for us in California. It would be inconsistent with everything the Axis has ever done, if it was not planned for us in California.

Id. at 94 (excerpting Warren’s comments from February 2, 1942 meeting).

¹⁸² See *Tolan Committee Hearings*, *supra* note 99, at 11011–12. In his testimony, Warren continued to disseminate his conspiracy theory:

Unfortunately, however, many of our people and some of our authorities . . . are of the opinion that because we have had no sabotage and no fifth column activities in this State since the beginning of the war, that means that none have been planned for us. But I take the view that that is the most ominous sign in our whole situation. It convinces me more than perhaps any other factor that the sabotage that we are to get, the fifth column activities that we are to get, are timed just like Pearl Harbor was timed and just like the invasion of [Europe].

Our day of reckoning is bound to come. . . . When, nobody knows, of course, but we are approaching an invisible deadline.

GRODZINS, *supra* note 43, at 402 (citing Warren’s Tolan Committee testimony).

¹⁸³ See GRODZINS, *supra* note 43, at 402 (stating that the argument was deployed by Congressman Tolan, the mayors of Portland, Seattle and Los Angeles, newspaper columnists and editorial writers, correspondents of Attorney General Biddle, “and not least of all, by General DeWitt in his recommendation for mass evacuation”); see also *Warren Tells of Spy Fears*, L.A. TIMES, July 25, 1942, Earl Warren Papers, California State Archives, File 3640:476 (Earl Warren, 1942: Gubernatorial Campaign, Newspaper, General) (reporting Warren’s comments at the Los Angeles Lawyers Club that he is “positive” of Japan’s targeting of California because the state houses “huge aircraft plants, great shipyards, and numerous other vital war industries”); *Warren Tells of State Fifth Column Danger*, L.A. TIMES, Sept. 25, 1942, Earl Warren Papers, California State Archives, File 3640:476 (Earl Warren, 1942: Gubernatorial Campaign, Newspaper, General); Clem Whitaker & Leone Baxter, *Warren-for-Governor Press Release*, Oct. 27, 1942, Earl Warren Papers, California State Archives, File 3640:537 (Earl Warren, 1942: Gubernatorial Campaign, Press Releases) [hereinafter October 27 *Warren-for-Governor Press Release*] (warning that “California is in graver danger than any state in the Union” because it is the “number one war industry state of the nation”).

¹⁸⁴ See *Warren Tells of Spy Fears*, *supra* note 183 (warning that California is at more risk for sabotage than any other state in the Union because “Japan has her eyes first on this State” and “there is nothing she wouldn’t do to destroy the vast war preparations under way here today”); see also *Warren Tells of Sabotage Peril Facing Pacific Coast*, *supra* note 180 (outlining dangers of Pacific Coast sabotage: “To my mind, the fact that we have as yet experienced no sabotage is merely evidence that the saboteurs are under discipline and are merely awaiting the zero hour

Tokyo by a Japanese naval intelligence officer that described how Japanese Angelenos in the San Pedro fishing area could be used to perform acts of sabotage.¹⁸⁵ Warren did not disclose to his audience that the book was a work of fiction.¹⁸⁶

Perhaps the most effective ploy of the Warren campaign was its portrayal of Governor Olson as a sort of "White Jap" or "Jap lover."¹⁸⁷ According to his campaign literature, while Warren was working hard to round up Japanese Americans, Governor Olson was entertaining Japanese delegations in the state capitol.¹⁸⁸ While Warren was fully prepared "to uphold the right of the military to take [] action against [West Coast] Japanese," Olson was ridiculed for believing, at least initially, that internment was not necessary.¹⁸⁹ While the incumbent Governor's indecisiveness constituted a threat to the West Coast's security interests, the challenger firmly advocated internment of Japanese Californians, and worked to "shut the door" on the concentration camps by submitting *amicus curiae* briefs in *Hirabayashi* and *Korematsu*. "Earl Warren was fully prepared," one of his campaign pieces stated, "to take a leading part in the legal battle to uphold the right of the military to take such action against the Japanese as might be required by military necessity on the Pacific Coast."¹⁹⁰

During the campaign, Warren's media strategists, Clem Whitaker and Leone Baxter, seized upon Olson's proposal to alleviate the farm labor shortage by releasing internees to harvest crops under armed guards. In Baxter's July 7, 1942 memo to Whitaker, she reveals that

when they should strike, which would probably coincide with an air attack on our California coast").

¹⁸⁵ See *Warren Tells of Sabotage Peril*, *supra* note 180, at 1, 14. Warren read excerpts from the book detailing how Japanese Angelenos could be used to "signal an air force, to furnish information, spread rumors, demoralize noncombatants, use secret radios for instructions to spies, and perform acts of sabotage." *Id.* at 14.

¹⁸⁶ See KATCHER, *supra* note 94, at 148 (reporting on the Kiwanis reading and commenting that the fact that the book was a fictional work was "much later disclosed").

¹⁸⁷ The Native Sons of the Golden West were particularly fond of the strategy of "Jap lover" baiting. In their monthly publication, *The Grizzly Bear*, articles routinely inveighed against "white-Jap co-conspirators" or "white Jap admirers and hirelings." See TENBROEK, *supra* note 43, at 48. Individuals urging restraint against Japanese Californians were denounced in public appeals to racism and homophobia as "Jap-lovers" and the "kiss-a-Jap-a-Day boys." See MCWILLIAMS, PREJUDICE, *supra* note 32, at 263 (quoting American legion head before a 1939 Japanese American Citizens League meeting).

¹⁸⁸ See *Campaign Ad: Before and After Pearl Harbor*, *supra* note 177; Memorandum from W.T. Sweigert re: Earl Warren and California in Wartime at 12, July 27, 1942, Earl Warren Papers, California State Archives, File 3640:5336 (Earl Warren, 1942: Gubernatorial Campaign, Platform) [hereinafter July 27 Sweigert Memo].

¹⁸⁹ July 27 Sweigert Memo, *supra* note 188, at 12, 15.

¹⁹⁰ *Id.* at 15.

“Olson wants Japs put to work on farms” by bringing back “‘deserving’ enemy aliens in farming and fishing industries.”¹⁹¹ In response, Baxter suggested that the American Legion and naturalized American citizens attack Olson’s plan along non-partisan lines and circulated a draft press release to that effect on July 13, 1942.¹⁹² Within days, numerous news stories appeared across the state with headlines such as “Olson Assailed for Jap Plan: Use of Orientals for Farm Labor Called ‘Unthinkable,’” and “Olson Called War Failure.”¹⁹³

Newspapers often quoted verbatim from the campaign’s press release, invoking the views of outraged naturalized citizens from the press release to denounce Olson¹⁹⁴ and closing their stories with a blatant endorsement of Warren’s candidacy.¹⁹⁵ Warren used the incident to highlight the Governor’s inability to lead in time of crisis, and dismissed the notion of using Japanese Californians as farm labor—even under armed guard—as ludicrous:

¹⁹¹ Memorandum from Leone Baxter to Clem Whitaker, July 7, 1942, Earl Warren Papers, California State Archives, F3640: 425 (Earl Warren, 1942: Gubernatorial Campaign, County files, County Organization, San Francisco).

¹⁹² See Warren-for-Governor Press Release, July 13, 1942, Earl Warren Papers, California State Archives, File 3640:536 (Earl Warren, 1942: Gubernatorial Campaign, Press Release) [hereinafter July 13 *Warren-for-Governor Press Release*]. (“Andronicos [the Greek organization leader on a Warren campaign committee] thinks both American Legion and naturalized American citizens should attack Olson et al., on non-political lines, claiming the post-war exposé will show the alien enemy property juggling more scandalous than last time.”).

¹⁹³ *Olson Assailed for Jap Plan*, OAKLAND TRIB., July 13, 1942, Earl Warren Papers, California State Archives, File 3640:445 (Earl Warren, 1942: Gubernatorial Campaign-Issues, Agriculture); *Olson Called War Failure*, L.A. TIMES, July 15, 1942, Earl Warren Papers, California State Archives, File 3640:445 (Earl Warren, 1942: Gubernatorial Campaign—Issues, Agriculture).

¹⁹⁴ The OAKLAND TRIBUNE, for example, reprinted six of the seven paragraphs of the Warren press release verbatim, quoting at length Orange County publisher and citrus grower Justin Creamer, whose criticisms of the Governor read in part:

Everyone—excepting Governor Olson, apparently—knows that part of the Japanese scheme to destroy California and use our beloved State as an invasion point for the conquest of this Nation was the implantation and development of a fifth column among our population. This fifth column spread its roots until there were Japs living and working in our most vital areas. Japs overlooked harbor installations, lived near strategic power stations and war plants.

Olson Assailed for Jap Plan, *supra* note 193. Compare with July 13 *Warren-for-Governor Press Release*, *supra* note 192.

¹⁹⁵ Compare July 13 *Warren-for-Governor Press Release*, *supra* note 192 (concluding with sentence, “[e]very thinking citizen must realize the time has come for constructive, war-time leadership of the type Earl Warren stands for”), with *Olson Assailed for Jap Plan*, *supra* note 193 (concluding that “[e]very thinking citizen must realize the time has come for constructive, war-time leadership of the type Earl Warren stands for”). See also *Olson Called War Failure*, *supra* note 193 (article ending with statement by Democratic leader Rex Hardy declaring that he is “going to support Atty. Gen. Earl Warren for Governor” who has “always demonstrated that he is of the caliber badly needed at a time like this”).

The public was not impressed by this [proposal] of the Governor. When the evacuation of the Japanese was first announced, the people of California heartily approved it as a necessary war measure. Nothing has changed their minds since, and the specious argument of the Governor that the Japs could be guarded by troops while harvesting crops was not impressive. They would still be where they might commit sabotage or turn into a fifth column in the event of an enemy raid upon the coast or an attempt at invasion. If all that is needed is to put a guard over them, there would have been no reason for evacuation. A cordon of troops could have been thrown around every Japanese district in the State, but the Japs would still have been in our midst to endanger the safety of our people in the event of enemy action.¹⁹⁶

After it was reported that some internees were “energetically seeking absentee ballots” for the 1942 elections, editorials implied that Governor Olson was catering to Japanese Californian voters: “[I]sn’t it a fair inference that the Governor was seeking, by an empty gesture, to line up the Jap vote in his favor?” one editorial queried.¹⁹⁷

Such editorials, carrying sensational titles such as “Olson and the Jap Vote” and calculated to defame Olson’s political and racial standing as a “loyal” (white) Californian, were possible because he had been less aggressive than his opponent in capitalizing upon the popular, anti-Japanese Californian sentiment in an election year.¹⁹⁸ These same editorials simultaneously characterized interned Japanese American citizens as an ongoing racial threat in light of their interest in exercising their right to vote.¹⁹⁹ Warren’s ability to speak to the fears and paranoia of California’s wartime voters in the language of long-standing anti-Asian racism amounted to a winning campaign strategy.

2. Warren’s Leadership in Supremacist Organizations

California’s most influential WWII-era political organizations were founded with the specific purpose of excluding and disenfranchising Asian immigrants to California.²⁰⁰ Earl Warren not only solicited the

¹⁹⁶ Earl Warren Campaign Speech 30–31 (undated), Earl Warren Papers, California State Archives, File 3640:5336 (Earl Warren, 1942 (Gubernatorial Campaign, Platform)).

¹⁹⁷ *Olson and the Jap Vote*, L.A. TIMES, Aug. 19, 1942, Earl Warren Papers, California State Archives, File 3640:536 (Earl Warren, 1942: Gubernatorial Campaign, Press Releases).

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

²⁰⁰ At its first national convention in Minneapolis in 1919, the American Legion passed

support of such groups, but had close ties to two of the most vitriolic anti-Asian hate groups in the state—the American Legion and the Native Sons (and Daughters) of the Golden West. These two organizations were each influential in their own right. In combination, however, they provided the foundation for the most effective anti-Japanese coalition in California’s history, the Japanese Exclusion League, which would later become the more benign-sounding California Joint Immigration Committee.²⁰¹

A relationship of mutual support existed between the American Legion, the Native Sons and Warren the gubernatorial candidate. Warren helped the groups make their case against Japanese Californians, and the organizations enthusiastically supported him for governor. Accordingly, Warren’s gubernatorial campaign took full advantage of his insider status with these core supremacist organizations.

a. *The American Legion*

Even before the outbreak of hostilities between Japan and the United States, American Legionnaires contemplated internment of Japanese Californians residing on the West Coast. In a 1939 article appearing in *The Saturday Evening Post*, the head of the American Legion’s National Defense Committee was quoted as saying to a 1939 Japanese American Citizens League audience that “[i]f we ever have war with Japan and I have anything to say about it, the first thing I’ll do will be to intern every one of you.”²⁰² As early as January 5, 1942, the California Legion War Council passed a resolution noting the pattern of Japanese Californian residencies near “strategic locations”

resolutions proposing that the 1907 Gentleman’s Agreement with Japan be abrogated, that the Japanese be excluded from immigrating and that an amendment to the Fourteenth Amendment be added to revoke birthright citizenship unless both parents are eligible to citizenship. See DANIELS, POLITICS, *supra* note 61, at 86. The Native Sons of the Golden West formed in 1875 on a campaign to contain the “yellow peril.” See Earl Warren Project, *The Internment*, Dillon Myer Interview at 9, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981.

²⁰¹ Formed in October 1923, the CJIC plotted the winning strategy for absolute exclusion of Japanese immigrants under the Immigration Act of 1924. See *supra* note 155 and accompanying text; see also GRODZINS, *supra* note 43, at 10–110. But see DANIELS, POLITICS, *supra* note 61, at 97–99 (maintaining that the Japanese Exclusion League was the primary moving force behind the 1924 Act). Perhaps the overlapping nature of the two groups explains the seeming historical contradictions. Grodzins points out that the CJIC assumed the office, records and funds of the Japanese Exclusion League in August of 1924. See GRODZINS, *supra* note 43, at 11. The Committee continued its work to maintain “white California” even after its exclusionist victory, and remained intact through the Depression to lobby for internment during World War II. See GRODZINS, *supra* note 43, at 11.

²⁰² RINGER, *supra* note 94, at 850 (quoting American Legion leader from September 30, 1939, *Saturday Evening Post* article entitled “Between Two Flags”).

and demanding that "all such enemy aliens be placed in concentration camps and that the land and/or property owned . . . by such aliens be placed under government supervision" ²⁰³ The Legion later defined enemy aliens and nationals as "Japanese, both aliens and American citizens." ²⁰⁴

The American Legion national leadership took a formal position on internment on January 19, 1942, unanimously adopting a resolution demanding "immediate action by the Government in evacuating and interning all enemy aliens and nationals in combat zones, such as the Pacific Coast." ²⁰⁵ By early March 1942, after Warren's Tolan Committee testimony, the California Legion released its survey declaring Japanese Californians to be a "menace to the safety of our country," on the basis of the more than 200,000 aliens and citizens living near railroads, aqueducts, power and oil lines and defense factories. ²⁰⁶

At the time, Asians were the only racial group prohibited from gaining citizenship under the naturalization statutes' whiteness requirement and Supreme Court precedent excluding Asians from whiteness. ²⁰⁷ The Legion's "one hundred percent Americanism" creed was therefore a facially-neutral but racially-loaded slogan. Using this same theme, Warren delivered one of his most important campaign addresses at the California Legion's convention in front of 40,000 delegates. ²⁰⁸ In his speech, Warren identified himself as a proud Legion member ²⁰⁹ and credited the Legion's Americanism Committee for the removal of Japanese Californians from coastal areas. ²¹⁰ Warren urged

²⁰³ GRODZINS, *supra* note 43, at 39 (quoting from the resolution).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citing *San Francisco Examiner* article dated March 6, 1942).

²⁰⁷ The Naturalization Law of 1790 required whiteness as a prerequisite for naturalization eligibility. See Act of Mar. 26, 1790, ch.3, 1 Stat. 103 (providing for naturalization of only a "free white person"). This racial requirement was amended after the Civil War to include persons of African descent. See Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254 (extending naturalization to "aliens of African nativity and to persons of African descent"). Racial restrictions were not lifted completely until the passage of the "McCarran-Walter Act" of 1952. See Immigration and Nationality Act of 1952, ch. 477, § 311, 66 Stat. 163, 239 (codified at 8 U.S.C. § 1422) (providing that 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 . . ."). Although primarily an immigration statute, the Chinese Exclusion Act not only prohibited Chinese from immigrating to the United States, but also barred persons of Chinese descent from naturalization eligibility. See Act of May 6, 1882, ch. 126, § 14, 22 Stat. 61 (repealed 1943); see generally *supra* note 64.

²⁰⁸ See *American Legion Convention Brings 40,000 Vets to L.A.*, S.F. NEWS, Aug. 17, 1942, (Earl Warren Papers, California State Archives, File 3640:481, Earl Warren, 1942 (Gubernatorial Campaign, Newspaper)).

²⁰⁹ Earl Warren, Address at Los Angeles American Legion 2 (Aug. 17, 1942) (transcript Earl Warren Papers, California State Archives, File 3640:457, Earl Warren, 1942 (Gubernatorial Campaign, Issues)) [hereinafter Address at American Legion].

²¹⁰ See *Legion Leader Scores Apathy*, L.A. TIMES, Aug. 18, 1942, at 6.

the organization to continue its “militant patriotism” “until the last Jap warship is destroyed.” He also supported a pending Legion resolution to keep Japanese aliens out of California “for all time.”²¹¹ Departing from his prepared remarks, Warren weighed in on the resolution: “I say to you now that they must not come back to our State—we must keep them away from California so long as the flag of Nippon is flying over the Philippines.”²¹²

In contrast to Warren’s warm reception, Legion members attacked Governor Olson for criticizing the Legion’s anti-subversive activities.²¹³ Newspapers reported enthusiastic ovations for Warren at his Legion address alongside a companion article that contained a stinging critique of Olson’s record, “Before and After Pearl Harbor,” by former American Legion national commander Thomas Riordan.²¹⁴ Though it appeared under Riordan’s byline, the companion “article” was masterminded by Assistant Attorney General W.T. Sweigert, a campaign adviser to Warren.²¹⁵

²¹¹ *Legion Hears Warren*, OAKLAND POST ENQUIRER, Aug. 17, 1942, at F; see *American Legion Convention*, *supra* note 208.

²¹² *Legion Leader Scored Apathy*, *supra* note 210. For text of his formal remarks, see Address at American Legion, *supra* note 209.

²¹³ See *Governor’s Race: Ex-Legion Chief Blasts Olson’s Record on State War Preparedness*, S.F. CHRONICLE, Aug. 18, 1942, at 20 (Earl Warren Papers, California State Archives, File 3640:481, Earl Warren, 1942 (Gubernatorial Campaign, Newspaper)) [hereinafter *Governor’s Race*].

²¹⁴ See, e.g., *id.* (reprinting full text of Warren campaign’s “Before/After Pearl Harbor” ad as Riordan’s criticisms of Olson); *Legion Assails Lag in Defense*, L.A. TIMES, Aug. 18, 1942 (Earl Warren Papers, California State Archives, File 3640:481, Earl Warren, 1942 (Gubernatorial Campaign, Newspaper)) (reporting that Legion delegates “gave an ovation that shook the rafters to their fellow member, Attorney General Earl Warren”); *Olson Record Denounced by Legion Aide*, L.A. TIMES, Aug. 18, 1942 (Earl Warren Papers, California State Archives, File 3640:481, Earl Warren, 1942 (Gubernatorial Campaign, Newspaper)) (covering denunciation of Olson by former Californian American Legion State Commander Thomas Riordan).

²¹⁵ See Memorandum from W.T. Sweigert to Helen R. MacGregor (July 30, 1942) (forwarding memorandum regarding “Earl Warren and California in Wartime” “to the General . . . subject to his comments and suggestions”) (Earl Warren Papers, California State Archives, File 3640:457, Earl Warren, 1942 (Gubernatorial Campaign, Issues)). For an example of the unattributed verbatim use of the July 27 Sweigert Memo for Legionnaire Riordan’s public critique of Olson, compare *Governor’s Race*, *supra* note 213, at 20 (“Olson received delegations of Japs at Sacramento and intimating in the press that ‘he had his own plans’ for dealing with the Japanese situation—a plan to the rather vague effect that evacuation was unnecessary and that the situation could be solved by having the loyal Japs report on the activities of the disloyal Japs!”) with July 27 Sweigert Memo, *supra* note 188 (quoting Riordan as saying that “Olson was receiving delegations of Japanese at Sacramento and intimating in the press that he had ‘his own plans’ for dealing with the Japanese, a plan to the rather vague effect that a removal of the Japanese was not necessary and that the situation could be solved by having the loyal Japanese report on the subversive or fifth column activities of the disloyal Japanese”).

b. *Native Sons of the Golden West*

With their mission to preserve California as the "White Man's Paradise" that God had intended, the Native Sons of the Golden West ("NSGW") were rivaled only by the American Legion in their exclusionary campaign against Californians of Japanese ancestry.²¹⁶ In the inaugural 1907 monthly issue of *The Grizzly Bear*, the NSGW's official publication, an article entitled *The Asiatic Peril* trumpeted the dangers faced by "white civilization in California" due to the "peaceful invasion" of Japanese to their state.²¹⁷ Expulsion of the issei from California and their exclusion from the United States were the unifying themes of NSGW.

