

**COPING WITH A NEW “YELLOW PERIL”:
JAPANESE IMMIGRATION, THE GENTLEMEN’S AGREEMENT,
AND THE COMING OF WORLD WAR II**

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I.	INTRODUCTION.....	1409
II.	EARLY OPPOSITION TO IMMIGRATION IN A CONTINENT OF IMMIGRANTS	1412
III.	HOSTILITY TO IMMIGRATION FROM THE REVOLUTION TO THE CIVIL WAR	1415
IV.	HOSTILITY TO EUROPEAN IMMIGRANTS, 1880–1924	1420
V.	EAST ASIAN IMMIGRATION	1421
VI.	THE NEW YELLOW PERIL: JAPANESE IMMIGRATION.....	1426
VII.	THE RISE OF ANTI-JAPANESE SENTIMENT, SCHOOL SEGREGATION IN SAN FRANCISCO, AND PRESIDENT ROOSEVELT	1432
VIII.	TOWARD RESTRICTION AND EXCLUSION.....	1444
IX.	THE DIPLOMATIC IMPACT OF THE BAN ON JAPANESE IMMIGRATION	1446
X.	THE ULTIMATE COSTS OF ANTI-JAPANESE POLICY.....	1451

I. INTRODUCTION

Immigration, both legal and illegal, has been a divisive political issue in the United States for the last two decades.¹ This is hardly a new

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phenomenon, although many commentators and politicians seem oblivious to the nation's long history of hostility to newcomers, especially those who are "different" in some way. The irony of this, of course, is that the United States is a nation of immigrants with greater religious and ethnic diversity than any other nation.²

An understanding of the periodic movements against immigration puts the current debates in perspective. This history also illustrates that sometimes the consequences of hostility to immigration can have long-reaching effects. This Article focuses on the movement to stop Japanese immigration a century ago, leading to the Gentlemen's Agreement of 1908.³ Particularly important were discriminatory state laws and court decisions, as well as aggressive and racist rhetoric by state officials, which undermined American foreign policy. In the early 20th century, when California went out of its way to persecute Japanese immigrants and their American-born children, the *Hartford Times* [Connecticut] quipped that "of the two, it might be cheaper to go to war with California than with Japan."⁴ In fact, the myriad of anti-Japanese laws passed in California and elsewhere,⁵ combined with America's insulting federal policy

¹ Immigration reform was accomplished with the bipartisan Simpson-Mazolli Act of 1986, which depoliticized immigration for about ten years. Immigration issues reemerged in the 1990s as a huge political issue. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

² See DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: 2012 tbl. 3 (2014), available at <http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2012/LPR/table3d.xls>. Between 2003 and 2012 about ten million people, from more than 200 countries—virtually every country in the world—moved to the United States. *Id.*

³ There is no formal or official text of this agreement. See Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States, Part I*, 37 POL. SCI. Q. 605, 631 (1922). The best early statement of it can be found in correspondence from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes. See 65 CONG. REC. 6073–74 (1924). In 1939, the State Department published 80 pages of documents on United States-Japanese relations from 1924 that included most of the memoranda that constituted the agreement of 1908. DEP'T OF STATE, *Japan: Restriction of Japanese Immigration by Act of Congress, and the Abrogation of the Gentlemen's Agreement*, in 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1924 at 333–421 (1939), available at <http://images.library.wisc.edu/FRUS/EFacs/1924v02/reference/frus.frus1924v02.i0011.pdf>. The best place to start in the study of the issue is ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 31–45 (1962) [hereinafter *POLITICS OF PREJUDICE*].

⁴ ALLAN R. BOSWORTH, *AMERICA'S CONCENTRATION CAMPS* 38 (1967).

⁵ For example, all three Pacific coast states as well as Arizona and Idaho attempted to prevent Japanese immigrants from owning land or engaging in certain businesses. See generally Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7 (1947). On access to professions and business, see *In re Takuji Yamashita*, 70 P. 482 (Wash. 1902) (denying an otherwise qualified applicant the right to practice law in Washington State on the grounds that Japanese born immigrants could not be citizens of the United States, and the State of Washington made

on Japanese immigration, starting with the Gentlemen’s Agreement of 1908, and culminating with the virtual ban on Japanese immigration after 1924,⁶ helped set the stage for the ultimate collapse of United States-Japanese relations in the 1930s and the war with Japan from 1941 to 1945. As the United States celebrates the 70th anniversary of the end of World War II, it is worth considering whether our irrational and racist immigration policies helped lead to the carnage of the Pacific theater in the War. We might further consider how state laws that are overtly hostile to immigrants affect foreign policy and national security, which constitutionally should be entirely in the hands of the federal government.

Most of this Article focuses on Japanese immigration and the Gentlemen’s Agreement of 1908. However, Sections I through IV offer brief histories of hostility to immigration in earlier periods. Section I offers a brief examination of hostility to immigration in the colonial period. Section II takes us from the Revolution to the end of the Civil War. Section III offers a very brief look at the growing hostility to immigration from southern and eastern Europe and from the Middle East in the period of mass immigration, from 1880 to 1924, when the United States did its best to close off immigration from everywhere but western Europe. This section briefly notes the catastrophic human costs of this policy, which prevented refugees from Nazism finding sanctuary in the United States in the 1930s and early 1940s. From Section IV to the end of this Article I look at immigration from China and Japan, focusing most of my attention in Sections V through IX on the process of restricting and ending Japanese immigration to the United States. While Americans focus on a crisis of immigration today, this Article reminds us that hostility to immigration

citizenship a prerequisite for admission to the bar; not all states had such a requirement); see also *In re Hong Yen Chang*, 24 P. 156 (Cal. 1890) (stating that California would not admit a Chinese immigrant to the bar even though he had been admitted to practice in New York). In 1943, California also prohibited Japanese immigrants from obtaining commercial fishing licenses. See *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948) (overturning California law denying commercial fishing licenses to “persons ineligible for citizenship,” which applied almost entirely to Japanese born aliens). The State of Washington prohibited aliens who had not declared their intention to become citizens—which meant Asians who could not become citizens—from owning firearms, obtaining hunting licenses, becoming public school teachers, or engaging in commercial fishing. For other discriminatory laws aimed at Japanese and Chinese immigrants, see PAULI MURRAY, *STATES’ LAW ON RACE AND COLOR* (1951).

⁶ In 1924, the United States set quotas on foreign immigrants. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952). The quota for Japanese immigrants was “zero”—that is no new immigrants could come into the United States from Japan. However, the law did allow wives, children, and parents of American residents and citizens to enter the country. From 1924 until 1941, a total of about 6,300 Japanese entered the United States. This contrasts with the 8,801 Japanese immigrants who entered just in the year 1924, before the quota system went into effect, or the 30,226 who entered the year before the Gentlemen’s Agreement went into effect. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957*, at 58 (1960) [hereinafter *HISTORICAL STATISTICS*], available at https://fraser.stlouisfed.org/docs/publications/histstatus/hstat_1957_cen_1957.pdf.

is not new, but it has a long history. Indeed, this Article suggests that hostility to immigrants is as American as apple pie—but, sadly, it is a pie made with the classic American crab apple.

II. EARLY OPPOSITION TO IMMIGRATION IN A CONTINENT OF IMMIGRANTS

One of the earliest recorded complaints about new immigrants to America is the outburst that Governor William Bradford of the Plymouth Colony recorded in his diary in 1642. Bradford complained that the population was being corrupted by recent immigrants who were “wicked persons and profane people,” who had “so quickly come over into this land and mix[ed] themselves amongst” the “religious men” who “began” the colony and “came for religion’s sake.”⁷

Bradford was responding to the recent execution for bestiality of Thomas Granger, a 16- or 17-year-old servant.⁸ When asked where he learned this immoral behavior, Granger “said he was taught it by another that had heard of such things from some in England when he was there, and they kept cattle together.”⁹ Thus, Bradford blamed Granger’s fatal deviant behavior on recent immigrants who had corrupted the young teenager.¹⁰ Bradford also noted that another young man who had recently been executed for sodomy “confessed he had long used it in old England.”¹¹ Bradford concluded that this illustrated how even “one wicked person may infect many” and urged residents to be careful of “what servants they bring into their families.”¹²

Bradford explained that the wrong kind of people were coming to the colony, in part because there was a shortage of labor and because many settlers, in desperate need of farm hands and servants, “were glad to take such as they could,” without regard to the religiosity or character of the people they hired.¹³ He also observed that, because “so many godly disposed persons” were “willing to come into these parts,” some men in England “began to make a trade of it, to transport passengers and their goods, and hired ships for that

⁷ WILLIAM BRADFORD, OF PLYMOUTH PLANTATION 1620–1647, at 321 (Samuel Eliot Morison ed., 1952).

⁸ Thomas Granger was tried and executed after he was “detected of buggery, and indicted for the same, with a mare, a cow, two goats, five sheep, two calves, and a turkey.” *Id.* at 320. Morison’s edition modernizes punctuation and spelling. For an exact transcript of Bradford’s diary, see BRADFORD’S HISTORY “OF PLIMOTH PLANTATION” 474 (1898), available at http://faculty.gordon.edu/hu/bi/ted_hildebrandt/nereligioushistory/bradford-plimoth/bradford-plymouthplantation.pdf.

⁹ OF PLYMOUTH PLANTATION 1620–1647, *supra* note 7, at 320–21.

¹⁰ *Id.*

¹¹ *Id.* at 321.

¹² *Id.*

¹³ *Id.*

end.”¹⁴ But once these businesses were started, the entrepreneurs, “to make up their freight and advance their profit, cared not who the persons were” they transported to Plymouth, as long as “they had money to pay them.”¹⁵ “And by this means the country became pestered with many unworthy persons who, being come over, crept into one place or other.”¹⁶

Thus, as early as 1642, authorities in the Plymouth colony blamed social problems on unwanted immigrants: in Granger’s case, a fellow Englishman whose religious convictions and personal behavior were not exactly in tune with the founders of the colony. The source of these dangerous aliens was capitalist entrepreneurs who brought over the “wrong” kind of immigrants because it was profitable to do. But, the problem was also caused by local residents, who were otherwise pious and moral citizens, but who were nevertheless willing to hire laborers without regard to their provenance or their religious values.¹⁷ As Bradford noted in his diary, the desire to come to America, the profits from transporting them, and the willingness of upright citizens to hire these undesirable aliens were, in Bradford’s mind, combining to destroy the moral fiber of the new colony.¹⁸

Bradford was not the only colonial official to oppose the immigration of strangers. In the Dutch colony of New Netherland (what is today New York), Governor-General Petrus Stuyvesant persecuted Quakers, Jews, and Lutherans, persistently arguing that ethnic and religious diversity would undermine the stability of the community.¹⁹ Officials of the Dutch West Indies Company, who were based in Holland, would not allow Stuyvesant to expel the Quakers and Jews, but they did support his decision to deport a Lutheran minister.²⁰ The leaders of the colony believed that a Lutheran minister in New Netherland “would tend to the injury of our [Dutch Reformed] church, the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 541. This of course resembles modern America where otherwise law abiding citizens (as well as citizens less scrupulous about legalities) hire undocumented aliens. See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS*, 177 (2007) (“[T]he ordinary law-abiding citizen does not consider the employment of undocumented workers to be truly criminal conduct. Many U.S. citizens, including several otherwise upstanding nominees for high-level cabinet positions, knowingly hired undocumented immigrants.”).

¹⁸ OF PLYMOUTH PLANTATION 1620–1647, *supra* note 7, at 320–21.

¹⁹ Paul Finkelman, *Toleration and Diversity in New Netherland and the Duke’s Colony: The Roots of America’s First Disestablishment*, in *NO ESTABLISHMENT OF RELIGION: AMERICA’S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY* 125, 131–37 (T. Jeremy Gunn & John Witte, Jr. eds., 2012) [hereinafter Finkelman, *Toleration and Diversity*], available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2209182_code547065.pdf?abstractid=2169919&mirid=1.

²⁰ *Id.*

diminution of hearers of the Word of God, and the increase of dissensions.”²¹ They feared it would “pave the way for other sects, so that in time our place would become a receptacle for all sorts of heretics and fanatics.”²² They believed that Quakers, Jews, Lutherans, and anyone else who was not Dutch Reformed, or at least Dutch, was a threat to the peace and stability of the colony.²³ In the end, the Directors of the West Indies Company allowed these foreigners to remain in New Netherland, because the colony needed settlers, even if they were not Dutch and had aberrant religious views.²⁴ Thus, the New Netherland colony became the most diverse and polyglot settlement in the New World, but that was over the objections of the Dutch leaders residing in the colony, who generally opposed all “foreign” immigration.²⁵

Between the British acquisition of the New Netherland colony in 1664 and the eve of the American Revolution, there was substantial voluntary immigration into the colonies that would make up the United States.²⁶ Most immigrants came from Great Britain (England, Wales, Scotland, and Ireland), and most were Protestants. There were, of course, many people of Dutch ancestry in what became New York. The largest non-British immigration was from Germany. Non-British immigrants were generally allowed free access to the colonies, birthright citizenship was generally accorded to their children, and, after 1740, naturalization was possible for non-British immigrants who were not Catholic.²⁷ This law encouraged non-British immigrants to come to

²¹ 1 ECCLESIASTICAL RECORDS: STATE OF NEW YORK 317 (Hugh Hastings ed., 1901) (quoting correspondence from Revs. Megapolensis and Drisius to the Classis of Amsterdam dated Oct. 6, 1653), available at <https://archive.org/stream/ecclesiasticalres01newy#page/316/mode/2up>.

