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NO RIGHT TO OWN?: THE EARLY TWENTIETH-CENTURY “ALIEN LAND LAWS” AS A PRELUDE TO INTERNMENT

KEITH AOKI*

*The past is never dead. It's not even past.*¹

*It was a long time before we began to understand exploitation It is possible that the struggles now taking place and the local, regional and discontinuous theories that derive from these struggles and that are indissociable from them stand at the threshold of our discovery of the manner in which power is exercised.*²

*Race relations [in the American West] parallel the distribution of property, the application of labor and capital to make the property productive, and the allocation of profit. Western history has been an ongoing competition for legitimacy—for the right to claim for oneself and sometimes for one's group the status of legitimate beneficiary of western resources. This intersection of ethnic diversity with property allocation unifies western history.*³

This Article recounts briefly the history and effects of the “Alien Land Laws” enacted in western states in the second and third decades of the twentieth century.⁴ These laws linked the virulent nineteenth-century Sinophobia that culminated in the 1882 Chinese Exclusion Act

* Associate Professor, University of Oregon School of Law, visiting, Boston College Law School, 1998–1999. Special thanks to the Civil Liberties Public Education Fund that provided support for this project and to Professor Sumi Cho who very ably organized and administered it. Thanks are also due to Steve Bender, David Bogen, Garrett Epps, Anthony Paul Farley, Ibrahim Gassama, Richard Huber, Tom Joo, Lisa Kloppenberg, Jim O'Fallon, Joseph Singer, John Hayakawa Torok, Leti Volpp, Eric Yamamoto and Fred Yen for their comments and criticisms. Thanks also to the research assistance of Jan Malia Harada and Gayle S. Chang. I would like to dedicate this piece to the memory of my paternal grandparents, Fukuma and Kanei Aoki, early-twentieth century Issei immigrants from Kochi prefecture on the island of Shikoku who lived and farmed near Woodland, California in Yolo County, and to my parents, Kenneth Kenzo Aoki, born on Ryer Island, California and a Nisei internee in the Gila River Canal #1 Relocation Camp in Arizona and my mother Agnes Asako Asakawa Aoki, a Kibei born in Hawaii in the 1920s.

¹ WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

² Michel Foucault, *Intellectuals and Power*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE* 205, 215 (Donald F. Bouchard ed., 1977).

³ PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 27 (1987).

⁴ Some were legislatively enacted and some were passed by popular initiative. Note also that these were repeatedly upheld judicially. *See, e.g., Frick v. Webb*, 263 U.S. 326, 331–32, 333, 334

with the mass internment of Japanese Americans in the mid-twentieth century. Initially, these laws barred “aliens ineligible to citizenship” from owning fee simple title in agricultural land and prohibited leases for such land lasting longer than three years.⁵ Ultimately, the ownership bar expanded to include all “real property,” a term broad enough to encompass sharecropping contracts and shares of stock in corporations owning agricultural land as legally cognizable interests in land, and therefore, off-limits to alien ownership.

The salient point of these laws was their strongly racist basis⁶—“aliens ineligible to citizenship” was a disingenuous euphemism de-

(1923) (upholding bar on land ownership by corporations or other business organizations with majority of shares owned by “aliens ineligible to citizenship”); *Webb v. O’Brien*, 263 U.S. 313, 316 (1923) (upholding 1920 California Alien Land Law classification of “cropping contracts” as “interests in land” and therefore beyond reach of “aliens ineligible to citizenship”); *Porterfield v. Webb*, 263 U.S. 225, 231, 232, 233 (1923) (upholding constitutionality of California’s 1920 Alien Land Law); *Terrace v. Thompson*, 263 U.S. 197, 211, 216–17 (1923) (upholding validity of Washington’s 1921 Alien Land Law). These laws were passed in response to growing numbers of Japanese immigrants as they began to compete in the agricultural land markets and were increasingly viewed as a threat to valuable “American” natural resources. Increasingly harsh versions of these Alien Land Laws were enacted during the 1920s and were upheld as constitutional. See generally Thomas E. Stuen, *Asian Americans and Their Rights for Land Ownership*, in *ASIAN AMERICANS AND THE SUPREME COURT* 603, 605 (Hyung-Chan Kim ed., 1992).

⁵ Additional variations included prohibitions on holding land in trust or in guardianship for minor children, bars to land ownership by corporations or partnerships with more than half their shares held by “aliens ineligible to citizenship” and prohibitions of alien trustees for land held in trust for native-born children. See WASH. CONST. art. II, § 33 (repealed 1966); Act of Mar. 8, 1921, ch. 50, §§ 1–10, 1921 Wash. Laws 156 (repealed 1967); Act of Mar. 10, 1923, ch. 70, §§ 1–2, 1923 Wash. Laws 220 (repealed 1967); Act of Mar. 19, 1937, ch. 220, § 1, 1937 Wash. Laws 1092 (repealed 1967); California Initiative, Nov. 2, 1920, §§ 1–14, 1921 Cal. Stat. lxxxiii, as amended; see also *Oyama v. California*, 332 U.S. 633 (1948); *Morrison v. California*, 291 U.S. 82 (1934); *Cockrill v. California*, 268 U.S. 258 (1925); *Porterfield*, 263 U.S. at 231, 232, 233 (upholding California’s Alien Land Law); *Terrace*, 263 U.S. at 211, 216–17 (upholding Washington’s Alien Land Law); Thomas A. Bailey, *California, Japan, and the Alien Land Legislation of 1913*, 1 PAC. HIST. REV. 36 (1932), reprinted in 2 *ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 104 (Charles McClain ed., 1994); Raymond L. Buell, *Some Legal Aspects of the Japanese Question*, 17 AM. J. INT’L L. 29 (1923); M. Browning Carrott, *Prejudice Goes to Court: The Japanese and the Supreme Court in the 1920s*, 62 CAL. HIST. 122 (1983), reprinted in 2 *ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 128 (Charles McClain ed., 1994); Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61 (1947); Richard A. Goater, *Civil Rights and Anti-Japanese Discrimination*, 18 U. CIN. L. REV. 81 (1949); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947); Thomas R. Powell, *Alien Land Cases in United States Supreme Court*, 12 CAL. L. REV. 259 (1924); Earl H. Pritchard, *The Japanese Exclusion Bill of 1924*, 2 RES. STUD. OF ST. C. WASH. 65 (1930), reprinted in 2 *ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 91 (Charles McClain ed., 1994); *The Japanese Problem in Oregon*, 24 OR. L. REV. 208 (1945); Theodore S. Woolsey, *The California-Japanese Question*, 15 AM. J. INT’L L. 55 (1921).

⁶ There are unsettling parallels between the racialized immigration discourse of the late-nineteenth century and contemporary debates over American federal and state immigration policy.

signed to disguise the fact that the targets of such laws were first-generation Japanese immigrants, or "Issei."⁷ The objective of these laws was to prevent racialized "others,"⁸ (who were also foreigners)—non-white Japanese barred from naturalized U.S. citizenship⁹—from assert-

See generally Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996); Kevin R. Johnson, "Aliens" and the U.S. Immigration Law: *The Social Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 5 (1997); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1885)*, 93 COLUM. L. REV. 1833 (1993); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

⁷ This Article uses the terms "Issei" (first generation), "Nisei" (second generation) and "Sansei" (third generation) to describe the generations of Japanese in America that immigrated during the relatively narrow time period between 1885 and 1924. *See generally* DARREL MONTERO, *JAPANESE AMERICANS: CHANGING PATTERNS OF ETHNIC AFFILIATION OVER THREE GENERATIONS* 8 (1980) ("The Japanese are the only ethnic group to emphasize geogenerational distinctions by a separate nomenclature and a belief in the unique character structure of each generational group.").

⁸ This Article uses concepts like "racialization" and "racial formation" as devices both to organize and interpret historical materials. *See generally* GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* (1986); Neil Gotanda, *A Critique of "Our Constitution Is Color Blind"*, 44 STAN. L. REV. 1, 32-34 (1991) (discussing historical co-evolution of slavery and ideological structure of racial categories showing that race is not scientific, "race is socially constructed" and race classification has a history as a badge of enslavability). On the Mexican experience in California see RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (1981); MARIO BARRERA, *RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY* (1979); ALBERT CAMARILLO, *CHICANOS IN A CHANGING SOCIETY: FROM MEXICAN PUEBLOS TO AMERICAN BARRIOS IN SANTA BARBARA AND SOUTHERN CALIFORNIA, 1848-1930* (1979). For a general overview of the Asian immigrant experience on the West Coast, see SUCHENG CHAN, *THIS BITTER-SWEET SOIL: THE CHINESE IN CALIFORNIA AGRICULTURE, 1860-1910* (1986) [hereinafter CHAN I]; ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* (2d ed. 1977); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: HISTORY OF ASIAN AMERICANS* (1989). On the California Indians, see RAMON A. GUTIERREZ, *WHEN JESUS CAME THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY AND POWER IN NEW MEXICO, 1500-1846* (1991); ROBERT F. HEIZER, *THE DESTRUCTION OF THE CALIFORNIA INDIANS* (1984); EDWARD SPICER, *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960* (1962). On the experience of racial minorities in California, see KENNETH G. GOODE, *CALIFORNIA'S BLACK PIONEERS: A BRIEF HISTORICAL SURVEY* (1974); ROBERT F. HEIZER & ALAN J. ALMQUIST, *THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920* (1971); REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981); RUDOLPH M. LAPP, *BLACKS IN GOLD RUSH CALIFORNIA* (1977); LIMERICK, *supra* note 3.

⁹ The first U.S. naturalization law provided that only "free white persons" could become naturalized citizens. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103. The ability to become a naturalized citizen was extended in 1870 to "aliens of African nativity and to persons of African descent." Act

ing the “right to own,” a fundamental stick in the proverbial “bundle of sticks” U.S. property regime, and related sticks such as the “right to rent” and the “right to devise” property by bequest.¹⁰

These laws were driven in large part by a xenophobic paranoia that John Higham has called “racial nativism.”¹¹ This “racial nativism” depended upon the existence in the popular U.S. imagination of a racial “link” between the reviled Chinese immigrants of the nineteenth century¹² and Japanese immigrants of the late-nineteenth and early-twentieth centuries. This link partially erased a specific nationality of these immigrants, conflating a generalized Asiatic “foreign-ness” marked by racial difference.

Initially, many Chinese immigrants were drawn to work gold mines during the 1850s. White miners and politicians in mid-century California, however, sought to tax and otherwise make it difficult for Chinese

of July 14, 1870, ch. 254, § 7, 16 Stat. 254; see generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 37–47 (1996); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

¹⁰ See generally JESSE DUKEMINIER & JAMES KRIER, *PROPERTY* 86 (3rd ed. 1993) (“For lawyers, if not lay people, property is an abstraction. It refers not to things, material or otherwise, but to rights or relationships among people with respect to things.”); J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996) (noting that conventional “bundle of rights” formulation combines Wesley Hohfeld’s and A.M. Honoré’s analysis of property rights; discussing various views of the “bundle of rights”). A.M. Honoré describes eleven “standard incidents” that constitute property ownership in western market economies. They are:

- (1) the right to exclusive possession;
- (2) the right to personal use and enjoyment;
- (3) the right to manage use by others;
- (4) the right to income from the property, including income from use by others;
- (5) the right to the capital value, including alienation, consumption, waste or destruction;
- (6) the right to security (that is, immunity from expropriation);
- (7) the power of transmissibility by gift, devise, or descent;
- (8) the lack of any term on these rights;
- (9) the duty to refrain from using the object in ways that harm others;
- (10) the liability of execution for repayment of debts; and
- (11) residual rights on the reversion of lapsed ownership held by others.