The attack on Pearl Harbor provided NSGW with "bragging rights" as to the correctness and foresight of their decades of anti-Japanese propaganda. In a bid for greater political respect and prominence, the deputy grand president and editor of *The Grizzly Bear* gloated in the first post-Pearl Harbor issue that "[h]ad the [Native Sons'] warnings been heeded . . . the treacherous Japs probably would not have attacked Pearl Harbor on December 7, 1941, and this country would not today be at war with Japan."²¹⁸

During a successful bid for Alameda County District Attorney in 1926, Warren joined the NSGW, an organization his biographers readily concede was "anti-Orientalist."²¹⁹ Eschewing campaign contributions and partisan support, they explain, Warren needed to supplement his base by cultivating alternative sources of support from fraternal, civic and patriotic groups like the Native Sons and the American Legion, among others.²²⁰ From 1926 until late middle-age, Earl Warren maintained an esteemed status within the NSGW.²²¹

²¹⁶ See TENBROEK, *supra* note 43, at 46. At no convention did the American Legion fail to adopt an anti-Japanese measure. See GRODZINS, *supra* note 43, at 12. Moreover, "the Native Sons took second place to no other organization in the number of resolutions passed [favoring internment] or in the vehemence with which they were expressed." *Id.* at 49.

²¹⁷ See TENBROEK, *supra* note 43, at 46-47. Although the NSGW formed in 1875, the first issue of *The Grizzly Bear* was published in 1907. Daniels notes that in almost every subsequent issue following the first, *The Grizzly Bear* contained at least one article attacking the Japanese. See DANIELS, POLITICS, *supra* note 61, at 85.

²¹⁸ GRODZINS, *supra* note 43, at 48. The article reviewed the long history of anti-Japanese agitation on the part of the Native Sons. See *id.*

²¹⁹ See CRAY, *supra* note 5, at 51 (noting that Warren "added memberships in fraternal societies and the anti-Oriental Native Sons of the Golden West, and took active roles with the Masons and the American Legion" during the 1926 District Attorney campaign); WHITE, *supra* note 15, at 31 (stating that Warren joined "several lodges" including the "anti-Orientalist Native Sons of the Golden West" in 1926).

²²⁰ See WHITE, *supra* note 15, at 31 (explaining Warren's NSGW membership in part as a campaign strategy that cultivated support from civic groups and the press to compensate for his refusal of campaign contributions and partisan support).

²²¹ See McWilliams, *supra* note 35, at 68.

The Native Sons' wartime agenda mirrored Earl Warren's agenda as Attorney General. For example, a February 1942 *Grizzly Bear* editorial entitled, "Save California," argued that the "Japs must be dispossessed of every foot of California land they now hold, and the land must be escheated to the state!"²²² Fortunately for the NSGW, the state's Attorney General was already working on exactly such a plan through his mapping project. Like Warren, the NSGW advocated not only that aliens and citizens of Japanese ancestry be interned, they further agitated that persons of Japanese ancestry be "permanently routed from these shores"²²³

The organization stayed in close contact with the Attorney General regarding its activities. For example, after the Board of Grand Officers of the Native Sons urged removal of "all Japanese," whether citizen or alien, on February 14, 1942, they sent the resolution and accompanying press release to Assistant Attorney General Warren Olney on March 24, 1942.²²⁴ In May, the Grand Parlor (NSGW headquarters) adopted an even more extreme measure calling for a lawsuit to challenge the birthright citizenship of Japanese American nisei and a constitutional amendment to exclude persons of Japanese ancestry from U.S. citizenship.²²⁵ This resolution was promptly forwarded to the Attorney General's office in early June.²²⁶ Within days, Warren's office responded to the NSGW mailing and replied that he would be "glad" to serve on the "Americanization Committee" of the NSGW.²²⁷

Unlike Justice Hugo Black, whose membership in the Ku Klux Klan repeatedly surfaced during his years on the bench,²²⁸ Warren's

²²² GRODZINS, *supra* note 43, at 48.

²²³ *Id.* at 49.

²²⁴ See Cover Sheet from Native Sons of the Golden West to Warren Olney (Mar. 24, 1942) (Earl Warren Papers, California State Archives, File 3640:17885, Earl Warren, 1931-42 (Personal Papers, Native Sons of the Golden West)). For the description of the officers' resolution, see TENBROEK, *supra* note 43, at 195.

²²⁵ Native Sons of the Golden West, Grand Parlor Resolution (June 1, 1942) (Earl Warren Papers, California State Archives, File 3640:17885, Earl Warren, 1931-42 (Personal Papers, Native Sons of the Golden West)).

²²⁶ See Letter from Charles W. Johnson, Secretary of Attorney General Earl Warren, to John T. Regan, Grand Secretary, NSGW (June 10, 1942) (Earl Warren Papers, California State Archives, File 3640:17885, Earl Warren, 1931-42 (Personal Papers, Native Sons of the Golden West)) (confirming receipt of NSGW resolution on citizenship of Japanese born in the United States that "will be called to his attention upon his return").

²²⁷ See Letter from Charles W. Johnson, Secretary of Attorney General Earl Warren, to John T. Regan, Grand Secretary, NSGW (June 12, 1942) (Earl Warren Papers, California State Archives, File 3640:17885, Earl Warren, 1931-42 (Personal Papers, Native Sons of the Golden West)).

²²⁸ See, e.g., John P. Frank, *Hugo L. Black*, in *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1987: THEIR LIVES AND MAJOR OPINIONS* 2321, 2326 (Leon Friedman & Fred L. Israel eds., 1980) (reporting that Black dropped out of the Ku Klux Klan to run for Senate before being appointed to the United States Supreme Court).

membership in supremacist organizations has largely escaped serious notice by judicial biographers and historians. Biographers who have addressed Warren's involvement with supremacist groups have tended to sanitize it by eliminating, downplaying or explaining away his affiliations. Ed Cray, for example, asserts that though "Warren the politician" belonged to both the American Legion and the Native Sons of the Golden West, "he said nothing to indicate he agreed with them that 'the Yellow Peril' was here and going to take over."²²⁹

Contrary to Cray's assertion, Warren's affiliation with the Native Sons was more than a marriage of political convenience, for the Attorney General's campaign files reflect that he knew and approved of the hostile measures forwarded by the NSGW. "Warren the politician," more than a mere "joiner," was a true believer, as evidenced by his wartime agenda against Japanese Californians and its compatibility, if not coordination, with the activities of nativist organizations. Warren's anti-Asian activist record while Attorney General cannot be explained away using the Hugo Black narrative, i.e., that he joined a racist organization because to do otherwise would have amounted to political suicide.²³⁰ Warren provided leadership, prestige and legitimacy to two

²²⁹ CRAY, *supra* note 5, at 115. As proof of Warren's lack of racial rancor, Cray excerpts part of a speech before the Associated Farmers convention in December of 1940, in which Warren "cautioned against bigotry":

It should be remembered that practically all aliens have come to this country because they like our land and our institutions better than those from whence they came. They have attached themselves to the life of this country in a manner that they would hate to change and the vast majority of them will, if given a chance, remain the same good neighbors that they have been in the past regardless of what difficulties our nation may have with the country of their birth. History proves this to be true. . . . We must see to it that no race prejudices develop and that there are no petty persecutions of law-abiding people.

Id. at 115-16.

There are at least two responses to Cray's use of the Associated Farmers text. First, Warren was full of contradictions, internal inconsistencies and denials throughout his "yellow peril" years as the attorney general. He could forward the most outlandish conspiracy theories and crude racial stereotypes and advocate tirelessly for internment while he simultaneously declared as unconstitutional a state statute that would suspend from employment all state civil service employees of Japanese ancestry. GRODZINS, *supra* note 43, at 124, 127. Grodzins captured Warren's contradictions when he referred to the Attorney General's actions as characterized "on one side, by a scrupulous regard for the legal status of resident Japanese, and on the other, by a determination to foster the evacuation by every possible lawful means." *Id.* at 127. Second, Warren may have held the Associated Farmers in low esteem. Unlike the higher-brow, businessman base of the American Legion and NSGW of which he curried favor, there is evidence that Warren's contemporaries considered the Associated Farmers to be "a bunch of bandits" "on the wrong side of everything." Earl Warren Project, *Decision and Exodus*, James Rowe Interview at 24, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional History Office, The Bancroft Library, University of California, Berkeley, 1981.

²³⁰ See McWilliams Interview, *supra* note 72, at 29 (characterizing Warren's involvement with the NSGW as "very active").

of the most extreme, racist organizations in California history, organizations that engineered the anti-Asian movement and supported a plethora of anti-Asian restrictions and exclusions.

C. *Epilogue: Governor Warren Goes to Sacramento*

Warren's hostility toward Japanese Californians did not end with his election as governor. If anything, the passage of time and the security of his office strengthened Warren's animosity toward those interned. In mid-1943, he referred to them as "150,000 potential aiders and abettors of this kind of [sabotage] warfare," all of whom "have been indoctrinated with the imperial designs and have had them coupled with Shintoism—the religion of the race."²³¹ Internment, the Governor argued "saved our state from terrible disorders and sabotage."²³² He vehemently opposed proposals to return "loyal" Japanese to California, calling it a "body blow" to national security.²³³ "If the Japs are released," he reasoned, "no one will be able to tell a saboteur from any other Jap."²³⁴

While denouncing Japanese Californians with his crude set of stereotypes, Warren simultaneously claimed to maintain a sense of fairness. "This is not a personal view," he explained. "Have you ever heard an Army or Navy man advocate release of these Japs? Have you ever heard any one connected with the FBI indicate such action would be consistent with the national security?"²³⁵ Even while he was declaring his opposition to having "Japs back in California during this war if there is any lawful means of preventing it," he added that "[t]his isn't an appeal to race hatred." Rather, he suggested, "[i]t is an appeal for safety."²³⁶

Even toward the end of the war, Warren could not distinguish between Japanese American citizens and Japanese from Japan.²³⁷ In a 1944 speech before the Newspapers Publishers Association on the "Japanese Problem," Warren suggested that return of the Japanese Californians would hinge upon the number of casualties suffered by Japan. "When, if ever, these Japanese are to be permitted to return to California is not a question we can decide now. There will have to be

²³¹ Governor Earl Warren, Address at the 35th Annual Meeting of Governors Conference 5 (June 21, 1943) (transcript, Earl Warren Papers, Library of Congress, cont. 788 "As Governor, General, May-Dec. 1943" folder) [hereinafter *Governors Conference Address*].

²³² CRAY, *supra* note 5, at 157; KATCHER, *supra* note 93, at 148.

²³³ See *Governors Conference Address*, *supra* note 231, at 5–6.

²³⁴ *Id.* at 6.

²³⁵ *Id.* at 5–6.

²³⁶ *Id.* at 6.

²³⁷ See also discussion *supra* notes 171, 211–12 and accompanying text.

many more lives lost far out across the Pacific before the question is germane."²³⁸ This position was particularly ironic in light of the extraordinary high casualty rates suffered by the nisei soldier 442nd regimental combat team recruited from the internment camps that distinguished itself as one of the war's most decorated units.²³⁹ Only when the War Department declared that Japanese Californians would be released from the camps at the end of 1944²⁴⁰ did Warren fall into line by pledging his support for the peaceful and safe return of the internees.²⁴¹

III. RACIAL REDEMPTION

A. *Redemption's Promise*

Webster's defines "redemption" as an act that releases one from blame or debt.²⁴² In the term's religious sense, one is freed from the consequences of sin through repentance for an offense or injury. For western Judeo-Christian cultures, redemption is a sacred remedy for those who have sinned. With proper acknowledgment and atonement for one's transgressions, anyone can return to proper society with a "clean slate" and a "second chance."²⁴³

²³⁸ Governor Earl Warren, Speech before the Newspaper Publishers Association (undated) (transcript, in Earl Warren Papers, Library of Congress, cont. 789 "As Governor, General, 1944" folder) [hereinafter Newspaper Publishers Speech].

²³⁹ See CWRIC, *supra* note 20, at 258-59 (recording the 300% casualty rate of the 442nd nisei battalion, and its status as "one of the war's most decorated combat teams, receiving seven Presidential Distinguished Unit Citations and 18,143 individual decorations—including one Congressional Medal of Honor, 47 Distinguished Service Crosses, 350 Silver Stars, 810 Bronze Stars and more than 3,600 Purple Hearts").

²⁴⁰ This announcement was the result of the unanimous Supreme Court decision in the *Endo* case, decided on December 18, 1944. See *Ex parte Endo*, 323 U.S. 283 (1944) (holding that Executive Order 9066 and its ratifying Act of March 21, 1942 do not authorize detention of petitioner-internee by the War Relocation Authority).

²⁴¹ See CRAY, *supra* note 5, at 158-59 (acknowledging that Warren began to "back away from exclusion"); DANIELS, CAMPS, *supra* note 32, at 158 (noting that "Governor Earl Warren, who as late as November 1944 was publicly warning against letting Japanese Americans return because of 'the dangers to the war effort from [possible] civil disturbances,' immediately urged the people of California to support the Army decision").

²⁴² Webster's Dictionary defines "redeem" in part as follows:

1 a: to buy back: REPURCHASE . . . 2: to free from what distresses or harms: as . . . c: to release from blame or debt: CLEAR d: to free from the consequences of sin . . . 5 a: to free from lien by payment of an amount secured thereby . . . 6 a: to atone for: EXPIATE b (1): to offset the bad effect of (2) to make worthwhile . . .

MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 979 (10th ed. 1994).

²⁴³ Indeed, if one reads the media coverage of President Clinton's admission of an "improper relationship" with Monica Lewinsky following his grand jury testimony, the primary criticism

It is possible that Earl Warren sought a religious sort of redemption for the injuries he inflicted upon Japanese Californians during the war. Significant evidence suggests that his actions weighed heavily on his conscience and may support speculation that his stellar civil rights record on the bench was tied to the “sins” of his past.²⁴⁴ While a religious-like redemption may have motivated the Chief Justice, I will deploy a more legalistic notion of redemption in an attempt to capture the meaning of Warren’s civil rights jurisprudence—its significance as racial redemption.

My theory of racial redemption, presented here in an early stage of development, offers a general framework within which to place a series of legal precedents and through which to understand legal history. Beyond its application to Earl Warren and the Warren Court, racial redemption theory is available for a wide range of purposes, including: analyzing contemporary post-civil rights politics in an era of race-coding; understanding the phenomenon of pitting one subordinated group against another in a process I refer to as “racial brokering;” explaining the increasing use of people of color as spokespersons or “racial mascots” for racially regressive policies and reconciling the increasing equality discourse with the decreasing yield in material resources to redress inequality.

In a legal property sense, redemption refers to the freeing of property from mortgage by paying the debt for which the property stood as security.²⁴⁵ Whiteness, as Professor Cheryl Harris has shown,

revolved around his failure to adequately acknowledge his wrongdoing and to apologize for it. Thus, redemption was withheld (by the media and political pundits at least) prompting a series of further acts of contrition by the President. See Laurie Goodstein, *Clinton Chooses Ministerial Team to be His Spiritual Advisors*, SAN DIEGO UNION-TRIB., Sept. 15, 1998, at A5 (describing Clinton’s choice of ministers to “help him resist what one of the ministers calls ‘the temptations that have conquered’ the president in the past”); Steve Dubin, *Acts of Contrition or Just an Act?*, PORTLAND OREGONIAN, Sept. 13, 1998, at D1 (detailing Clinton’s actions since the break of the Lewinsky story in January 1998 and stating that “[o]n the morning he was publicly undressed by the unveiling of independent counsel Kenneth Starr’s report, Clinton played the sinner in genuine need of forgiveness”); *White House Frenetic After Report’s Release*, GREENSBORO NEWS & REC., Sept. 12, 1998, at A4 (stating that Clinton tried to rebut the Starr report by a teary plea for redemption at a prayer breakfast); Melissa Healy, *First Lady Publicly Forgives Spouse*, DENVER POST, Aug. 19, 1998, at A1 (looking at Hillary Clinton’s public ovation of forgiveness as the key to Bill Clinton’s political redemption); Arianna Huffington, *For Clinton, Repentance, Then Redemption*, SACRAMENTO BEE, Feb. 13, 1998, at B7 (arguing, in a pre-Starr report editorial, that Clinton was shutting off the road to redemption by playing the perfectionist).

²⁴⁴ See *infra* Part IV.B.

²⁴⁵ Black’s Law Dictionary defines “redeem” as follows:

To buy back. To free property or article from mortgage or pledge by paying the debt for which it stood as security. To repurchase in a literal sense; as, to redeem one’s land from a tax-sale. It implies the existence of a debt and means to rid property of that incumbrance.

has constituted a form of property recognized in law.²⁴⁶ In *Plessy v. Ferguson*, for example, the Court acknowledged that if Plessy were white, he would have an action for damages against the railway company for his wrongful exclusion from the "white car":

If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.²⁴⁷

In the *Plessy* era, the property value of whiteness was maintained under a legal system and social order based on the logic of white supremacy.²⁴⁸ But in a post-civil rights era in which open forms of white supremacy have been legally prohibited and socially discredited, the property value of whiteness, to the extent it is understood to retain a supremacist content, has been "mortgaged" and diminished.²⁴⁹

BLACK'S LAW DICTIONARY 884 (6th ed. 1991).

²⁴⁶ See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993). Harris's work builds upon insights expressed by Derrick Bell in an earlier work, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1602, 1608 (1989) (discussing the "property interests of identifiable whites").

²⁴⁷ Harris, *supra* note 246, at 1749 (citing *Plessy v. Ferguson*, 164 U.S. 537, 549 (1896)).

²⁴⁸ My working definition of white supremacy is a set of reinforcing and synergistic beliefs and institutional practices and policies consistent with superiority based on white racial identity or inferiorization of non-white racial identity, and reflected in societal group power relations. See Sumi Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1036 & n.6 (1997). Cf. GEORGE FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* xi (1981) (defining white supremacy as the "attitudes, ideologies, and policies associated with the rise of blatant forms of white or European dominance over 'nonwhite' populations"—a domination achieved by making race or color a qualification for equal participation in civil society); Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 & n.129 (1989) (referring to white supremacy as a "political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings"). For a concise summary of definitions of white supremacy, see Margaret Montoya, *Of "Subtle Prejudices," White Supremacy, and Affirmative Action: A Reply to Paul Butler*, 68 U. COLO. L. REV. 891, 900-03 (1997) (summarizing definitions forwarded by George Fredrickson, Winthrop Jordan, Ronald Takaki and Tomás Almaguer).

²⁴⁹ In a recent book, Shelby Steele observes the impact of the civil rights movement on the meaning and status of whiteness and the need for racial redemption:

Ironically, it was the idea of equality that brought stigma to whites. In the civil rights era, when white America finally accepted a legal equality that would extend to different races, it also accepted an idea that shamed it. For three centuries white

Logically, however, whites have a vested interest in retaining advantageous racial hierarchies, structures and cultures—the property value of whiteness—and may be expected to defend political and material advantages over peoples of color.²⁵⁰ Inherent in this property interest, though, lies a tension between the *knowledge* of white supremacy's moral decrepitude and the *desire* to enjoy the fruits of that tainted tree. A racial redemption of sorts is needed to restore the property interest in whiteness to its full pre-Jim Crow value under post-Jim Crow norms and to reconcile the fundamental tension at the heart of the current U.S. racial socio-economy.

Racial redemption is the process by which whiteness can be restored to its full material value by removing the encumbrances that the legacy of racism has placed upon it. Such a process reconciles the knowledge/desire tension by denouncing supremacy while permitting its continued operation. Specifically, there are three identifiable features that characterize the process of racial redemption: 1) the repudiation of old forms of white supremacy; 2) the burial of historical memories of racial subordination; and 3) the transformation of white supremacy into more sustainable forms.

The repudiation of America's supremacist past may take various forms, such as the declaration of racial apologies or racial equality "covenants." A number of historical events merged in the mid-twentieth century to force the repudiation of white supremacist regimes, only two of which I will address. First, the discovery of the Nazi death camps was an epiphanal moment for the United States and began the final demise of the pseudo-scientific, biologically-based philosophy of white supremacy.²⁵¹ The Holocaust held a mirror to white Americans' violent

America had used race to defeat equality. It had indulged in self-serving notions of white supremacy, had transgressed the highest principles of the democracy, and had enforced inequality on others while possessing the ideas to know better. . . . America's new commitment to equality in the civil rights era brought with it an accountability for all this. . . . In a sense the new embrace of equality floated the nation's racial shame, unanchored it, so that it rose to the surface of American life as a truth that the nation would have to answer for.