²² *Id.*

²³ Their fears were both religious and ethnic. Thus, the New Netherland officials were unconcerned when a few Dutch Jews came to the colony, apparently because their connections to Holland neutralized any threat posed by their religion. But, the officials were horrified when Portuguese Jews arrived. See Finkelman, *Toleration and Diversity*, *supra* note 19, at 139.

²⁴ Paul Finkelman, “A Land That Needs People for Its Increase”: *How the Jews Won the Right To Remain in New Netherland*, in *NEW ESSAYS IN AMERICAN JEWISH HISTORY* 19 (Pamela S. Nadell et al. eds., 2010).

²⁵ *Id.*

²⁶ See *Assessing the Slave Trade: Estimates*, VOYAGES: THE TRANS-ATLANTIC SLAVE TRADE DATABASE, <http://www.slavevoyages.org/tast/assessment/estimates.faces> (last visited Apr. 10, 2015). There was also, of course, substantial involuntary immigration for African slaves. *Id.* From 1619 to 1775, traders brought about 125,000 slaves to what became the 13 colonies. *Id.* This included about 104,000 directly from African and about 20,000 who were brought from the Caribbean islands. *Id.* This is based on the exhaustive international research project, which has examined records (especially tax and shipping records) in Europe and America to map the African slave trade. See *id.* I thank Professor David Richardson at the University of Hull in the United Kingdom for help with this data.

²⁷ Naturalization Act, 1739, 13 Geo. 3, c. 7 (Eng.) (“An Act for naturalizing such foreign Protestants, and others therein mentioned, as are settled or shall settle, in any of his Majesty’s

the colonies and helped set the stage for a liberal immigration policy during and immediately after the Revolution.²⁸

III. HOSTILITY TO IMMIGRATION FROM THE REVOLUTION TO THE CIVIL WAR

Revolutionary America welcomed freedom-seeking immigrants. Indeed, one of the specific complaints against King George III listed in the Declaration of Independence was: “He has endeavored to prevent the population of these states; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.”²⁹ Europeans who came to support the patriot cause were welcomed during the War, and many, such as Marquis de Lafayette, were granted citizenship.³⁰ In passing, it is worth noting that the current hostility to allowing citizenship for millions of immigrants to the United States violates the principles of the American Revolution and the principle of the patriots who participated in the first political “tea party” in America, in Boston Harbor in December 1773.

After the Revolution, the new nation was initially receptive to immigration as well.³¹ Before the adoption of the new Constitution, the states passed their own naturalization laws. Except for bans on the importation of African slaves,³² none of the new states passed any limitations on immigration. The new Constitution gave Congress the power to regulate naturalization but prohibited Congress from passing any laws restricting immigration until 1808.³³ While Congress could not ban or even limit immigration until 1808, it

Colonies in America”). The “others” mentioned and allowed to be naturalized were Quakers and Jews.

²⁸ See generally JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 74–105, 173–247 (1978); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 54–59, 71–76 (1997).

²⁹ THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

³⁰ For background information about the Marquis de Lafayette, see Stanley J. Idzerda, *Lafayette, Marquis de*, AMERICAN NATIONAL BIOGRAPHY, available at <http://www.anb.org/articles/03/03-00266.html>.

³¹ SMITH, *supra* note 28, at 92–98.

³² See Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 433–67 (2009) [hereinafter Finkelman, *The American Suppression*].

³³ U.S. CONST. art. I, § 9, cl. 1. “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” *Id.* This clause is correctly known as the “Slave Trade” clause, and was at the heart of the most vitriolic debates at the Constitutional Convention, because through it the Constitution sanctioned the African slave trade. See PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 22–32 (2014). The clause prevented the federal government from ending the African slave trade until

could regulate naturalization³⁴ and the status of immigrants in the nation. In 1798, Congress passed a series of “alien” laws to make it more difficult for newcomers to become citizens and easier for the national government to expel them.³⁵ Setting a pattern that would be repeated in the future, the Federalists in Congress believed that immigrants were a threat to national security because too many were sympathetic to France during the Napoleonic Wars.³⁶ In addition, most new citizens seemed to be gravitating to the party of Thomas Jefferson, and thus slowing down naturalization was seen as a way of protecting Federalist political power.³⁷ Followers of Jefferson were correct in believing that “the Federalists were conniving to use citizenship laws to deny their opponents [the Jeffersonsonians] access to office.”³⁸ From the 1820s to the Civil War, there were various waves of anti-immigration sentiment. In the 1820s, New York attempted to regulate the arrival of poor immigrants—mostly Irish Catholics—through a registration process.³⁹ When the Supreme Court of the United States upheld this statute in *Mayor of New York v. Miln*,⁴⁰ the majority opinion noted that it was “obviously passed with a view to prevent her citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves.”⁴¹ In *Miln*, the Court developed the concept of “state police powers,” which allowed states to protect themselves from undesirable migrants, whether they were poor Irish immigrants coming to New York or free blacks⁴² entering the slave state of South Carolina.⁴³ Thus, Justice Philip P. Barbour concluded,

1808. *Id.* But the clause also prevented the national government from regulating immigration (“migration”) until 1808, and left that entirely to the states. *Id.*

³⁴ U.S. CONST. art. 1, § 8, cl. 1, 4 (“The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . .”).

³⁵ Act of June 18, 1798, ch. 54, 1 Stat. 566 (1798) (establishing a uniform rule of naturalization); Act of June 25, 1798, ch. 58, 1 Stat. 570 (1798) (concerning aliens); Act of July 6, 1798, ch. 66, 1 Stat. 577 (1798) (concerning enemy aliens).

³⁶ See generally JAMES MORTON SMITH, FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1966).

³⁷ *Id.*; SMITH, *supra* note 28, at 160–63.

³⁸ SMITH, *supra* note 28, at 161.

³⁹ *Mayor of New York v. Miln*, 36 U.S. 102, 130 (1837) (referencing the “act concerning passengers in vessels arriving in the port of New York”).

⁴⁰ 36 U.S. 102 (1837).

⁴¹ *Id.* at 141.

⁴² For a discussion of the slavery aspects of this case, see Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 266, 275–76 (2000).

⁴³ Much of the argument of counsel in this case centered on the right of South Carolina and other slave states to prohibit free blacks from moving to, or even entering, their jurisdiction. The arguments focused on what were known as Black Seamen’s Laws, which allowed for the temporary incarceration of free black sailors whose ships docked in slave states. While clearly a

We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease.⁴⁴

Thus, regulating poor immigrants—especially Irish Catholics—was the moral equivalent of preventing a “pestilence” from coming into the country.

A decade later, at the beginning of a new wave of anti-immigrant political activity, the Court overturned laws from New York and Massachusetts, which taxed immigrants, on the grounds that these taxes violated the dormant powers of Congress.⁴⁵ However, the laws themselves illustrated the growing hostility to immigrants, especially Catholics from Ireland and Germany. In the 1840s, opponents of Catholic immigration organized the North American Party, which was also called the American Republican Party and later called the Native American Party. In 1844, the party’s candidates won the mayor’s races in New York and Philadelphia, and won a few seats in Congress, but also hurt some politicians like Millard Fillmore, who probably lost the governor’s race in New York because of his support for the party.⁴⁶ In the mid-1850s, the anti-immigrant and anti-Catholic American Party, more commonly known as the Know-Nothing Party, had fleeting success, sending more than 50 candidates to Congress in 1854 (including the entire Massachusetts delegation); taking control of some state legislatures (including 397 out of 400 seats in the Massachusetts assembly); electing governors in Massachusetts, Maine, and Pennsylvania; and winning races for mayor in Boston, Philadelphia, and San Francisco.⁴⁷ In 1856, the former president Millard Fillmore, running on the Know-Nothing Party, carried

violation of the Commerce Clause (U.S. CONST. art. I, § I, cl. 3), federal courts ducked the issue because it was too politically sensitive for them to rule on it. *See, e.g.,* *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D. S.C. 1823) (No. 4366). For a discussion of the “Black Seamen’s Laws,” see Paul Finkelman, *States’ Rights North and South in Antebellum America*, in *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH* 125, 125–58 (Kermit L. Hall & James W. Ely, Jr. eds., 1989).

⁴⁴ *Miln*, 36 U.S. at 142–43.

⁴⁵ *See* *Smith v. Turner*, 48 U.S. 283 (1849).

⁴⁶ PAUL FINKELMAN, *MILLARD FILLMORE* 11 (2011).

⁴⁷ SMITH, *supra* note 28, at 210–11. The literature on the Know-Nothings and nativists is rich. *See generally* DAVID H. BENNETT, *THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* (1988); TYLER ANBINDER, *NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S* (1992) (discussing the Know-Nothings); Stephen E. Maizlish, *The Meaning of Nativism and the Crisis of the Union: The Know-Nothing Movement in the Antebellum North*, in *ESSAYS ON AMERICAN ANTEBELLUM POLITICS, 1840–1860*, at 166 (Stephen E. Maizlish & John J. Kushma ed., 1982).

one state, Maryland, as the anti-immigrant and anti-Catholic candidate for president, but that was the end of the movement.⁴⁸

Despite the persistent hostility to immigrants—especially towards those who were different because of their faith, language, or appearance—most Americans tolerated or even welcomed immigrants. They provided inexpensive labor and helped to populate the large and mostly empty nation in the 19th century. While New York and Massachusetts tried to limit immigration (with virtually no success), some midwestern and western states tried to encourage immigrants to populate their empty lands.⁴⁹ The politics of immigration mattered throughout the 1850s, as both major parties—the Democrats and the new Republican Party—competed for the votes of the foreign born, as the Know-Nothings ran on their anti-Catholic and anti-immigration platform. After the demise of the Know-Nothings, most supporters of that party migrated to the Republican Party, where they unsuccessfully pushed their anti-immigrant agenda.⁵⁰ Most Republican leaders rejected such xenophobia as impolitic and contrary to the emerging Republican views about equality for all Americans.⁵¹ In 1855, with the Know-Nothing Party at its apex, Abraham Lincoln, the leader of the new Republican Party in Illinois, wrote a friend:

I am not a Know-Nothing. That is certain. How could I be? How can any one who abhors the oppression of negroes, be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that “*all men are created equal.*” We now practically read it “*all men are created equal, except negroes.*” When the Know-Nothings get control, it will read “*all men are created equal, except negroes, and foreigners, and catholics.*” When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy.⁵²

Five years later, Lincoln would be elected president and be forced to lead the nation in an enormously bloody and expensive war to preserve the

⁴⁸ MILLARD FILLMORE, *supra* note 46, at 128, 133–34.

⁴⁹ See LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 2–4 (1995).

⁵⁰ William E. Gienapp, *Nativism and the Creation of a Republican Majority in the North Before the Civil War*, 72 J. AM. HIST. 529, 531 (1985); see also WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1856* (1987).

⁵¹ Angela M. Alexander, “*All Men are Created Equal*”: *Abraham Lincoln, Immigration, and Ethnicity*, 3 ALB. GOV’T L. REV. 803, 804 (2010).

⁵² *Id.* (citing Abraham Lincoln to Joshua Speed, Aug. 24, 1855, in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (Roy P. Basler et al. eds., 1953)).

Constitution and the nation. His sympathy towards immigrants paid off, as more than a half a million foreign-born men would serve in the U.S. Army during the Civil War, including more than 200,000 from Germany and perhaps 150,000 from Ireland.⁵³ There were numerous German and Irish brigades and regiments, as well as units made up of immigrants from Switzerland, Italy, Poland, and Norway.⁵⁴ A number of prominent German immigrants served as generals, including Major Generals Franz Sigel and Carl Schurz.⁵⁵ Reflecting the diversity of America’s immigrant culture and the openness of the Lincoln administration, there were also a number of immigrant Jewish generals, including Frederick Knefler, Edward Selig Salomon, and Frederick C. Salomon.⁵⁶ Recognizing the recent immigration of Jews from central Europe,

⁵³ PORTLAND STATE UNIV., IMMIGRANTS IN THE UNION AND CONFEDERATE ARMY DURING THE CIVIL WAR (n.d.), available at http://www.upa.pdx.edu/IMS/currentprojects/TAHV3/Content/PDFs/Immigrant_Soldiers_Civil_War.pdf; *Irish-Americans in the Civil War*, CIVILWARHOME.COM, <http://civilwarhome.com/irish.html> (last visited Apr. 10, 2015); *Ethic* [sic] *Composition of Civil War Forces*, CIVILWARHOME.COM, <http://civilwarhome.com/ethnic.html> (last visited Apr. 10, 2015).