See A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 112–28 (A.G. Guest ed., 1961). See generally LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 18–20 (1977). But see Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

¹¹ JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925*, at 132 (2d ed. 1988). Higham uses the term “racial nativism” to examine the “intersection of racial attitudes with nationalistic ones . . . [here] the extension to European nationalities of that sense of absolute difference which already divided white Americans from people of other colors.” *Id.*

¹² See Keith Aoki, *“Foreign-ness” & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 33–35 (1996).

to work prime mining sites. To the extent that they began working spent mines, they remained largely out of sight from mainstream white California society, segregated in back country areas.¹³ To the extent that Chinese laborers impinged on mid-nineteenth century America legal consciousness, they were classified as “non-white” and were denied privileges and entitlements that such subordinate status suggests.¹⁴ According to prevailing social perceptions, mid-nineteenth century Chinese immigrants were viewed as utterly inassimilable, “foreign” others,¹⁵ posing a variety of threats to the health of the white American polity. They were often characterized as dangers to the public health, both literally and metaphorically.¹⁶ Bias notwithstanding, as the Southern Pacific Railroad began building the transcontinental railroad dur-

¹³ See CHAN I, *supra* note 8, at 76; see also GUNTHER BARTH, BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES, 1850–1870, at 115 (1964) (describing Chinese miners working in deserted and desolate mining sites). See generally Sucheng Chan, *Chinese Livelihood in Rural California: The Impact of Economic Change, 1860–1880*, 53 PAC. HIST. REV. 273, 280–83 (1984) (discussing locations and types of Chinese gold mining claims in California).

¹⁴ See Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, *quoted in* Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CAL. L. REV. 529, 549 n.113 (1984) (“No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person.”); *People v. Hall*, 4 Cal. 399, 399, 404–05 (1854); see also BENJAMIN B. RINGER, “WE THE PEOPLE” AND OTHERS: DUALITY AND AMERICA’S TREATMENT OF ITS RACIAL MINORITIES 582–83 (1983). California enacted various versions of onerous and racially-targeted foreign miners taxes from 1850 through 1870 designed to drive Chinese miners from working rural gold mines. This legislative animus, when coupled with extra-legal anti-Chinese mob violence drove Chinese miners out of the mining industry into containment zones in large urban centers. See HYUNG-CHAN KIM, A LEGAL HISTORY OF ASIAN AMERICANS 1790–1990, at 47–48 (1994); see also Chinese Police Tax, ch. 339, 1862 Cal. Stat. 462 (repealed 1939) (also entitled “An Act to protect Free White Labor Against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California”); Act of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194 (repealed 1955) (requiring \$50 payment from each passenger ineligible to become a citizen). See generally ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1971).

¹⁵ Strict containment policies were enforced against Chinese immigrants, limiting them to specific geographic, employment, educational and social zones by means of zoning, anti-miscegenation laws, licensing requirements and the establishment of segregated schools. See generally *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (successful challenge to facially neutral law intended to drive Chinese laundries out of business); CHARLES J. McCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 224–30 (1994) (describing attempt by San Francisco Board of Supervisors to make it illegal for Chinese to live or do business outside of a narrowly circumscribed “Chinatown”); Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of American Law*, in ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943, at 3, 12 (Sucheng Chan ed., 1991) (discussing that between 1870 and 1880, San Francisco passed 14 separate ordinances designed to encumber and discourage Chinese laundries from competing with white-owned businesses).

¹⁶ See JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 19, 21 (1968). As tenBroek et al. explain:

The most significant feature of the Chinese stereotype—and the most meaningful

ing the 1850s and 1860s, demand for cheap labor became a powerful draw for Chinese immigrants who worked at considerably lower rates than white laborers.¹⁷

After completion of the transcontinental railroad, however, many Chinese laborers began migrating to urban centers. Even though they remained spatially segregated in Chinatowns and largely cabined in certain non-manufacturing labor market niches, the Chinese began impinging on popular consciousness.¹⁸ Accordingly, during the late 1860s and 1870s, the Chinese were negatively constructed by politi-

. . . was that which became familiar as the "yellow peril." From the beginning it was alleged that the Chinese had only hatred for American institutions, that their sole loyalty was to the homeland and the emperor. Their entrance into the states was seen as an "invasion" and their motive ultimate conquest of the country by infiltration and subversion; behind those already here were the masses of Asia, eyeing the North American continent. . . . The basic charges against the Chinese—of unscrupulous competition, moral degradation, treacherous character, and subversive intent—were elaborated over the latter half of the century with such variety and force that it is difficult not to conclude that they found wide acceptance in the public opinion of California. . . . To this general hostility [to dark-skinned minorities] were soon added the specific apprehensions of the workingman and the grievances of special-interest groups; and the developing issue was seized upon and boldly exploited by politicians, journalists, and writers of fiction . . . [forming] a distinctive stereotype which for large numbers of Californians became inseparable from reality.

Id.

¹⁷ See generally *id.* at 18. Widespread racial stereotypes mixed with class antagonisms towards such non-unionized "ratebusters":

The principal charge of the unions, that Chinese labor drove white workers from employment, found wide expression in stories, poems, and plays as well as in political utterances, and by grace of dramatic license became associated with insinuations of stealth and treachery. Thus an 1880 novel, *Almond-Eyed*, portrayed the invasion of a California town by hordes of Chinese who, besides driving white workers into starvation, introduced an epidemic of smallpox. The *San Francisco Chronicle* voiced a similar suggestion: "Who have built a filthy nest of iniquity and rottenness in our very midst? The Chinese. Who fill our workshops to the exclusion of white labor? The Chinese. Who drive away white labor by their stealthy but successful competition? The Chinese."

Id.

¹⁸ See TAKAKI, *supra* note 8, at 101 ("Like blacks, the Chinese were described as heathen, morally inferior, savage, childlike, and lustful. Chinese women were condemned as a 'depraved class,' and their depravity was associated with their physical appearance, which seemed to show 'but a slight removal from the African race.'"); TENBROEK ET AL., *supra* note 16, at 103 ("In 1879 President Rutherford Hayes placed the 'Chinese Problem' within the broad context of race in American society. The 'present Chinese invasion,' he argued, was 'pernicious and should be discouraged. Our experience in dealing with the weaker races—the Negroes and Indians . . .—is not encouraging. . . . I would consider with favor any suitable measures to discourage the Chinese from coming to our shores.' In the exclusionist imagination, however, the 'strangers' from Asia seemed to pose a greater threat than did blacks and Indians. Unlike blacks, the Chinese were seen as intelligent and competitive; unlike Indians, they represented an increasing rather than a decreasing population.").

cians, labor leaders and the media, each of whom actively deployed degrading racial stereotypes for assorted self-interested and sundry purposes.¹⁹ While some large agriculturalists and railroad magnates may have initially favored open Chinese immigration policies because they needed cheap, easily exploitable labor, counterforces such as the nascent labor union movement on the West Coast began to denounce vehemently the use of “unfree” labor, such as the Chinese, by big “Capital.”²⁰ These harsh criticisms were particularly resonant during the nationwide economic depression of the mid-1870s.²¹ Ultimately, in spite of the unquenchable appetite for cheap labor to develop the West, politicians from the western states made alliance with southern politicians to secure passage of the federal Chinese Exclusion Act of 1882.²²

¹⁹ See generally SAXTON, *supra* note 14, at 258–59. Saxton reports that:

[i]n California . . . [the white workforce was] drawn together by a sense of frustration and dispossession that was common to all. . . . Despite their [internal] differences, they believed that a greater distance separated them from the Chinese. These two psychological factors—frustration and consciousness of non-Chineseness—welded the non-Chinese labor force into a bloc that would deeply modify the politics and social relationships of the Far West. Here . . . the organizational pattern was horizontal: the workers, the producers, the dispossessed joined in self-defense against non-producers, exploiters and monopolists. And since these producers viewed the Chinese as tools of monopoly, they considered themselves under attack on two fronts, or more aptly, from above and below. But when they struck back, they generally struck at the Chinese.

Id.

²⁰ See TAKAKI, *supra* note 8, at 98–99. In the 1870s, a North Adams, Massachusetts shoe factory owner brought in Chinese workers from San Francisco to bust demands of newly organized white laborers for higher wages. Ronald Takaki quotes a report about the effects of imported Chinese laborers on newly-organized shoe workers: “If for no other purpose than the breakup of the incipient step toward labor combinations and ‘Trade Unions’ . . . the advent of Chinese labor should be hailed with warm welcome.” Frank Norton, *Our Labor System and the Chinese*, SCRIBNER’S MONTHLY, May 1871, at 70, *quoted in* TAKAKI, *supra* note 8, at 98–99.

²¹ See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 512 (1988) (“By 1876, over half the nation’s railroads had defaulted on their bonds and were in the hands of receivers. . . . By the end of 1874, nearly half the nation’s iron furnaces had suspended operation. Not until 1878, a year that saw more than 10,000 businesses fail, did the depression reach bottom.”).

²² See The Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58 (1882). See generally Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 589, 609 (1889) (upholding constitutionality of 1882 Chinese Exclusion Act, as amended in 1888); TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 3 (1994). Almaguer suggests that:

[T]he material structuring of racialized group relationships . . . are best understood as unfolding within the context of the capitalist transformations of [California] and the ensuing competition between various ethnic populations for group position within the social structure. . . . The particular success of European-American men in securing a privileged social status was typically exacted through contentious,

While Chinese immigration to the U.S. tailed off dramatically following 1882, degrading stereotypes left a lasting impression on the American imagination.²³ Because, in part, many Chinese laborers viewed themselves as “sojourners” in the United States, hoping ultimately to return to China with wealth acquired through hard labor, and also due partially to restrictive U.S. policies toward the immigration of Chinese women (and strict enforcement of anti-miscegenation laws),²⁴ there were relatively low levels of Chinese family formation within the United States during the mid- to late-nineteenth century.

Unlike nineteenth-century China, Japan, following the entry of Commodore Perry in 1853, had single-mindedly set its sights on becoming a major military and industrial power. During the 1870s and 1880s, through a variety of onerous taxation schemes and land ownership reforms meant to end swiftly the feudal economy (although primogeniture was a curious holdover), many former Japanese farmers were driven off agricultural land they had cultivated for generations.²⁵

racialized struggles with Mexicans, native Americans, and Asian immigrants over land ownership or labor market position.

Id. See generally SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 39 (1991) [hereinafter CHAN II] (discussing arrival of Japanese in late 1880s/90s and fact that they often took types of work Chinese had done and accepted low wages); Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOC. REV. 547, 551 (1972) (discussing Japanese workers' acceptance of low wages and long hours, sometimes resulting in displacement of non-Japanese workers). Exclusion of Chinese immigrants was authorized by the 1882 Chinese Exclusion Act and its subsequent renewals, at 10-year intervals, until 1902. In 1904, Chinese were excluded indefinitely until 1943, when U.S. immigration laws were modified to allow Chinese immigrants, in order to reflect the fact that China was a U.S. ally during World War II. See Edna Bonacich, *Some Basic Facts: Patterns of Immigration and Exclusion*, in *LABOR IMMIGRATION UNDER CAPITALISM: ASIAN WORKERS IN THE UNITED STATES BEFORE WORLD WAR II*, at 60, 74 (Lucie Cheng & Edna Bonacich eds., 1984).

²³ See Aoki, *supra* note 12.

²⁴ See, e.g., Act of Mar. 3, 1875, ch. 141, § 1, 18 Stat. 477 (requiring U.S. consul or consul-general of embarkation port for “any subject of China, Japan, or any Oriental country” immigrating to the United States to ascertain whether such immigrant has “entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes”).