SHELBY STEELE, *A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA* 118–19 (1998). I agree with Steele when he asserts that three centuries of white supremacy have created a need to redeem whiteness in the post-civil rights era. In fact, this need also explains why conservatives of color receive such a positive hearing among many whites.

²⁵⁰ See Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1381 (1988).

²⁵¹ See KLUGER, *supra* note 1, at 690 (noting that postwar public opinion on U.S. race relations had undergone a "profound change" due to the "awful consequences of racial prejudice revealed by the Nazi regime" that caused a "revulsion against the kind of racial feeling that had led to the Japanese-American relocation cases during the Second World War").

exclusion and disfranchisement of people of color, particularly Black Americans in the South. In addition, the 1944 publication, *An American Dilemma*, removed the intellectual cover enjoyed by scientific racism.²⁵² In his thousand page work, Gunnar Myrdal argued that America's race problem was attributable not to the biological inferiority of the minority group, but to the irrational prejudices of members of the majority group.²⁵³ The Holocaust, the public spectacle of the Nuremberg trials and the influence of *An American Dilemma* made it impossible to sustain old forms of white supremacy as a public rationale for the racial caste system in postwar America.²⁵⁴

The burial feature of racial redemption makes use of censorship, historical amnesia, selective recall, euphemizing and revisionist historicizing in achieving its ends. This process obscures individual, institutional and cultural complicities with the old forms of white supremacy that would otherwise have left "blood on the hands" of those who participated in the repudiated regime, and even damaged the moral currency of those who passively benefited from it. In one sense, burial provides closure after a grieving period, granting permission to "move on" from the legacy of America's racist past. Such burials may manifest themselves as outright denials, glaring omissions, silences, absences and counter-factual or decontextualized assertions. Burial obscures the full extent to which white privilege has been consolidated and leveraged into material gain.²⁵⁵

The third, and most important, feature of racial redemption involves the simultaneous transformation and reassertion of white su-

²⁵² GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944) (documenting methodically how irrational prejudice on the part of the white majority is primarily responsible for the racial inequality of Blacks).

²⁵³ See *id.* at 100. Myrdal observes that the inferiority of the Negro "is the white man's own indubitable sensing of it . . ." *Id.* He claims though, that such beliefs were declining because "[p]eople want to be rational, to be honest and well informed." *Id.* at 109.

²⁵⁴ For other reasons, see Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1990) (identifying three points of white self-interest that animated the *Brown* decision: 1) to improve international credibility with the Third World in the contestation for unaligned nation-states; 2) to blunt social unrest among African Americans returning from World War II to face discrimination and physical violence; and 3) to promote further industrialization in the South). See also GERALD HORNE, *BLACK AND RED: W.E.B. DU BOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944-63*, at 227 (1986) (observing that the timing of the *Brown* decision during "a concerted governmental campaign against international and domestic communism is one of the most overlooked aspects of the decision"); Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (supplementing Bell's first point of white self-interest with historical evidence).

²⁵⁵ For an approach in direct opposition to "burial" of white privilege, see generally, STEPHANIE WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

premacy. The process of racial redemption retires an outmoded form of white supremacy while introducing a new, more resilient form. What has been billed as revolutionary racial change in the repudiation phase reveals itself as a “mere change in the form of investment” in white supremacy.²⁵⁶ Burial of racial historical context makes it analytically difficult for the public to evaluate comparatively the evolving form of subordination. Pre-*Brown*, white supremacy manifested itself in the system of segregation supported by an ideology of biological determinism. Post-*Brown*, white supremacy continued in the new form of formal legal equality abutted by the ideology of colorblind fundamentalism.

Through the stages of repudiation, burial and transformation, the racial redemption process effects, and depends upon, a retrieval of innocent whiteness. This retrieval decouples whiteness from the stigma of white supremacy by imagining a kinder, gentler whiteness—one that would never be seen cloaked in white sheets and hoods, one that has not benefited from centuries of a racial caste system, one that has not been constructed through belief in inherent biological differences between people of color and whites and one that has not been tolerant of outright violence and malign neglect. For Warren individually, the Supreme Court as an institution and the nation as a whole, the decoupling of whiteness from white supremacy occurred through *Brown* and its companion cases that invalidated the principle of separate-but-equal and the practice of segregation.²⁵⁷ The jurisprudence that began with *Brown* has had the effect of restoring white innocence and relegitimizing the state and its institutions through the embrace of colorblind ideology.²⁵⁸

The following sections analyze Warren’s post-internment actions and the Warren Court’s racial jurisprudence through the lens of racial redemption. I suggest the centrality of *Brown et al.* as a moment in

²⁵⁶ The “mere change in the form of investment” phrase comes from *Lone Wolf v. Hitchcock*, in which the federal government claimed that the doctrine of “plenary power” permitted it to abrogate treaties with Native nations unilaterally and without consent. In order to justify a “taking” of Kiowa and Comanche lands absent consent or compensation, and in contravention to the 1867 Treaty of Medicine Lodge, the Court characterized the lands as “surplus” and the taking as a “mere change in the form of investment of Indian tribal property,” since Indians are considered “wards of the government.” *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903). Reva Siegel offers a related term, “preservation-through-transformation,” to refer to the changing, yet ongoing nature of subordination through the Equal Protection Clause and antidiscrimination law more generally. See Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2178–87 (1996) [hereinafter “*The Rule of Love*”].

²⁵⁷ See *infra* discussion Parts III.B, III.C.1–2.

²⁵⁸ See *infra* discussion Part III.C.3.

individual and institutional redemption processes, both of which involve the retrieval of racial innocence in the postwar era.

B. Warren's Search for Redemption

*Earl Warren, I believe, experienced a transformation when, during World War II, he realized how mistaken he had been—that instead of leading the effort to deny Japanese Americans their rights as citizens, he should have been defending those rights. As a result, I believe, Warren experienced a deep personal awakening that was not unlike that experienced nearly two hundred years earlier by a man named John Newton, who became so revolted by his life as a slave ship's captain, that he repented, became a minister in the Church of England, and authored the great Protestant hymn "Amazing Grace."*²⁵⁹

What was the nature of Warren's search for redemption? Was it, as his biographers suggest, a sincere attempt to acknowledge fully his past wrongdoing? Or was it an attempt to restore his reputation and the transparency and innocence of his racial identity?

The first feature of racial redemption requires an admission of racial wrongdoing or a declaration of racial "rightdoing" to sever publicly one's relationship with white supremacy. In Warren's case, one may observe both of these moves occurring. In his posthumously published memoirs, Warren issued a "racial apology" for his wartime transgressions against Japanese Americans.²⁶⁰ Similarly, *Brown*, which Warren engineered and authored, reads like an unburdening that is designed in part to purge the guilt over white supremacy.

Just three years before his death, Warren purportedly shared with his former law clerk the "unusual admission"²⁶¹ that only one issue dogged his conscience—"the Japanese evacuation of 1942."²⁶² Although he refused to issue a public apology during his lifetime, Warren admitted in his memoirs:

I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with

²⁵⁹ Tyrone Brown, *Clerking for the Chief Justice*, in *THE WARREN COURT: A RETROSPECTIVE* 276, 281 (Bernard Schwartz ed., 1996).

²⁶⁰ See *infra* note 263 and accompanying text.

²⁶¹ CRAY, *supra* note 5, at 520 (noting that the comments to Ira Michael Heyman represented "an unusual admission").

²⁶² *Id.*; see also SCHWARTZ, *supra* note 19, at 17 (stating that Warren admitted to former Justice Arthur Goldberg in a conversation on the internment, "You know, in retrospect, that's one of the worst things I ever did").

our American concept of freedom and the rights of citizens. It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts.²⁶³

In a recent monograph, Morton Horwitz acknowledges Warren's apology and suggests that his guilt over the internment is one possible explanation for the Chief Justice's effectiveness at procuring a unanimous opinion in *Brown*.²⁶⁴ Warren, Professor Horwitz observes, framed *Brown* as a "moral challenge to America" about its "unkept promises" to African Americans.²⁶⁵ Warren himself was challenged by the "defining moment of his life"—the incarceration of over 120,000 Japanese Americans in concentration camps—in which "racist stereotypes had substituted for evidence."²⁶⁶

Some of Warren's contemporaries have similarly suggested that he sought to redeem his wartime behavior through his leadership on the bench. Dillon Myer, director of the War Relocation Authority during World War II, said that he believed "[Warren] became the great liberal judge in atonement in part for what he did on the evacuation."²⁶⁷ Similarly, Bill Hosokawa of the Japanese American Citizens League ("JACL") surmised that, upon appointment to the Supreme Court, Warren "seemed to become aware of the grievous injustice [toward Japanese Americans] he had helped perpetuate,"²⁶⁸ and observed that "[s]ome believed that Warren's realization of the grievous wrong he had done the Japanese Americans caused him to search his soul, and that resulted in the enlightened view he adopted on human rights matters."²⁶⁹

²⁶³ WARREN, *supra* note 70, at 149.

²⁶⁴ See HORWITZ, *supra* note 6, at 24–25 (identifying two possible explanations for Warren's success at forging a unanimous decision in *Brown* as deriving from: (1) his personal experience with internment that enabled him to pose the question as a "moral challenge to America" about its unkept [racial] promises; and (2) his political savvy developed in California politics "to create as extensive a legal and moral consensus as possible").

²⁶⁵ *Id.* at 24.

²⁶⁶ *Id.* According to the Horwitz's account, "Warren movingly remembered witnessing the terrified faces of Japanese American children being removed from their homes and expressed regret for his part in the deportations." *Id.*

²⁶⁷ Earl Warren Project, Dillon Myer/James Rowe Interview, at 11, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981.

²⁶⁸ BILL HOSOKAWA, THIRTY-FIVE YEARS IN THE FRYING PAN 34 (1978).

²⁶⁹ *Id.* at 271; see also GIRDNER & LOFTIS, *supra* note 147, at 460 (reporting on how Governor Warren's appointment of a Japanese American judge, John Aiso, in Los Angeles was interpreted as atonement for Warren's role in internment); Brown, *supra* note 259, at 281 (claiming that Warren became "a priest at the altar of equal justice" because of his experience with Japanese

Through his admission of regret and his liberal leadership on the bench, Warren likely sought to distance himself from the time he spent purging the Golden State of its "yellow menace." Striking segregationist arrangements in one *per curiam* order after another,²⁷⁰ his pro-civil rights decisions appear as the product of an almost obsessional desire to separate himself from his former supremacist views. As his law clerk Tyrone Brown would later write: "In my year on the Court, [Chief Justice Warren] seemed to have embarked on a course to distinguish out of existence the *Hirabayashi* decision in which the Court had validated the Japanese exclusions."²⁷¹

Warren's efforts to bury his wartime transgressions are best reflected in his exchange of letters with biographer John Weaver. Weaver requested the Chief Justice's permission to reprint portions of a letter that captured Warren's wartime attitude towards Japanese Americans. In the letter, Warren addressed the balancing of civil defense and constitutional principles:

Either we take the protective measures that we know in our hearts are necessary to insure the safety of our country or we abandon them as being in conflict with some principle of law. We cannot do both in this situation, and our Supreme Court unanimously recognized this fact recently in sustaining the curfew regulations on those of Japanese ancestry. It arrived at its conclusion reluctantly as we all do in such situations. Nevertheless it was firm and unanimous in its conclusion that because of the peculiar situation of those of Japanese extraction, a distinction could, under the Constitution be made.²⁷²

Asking Weaver to omit this evidence of advocacy against Japanese Americans, Warren wrote "I would particularly not care to see my letter to Alfred J. Lundberg published at this time, because the subject under discussion is not only controversial but is highly emotional, and I know there are those who would like to stir up the controversy at this time."²⁷³

exclusion, after which the Chief Justice vowed "never again to neglect to consult the compass inside him").

²⁷⁰ See *supra* notes 1-3 and accompanying text.

²⁷¹ Brown, *supra* note 259, at 281 (the author reflecting upon his year as Chief Justice's law clerk in 1968).

²⁷² Letter from Earl Warren, California Governor, to Alfred J. Lundberg, at 3 (July 16, 1943) (available in Earl Warren Papers, Library of Congress, Manuscripts Division, Cont. 6).

²⁷³ Letter from Earl Warren, Chief Justice, to John D. Weaver, at 1 (Feb. 3, 1967) (available in Earl Warren Papers, Library of Congress, Manuscripts Division) [hereinafter Warren letter, Feb. 3, 1967]. In a seeming non-sequitur, Warren further explained that "[t]he relationship of

Warren, elaborating on his wartime posture, explained that, “[w]hen these people were returned to California after the War, I mobilized all the forces in the State to welcome them and even to prosecute successfully those who violated their rights.”²⁷⁴ In perhaps the most ironic paragraph, the same former California Attorney General who had aggressively initiated escheat actions against issei and nisei claimed that under his supervision, the state “carefully husbanded” the financial matters of those interned, and “as far as [he could] remember,” “repaid [the owners] in full.”²⁷⁵ Further, Warren noted that immediately after the war, and “with [his] approval,” the state legislature set aside judgments for violations of the Alien Land Law, many of which Warren had initiated as Attorney General.²⁷⁶ Weaver complied with the Chief Justice’s wishes.²⁷⁷

Warren’s refusal to accept full responsibility for his internment advocacy, combined with his success in convincing biographers to

the Japanese nationals and the Japanese Americans has been so splendid since the War that I would not now like to see the matter reopened.” *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* But see Earl Warren Project, *The Internment*, Robert Cozzens Interview 41, an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981 [hereinafter Cozzens Interview] (recalling that during Warren’s term as Governor, business licenses of Japanese Californians were rescinded and resold “for lots of money”); discussion *infra* Part II.A.1. on Warren’s escheat action campaign against the Japanese Californians.

Rebutting Warren’s claim that internees were “repaid in full,” see CWRIC, *supra* note 20, at 117–33 (detailing economic loss of internees and inadequacy of post-internment federal claims acts to compensate for such losses); GIRDNER & LOFTIS, *supra* note 147, at 428–38 (reviewing property losses of internees due to predatory interests and insufficiency of the postwar claims processes); DILLON MYER, *UPROOTED AMERICANS* 245–56 (1971) (recording ineffectiveness of government programs to safeguard internee property). See also LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988*, at 174 (1993) (discussing class-action *Hohri* lawsuit for governmental unjust taking of internees’ “real and personal property, commercial interests, livelihood, reputation, liberty, and other property rights” and state failure to adequately compensate for losses).

²⁷⁶ Warren letter, Feb. 3, 1967, *supra* note 273, at 1.

²⁷⁷ Perhaps because of his admiration for Warren, the Supreme Court, or the *Brown* decision, or perhaps out of a pragmatic concern for continued access to the subject of his forthcoming book, Weaver readily agreed to Warren’s request. Weaver published his biography later that year. See WEAVER, *supra* note 60. “I quite understand your feelings and will make no use of [the Lundberg] letter,” the author assured Warren. The biographer shared with Warren his methodology to ensure an accurate and fair version of events, which included making all the editorial changes requested by two of Warren’s sons, a trusted law clerk, and personal secretary during the war years. “I share your admiration for the Japanese-Americans who have contributed so much to the growth and culture of California,” Weaver deferred. “I have dealt with this subject in a chapter which should be a source of pride to them and will not, I hope, be instrumental in causing you or the Court any embarrassment.” Letter from John D. Weaver to Earl Warren, Chief Justice (Feb. 8, 1967) (Earl Warren Papers, Library of Congress, Manuscripts Division, Articles Holiday: 1964–68 folder).

self-censor their comments on his anti-Japanese sentiment as Attorney General and Governor of California, illustrate the burial function at work. The result is orchestrated historical amnesia surrounding the extent of Warren's complicity with white supremacy. As reflected by his handling of Weaver, Warren went to his grave having avoided a frank and full acknowledgment of his leading role in internment, choosing instead a strategy of disclaiming personal involvement, deracializing the biases of his decisionmaking and diminishing constitutional objections to the internment.

The apology published in Warren's memoirs downplays his leadership role in the project. It recharacterizes his part in the February 2, 1942 mapping efforts through the "reverse Nuremberg" defense: "After a conference with the law officers, who agreed unanimously, I testified for a proposal which was not to intern in concentration camps *all* Japanese, but to require them to move from what was designated as the theater of operations"²⁷⁸ As contextualized by Warren, his actions as the highest ranking law officer for the State of California were conditioned by an obligatory heeding of the wishes of his subordinates, notwithstanding his responsibility for organizing and guiding the meeting.

Warren further diminishes his personal involvement by placing the internment decision within the context of one segment of the anti-Asian movement in California. He claims that anti-Asian sentiment "stemmed largely from some of our farming communities."²⁷⁹ As for his own biases, the former Native Son and American Legionnaire asserted, "I have always believed that I had no prejudice against the Japanese as such except that directly spawned by Pearl Harbor and its aftermath."²⁸⁰

In addition, Warren offered non-racial justifications for his wartime actions. His words and actions provide key insights not only into his desire for redemption, but also into the nature of the redemption he sought. In 1972, just before his death, Warren said, "I feel that everybody who had anything to do with the relocation of the Japanese after it was all over, had something of a guilty conscience about it, and wanted to show that *it wasn't a racial thing* as much as *it was a defense matter*."²⁸¹ Indeed, the redemption Warren sought entailed neither

²⁷⁸ WARREN, *supra* note 70, at 148.

²⁷⁹ *Id.* at 147-48.

²⁸⁰ *Id.* at 149.

²⁸¹ Earl Warren Project, The Internment, Earl Warren Interview at 329 (June 22, 1972), an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral

contrition nor any serious attempt at reparation for his individual wrongdoing.²⁸² Rather, he primarily wanted to clear his name by maintaining, as he did in his 1943 Governors Address, that his obligation to bar Japanese Californians from returning to California was not “an appeal to race hatred,” but “an appeal for safety.”²⁸³

Non-racial security justifications for wartime transgressions reappear in Warren’s memoirs. Of the five pages he devotes to World War II, three and one-half review the defense matters posed by the bombing of Pearl Harbor, Japan’s successive victories during the war and the security hazards allegedly posed by saboteurs of Japanese ancestry.²⁸⁴ In the brief passage cited above, Warren expresses deep regret for his wartime role, but with qualifications:²⁸⁵ “It was wrong to act so impulsively, without *positive evidence* of disloyalty, even though we felt we had a good motive in the security of our state.”²⁸⁶ The racialized nature of “national security” is not addressed.²⁸⁷ His role is contextualized by maintaining that “[t]he atmosphere was so charged with anti-Japanese feeling that I do not recall a single public officer responsible for the security of the state who testified against a relocation proposal.”²⁸⁸ By playing the national security “trump card” over constitutionally-guaranteed civil rights and liberties, Warren attempts to deflect racial guilt even as he issues his apology. His steadfast claim that his actions were not “racial” reflects his desire to conceal and deny the white supremacist regime within which his actions as Attorney General and Governor originated.

Nowhere in his expression of regret does the former Chief Justice mention the constitutional rights violated by the internment order. By omitting discussion of constitutional violations, the apology leaves un-

History Office, The Bancroft Library, University of California, Berkeley; see also WHITE, *supra* note 15, at 76.

²⁸² See discussion *infra* on his refusal to apologize to Japanese Americans during his lifetime, notes 298–300 and accompanying text.

²⁸³ Governors’ Conference Address, *supra* note 231, at 6.

²⁸⁴ See WARREN, *supra* note 70, at 144–50.

²⁸⁵ The last half-page details two actions he took to pass legislation to protect the employment rights of Japanese Californians during the internment, and to remove the powers of the U.S. Attorney General to impound suspected subversives during peacetime. See *id.* at 149–50.

²⁸⁶ *Id.* at 149 (emphasis added).

²⁸⁷ For this analysis of the role of race in national security law, see generally Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, in this issue, at 179. Nor does Warren discuss how a significant piece of his “evidence” at the Tolan Committee hearings was the fact that no sabotage had occurred, i.e., “negative evidence” as positive proof of disloyalty. See *supra* notes 181–83 and accompanying text for a discussion of negative evidence as positive proof.

²⁸⁸ WARREN, *supra* note 70, at 148.

challenged the formal sanctioning of white supremacy that occurred through the extremely deferential process of judicial review that culminated in the Supreme Court's internment decisions. As Bill Hosokawa pointed out, "[h]e ignores the issues that were raised by the *Yasui*²⁸⁹ and *Hirabayashi*²⁹⁰ lawsuits that challenged the military's selective curfew order against civilians in the absence of martial law, and the *Korematsu*²⁹¹ and *Endo*²⁹² cases that challenged the legality of the evacuation and continued incarceration."²⁹³ Instead, he primarily refers to his own emotional response. "Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken."²⁹⁴

Warren's avoidance of legal analysis in his memoirs preserves the rationalization of internment he offered in a 1962 law review article. There, he defends the Court's decisions in *Hirabayashi* and *Korematsu*:

Where the circumstances are such that the Court must accept uncritically the Government's description of the magnitude of the military need, actions may be permitted that restrict individual liberty in a grievous manner. Consequently, if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum.²⁹⁵

Twenty years after the internment order and nine years after *Brown*, the Chief Justice suggested that the same result would ensue if he were presiding over the case in 1962. Warren's invocation of "freedom" and "military necessity" rationalized the Court's de minimis review of the military's case for internment, while obscuring the documented racial hysteria and stereotypes that pervaded the military's flawed assessment of "necessity."²⁹⁶ Under such an "absolute minimum" standard of review, Warren uncritically reproduces the

²⁸⁹ *Yasui v. United States*, 320 U.S. 115 (1943) (challenging curfew order as unconstitutional).