⁵⁴ See generally MARTIN W. ÖFELE, TRUE SONS OF THE REPUBLIC: EUROPEAN IMMIGRANTS IN THE UNION ARMY (2008); GERMANS IN THE CIVIL WAR: THE LETTERS THEY WROTE HOME (Walter D. Kamphoefner & Wolfgang Helbich eds., 2006). For a new discussion of some of the motivations of German volunteers, see also Mischa Honeck, *Men of Principle: Gender and the German American War for the Union*, 5 J. CIV. WAR ERA 38 (2015).

⁵⁵ See HANS L. TREFOUSSE, CARL SCHURZ: A BIOGRAPHY (1982). Schurz came to the United States in 1852 and was chairman of the Wisconsin delegation at the Republican National Convention in 1860. He briefly served as U.S. Ambassador to Spain before returning in 1862 to serve as a general, although his military career was undistinguished. He would later be a U.S. Senator and Secretary of the Interior. Sigel, who came to the United States in 1852 and had been an officer in Germany, was even less successful as a major general than Schurz. However, under the slogan, “I goes to fight mit Sigel,” he was very successful at recruiting Germans to join the army at the beginning of the war. His success even led to one of the more interesting songs of the war. 97TH REGIMENTAL STRING BAND, I GOES TO FIGHT MIT SIGEL, https://www.youtube.com/watch?v=IUSJA-vtg_s (last visited Apr. 10, 2015). On Sigel’s life and wartime career, see, STEPHEN D. ENGLE, YANKEE DUTCHMAN: THE LIFE OF FRANZ SIGEL 83 (1999).

⁵⁶ BERTRAM WALLACE KORN, AMERICAN JEWRY AND THE CIVIL WAR (1951). Knefler was a Hungarian immigrant who arrived in the United States in 1850 after fighting, at age 15, in the Revolution of 1848. He enlisted in an Indiana regiment and gradually rose to brevet brigadier general in March 1865. *Id.* See generally ROBERT PERLMAN, BRIDGING THREE WORLDS: HUNGARIAN-JEWISH AMERICANS, 1848–1914 (1991). Edward S. Salomon came from Germany in 1856 and in 1861, at age 24, was elected as an alderman in Chicago. He was commissioned in Colonel Friedrich Hecker’s virtually all-German 24th Illinois Infantry Regiment, displayed great gallantry at Gettysburg, and rose to brigadier general. After the war, he was the governor of Washington Territory. Frederick Charles Salomon (no relation to Edward S.) left Germany after the 1848 Revolution, enlisted in 1861 as a captain under Franz Sigel, and was made a brigadier general in 1862, and mustered out as brevet major general in 1865. *Major General Frederick Salomon*, TWENTY-EIGHTH WIS. VOLUNTEER INFANTRY, <http://www.28thwisconsin.com/salomon.html> (last visited Apr. 11, 2015). He had one brother, Charles Eberhard Salomon, who was made a general after the war ended while his other brother, Edward Salomon (not to be confused with Edward S. Salomon) was governor of Wisconsin during the War. See *Wisconsin’s*

the Lincoln administration supported a change in federal law that allowed for the appointment of Jewish clergy to serve as military chaplains.⁵⁷

IV. HOSTILITY TO EUROPEAN IMMIGRANTS, 1880–1924

Starting in the 1880s, there was a massive wave of immigration from Scandinavia, eastern and southern Europe, and the Ottoman Empire, which dramatically changed the nature of American ethnic culture. These new immigrants stimulated a rise in anti-Catholic sentiment, anti-Semitism, and general hostility to open immigration. From the 1890s on, there would be new movements against immigration, like the American Protective Association, and various attempts to regulate or limit immigration from Ireland, southern and eastern Europe, and the Turkish empire. But, despite the waxing and waning of hostility to European and Middle Eastern immigration, “white”⁵⁸ immigrants from these places poured into the United States until after World War I.⁵⁹ These new immigrants faced no legal disabilities, and most were gradually, although sometimes grudgingly, able to fully participate in American political and economic culture. The Immigration Act of 1924⁶⁰ reduced immigration into the United States, and severely limited immigration from eastern and southern Europe. This law had horrendous and fatal consequences for Jews trying to flee Nazism in the 1930s and 1940s.⁶¹ However, those immigrants and their children from eastern and southern Europe who were able to enter the United States were able to attend public schools, buy property, enter professions, and become citizens.

Thus, when we look at European immigration, it is a mixed bag. Anti-immigrant attitudes and politics burdened some immigrants, especially Irish, Jews, Italians, and Catholics in general. The immigration restrictions in 1924

Salomon Brothers in the Civil War, SONS OF UNION VETERANS OF THE CIVIL WAR, <http://suvvw.org/past/salomon.htm> (last visited Apr. 12, 2015).

⁵⁷ Act of July 17, 1862, ch. 200, 12 Stat. 595 (1862) (defining “the pay and emoluments of certain officers of the Army, and for other purposes”).

⁵⁸ For a discussion of the slippery and not entirely clear definition of “white” in naturalization laws, see IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

⁵⁹ Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952) (an “Act to Limit the Immigration of Aliens into the United States, and for Other Purposes”).

⁶⁰ *Id.*

⁶¹ *United States Policy Toward Jewish Refugees, 1941–1952*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007094> (last updated June 20, 2014); see also *Holocaust*, IMMIGRATION IN AM. (Jan. 16, 2012), <http://immigrationinamerica.org/552-holocaust.html?newsid=552>. The most famous example of this was the ship the *St. Louis*, which was not allowed to land in the United States in 1939. SARAH A. OGLIVIE & SCOTT MILLER, *REFUGE DENIED: THE ST. LOUIS PASSENGERS AND THE HOLOCAUST 3* (2006). Of the 908 Jewish passengers on the ship, at least 254 died in the Holocaust. *Id.* at x, 4; see also *Voyage of the St. Louis*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005267> (last updated June 20, 2014).

led to tragic results in the 1930s and 1940s, when the immigration laws and policies prevented hundreds of thousands of Jewish refugees escaping German anti-Semitism from reaching a safe harbor in the United States. But, at the same time, from the American Revolution to 1924, there had been uninterrupted and mostly open immigration from Europe and the Middle East. These immigrants provided soldiers for American armies. In the mid- and late-19th century, they turned the upper Midwest and Great Plains into farms and provided the labor that built canals, railroads, subways, and factories. From the late-19th century to after World War II, these immigrants provided much of the labor that led to American industrialization. American prosperity after the Civil War was, to a great extent, possible because of the hard work and energy of millions of immigrants⁶²—more than 22 million between 1880 and the outbreak of World War I in 1914.⁶³ A significant number of these immigrants and their children improved their lives, became “Americanized,” and participated in the democratic process and the economy.⁶⁴ Only after World War I did the United States try to limit immigration and to end it, as much as possible, from eastern and southern Europe and most of the rest of the world.

V. EAST ASIAN IMMIGRATION

Until the 1850s, virtually all voluntary immigrants to the United States were from Europe or were of European origin.⁶⁵ In common parlance, they

⁶² Not well studied is the huge amount of wealth that was transferred to the United States during this period. Even poor immigrants brought some money with them.

⁶³ HISTORICAL STATISTICS, *supra* note 6, at 56–57.

⁶⁴ This continues to be the case. Cities in decline in the 21st century are seeking immigrants because they provide economic growth and safer environments. “Immigrants are especially likely to move into the most blighted neighborhoods and spruce them up.” *Rolling Out the Welcome Mat*, *ECONOMIST* (Feb. 7, 2015), <http://www.economist.com/news/united-states/21642226-two-cities-hope-embracing-immigrants-can-reverse-their-decline-rolling-out-welcome>. Indeed, “[s]everal studies suggest that when immigrants arrive, crime goes down, schools improve and shops open up.” *Id.*

⁶⁵ HISTORICAL STATISTICS, *supra* note 6, at 57. Slaves imported from Africa were “immigrants” at one level, although surely unwilling immigrants. After 1808, it was illegal to import slaves into the United States, although a small number of slaves were illegally imported. Finkelman, *The American Suppression*, *supra* note 32, at 432. A small number of free blacks came to the United States in the wake of the Haitian revolution, and a smattering of blacks migrated from the Caribbean to the United States from 1820 to 1860. *Id.* at 439–40. In 1860, the census found just over 7,000 people of Caribbean birth living in the United States, but this figure does not indicate how many were black and how many were white. Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990* (U.S. Census Bureau, Working Paper No. 29, 1999), available at <http://www.census.gov/population/www/documentation/twps0029/tab04.html>.

were “white.”⁶⁶ Americans began trading with China shortly after the Revolution and an occasional Chinese sailor or merchant came to the nation. They were, for the most part, curiosities, strange in their physical appearance, clothing, and manners. They were so few in number that no one was alarmed by their presence. In the first half of the 19th century, a handful of Chinese came to the United States, mostly as sailors on American ships returning from Asia. The federal government recorded fewer than 50 Chinese immigrants and 90 other Asian immigrants before 1849.⁶⁷ In 1850, the census found 758 people of Chinese birth in the country.⁶⁸ Most of the Chinese in the United States in 1850 had recently moved to California, as had tens of thousands of other foreigners, to participate in the California gold rush. Californians initially saw these Chinese as just an unusual, but hard working, component of the massive international gold rush. They were once again seen as curiosities with their exotic religion, dress, hair styles, food, and language. In January 1852, Governor John McDougal of California praised these few Chinese immigrants as “one of the most worthy classes of our newly adopted citizens,” who were well suited to the climate and especially useful for draining the Golden State’s swamps.⁶⁹ But, such views were not long lasting. By the end of the decade the Chinese in California and Oregon were the subject of discriminatory laws and lethal vigilante violence.⁷⁰

The gold rush, the rapid development of a mostly empty state, and massive railroad building created a seemingly insatiable appetite for labor. All this led to a significant rise in Chinese immigration to the west coast. In 1850, there were only 1,135 people of Asian birth living in the United States.⁷¹ In the 1850s, more than 40,000 Chinese came into the country,⁷² and in 1860, there

⁶⁶ When some poor immigrants came to America, they were sometimes perceived as “non-white,” even though physically they were no different than other European immigrants. Irish immigrants were sometimes portrayed as looking like people of African ancestry and sometimes referred to as the “black Irish.” NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 40–59 (1995). Similarly, many white Protestants of British origins believed that Jews were a separate “non-white” race. *See generally* KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS, AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998).

⁶⁷ HISTORICAL STATISTICS, *supra* note 6, at 59.

⁶⁸ Gibson & Lennon, *supra* note 65.

⁶⁹ CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 9 (1994) (quoting GUNTHER BARTH, *BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES, 1850–1870*, at 136 (1964)).

⁷⁰ *See generally* RONALD T. TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1990).

⁷¹ Table 2, *Region of Birth of the Foreign-Born Population: 1850 to 1930 and 1960 to 1990*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/documentation/twps0029/tab02.html> [hereinafter *Table 2*] (last updated Oct. 21, 2011).

⁷² HISTORICAL STATISTICS, *supra* note 6, at 59.

were over 36,000 Chinese nationals in the country.⁷³ This number grew to 64,000 by 1870 and eventually surpassed 107,000 by 1880.⁷⁴ These numbers may undercount the Chinese population, because in this period more than 200,000 Chinese immigrants arrived.⁷⁵ During these three decades, almost all Asians in the United States were from China.⁷⁶ While entrepreneurs and railroad executives in California welcomed this source of cheap labor, the vast majority of Californians and Oregonians came to resent the presence of these apparently strange people whose culture, language, religion, dress, hair style, food—and most of all physical appearance—were so alien to most Americans.

The Chinese on the West Coast soon faced significant discrimination in California, Oregon, Washington, and some other western states.⁷⁷ Laws prevented them from testifying against whites⁷⁸ and other non-Chinese.⁷⁹ In *People v. Hall*, the California Supreme Court upheld the state’s laws prohibiting Chinese from testifying against whites.⁸⁰ After the adoption of the Fourteenth Amendment, these rules gradually disappeared, but courts remained skeptical of the value of Chinese testimony.⁸¹ Thus, in 1880, the Oregon Supreme Court allowed the admission of a dying declaration of a Chinese man,

⁷³ Table 2, *supra* note 71.

⁷⁴ *Id.*

⁷⁵ HISTORICAL STATISTICS, *supra* note 6, at 59.