²⁵ See DAVID J. O'BRIEN & STEPHEN S. FUGITA, *THE JAPANESE AMERICAN EXPERIENCE* 10–11 (1991). See generally Alan Moriyama, *The Causes of Emigration: The Background of Japanese Emigration to Hawaii, 1885–1894*, in *LABOR IMMIGRATION UNDER CAPITALISM: ASIAN WORKERS IN THE UNITED STATES BEFORE WORLD WAR II* 248 (Lucie Cheng & Edna Bonacich eds., 1984). O'Brien and Fugita describe some of the pressures pushing Japanese farmers off their land in Japan:

[T]o support the newly adopted Western-style industrialization, the Japanese government in 1873 substantially increased land taxes, shifting from the traditional method of taxing a percentage of crops produced to a new method of calculating taxes based on the value of the land itself. This placed a disproportionately heavy burden on farmers, with the result that between 1883 and 1890, 367,000 farmers

When the Japanese government reversed its former no-emigration policy of the 1880s, increasing numbers of Japanese immigrated to work on the sugar cane plantations of Hawaii,²⁶ which remained a sovereign nation until 1898, and to the West Coast of the United States, where their entry was not barred by the 1882 Chinese Exclusion Act. This development was fortuitous in some ways for nascent California agribusiness, which during the 1880s and 1890s began shifting from raising corn and grain crops to more intensive agricultural crops such as vegetables and citrus fruits.²⁷ The introduction of the refrigerated railroad car and the now completed network of transcontinental railroads opened national markets for California agriculturalists, sparking their need for a growing supply of cheap agricultural labor.²⁸ This need was initially fulfilled by the largely rural population of Japanese immigrants along the West Coast.²⁹

were pushed off the land. . . . In addition, government spending to suppress the Satsuma Rebellion in 1877 and to finance the Sino-Japanese War of 1894-95 created inflationary pressures which further reduced farmers' incomes. Moreover, the opening up of Japanese markets to foreign goods at a time when the Japanese themselves were under-industrialized and thus unable to compete effectively resulted in a substantial trade deficit which the government dealt with by circulating more money, thus stimulating inflation even more. The economic pressures described forced many small farmers to seek alternative ways of bolstering sagging family incomes. . . . [Some farmers,] following the traditional practice of *dekasegi rodo*, made the decision to leave home temporarily and work in distant places. . . . [M]igration from the countryside to foreign lands, with the clear intent of staying temporarily and then returning home, was therefore a logical extension of the *dekasegi rodo* tradition.

O'BRIEN & FUGITA, *supra*, at 10-11; see also PAUL R. SPICKARD, JAPANESE AMERICANS: THE FORMATION AND TRANSFORMATIONS OF AN ETHNIC GROUP 27 (1996) ("Mindful of [the abuses visited earlier on Chinese immigrants to the U.S.] the Japanese government had carefully tried to control who went abroad and to monitor their behavior and reception in the United States. . . . Japan was trying to avoid China's quasi-colonial fate and guarding its own international image as it sought to enter the growing world market economy: the Japanese government did not want overseas Japanese to be perceived as a problem in their host countries.").

²⁶ See generally GARY OKIHIRO, CANE FIRES: THE ANTI-JAPANESE MOVEMENT IN HAWAII, 1865-1945 (1991).

²⁷ See TAKAKI, *supra* note 8, at 189; see also YAMATO ICHIHASHI, JAPANESE IN THE UNITED STATES 163 (1969); LINDA TAMURA, THE HOOD RIVER ISSEI: AN ORAL HISTORY OF JAPANESE SETTLERS IN OREGON'S HOOD RIVER VALLEY 19-22 (1993); Masakazu Iwata, *The Japanese Immigrants in California Agriculture*, 36 AGRIC. HIST. 25, 27 (1962).

²⁸ See *supra* note 17 and accompanying text.

²⁹ In California in 1890, there were approximately 1000 Japanese immigrants concentrated primarily in San Francisco, Sacramento and the San Joaquin Valley, but by 1900, the number of Japanese on the West Coast of the United States had jumped ten-fold to approximately 10,151. See ALMAGUER, *supra* note 22, at 184. By contrast, the U.S. Census of 1880 counted only 148 people of Japanese descent in the United States. See O'BRIEN & FUGITA, *supra* note 25, at 137. See generally ICHIHASHI, *supra* note 27, at 163; YUJI ICHIOKA, THE ISSEI: THE WORLD OF THE FIRST GENERATION JAPANESE IMMIGRANTS, 1885-1924 (1988); HARRY H.L. KITANO, JAPANESE AMERI-

While mid-nineteenth century Chinese immigrants in the United States were sometimes viewed as an “invasion,” they were seen as akin to an “invasion” by a contagion that, once within the body politic, begins to eat away the nation from within. The political entity, namely the nation of China, was not perceived as an imminent military threat to the national military security of the United States. The logic of the Chinese Exclusion Act of 1882 purported to choke off the source of the foreign contagion and drive those Chinese already here back to their homes, thereby restoring the integrity and health of the American body politic.³⁰ By contrast, from the turn of the century onward, the Japanese were seen as threats to the American body politic from both within and without.³¹ They were seen as threats from within to

CANS: THE EVOLUTION OF A SUBCULTURE 16–18 (1976); TAMURA, *supra* note 27, at 19–22; Iwata, *supra* note 27, at 25, 27. O’Brien and Fugita discuss the demographics of the arriving Japanese:

The vast majority of Japanese who immigrated to Hawaii and the West Coast of the United States came from four southwestern prefectures, Hiroshima, Yamaguchi, Fukuoka, and Kumamoto. Contrary to what we might expect, these were not the poorest areas of Japan during that period. . . . These prefectures did . . . have an experienced agricultural labor force, part of which was prompted to emigrate through active recruiting by labor contractors.

O’BRIEN & FUGITA, *supra* note 25, at 15. Lauren Kessler makes a parallel observation:

Unlike the Chinese who came before them, many of whom came from the destitute peasantry, Japanese immigrants tended to be from the comparatively prosperous farming class. They were accustomed to owning land and making their living from it. In America, land ownership was a goal for many. Thus land—and who had a right to own it—became a focus for California nativists, who saw their national efforts at exclusion at least temporarily stymied by what they considered the far too moderate gentleman’s agreement.

LAUREN KESSLER, *STUBBORN TWIG* 66 (1993).

³⁰With regard to immigration from outside the United States, a delegate to the 1878 California Constitutional Convention proposed a state law to bar “all further immigration to this State of Chinese ineligible to become citizens of the United States.” The rationale for this state prohibition on Chinese immigration to California was to

protect its people from moral and physical infection from abroad. . . . [I]f under its police and quasi-commercial powers, it can shut its ports to smallpox and contagious fevers, to leprosy and elephantiasis, to foreign convicts and foreign paupers, why, I ask you, has it not the power to deny the hospitality of its territory to a race, who are slowly, but surely and insidiously, substituting themselves for our own people? . . . Are the institutions of the country founded on so flimsy a basis that States may invoke the highest and exercise the most sweeping powers to quarantine a few unfortunate passengers afflicted with disease, but . . . they cannot deny the entrance to their ports of swarms of Asiatics, whose presence in their midst is fraught with evils compared with which a plague is the acme of blissful visitation.

RINGER, *supra* note 14, at 590 (quoting 1 CALIFORNIA CONSTITUTIONAL CONVENTION DEBATES, at 627).

³¹Initially, the Japanese were linked in the popular imagination to the Chinese. Anti-Asian sentiment was on the rise as the expiration date for the Chinese Exclusion Act approached in 1902. California Labor Unions began lobbying Congress to exclude Chinese immigration in-

the extent that stereotypes once attached to the Chinese (i.e., unfair competitors and ineradicably foreign) were easily transferred from one group of immigrants to another. The Japanese, however, were also perceived as a threat from without. Japan's growing industrial strength, its imperial military aspirations in the Pacific and the defeat of Russia in 1905,³² collectively enticed American politicians to inscribe on Japanese immigrants an image of disloyalty and allegiance to a threatening foreign military power. They were portrayed as an imminent fifth column threat within the United States waiting to be activated at the emperor's command³³—the plowshares of Japanese immigrant farmers transforming themselves into swords at the whim of a foreign power.

definitely as well as for the explicit exclusion of Japanese immigrants. In 1900, then-Governor Henry T. Gage testified before Congress that "the peril from Chinese labor finds a similar danger in the unrestricted importation of Japanese laborers." RINGER, *supra* note 14, at 687 (citing S. Doc. No. 633 (1911)). This anti-Japanese agitation did not go completely unanswered, as evidenced in Roger Daniels' description of an Issei counter-demonstration at the November 1901 Chinese Exclusion Convention that met in San Francisco, attended by "a thousand delegates," of whom approximately "eight hundred were trade unionists":

[O]n entering the hall, [the delegates] had to pass through a small group of Issei who were handing out leaflets protesting against any move to exclude Japanese. One of the Issei even made an "aggressive and flamboyant" speech in what must have been fairly good English. . . . The burden of the message on the leaflet was that it was all right to exclude Chinese, but not Japanese, and the Issei speaker, a local Japanese editor, insisted that his people were the equals of Americans. . . . In half a century of anti-Chinese agitation no such counter-demonstration had occurred; what advocacy the Chinese enjoyed was furnished by their Caucasian supporters, mostly missionaries and businessmen. But the Japanese, both immigrants and visitors, would in the years to come constantly organize demonstrations and meetings of their own and, with their white backers, make thousands of speeches and publish dozens of books and pamphlets answering the exclusionists.

DANIELS, *supra* note 8, at 23.

³²The Japanese victory over Russia only heightened the anti-Japanese paranoia in segments of the U.S. population:

The sweeping Japanese victories in the Russo-Japanese War strongly reinforced [yellow peril] propaganda, inspiring rumors in the United States that resident Japanese were spies and soldiers in disguise, representing the first wave of a "peaceful invasion" which threatened to overrun the country. . . . For more than two decades after the Russo-Japanese War, the possibility of war with Japan was regularly kept before the American public, with many declaring it to be inevitable. . . . In 1907 the fear of war with Japan was general throughout America. A number of diplomats warned openly that Japan was on the point of attack; even the cautious *New York Times* considered the conflict all but inevitable, and a *Literary Digest* survey found the belief to be widespread

TENBROEK ET AL., *supra* note 16, at 25-27. "[B]y 1910 the war scare had been revived by a new rash of invasion rumors, which were aggravated by the Japanese annexation of Korea." *Id.* at 27.

³³In a February 1905 article entitled "THE JAPANESE INVASION, THE PROBLEM OF THE HOUR," the headlines of the *San Francisco Chronicle* announced the

This simmering paranoia about the double-edged threat of Japan and Japanese immigrants erupted in 1905, spurred by a decision by the San Francisco School Board to segregate Japanese pupils in the school system from white pupils.³⁴ While implementation of this policy was delayed by the catastrophic San Francisco earthquake of 1906, the Japanese government reacted with immediate protest when it was finally implemented during the fall of 1906.³⁵ Japan's government filed a formal protest with President Theodore Roosevelt, who initially sought to mollify Japan's anger by seeking to have the San Francisco School Board rescind its segregation order. Roosevelt, however, had underes-

advance of the Japanese army toward Mukden. . . . [The *Chronicle*] asserted that at least 100,000 of the "little brown men" were here already, that they were "no more assimilable than the Chinese," and that they undercut white labor . . . [warning that] "once the war with Russia is over, the brown stream of Japanese immigration" will become a "raging torrent."

DANIELS, *supra* note 8, at 25. The *San Francisco Chronicle* was owned by conservative Republican publisher Michael H. de Young, who, some have speculated, may have hoped to draw working-class readers away from the *Chronicle's* competitor, Hearst's *Examiner*. *See id.*

³⁴In 1905, the *San Francisco Chronicle*, the Union Labor Party, the Japanese and Korean Exclusion League, the Coast Seaman's Union and the San Francisco Building Trades Council all pushed for segregation of Japanese pupils. In May 1905, acting pursuant to a state law that granted the School Board discretion to establish segregated educational facilities for Chinese, Indian and Mongolian children, the Board passed a resolution classifying Japanese school children as "Mongolian," and therefore required to attend separate schools from white children:

Resolved that the Board of Education is determined in its efforts to effect the establishment of separate schools for Chinese and Japanese pupils [to relieve school crowding and] . . . for the higher end that our children should not be placed in any position where their youthful impressions may be affected by associations with pupils of the Mongolian race.

Quoted in Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, 37 POL. SCI. Q. 605, 623 (1922) [hereinafter Buell I], reprinted in 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 25 (Charles McClain ed., 1994); *see also* Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States II*, 38 POL. SCI. Q. 57, 57-81 (1923) [hereinafter Buell II], reprinted in 2 ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES 59-83 (Charles McClain ed., 1994).