²⁹⁰ *Hirabayashi v. United States*, 320 U.S. 81 (1943) (challenging curfew order and delegation of Congress's legislative power to military officials as unconstitutional).

²⁹¹ *Korematsu v. United States*, 323 U.S. 214 (1944) (challenging exclusion order as unconstitutional).

²⁹² *Ex Parte Endo*, 323 U.S. 283 (1944) (challenging detention order as unconstitutional).

²⁹³ HOSOKAWA, *supra* note 268, at 273.

²⁹⁴ WARREN, *supra* note 70, at 149.

²⁹⁵ Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962).

²⁹⁶ *Id.*

legal structure of internment's injustice, perhaps even countenancing its future recurrence.²⁹⁷

Insofar as he refused to apologize directly to Japanese Americans, Warren also failed to make amends with the Japanese American community for the injuries he inflicted. As a JACL member observed, "[m]any nisei would have liked to hear Warren say he was sorry, but he refused to speak out in public."²⁹⁸ He repeatedly resisted attempts by nisei activists to elicit a retraction of his statement impugning the loyalty of Japanese citizens and aliens.²⁹⁹ A straightforward and sincere apology might have aided the racial healing of issei and nisei victims,³⁰⁰ many of whom carried the guilt, shame and injustice of internment to their death. Former internees would have to wait another decade for vindication—beginning in 1984 with the vacating of the *Korematsu* conviction and other *coram nobis* cases,³⁰¹ and in 1988 with a formal apology³⁰² and Congressional grant of \$20,000 in reparations for each surviving internee.³⁰³

²⁹⁷ *Id.*

²⁹⁸ HOSOKAWA, *supra* note 268, at 271.

²⁹⁹ See WEGLYN, *supra* note 32, at 299 n.8 (mentioning Edison Uno's eight-year struggle to extract a retraction from Warren).

³⁰⁰ See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 232 (1999) (detailing how racial apologies, accompanied by "affirmative redress of justice grievances and the rearticulation and restructuring of current relations," are part of a larger process that may link interracial justice, healing, and reconciliation).

³⁰¹ An obscure procedural mechanism available in cases involving the suppression of evidence—petitions for writ of error *coram nobis*—was used by sansei (third-generation) Japanese American attorneys who reopened the *Korematsu*, *Hirabayashi* and *Yasui* cases, overturning the convictions based upon evidence that the government suppressed critical evidence in the original internment challenges. See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (upholding district court's vacating of exclusion conviction, but overturning affirmation of curfew conviction); *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986) (vacating conviction for violation of the exclusion order but upholding conviction for curfew violation); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (vacating conviction for violation of the exclusion order). Minoru Yasui's case was heard in the U.S. District Court for the District of Oregon where the court vacated Yasui's conviction without hearing evidence or making findings on the prosecutorial misconduct claim. While appealing the order, Yasui passed away. See HATAMIYA, *supra* note 275, at 165–80; Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations*, in *ASIAN AMERICANS AND THE SUPREME COURT* 755, 778 (Hyung-Chan Kim ed., 1992). For thorough treatments of the *coram nobis* cases, see generally PETER IRONS, *JUSTICE DELAYED* (1989); Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986) [hereinafter Yamamoto, *Korematsu Revisited*].

³⁰² President Ronald Reagan signed H.R. 442, The Civil Liberties Act of 1988, on August 10, 1988. Pub. L. No. 100–383, 102 Stat. 903 (Aug. 10, 1988) (codified at 50 U.S.C. § 1989(a)) (providing in part, an apology for the "grave injustice" inflicted upon "both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II").

³⁰³ Civil Liberties Act, Pub. L. 100–383, 102 Stat. 903 (codified at 50 U.S.C. § 1989(b-4)). *But*

From an internee's perspective, therefore, the expression of regret in Warren's memoirs was little more than an "awkward, mawkish admission"³⁰⁴ that occupied less space than his reminiscences on his role in closing down gambling ships off the Santa Monica coast.³⁰⁵ As Professor Eric Yamamoto observes, such insincere "pseudoapologies" occur when the apologizer "fails to participate in a joint analysis of the conditions of conflict and underlying grievances, to accept appropriate responsibility for injuries inflicted, and to discharge that responsibility through action."³⁰⁶ In such cases, the apology amounts to "just talk."³⁰⁷

Warren's mostly private expressions of regret have become public through the biographical record. Warren's apology, in other words, was not intended as a public reparation or remedy to those he injured, but as a personal pitch for racial redemption and a formal distancing of himself from his earlier days as a nativist politician. By not apologizing to Japanese Americans directly, Warren perhaps unwittingly indulged (again) his feeling of supremacy over them, thereby maintaining the same hierarchical structural relationship he perpetuated during the war. He would set the terms of interaction, including that of apology, and would avoid subjecting himself to criticisms or dialogue. Thus, the racial apology for internment, in and of itself, represents a moment in the reconstruction of racial hierarchy akin to the transformation of white supremacy described below.³⁰⁸

Furthermore, by reprising wartime rationales for internment in his apology, Warren draws on the unrestrained arrogance of transformed whiteness in a manner that does further violence to the interned community.³⁰⁹ By rationalizing his race-based decisionmaking

see Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, in this issue, at 410 [hereinafter *Racial Reparations*] (questioning the transformative potential of the governmental apology given its roots in rewarding Japanese American acquiescence to political accommodation to internment); Natsu Taylor Saito, *Personal Justice Still Denied: International Law and the U.S. Internment of Japanese Peruvians during World War II*, in this issue, at 276 (maintaining that the U.S. *Mochizuki* settlement with Japanese Peruvians it kidnapped, interned and deported offers little in the way of reconciliation and justice); Eric Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, in this issue, at 496 (pointing out the ironic aftermath of Japanese American redress and reparations: "Since past government sin had been absolved, Asian Americans were once again permissible targets for the government and mainstream America").

³⁰⁴ HOSOKAWA, *supra* note 268, at 273-74.

³⁰⁵ Warren devotes six pages to his successful purge of gambling ships and one paragraph to the "apology." See WARREN, *supra* note 70, at 132-37, 149.

³⁰⁶ YAMAMOTO, *supra* note 300, at 195.

³⁰⁷ *Id.*

³⁰⁸ See *infra* Part III.C.3; see also YAMAMOTO, *supra* note 300, at 171 (recognizing how "incomplete or insincere acknowledgments," "empty apologies" and "words without institutional restructuring and attitudinal changes" mask, rather than acknowledge continuing oppression).

³⁰⁹ For this use of violence in a discursive context, see Robert M. Cover, *Violence and the Word*,

in terms of wartime defense and security needs, Warren claims racial innocence in a way that sacrifices the integrity of the process by which he engages the injustices of the past. His refusal to acknowledge the legal wrongs inflicted by internment leaves intact the “military necessity” myth adopted by *Hirabayashi* and *Korematsu*, and rhetorically reimposes the injury of internment. As apologies go, Warren’s *mea culpa* is woefully deficient,³¹⁰ but as a component of racial redemption it skillfully restores Warren’s own racial integrity and makes possible his reassertion of personal supremacy over the victims and events of the past. The apology, an act of repudiation, burial and transformation, uncritically re-staged by Warren’s biographers,³¹¹ is of a piece with the

in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203 (Martha Minow, et al. eds., 1992) (arguing that “legal interpretive acts signal and occasion the imposition of violence upon others”).

³¹⁰ Sociologist Nicholas Tavuchis characterizes an apology as “a special kind of enacted story whose remedial potential, unlike that of an account stems from the acceptance by the aggrieved party of [a contrite] admission of iniquity and defenselessness.” NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 8 (1991); see also HARLON L. DALTON, *RACIAL HEALING, CONFRONTING THE FEAR BETWEEN BLACKS & WHITES* 100 (1995) (maintaining that racial healing requires “candidly confronting the past, expressing genuine regret, carefully appraising the present in light of the past, agreeing to repair that which can be repaired, accepting joint responsibility for the future, and refusing to be derailed by setbacks and short-term failure”); YAMAMOTO, *supra* note 300, at 195–96 (revealing how the exploitative deployment of the language of apology unaccompanied by changes in the apologizer’s underlying belief system becomes a self-serving pursuit). Warren’s unilateral apology clearly falls short of Tavuchis’s, Dalton’s, and Yamamoto’s standards for transformative apology and healing.

There has been a significant amount of recent literature on reconciliation and healing. As Professor Yamamoto points out, however, most of these works are “uni-disciplinary” in the field of theology, and draw examples primarily from outside of the United States. None of the works, he notes, address interracial conflicts. See YAMAMOTO *supra* note 300, at 34. For the reconciliation literature cited by Professor Yamamoto, see generally JOHN DAWSON, *HEALING AMERICA’S WOUNDS* (1995); GEIKO MULLER-FAHRENHOLZ, *THE ART OF FORGIVENESS* (1997); DONALD SHRIVER, *AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS* (1995); ROBERT SCHREITER, *RECONCILIATION: MISSION AND MINISTRY IN A CHANGING SOCIAL ORDER* (1992); *THE RECONCILIATION OF PEOPLES: CHALLENGE TO THE CHURCHES* (Gregory Baum & Harold Wells, eds., 1997); SPENCER PERKINS & HAROLD RICE, *MORE THAN EQUALS: RACIAL HEALING FOR THE SAKE OF THE GOSPEL* (1993); see also ANDREW SUNG PARK, *RACIAL CONFLICT & HEALING: AN ASIAN AMERICAN THEOLOGICAL PERSPECTIVE* (1996).

³¹¹ For similar apprehensions about superficial apologies and gestures toward racial healing, see DALTON, *supra* note 310, at 97–98 (discussing the public invocation of the language of healing absent true engagement and “pure, unadulterated struggle” necessary to bring about transformative healing); Iijima, *supra* note 303, at 410 (troubling the “accommodationist” basis of the 1988 redress and reparations bill); Saito, *supra* note 303, at 278 (critiquing the U.S. *Mochizuki* settlement with Japanese Peruvians it kidnapped, interned and deported insofar as the settlement agreement offers “no recognition by the United States that it violated international law at the time of internment, and no U.S. recognition of the resulting harm suffered” for the past fifty years, and that the offer entails no additional expenditure by the government); Eric K. Yamamoto, *Friend, or Foe or Something Else: Social Meanings of Redress and Reparations*, 20 *DENV. J. INT’L L. & POL’Y* 223 (1992) (cautioning that reparations may provide merely “illusions of change” that perpetuate the same structures that perpetuated the original injury).

broader institutional and social racial redemption process to which I now turn.

C. *The Postwar Court's Redemption Through Brown*

Constitutional scholar Mark Tushnet challenges us to transcend the triumphalism surrounding the popular understanding of *Brown v. Board of Education* and the Warren Court. "[T]he task ought to be," Tushnet suggests, "to explain how *Brown* validated rather than disturbed the status quo, how the Court's rights jurisprudence of the 1960s and early 1970s was a stabilizing rather than a destabilizing force."³¹² This challenge is addressed by understanding the Warren Court through the framework of racial redemption.

1. Repudiation: *Brown* as Racial Covenant

*The United States has been able to move from the past into the present because of the Court. In 1933, the Court refused to do so and lost stature. The Warren Court did not make the same mistake.*³¹³

The same general dynamic of repudiation evident in Warren's racial apology appears in the Court's move to end judicial complicity with supremacist Jim Crow segregation. As Professor Derrick Bell points out, the post-Reconstruction Court ignored the clear intentions of the Thirteenth, Fourteenth and Fifteenth Amendments and condoned every transgression on the bodies of Black people, including murder.³¹⁴ Deploying legal doctrines such as "no private constitutional rights,"³¹⁵

³¹²Tushnet, *supra* note 55, at 808.

³¹³KATCHER, *supra* note 94, at 476.

³¹⁴DERRICK BELL, AND WE ARE NOT SAVED 91 (1987).

³¹⁵See *James v. Bowman*, 190 U.S. 127, 136 (1903) (denuding Fifteenth Amendment of force by concluding that Section 5507 of the Revised Statutes was unconstitutional as the amendment does not contemplate "wrongful individual acts"); *Civil Rights Cases*, 109 U.S. 3, 17 (1883) (finding that the Civil Rights Act of 1875 has no authority in the Constitution insofar as "the wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong" and does not give rise to a civil rights violation); *United States v. Harris*, 106 U.S. 629, 640 (1883) (upholding challenge by indicted white members of lynch mob who beat four African American prisoners and killed one of them on the grounds that Ku Klux Klan Act of 1871 "is directed exclusively against the action of private persons, without reference to the laws of the State" and is therefore unwarranted by the Fourteenth Amendment); *Virginia v. Rives*, 100 U.S. 313, 318 (1880) (ruling that exclusion of African Americans from juries does not violate the Fourteenth Amendment by construing such exclusion as the "action of private individuals" and not state action); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (arresting judgment and dismissing charges against white defendants including state officials for massacre of African Americans on the basis that the Fourteenth Amendment does not "add anything to the rights which one citizen has under the Constitution against another").

“separation of powers,”³¹⁶ “civil versus social rights,”³¹⁷ “equal application”³¹⁸ and “‘states’ rights’-oriented federalism,”³¹⁹ the Court refused to protect the civil rights, and indeed lives, of people of color.

This regressive reputation was familiar to members of the Warren Court. In his memoirs Warren displayed such an understanding of the Court’s racial history.

When the Democrats in the Tilden-Hayes affair traded the presidency to the Republicans for the muting of the newly acquired rights of the black people who had so recently been

³¹⁶ See *Giles v. Harris*, 189 U.S. 475, 488 (1903) (refusing to enroll onto voting lists prospective African American voter denied registration on the basis that such “relief from a great political wrong . . . by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States”); *Hall v. DeCuir*, 95 U.S. 485, 488 (1878) (striking as unconstitutional a state statute requiring equal rights and privileges on public conveyances on the grounds that such legislation “does encroach upon the exclusive power of Congress”).

³¹⁷ See *Plessy*, 163 U.S. 537, 544 (1896) (upholding state segregation statute by arguing that Fourteenth Amendment “could not have been intended to . . . enforce social, as distinguished from political [civil], equality, or a commingling of the two races upon terms unsatisfactory to either”); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (affirming the Fourteenth Amendment’s purpose as “securing to a race recently emancipated . . . all the civil rights that the superior race enjoy”); *Civil Rights Cases*, 109 U.S. at 25 (distinguishing between constitutional protection of the “essential [civil] rights of life, liberty, and property” compared to “mere [social] discriminations on account of race or color,” such as those discriminations in the “enjoyment of accommodations in inns, public conveyances, and places of amusement”); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–28 (1997) (detailing the pre-Brown history of the Supreme Court delineation between constitutionally protected “civil” and “political” rights versus unprotected “social” rights).

³¹⁸ See *Giles*, 189 U.S. at 486–87 (rationalizing non-relief in “grandfather clause” voting rights case by stating that “[i]f a white man came here on the same general allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer”); *Williams v. State of Mississippi*, 170 U.S. 213, 222 (1898) (upholding state constitution and laws excluding African Americans from jury service through use of criteria with disparate racial impact on basis that such exclusions “reach weak and vicious white men as well as weak and vicious black men”); *Pace v. State of Alabama*, 106 U.S. 583, 585 (1882) (finding no constitutional violation in antimiscegenation statute since “[t]he punishment of each offending person, whether white or black, is the same”).

³¹⁹ See *Civil Rights Cases*, 109 U.S. at 11 (striking the Civil Rights Act of 1875 prohibiting segregation in public accommodations and conveyances on the basis that “legislative power conferred upon Congress . . . does not invest . . . power to legislate upon subjects which are within the domain of state legislation”); *Slaughter-House Cases*, 83 United States 36, 78 (1 Wall.) (1872) (arguing that recognition of the federal government’s concurrent jurisdiction for the “privileges and immunities of citizenship” under the Fourteenth Amendment would “fetter and degrade the State governments by subjecting them to the control of Congress” as well as “radically change[] the whole theory of the relations of the State and Federal governments to each other”); *Blyew v. United States*, 80 U.S. 581 (1 Wall.) (1872) (denying federal jurisdiction under Civil Rights Act of 1866 for murder of an African American family by whites despite state law prohibiting testimony by African Americans unless they were parties to the case).

enfranchised, the Supreme Court then, in keeping with the national mood, in one case after another, beginning with *Slaughter House* cases and the *Civil Rights* cases, limited the rights of blacks until finally the case of *Plessy v. Ferguson* held that the states could by statute separate blacks from whites in public transportation providing the accommodations were equal.³²⁰

Against the background of this disreputable past, the Warren Court attempted to restore the institution's legitimacy and stature on racial matters amidst rapidly shifting postwar racial norms.

*Brown I*³²¹ definitively rejects the racial inferiorization of African Americans through segregation. "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community," Warren wrote for the *Brown I* Court.³²² In conference with his Supreme Court brethren, Warren straightforwardly asserted that the basis for segregation and the principle of separate-but-equal "could be justified only by belief in the inferiority of the Negro."³²³ In his memoirs, he made clear his view of *Brown's* role in repudiating racism, stating that "*Brown* lashed at three centuries of slavery and its remnants based on the white supremacy theory"³²⁴

The *Brown I* decision reflects the Court's conscious shift from white supremacist biological determinism to a Myrdalian prejudice model as the dominant racial ideology.³²⁵ As discussed above, Myrdal's *An American Dilemma*³²⁶ undermined the widespread belief among whites that racial inequality was based on the genetic inferiority of African Americans.³²⁷ According to Myrdal, it was the irrational prejudice of white individuals that led to racial discrimination. Since the restrictive covenant cases of the 1940s, the NAACP had subjected the

³²⁰ WARREN, *supra* note 70, at 293.

³²¹ The 1954 case declaring that segregation has no place in education is known as the "*Brown I*" decision. See *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483 (1954).

³²² *Brown I*, 347 U.S. at 494.

³²³ KLUGER, *supra* note 1, at 679-80; see also CRAY, *supra* note 5, at 281.

³²⁴ WARREN, *supra* note 69, at 306.

³²⁵ See G. Edward White, *Earl Warren's Influence, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 41, 43 (Mark Tushnet ed., 1993) (asserting that "[o]ne of the moral principles at stake in *Brown* . . . was the continued viability of racial supremacist theories").

³²⁶ MYRDAL, *supra* note 252.

³²⁷ See DAVID W. SOUTHERN, *GUNNAR MYRDAL AND BLACK-WHITE RELATIONS: THE USE AND ABUSE OF AN AMERICAN DILEMMA, 1944-1969*, at 101-25 (1987) (noting how Myrdal's work was most influential on Americans from 1945-53); see also *supra* notes 252-54 and accompanying text.

Court to a “steady diet of Myrdal” in its amicus briefs.³²⁸ In *Brown*’s controversial footnote 11, the Court ultimately embraced the analysis of the hefty text as “modern authority” for the deleterious effects of segregation.³²⁹

Thirteen years later, after judicially recognizing and combating the racist creation of a “feeling of inferiority,” the Court directly confronted the power of “white supremacy.”³³⁰ Massive Southern resistance to the *Brown* edict of desegregation had prepared the Warren Court to take on Southern honor and culture where racial matters were concerned.³³¹ In *Loving v. Virginia*,³³² the Chief Justice authored an opinion striking the Virginia anti-miscegenation law as being violative of the Fourteenth Amendment. In that opinion, Warren made clear his declaration of racial egalitarianism:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures *designed to maintain White Supremacy*.³³³

By lashing out at white supremacy—tentatively in *Brown* in 1954, and explicitly in *Loving* in 1967—the Warren Court announced a jurisprudence in which the norms and values of racial egalitarianism would be righteously proclaimed and the judicial complicity of the past rejected. Combined with the civil rights legislation passed during the Johnson administration, the Warren Court’s racial jurisprudence essentially constituted a “Second Reconstruction.” The Warren Court hoped to distinguish itself from previous Courts that had assisted and defined Black disfranchisement in the aftermath of the First Reconstruction. Indeed, this repudiatory posture that distanced the Court from biologically based white supremacy is prominent in the *popular* understanding of the Court’s significance.

³²⁸ SOUTHERN, *supra* note 327, at 145.