⁷⁶ Between 1861 and 1882, only 350 Japanese migrated to the United States. *Id.* In the same period, fewer than 450 people immigrated from *all* of the rest of Asia (other than from the Ottoman Empire). *Id.* Most (about 440) came from India. 1 HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT 567–68 (Millennial ed., 2006) [hereinafter HISTORICAL STATISTICS, MILLENNIAL].

⁷⁷ For good histories of this discrimination, see MCCLAIN, *supra* note 68, and SALYER, *supra* note 49.

⁷⁸ California’s Law on Testimony in Court, Act of Apr. 16, 1850, ch. 99, 14, 1850 Cal. Stat. 229, 230, provided that “[n]o black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, a white person.” During the Civil War, the legislature modified this law to allow black testimony, while explicitly prohibiting Chinese testimony against whites with this language: “[n]o Indian, or person having one half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor or against any white person.” Act of Mar. 16, 1863, ch. 68, § 1, 1863 Cal. Stats. 60 *amending* ch. 70, § 14, 1851 Cal. Stat. 114; Amendment to § 14 of the Crimes Act of 1850, ch. 70, § 1, 1863 Cal. Stat. 69. See J.A.C. Grant, *Testimonial Exclusion Because of Race: A Chapter in the History of Intolerance in California*, 17 UCLA L. REV. 192 (1969).

⁷⁹ See *People v. Washington*, 36 Cal. 658 (1869) (holding that Chinese could not testify against blacks).

⁸⁰ See *People v. Hall*, 4 Cal. 399 (1854) (holding that this statute prohibited Chinese from testifying against whites).

⁸¹ See, e.g., *Oregon v. Ah Lee*, 8 Or. 214, 218 (1880). The anti-Chinese racism was complicated by religious prejudice. Because the Chinese were not Christians, many jurists and others believed that their oath on the Bible, “to tell the truth,” had no meaning and would not constrain them from lying.

despite the “heathenish religion of his race[.]”⁸² In 1886, the same court observed that “[e]xperience convinces every one that the testimony of Chinese witnesses is very unreliable, and that they are apt to be actuated by motives that are not honest.”⁸³ Such racism coming from the bench bolstered hostility to Chinese immigration. At the federal level, Chinese immigrants were barred from naturalization,⁸⁴ although under the Fourteenth Amendment, their American-born children were citizens.⁸⁵

Hostility to Chinese immigration culminated in the Chinese Exclusion Act of 1882,⁸⁶ which dramatically reduced Chinese immigration. In 1882, nearly 40,000 Chinese immigrated to the United States.⁸⁷ Only 8,031 came the following year, and two years later, there were only 22 Chinese immigrants.⁸⁸ In the wake of the 1882 law, the growth of the Chinese-born population in the United States began to decline. In 1870, there were over 63,000 Chinese-born residents in the country, and this number grew to 105,000 by 1880.⁸⁹ But the Exclusion Act of 1882, combined with deaths and return migration, changed this. Between 1880 and 1884, more than 63,000 Chinese came to the United States,⁹⁰ but in 1890, there were just 109,000 Chinese in the country, only 4,000 more than ten years earlier.⁹¹ By 1900, the population had declined to 82,000, and by 1910, there were only about 57,900 Chinese-born residents in the United States.⁹² These figures may undercount the Chinese population, as many immigrant Chinese probably avoided any contact with government officials and many people did not list a country origin on their census forms. Nevertheless, it is clear the exclusion led to a dramatic decline in the number of Chinese immigrants entering the country. Despite its name, the law did not

⁸² *Id.*

⁸³ *State v. Mah Jim*, 13 Or. 235, 236 (1886) (ordering a new trial to allow for a more extensive cross-examination of a Chinese witness in the murder prosecution of another Chinese).

⁸⁴ *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795); Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 256 (allowing whites and Africans and people of African ancestry to become citizens); 1 Rev. Stat. 378, 380 (1878), § 2169 (“The provisions of this Title shall apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent.”).

⁸⁵ U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

⁸⁶ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Magnuson Act of 1943, ch. 344, 57 Stat. 600. *See generally* SALYER, *supra* note 49; MCCLAIN, *supra* note 69.

⁸⁷ HISTORICAL STATISTICS, *supra* note 6, at 59.

⁸⁸ *Id.*

⁸⁹ Gibson & Lennon, *supra* note 65; Table 2, *supra* note 71.

⁹⁰ HISTORICAL STATISTICS, *supra* note 6, at 59.

⁹¹ Gibson & Lennon, *supra* note 65; Table 2, *supra* note 71.

⁹² Gibson & Lennon, *supra* note 65; Table 2, *supra* note 71.

exclude all Chinese immigrants. Rather, it specifically banned the immigration of Chinese laborers.⁹³ Chinese merchants, students, and tourists were still allowed to enter the nation, as were the wives and children of Chinese men living in the United States.⁹⁴ This included women who were married in China through proxies and saw their husbands for the first time when they arrived in the United States.⁹⁵

In the end the Exclusion Act was more porous than its supporters expected, which only tended to infuriate opponents of Asian immigration. Thus, another 50,000 Chinese would enter the U.S. from 1885 until the beginning of World War I, but this was fewer than the number who arrived just in the two years of 1881 and 1882.⁹⁶ Congress amended the law a number of times to limit immigration and to prevent some Chinese aliens from returning to the United States if they left the country.⁹⁷ The Supreme Court upheld these regulations in various cases,⁹⁸ although occasionally the Court required a certain level of fairness in their application.⁹⁹

⁹³ Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58, 58–59 (1882) (“That from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States.”).

⁹⁴ *Id.* § 6, 22 Stat. at 60 (“That in order to the faithful execution of articles one and two of the treaty in this act before mentioned, every Chinese person other than a laborer who may be entitled by said treaty and this act to come within the United States, and who shall be about to come to the United States, shall be identified as so entitled by the Chinese Government in each case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the certificate is issued and that such person is entitled conformably to the treaty in this act mentioned to come within the United States. Such certificate shall be prima-facie evidence of the fact set forth therein, and shall be produced to the collector of customs, or his deputy, of the port in the district in the United States at which the person named therein shall arrive.”).

⁹⁵ From 1884 (the year the Act was fully implemented) until 1902, Chinese immigration into the country averaged 2,000 people a year. HISTORICAL STATISTICS, *supra* note 6, at 58–59. In the 20 years from 1863 to 1882 (the last year of open migration from China) about 11,000 Chinese per year (more than 220,000 overall) came to the United States. *Id.* at 567–68.

⁹⁶ BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES FROM COLONIAL TIMES TO 1957, at 59–60 (1960).

⁹⁷ Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476 (“An Act to Prohibit the Coming of Chinese Laborers to the United States”); Geary Act of 1892, ch. 60, 27 Stat. 25 (“An Act to Prohibit the Coming of Chinese Persons into the United States”).

⁹⁸ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (also known as the Chinese Exclusion Case); *see also* *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (upholding the power of Congress to deport aliens who were of an “undesirable” race). *See generally* Gabriel J.

VI. THE NEW YELLOW PERIL: JAPANESE IMMIGRATION

In 1882, when Congress passed the Exclusion Act, almost all Asian immigration was from China. Between 1860 and 1882, fewer than 350 Japanese migrated to the United States, although the census in 1880 actually found 401 Japanese born residents.¹⁰⁰ Some of these were probably students who were not immigrants.¹⁰¹ At the time, it was illegal for Japanese to emigrate.¹⁰² That changed in the mid-1880s. The number of Japanese immigrants grew from 49 in 1885 to 194 in 1886.¹⁰³ In 1890, more than 1,700 Japanese came to the United States, and after that, Japanese immigration grew rapidly to over 12,000 in 1900 and 30,000 by 1907.¹⁰⁴

Most of the pre-1882 Chinese immigrants had been rural peasants. They were largely illiterate and impoverished. They readily accepted work as agricultural laborers or building railroads. But many Japanese were literate skilled farmers. They came to the United States expecting to own land and prosper. In California they almost immediately faced hostility because they were not the kind of immigrants that employers wanted. Meanwhile, their racial distinctness made them targets of discrimination. They were seen like the Chinese, except worse. The United States Industrial Commission, for example, declared in 1901 that the Japanese “are more servile than the Chinese, but less obedient and far less desirable. They have most of the vices of the Chinese, but none of the virtues. They underbid the Chinese in everything, and are as a class

Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (concluding that the Plenary Power doctrine as applied to race is anachronistic).

⁹⁹ Chew Heong v. United States, 112 U.S. 536 (1884).

¹⁰⁰ HISTORICAL STATISTICS, *supra* note 6, at 59–60; Gibson & Lennon, *supra* note 65; Table 2, *supra* note 71.

¹⁰¹ For example, in 1876, Kozu Senzaburo was allowed to come to the United States to study law at Albany Law School. *Minorities*, ALB. L. SCH., <http://www.albanylaw.edu/about/history/Pages/Minorities.aspx> (last visited Apr. 10, 2015). He would return to Japan in 1878. *Id.* That year, Kentarō Kaneko, later Baron Kaneko, graduated from Harvard College two years ahead of Theodore Roosevelt. Kaneko would return to Japan with a position in the Imperial University in Tokyo until he entered the government. In 1900, he would become the Japanese Minister of Justice. I have used the western convention in Japanese names, putting the family name Kaneko after his “given name.” In Japan he would have been Kaneko Kentarō. See Ken Gewertz, *History of the Japanese at Harvard*, HARV. U. GAZETTE, <http://news.harvard.edu/gazette/2004/02.26/11-japan.html> (last visited Apr. 10, 2015).

¹⁰² *Immigration: Japanese*, LIBR. OF CONGRESS, <http://loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/japanese.html> (last visited Apr. 10, 2015).

¹⁰³ HISTORICAL STATISTICS, *supra* note 6, at 58–59.

¹⁰⁴ *Id.* at 58.

tricky, unreliable and dishonest.”¹⁰⁵ Furthermore, there was some level of anger because Californians believed they had stopped East Asian immigration with the 1882 Act, and suddenly, Asians were once again immigrating through San Francisco Bay.

At the time Congress passed the Exclusion Act, Japan did not allow its citizens to freely emigrate,¹⁰⁶ and consequently, there were virtually no Japanese immigrants in the United States. Nor were immigrants coming from Korea, Siam (now Thailand), or any other part of East and Southeast Asia at this time. Thus, immigrants from Japan were not covered by the Chinese Exclusion Act in 1882.¹⁰⁷ When Japan changed its laws to allow its citizens to emigrate, there were still relatively few Japanese immigrants. Japanese immigration was initially slow and did not attract much attention in California until the late-1890s. Hostility to Asian immigrants, especially in California, Oregon, and the new state of Washington continued to focus mainly on the Chinese.¹⁰⁸ Congress tinkered with the Chinese Exclusion Act in the 1880s and 1890s, and in 1902, finally settled the issue by making the Act permanent.¹⁰⁹

By 1890, there were only 2,039 Japanese nationals in the country, but, by 1900, there were more than 24,000, with just over 10,000 of them in California.¹¹⁰ In the next eight years, Japanese emigration to the United States exploded, as 127,000 Japanese entered the country.¹¹¹ Just as Ellis Island proved to be a “Golden Door” for millions of Europeans in this period, San Francisco was very much a Golden Gate beckoning Japanese immigrants.

When Congress passed the Chinese Exclusion Act in 1882, China was a weak and almost powerless nation. Its prestige and power continued to decline, thus making it impossible for China to protest or fight against this anti-Chinese legislation. In the wake of the Boxer Rebellion in 1901, seven western powers plus Japan forced China to cede virtual sovereignty over some of its

¹⁰⁵ JACOBUS TENBROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION: CAUSES AND CONSEQUENCES OF THE EVACUATIONS OF THE JAPANESE AMERICANS IN WORLD WAR II* 23–24 (1954).

¹⁰⁶ *Immigration: Japanese*, *supra* note 102.

¹⁰⁷ There were only 148 Japanese nationals in the United States in 1880, 86 of whom were in California. Most were students. *POLITICS OF PREJUDICE*, *supra* note 3.

¹⁰⁸ See generally MCCLAIN, *supra* note 69; SALYER, *supra* note 49.

¹⁰⁹ Scott Act of 1902, ch. 641, 32 Stat. 176 (“An Act to Prohibit the Coming into and to Regulate the Residence Within the United States, its Territories, and all Territory Under its Jurisdiction, and the District of Columbia, of Chinese Persons and Persons of Chinese Descent”); Chin, *supra* note 98, at 36–37.

¹¹⁰ Akira Iriye, *Japan as a Competitor*, in *MUTUAL IMAGES: ESSAYS IN AMERICAN-JAPANESE RELATIONS* 73, 76 (Akira Iriye ed., 1975) (placing total Japanese immigration into the United States at 35,000 in 1899).