³⁵*See* Buell I, *supra* note 34, at 624. As Buell notes, the crisis quickly became international in scope:

Aroused by this school order, the secretary of the Japanese Association of America immediately protested to the School Board. Upon its refusal to modify the order, the secretary sent word to the newspapers in Japan. And it was the frenzied outbursts of Japanese opinion against a measure which it considered to be a treaty violation and a national insult, that first attracted the attention of the city of San Francisco to the act of its own authorities. The views of the Japanese government were brought to the attention of Washington by a telegram from Ambassador Wright in Tokyo to Secretary [of State] Root. . . . Two days later Ambassador Aoki formally protested against the school measure . . . on the ground that it denied rights expressly conferred by the [U.S.-Japan] Treaty of 1894.

Id.

timated the depth of anti-Japanese sentiment that had been building steadily on the West Coast, particularly in San Francisco.³⁶ Ultimately, after much negotiation and effort, Roosevelt was able to persuade Republican state politicians to prevail upon the recalcitrant School Board to rescind its segregation order on the condition that Roosevelt would press the Japanese government for a definitive agreement restricting Japanese immigration to the United States.³⁷ In late 1906 through early 1907, Roosevelt and the Japanese government negotiated and entered into an unpublished agreement, the "Gentleman's

³⁶ See generally Buell I, *supra* note 34, at 628 ("[T]he [Asiatic] Exclusion League would have nothing to do with a diplomatic form of settlement; it demanded an ironclad exclusion law. Moreover, its feelings were deeply hurt by the intrusions of the federal government into what it considered a purely municipal affair."). In December 1906, in a message to Congress, with geopolitics clearly on his mind, Roosevelt said:

It is the sure mark of a low civilization . . . to abuse or discriminate against, or in any way humiliate such stranger who has come here lawfully and who is conducting himself properly. . . . [Hostility towards the Japanese] is sporadic and is limited to a very few places. Nevertheless, it is most discreditable to us as a people, and it may be fraught with the gravest consequences to the nation. . . . [H]ere and there a most unworthy feeling has manifested itself toward the Japanese—the feeling that has been shown in shutting them out from the common schools in San Francisco, and in mutterings against them in one or two other places, because of their inefficiency as workers. To shut them out from the public schools is a wicked absurdity

....

Quoted in RINGER, *supra* note 14, at 694–95; see also Extract from President Theodore Roosevelt's Message to Congress Concerning the Japanese Question (Dec. 3, 1906), in ELIOT GRINNELL MEARS, *RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST: THEIR LEGAL AND ECONOMIC STATUS* 438–42 (1927). But see Letter from Theodore Roosevelt to Philander C. Knox (Feb. 8, 1909), in 6 *THE LETTERS OF THEODORE ROOSEVELT* 1511 (Elting E. Morison ed., 1951) ("To permit the Japanese to come in large numbers into this country would be to cause a race problem and invite and insure a race contest."). Daniels relates that:

[after this speech] Roosevelt never again publicly proposed naturalization for the Japanese. . . . Roosevelt knew well that anti-Japanese feeling was not limited to San Francisco and "one or two other places"; he knew also that Southern opinion would support the West on any racial matter. Since there is no evidence that he ever made the slightest effort to have this proposal implemented—and certainly there were men in Congress who would have introduced such a bill had the President so requested—it is reasonable to assume that Roosevelt made it chiefly for Japanese consumption and in order to have an advanced position from which to retreat in his dealings with California.

DANIELS, *supra* note 8, at 39.

³⁷ See Buell I, *supra* note 34, at 629–31. Buell summarizes the solution agreed upon: (1) that the School Board would rescind its resolution ordering the Japanese children to attend the Oriental School; (2) that the President would prevent Japanese in Hawaii, Canada and Mexico from entering the United States on passports issued by Japan only to those destinations; (3) that the President would undertake to restrict Japanese emigration coming directly to the United States from Japan, by diplomatic means; (4) that the federal government would withdraw the suits instituted to test the constitutionality of the California school law.

Agreement," in which the Japanese government agreed to screen and restrict the emigration of Japanese nationals to the American shores.³⁸ Thus, the international crisis that was sparked by the San Francisco School Board's segregation order was temporarily averted.³⁹

The costs of the "Gentleman's Agreement," however, were evident almost immediately.⁴⁰ For example, the "Gentleman's Agreement" permitted the wives of "settled agriculturalists" to immigrate to the United States to join their spouses. From 1907 to 1913, increasing numbers of

Id. at 631.

³⁸ See *id.* at 634. As Buell records:

The press reported an interchange of notes at the end of December and the first of January, 1908, after which, on January 25, Washington pronounced the position of Japan toward immigration "satisfactory." In all probability, these notes confirmed the "Gentleman's Agreement," by which Japan undertook voluntarily, and upon her own responsibility to restrict emigration to the United States. . . . Although the agreement with the United States was apparently negotiated in January, 1908, the first official announcement of it did not appear until the annual report, July, 1908, of the United States Commissioner-General of Immigration.

Id. at 634-35; see also FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS* 35-36 (1976). Chuman relates the version of the "Gentleman's Agreement" reported in the U.S. annual immigration report of 1908:

[The] understanding contemplates that the Japanese Government shall issue passports to the continental United States only to such of its subjects as are non-laborers or are laborers who, in coming to the continent, seek to resume a formerly acquired domicile, to join a parent, wife, or children residing there, or to assume active control of an already possessed interest in a farming enterprise in this country; so that the three classes of laborers entitled to receive passports have come to be designated as "relatives," "former residents," and "settled agriculturalists."

CHUMAN, *supra*, at 35.

³⁹ See DANIELS, *supra* note 8, at 41. Daniels suggests that:

[w]hen Roosevelt found that he had underestimated the temper of the Californians, and that his message was resulting in more rather than less agitation in California, he and Root revamped their plans. Three things had to be accomplished before the restriction of Japanese immigration could be effected: the San Francisco segregation order had to be revoked by one means or another; the California legislature had to be restrained from passing further discriminatory legislation; and a bill had to be passed by Congress giving the President power to restrict Japanese immigration from intermediate points such as Hawaii, Mexico and Canada. All these preconditions were related; the executive order limiting intermediary immigration was to be offered to the Californians as a sort of prize for good behavior, and it would not be proclaimed until the segregation order was revoked and all anti-Japanese measures in the California legislature were killed.

Id.

⁴⁰ Daniels observes that:

The Gentleman's Agreement was represented to the Californians as exclusion. Had Roosevelt and Root realized that under its terms thousands of Japanese women would come to the United States, they might never have sought it; having done so, they made a blunder of the first magnitude by failing to foresee its consequences. The State Department, hypnotized by statistics which began to show more Japanese

Japanese women entered the United States under this "exemption," thereby stimulating family formation among Japanese immigrants.⁴¹ While this first generation of Japanese immigrants was barred from naturalization because of a provision in the first U.S. immigration law that restricted naturalized citizenship to "free white persons,"⁴² and an emerging line of racial prerequisite cases holding that Japanese, Chi-

emigration than immigration, refused for many years to recognize what Californians quickly discovered: Japanese women were joining their husbands and having babies. That these babies were citizens of the United States made no difference to Californians, most of whom insisted that "a Jap was a Jap," no matter where he was born. . . . It soon became an article of faith with the exclusionists that they had been betrayed by their own diplomats, who, in turn, were held to be mere dupes of the perfidious Japanese.

Id. at 44-45.

⁴¹ See generally CHAN II, *supra* note 22, at 54; George Anthony Pepper, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, 6 J. OF AM. ETHNIC HIST. No. 1, 28 (1986). Spickard describes the immigration of Japanese women as "picture brides" in this period:

The picture bride phenomenon was simple and filled with human drama. To save money or avoid exposing himself to the Japanese military draft by going home, an Issei man working in America would write home and have relatives arrange a bride. He would send money and presents for her and her family, along with a picture of himself that showed him at his best—sometimes even better than his best. He would send her courtship letters describing the success he was having and the wonderful life they would lead together in America. She would send letters and pictures, too, and he would send a ticket. There might or might not be a proxy wedding in Japan before the bride boarded the ship. On disembarking in Seattle or San Francisco, she met the man she had agreed to marry. . . . Although proxy weddings had been legally recognized in prior years, through most of this period American state governments no longer recognized proxy wedding ceremonies. As a result, some husbands married their wives at dockside, or in religious or civil ceremonies a few days later. Some wives, feeling defrauded, insisted on returning home. Some swapped husbands on the dock; others were swapped by the men who had paid their passage. . . . It is worth noting that . . . the picture bride arrangement was not all that different from the way people had been getting married in Japan for some generations . . . [and] Japanese Americans were not the only ones in America marrying in such a way: there were also Chinese picture brides and Italian picture brides.

SPICKARD, *supra* note 25, at 34-35. In a 1912 report, the U.S. Commissioner-General of Immigration wrote that allowing photograph brides into the United States:

must necessarily result in constituting a large, native-born Japanese population, persons who, because of their birth on American soil, will be regarded as American citizens, although their parents cannot be naturalized, and who, nevertheless, will be considered (and will probably consider themselves) subjects of the Empire of Japan under the laws of that country, which hold that children born abroad of parents who are Japanese subjects are themselves subjects of the Japanese Empire.

RINGER, *supra* note 14, at 713; see also *id.* at 712-13.

⁴² On March 26, 1790, the U.S. Congress passed a "Uniform Rule of Naturalization" that set three preconditions for naturalization of resident aliens: (1) a required residency period of two (later changed to five) years; (2) proof of "good character" and (3) that a person seeking naturalization be a "free white person." See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

nese and other Asians were not “white” for purposes of naturalization, the children of such immigrants were not so barred. Under an 1898 Supreme Court decision, children of immigrants born on U.S. soil were U.S. citizens.⁴³ Politicians and other white Californians felt that the federal government had sold them out in the “Gentlemen’s Agreement” for the sake of being able to negotiate smoothly and sign⁴⁴ the 1911 U.S.-Japan Treaty of Commerce and Navigation.⁴⁵

The California interests vis-à-vis Japanese farmers shifted during this period.⁴⁶ Initially, smaller agriculturalists desired Japanese agricultural laborers, who tended to be viewed as reliable, hard-working and could be paid less than the relatively few white agricultural laborers. Large-scale agricultural interests also found much that was useful in the Japanese agricultural labor force in the first years of the twentieth

⁴³ See *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

⁴⁴ The California Assembly reacted with outrage at the apparent caving in to federal power and tried enacting numerous Jim Crow-like laws against the Japanese, banning them from public transportation and barring Japanese students over 10 years of age from attending schools with white students. Roosevelt communicated to Governor James N. Gillett that he should halt these legislative moves or their “compromise” would fall through and Gillett would never get exclusion of Japanese immigrants from California. Governor Gillett intervened and dampened the anti-Japanese legislative activity. See RINGER, *supra* note 14, at 700.

⁴⁵ See Treaty of Commerce and Navigation, Feb. 21, 1911, U.S.-Japan, art. I, 37 Stat. 1504. The treaty provided that:

[t]he citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

Id.

⁴⁶ Daniels sums up the changing attitude of employers toward the Japanese farm laborers and farmers:

[E]mployers welcomed [the] early Issei recruits to the ranks of American agriculture, particularly since the Chinese, abetted by their rapidly diminishing numbers, were trying to raise wages. Within a few years the growers were singing a different tune. Around the turn of the century business conditions improved, both in California and the nation, and the decline in number of the Chinese laborers became even more noticeable. At the same time, Japanese labor began to serve notice that it would not long be content with the lowest rung of the economic ladder. Although the earliest recorded strike of Japanese agricultural laborers occurred in 1891, strikes do not seem to have become a frequent tactic until 1903. A standard device was to wait until the fruit was ripe on the trees and then insist upon renegotiating the contract. The growers protested that this was unethical, since a contract was a contract, and remembered that the Chinese, to their credit, had never done such things. . . . From about . . . 1903, we begin to hear invidious comparisons of the two races from agriculturists, almost always to the detriment of the Japanese.