³²⁹ *Brown I*, 347 U.S. at 494–95 n.11. Following the string cite of shorter works or passages on racial prejudice and discrimination, the Court nods to Myrdal’s authoritativeness by closing the cite with “And see generally Myrdal, *An American Dilemma* (1944).” *Id.* For the significance of AN AMERICAN DILEMMA to the Court from 1944–54, see SOUTHERN, *supra* note 327, at 127–50.

³³⁰ See *infra* notes 332–33 and accompanying text.

³³¹ See *infra* notes 365–71 and accompanying text.

³³² 318 U.S. 1 (1967).

³³³ *Loving*, 388 U.S. at 11 (emphasis added).

2. Burial: Revisioning Postwar America

*Nowhere in the decision did the words "segregation" or "desegregation" appear.*³³⁴

While the full significance of *Brown's* capacity to "disappear" America's racial sins would be realized through the Burger and Rehnquist Courts, particularly in their affirmative action jurisprudence,³³⁵ even *Brown I's* engagement of the most extreme forms of American apartheid demonstrates the burial function of racial redemption through the techniques of silence, euphemism and contradiction. In *Brown I*, Warren faced the task of reconciling *Plessy's* "separate-but-equal" precedent with the Court's declaration that segregation had no place in education. In *Plessy*, the Court had dismissed the plaintiff's complaint as fictive and based on the "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."³³⁶ According to the *Plessy* Court, if there was any sense of inferiority flowing from segregation, it was "solely because the colored race [chose] to put that construction upon it."³³⁷

Rather than directly challenge the Fuller Court's disingenuousness, Warren evaded it "in such an economical and uncontentious way that the basic dishonesty of *Plessy* was . . . dismissed as simply no longer fashionable thinking."³³⁸ Writing for the Court, Warren declared that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [in *Brown* that segregation produces inferiority] is amply supported by modern authority."³³⁹ By refusing to censure the *Plessy* Court, however, the Warren Court obscured judicial complicity in maintaining the material interest in whiteness. Moreover, by failing to expose *Plessy's* supremacist logic, *Brown I* invited Southern resistance, for critics could argue that the decision "had been based not on solid reasoning or legal precedent but on psychological evidence."³⁴⁰ In exchange for a unanimous verdict, the

³³⁴ KLUGER, *supra* note 1, at 744 (describing *Brown II*, decreeing the implementation order for *Brown I*).

³³⁵ See *infra* Part III.C.3.; Part IV.C.1.

³³⁶ *Plessy*, 163 U.S. at 551.

³³⁷ *Id.*

³³⁸ KLUGER, *supra* note 1, at 705.

³³⁹ *Brown I*, 347 U.S. at 494.n.11 (listing social science sources as modern authority). For a discussion of the controversy over footnote 11, see DAVIS & GRAHAM, *supra* note 1, at 121-25 (summarizing criticisms to the *Brown* Court's use of social science data); SOUTHERN, *supra* note 327, at 172-75, 187-224 (recording political and academic objections to the Myrdal reference in *Brown I*).

³⁴⁰ KLUGER, *supra* note 1, at 723.

Court preserved the integrity of the South's racial honor.³⁴¹ In so doing, the Court left concealed the racist ideology and structures behind the South's segregationist policies.

Pro-segregation advocates appearing before the *Brown I* Court emphasized their pious motives and irreproachable racial history.³⁴² Arguing for the state of Texas, Attorney General Ben Shepperd proclaimed that "[t]here is no discrimination on the part of the State of Texas in administering its public school system, only separation of the races."³⁴³ He continued that "Texas loves its Negro people and Texas will solve their problems its own way."³⁴⁴ On behalf of South Carolina, the venerated John W. Davis lectured the Court on the non-racist nature of segregation:

You say that [segregation is the product of] racism. Well, it is not racism. Recognize that for sixty centuries and more humanity has been discussing questions of race and race tension, not racism

Let me say this for the State of South Carolina . . . It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it is a thousand pities that by this controversy there should be urged the return to an experiment which gives not more promise of success today than when it was written into their Constitution during what I call the tragic era.³⁴⁵

The Court responded to these advocates' insistence on the absence of racism, with a "howling silence," thereby leaving intact the segregationists' implicit claim of white innocence.³⁴⁶ As Professor Thomas Ross points out, the impact of this glaring omission had significant repercussions on the viability of an effective remedy: "Had the Court in *Brown I* spoken of the racism that motivated the segregation laws, the delay in *Brown II* would have been more difficult to justify."³⁴⁷

³⁴¹ See *id.* Kluger, Justice Jackson's law clerk at the time of *Brown*, said Warren's opinion convinced Jackson not to write a concurring opinion because Warren's "took the sting off the decision, it wasn't accusatory." *Id.* at 697.

³⁴² See *infra* Part IV.C.3.

³⁴³ See Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 21 (1990) [hereinafter *Rhetorical Tapestry*].

³⁴⁴ *Id.* at 22.

³⁴⁵ *Id.* at 22-23.

³⁴⁶ *Id.* at 24-25.

³⁴⁷ *Id.* at 26.

The Court's burial of segregation's impact and nature continued in *Brown II*.³⁴⁸ Defenders of segregation made oral arguments so aggressively that observers believed Warren might issue a contempt citation.³⁴⁹ In Warren's view, the pro-segregationists' unwillingness to comply with the Court's *Brown I* decree amounted to "heresy."³⁵⁰ Yet, the Chief Justice, writing for the Court in *Brown II*, described the presentations as "informative and helpful" in considering the "complexities" of transitioning to a public education system free of racial discrimination.³⁵¹ Further, Warren rewarded the heretic and supremacist stance of the respondents by euphemizing segregationists' resistance to *Brown* as receptiveness: "The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae*, and in other states as well."³⁵²

Consistent with its "restraint" regarding *Plessy* and the segregationist defiance in the *Brown I* record, the *Brown II* Court, finding no "racial malice," announced that the timetable for implementation of *Brown I*'s desegregation edict would be that of "all deliberate speed."³⁵³ *Brown II*'s oxymoronic standard would predictably encourage Southern resistance and permit segregated schooling to continue.³⁵⁴ The

³⁴⁸ The 1955 case to implement desegregation with "all deliberate speed" is known as the "*Brown II*" decision. See *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

³⁴⁹ KLUGER, *supra* note 1, at 731.

³⁵⁰ For example, the Chief Justice interrogated Emory Rogers representing South Carolina who declared his state's intention to evade the law:

Chief Justice Warren: Is there any basis upon which we can assume that there will be an immediate attempt to comply with the decree of this Court?

Rogers: Mr. Chief Justice, I would say that we would present our problem, as I understand it, if the decree is sent out—that we would present our problem to the District Court, and we are in the Fourth Circuit . . . I feel we can expect the courts in the Fourth Circuit and the people of that district to work out something in accordance with your decree.

. . . .

Chief Justice Warren: But you are not willing to say here that there would be an honest attempt to conform to this decree, if we did leave it to the District Court?

Rogers: No, I am not. Let us get the word "honest" out of there.

Chief Justice Warren: No, leave it in.

Rogers: No, because I would have to tell you that right now we would not conform—we would not send our white children to the Negro schools.

Chief Justice Warren: Thank you.

KLUGER, *supra* note 1, at 732. According to Kluger, this exchange from Warren's view, "was close to heresy." *Id.*

³⁵¹ *Brown II*, 349 U.S. at 299.

³⁵² *Id.*

³⁵³ *Id.* at 301.

³⁵⁴ On Southern resistance to desegregation, see *infra* notes 365–71 and accompanying text;

burial of the past (and ongoing) operation of racial subordination rationalized the “all deliberate speed” guideline and transformed the already-compromised promise of equality in *Brown I* into the clear betrayal of *Brown II*.³⁵⁵

Perhaps the Court’s generosity toward Southern segregationists stemmed from the restoration of racial honor that seems to have occurred rather instantaneously. In *Bolling v. Sharpe*, decided the same day as *Brown I*, the Chief Justice, writing for the Court, asserted that “[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”³⁵⁶ Warren’s declaration of racial classifications as “contrary to our traditions” seems incongruous when *Brown* had just overturned Jim Crow’s racial classifications that had survived over 50 years of the Supreme Court’s “scrutiny.” What’s more, Warren cites to *Hirabayashi* and *Korematsu* as precedent for *Bolling*’s special duty to

see also Ross, *Rhetorical Tapestry*, *supra* note 343, at 26 (noting that “the implicit backdrop of white innocence [left intact in *Brown I*] made the delay in implementation intellectually and socially tolerable”).

³⁵⁵ *Brown I* declared one form of white supremacy—*de jure* segregation—to be unconstitutional. 347 U.S. at 495. But this declaration did not set out to eliminate societal, *de facto* racial discrimination. See Harris, *supra* note 246, at 1753 (observing that *Brown I* dismantled one form of whiteness as property—Jim Crow schools—while allowing more subtle forms to reemerge by leaving intact the *de jure/de facto* discrimination distinction in the Equal Protection Clause). Thus, *Brown* ushered in the era of formal, but not substantive equality that saw the perpetuation of racial inequality. This shift did not much disturb white privilege and supremacy, but merely transformed it into a more palatable postwar form, as discussed *infra* Part III.C.3.

Looking beyond the realm of Black-white relations, we can see further evidence of ironic burial during the Warren Court era. As Professor Joseph Singer has argued, no analysis of the Warren Court’s racial jurisprudence would be complete without an examination of the cases involving Native Americans. See generally, Joseph Singer, in this issue, at 171. Sandwiched between *Brown I* and *Brown II*, the Court decided *Tee-Hit-Ton Indians v. United States* in February, 1955. 348 U.S. 272 (1955). By reading *Tee-Hit-Ton*, one may gauge the full meaning of *Brown I*’s promise of racial equality. In *Tee-Hit-Ton*, the Court found that a band of the Tlingit nation in Alaska had no aboriginal title to lands they had occupied “from time immemorial” as Congress did not recognize any treaty rights granting such title. *Id.* at 274, 277. In order to reach this conclusion, the Court misapplied internationally settled legal doctrines of discovery and conquest. *Id.* at 280, 285, 289–90.

The Court made clear, however, that “[g]enerous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.” *Id.* at 281. Its opinion did not “uphold harshness as against tenderness toward the Indians, but leaves with Congress, where it belongs, the policy of Indian gratuities for termination of Indian occupancy of Government-owned land, rather than making compensation for its value a rigid constitutional principle.” *Id.* at 291.

Notwithstanding the “march to enlightenment” modernist character of emerging judicial doctrines of *Brown*, the Court is caught in a performative contradiction even as it announces its new redemptive tenets of law. *Tee-Hit-Ton* amply demonstrates how the Warren Court was willing and able to maintain and transform the legal workings of white supremacy post-*Brown*.

³⁵⁶ 347 U.S. 497, 499 (1954).

scrutinize racial classifications, implying counter-factually that those cases had actually involved some kind of meaningful scrutiny.³⁵⁷

The internment cases are similarly deployed in *Loving v. Virginia*, another unanimous Warren opinion.³⁵⁸ Again, Warren buries the significance of the internment precedents³⁵⁹ as he uses them to script the reconstruction of the Court's racial reputation:

Over the years, this Court has repudiated "(d)istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States* (citation omitted). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny" *Korematsu v. United States* (citation omitted)³⁶⁰

Applying relatively heightened judicial review of racial classifications, though, does distinguish the Warren Court from its openly complicit predecessors. The development of strict scrutiny analysis was used by the postwar judiciary to attack segregation-era forms of *de jure* racial discrimination. But by invoking a separate, seemingly more rigorous process for race cases, the Warren and postwar Courts restored the judiciary's "clean slate" on racial matters in a manner that both repudiated and buried the sins of the past.

3. Transformation: Restoring Whiteness through Post-Civil Rights Doctrines of Supremacy

*My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man [T]o compare [his] racial debt . . . with that of those who plied the slave trade, and who maintained a formal caste system for many years thereafter, is to confuse a mountain with a molehill.*³⁶¹

³⁵⁷ See *id.* at 499 n.3.

³⁵⁸ 388 U.S. at 11 (1967).

³⁵⁹ See Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 UCLA AS. PAC. AM. L.J. 72 (1996). Professor Hashimoto refers to this facial use of internment cases as demanding a "strict scrutiny standard" in *Loving v. Virginia* as "hyperbole" since the Court clearly did not adopt a "most rigid scrutiny" in either *Hirabayashi* or *Korematsu*.

³⁶⁰ *Loving*, 388 U.S. at 11.

³⁶¹ Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 152 (1979).

This section explores the ways in which the earlier jurisprudence of the *Brown* era leads to the later transformation of white supremacy that occurs during the Burger and Rehnquist Courts. The most important linkage involves the restoration of innocent whiteness,³⁶² which underwrites such neoconservative judicial standbys as the permuted strict scrutiny standard of review as a judicial device for protecting majority interests,³⁶³ the rejection of societal or systemic discrimination as a basis for affirmative action,³⁶⁴ and the rhetoric of colorblindness. I will sketch briefly the historical understanding of post-*Brown* racial jurisprudence that is underwritten by the theory of racial redemption I am developing in this Article.

The Warren Court rejected and sought to bury the dominant racial paradigm of biological determinism and its related practice of *de jure* segregation, and, in doing so, inaugurated the process of institutional racial redemption. The Court was frustrated in this endeavor, however, by concerted efforts of Southern segregationists to evade compliance with *Brown*.³⁶⁵ The initial refusal of the South, and later the North, to transition to a kinder, gentler form of racial subordination under *Brown*'s new principles meant that the hegemonic "preservation-through-transformation"³⁶⁶ project of the civil rights era would be delayed. The Southern Manifesto,³⁶⁷ the Parker doctrine,³⁶⁸ "pupil

³⁶² See *infra* notes 408–15 and accompanying text.

³⁶³ See *infra* notes 389–96 and accompanying text.

³⁶⁴ See *infra* notes 397–407 and accompanying text.

³⁶⁵ C. Vann Woodward recorded 106 tactics southern states used to evade the *Brown* decision. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 162 (1974). Due to this resistance, only 1.2% of African American children attended desegregated southern schools ten years after *Brown I* was decided. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52 (1991).

³⁶⁶ See Siegel, "The Rule of Love," *supra* note 256, at 2178–87.

³⁶⁷ Issued in the spring of 1956, the Southern Manifesto declared the *Brown* decision to be "a clear abuse of judicial power" that substituted the Justices' "personal political and social ideas for the established law of the land." Accordingly, 101 Congressmen from the eleven states comprising the old Confederacy pledged "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution." KLUGER, *supra* note 1, at 752.

³⁶⁸ On remand from the Supreme Court following *Brown*, the Eastern District Court of South Carolina, in a panel including Judge John Parker, set the standard for judicial evasiveness of the *Brown* edict in *Briggs v. Elliott*, declaring in a *per curiam* opinion that the Constitution "does not require integration," but "merely forbids discrimination." 132 F. Supp. 776, 777 (E.D.S.C. 1955) (claiming that *Brown* "does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation"). This form of judicial resistance inspired many other southern judges and courts to defy *Brown* and became known as the "Parker doctrine." On the "Parker Doctrine," see Wallace D. Loh, *In Quest of Brown's Promise: Social Research and Social Values in School Desegregation*, (reviewing ELEANOR WOLF, *TRIAL AND ERROR: THE DETROIT SCHOOL SEGREGATION* (1981)), 58 WASH. L. REV. 129, 135 (1982) (arguing that the Parker Doctrine served as a legal justification for tokenism: "this so-called Parker

placement" programs,³⁶⁹ "freedom-of-choice" plans³⁷⁰ and other tactics³⁷¹ demonstrated the ingenuity of those intent on preserving white supremacy's old forms and habits. Accordingly, it was the Burger and Rehnquist Courts that completed the redemptive process initiated in the Warren era, in part by limiting the reach of *Brown* and its progeny to *de jure* and apartheid-like forms of discrimination.³⁷² Discriminating actors and institutions eventually shifted away from these repudiated overt social and legislative forms of racial subjugation, initiating the post-*Brown* transformation of white supremacy.

Despite fears that it would "turn back the clock" on Warren Court gains, the Burger Court,³⁷³ perhaps still vaguely haunted by judicial complicity with white supremacy, tread carefully around established precedent. In fact, early Burger Court decisions in *Swann*,³⁷⁴ *Keyes*³⁷⁵

Doctrine—that integration and desegregation are descriptive of two different concepts—served to deflect the mandate of *Brown* short of outright defiance"); Craig Leonard Jackson, *Herbert High School and the Brown Aftermath—Good Intentions and Troubled Policy*, 21 T. MARSHALL L. REV. 45, 77 (1996) (characterizing the Parker Doctrine as a means to evade the *Brown* decision).

³⁶⁹ Pupil placement programs were facially neutral but "strongly segregative in practice" and therefore amounted to stalling tactics permitted by the Warren Court. Kluger explains that such plans were abided because they offered the South a bad faith delay and the Court cursory compliance of its order. See KLUGER, *supra* note 1, at 752 (commenting that "[t]okenism was the order of the times, and just enough of it served to insulate most of the South from the Court's wrath.").

³⁷⁰ Also known as "local option" or "open enrollment" plans, these tactics purported to offer students "freedom of choice" in selecting their schools, regardless of residence. Under such desegregation schemes, few African Americans "chose" to send their children to previously all-white schools due to the threat of violence or job loss. Fourth Circuit Court of Appeals Chief Judge Haynsworth acknowledged the lack of "freedom" in such a plan:

There followed . . . numerous acts of violence and threats directed against Negro members of the community, particularly those requesting transfers of their children into formerly all-white schools. Shots were fired into houses, oil was poured into wells, and some of the Negro leaders were subjected to a barrage of threatening telephone calls. Violence was widely reported in the local press, and an implicit threat was carried home to everyone by publication of the names of Negro applicants for transfer.

Coppedge v. Franklin County Bd. of Educ., 394 F.2d 410 (4th Cir. 1968), excerpted in DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 554 (1992) [hereinafter, BELL, RACE, RACISM].

The Supreme Court disapproved of such plans for desegregation in *Green v. County School Board of New Kent County*, 391 U.S. 430, 440 (1968) (holding that "in desegregating a dual system a plan utilizing freedom of choice is not an end in itself").

³⁷¹ For a fuller description of the various modes of southern resistance to desegregation, see BELL, RACE, RACISM, *supra* note 370, at 547-51.

³⁷² See *infra* notes 380-415 and accompanying text.

³⁷³ The Burger Court lasted from 1969 to 1986.

³⁷⁴ *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding busing as a means to achieve school desegregation in a district with a history of *de jure* segregation).

³⁷⁵ *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973) (upholding busing as a

and *Griggs*³⁷⁶ expanded civil rights gains. These decisions gave civil rights advocates hope that not only would racial progress continue, but also that legal remediation would take on a deeper understanding of discrimination—one that transcended the Myrdalian prejudice model.³⁷⁷ For a brief period from 1969–73, the Court favored a more systemic understanding of racial oppression that acknowledged the impact of societal discrimination and the state’s obligation to remedy.³⁷⁸

This shift reflected the political tenor of the times, as the tactics of the civil rights movement changed from non-violent protest and integration to “Black Power” and Black nationalism.³⁷⁹ Once these movements reached their zenith in the early 1970s, the Court abandoned its flirtation with the “institutionalized racism” model of racial inequality and reverted back to Myrdal in *Milliken v. Bradley* in 1974,³⁸⁰

remedy for *de facto* segregation and finding that an intent to segregate provided an inference that *de jure* segregation is system-wide).

³⁷⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing disparate impact form of employment discrimination to challenge facially neutral employment practices that have an adverse impact on protected groups under Title VII).

³⁷⁷ On the Myrdalian prejudice model, see *supra* notes 252–53 and accompanying text. For an example of such a transcendence, see Montoya, *supra* note 248, at 896–907 (analyzing how the current Court’s conceptualization of affirmative action reflects the prejudice model, while Professor Butler’s proposals for the criminal justice system reflect the white supremacy model).

³⁷⁸ Alan Freeman refers to this period as within the “era of contradiction” in which federal courts manifest a simultaneous operation of a perpetrator perspective indifferent to results, and a victim perspective emphasizing “consequences” rather than “motivation.” Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 293–97 (David Kairys ed., 3d ed. 1998) [hereinafter *Antidiscrimination Law*].

³⁷⁹ For this shift’s historical context and a description of Black Power, Black nationalism and Black radicalism and their distinctions from civil rights and intergrationism, see MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* 292 (1997) (identifying the radicalized Black organizations diverging from the civil rights movement as including “The Black Panther Party, the League of Revolutionary Black Workers, the African National People’s Congress, the Revolutionary Action Movement, and large numbers of groups loosely affiliated with the African Liberation Support Committee”); MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1990*, at 86–148 (1991) (chronicling the eras of Black Power and Black Rebellion in the late-1960s to the mid-1970s); Gary Peller, *Race-Consciousness*, in *CRITICAL RACE THEORY, KEY WRITINGS THAT FORMED THE MOVEMENT* 127, 135–38, 145–50 (Kimberlé Crenshaw et al. eds., 1995) (summarizing the Black Nationalist critique of integrationism and providing the historical context for the rise of Black Nationalism). For an original text on Black Power, see generally KWAMÉ TOURÉ (formerly known as Stokely Carmichael) & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1967). For original documents from the Black Power (Student Non-Violent Coordinating Committee) and Black Panther Party, see generally CHARLES V. HAMILTON, *THE BLACK EXPERIENCE IN AMERICAN POLITICS* 191–243 (1973).