¹¹¹ See generally *POLITICS OF PREJUDICE*, *supra* note 3. By this time there were also about 30,000 Japanese workers in Hawaii. *Japanese Immigration to Hawaii*, HAWAII FOR VISITORS, <http://www.hawaiiiforvisitors.com/about/japanese-immigration.htm> (last visited Apr. 10, 2015).

territory and pay enormous reparations. A year later, the ban on Chinese Immigrants to the United States was made permanent.¹¹² Supporters of the 1902 law argued that the Chinese should be permanently excluded from the United States because they were racially inferior and incapable of ever being true Americans. As one member of Congress put it during this debate, “the Chinaman in America is forever and always an alien.”¹¹³ Members of Congress asserted that “the Mongolian race [is] not a desirable addition to our population.”¹¹⁴ However, the law only affected Chinese immigration, even though presumably Japanese were also members of “the Mongolian race.”

The failure to include the Japanese in the final Chinese Exclusion Act of 1902 infuriated some in California. As early as 1899, the *San Francisco Chronicle* argued “that Japanese immigration was more serious than Chinese because Japan had attained the status of a great power whereas China had not.”¹¹⁵ Similarly, in 1901, Governor Henry T. Gage noted the “Japanese problem” in his annual message.¹¹⁶ But the insights of the *Chronicle* indicated why the United States was not ready to ban Japanese immigration. It was one thing to insult the powerless and weak Chinese government. It was quite another to insult Japan, which was about to attain “the status of a great power.”¹¹⁷ In addition, even in 1902, there were still relatively few Japanese in the United States. Moreover, in 1900, the Japanese government announced that it would voluntarily restrict emigration to the United States by reducing the number of exit visas the Japanese government would issue to common laborers.¹¹⁸ This was the first Gentlemen’s Agreement.

Initially, this first Gentlemen’s Agreement achieved its goals. Japanese emigration to the United States declined from over 12,000 in 1900 to just under 5,000 in 1901.¹¹⁹ However, despite the intentions of the Japanese government, Japanese migration to the United States began to increase after 1901.¹²⁰ The

¹¹² Scott Act of 1902, ch. 641, 32 Stat. 176 (“An Act to Prohibit the Coming into and to Regulate the Residence Within the United States, its Territories, and all Territory Under its Jurisdiction, and the District of Columbia, of Chinese Persons and Persons of Chinese Descent”).

¹¹³ Chin, *supra* note 98, at 36–37 (quoting 35 CONG. REC. 3807 (1902) (statement of Rep. Mondell)).

¹¹⁴ *Id.* at 37 (quoting 35 CONG. REC. 3781 (1902) (statement of Rep. Lacey)).

¹¹⁵ Iriye, *supra* note 110, at 76.

¹¹⁶ Buell, *supra* note 3, at 609.

¹¹⁷ Iriye, *supra* note 110, at 76.

¹¹⁸ *Gentleman’s Agreement*, HISTORY, <http://www.history.com/topics/gentlemens-agreement> (last visited Apr. 10, 2015).

¹¹⁹ Iriye, *supra* note 110, at 76.

¹²⁰ HISTORICAL STATISTICS, *supra* note 6, at 58. Japanese immigration dropped from over 12,500 in 1900 to just over 5,000 in 1901, but in 1902, it had jumped to more than 14,000, and with the exception of a dip in 1905—the year of the Russo-Japanese War—Japanese immigration

1900 agreement only limited Japanese migration to the mainland of the United States, and under the agreement, a significant number of Japanese common laborers emigrated to Hawaii, where they found work in the expanding sugar industry. Once in Hawaii, some Japanese laborers then moved on to California.¹²¹ In addition, Japanese also went to Mexico and Canada and then moved to the United States.¹²² Thus, despite the agreement, Japanese immigration was still growing. This led to an explosion of nativist¹²³ opposition to the Japanese, in California and especially in San Francisco.

Californians wanted to end Japanese immigration and also, as much as possible, to undermine the economic and social progress of the Japanese in the United States. However, curbing Japanese immigration was not as simple as dramatically reducing Chinese immigration. China was an utterly weak and powerless nation in the late-19th century while Japan was a rising power by the early-20th century.

In 1894, Japan and the United States had signed a commercial treaty that gave Japan most-favored-nation status with the United States, which in part meant that Japanese citizens were generally allowed to enter the United States without restriction.¹²⁴ The treaty recognized Japan's new prestige in the world. While the treaty was being negotiated, Japan successfully flexed its growing military muscle in the Sino-Japanese War (1894–1895), which resulted in Korea becoming a Japanese protectorate, China ceding Taiwan to Japan, and China paying indemnities to Japan. In the Boxer Rebellion (1900–1901), Japan provided more troops than any other nation to protect Western (and Japanese) citizens and interests in China. Japan's 20,000 or so troops constituted about 40% of the foreign forces used to suppress the rebellion.

The wisdom of a policy that respected Japan's growing prestige and power became clear four years later, when Japan startled the world by defeating

remained at or above that figure until 1909, when the second Gentlemen's Agreement dramatically reduced Japanese immigration.

¹²¹ Buell, *supra* note 3, at 613–14.

¹²² *Id.*

¹²³ Nativists were Americans, almost exclusively Protestants and usually of British ancestry, who opposed the immigration of non-Protestants, Asians, and even Protestants who were not from Britain or at least northern Europe. *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 (1985).

¹²⁴ Treaty on Commerce and Navigation, U.S.-Japan, Nov. 22, 1894, 29 Stat. 848. Immigration officials could still exclude Japanese Immigrants who were "paupers or persons likely to become a public charge," under the Immigration Act of 1891, ch. 551, 26 Stat. 1085. The Supreme Court upheld the application of the 1891 law regulating immigrants in *Ekiu v. United States*, 142 U.S. 651 (1892), allowing the government to exclude Nishimura Ekiu because she arrived with just \$22, her passport falsely claimed she was "in company with her husband," and she had no destination other than "some hotel" where she was to wait "until her husband calls for her." *Id.* at 651–52. The Court reaffirmed this application of the 1891 law to Japanese immigrants after the 1894 treaty in *Yamataya v. Fisher*, 189 U.S. 86 (1903).

Russia in the Russo-Japanese War. The smaller, non-Western, non-Christian country had defeated the largest nation in Europe. In the 1850s, Czar Nicholas I had referred to the Ottoman Empire as the “sick man of Europe,”¹²⁵ but Japan showed that Russia itself was equally sick and weak. Japan was clearly a power to be reckoned with, and not one to be gratuitously insulted. In 1905, President Theodore Roosevelt negotiated an end to the war between Russia and Japan, and in 1906, was awarded the Nobel Peace Prize for his efforts.¹²⁶ While leading the peace talks, Roosevelt came to appreciate Japan’s economic strength and its military prowess. Roosevelt also observed that the Japanese were particularly sensitive to the racism of the Russians and other westerners during both the war and the peace negotiations.¹²⁷ Insulting this country was simply not a good idea.

Japan’s rise as an important power coincided with two other developments that affected relations with the United States and made it even more important (for diplomatic reasons) that the United States not insult Japan with immigration restrictions in 1902. Since the mid-19th century, the United States had been developing outposts in the Pacific Ocean. In 1856, the American Guano Company claimed Baker Island¹²⁸ and Jarvis Island¹²⁹ under the Guano Act of 1856.¹³⁰ In 1857, other Americans claimed Howland Island¹³¹ under the Guano Act. In 1860, the U.S. Guano Company claimed Kingman

¹²⁵ KARL MARX, *THE EASTERN QUESTION: A REPRINT OF LETTERS WRITTEN IN 1853–1856*, at 289–290 (1897) (citing Sir G.H. Hamilton Seymore in a diplomatic dispatch from January 7, 1853). In this dispatch, Seymour described his conversations with the Czar, reporting that Czar Nicholas I described the Ottoman Empire as “a sick man—a very sick man.” *Id.* at 290.

¹²⁶ *Theodore Roosevelt - Biographical*, NOBEL PRIZE, http://www.nobelprize.org/nobel_prizes/peace/laureates/1906/roosevelt-bio.html (last visited Apr. 18, 2015).

¹²⁷ See, for example, complaints about racist attitudes toward the Japanese in Baron Kentarō Kaneko, *Japan’s Position in the Far East*, 26 ANNALS AM. ACAD. POL. & SOC. SCI. 77 (1905). For a fascinating discussion of the startled response of the western world to Japan’s victory over a European nation, and Japanese shock at continued racist responses to them, see MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN’S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY* 166–72 (2008). A young scholar at Oxford, for example, called the result of the war “the most important historical event which has happened, or is likely to happen, in our lifetime, the victory of a non-white people over a white people.” *Id.* at 166.

¹²⁸ U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-98-5, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION 54 (1997) [hereinafter *INSULAR AREAS*], available at <http://www.gao.gov/archive/1998/og98005.pdf>. Baker Island, which is uninhabited, is about 1,650 miles southwest of Honolulu. *Id.*

¹²⁹ *Id.* at 55–56. Jarvis Island is about 1,350 miles southwest of Honolulu. *Id.* at 55.

¹³⁰ *Id.* at 54–56. Guano is the dried accumulation of feces from seabirds used as fertilizer. *Id.* at 9; see also 48 U.S.C. §§ 1411–19 (2013).

¹³¹ *INSULAR AREAS*, *supra* note 128, at 55. Howland, which is uninhabited, is about 1,300 miles southwest of Honolulu. *Id.* at 54–55.

Reef under the Guano Act.¹³² More importantly, in 1867, a U.S. Naval expedition claimed the Midway Islands for the United States,¹³³ and in 1869, Congress appropriated \$50,000 to create a naval coaling station there.¹³⁴ During and immediately after the Spanish-American War (1898), the United States dramatically expanded its overseas Pacific presence. The United States acquired Guam and the Philippines from Spain, quickly building military and naval bases in both places.¹³⁵ That year, the United States annexed the Republic of Hawaii (with the consent of the Hawaiian government)¹³⁶ and also annexed Wake Atoll¹³⁷ and Palmyra Atoll.¹³⁸ After the Boxer Rebellion (1901), the United States also had a presence in China. Thus, by 1902, the United States had substantial interests in the western Pacific, and good relations with Japan were even more imperative. In 1903, President Theodore Roosevelt issued an executive order that placed Midway Atoll under the jurisdiction and control of the U.S. Navy,¹³⁹ expanding the growing U.S. military presence closer to Japan. In addition, in 1904, the United States began construction of the Panama Canal,¹⁴⁰ which would give the United States a greater Pacific presence. Thus, just as Japan was emerging as a world power, it faced a powerful non-Asian nation edging close to its doorstep, asserting its own growing political, economic, and military might, with the near-term potential (once the Canal was completed) to easily move its fleet from the Atlantic to the Pacific.

American officials saw the rise of Japan and the development of America's Pacific empire as a source of potential conflict. In 1906, in the wake of Japan's stunning victory over Russia (which included sinking virtually all of Russia's navy), Secretary of State Elihu Root told a cabinet colleague that “Japan is ready for war,” because it had “the most effective equipment and

¹³² *Id.* at 57. Kingman Reef, which is uninhabited, is about 900 miles south of Honolulu. *Id.*

¹³³ *Id.* at 60.

¹³⁴ Navy Appropriations Act for 1870, ch. 48, 15 Stat. 276, 279; *see also* S. Rep. No. 40-194 (1869).

¹³⁵ Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

¹³⁶ Newlands Resolution, J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

¹³⁷ INSULAR AREAS, *supra* note 128, at 63. “Brigadier General Francis Greene stopped at Wake in 1898 en route to the Philippines during the Spanish-American War and raised the American flag on the island. The following year, Commander Taussig of the U.S. Navy landed on Wake and took possession of the island for the United States.” *Id.*

¹³⁸ *Id.* at 7. “Palmyra was once part of the Territory of Hawaii, but was expressly excluded when Hawaii became a state.” *Id.*

¹³⁹ Exec. Order No. 199-A (1903), *superseded by* Exec. Order No. 11,048, 27 Fed. Reg. 8851 (Sept. 4, 1962).

¹⁴⁰ Under the Spooner Act, the United States purchased the right to the French canal project. Spooner Act of 1902 (Panama Canal Act of 1902), 32 Stat. 481. Under the Hay-Bunau Varilla Treaty of Nov. 18, 1903, the United States obtained the right to dig from the local government. Hay-Bunau-Varilla Treaty of 1903, U.S.-Pan., Nov. 18, 1903, 33 Stat. 2234. The United States purchased the right from Panama in 1904. Panama Canal Act of 1904, 33 Stat. 429.