DANIELS, *supra* note 8, at 9.

century.⁴⁷ To their chagrin, however, both groups eventually found that Japanese agricultural labor was not as compliant as the Chinese labor force had been thirty years earlier. Furthermore, smaller agriculturalists, who may have been appreciative of the agricultural skills of immigrant Japanese as long as they were laborers, looked upon them with increasing suspicion and distrust as they climbed the labor ladder from laborers to sharecroppers to tenant farmers and, finally, to farm owners in direct competition with those who had formerly been their employers.⁴⁸

Japanese agricultural laborers in the early-twentieth century tended to be better educated than their Chinese predecessors because the late nineteenth-century Meiji Restoration mandated an elementary

⁴⁷ Daniels notes that the economic interests of many of the largest growers would also later cause them to oppose the Alien Land Laws:

Also in opposition [to possible anti-Japanese laws] were a few large-scale farmers like Lea A. Phillips, whose California Delta Farms, Inc., controlled 65,000 acres and had profitable relations with Japanese laborers and tenants. As Chester Rowell noted, the holders of such views were a "minority . . . in California, but those who hold [them] own a great deal of California." Business and labor were now again in their usual polar positions . . . [with] their attitudes dictated by what they believed was their enlightened self-interest.

Id. at 48. Observations by tenBroek et al., however, reveal the conflict between the attitudes and interests of the large growers and the small farmers concerning the Japanese:

The large-scale corporation agriculturalist, interested primarily in the maintenance of a cheap and steady labor force, generally favored the Japanese as workers and had little fear of their competitive operations as independent farmers. But the majority of California farmers . . . fell into two less prosperous categories, both vigorously opposed to Japanese encroachment on the land: (1) the farmer who did all his own work and whose product came into competition with that of other farmers who could undersell him if their labor was worth less, and (2) the working farmer who was a part-time employer, and therefore interested in hiring cheap and efficient labor.

TENBROEK ET AL., *supra* note 16, at 52-53.

⁴⁸ Those Japanese that managed to obtain enough capital to purchase land and become small farmers themselves were seen as active threats to white small farmers. One anti-Japanese horticulturist wrote in 1907:

[The Japanese] are cunning—even tricky. They have no scruples about violating a contract or agreement when it is to their advantage to do so. They of all are far short of giving satisfaction as laborers in the service of Americans. This is partly due to their racial pride and self-consciousness of their own importance. They are great imitators and tireless in their efforts to acquire knowledge that will enable them to become contractors. . . . They are not long content to work for others; their ambition is to do business on their own account. While they have no organized unions as we know them, they are clannish and have such a complete understanding among themselves that they can act promptly and in unison in an emergency.

G.H. Hecke, *The Pacific Coast Labor Question, From the Standpoint of a Horticulturist*, in PROCEEDINGS OF THE THIRTY-THIRD FRUIT-GROWERS' CONVENTION OF THE STATE OF CALIFORNIA 69-70 (1908), *cited in* ALMAGUER, *supra* note 22, at 186.

education for all Japanese subjects. Thus, they came to the United States possessing a modicum of agricultural knowledge and skills that made them increasingly useful as California agriculture turned toward intensive agricultural crops.⁴⁹ In addition, the Japanese managed to establish a relatively integral “enclave economy,” which, while segregated racially from white society, mirrored mainstream social and economic institutions, providing an economic and cultural safety net for Issei, albeit a thin one.⁵⁰ Many Japanese agricultural laborers would underbid other labor groups until they gained a significant portion of the workforce, at which point they would insist on higher wages and better working conditions or threaten slowdowns and strikes.⁵¹ The rising solidarity of the Japanese agricultural workforce was met with resistance both by white management and, ironically, by white labor leaders such as the American Federation of Labor’s Samuel Gompers who rejected any outreach to Asian laborers.⁵² Likewise, many of the

⁴⁹ See ICHIHASHI, *supra* note 27, at 163; LAWRENCE J. JELINEK, *HARVEST EMPIRE: A HISTORY OF CALIFORNIA AGRICULTURE* 68–69 (2d ed. 1982); see also TAMURA, *supra* note 27, at 19–22; Iwata, *supra* note 27, at 27. Takaki chronicles the rapid success of the Japanese farmers:

By 1909, significantly, 6,000 Japanese had become farmers. . . . In 1910, . . . of the total Japanese farm acreage, 37,898 acres were under contract, 50,400 under share, 89,464 under lease, and 16,980 under ownership. . . . [The many Japanese fruit and vegetable farmers] concentrated on short-term crops like berries and truck vegetables. As early as 1910, they produced 70 percent of California’s strawberries, and by 1940 they grew 95 percent of the state’s fresh snap beans, 67 percent of its fresh tomatoes, 95 percent of its spring and summer celery, 44 percent of its onions, and 40 percent of its fresh green peas. . . . In 1920 the agricultural production of Japanese farms was valued at \$67 million—approximately 10 percent of the total value of California’s crops.

TAKAKI, *supra* note 8, at 188–91.

⁵⁰ See generally O’BRIEN & FUGITA, *supra* note 25, at 19; TAKAKI, *supra* note 8, at 188.

⁵¹ See generally O’BRIEN & FUGITA, *supra* note 25, at 19–20; SPICKARD, *supra* note 25, at 18, 21. O’Brien and Fugita explain the advantage of the Japanese labor contracting system:

A factor which permitted Japanese farm laborers to be more aggressive toward the farmers they worked for was the interpersonal nature of their labor contractor system. As was the case with other ethnic groups, Japanese labor contractors sometimes took advantage of their fellow countrymen—e.g., by assessing daily commissions, charging “translation-office fees,” selling expensive provisions, charging for remitting money to Japan, and withholding a medical fee But because they were embedded in other social relationships with the same individuals in the Japanese community, the more serious forms of exploitation would result in ostracism from the community. This tended to reduce exploitation substantially. The labor contractor-worker relationship was also supported by the traditional Japanese principal of *ieomoto* . . . , which emphasized the obligations of superiors towards subordinates as much as those of lower echelon persons to their superiors.

O’BRIEN & FUGITA, *supra* note 25, at 19–20.

⁵² See, e.g., TAKAKI, *supra* note 8, at 200 (“Tragically for the American labor movement, Gompers had drawn a color line for Asians. Earlier he had led the movement against the Chinese.

leading San Francisco Socialists such as Jack London eschewed labor solidarity in favor of racial solidarity with "white labor." Thus, by the second decade of the twentieth century, these labor interests and the interests of Japanese agricultural labor had parted ways.

By 1911, anti-Japanese media, opportunistic politicians and small-to-medium agriculturalists in counties where Japanese land ownership had increased steadily since the "Gentleman's Agreement" combined to begin drafting what eventually became the 1913 California Alien Land Law. That law barred "aliens ineligible to citizenship" from owning fee simple absolute interest in agricultural property or from entering into leases for such land longer than three years.⁵³ Land acquired in violation of the statute would, following successful completion of an escheat action by the California State Attorney General, escheat to the state. The 1913 Act was carefully crafted so as not to incur federal judicial or legislative ire.⁵⁴ Although the Act disingenuously used the

Again, in 1903, under Gomper's leadership, the American Federation of Labor turned away from the possibility of class solidarity."); see also DANIELS, *supra* note 8, at 22 ("In December [1900] the American Federation of Labor, meeting in Louisville, Kentucky, declared that 'the Pacific Coast and inter-mountain states are suffering severely from Chinese and Japanese cheap coolie labor' and asked Congress to 'reenact the Chinese exclusion law, including in its provision all Mongolian labor.'"); GARY Y. OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 158 (1994); Tomás Almaguer, *The 1903 Oxnard Sugar Beet Workers' Strike, in PEOPLES OF COLOR IN THE AMERICAN WEST* 300, 307 (Sucheng Chan et al. eds., 1994).

⁵³ See generally ICHIHASHI, *supra* note 27, at 274-75; RINGER, *supra* note 14, at 731. Ichihashi quotes Ulysses S. Webb, California's Attorney General and co-drafter of the Alien Land Law in an address before the Commonwealth Club of San Francisco on August 9, 1913 concerning the intent of the statute:

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

ICHIHASHI, *supra* note 27, at 275. Webb's definition of undesirability was "efficient." See Brief by Ulysses S. Webb in *Porterfield v. Webb*, 263 U.S. 225 (1923), cited in *Oyama*, 332 U.S. at 657 n.10 ("The fundamental question is not one of race discrimination [but] . . . of recognizing the obvious fact that the American farm, with its historical associations of cultivation, environment and including the home life of its occupants, can not exist in competition with a farm developed by Orientals with their totally different standards and ideas of cultivation of the soil, of living and social conditions. If the Oriental farmer is the more efficient, from the standpoint of soil production, there is just not much greater certainty of an economic conflict which it is the duty of statesmen to avoid."); see also DANIELS, *supra* note 8, at 55.

⁵⁴ See Buell II, *supra* note 34, at 63; Herbert P. Le Pore, *Prelude to Prejudice: Hiram Johnson, Woodrow Wilson and the California Alien Land Law Controversy of 1913*, 61 S. CAL. Q. 99, 103-08 (1979), reprinted in 2 *ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 265 (Charles McClain ed., 1994). Roger Daniels notes that:

phrase "aliens ineligible to citizenship" to describe those it was dispossessing and explicitly stated that it was meant to honor the language of the 1911 U.S.-Japan Treaty, a treaty that did not mention rights to own agricultural land, the 1913 Alien Land Act was meant as a direct attack on the Japanese agricultural community within California. While nativist politicians could claim they had taken decisive action against the Japanese, the reality was that the 1913 Alien Land Law was subject to easy and widespread evasion. In fact, Japanese land holdings within California actually increased from 1913 to 1920, the peak pre-war year for Japanese land holdings in California. Japanese farmers were able to place land in trusts and guardianship for their American-born children, form agricultural land-holding corporations, put land in the name of friends and American-born relatives or enter into three-year leases that were simply renewed for another three years at lease's end.

By 1920, however, it had become widely known that Japanese land holdings had increased despite the 1913 law.⁵⁵ Following the end of World War I, the American Legion and other veterans' organizations entered the equation, weighing in on the "Japanese Problem" in California and reinforcing the growing sense of disquiet over the rise of Japan as a threat to U.S. interests in the Pacific.⁵⁶ The American Legion

Another argument used to justify action by California was the fact that in Japan no alien could hold land. . . . Theodore Roosevelt used this hypothetical justification as early as 1905. It was specious on three counts. First, the Japanese law applied to all foreigners alike and the Japanese naturalization laws were nondiscriminatory; second, in Japan a foreigner could get a nine-hundred-and-ninety-nine-year lease (such leaseholders paid all the taxes on the property); and, third, American legal treatment of resident aliens had almost always been identical, without regard to their national origin, and any invidious departure from that precedent could rightly be regarded as discrimination.

DANIELS, *supra* note 8, at 51.

⁵⁵ In fact, Japanese landholdings in California increased from 1913 to 1920. In 1910 the figures for Japanese ownership, lease, sharecropping and contracting were 17,035 acres owned, 89,466 acres leased, 50,400 acres sharecropped and 37,898 acres contracted for a total of 194,799 acres. See Iwata, *supra* note 27, at 30. By 1920 the figures were 74,769 acres owned, 192,150 acres leased, 121,000 acres sharecropped and 70,137 acres contracted for a total of 458,056 acres. See *id.* The Alien Land Laws, however, became more effective at dispossessing Japanese farmland owners after 1923 when various loopholes were closed.

⁵⁶ See generally DANIELS, *supra* note 8, at 77. Daniels reports that:

In the years immediately after the war, the real rather than the imagined acts of the Japanese government were of growing concern to many Americans. The continued subjugation of Korea; the Twenty-one demands upon China; the Shantung question; the friction between Japanese and American troops in Siberia; the insistent Japanese demands for racial equality, raised at Versailles and later at Geneva; the persistent and erroneous belief, before 1922, that the Anglo-Japanese alliance was somehow aimed at the United States: these were some of the issues that caused friction between the two countries. When these were added to the hostile feeling

combined forces with more established nativist politicians, small agricultural interests and virulent anti-Japanese media interests such as the McClatchy and Hearst newspaper chains. In 1920, newly resurgent anti-Japanese activists managed to secure a ballot initiative designed to close off the loopholes of the 1913 Alien Land Law.⁵⁷ The 1920 Initiative barred guardianships and trusteeships in the name of "aliens ineligible to citizenship" who would be prohibited from owning such properties, barred all leases of agricultural land, barred corporations with a majority of shareholders who were "aliens ineligible to citizenship" from owning agricultural land and classified sharecropping contracts as "interests in land," making them off-limits to first-generation Japanese.⁵⁸ The 1920 Initiative amendment to the 1913 Alien Land Law passed with a decisive majority in every county in California.

toward Japan already created by the war scares and the yellow peril propaganda, it was not difficult to convince many non-Californians that Japan was, as V.S. McClatchy put it, "the Germany of Asia."