³⁸⁰ *Milliken I*, 418 U.S. 717 (1974) (holding that an interdistrict busing remedy between Detroit and suburban areas could not be ordered absent proof that each district affected has

Washington v. Davis in 1976,³⁸¹ and *Arlington Heights v. Metropolitan Housing* in 1977.³⁸² Through these cases, the Court ushered in a jurisprudence that imposed on plaintiffs strict requirements for proving causation and intent.³⁸³ The Burger Court would begin, and the Rehnquist Court would continue, to apply principles that restricted racial remedies as they redeemed whiteness.³⁸⁴

By the time William Rehnquist was installed as Chief Justice of the Supreme Court in 1986, the Reagan administration had redefined the most compelling civil rights violations as those resulting from affirmative action policies that discriminated against innocent white victims.³⁸⁵ Consistent with this redefinition, the Court narrowed the acceptable range of race-conscious remedial efforts, shrewdly seizing upon earlier Warren-era discourse. This narrowing, effected through use of three mechanisms, began with *Wygant*³⁸⁶ and continued through *Adarand*³⁸⁷ (and its Fifth Circuit cousin *Hopwood*).³⁸⁸ These three mechanisms were the doctrine of strict scrutiny, the distinction between "identifiable" versus societal discrimination and an *a priori* principle of colorblindness. In using these three facially-neutral mechanisms that privileged

been a substantial cause of interdistrict segregation or that district lines have been intentionally drawn on the basis of race).

³⁸¹ 426 U.S. 229 (1976) (requiring a showing of discriminatory intent for facially-neutral governmental actions regarding employment that have a racially disparate impact under an equal protection claim).

³⁸² 429 U.S. 252 (1977) (requiring a showing of discriminatory intent for facially-neutral governmental action regarding zoning that has a racially disparate impact under an equal protection claim).

³⁸³ See Freeman, *Antidiscrimination Law*, *supra* note 378, at 297-300 (explaining early Burger cases requiring intent and causation as reflective of the individualized "perpetrator" approach to antidiscrimination law).

³⁸⁴ See *infra* notes 385-415 and accompanying text.

³⁸⁵ See OMI & WINANT, *supra* note 10, at 135 (analyzing how "under the guise of creating a truly color-blind society, [Reagan] administration officials sought to define and eliminate the new racism *against whites*"); THOMAS BYRNE EDSALL with MARY EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 187 (1992) (chronicling the Reagan assault on civil rights as reward to lower-income white citizens who voted Republican).

³⁸⁶ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1985) (stating that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive").

³⁸⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218-27 (1995) (stating that Court's cases from *Bakke* to *Crosby* lead to the conclusion that a person has the right to demand that all government racial classifications subjecting a person to unequal treatment be justified under the strictest scrutiny).

³⁸⁸ *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (announcing that "we agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment").

white interests at the expense of people of color, courts relied on the figure of innocent whiteness as the *ultima ratio* of racial constitutionalism, while they discursively constituted that innocence through a process of reiteration. The result has been the unique post-civil rights era form of redeemed whiteness.

Whereas strict scrutiny was initially used by the Warren Court as a means to ferret out invidious intent, the Burger and Rehnquist Courts deploy strict scrutiny in favor of whites by expanding racially-suspect classes to include racial classifications generally.³⁸⁹ This move was closely connected to the redemption of whiteness. Once whites could be cast as innocent victims of affirmative action policies,³⁹⁰ increased judicial protection of white people's interests through heightened judicial review could be pursued audaciously.³⁹¹

The identifiable versus societal discrimination doctrine,³⁹² which asserts that institutionalized racism (practiced primarily against people

³⁸⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–37 (1995) (holding that all racial classifications, whether imposed by federal, state, or local governments, must be analyzed by a reviewing court under strict scrutiny and refusing to distinguish between classifications promoting racial caste and those attempting to eliminate it); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (concluding that strict scrutiny is warranted for benign racial classifications because “there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics”); see also *Adarand*, 515 U.S. at 245 (Stevens, J., dissenting) (criticizing the majority’s inability to discern “between a No Trespassing sign and a welcome mat”). Justice Stevens elaborated on the invidious/benign distinction: “Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: A desire to foster equality in society.” *Id.* at 243.

For a critique of the application of strict scrutiny review to affirmative action, see generally Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 46–68 (1991); Michael L. Manuel, *Adarand Constructors, Inc. v. Peña: Is Strict Scrutiny Fatal in Fact for Governmental Affirmative Action Programs?* 31 NEW ENG. L. REV. 975 (1997); Cedric Merlin Powell, *Blinded By Color: The New Equal Protection, The Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 260–71 (1997); Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Leland Ware, *A Remedy for the “Extreme Case:” The Status of Affirmative Action After Croson*, 55 MO. L. REV. 631 (1990); Leland Ware, *Tales from the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education?* 23 J.C. & U.L. 43 (1996).

³⁹⁰ See *McLaughlin v. Florida*, 370 U.S. 184, 192 (1964) (holding the most rigid scrutiny to be appropriate for racial classifications that are constitutionally suspect); *Loving*, 388 U.S. at 11 (requiring a showing of compelling governmental interest to uphold racial classifications).

³⁹¹ For the inscription of innocent white victimhood in affirmative action cases prompting heightened scrutiny, see *infra* notes 401 & 407 and accompanying text.

³⁹² Writing for the *Croson* majority, Justice O’Connor described the finding for Wendy Wygant, a white woman in *Wygant v. Jackson Board of Education*: “Justice Powell, writing for the plurality, again drew the distinction between ‘societal discrimination’ which is an inadequate basis for race-conscious classifications, and the type of *identified discrimination* that can support and

of color) is not legally remediable, does not per se deny the existence of racism.³⁹³ It merely holds injuries of the deeply-rooted systemic sort to be “too amorphous”³⁹⁴ to be countenanced legally.³⁹⁵ Without an actual wrongdoer (individually, whites are innocent), the recognition of societal discrimination is without legal consequence, displaced analytically by the “faced” figures of innocent white individuals.

Like the vagaries of the marketplace, societal discrimination is beyond constitutional logic and legal sanction. It is just another cost of doing business in America. Instead, only non-structural, “identifiable” injuries (especially those of whites in affirmative action cases) are deemed “intrusive” enough to warrant legal redress and judicial favor.³⁹⁶ Here the repudiatory and burial stages combine with the figure of white innocence to effect the crucial transformational binarism of societal versus identifiable discrimination.

While the Warren Court embraced the concept of colorblindness as a repudiatory principle with which to battle color-conscious segregationist legal regimes,³⁹⁷ subsequent courts have used *Brown*’s strategic

define the scope of race-based relief.” *Croson*, 488 U.S. at 497 (discussing *Wygant*) (emphasis added).

³⁹³ See *Croson*, 488 U.S. at 499 (admitting that “there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs”); *Wygant*, 476 U.S. at 278 n.5.

³⁹⁴ See *Croson*, 488 U.S. at 496–97 (discussing *Bakke*) (noting that “Justice Powell contrasted the focused goal of remedying wrongs worked by specific instances of racial discrimination with ‘the remedying of the effects of societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.”). The Court also stated that “[a] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.” *Id.* at 498. *Croson* continues: “Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity. *Id.* at 504; see also *Wygant*, 476 U.S. at 276.

³⁹⁵ See *supra* note 386 (discussing *Wygant*); see also *Croson*, 488 U.S. at 499 (admitting that “[w]hile there is no doubt that the sorry history of both private and public discrimination in this country had contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia”); *Croson*, 488 U.S. at 505 (concluding that “[t]o accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for remedial relief for every disadvantaged group”); *Wygant*, 476 U.S. at 274 (stating that “[t]his Court has never held that societal discrimination alone is sufficient to justify a racial classification”).

³⁹⁶ See *Wygant*, 476 U.S. at 283 (determining that layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives, imposing a burden that is “too intrusive”); *id.* at 283 (after finding that affirmative action layoffs are too intrusive to “particular individuals,” the Court invalidated the plan under the “narrow tailoring” prong of strict scrutiny, “as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause”). See *id.*

³⁹⁷ *Brown*’s “central lesson” became the mantra of colorblindness. The *Brown* decision does

colorblind stance to transform repudiated/buried white privilege into a viable post-civil rights regime.³⁹⁸ The Rehnquist Court hypothesized that the Fourteenth Amendment created colorblind “personal rights,” as opposed to race-conscious group rights.³⁹⁹ Because affirmative action policies were race-based remedies that relied on group-based racial classifications, the Rehnquist Court concluded that they violated the Fourteenth Amendment’s edict of colorblind, individualized equal protection established through *Brown*.

Moreover, the Court’s colorblind interpretation of white supremacy’s victims and beneficiaries transformed the Fourteenth Amendment’s understanding of equality from an “anticaste principle” to an “antidifferentiation principle.”⁴⁰⁰ Once affirmative action was shown to burden whites, the colorblind Court used strict scrutiny to protect them from the invidious intent of affirmative action—to reverse the effects of white privilege by treating its victims “differentially.”⁴⁰¹

not announce a clear constitutional principle embracing colorblindness, though some have argued that the per curiam decisions following *Brown* compels such a reading. See Andreas Auer, *Public School Desegregation and the Color-Blind Constitution*, 27 Sw. L.J. 454, 458–9 (1973); Charles Lawrence, *The Big Lie: Colorblindness and the Taboo Against Honest Talk About Race*, in *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 67 (Charles Lawrence & Mari Matsuda eds., 1997); Wechsler, *supra* note 54, at 32. But see Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Retirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1007–08 (1993) (detailing contemporary commentators on *Brown* who failed to find a colorblindness rationale). In *Brown I*, the problem was segregation’s sorting of school-age children “solely on the basis of race.” *Brown I*, 347 U.S. at 488, 493, 494 (discussing segregation’s dictates that deny admission of Negro children “according to race,” “solely on the basis of race,” and “solely because of race,” respectively). Accordingly, the remedy devised in *Brown II* called for school districts “to achieve a system of determining admission to the public schools on a nonracial basis.” *Brown II*, 349 U.S. at 300–01 (emphasis added).

³⁹⁸ See *infra* notes 399–415 and accompanying text.

³⁹⁹ This liberal-individualist understanding of the Fourteenth Amendment considers any race-based classification to be immediately suspect, effectively inhibiting the implementation of class-wide relief for race-based injuries. See *Croson*, 488 U.S. at 493 (maintaining that “[a]s this Court has noted in the past, the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). *Croson* continues: “To whatever racial group these [white] citizens belong, their “personal rights” to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision-making.” *Id.*; see also *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (arguing the Fifth and Fourteenth Amendment principles “protect persons, not groups,” and require that “all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed”) (citation omitted).

⁴⁰⁰ *Adarand*, 515 U.S. at 227 (declaring that racial classifications are suspect “irrespective of the race of the burdened or benefited group”); see also Powell, *supra* note 389, at 228 (arguing that at some stage in the twentieth century, the legal understanding of constitutional equality shifted dramatically from an anticaste principle into an antidifferentiation principle).

⁴⁰¹ See *Wygant*, 476 U.S. at 273 (stating that: “[t]he Court has recognized that the level of

In these ways, the now sacred altar of colorblindness has become an important discursive site in the transformation and extension of white supremacy in the post-*Brown* era, even as it represents an ideological gravemarker to the earlier forms of white supremacy and judicial complicity.⁴⁰² As Professor John Morrison has observed, white insistence on non-race consciousness amounts to white denial of racial guilt.⁴⁰³ If Euro-Americans do not acknowledge race, then they cannot be guilty of racial subordination.⁴⁰⁴ Similarly, Professor Gary Peller has argued that colorblindness was the ideological flipside of “a more diffuse and widespread cultural avoidance that seemed to include measures of guilt, desires for atonement, and needs for absolution.”⁴⁰⁵

scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination. . . . In this case, Article XII of the CBA operates against whites and in favor of certain minorities”; *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (declaring that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees”); *Crosby*, 488 U.S. at 495–96 (arguing that “[i]n this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case”); *Adarand*, 515 U.S. at 227 (holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”).

As Professor Derrick Bell succinctly summarized, contemporary civil rights doctrines of strict scrutiny and colorblindness have operated together to protect whites as the “discrete and insular minority”:

1) Because most policies challenged by blacks as discriminatory make no mention of race, blacks can no longer evoke the strict scrutiny shield in absence of proof of intentional discrimination—at which point, strict scrutiny is hardly needed.

2) Whites challenging racial remedies that usually contain racial classifications are now deemed entitled to strict scrutiny without any distinction between policies of invidious intent and those with remedial purposes. Thus, for equal protection purposes, whites have become the “discrete and insular minority.”

Derrick A. Bell, Jr., *California's Proposition 209: A Temporary Diversion on the Road to Disaster*, 30 LOY. L.A. L. REV. 1447, 1458 (1997).

⁴⁰² See *supra* notes 397–401 and accompanying text. On the role of “colorblindness” to white supremacy in the post-*Brown* era, see generally BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION 67–113 (1997); Flagg, *supra* note 397, at 953; Gotanda, *supra* note 389; David Kairys, *Unexplainable on Grounds Other than Race*, 45 AM. U. L. REV. 729, 737, 748–49 (1996); Amy L. Knickmeier, *Blind Leading the “Colorblind”*: *The Evisceration of Affirmative Action and a Dream Still Deferred*, 17 N. ILL. U. L. REV. 305 (1997); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 29 STAN. L. REV. 317, 349–55 (1987) [hereinafter *The Id*]; John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 316–24 (1994); Powell, *supra* note 389; Herbert O. Reid, Sr., *Assault on Affirmative Action: The Delusion of a Color-Blind America*, 23 HOW. L.J. 381, 427 (1980); David Strauss, *the Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

⁴⁰³ Morrison, *supra* note 402, at 340 (claiming that “[a]t the heart of colorblindness lies Euro-American’s racial guilt”).

⁴⁰⁴ *Id.*

⁴⁰⁵ Peller, *Race Consciousness*, *supra* note 379, at 842.

The historicity of colorblindness as a response to the group-based biological determinism of the segregation era actually places it in close epistemological proximity to scientific racisms that view people of color as inherently inferior. In Hegelian terms, the “sublation” of *Brown* colorblindness that occurs through the dialectic it forms with biologicistic racism, which destroys/preserves (*Aufhebung*) aspects of both, conditions the meaning and politics of neoconservative colorblindness.⁴⁰⁶ In short, the ideology of colorblindness remains forever bound up with biologically deterministic forms of white supremacy.

The increasing dominance of colorblind morality in racial jurisprudence today suggests that we have circled back to *Brown* through a dehistoricized 1950s’ understanding of racial inequality as individual “prejudice.” This superficial and incomplete understanding of racial subordination, pried from its original context, is sufficiently locked-in to prevent dialogue about a more systemic approach to oppression. Instead, colorblindness draws on a strategic pre-civil rights discourse of resistance to provide the Court with a mantra, cited and recited in the judicial attack on racial remedies.⁴⁰⁷ Accordingly, the *Brown*-era’s repudiatory proclamations of racial equality and burial of historic and ongoing racial injuries have become crucial to the effective transformation of white supremacy during the post-Warren Court era.

In its late-redemption stage, the Court is able to reintegrate whiteness into its moral canon. This reintegration can be traced through references to white innocents in affirmative action cases.⁴⁰⁸ Beginning

⁴⁰⁶ GEORG W.F. HEGEL, *PHILOSOPHY OF RIGHT* ¶ 261 (T.M. Knox trans., 1952) (1821).

⁴⁰⁷ See Freeman, *Antidiscrimination Law*, *supra* note 378, at 288 (criticizing antidiscrimination law’s failure to offer a racial remedy unless there are “identifiable perpetrators who have *purposefully* and *intentionally* caused harm to *identifiable* victims”); Lawrence, *The Id*, *supra* note 402, 325–26 (arguing that the intent requirement in antidiscrimination cases assigns individualized fault for racial discrimination and creates a class of white innocents who feel “resistance to and resentment of affirmative action programs and other race-conscious remedies for past and continuing discrimination”); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 67 MINN. L. REV. 1049, 1055 (1978) (“The fault concept . . . creates a class of ‘innocents’ who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations”); see also *supra* Part III.C.1–2.

⁴⁰⁸ See, e.g., *Bakke*, 438 U.S. 265, 298 (1978) (plurality opinion) (pointing out the inequity of “forcing innocent persons” to “bear the burdens of redressing grievances not of their making”); *Fullilove*, 448 U.S. 448, 514 (1980) (Powell, J., concurring) (stating that racial remedies should not be approved on the basis of societal discrimination without consideration to the concept’s over-expansive impact on “innocent people”); *Wygant*, 476 U.S. at 276 (Justice Powell, joined by Justices Rehnquist, O’Connor, and Chief Justice Burger) (expressing his concern about “legal remedies that work against innocent people”); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 609 (1990) (O’Connor, J., dissenting) (articulating concern over impact of affirmative action program to “persons denied an opportunity or right based on race”); *United States v. Paradise*,

with *Bakke* in 1976, we see Justice Powell lamenting the dangers of affirmative action policies which amount to “forcing innocent persons . . . to bear the burdens of redressing grievances not of their making.”⁴⁰⁹ In *Fullilove*, Chief Justice Burger, writing for the Court, upheld the federal affirmative action plan in large part because innocent whites were not impermissibly burdened.⁴¹⁰ *Wygant* epitomizes the Court’s obsession with white innocence. Professor Ross points out that the *Wygant* Court characterizes whites as “innocent” no less than five times in two paragraphs.⁴¹¹ Such a rhetoric of innocence continued in Justice Stevens’ concurrence in *City of Richmond v. Croson* which warned that “the disadvantaged class of white contractors presumably includes . . .

480 U.S. 149, 197 (1987) (O’Connor J., dissenting) (noting that [e]ven more flexible ‘goals,’ however, also may trammel unnecessarily the rights of nonminorities”); *Paradise*, 480 U.S. at 193 (Stevens, J., concurring) (referring to “innocent victims” of affirmative action).

For an exploration of the narrative of “innocent whites” in affirmative action cases, see generally Ansley, *supra* note 248, at 1005–23; Robert Belton, *Reflections on Affirmative Action After Paradise and Johnson*, 23 HARV. C.R.-C.L. L. REV. 115, 122–24 (1988); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?* 91 COLUM. L. REV. 790, 790–93 (1991); Deborah E. Klein, *Wygant v. Jackson Board of Education: Affirmative Action and the Innocent Party*, 18 U. TOL. L. REV. 519, 536–41 (1987); Sylvia R. Lazos Vargas, *Deconstructing Homo[ogeneous] Americans: The White Ethnic Immigrant Narrative and its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1539–43 (1998); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) [hereinafter *Innocence*]; Ross, *Rhetorical Tapestry*, *supra* note 343; Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989); Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 84–96 (1986); Frederick A. Morton, Jr., Note, *Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089, 1132–36 (1993). For a related discussion on the “rights of whites” embodied in the Supreme Court’s 1989 decisions, see Linda S. Greene, *Race in the 21st Century: Equality Through Law?* 64 TUL. L. REV. 1515, 1533–38 (1990).

⁴⁰⁹ *Bakke*, 438 U.S. at 298.

⁴¹⁰ *Fullilove*, 448 U.S. at 484 (upholding a federal affirmative action plan in governmental contracting because the innocent parties are not found to be impermissibly burdened).

⁴¹¹ Ross, *Innocence*, *supra* note 408, at 297 n.21. Justice Powell states in *Wygant*:

We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation’s dedication to eradicating racial discrimination, *innocent persons* may be called upon to bear some of the burden of the remedy. “When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a “sharing of the burden” by *innocent parties* is not impermissible. We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on *innocent parties*. In cases involving valid hiring goals, the burden to be borne by *innocent individuals* is diffused to a considerable extent among society generally. Though hiring goals may burden some *innocent individuals*, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Id. (quoting *Wygant*, 476 U.S. at 280–83 (emphasis added) (citations and footnotes omitted) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980)).

some who have never discriminated against anyone on the basis of race.”⁴¹²

From *Bakke*, the first major affirmative action case decided in 1978, through *Croson* in 1989, the Supreme Court consistently hypothesized and ultimately asserted the innocence of whiteness, thereby privileging perceived infringements against innocent whites over racial injuries to people of color and distorting the historical record of power relations between dominant whites and people of color. However, by the time *Adarand* was decided in 1995, the Court no longer had to make such express assertions.⁴¹³ The *Adarand* Court conspicuously avoids any mention of “innocence” in its majority and concurring opinions. Instead, Justice O’Connor, writing for the majority, emphasizes a new triad of constitutional principles to be applied to racial remediation—“skepticism,” “consistency” and “congruence.”⁴¹⁴ Noticeably, none of the principles in this triad has as its immediate historical referent the pre-*Brown* or *Brown*-era problematic of whiteness as encumbered by white supremacy.⁴¹⁵ White innocence is now naturalized; it is the Court’s default assumption, signaling that whiteness has been restored to its fullest value through the successful completion of the racial project of redemption begun in *Brown*.