[military] personnel in the world.”¹⁴¹ In 1907 and 1908, the Roosevelt administration began to seriously gather intelligence about Japanese military capabilities and its “preparedness for war.”¹⁴² In 1907 and 1908, just as the last part of the second Gentlemen’s Agreement was being negotiated, President Theodore Roosevelt sent 16 battleships (with numerous escort and support vessels)—known as the Great White Fleet for the color the ships were painted—on a world-wide cruise.¹⁴³ Roosevelt was clearly worried about rising tensions with Japan, telling Secretary of State Root: “I am more concerned over the Japanese situation than almost any other. Thank Heaven we have the navy in good shape. It is high time, however, that it should go on a cruise around the world.”¹⁴⁴

The message of America’s vast naval power, with its state-of-the-art dreadnaughts, was clear to the Japanese when the Great White Fleet steamed into Yokahama Bay in October 1908.¹⁴⁵ Roosevelt could not control the “hideous sensationalism and offensiveness of the yellow press,” which was a “serious a menace to us in our foreign relations.”¹⁴⁶ The President correctly feared that the attacks on Japan and Japanese-Americans in the press, combined with the actions of the officials in California and some violent attacks on Japanese in San Francisco, would “cause the greatest irritation against us” in Japan.¹⁴⁷ Thus, Roosevelt hoped that this demonstration of American naval prowess would temper Japanese responses to the virulent racism against them coming out of California.

VII. THE RISE OF ANTI-JAPANESE SENTIMENT, SCHOOL SEGREGATION IN SAN FRANCISCO, AND PRESIDENT ROOSEVELT

At the same time that both nations were emerging as Pacific powers, Japanese emigration to the United States increased. This was in part a result of the success of the Chinese Exclusion Act. In 1882, the year the Exclusion Act was passed (but before it went into effect), just under 39,600 Chinese had entered the United States, most of whom were laborers.¹⁴⁸ But in the entire decade of the 1890s, only about 20,000 Chinese arrived, most of whom were

¹⁴¹ Iriye, *supra* note 110, at 79.

¹⁴² *Id.* at 85.

¹⁴³ See generally JAMES R. RECKNER, TEDDY ROOSEVELT’S GREAT WHITE FLEET (1988).

¹⁴⁴ Letter from Theodore Roosevelt to Elihu Root (July 13, 1907), in 5 THE LETTERS OF THEODORE ROOSEVELT 717 (Elting E. Morison et al. eds., 1952) [hereinafter 5 LETTERS].

¹⁴⁵ See generally RECKNER, *supra* note 143.

¹⁴⁶ Letter from Theodore Roosevelt to Elihu Root, in 5 LETTERS, *supra* note 144, at 717.

¹⁴⁷ *Id.*

¹⁴⁸ HISTORICAL STATISTICS, *supra* note 6, at 567.

not laborers.¹⁴⁹ The cumulative effect of this decline in Chinese labor—what people at the time called Coolie labor—stimulated the rapid increase in Japanese immigration. In the face of this labor shortage, businesses in California, desperate for more inexpensive labor, began to encourage immigration from Japan.¹⁵⁰ These business leaders assumed that the Japanese would be pliant and ready to work for very low wages.

The rise of anti-Japanese sentiment in California was tied to labor conditions, California’s half century of hostility to Asian immigration, and the growing number of Japanese immigrants coming to the United States.¹⁵¹ As much as Japanese labor was needed, the majority of white Californians, especially those in urban areas, resented these new immigrants. Initially, the response to the Japanese was a carryover from anti-Chinese attitudes—as Roger Daniels perceptively noted, “[i]n 1900 the anti-Japanese campaign . . . was mainly a tail to the anti-Chinese kite.”¹⁵² But, the focus of anti-Japanese sentiment shifted as white Californians realized that Japanese immigrants (unlike the Chinese) were intent on obtaining an education for themselves and their children, and moving beyond the role of unskilled laborers. In 1900, the voice of San Francisco’s labor movement offered a deeply racist analysis of Japanese immigration that highlighted the upward mobility and middle class aspirations of the Japanese:

Chinatown with its reeking filth and dirt, its gambling dens and obscene slave pens, its coolie labor and bloodthirsty tongs, is a menace to the community; but the sniveling Japanese, who swarms along the streets and cringingly offers his paltry services for a suit of clothes and a front seat in our public schools, is a far greater danger to the laboring portion of [our] society than all the opium-soaked pigtailed who have ever blotted the fair name of this beautiful city.¹⁵³

White working class Californians resented the Japanese, not only because they were non-white competitors, but because they also seemed poised to leapfrog over them in economic status.

The *San Francisco Chronicle* later observed that the Japanese “probably would have attracted small attention” if they “had . . . throttled [their] ambition.”¹⁵⁴ But, the *Chronicle* noted, the fact that the Japanese aspired

¹⁴⁹ Buell, *supra* note 3, at 606; HISTORICAL STATISTICS, *supra* note 6, at 567.

¹⁵⁰ TENBROEK ET AL., *supra* note 105, at 11–67.

¹⁵¹ *Id.* at 23–24.

¹⁵² POLITICS OF PREJUDICE, *supra* note 3, at 21.

¹⁵³ TENBROEK ET AL., *supra* note 105, at 24 (quoting the Journal of Organized Labor).

¹⁵⁴ HARRY H.L. KITANO, JAPANESE AMERICANS: THE EVOLUTION OF A SUBCULTURE 16 (1969) (quoting a *San Francisco Chronicle* article from 1910).

“to progress beyond mere servility to the plane of the better class of American workman and to own a home with him” and that when they achieved that status they “cease[d] to be an ideal laborer.”¹⁵⁵ This may have been somewhat of an exaggeration, because anti-Asian sentiment in California undoubtedly would have been directed at the Japanese no matter how much or how little education they sought or how much economic progress they achieved. The Chinese, after all, faced discrimination and exclusion even though they were mostly also viewed as “ideal laborer[s].”¹⁵⁶ Nevertheless, the paper’s main point is probably accurate: that resentment toward the Japanese grew as they sought and achieved upward mobility. The fact that the crisis leading to the final Gentlemen’s Agreement came over school segregation reflects this tension.

At the very time Japan was rising as an international power—and as President Roosevelt was coming to admire the nation and its people—the United States Industrial Commission told the nation that the Japanese “are more servile than the Chinese, but less obedient and far less desirable. They have most of the vices of the Chinese, with none of the virtues. They underbid the Chinese in everything, and are as a class tricky, unreliable, and dishonest.”¹⁵⁷ This official position of a United States Government agency clashed dramatically with President Roosevelt’s foreign policy goals and the respect he gained for the Japanese while negotiating an end to the Russo-Japanese War. After these negotiations, Roosevelt told a confidant: “I thoroughly admire and believe in the Japanese.”¹⁵⁸ He was particularly impressed that throughout these negotiations, the Japanese “always told me the truth,” unlike the Russians.¹⁵⁹

The theme of anti-Japanese sentiment was the simultaneous fear that the Japanese would undercut wages—“[t]hey underbid the Chinese in everything” as the United States Industrial Commission claimed¹⁶⁰—while at the same time they sought to improve their status through home ownership and education—“a front seat in our public schools” as the journal *Organized Labor* put it.¹⁶¹ These themes coalesced in the crisis that precipitated the second

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ 15 U.S. INDUS. COMM’N, REPORTS OF THE INDUSTRIAL COMMISSION ON IMMIGRATION AND EDUCATION 754 (1901).

¹⁵⁸ Letter from Theodore Roosevelt to George Kennan (1905), in THEODORE ROOSEVELT CYCLOPEDIA 273 (Albert Bushnell Hart & Herbert Ronal Ferlinger eds., 1941) [hereinafter ROOSEVELT CYCLOPEDIA].

¹⁵⁹ *Id.*

¹⁶⁰ 15 U.S. INDUS. COMM’N, *supra* note 157, at 754.

¹⁶¹ TENBROEK ET AL., *supra* note 105, at 24.

Gentlemen's Agreement in 1908, when San Francisco tried to segregate the Japanese in the public schools.¹⁶²

In 1905, the San Francisco school board passed a resolution to segregate all Asians in the city's public schools. However, the San Francisco earthquake in April 1906 delayed its implementation. On October 11, 1906, the school board passed a new resolution to segregate all Asian students.¹⁶³ When schools reopened after the earthquake, the Japanese were excluded from schools that they had previously attended.¹⁶⁴ In this regard, the Japanese were treated the same way as the Chinese and other Asians.¹⁶⁵

But the Japanese government was not the same as the Chinese, and the relationship between the United States and Japan was far different from China's relationship to the United States. Fresh from its victory in the Russo-Japanese War, as well as providing the largest number of foreign troops to suppress the Boxer Rebellion, Japan was a growing power unwilling to ignore this insult from the San Francisco school board. The Japanese government immediately protested to President Theodore Roosevelt, complaining that this segregation violated the 1894 treaty between the two nations,¹⁶⁶ which provided that "the citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property."¹⁶⁷ The treaty also provided that "in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects."¹⁶⁸

The Japanese government naturally believed that, under these provisions of the 1894 treaty, Japanese immigrants and their children could not be segregated. On the other hand, the Californians doubtlessly saw their policy as consistent with the American constitutional regime, which allowed the states

¹⁶² For the best summary of anti-Japanese sentiment in this period, see *POLITICS OF PREJUDICE*, *supra* note 3, at 1–30.

¹⁶³ 5 *LETTERS*, *supra* note 144, at 473 n.1.

¹⁶⁴ Ironically, Japanese citizens and the Japanese government sent about \$244,960 in earthquake relief to the city of San Francisco just before the school segregation rules were implemented. This constituted more than half of all foreign relief money sent to San Francisco. Japanese earthquake experts also came to California to consult with authorities and help them prepare for future earthquakes. Some of them were attacked by anti-Japanese thugs in the city. *POLITICS OF PREJUDICE*, *supra* note 3, at 33; *see also* ROY HIDEMICHI AKAGI, *JAPAN'S FOREIGN RELATIONS, 1542–1936: A SHORT HISTORY* 433 (1936).

¹⁶⁵ It is also worth noting that this did not differ from the practice of segregating blacks throughout the South and in some places in the North and West.

¹⁶⁶ *See* Aoki, *supra* note 5, at 48.

¹⁶⁷ Treaty of Commerce and Navigation, U.S.-Japan, art. 1, Nov. 22, 1894, 29 Stat. 848.

¹⁶⁸ *Id.*

to regulate race relations almost at will. In a series of decisions¹⁶⁹ culminating in *Plessy v. Ferguson*,¹⁷⁰ the Supreme Court allowed the states to require separate facilities for members of different races as long as the separate facilities were “equal.” By 1900, the pretense of equality for black facilities in the South no longer existed, and the Supreme Court showed little inclination to interfere with the South’s aggressive segregation of all aspects of southern life. By this time, all public schools in the South were completely segregated.¹⁷¹ The American South took advantage of the *Plessy* decision and other cases to segregate almost every aspect of southern life.¹⁷² Thus, Californians believed that if white Southerners could segregate blacks and discriminate against them in other ways, they could segregate all Asians, including the Japanese, and also discriminate against them beyond the school setting. Indeed, the San Francisco school policy was part of a larger movement in California to end all Japanese immigration into the country.¹⁷³

There was, of course, an ironic difference between Japanese immigrants and their children, and American blacks living in the South. The rights of African-Americans were protected only by the Fourteenth and Fifteenth Amendments, and were dependent on the whims of the federal courts, the national government, and, under the Supreme Court’s interpretation of the Fourteenth Amendment, the state governments. In the *Civil Rights Cases*,¹⁷⁴ the Supreme Court held that Congress had limited power to regulate and protect the civil rights of blacks under the Fourteenth Amendment. In *Plessy v. Ferguson*, the Court allowed the states to practice segregation as long as the separate facilities were “equal,” but the courts were never willing to require any proof that facilities were actually “equal.” Nor was the federal government willing to exert its constitutional power to protect black voting rights or black civil rights from state deprivation. Thus, the power of protecting the civil rights of black Americans was, by this time, almost entirely in the hands of the state

¹⁶⁹ For a more detailed discussion of these cases, see Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 973–1027 (2005) [hereinafter Finkelman, *Civil Rights in Historical Context*] (book review) and Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1019–63 (2014) [hereinafter Finkelman, *Original Intent and the Fourteenth Amendment*].

¹⁷⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁷¹ In *Berea College v. Kentucky*, decided the same year as the Gentlemen’s Agreement, the Court would uphold a Kentucky law which required a private college to terminate its policy of integrated education. 211 U.S. 45 (1908). For the history of segregated schools in the South see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1976).

¹⁷² See generally Paul Finkelman, *The Radicalism of Brown*, 66 U. PITT. L. REV. 35 (2004).

¹⁷³ For background on this, see TENBROEK ET AL., *supra* note 105, at 11–67.

¹⁷⁴ *The Civil Rights Cases*, 109 U.S. 3 (1883).

governments. In the North, this led to state laws protecting civil rights¹⁷⁵ as well as some segregation.¹⁷⁶ But in the South, the Court’s narrow and racially biased interpretation of the Fourteenth Amendment left blacks trapped in a world of increasing segregation.