Id.

⁵⁷In September 1919, the Asiatic Exclusion League was revived by the California State Grange, which had been relatively quiescent since 1909. See generally CHUMAN, *supra* note 38, at 78; TENBROEK ET AL., *supra* note 16, at 54-55, 57. Other California farm organizations also agitated against the Japanese at this time. TENBROEK ET AL. report that:

[T]he California State Farm Bureau Federation . . . by 1920 had attracted a membership of twenty thousand farmers—largely through its early and shrewd manipulation of the "Japanese Problem." . . . As early as December 1919, the Magnolia-Mulberry Farm Center of Imperial Valley passed resolutions calling for the total exclusion of Japanese, Hindus and Mohammedans. In a letter to Governor Stephens, a spokesman for the group warned that "if something is not done in the way of legislation to bar these races, it will be only a comparatively short time until they have crowded out the white race from the most fertile parts of California." . . . The immediate goal of the Farm Bureau agitation was attained in 1920 when the voters of California approved the initiative amendment to the Alien Land Law Credit for the victory was quickly claimed by farmers and their organizations, one spokesman declaring that "this legislation is a farmer's movement There was practically no division of opinion among country people who have to compete with the Japs."

TENBROEK ET AL., *supra* note 16, at 51, 53.

⁵⁸See California Initiative November 2, 1920, §§ 1-14, 1921 Cal. Stat. lxxxii. The initiative measure adopted November 2, 1920 had the following provisions:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Id. §§ 1, 2. Sections three and four provided that:

Any company, association or corporation . . . of which a majority of the members are aliens other than those specified in section one . . . or in which a majority of the issued capital stock is owned by such aliens may acquire, possess, enjoy and convey real property, or any interest therein, . . . in the manner and to the extent and for the purposes prescribed by any treaty now existing. . . . Hereafter [ineligible] aliens . . . may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty . . . and not otherwise.

Sec. 4. Hereafter no alien mentioned in section two hereof and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. . . . [T]he superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court . . . [t]hat facts exist which would make the guardian ineligible to appointment in the first instance. . . .

Id. § 3, 4. Section 5(a) of the initiative provided that:

The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof or to the minor child of such an alien, if the property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

Id. § 5(a). Section 5(b) provided that:

Annually . . . every such trustee must file . . . a verified written report showing: . . . An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

Id. § 5(b).

Section 6 provided for court-ordered sale and distribution of proceeds when, "by reason of the provisions of this act, heir . . . cannot take real property . . . or membership or shares of stock in a company, association or corporation." *Id.* § 6.

Section 7 provided for the escheat of property acquired in fee by any ineligible alien and that "[n]o alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt." *Id.* § 7. Section 8 of the 1920 initiative further provided that:

Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any [ineligible] alien . . . or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California. . . . Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California.

Id. § 8. Section 9 provided that:

Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed . . . shall escheat to the state if the property interest involved is of such a character that an [ineligible] alien . . . is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

Unlike the 1913 Alien Land Law, the 1920 Initiative had significant material effects. Japanese-owned acreage declined relatively dramatically between 1920 and 1925. In 1923 and 1927, the California legislature added additional amendments to the 1920 Initiative, making escheat effective immediately upon the conclusion of a transaction involving agricultural land with an "alien ineligible to citizenship," rather than at the successful conclusion of an escheat action by the State Attorney General (a citizen buyer could lose one's property thus acquired). The Amendments also required "aliens ineligible to citizenship" to sell inherited property or it would escheat to the state, made escheat actions commencing by the County District Attorney, barred "aliens ineligible to citizenship" from owning stock in a corporation that owned agricultural land and created a rebuttable presumption that any real estate transaction involving an "alien ineligible to citizenship" was to be treated as a criminal conspiracy to evade the Alien Land Law. As a result of these enactments, increasing Japanese land ownership was arrested after 1920 in California and the Alien Land Laws remained on the books even though relatively few escheat actions were brought between 1913 and 1940.⁵⁹

A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof. . . .

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Id. § 9; see also CHUMAN, *supra* note 38, at 87. Section 10 of the 1920 initiative added criminal penalties for violations of the statute:

If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

California Initiative November 2, 1920, § 10, 1921 Cal. Stat. lxxxiii, lxxxv.

⁵⁹ Masao Suzuki suggests that:

[A]lmost all of the prosecutions of the Alien Land Law were aimed at Japanese and other Asian Americans, so that while the law may not have been enforced for whites who wanted to rent farmland to Japanese, it certainly was for Japanese Americans who wanted to buy land. One can also question whether it was nondiscriminators who wanted to rent or sell to Japanese farmers. Higgs himself documents discrimination in the farm rental market where Japanese were paying higher rents than whites. . . . The Alien Land Laws probably served to reinforce price discrimination in the rental and sales markets, as landowners knew that the Japanese were in a weak (legal) position to begin with. There is support for [the] suggestion that competition with Japanese immigrant farmers led to discrimination. While farmers

Among the escheat actions brought, however, were a group of cases challenging the 1920 California Initiative as well as a similar law passed by the Washington legislature in 1921.⁶⁰ In deciding these four cases,⁶¹ the Supreme Court sent a stark message to the nation, and California in particular, that the Alien Land Laws clearly passed constitutional muster. Moreover, in the words of Justice Pierce Butler, the enactments were eminently justified:

It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within

had kept quiet when Japanese were mainly farm laborers, they were more outspoken when Japanese immigrants moved into farming.

MASAO SUZUKI, *THE IMPACT OF ALIEN LAND LAWS AND THE ECONOMIC STATUS OF JAPANESE IMMIGRANTS BEFORE WORLD WAR II*, at 22 (June 23, 1998) (unpublished draft on file with author); see also Robert Higgs, *Landless by Law: The Japanese Immigrants in California Agriculture to 1941*, 38 J. OF ECON. HIST. 205, 223 (1978).

Ichioka also comments on the negative effects of the earlier 1913 law:

It would be wrong, however, to claim that the [1913 California Alien Land] law had no negative effects. In 1917 Chiba Toyoji, managing director of the Japanese Agricultural Association, presented a perceptive critique. According to his analysis, in the few cases in which landowners died with deeds still in their names, their land sold for 30 to 40 percent less than the going market value at public auctions. The three-year leasing limitation discouraged many farmers from cultivating fruit, grapes, and other crops which required a longer investment of money, time and labor. On the other hand, it encouraged "speculative" agriculture in one-year crops. Moreover, given the uncertain future of Japanese farmers, it also reinforced their desire to return to Japan as soon as possible, causing many to neglect their housing and physical environment. Finally, and most important, the 1913 Alien Land Law forced all Japanese to live with the stigma of being aliens ineligible to citizenship and subject to discriminatory treatment.

Yuji Ichioka, *Japanese Immigrant Response to the 1920 Alien Land Law*, 58 AGRIC. HIST. 157, 162-63 (1984), reprinted in 2 *ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 229 (Charles McClain ed., 1994).

⁶⁰ See Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 627 (1976). Under the first Washington Alien Land Law, which was enacted by the territorial legislature in 1864, aliens could acquire, hold and convey lands. A later version of Washington's Alien Land Law, however, deprived land ownership rights to aliens incapable of becoming citizens. See Mark L. Lazarus III, *An Historical Analysis of Alien Land Law: Washington Territory & State 1853-1889*, 12 U. PUGET SOUND L. REV. 197, 205, 220 (1989).

⁶¹ In 1923, litigants tested the Alien Land Laws. Four cases reached the U.S. Supreme Court that year. On November 12, 1923, the U.S. Supreme Court issued two opinions. The first was *Terrace v. Thompson*, 263 U.S. 197 (1923), which tested the validity of the 1921 Washington law that prohibited land ownership in the State of Washington by aliens who had not declared their good faith intention to become citizens or who could not declare their intention because they were ineligible for citizenship. The second was *Porterfield v. Webb*, 263 U.S. 225 (1923), which challenged the more draconian 1920 Ballot Initiative Amendment to the 1913 California Alien Land Law.

In *Terrace*, a citizen wished to lease land in King County, Washington to a Japanese alien. They brought suit, seeking to enjoin enforcement of the 1921 Washington Alien Land Law which precluded "aliens unable to declare their good faith intention to become a citizen" from owning agricultural lands within Washington. *Porterfield* involved a fact pattern similar to *Terrace*. Porterfield, a citizen, wanted to lease land to Mizuno, a Japanese alien. In *Porterfield*, the U.S. Supreme Court upheld the validity of the 1920 ballot initiative amendment, rejecting the argument that it did not make the same distinction that the Washington State Alien Land Law had between aliens who did not declare their intention to become citizens and those who were ineligible. The *Porterfield* Court found that the difference between the California and Washington Land Laws was neither arbitrary nor unreasonable. In *Webb v. O'Brien*, 263 U.S. 313 (1923), decided on November 19, 1923, O'Brien, a citizen, wanted to enter a cropping contract with Inouye, a Japanese alien. This contract would permit Inouye to plant, cultivate and harvest crops on ten acres of land that O'Brien owned for a period of four years. Inouye would retain one-half of the crops as well as the right to house himself and persons working for him on O'Brien's land. O'Brien and Inouye won at the district court level because cropping contracts were not explicitly included under the 1920 Alien Land Law. Attorney General Ulysses S. Webb appealed.

O'Brien confronted the U.S. Supreme Court with the question of whether a "cropping contract" between an American citizen and an "alien ineligible to citizenship" was a contract of employment or the transfer of an interest in land. If the answer was that such an arrangement was an employment contract, then it did not constitute a transfer of a real property interest. Alternately, if the answer was that such arrangements were "more" than a mere employment contract, then they could constitute conveyances of property interests in land and would therefore be prohibited under the 1920 California Act.

The Supreme Court held that while a cropping contract gave no legal interest in land, such an agreement gave "use, control, and benefit of land . . . substantially similar to that granted to a lessee" and consequently, the agreement was prohibited under the Act. *O'Brien*, 263 U.S. at 324. In an opinion again penned by Justice Pierce Butler, the Court reasoned:

[This cropping contract] is more than a contract of employment, and that, if executed, it will give to Inouye a right to use and to have or share in the benefit of the land for agricultural purposes. . . . The term of the proposed contract, the measure of control and dominion over the land which is necessarily involved in the performance of such a contract, the cropper's right to have housing for himself and to have his employees live on the land, and his obligation to accept one-half the crops as his only return for tilling the land clearly distinguish the arrangement from one of mere employment. . . . Conceivably, by use of such contracts, the population living on and cultivating the farm lands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the state directly affects its strength and safety. . . . We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders.

Id. at 322-24. Note here, as in *Terrace*, the suggestion that a foreign threat from without (rising Japanese military strength) was embodied by Japanese immigrants within. The Court here continued its steadfast categorical move to underwrite the states' power to legislate to protect itself from this imagined dual-edged threat. Perhaps more significantly, this case illustrates the erosion of the late *Lochner*-era jurisprudence that protected the formal equality of contracting parties in the private sphere and disfavored legislative intervention into such arrangements.

Finally, in *Frick v. Webb*, 263 U.S. 326 (1923), decided November 19, 1923, the U.S. Supreme Court upheld the 1920 Initiative Act's bar on "aliens ineligible to citizenship" from owning majority stock in corporations established to work agricultural lands, despite arguments that stock ownership was guaranteed by the U.S.-Japan Treaty of 1911. Frick, a U.S. citizen, and Satow, a Japanese alien, sought injunctive relief in federal court to enjoin California Attorney General Ulysses S. Webb and the San Francisco District Attorney, Matthew Brady, from enforcing the Alien Land Law. Frick held 28 shares in the Merced Farm Company, which held 2200 acres of California farmland and wanted to transfer them to Satow. Again, Justice Butler upheld the Alien Land Law:

its boundaries. If one incapable of citizenship may lease or own real estate, *it is within the realm of possibility, that every foot of land within the state might pass to the ownership or possession of non-citizens.*

. . . .