IV. RACIAL REDEMPTION AS SOCIOLEGAL-RACE CRITICAL THEORY

The theory of racial redemption presented in this Article uses a form of psycho-biographic historiography to understand the link between societal racial formation and the racial jurisprudence of the Supreme Court. In doing so, three levels of analysis are brought together—the individual, the social and the judicial-institutional—in a way that requires further theoretical elaboration. What model sufficiently explains how these three levels interrelate in order to ground the argument mounted in this article? To answer this question, I turn to the sociopolitical work of Michael Omi and Howard Winant who have developed a theory of racial formation in American society.

⁴¹² *Croson*, 488 U.S. at 516; see also Ross, *Innocence*, *supra* note 308, at 306 (discussing Stevens’ concurrence in *Croson* within the context of the rhetoric of white innocence).

⁴¹³ See generally *Adarand*, 515 U.S. at 223–24 (grounding decision instead on the “general propositions” of “skepticism,” “consistency” and “congruence”).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* For a race-based critique of these seemingly neutral principles, see Kairys, *supra* note 402 (pointing out various examples of the Court’s inconsistency in applying its skepticism toward measures disadvantaging whites as opposed to people of color or women).

As applied to my work on Warren, the Court and racial redemption, racial formation theory helps explain the ways in which the different levels of analysis presented here may be linked. In particular, I have borrowed three conceptual tools from Omi and Winant's theory of racial formation: the racial project,⁴¹⁶ the racial state⁴¹⁷ and the concept of race-historical trajectory⁴¹⁸ to ground this particular race critical-sociolegal analysis. While I do not claim a "perfect fit" between racial formation theory (sociopolitical in nature) and my theory of racial redemption (race critical-sociolegal in nature), Omi and Winant's work elaborates specific types of mechanisms and processes that may encompass a psycho-social race jurisprudential construct such as that suggested in racial redemption theory.

A. *Redemption as Racial Project*

In seeking to explain the unique role of race in American society and politics, Omi and Winant develop a theory of racial formation, defined generally as "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed."⁴¹⁹ This definition reflects the basic understanding of race and racial formation as products of social, cultural and political processes. Racial formation theory, however, goes far beyond this basic insight. Omi and Winant further break down racial formation into its smaller component parts, referred to as racial projects. These racial projects are social and political manifestations that one may, at the risk of great oversimplification, liken to movements or campaigns.⁴²⁰ Racial projects "do the ideological work" of linking two levels of social theory that often remain unintegrated: the structural (material and institutional) and the representational (cultural and discursive) components of a society's racial formation.⁴²¹

As Omi and Winant explain: "A racial project is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines."⁴²² Stated in slightly different terms: "Racial projects connect what race means in a particular discursive practice and the ways in which both

⁴¹⁶ See *infra* notes 419-30 and accompanying text.

⁴¹⁷ See *infra* notes 431-42 and accompanying text.

⁴¹⁸ See *infra* notes 443-82 and accompanying text.

⁴¹⁹ OMI & WINANT, *supra* note 10, at 55.

⁴²⁰ *Id.* at 55-56.

⁴²¹ *Id.* at 56.

⁴²² *Id.*

social structures and everyday experiences are racially *organized*, based upon that meaning.⁴²³ Both subjects and structures are accounted for in the theory, for the racial project reconciles the role of individual agency with the constraints of social structure (thereby transcending this perennial social theory dilemma). Finally, racial projects may be either regressive or progressive, liberal or conservative; they may involve society's micro-level interactions or macro-level actions, involving, for example, state institutions and electoral politics.⁴²⁴

Racial redemption can be thought of generally as a racial project, containing both a structural-material and a representational-cultural component. As described above, the *meaning* of whiteness is at stake in the project of racial redemption, and the outcome will have significant *material* consequences. More specifically, the value of whiteness is maintained through its reputational rehabilitation, shown above to occur through the operation of various component projects, from repudiation of white supremacy and burial of historical complicities in white supremacy to transformation toward a redeemed and innocent whiteness.⁴²⁵ The property value of whiteness and the social structure of racial privilege depend on this rehabilitation.

Importantly, the theoretical construct of the racial project provides a mechanism for linking Warren's personal history with broader societal and political processes of racial formation. When viewed through the lens of the racial project, we may postulate homologous and isomorphic relationships between both the personal and society-wide drive for racial redemption. In addition to the common sense appeal of reading Warren's personal need for redemption into his Supreme Court race jurisprudence, the concept of racial project helps us to understand how that personal need arose within, and was conditioned by, a broader matrix of social and political forces and relations.

From the perspective of the racial project, we cannot plausibly divorce Warren's personal story (and the kind of individual and spiritual/religious redemption he perhaps sought) from the broader contours of racial formation in his society. Understanding *Brown* as integral to the process of racial redemption becomes, in part, an exercise in placing the "personal" motivations of Warren in their proper social context. Warren's individual intentionality, the primary focus of most biographical narratives regarding his remorse for the internment, and, to some extent, his race jurisprudence, becomes a false category of

⁴²³ *Id.*

⁴²⁴ OMI & WINANT, *supra* note 10, at 56–59.

⁴²⁵ See *supra* Part III.

analysis. As it unfolded within the universe of postwar racial projects, Warren's processing of his role in internment and his role on the Court are not primarily manifestations of purely subjective processes, but rather must be understood first as outcomes and constituents of objective processes of racial formation.

When understood as a racial project, racial redemption does not necessarily imply coordinated actions by conspiratorial groups of whites openly and consciously seeking to maintain white domination over peoples of color. The theory of racial formation and the racial project are more nuanced than that, accounting for race-conservative, "well-intentioned" liberal interventions, and progressive resistances to such domination.⁴²⁶ The actions of individuals and groups occur within a field of thoroughly racialized relations, structures, discourses and meanings.⁴²⁷ So, in the case of Chief Justice Warren, we may bracket linear notions of causality and motivation in understanding how he perceived his actions in the internment of Japanese Americans, what he did to rectify those wrongs and how he effected race jurisprudence as a member of the Supreme Court. According to the racial formation theory, Warren is always already within the racial matrix, and our job is to construct a coherent theory for grasping the nature of racial projects to which he contributed.

In this sense, we might place Warren in a more direct relationship with neoconservatives of the post-civil rights era whose racial project has been to "rearticulate"⁴²⁸ the meaning of various liberational concepts of the previous era such as colorblindness and "reverse discrimination."⁴²⁹ Warren's relationship to later rearticulatory practices, as discussed above, has been one of complicated antecedence. This ambiguous posture has allowed modern neoconservatives to deploy Warren's legacy in their racial project of rearticulating the meaning of *Brown's* racial equality as colorblind individualism rather than as a

⁴²⁶ OMI & WINANT, *supra* note 10, at 58–59 (describing contemporary racial projects in the U.S. as ranging from those of the "far right" emphasizing biologicistic and racist views of difference, "new Right" projects asserting "colorblind" views that simultaneously manipulate racial fears, and "radical democratic" projects that invoke difference in conjunction with egalitarian policies). For one of the few legal scholars analyzing the significance of "racial projects" to law and the Court's race jurisprudence, see John Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. J. 25, 37–56 (1997).

⁴²⁷ OMI & WINANT, *supra* note 10, at 60 (identifying racial formation as a synthesis of the interaction between social signification and social structure).

⁴²⁸ According to Omi and Winant, rearticulation is the process of developing a new subjectivity based upon one's pre-existing information and knowledge. *Id.* at 99.

⁴²⁹ *Id.* at 131 (describing the neoconservative rearticulation of racial collectivity as "reverse discrimination").

“group or collective concern.”⁴³⁰ Again, this racial project analysis says nothing about Warren’s intentionality. Instead, it argues that the tensions inherent in the repudiatory and burial stages of his racial redemption create conditions conducive to subsequent retrenchment of (reformulated) white supremacy.

B. *The Racial State*

When Omi and Winant characterize the state in the context of the United States as a racial state, they mean that the state is “inherently racial”—i.e., racial in its structures.⁴³¹ They argue that the state does not merely intervene in racial conflicts, rather “the state is itself increasingly the pre-eminent site of racial conflict.”⁴³² Moreover, “[t]hrough policies which are explicitly or implicitly racial, state institutions organize and enforce the racial politics of everyday life.”⁴³³ The theory of the racial state is not vulgarly deterministic; rather, it understands the state as a field of struggle, operating in the present conjuncture according to hegemonic principles.⁴³⁴ In other words, the outcomes of racial conflicts, as mediated by the state, will produce order “secured by a complex system of compromises, legitimating ideologies (i.e., the ‘rule of law’), by adherence to established political rules and bureaucratic regularities, etc.”⁴³⁵ Further, the racial state is thoroughly embedded in social relations, meaning that state actors and agencies are linked in complicated and myriad ways to racialized constituencies.⁴³⁶ The social relations within which states operate include cultural and technical norms that, in the United States, are structurally driven by difference.⁴³⁷

The theory of the racial state as the site of racial struggle, embedded in social relations and producing hegemonic order, further strengthens the argument made here. Racial redemption and the meaning of whiteness are highly conflicted, involving racial projects launched from various points on the political spectrum. From the perspective of the theory of the racial state, it makes sense that redemption would proceed, in part, at the level of the Supreme Court’s race jurisprudence. The Court has slowly absorbed radical race-political

⁴³⁰ See *id.* at 130.

⁴³¹ *Id.* at 82.

⁴³² OMI & WINANT, *supra* note 10, at 82.

⁴³³ *Id.* at 83.

⁴³⁴ *Id.* at 84.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ OMI & WINANT, *supra* note 10, at 84.

challenges to the existing social order through the standard rule-of-law mechanisms of neutral principles and procedures.⁴³⁸ More subtly, as shown above, the Court has transformed the image of whiteness through its discourse of innocent white victimization.⁴³⁹ This move has been more significant to the hegemonic functioning of the Court than its usual deployment of legal liberalism because of the uniquely racial nature of social divisions and social conflict in the United States, as well as the racial nature of the state as a whole.⁴⁴⁰

By reclaiming white innocence, the Court has undermined a crucial component of progressive race politics and thrown askew the moral compass of progressive challengers to the racial status quo. A redeemed white innocence renders claims of injustice incomprehensible because it imposes a system of "shared" racial meanings wherein there are no "wrongdoers" and no unjust beneficiaries of racial privilege—merely sets of competing interest groups that must not be "unnecessarily trammled"⁴⁴¹ under Pareto principles of efficiency.⁴⁴² However, it should be noted that the Court's iteration of innocent whiteness may prove to be such an effective endgame maneuver that it ultimately pushes us beyond the equilibrating reinstatement of a racial hegemony. It may help create a new set of disequilibria that will lead to reformulated challenges to the state and the current racial order.

The racial project of racial redemption, then, is effected not only at the level of the individual and society at-large, but also on the terrain of the racial state and its adjudicatory institutions. White innocence represents cultural-representational claims that are operationalized within the state legal structure, which exercises the pivotal func-

⁴³⁸ Indeed, the radical race movements of the 1960s and 1970s have been absorbed by the jurisprudence of affirmative action and the limitations imposed by strict scrutiny review to balance the interests of minorities against those of "innocent whites." See *supra* discussion notes 389–91, 408–12 and accompanying text. Stated more succinctly, Black Power has become absorbed through legal process theory.

⁴³⁹ See *supra* notes 408–12 and accompanying text.

⁴⁴⁰ On the racial nature of the state, Derrick Bell identifies ten provisions in the allegedly colorblind Constitution, inserted to protect the property interest in slavery. See BELL, AND WE ARE NOT SAVED, *supra* note 314, at 34–35; see also OMI & WINANT, *supra* note 10, at 81–88.

⁴⁴¹ See *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 637–38 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (approving voluntary affirmative action plans as long as they do not "unnecessarily trammel" the interests of white males).

⁴⁴² According to Pareto optimal definitions of efficiency, a redistribution of resources is efficient when someone is better off and no one is worse off. Affirmative action (and antidiscrimination laws generally) would not be considered Pareto-optimal because, while protected groups such as people of color and women will benefit, white males will not. See MICHAEL ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 83–84 (4th ed. 1997) (discussing Pareto optimal definitions of efficiency).

tion of declaring the limits of race-conscious affirmative relief from white supremacy.

C. The “Trajectory” of Racial Jurisprudence

1. Racial Projects and Unstable Equilibria

Omi and Winant refer to the trajectory of racial politics as the cyclical disruption and restoration of the racial order.⁴⁴³ The racial order in the U.S. is “equilibrated by the state—encoded in law, organized through policy-making, and enforced by a repressive apparatus.”⁴⁴⁴ Because racial identities and meanings are fluid and shifting, the racial order imposed by the state is inherently temporary and thus subject to ongoing disruption and restoration.⁴⁴⁵ Racially based social movements that arise in the form of political projects defy and define the racial state by creating ruptures that lead to the restoration of a new equilibrium.⁴⁴⁶ In turn, the racial state “co-opts” racial movements by *absorbing* the least threatening demands through the creation of new rules, policies, programs and agencies.⁴⁴⁷

From the period of the Hayes-Tilden Compromise of 1877⁴⁴⁸ to World War II, the U.S. racial state preserved a relatively undisturbed equilibrium. Omi and Winant describe the state as “despotic” insofar as the state exercised its primary objectives of repression and exclusion through its racial policies.⁴⁴⁹ Accordingly, there was limited political space to contest the prevailing racial order prior to World War II. After the war, the Black freedom movement and other racially based movements began to “open up” the state. They made contestation of dominant racial ideologies possible through “normal politics” (electoral, legislative, litigation, institutional reform, etc.) and direct action

⁴⁴³ OMI & WINANT, *supra* note 10, at 78, 85 (defining trajectory as “the pattern of conflict and accommodation which takes shape over time between racially based social movements and the policies and programs of the state). Omi and Winant identify the racial order as linking the system of political rule to the racial classification of individuals and groups. *See id.* at 79.

⁴⁴⁴ *Id.* at 84.

⁴⁴⁵ *See id.* at 84–85.

⁴⁴⁶ *See id.* at 86 (“Racially based political movements as we know them are inconceivable without the racial state, which provides a focus for political demands and structures the racial order. The racial state, in its turn, has been historically constructed by racial movements; it consists of agencies and programs which are the institutionalized responses to racial movements of the past.”).

⁴⁴⁷ *See id.* at 87 (explaining effective mobilization by racial movements as triggering a crisis for the racial state that is eventually met with policies of absorption and insulation).

⁴⁴⁸ *See infra* notes 458–61.

⁴⁴⁹ OMI & WINANT, *supra* note 10, at 81.

“movement” strategies.⁴⁵⁰ This postwar period produced the possibility of oppositional racial politics and enhanced the instability of the racial order.

Using the racial trajectory framework, we can trace the ebbs and flows of the Court’s redemption jurisprudence, beginning with *Brown*, (which represents a racial crisis) the NAACP’s civil rights litigation, the “cold war imperative” and the postwar, post-Nuremberg consciousness generally. From *Brown* in 1954 through roughly 1974, the Court as a racial state institution established a new equilibrium using liberal intellectual paradigms. Neoconservative challenges to the existing equilibrium arose from within liberal paradigms that had always embraced “limiting principles” in their equality projects. Between 1974 and 1978, the Burger Court created a “rupture” in the equilibrating racial jurisprudence of the previous period by unequivocally restricting racial remedies to situations where plaintiffs could make near-impossible showings of causation and discriminatory intent, as seen in *Milliken I*, *Washington* and *Arlington Heights*.⁴⁵¹

From 1978–89, a new jurisprudential equilibrium was established⁴⁵² that rested on neoconservative racial jurisprudence and a greatly truncated vision of state-provided racial justice. By 1989, the New Right’s various racial projects created another rupture. These projects achieved racial regression by rearticulating equality as synonymous with a colorblind and noninterventionist state. The 1989 term yielded a number of controversial decisions that reflected the New Right program of rhetorically colorblind, yet racialized and judicially activist constitutional jurisprudence.⁴⁵³ Congress, however, in perhaps its last reconstructive moment (of the Second Reconstruction), reversed many of these Title VII decisions in the Civil Rights Act of 1991.⁴⁵⁴ The back-and-forth compromises between Congress and the

⁴⁵⁰ *Id.* at 85.

⁴⁵¹ *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*) (finding inadequate causation to order interdistrict busing remedies); *Washington v. Davis*, 426 U.S. 229 (1976) (requiring a showing of discriminatory intent for constitutional disparate impact claim); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (requiring a showing of discriminatory intent for facially-neutral governmental zoning action with disparate impact); see *supra* notes 380–84 and accompanying text.

⁴⁵² See *supra* discussion Part III.C.3.

⁴⁵³ See Freeman, *Antidiscrimination Law*, *supra* note 378, at 302 (discussing *Wards Cove Packing v. Atonio*, *Martin v. Wilks* and *City of Richmond v. J.A. Croson* as three of the six major civil rights defeats of the 1989 term that “amount collectively to a repudiation of the implicit principles, if not the actual results” of prior antidiscrimination law foundations) (citations omitted).

⁴⁵⁴ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended (1991).

Court over the “declining significance” of racial discrimination reflect both the racialized and hegemonic nature of the state. In 1995 in *Adarand*, the Supreme Court announced what seems to be the new equilibrium position, recasting colorblindness in the heavily-coded terms of “consistency,” “congruence” and “skepticism.”⁴⁵⁵

The Court’s race jurisprudence reflects with amazing consistency the racial trajectory mapped by Omi and Winant.⁴⁵⁶ In particular, racial redemption represented a specific racial project, persistently pursued, that was instrumental in achieving the neoconservative/New Right⁴⁵⁷ goal of realizing a “colorblind,” non-redistributive regime that would be enforced judicially. Redeeming whiteness thus had both a discursive and material aspect. The redemption project was pivotal to the creation of limiting principles that halted the legal and cultural racial progressivism of the 1960s-70s, and it triggered ruptures that brought about new, regressive equilibria within the racial state.

2. Recurring Racial Compromises and the Racial Trajectory Theory

A redemption project, similar to the post-Warren racial project, followed the First Reconstruction and the Hayes-Tilden Compromise of 1877.⁴⁵⁸ The Hayes-Tilden Compromise of 1877 marked the abrupt end to the decade-long post-Civil War Reconstruction-era reforms. With this racial compromise, Democrats ceded the White House to Rutherford Hayes and, in exchange, Republicans recognized Democratic governors elected in three belligerent southern states—South Carolina, Florida and Louisiana.⁴⁵⁹ Most importantly, Republicans granted the South “home rule” by withdrawing federal troops moni-

These changes included restoring the burden of proof upon the employer following plaintiff’s prima facie showing in disparate impact cases, determining that a violation of Title VII inheres in “mixed motive” cases once prohibited considerations motivate an employer’s decision, regardless of whether employer would have made the “same decision” absent the illegal motivation, and providing for jury trial and availability of compensatory and punitive damages (with limits).

⁴⁵⁵ See *supra* notes 413–14 and accompanying text.

⁴⁵⁶ See *supra* notes 443–82, and accompanying text.

⁴⁵⁷ Omi and Winant distinguish neoconservatives from the New Right on the basis that the former do not embrace the politics of resentment, whereas the New Right explicitly organizes around this theme. However, the authors acknowledge that neoconservatives “made their peace” with New Right adherents over the shared opposition to affirmative action to produce a new public policy and intellectual realignment on race. OMI & WINANT, *supra* note 10, at 131–32.

⁴⁵⁸ W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA* (1935); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 575–87 (1988); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (rev. ed., 1956).

⁴⁵⁹ FONER, *supra* note 458, at 581.

toring the transition from slavery to freedom in the former Confederate states.⁴⁶⁰ The chair of Kansas' Republican state committee bluntly stated the intended impact of the 1877 Compromise: "As matters look to me now, I think the policy of the new administration will be to conciliate the white men of the South. Carpetbaggers to the rear, and [n*****s] take care of yourselves."⁴⁶¹

In an ironic and tragic parallel, the current redemptive process has involved similar racial compromises between dominant political groupings that again have resulted in the "involuntary sacrifice" of people of color.⁴⁶² In his first bid for the presidency in 1992, Bill Clinton marketed himself according to a Democratic Leadership Council ("DLC") blueprint for the "New Democrat" who could stand up to special (read: racial) interests.⁴⁶³ Clinton displayed this new party identity by staging a public rebuke of Sistah Souljah, a young African American rap artist, at an event organized by Jesse Jackson and the National Rainbow Coalition.⁴⁶⁴ Calculated to distance himself publicly from Reverend Jackson and the Rainbow Coalition power base, the move was a success. Polls showed a dramatic increase in white voter support immediately after the Sistah Souljah incident.⁴⁶⁵ The wooing of "Reagan Democrats" to the New Democrat fold represented a compromise between moderate and liberal white Democrats in their bid for the White House.⁴⁶⁶ The compromise culminated in the abolition of the "special interest" caucuses and the consequent disempowerment

⁴⁶⁰ See *id.* at 582.