By contrast, Japanese immigrants could legitimately turn to their home country for protection and support. The government of Japan, operating under the 1894 treaty and bolstered by its rising status as a military and economic power, could demand protection for its citizens living in the United States. Furthermore, the states—in this case California—were obligated to defer to the federal government on the treatment of the Japanese because under the Supremacy Clause of the United States Constitution a treaty was binding on the states.¹⁷⁷ The treaty insured that Japanese immigrants “enjoy all the rights and privileges enjoyed by native citizens or subjects.”¹⁷⁸ It would seem that this clause made San Francisco’s segregation order illegal, and in violation of the Supremacy Clause of the U.S. Constitution, which made “all Treaties made . . . under the Authority of the United States . . . the supreme Law of the Land.”¹⁷⁹

Unlike blacks in the South, Japanese immigrants could demand protection under a treaty and the Supremacy Clause, even if, like blacks, they could not hope for racial justice under the Fourteenth Amendment. Thus, the segregation of the Japanese in California was an international issue in which the administration in Washington had a concern.

Although President Roosevelt found the anti-Japanese movement in California abhorrent, he was hardly a racial liberal. He believed that “race purity must be maintained”¹⁸⁰ and famously refused to support black soldiers who defended themselves from the attacks of white civilians in Texas.¹⁸¹ He favored some limitations on Asian immigration and, to that extent, he sympathized with some of the goals of the anti-Chinese movements on the West Coast. In 1897, before he ran for vice president, he had endorsed limiting Chinese immigration and other immigrant “laborers who are ignorant, vicious, and with low standards of life and comfort.”¹⁸² In his first annual message to

¹⁷⁵ Finkelman, *Civil Rights in Historical Context*, *supra* note 169, at 979–91.

¹⁷⁶ See generally DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954* (2005).

¹⁷⁷ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹⁷⁸ Treaty on Commerce and Navigation, U.S.-Japan, art. 1, Nov. 22, 1894, 29 Stat. 848.

¹⁷⁹ U.S. CONST. art. VI, cl. 2.

¹⁸⁰ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 24 (2004) (quoting Theodore Roosevelt).

¹⁸¹ Finkelman, *Civil Rights in Historical Context*, *supra* note 169, at 999.

¹⁸² ROOSEVELT CYCLOPEDIA, *supra* note 158, at 244 (citing Review of Reviews (Jan. 1897)).

Congress, in the wake of the assassination of President William McKinley by an immigrant anarchist, Roosevelt asked for legislation to prevent anarchist immigrants, to “reenact immediately the law excluding Chinese laborers, and to strengthen it wherever necessary in order to make its enforcement entirely effective,” and to “stop the influx of cheap labor.”¹⁸³ In his annual message of 1905, he asserted that the nation could never “have too much immigration of the right sort and we should have none whatever of the wrong sort.”¹⁸⁴ Chinese laborers, anarchists, and the ignorant were clearly “the wrong sort.”

However, unlike the West Coast nativists, Roosevelt was not opposed to immigration per se, or to all Asian immigration. Unlike the Californians, he clearly did not favor stopping all Japanese immigration. In fact, he greatly admired the Japanese, and in his annual message in 1906, he suggested that America’s naturalization laws be changed to allow Japanese immigrants to become citizens.¹⁸⁵ It is clear that he did not think the Japanese were “the wrong sort.” His notion of the “right” and “wrong sort” of immigrant was tied to character and motivation and reflective of his own concepts of rugged individualism. Thus, he argued that the United States should not “discriminate for or against any man who desires to come here and become a citizen, save on the ground of that man’s fitness for citizenship.”¹⁸⁶ The nation had a “right and duty to consider his moral and social quality,”¹⁸⁷ but Roosevelt asserted that the nation should:

Pay [no] heed to whether he is of one creed or another, of one nation, or another. We cannot afford to consider whether he is Catholic or Protestant, Jew or Gentile; whether he is Englishman or Irishman, Frenchman or German, Japanese, Italian, Scandinavian, Slav, or Magyar.¹⁸⁸

Roosevelt was not ready to support unlimited immigration from China, and probably the Middle East and South Asia. But he clearly thought the Japanese were as worthy as Europeans, and rejected prejudice against Japanese, just as

¹⁸³ President Theodore Roosevelt, First Annual Message (Dec. 3, 1901), in 14 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 6650–51 (James D. Richardson ed., 1897).

¹⁸⁴ President Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), in 15 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7007 (James D. Richardson ed., 1920) [hereinafter 15 RICHARDSON].

¹⁸⁵ President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), in 15 RICHARDSON, *supra* note 184, at 7055.

¹⁸⁶ President Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), in 15 RICHARDSON, *supra* note 184, at 7008.

¹⁸⁷ President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), in 15 RICHARDSON, *supra* note 184, at 7055.

¹⁸⁸ *Id.*

he rejected prejudice against Germans, Irishmen, Frenchmen, Jews, Italians, Englishmen, and other Europeans.

In this speech, Roosevelt then went on, at some length, to explain why the "questions arising in connection with Chinese immigration stand by themselves."¹⁸⁹ He endorsed "the policy of excluding Chinese laborers, Chinese coolies," but he was not willing to exclude all Chinese.¹⁹⁰ He declared that "Chinese students, business and professional men of all kinds" including "merchants" and "bankers, doctors, manufacturers, professors, travelers, and the like—should be encouraged to come here."¹⁹¹ Thus it seems that the president favored an immigration policy based on class, education, skills, and moral stature, rather than race. Significantly, he listed the Japanese along with Europeans as the kind of people the United States should allow into the nation, and only singled out the Chinese for special consideration.

Roosevelt's views of the Japanese were complex and conflicted. He thought Japan would become one of the "great civilized powers."¹⁹² But because of race and "their own ancestral civilization" he also believed the Japanese would "be of a different type from our civilizations."¹⁹³ Despite these racial and cultural differences, Roosevelt concluded that there were things Japan "can teach us," and predicted that Japan would become a "formidable industrial competitor."¹⁹⁴ Thus, it was important to "treat her courteously, generously, and justly, but we should keep our navy up and make it evident that we are not influenced by fear."¹⁹⁵ In his annual message to Congress in 1906, Roosevelt extolled the virtues of Japanese society, pointing out that the growth of Japan's economy under the Meiji was "literally astounding."¹⁹⁶ He noted that Japan had "a glorious and ancient past" with a "civilization older than that of the nations of northern Europe—the nations from whom the people of the United States have chiefly sprung."¹⁹⁷ This statement is particularly significant, given the growing obsession of most white American Protestants with racial and ethnic heritage, the purity of races, and social Darwinian notions of

¹⁸⁹ President Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), in 15 RICHARDSON, *supra* note 184, at 7008–09.

¹⁹⁰ *Id.* at 7009.

¹⁹¹ *Id.*

¹⁹² Letter from Theodore Roosevelt to Cecil Arthur Spring Rice (Mar. 19, 1904), in 4 THE LETTERS OF THEODORE ROOSEVELT 759–61 (Elting E. Morison et al eds., 1952) [hereinafter 4 LETTERS].

¹⁹³ *Id.*

¹⁹⁴ Letter from Theodore Roosevelt to Henry Cabot Lodge (June 16, 1905), in 4 LETTERS, *supra* note 192, at 1221, 1231.

¹⁹⁵ *Id.*

¹⁹⁶ President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), in 15 RICHARDSON, *supra* note 184, at 7053.

¹⁹⁷ *Id.*

superior and inferior races.¹⁹⁸ Roosevelt had essentially concluded that the Japanese were “equal” to white American Protestants of northern and western European origins. The President stated that in the four decades of Meiji modernization “[t]he Japanese have won in a single generation the right to stand abreast of the foremost and most enlightened peoples of Europe and America; they have won on their own merits and by their own exertions the right to treatment on a basis of full and frank equality.”¹⁹⁹

This claim to equality was bolstered by Japan’s recent military successes. Roosevelt, whose diplomatic experience had led him to a greater understanding of Japan than most Americans had, declared that Japan “now stands as one of the greatest of civilized nations; great in the arts of war and in the arts of peace; great in military, in industrial and artistic development.”²⁰⁰ As a military hero of the Spanish American War, Roosevelt noted that “Japanese soldiers and sailors have shown themselves equal in combat to any of whom history makes note. She has produced great generals and mighty admirals; her fighting men, afloat and ashore.”²⁰¹ Roosevelt praised “the heroic courage, the unquestioning, unflinching loyalty, the splendid indifference to hardship and death” of Japanese sailors and soldiers.²⁰²

In addition to his growing admiration for the Japanese—and his respect of their military prowess—Roosevelt correctly saw immigration policy as belonging to the national government, and off limits to the states. He saw California’s attacks on the Japanese as particularly problematic, not only because the state seemed to be usurping the plenary power of the national government to regulate immigration and conduct foreign policy, but also because California’s actions threatened the nation’s diplomacy and ultimately its security.²⁰³

A year before his public praise for the Japanese and his endorsement of allowing Japanese immigrants to become naturalized citizens, Roosevelt had analyzed the problematic nature of the California anti-Japanese movement in a letter to his friend and ally, Henry Cabot Lodge. First, Roosevelt noted that the

¹⁹⁸ ROBERT C. BANNISTER, *SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN SOCIAL THOUGHT* (1989); CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT* (1992); RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1944).

¹⁹⁹ President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), in 15 RICHARDSON, *supra* note 184, at 7054.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See, e.g., Letter from Theodore Roosevelt to Henry Cabot Lodge, May 15, 1905 reprinted in 2 SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884–1918, at 122 (1925) [hereinafter SELECTIONS]; Letter from Theodore Roosevelt to Kermit Roosevelt (Oct. 27, 1906), in 5 LETTERS, *supra* note 144, at 475–76 (discussed *infra* at notes 216–17).

Japanese had "come around" to Roosevelt's position on how to end the Russo-Japanese War.²⁰⁴ Fresh from bringing the Japanese to the peace table by convincing them that he was a fair broker, Roosevelt now faced the problem that California would undermine his foreign policy. He told Lodge,

I am utterly disgusted at the manifestations which have begun to appear on the Pacific slope in favor of excluding the Japanese exactly as the Chinese are excluded. The California State Legislature and various other bodies have acted in the worst possible taste and in the most offensive manner to Japan.²⁰⁵

Roosevelt also found it particularly ironic that the Congressional delegations from California and other states hostile to the Japanese were also "lukewarm" about supporting his proposals for a stronger Navy. Roosevelt felt "disgust" towards those politicians who "justify by their actions any feeling the Japanese might have against us, while at the same time refusing to take steps to defend themselves against the formidable foe whom they are ready with such careless insolence to antagonize."²⁰⁶ The President could not understand how politicians could risk antagonizing the Japanese while they were in the process of defeating Russia.

In other correspondence, Roosevelt complained about the "foolish offensiveness" of the "idiots" in California who insulted the Japanese when the whole nation would bear the costs of a war.²⁰⁷ In March 1905, the California legislature passed a resolution asking Congress to prohibit the immigration of "immoral, intemperate, quarrelsome men bound to labor for a pittance."²⁰⁸ This resolution was directly aimed at Japanese immigration, and its language seemed designed to infuriate the Japanese. Roosevelt complained that the "idiots of the California legislature" were doing "exactly the reverse of what I have made the cardinal doctrine of my foreign policy. That is to say, they talk offensively to foreign powers and yet decline ever to make ready for war."²⁰⁹ Roosevelt believed one should "speak softly and carry a big stick," while the California legislature and the California delegation in Congress insisted on aggressive rhetoric without supporting the expansion of the Navy that Roosevelt believed was necessary to protect the nation and prevent a war with Japan. Aside from refraining from anti-Japanese rhetoric and state laws,

²⁰⁴ Letter from Theodore Roosevelt to Henry Cabot Lodge, May 15, 1905 *reprinted in 2 SELECTIONS* at 122.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Letter from Theodore Roosevelt to George Kennan (May 6, 1905), in 4 *LETTERS*, *supra* note 192, at 1168–69.

²⁰⁸ *Id.* at 1169 n.2.

²⁰⁹ *Id.* at 1169.

Roosevelt believed the best way to avoid a war with Japan was to “keep our navy so strong and so efficient that we shall be able to handle Japan if the need ever arises.”²¹⁰

During the crisis over San Francisco’s attempt to segregate Japanese school children, Roosevelt told the American ambassador to Japan to reaffirm to the Japanese government that neither the Roosevelt administration nor the American people had “the slightest sympathy with the outrageous agitation against the Japanese.”²¹¹ He assured Japanese officials that he would do everything in his power to “protect the rights of the Japanese” in the United States.²¹²

Unfortunately for Roosevelt (and the American people), the nature of American federalism complicated Roosevelt’s foreign policy. He could not control California or prevent that state from passing laws and ordinances which violated the treaty with Japan. At best, he could take actions in the courts—which eventually he did—to challenge California’s actions. He told Baron Kentarō Kaneko, Japan’s Minister of Justice, that one of the “disadvantages” of the American system was “in dealing with movements like this,” but that he had already directed the Department of Justice “to see if we cannot remedy the matter thru the courts.”²¹³

The flip side of federalism, however, was that Roosevelt was free to publicly and privately criticize the authorities in California. Thus, in his letter to Baron Kaneko he compared the actions of “these people in California” to “pirates.”²¹⁴ In public, Roosevelt chastised authorities in California for their segregation policies, calling them a “wicked absurdity” noting that “there are no first-class colleges in the land, including the universities and colleges of California, which do not gladly welcome Japanese students and on which Japanese students do not reflect credit.”²¹⁵ In private, he was furious, writing his son Kermit, a student at Harvard at the time: “I am being horribly bothered about the Japanese business. The infernal fools in California, and especially in

²¹⁰ *Id.*

²¹¹ Letter from Theodore Roosevelt to Lloyd C. Griscom (July 1, 1905), in 4 LETTERS, *supra* note 192, at 1274–75.