In the case before us, the thing forbidden . . . is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The *quality* and *allegiance* of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself.⁶²

While the Alien Land Laws and the judicial opinions that upheld them were an important component of the nativist fervor that gripped the American legal imagination during the 1920s, they were merely a prelude to the enactment of the severe federal Immigration Act of 1924 that excluded immigration from Japan as well as southern and eastern Europe. The 1924 Immigration Act represented the nexus of waning early nineteenth-century attitudes toward open immigration that provided new labor for vital economic enterprises and waxing American anxiety over racial and ethnic “others.” By the mid-1920s the latter attitude had clearly carried the day.

While the import of the Alien Land Laws are evident on a symbolic level—the creation and maintenance of a class unable to hold land unambiguously sends a message about the status of members of that class as less than worthy—the Alien Land Laws had a more subtle but equally invidious effect.⁶³ The Alien Land Laws served as a material prelude to the internment of Japanese Americans by weakening the structure of the agricultural opportunity “ladder” faced by Japanese immigrants entering this country at the beginning of the century. The

[California] may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens. The right “to carry on trade” given by the [1911 U.S.-Japan] treaty does not give the privilege to acquire the stock [of such a corporation]. To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties.

Frick, 263 U.S. at 334.

In these four cases, the Alien Land Laws of Washington and California were upheld and, at least momentarily, Justice Butler managed to make distinctions between the constitutionally guaranteed “right to work” and “freedom of contract” and a prohibition on transfers of interests in land (including indirect ownership of stock) made by the California Legislature without seeing any contradiction at all.

⁶² *Terrace*, 263 U.S. at 220, 221 (quoting in part the court below) (emphasis added).

⁶³ See Aoki, *supra* note 12; Ichioka, *supra* note 59, at 162–63.

“ladder” had four “rungs.” First, Japanese immigrants could become agricultural laborers, toiling for wages. Second, a Japanese laborer might convince a landowner to enter into a sharecropping contract, that is, the landowner would provide housing, tools and other materials necessary to farm, in exchange for a share of profits on the crop. If the Japanese sharecropper had a successful season, so too did the landowner. Third, a Japanese agricultural laborer or sharecropper who managed to save enough money might enter into a direct lease for a parcel of farmland, paying rent and keeping profits from crops for himself. Finally, the goal of laborers, sharecroppers and tenants was to become landowners—to save and borrow enough money to purchase land outright.

The Alien Land Law of 1913 placed the fourth rung legally out of reach of Japanese immigrants. The 1920 Initiative, by closing off the numerous loopholes discussed above, not only prohibited ownership of agricultural land, but leases and sharecropping contracts as well. Although the leasing and sharecropping prohibition was evaded in part by employing Japanese immigrants as “managers” (though to a lesser degree than under the 1913 Act), the net effect was to push Japanese immigrant farmers further down the agricultural labor “ladder.”

A loophole that was still open to Japanese immigrants, albeit one made increasingly difficult to utilize, was the ability of children of Issei, as American citizens, to own property. During the late 1920s and 1930s, many such Nisei reached the age of majority and as such were able to gain title to purchased agricultural land. Throughout the 1920s, the California legislature, however, continued placing legislative obstacles in the path of Japanese land ownership by creating a legal presumption that transactions with “aliens ineligible to citizenship” were criminal conspiracies. This presumption placed burdens on persons who were potentially “aliens ineligible to citizenship” to prove they were citizens before a real estate transaction could be consummated. The legislature also provided for immediate escheat to the state (rather than on successful initiation and completion of an escheat proceeding by the state attorney general) in any transaction involving an “alien ineligible to citizenship.” These and other devices created serious obstacles to a citizen Nisei’s attempt to acquire land.⁶⁴

⁶⁴ On the role of racially structured hierarchies of inequality, see Stuart Hall, *New Ethnicities*, in ‘RACE’, CULTURE AND DIFFERENCE 252 (James Donald & Ali Rattansi eds., 1992). Hall suggests that:

By the eve of World War II in California, Japanese immigrant farmers were poised for a major fall. Those who did not own land outright were in some ambiguous sort of tenant/cropper/manager relationship with landowners. Following the evacuation order and subsequent internment, landowners would look elsewhere to find the rents and labor that had been supplied by Japanese immigrants.⁶⁵ All of the labor Japanese immigrants had put into cultivating land which they were forbidden to own was gone. Following the war, many of the internees who had been landowners were able to return to their properties that had been cared for by family friends. Internees who were landless by law, however, lost virtually everything. During the post-war era, Congress enacted a restrictively worded and extremely limited "Japanese-American Evacuation Claims Act of 1948"⁶⁶ that paid a maximum of \$2500 per claim for documented damages arising from the 1941 Evacuation Order. It has been estimated that, at best, ten cents on the dollar was paid.⁶⁷

The mood of the federal courts toward Japanese Americans shifted in the post-war era. In the *Oyama* case in 1948, the U.S. Supreme Court overturned a provision of the 1920 California Land Law that forbid an "alien ineligible to citizenship" from being a guardian for an American-born minor child.⁶⁸ The provision was overturned on the ground that it denied minor children who were U.S. citizens the equal protection of the law because a citizen child of a Japanese immigrant could not have property administered by a parent guardian as would a minor citizen with a citizen parent. While the holding in *Oyama* was narrow, the eloquent concurrence by Justice Murphy⁶⁹ recounting the unjust treatment of Japanese and Japanese Americans

[Specific] events, relations, [and] structures do have conditions of existence and real effects, outside the sphere of the discursive. . . . [H]ow things are represented and the "machineries" and regimes of representation in a culture do play a *constitutive* and not merely a reflexive, after-the-event, role. This gives questions of culture and ideology, and the scenarios of representation—subjectivity, identity, politics—a formative, not merely an expressive, place in the constitution of social and political life.

Id. at 253–54.

⁶⁵ See *infra* notes 83, 84 and accompanying text (noting that federal government instituted Bracero Program in 1942, which sought to import Mexican labor into California to meet demand for agricultural labor made more acute by evacuation and internment of Japanese Americans in early to mid 1942).

⁶⁶ Japanese-American Evacuation Claims Act of 1948, Pub. L. No. 80-886, 62 Stat. 1231 (1948).

⁶⁷ See CHUMAN, *supra* note 38, at 242–43 (estimating economic losses to internees and costs of internment to U.S. government to be more than \$700,000,000).

⁶⁸ See *Oyama*, 332 U.S. at 633.

⁶⁹ See *id.* at 673 (Murphy, J., concurring).

foreshadowed the *Brown* era's chastened racial jurisprudence in contemporaneous cases such as *Sweatt v. Painter*⁷⁰ and *Shelley v. Kraemer*.⁷¹

In 1948, the voters of California also rejected Proposition 151, which would have amended and re-ratified the 1920 Alien Land Law and all subsequent legislative amendments. On the federal and state legislative level as well as on the judicial and the "court of popular opinion," the end of World War II had wrought significant changes in mainstream America's attitude toward Japanese Americans.⁷²

The Alien Land Laws are significant on a number of levels. First, they span a remarkable period of time in American legal consciousness, enacted in the heyday of the *Lochner*⁷³ era—the mode of judicial reasoning that valorized substantive due process exemplified by freedom of contract, private property as a welcome evolution from feudalism and the smothering authority of the state—and lasting to the dawn of the *Brown v. Board of Education*⁷⁴ era in the late 1940s.

The Alien Land Laws invite us to consider what it means that during the height of the *Lochner* era, the Supreme Court was willing to endorse state intervention into both the private labor and real estate markets, such that even U.S. citizens had *no right to sell* to "aliens ineligible to citizenship" any more than such aliens had no right to buy. These laws were in remarkable tension with the prevailing, late *Lochner*-era, legal consciousness that held, under the rubric of "substantive due process," private property and freedom of contract as sacrosanct. On both superficial and deeper levels, the Alien Land Laws contradicted the idea of sharply separate public and private spheres, for the legislatures enacting these laws were intervening in "private" market arrangements as surely as the New York legislature had intervened (illegitimately, in the eyes of the *Lochner* Court) in prescribing the maximum hours a bakery employee could work. The different results in the Supreme Court's decisions to overturn state intervention in bakery employee contracts in *Lochner*, but to uphold state intervention in alien land contracts, may best be explained by the factors of the "race" and "nationality," of the Issei, making them susceptible to characterization as a threat to public health, welfare and morals, and, therefore, within the legitimate scope of the state's police power.

⁷⁰ 339 U.S. 629 (1950).

⁷¹ 334 U.S. 1 (1948).

⁷² See CHUMAN, *supra* note 38, at 202–03.

⁷³ See *Lochner v. New York*, 198 U.S. 45 (1905). See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 33–39 (1993) (discussing *Lochner* era's valorization of "private property" and "freedom of contract").

⁷⁴ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

The Supreme Court of the day valued the primacy of laissez-faire market allocations as self-evidently superior to the workings of feudal centralized decisions. Why, then, did they embrace the Alien Land Laws, whose roots stretch back to the feudal, strictly hierarchical legal system of eleventh-century England, and whose presumptive validity is premised on the transcendental sovereignty of the monarch?⁷⁵ This was, after all, the same Supreme Court that decided *Coppage v. Kansas*⁷⁶ striking down the Kansas legislature's attempt to outlaw "yellow dog" labor contracts for strike-breaking purposes as illegitimate interference with the "right to labor" and "freedom of contract."

At the very least, the Alien Land Laws suggest that the answer lies in unresolved American attitudes, deeply implicated in our legal system, based on conflicting notions of "nation" and "race." The limits of the *Lochner*-era vision of freedom of contract and private property ended abruptly at the boundary of the nation-state and its abilities to subject citizens and non-citizens to concepts of "race." While the concepts were constructed in the private sphere of economic and social relations, they were also ratified by the power of the state.

While the Alien Land Laws were generally ineffective at dispossessing Japanese farmers from 1913 to 1920,⁷⁷ they were much more effective after 1920. Furthermore, they set the stage for the internment and dispossession of Japanese and Japanese Americans during World War II. The Alien Land Laws ideologically affirmed the "foreign-ness," and hence, "disloyalty" of the Issei and their American citizen children,

⁷⁵ See *Calvin's Case*, 77 Eng. Rep. 377 (K.B. 1609). The ancient English rationale for alien land ownership disability was articulated in *Calvin's Case*:

It followeth next in course to set down the reasons, wherefore an alien born is not capable of inheritance within England, and that he is not for three reasons. 1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm (the sinews of war, and ornaments of peace) should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm. . . . [F]irst, it tends to destruction *tempore belli*, for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth, as was excellently shadowed by the Trojan horse in Virgil's . . . Aeneid, where a very few men in the heart of the city did more mischief in a few hours, than ten thousand men without the walls in ten years. Secondly, *tempore pacis*, for so might many aliens born get a great part of the inheritance and freehold of the realm, whereof there should follow a failure of justice . . . for that aliens born cannot be returned of juries . . . for the trial of issues between the King and the subject, or between subject and subject.

Id. at 399.

⁷⁶ 236 U.S. 1, 26 (1915).