⁴⁶¹ *Id.* at 581.

⁴⁶² BELL, RACE, RACISM, *supra* note 370, at 34-36.

⁴⁶³ See CLARENCE LUSANNE, AFRICAN AMERICANS AT THE CROSSROADS: THE RESTRUCTURING OF BLACK LEADERSHIP AND THE 1992 ELECTIONS 127-28 (1994) (describing the creation of the Democratic Leadership Council in 1985 to "revitalize the Democratic Party and lead it back into the political mainstream," and denouncing Jesse Jackson's 1984 and 1988 presidential campaigns as "the purest version of liberal fundamentalism"); Jon Margolis, *Party Election Angers Jackson*, CHI. TRIB., Feb. 2, 1985, at 1 (calling the election of Roland Burris as one of three vice-chairmen of the Democratic National Committee a sign of "the Democratic declaration of independence from the racial, ethnic, and other caucuses"); E.J. Dionne, Jr., *The Democrats in Atlanta: Democrats, After Lean Years, Are Optimistic as They Gather*, N.Y. TIMES, July 17, 1988, at 1 (describing the Democrats' goal at their 1988 convention to reclaim issues of economic growth and basic values from the Republicans, as evidenced by their chairman, Paul Kirk arguing against "exotic issues" and "narrow agendas").

⁴⁶⁴ See LUSANNE, *supra* note 463, at 118 (describing Clinton's disciplining of rap artist Sistah Souljah at the National Rainbow Coalition leadership summit as a staged event "through which Clinton was able to distance himself from [Jesse] Jackson and the progressive wing of the Democratic party").

⁴⁶⁵ See *id.* at 120 (describing Clinton's rise in the polls almost exclusively among whites following his disciplining of Sistah Souljah at the Rainbow Coalition event).

⁴⁶⁶ GOLDFIELD, *supra* note 379, at 362.

of grassroots-oriented racial, gender and sexuality based political communities within the Democratic Party.⁴⁶⁷

More evidence of the new racial compromise came to light in Clinton's re-election campaign. That year, Proposition 209, entitled the *California Civil Rights Initiative*, was placed on the ballot in California to outlaw race-based affirmative action in publicly-funded institutions.⁴⁶⁸ In order to mount a competitive campaign against well-financed anti-affirmative action forces led by Governor Pete Wilson, affirmative action organizers expected financial assistance from the Democratic Party, but their expectations were frustrated. The Democratic Party feared the affirmative action issue was too controversial to fund in a presidential election year. Again seeking to curry favor with the Reagan Democrats, Clinton's Democratic Leadership Council in effect found common ground with Wilson's minions by adopting a race-averse party platform and national funding strategy.⁴⁶⁹ As a result, Proposition 209 narrowly passed, and the enrollments of students of color at the state's top campuses, such as UC Berkeley and UCLA, have since plummeted dramatically, effectively (re)segregating public post-secondary education in California.⁴⁷⁰

A similar racial compromise has occurred during the same time span between conservative and liberal white intellectuals. In the early 1990s, neoconservatives criticized diversity movements nationwide by

⁴⁶⁷ See *All But 3 Democratic Caucuses Stripped of Official Recognition*, L.A. TIMES, May 18, 1985, at 3 (reporting on how the Democratic Party's executive committee stripped official recognition from all except three of its caucuses); *Democrats Oppose Caucuses*, N.Y. TIMES, May 18, 1995, at 33 (covering criticism of Democratic party's elimination of caucuses "behind closed doors" and absent consultations).

⁴⁶⁸ The California Civil Rights Initiative as passed in Proposition 209 amended the California Constitution to read: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a). State was defined as "includ[ing], but not necessarily [] limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district . . ." *Id.* § 31(f).

⁴⁶⁹ See *id.*

⁴⁷⁰ On the resegregation of higher education, see Michelle Locke, *Steep Drop in Minority Students Hits Law Schools*, COMMERCIAL APPEAL, July 13, 1997, at A4 (reporting on declines of students of color from 1996 to 1997 after enactment of affirmative action prohibitions with University of Texas recording a 83% and 51% decline in African American and Latino admissions respectively and University of California admissions reflecting 81% and 50% declines respectively); Scott Shepard, *Declining Enrollment to be Civil Rights Target of Protest*, ATLANTA CONST., July 13, 1997, at 14A (stating that enrollments of students of color at University of Texas and UC Berkeley law schools "have virtually disappeared"); *Berkeley Law School to Enroll Only One Black First-Year Student*, CHRON. HIGHER EDUC., July 11, 1997, at A23; *Minority Applications and Admissions at U. of Texas Plunge*, CHRON. HIGHER EDUC., Apr. 18, 1997, at A28.

tarring them with the brush of “political correctness” (“P.C.”).⁴⁷¹ Members of the white left intelligentsia joined white conservatives and repackaged the P.C. critique with a similar attack on diversity movements as “identity politics.”⁴⁷² Both critiques, from the Right and the Left, reflected discomfort with the spotlight that had been placed on institutional racism and the increasing significance of political leadership by people of color. Specifically, anti-apartheid and diversity movements organized predominantly by people of color were perceived as a threat to the centrality of straight white men of all political persuasions.⁴⁷³

Arguably, as both cause and consequence of the racial compromises of the 1990s stands this increasing affinity of competing groups of whites—of course, to the overall detriment of racial minority interests. The new compromises resulted in the elimination or general weakening of progressive racial projects, remedies or structures, be that in the form of the DLC’s elimination of racial caucuses,⁴⁷⁴ the banning of affirmative action in the states of California and Washington⁴⁷⁵ or the converging Right/Left attack on race-based student organizing.⁴⁷⁶ These compromises represent the nadir of the postwar Second Reconstruction and reflect the perfection of whiteness redeemed.

The current period of redemption shares some disturbing similarities with the first. For example, in the wake of the First Reconstruction and the Hayes-Tilden Compromise, southern states organized constitutional conventions for the explicit purpose of disenfranchising African Americans.⁴⁷⁷ At the end of the Second Reconstruction, we now

⁴⁷¹ For this analysis, see Sumi Cho, *Essential Politics*, 2 HARV. LATINO L. REV. 433, 449–51 (1997).

⁴⁷² See *id.*

⁴⁷³ See *id.* at 451–52 n.38.

⁴⁷⁴ See *supra* note 467 and accompanying text.

⁴⁷⁵ See *supra* notes 468–70 and accompanying text for California’s ban. On Washington’s prohibitions, see Heath Foster, *Affirmative Action Rules Tossed Out by State Voters*, SEATTLE POST-INTELLIGENCER, Nov. 4, 1998, at A1 (reporting on Washington state voters’ overwhelming approval of anti-affirmative action ballot measure, “Initiative-200”).

⁴⁷⁶ See *supra* notes 471–73 and accompanying text.

⁴⁷⁷ See BELL, RACE, RACISM, *supra* note 370, at 186, n.3 (discussing the constitutional conventions held in Mississippi, South Carolina, Louisiana, Alabama, and Virginia between the years 1890 and 1902). Bell cites V. WHARTON, *THE NEGRO IN MISSISSIPPI, 1865–1890*, at 199–215 (1947); A. KIRWAN, *REVOLT OF THE REDNECKS, MISSISSIPPI POLITICS: 1876–1925*, at 58–64 (1964); G. TINDALL, *SOUTH CAROLINA NEGROES, 1877–1900*, at 68–91 (1952); J. BRITAIN, *NEGRO SUFFRAGE AND POLITICS IN ALABAMA SINCE 1870*, at 125–70 (1958); C. WYNES, *RACE RELATIONS IN VIRGINIA, 1870–1902*, at 51–67 (1961); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS 139–81* (1974) for a general discussion of the conventions.

see the return of “home rule” in the devolution of federal authority to states to “manage” their racial affairs.⁴⁷⁸ Consistent with patterns that arose during the First Redemption, the Second Redemption produces similar forms of racial subordination: judicial complicity with regressive regimes;⁴⁷⁹ the rapid proliferation of state-sponsored segregation;⁴⁸⁰ the deployment of racial violence as disciplinary spectacle and a resurgence in scientific racism.⁴⁸¹

⁴⁷⁸ See *supra* note 460 and accompanying text.

⁴⁷⁹ The Supreme Court played a key role in dismantling the First Reconstruction by curtailing federal power to craft effective racial remedies and by restricting the reach of the postbellum Amendments and civil rights legislation. Similarly, the Supreme Court in *Adarand* curtailed federal power to enact affirmative action remedies by imposing strict scrutiny review on even federal governmental affirmative action plans. See *Adarand*, 515 U.S. at 227. Moreover, the Court interpreted the Fourteenth Amendment as prohibiting race-conscious remedies. See *Wygant v. Jackson Bd. of Educ.*, 746 U.S. 267 (1986). Consequently, the Court’s denial of certiorari in the Fifth Circuit’s attempt to overturn *Bakke* in *Hopwood* signals to other regressive circuits and states its approval of local self-determination of racial justice. See *Texas v. Hopwood*, 518 U.S. 1033 (1996) (cert. denied).

⁴⁸⁰ In the wake of the First Reconstruction and the Hayes-Tilden Compromise, southern states organized constitutional conventions for the explicit purpose of disenfranchising African Americans. At the end of the Second Reconstruction, we now see the return of “home rule” manifesting itself first in the western states of California and Washington, where state-by-state initiatives eliminate access recently granted to people of color to quality education and public employment under affirmative action. See *supra* notes 468–70 on California’s Prop. 209 and its impact; Foster, *supra* note 475, at A1 on Washington’s Initiative 200. Only in an era of redeemed whiteness could such racially regressive initiatives and their foreseeable resegregative results be packaged and interpreted as “civil rights.” In addition to the return to home rule for affirmative action, the “Welfare-to-Work” legislation effectively transfers to the states responsibility for welfare “reform.” For another characterization of the contemporary period as the “Second Redemption,” see Adrienne D. Davis, *Identity Notes Part II: Redeeming the Body Politic*, 2 HARV. LATINO L. REV. 267, 274 (1997).

⁴⁸¹ The period following Reconstruction and the onset of segregation produced an upsurge in racial violence as spectacle. White men, women and children attended lynchings of African Americans as public sporting events designed to entertain and excite. The denial of racial guilt and the affirmation of whiteness under Redemption unleashed a social atmosphere in which open season would be declared against Black bodies. Following anti-affirmative action victories and legal and political endorsements of racial home rule, a disturbing pattern of spectacular racial violence is reemerging. On March 21, 1997, three white youths brutally beat 13-year-old Lenard Clark nearly to death for transgressing racial boundaries and playing basketball in the “wrong” neighborhood. The racially-motivated attack, during which racial epithets were used, left Clark permanently brain damaged. Janan Hanna, *Deal Lets 2 in Clark Case Stay out of Jail: Suspects in Beating of Black Youth Agree to Offer of Probation*, CHI. TRIB., Oct. 20, 1998, at 1; *Imperfect Justice for Lenard Clark*, CHI. TRIB. Oct. 22, 1998, at 26. Two of Clark’s attackers received probation, and one was sentenced to eight years in prison. Janan Hanna, *2 Receive Probation in Clark Beating: Jasas, Kwidzinski Pleads Guilty to Charges*, CHI. TRIB., Oct. 19, 1998, at 1. Part of the reason the prosecutor failed to convict Caruso on the attempted murder charge and agreed to plead out with the other two was due to severe witness problems, i.e. one was murdered and another disappeared. *Id.* On July 25, 1997, two white men after an evening of drinking doused with gasoline their fellow party-goer, “G.P.” Johnson, an African American ex-marine. Earlier in the

CONCLUSION

It has been my objective in this article not to impugn the record of Earl Warren, but rather to understand the complexity of his actions during World War II and later as Chief Justice. In so doing I have sought to understand the meaning of the silence, downplaying and apologia surrounding Warren's role in internment practiced by both judicial biographers and internment historians. In one sense, I agree with Warren's many admiring biographers who have suggested that Warren stands as the personification of the American spirit and char-

evening, one of the men had bragged that he was "going to kill a n——." The two white men set Johnson on fire and then decapitated his charred corpse with a splitting maul. Johnson was alive when he was set afire but died upon decapitation. His killers buried his head underneath his body in a 13-inch-deep hole. Michael Paul Williams, *Slaying Case in Grayson Stirs Questions*, RICHMOND TIMES-DISPATCH, June 8, 1998, at B1; Diane Struzzi, *A Trial in Grayson County: A Crime Against the Community*, ROANOKE TIMES & WORLD NEWS, Feb. 15, 1998, at A1. Despite the gruesomeness of the murder, the crime escaped national attention until the Congressional Black Caucus ("CBC") questioned why the killing was not being investigated as a hate crime and called upon President Clinton to intervene. See Rex Bowman, *Cullen Calls for Probe but Says Wait*, RICHMOND TIMES-DISPATCH, Aug. 20, 1997, at B4 (reporting on victim's family's and Congressional Black Caucus' calls for the federal government to investigate the case); Diane Struzzi, *Determining the Hate in Crime: Grayson County Interracial Case Puts a Spotlight on How Hate Crimes are Defined*, ROANOKE TIMES & WORLD NEWS, Aug. 17, 1997 at B1 (stating that CBC called on President Clinton "to keep a watchful eye on the case"). On June 7, 1998, another post-civil rights "lynching" occurred in eastern Texas. James Byrd, Jr., a disabled 49-year-old Black man, was chained to a pickup truck by three white men and dragged to his death on a rural road in the outskirts of Jasper. Byrd was dragged until he was decapitated and dismembered. The victim's blood was discovered on the shoes of all three defendants. See Patty Reinert & Richard Stewart, *A Day in Court for White Supremacist: Victim Conscious Before Dragged to Death: Prospective Jurors Briefed on First Day of Jasper Trial*, HOUSTON CHRON., Jan. 26, 1999, at 1.

In addition to these spectacles of racial violence that evince the return of a dominant and arrogant whiteness, more subtle examples also abound. Following the trial in the Lenard Clark beating case, an angry crowd erupted after Judge Daniel Locallo sentenced lead defendant, Frank Caruso, Jr. to eight years in prison. The angry crowd criticized the sentence as "compromised by racial politics." Terry Wilson & John Chase, *Angry Crowd Erupts as Clark Sentence Upheld: Judge Refuses to Give Ground on Caruso's Term for Beating*, CHIC. TRIB., Oct. 23, 1998, at 1. When Locallo upheld his sentencing of the instigator in a later hearing, he was jeered by a crowd that brought the courtroom to the brink of disorder. What is significant about this story is that the angry crowd consisted of Caruso's white defenders who argued that the eight-year sentence was too harsh! See *id.* As the defendant's father, Frank Caruso, Sr., told Judge Locallo, "I feel the scales of justice weren't tipped. The robe was actually ripped off the lady." *Id.* A woman in the angry crowd promised that "the Italians will fight Judge Locallo." *Id.*

For a discussion of the resurgence in scientific racism see RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994) (becoming a national bestseller in 1994). For a thorough tracing of postwar neo-eugenical scholarship, see generally WILLIAM TUCKER, *THE SCIENCE AND POLITICS OF RACIAL RESEARCH* 138-295 (1994). For a detailed analysis of the proliferation of right-wing think tanks and foundations, see generally JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1997).

acter. That spirit and character, however, embody a troubling dualism inherent in the simultaneous promise and betrayal of equality at the individual, institutional and societal levels, which are assessed in this article through the theory of racial redemption.

A theory of racial redemption is useful in analyzing the politics of race in the post-civil rights era for at least three reasons. First, racial redemption explains the seeming paradox that arises when an increasing discourse of equality is accompanied by policies that produce a decreasing yield in racial justice. *Brown* and its progeny removed the rationale of white supremacy from legitimate legal and public debate, while simultaneously permitting a reformulated regime of white supremacy to remain intact. It seems the political challenge for race progressives today is to analyze and expose how conservatives are able to “turn civil rights on its head” and succeed at winning popular support for anti-affirmative action initiatives posing as “civil rights initiatives.” Toward this end, racial redemption theory offers a framework to link postmodernist, discursively-oriented legal scholarship with modernist structural and materialist critiques of law. In other words, cultural representations through legal texts (cases, doctrines, legal principles and holdings) can be seen as connected to material structures of the racial state (laws, courts, legal institutions) in the maintenance of hegemony (consensually legitimated norms, values, racial “common sense” and status quo).

Second, racial redemption answers Professor Tushnet’s challenge of how we might begin to view *Brown* and the Warren Court in a non-triumphalist way. By acknowledging the duality of the *Brown* decision—its promise and its betrayal of racial equality—we can better understand why it represents a link, rather than a discontinuity, between the pre-Warren Courts (from Marshall to Vinson) and the current Rehnquist Court. For example, the valorization of “colorblindness” as the legal and moral principle of *Brown* set the stage for the Burger-Rehnquist era’s narrowing of affirmative action jurisprudence. At the time of *Brown*, colorblindness may have served as a useful moral principle for repudiating a strain of white supremacy that was based on the assumed biological inferiority of African Americans and other peoples of color. However, that the idea of colorblindness has become even more entrenched after the fall of biological determinism can be explained by grasping its relationship to the overall redemptive framework and the reinstatement of innocent whiteness. Colorblindness now insulates whiteness from its supremacist past, while inserting an individualist framework that protects “innocent whites” and, not coinciden-

tally, their property interests by leaving access to the best jobs and educational opportunities unencumbered by affirmative action.

Finally, racial redemption as illustrated through Earl Warren, internment and *Brown*, is nuanced enough to shed light on the increasingly important phenomenon of racial brokering—i.e., the pitting of groups of color against one another for the purpose of maintaining redeemed whiteness, even as racial retrenchment accelerates. The case of Earl Warren well illustrates how racial injustices for one outsider group may be directly related to racial advances for another. In short, the guilt that plagued Warren over his role in the internment may have manifested itself positively in his pro-civil rights decisions. Recall Bell's interest convergence equations:

$$\begin{aligned} \text{White Racism v. Justice} &= \text{White Racism} \\ \text{White Racism v. White Self-Interest} &= \text{Justice}^{482} \end{aligned}$$

A theory of racial redemption would allow us to understand how white racism and white self-interest are not, as suggested by the second equation, occasionally oppositional, but rather in a multi-racial society are more complexly, but positively, correlated. So, "justice" might result when wrongdoing toward one group of color can be redeemed by working in favor of another group of color. White racism (toward the wronged group) and white self-interest can actually result in a compromised and particularized justice for the second group of color, but, more importantly, racial redemption for whites. Taking the historical example of Warren, internment and *Brown* or the contemporary anti-affirmative action campaign in California, which invokes alleged "Asian American victims" of affirmative action to combat charges of racism, we might formulate the following equations:

$$\begin{aligned} \text{Advocacy against Asian Americans} + \text{Advocacy for African} \\ \text{Americans} &= \text{White Liberal Redemption} \\ \text{Advocacy against African Americans} + \text{Advocacy for Asian} \\ \text{Americans} &= \text{White Conservative Redemption} \end{aligned}$$

The adoption of a racial group, or even an individual of color by a white political figure or constituency—a practice I refer to as mascotting—is necessary to deflect charges of racism and preserve the redeemed status of whiteness. Indeed, is it possible to imagine a winning

⁴⁸² BELL, RACE, RACISM, *supra* note 370, at 46.

campaign by the anti-affirmative action movement absent the conservative deployment of racial mascots? It hasn't happened yet.

Standing at the threshold of the Second Redemption, we might wonder how things would be if earlier actors such as Warren had proven themselves truly heroic. As we look to past leadership for inspiration for future action, it is unfortunate that we observe Chief Justice Warren being personally unable and judicially ineffective at transgressing what historian George Lipsitz calls the "possessive investment in whiteness."⁴⁸³ Because Warren settled for a halfway racial politics, he left his legacy available to regressive racial projects that have sought white supremacy's "preservation through transformation." Using racial formation theory to link Warren's personal past with his Court's and society's racial trajectory allows us to defeat facile understandings of his and other liberal reform efforts that indulge the narrative of "putting race out of business."⁴⁸⁴ Warren's story shows that, as a project of racial redemption, these reforms were all about an ongoing racialization of the political and the legal. Race got a new storefront perhaps, but it has not gone out of business as a primary axis of social subordination and organization.

⁴⁸³ See generally GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS* (1998).

⁴⁸⁴ See Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Post-Structuralist" Age*, 212 *NEW LEFT REV.* 68, 87, 91 (1995) (calling for a blurring of group differentiation and for the transformative remedy of "socialism in the economy plus deconstruction in the culture").