⁷⁷ See VALERIE J. MATSUMOTO, *FARMING THE HOME PLACE* 25 (1993) ("Nevertheless, as Roger Daniels has suggested, [the Alien Land Laws] have had greater psychological than economic impact since by 1920 many *Issei* had already acquired the title in land in the names of their *Nisei* children.").

positioning them to be racial scapegoats in the wake of Pearl Harbor. To the extent that many white owners held land in trust for Japanese immigrants, the Issei were effectively occupants at sufferance. These laws created a category of persons existing at sufferance of their white neighbors—as well as the state attorney general and county district attorneys—a “caste” of less-than-worthy persons occupying land at the pleasure of white “owners.”⁷⁸ This symbolic dispossession and material

⁷⁸ See generally TAKAKI, *supra* note 8, at 206. Takaki explains some of the circumvention needed to continue farming:

To circumvent the [Alien Land] laws, many farmers entered into unwritten arrangements with white landlords. The farmer would actually lease the land but would appear to serve as a salaried manager. . . . Issei farmers also evaded the law by “borrowing the names” of American citizens. L.M. Landsborough, for example, purchased six lots of land for Japanese farmers with the deeds in his name. . . . An Issei farmer explained [how many Issei purchased land in the name of Nisei relatives] . . . “I asked a Nisei nearby to be the nominal owner of the land, and pretended that I worked for the boy. I presume about 80% or 90% of the Japanese farmers in the Auburn district quietly went about their business in this way.” . . . [H]e realized that all of them would be helpless if the law were strictly applied. . . . An Issei woman said that her son was the nominal owner of the family’s farm: “Every time some kind of difficulty arose we had to pay a lawyer’s fee to go through the legal process. . . . Every day was insecure like this, and whenever we had unfamiliar white visitors, I was scared to death suspecting that they might have come to investigate our land.”

See *id.* O’Brien and Fugita give a parallel description of the methods of circumventing the Alien Land Laws:

[T]he Japanese were able to get around the 1913 [California] law and continue farming because of the wide legal loopholes. Some Issei put the land in the name of their American-born children and made themselves their guardians. Or they placed land in the name of legal-age children, usually Hawaiian-born Nisei, some of whom were just beginning to reach their majority, or less often used the name of sympathetic white friends. Some Issei created dummy corporations which had a majority of American citizen shareholders. . . . If there were two children, the lawyer, and the Issei farmer and his wife, citizens would outnumber the “aliens ineligible for citizenship.”

O’BRIEN & FUGITA, *supra* note 25, at 24. At least some politicians understood that this circumvention was likely:

Johnson . . . knew well that Japanese land tenure in California would not be seriously affected by [the 1913 Law]. In effect, the Alien Land Law limited leases of agricultural land to Japanese to maximum terms of three years and barred further land purchases by Japanese aliens. It was quite simple for the attorneys who represented Japanese interests in California to evade the intent of this law, as Californians were soon to discover. One of Johnson’s chief advisers pointed this out to him before the bill had been drafted. “It will be perfectly easy,” wrote Chester Rowell, “to evade the law by transferring to [a] local representative enough stock to make fifty-one per cent of it ostensibly held by American citizens.” For the growing number of Issei who had American-born children, it was even simpler: they merely had the stock or title vested in their citizen children, whose legal guardianship they naturally assumed.

DANIELS, *supra* note 8, at 63.

deprivation laid the ideological, legal and cultural foundation for the mass physical dispossession, evacuation and internment of Japanese and Japanese Americans on the West Coast in 1942.

The significance of the Alien Land Laws went beyond their immediate effects on landowning and agricultural practices of Japanese immigrant farmers. The Alien Land Laws provided a bridge that sustained the virulent anti-Asian animus that linked the Chinese Exclusion Act of 1882 with the internment of Japanese-American citizens pursuant to Executive Order 9066. Transferring and generalizing anti-Chinese sentiments to all Asian immigrants gave degrading stereotypical tropes an extended and unfortunate shelf life. Even if the Alien Land Laws were, in many cases, symbolic xenophobic iterations of a nativist impulse, dispossessing in reality far fewer Japanese immigrants than they theoretically (and legally) were capable of, they did, without doubt, foreshadow the mass internment and practical dispossession of Japanese-American citizens during World War II. As Neil Gotanda has pointed out, the internment cannot be understood as the isolated action of a small number of renegade racists. To the contrary, it was the tragic symptom of systematic and institutionalized racism.⁷⁹ Understanding the Alien Land Laws empowers us to comprehend the depth and scope of the practices and institutionalized subordination that helped make the racial scapegoating of the internment possible. The Alien Land Laws allowed, promoted and indeed encouraged a linkage between race, nationality and denial of civil rights that culminated in the internment of Japanese Americans. Accordingly, the denial of civil rights to Asian immigrants “ineligible for citizenship” under Alien Land Laws paved the way for the denial of civil rights to Japanese-American citizens under Executive Order 9066 only two decades later. The inescapable lesson to be drawn is that the denial of basic rights such as due process and property ownership of non-citizens may be a step toward the cavalier denial of civil rights to citizens.

A second point is that the Alien Land Laws demonstrate a deep contradiction at the heart of our concepts of property, citizenship and nationhood. Prevailing liberal and civic republican visions of property

⁷⁹ Angela Oh observes that:

The fact that “racial undesirability” was the real basis for the alien land laws that prohibited Asian Americans to gain ownership of real property is no longer subject to serious debate. But more disturbing and troublesome is knowing how many times lawyers, government officials and judges acted in complicity with such odious interpretations of the law.

Angela Oh, *Foreword* to HYUNG-CHAN KIM, *A LEGAL HISTORY OF ASIAN AMERICANS 1790–1990*, at x (1994).

ownership rest on the notions that owning property, in some important way, ties an individual's fate to the fate of the larger polity, giving him or her a stake in important political controversies of the day, as well as providing a valuable shield against the state and other private parties. What does it mean that an entire group such as the Issei and their minor children could be dispossessed—incompletely, but dispossessed nonetheless—from the citizen's prerogative of property ownership, especially when such disenfranchisement turns on membership in a reviled racial group? Against this backdrop, what do recent anti-immigrant federal and state measures mean for the future of American democracy? Consider that until the arrival of large numbers of immigrants of non-English descent, the electoral franchise was often extended to non-citizen immigrants who resided in a particular area.⁸⁰

Third, the Alien Land Laws remind us of the linkage between global political, economic and social phenomena and localized material conflicts such as those that drove the struggles between California's ascendant agribusiness and the nascent California labor movement. Local struggles that are pressurized by global conflict become particularly explosive when they are fueled by long-standing racial antagonisms, entrenched racial hierarchies or white supremacist ideology.

In contending that the Alien Land Laws should be properly understood as an essential prelude to internment, this Article questions a model of analyzing racism that equates "racism" with "irrationality" and locates racism as an aberration within human consciousness. In varying degrees, various accounts of the internment of Japanese Americans incorporate aspects of this view of racism, assigning blame to renegade "bad actors" such as Lt. DeWitt or persons in the War Department who deliberately withheld, or lied about, information regarding the nature of the threat posed by Japanese Americans on the West Coast. Peter Irons' "Justice at War" is an excellent example of this genre.⁸¹ It is not that Professor Irons is wrong, for there were indeed many instances of individual racial animus in high and low places. It is just that his account may be incomplete.⁸² This Article advances a model of racism put forth by Neil Gotanda in which racism is not defined as irrational, but structural and, in important ways, may be

⁸⁰ See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1404 (1993) (quoting Rosberg's suggestion that the move away from allowing noncitizens to vote may have been due to arrival of large numbers of non-English-descent immigrants "who were thought incapable of ready assimilation").

⁸¹ See PETER IRONS, *JUSTICE AT WAR* (1983).

⁸² See Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of JUSTICE AT WAR*, 85 COLUM. L. REV. 1186, 1187-88 (1985) (criticizing shortcomings of Irons' approach).

seen as the epitome of rationality on the systemic level, if the goal is to ensure the continued domination—access to power and resources—of a superordinate racial group over a subordinate group on a racial basis. Under the Gotanda model, racism is not an aberration within a deviant individual's consciousness, but is located in the material world: who has control of what, who may exclude whom from valuable resources and privileges, such as particular types of jobs, education and agricultural land. By questioning the view that the internment was the result of a few misguided or racially malevolent individuals, this Article suggests that lessons to be learned from the Alien Land Laws, the internment of Japanese Americans and the 1989 Apology and Redress to interned Japanese Americans should not be triumphalist paeans to the vindicatory power of the "Rule of Law." Instead, the lesson may be a no less useful—if less sanguine—critique of how little we have learned from the internment. For example, beginning in 1942, the U.S. government engaged in the Bracero Program to import thousands of Mexican laborers to replace the decimated Japanese agricultural labor ranks.⁸³ In the 1950s, the government engaged in Operation Wetback to deport many of the same Mexican laborers brought in by the Bracero program who attempted to stay in America.⁸⁴ In the 1960s, the FBI waged a literal domestic war against the Black Panthers and other black nationalist groups, whose leaders were either dead, imprisoned or discredited by the end of the decade.⁸⁵ From the 1970s onward, domestic race relations have had to grapple with the internal repercussions of U.S.-backed military adventurism abroad, whether in Southeast Asia, Central America or the Middle East, including the influx of immigrants who have been rapidly and differentially racialized within the United States. In the 1980s and 1990s, we have seen the internment and incarceration without due process of Cubans and Central American refugees in Guantanamo Bay⁸⁶ and Texas by the Immigration and Naturalization Service ("INS").⁸⁷ We have witnessed the interdiction and "hearings" at sea of Haitian boat persons by the

⁸³ See Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in *THE LATINO/A CONDITION: A CRITICAL READER* 77, 80–82 (Richard Delgado & Jean Stefancic eds., 1998).

⁸⁴ See *id.* at 83; Michael A. Olivas, *My Grandfather's Stories and Immigration Law*, in *THE LATINO/A CONDITION: A CRITICAL READER* 257 (Richard Delgado & Jean Stefancic eds., 1998).

⁸⁵ See, e.g., WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WAR AGAINST DOMESTIC DISSENT* 91–164 (1990); HUEY P. NEWTON, *WAR AGAINST THE PANTHERS: A STUDY OF REPRESSION IN AMERICA* (1996).

⁸⁶ See Jonathan Wachs, *Recent Development: The Need to Define the International Legal Status of Cubans Detained at Guantanamo*, 11 *AM. U. J. INT'L L. & POL'Y* 79 (1996).

⁸⁷ See Olivas, *supra* note 84, at 258.

INS,⁸⁸ the congressional passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁸⁹ and the passage of Proposition 187 in California in 1994, which represented the darker side of direct democracy by mandating the withdrawal of many basic social services for undocumented non-citizens.⁹⁰

Perhaps we have yet to learn the lessons of the Alien Land Laws and the internment of Japanese Americans because as George Santayana said, "those who cannot remember the past are condemned to repeat it."⁹¹ It is only through willful and selective amnesia that highly formalistic and abstract arguments about "reverse racism" and "color blindness" can achieve even the slightest plausibility. There is an important difference between acknowledging the burdens of history and ignoring them, between recognizing and seeking to remedy the harms of racism and pretending that racism no longer exists. The history of the Alien Land Laws and the internment of Japanese Americans may not only be a lesson about the dangers of overzealous wartime hysteria and racial scapegoating. It may also be a lesson that long before World War II loomed on the horizon, our legal system, from the U.S. Supreme Court to the U.S. Congress to various state legislatures and courts, vigorously produced and upheld laws that distributed power and resources—from the ability to own agricultural land to the ability to become a naturalized citizen—on an invidiously racial basis. The experience of the Alien Land Laws reveals the deep moral indeterminacy of our legal and political structures, including such foundational concepts as "private property" and "freedom of contract," as they have been applied disadvantageously at many different times and places to

⁸⁸ See *id.* (reporting that as of 1990, only six of over 20,000 Haitian boat persons had been granted asylum); Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 SMU L. REV. 189 (1994); see also *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (upholding return of Haitians seeking refuge from political violence without determining whether they might be entitled to refugee status with the United States); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994).

⁸⁹ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); see also The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

⁹⁰ See Linda S. Bosniak, *Undocumented Immigrants and the National Imagination*, in *THE LATINO/A CONDITION: A CRITICAL READER* 99 (Richard Delgado & Jean Stefancic eds., 1998); Kevin R. Johnson, *Immigration Politics, Popular Democracy, and California's Proposition 187*, in *THE LATINO/A CONDITION: A CRITICAL READER* 110 (Richard Delgado & Jean Stefancic eds., 1998).

⁹¹ George Santayana, *The Life of Reason*, quoted in *FAMILIAR QUOTATIONS* 588 (Justin Kaplan ed., 1992).

different racial and ethnic groups in our history. By confronting that indeterminacy squarely, that is, acknowledging how apparently neutral forms and legal rules may at times carry terrible political freight, we are enabled to critique, judge and indeed, learn from our complex, rich, but very troubled past of race relations within the United States.