²¹² Letter from Theodore Roosevelt to Baron Kentarō Kaneko (Oct. 26, 1906), in 5 LETTERS, *supra* note 144, at 473. Kaneko had met Roosevelt in 1889 and both had been involved in the negotiations to end the Russo-Japanese War. After 1906, he was a member of Japan’s Privy Council. Roosevelt and Kaneko had been students at Harvard University in the 1870s at the same time but had not known each other then. *See generally* MARIUS B. JANSEN, THE MAKING OF MODERN JAPAN (2002); MASAYOSHI MATSUMURA, NICHU-RO SENSO TO KANEKO KENTARŌ: KOHO GAIKO NO KENKYU (Japanese ed. 1996).

²¹³ Letter from Theodore Roosevelt to Baron Kentarō Kaneko (Oct. 26, 1906), in 5 LETTERS, *supra* note 144, at 473.

²¹⁴ *Id.*

²¹⁵ President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), in 15 RICHARDSON, *supra* note 184, at 7054.

San Francisco, insult the Japanese recklessly, and in the event of war it will be the Nation as a whole which will pay the consequences.”²¹⁶ Eventually Roosevelt convinced leaders in California to rescind the rule segregating Japanese students, but by then the rupture of Japanese-American relations was clear.

The State Department, following Roosevelt’s lead, did everything it could to shore up relations with Japan. On October 23, 1906, Secretary of State Elihu Root told the American ambassador in Tokyo to communicate to the Japanese government that “the United States will not for a moment entertain the idea of any treatment of the Japanese people other than that accorded to the people of the most friendly European nations”²¹⁷

Roosevelt’s response was more than just verbal. He dispatched Secretary of Commerce and Labor Victor Metcalf, a former Congressman from California, to San Francisco to investigate three things: “first, the exclusion of Japanese children from the San Francisco schools; second, the boycotting of Japanese restaurants, and, third, acts of violence committed against the Japanese.”²¹⁸ The report detailed violence against Japanese immigrants and citizens, including Japanese scientists who had come to California to help the state in the wake of the 1906 earthquake.²¹⁹ Metcalf’s report noted that there were very few Japanese children in the public schools and they posed no threat to any non-Japanese children in the city. Roosevelt told the Senate that his administration had already instituted legal action to prevent the segregation of Japanese children in the schools.²²⁰ Ever the politician and reflecting his motto to “talk softly,” Roosevelt asserted that California authorities “assured Secretary Metcalf that everything possible would be done to protect the Japanese in the city,”²²¹ but reflecting the other part of his motto, Roosevelt let California authorities know that he was also prepared to “carry a big stick.” Thus, the report noted that

I authorized and directed Secretary Metcalf to state that if there was failure to protect persons and property, then the entire power of the Federal Government within the limits of the Constitution would be used promptly and vigorously to enforce

²¹⁶ Letter from Theodore Roosevelt to Kermit Roosevelt (Oct. 27, 1906), in 5 LETTERS, *supra* note 144, at 475–76.

²¹⁷ AKAGI, *supra* note 164, at 433–34 (quoting Secretary of State Elihu Root).

²¹⁸ VICTOR HOWARD METCALF, JAPANESE IN THE CITY OF SAN FRANCISCO, CAL., S. DOC. NO. 147 (2d Sess. 1906). In December 1906, Roosevelt moved Metcalf to a new position in his cabinet, making him Secretary of the Navy.

²¹⁹ *Id.*

²²⁰ *Id.* at 17; *see also* letter from Theodore Roosevelt to Baron Kentarō Kaneko (Oct. 26, 1906), in 5 LETTERS, *supra* note 144, at 473.

²²¹ S. DOC. NO. 147, at 2.

the observance of our treaty, the supreme law of the land, which treaty guaranteed to Japanese residents everywhere in the Union full and perfect protection for their persons and property, and all the forces of the United States, both civil and military, which I could lawful employ, would be employed.²²²

To this end, Roosevelt directed the Senate to the final sentence of Metcalf's report:

All considerations which may move a nation, every consideration of duty in the preservation of our treaty obligations, every consideration prompted by fifty years or more of close friendship with the Empire of Japan, would unite in demanding, it seems to me, of the United States Government and all its people, the fullest protection and the highest consideration of its subjects.²²³

Indeed, Secretary Metcalf suggested that the United States send troops to San Francisco to protect Japanese immigrants.²²⁴

VIII. TOWARD RESTRICTION AND EXCLUSION

In his annual message of 1906, President Roosevelt urged Congress to pass laws allowing the naturalization of Japanese immigrants.²²⁵ Under existing law, only people who were "white" or of African ancestry could be naturalized.²²⁶ However, this did not happen. Despite his claims of support of the Japanese, his disgust at the behavior of the Californians, and his fear that insulting Japan would undermine international relations, in the end, Roosevelt

²²² *Id.*

²²³ *Id.* at 17.

²²⁴ *Id.* There is an obvious parallel here with President Eisenhower sending troops to enforce school integration in 1957. See generally TONY A. FREYER, *LITTLE ROCK ON TRIAL: COOPER V. AARON AND SCHOOL DESEGREGATION* (2007).

²²⁵ President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906) in 15 RICHARDSON, *supra* note 184, at 7053.

²²⁶ AKAGI, *supra* note 164, at 434. Some Courts ruled that Middle Easterners—Syrians, Lebanese, Armenians—were white, while others ruled the other way. Courts generally held that people from India were not white. Nor were Japanese, whatever their actual skin color might appear to be. An early example for is a lower court decision in Massachusetts denying naturalization to Shebata Siato on the grounds that he is a member of the "Mongolian race." *In re Saito*, 62 Fed. 126 (C.C.D. Mass., 1894); see also *Toyota v. United States*, 268 U.S. 402 (1925) (denying naturalization for a Japanese immigrant who had served in the United States Navy in World War I); *United States v. Thind*, 261 U.S. 204 (1923) (holding that someone from India could not be naturalized); *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that someone from Japan, whose skin was "light" was not white under the law). See generally HANEY LÓPEZ, *supra* note 58, at 203–08.

conciliated the “idiots” in California²²⁷ who insulted Japanese immigrants and more importantly, the Japanese nation.²²⁸ But, instead of pushing for citizenship for Japanese immigrants, Roosevelt signed the Immigration Act of 1907,²²⁹ which authorized him to prohibit immigrants from coming to the United States when such immigration would work “to the detriment of labor conditions” in the United States.²³⁰ This law also allowed the President to prohibit immigrants initially destined for any “insular possession of the United States” or any foreign country from entering the continental United States.²³¹ The law did not *require* that such immigrants be banned, but instead gave the President full discretion to implement these measures. These provisions of the law were aimed at Japanese who moved first to Mexico, Canada, or Hawaii (an “insular possession of the United States”) and then migrated to the United States.²³² Shortly after he signed this law, President Roosevelt issued an executive order prohibiting “citizens of Japan or Korea, to-wit: Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada or Hawaii” from being allowed “to enter the continental territory of the United States.”²³³

After this, Roosevelt opened negotiations with the Japanese government to dramatically limit Japanese immigration into the United States, which led to the Gentlemen’s Agreement of 1908. Despite his high regard for the Japanese, Roosevelt concluded that he needed to curb Japanese immigration to keep the peace in California. He was concerned that the level of Japanese immigration was growing despite earlier agreements by Japan to reduce immigration.²³⁴ Thus, Roosevelt’s administration negotiated the final Gentlemen’s Agreement of 1908.

Under the agreement, Japan agreed to limit the type and number of visas it issued to its citizens coming to the United States.²³⁵ These limitations included denying visas to “laborers, skilled or unskilled” unless they had previously lived in the United States or were the “parents, wives, or children

²²⁷ Letter from Theodore Roosevelt to George Kennan (May 6, 1905), in 4 LETTERS, *supra* note 192, at 1168–69.

²²⁸ *Id.*

²²⁹ An Act to Regulate the Immigration of Aliens into the United States, ch. 1134, § 1, 34 Stat. 898 (1907).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Exec. Order No. 589 (1907).

²³⁴ See RAYMOND A. ESTHUS, THEODORE ROOSEVELT AND JAPAN 105 (1967).

²³⁵ 65 Cong. Rec. 6073 (1924) (correspondence from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes); see also Kiyō Sue Inui, *The Gentlemen’s Agreement: How it Has Functioned*, 122 ANNALS AM. ACAD. POL. & SOC. SCI. 188 (1925).

under 20 years of age” of such laborers.²³⁶ The agreement allowed for tourists, students, and merchants to come to the United States.²³⁷ The agreement also allowed for family reunification, which meant wives and children could move to the United States to be reunited with a husband or a parent.²³⁸ This led to what was later termed “picture brides”—women who married husbands while in Japan through a proxy system and then were given an exit visa by the Japanese government to enter the United States.²³⁹

The agreement allowed Japan to appear to be an equal partner in the development of American immigration policy. By declaring that Japan would voluntarily restrict emigration to the United States, the agreement did not appear to be forced on the Japanese. But this was a face-saving device. With the exception of China, no other nation in the world had been forced to limit how many of its citizens could move to the United States. Caving in to the racism of the “idiots” in California, the United States effectively browbeat Japan into voluntarily accepting its status as a second-class nation whose citizens were unworthy of moving to the United States.

IX. THE DIPLOMATIC IMPACT OF THE BAN ON JAPANESE IMMIGRATION

In 1908, the governments of Japan and the United States completed the final negotiations of the informal, non-binding “Gentlemen’s Agreement” to limit Japanese immigration to the United States. The goal of this agreement was to resolve disputes over immigration and the status of Japanese immigrants in the United States without resorting to formal legislation or treaties. The 1908 agreement replaced a less successful one developed in 1900. Under the 1908 agreement, Japan promised to voluntarily restrict Japanese immigration to the United States while the administration of Theodore Roosevelt promised to protect the rights of Japanese immigrants and their children living in the United States.²⁴⁰ While reducing some tensions between the two nations over these issues, the Gentlemen’s Agreement formed a rocky foundation for relations between the United States and Japan. Usually relegated to a footnote in

²³⁶ 65 Cong. Rec. 6073 (1924) (correspondence from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes); *see also* Inui, *supra* note 235, at 188.

²³⁷ 65 Cong. Rec. 6073 (1924) (correspondence from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes); *see also* Inui, *supra* note 235, at 188.

²³⁸ 65 Cong. Rec. 6073 (1924) (correspondence from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes); *see also* Inui, *supra* note 235, at 188.

²³⁹ 65 Cong. Rec. 6073 (1924) (correspondence from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes); *see also* Inui, *supra* note 235, at 188.

²⁴⁰ 65 Cong. Rec. 6073 (1924) (correspondence from Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes); *see also* Inui, *supra* note 235, at 188.

American history—and even less than that in the field of immigration law—the Gentlemen’s Agreement deserves greater attention.²⁴¹

Under the first Gentlemen’s Agreement of 1900, as noted above, Japan had promised to stop issuing exit visas to common laborers seeking to migrate to the United States.²⁴² But Japan had continued giving common laborers exit visas for Hawaii, whose labor was vital for the expanding sugar industry on the Islands. However, the 1900 agreement was relatively ineffective. After a short dip in immigration in 1901, the number of Japanese entering the country rose to new levels in 1902 and continued rising until 1909.²⁴³ In addition, a significant number of Japanese migrated to Hawaii, Canada, and Mexico and then eventually moved on to the United States.

The failure of the first Gentlemen’s Agreement in 1900 led to legislation in 1907 aimed at stopping this remigration.²⁴⁴ Under the new law the president was given discretionary power to prohibit immigrants, like the Japanese, from entering the United States through a third country, such as Mexico or Canada, or through American territories like Hawaii or the Canal Zone.²⁴⁵ While this statute successfully reduced the number of Japanese coming to the United States by way of Canada, Mexico, and elsewhere, it did not reduce the number of Japanese directly entering the mainland United States or coming indirectly through Hawaii, in part because ships from that American territory were not considered to be of foreign origin when they docked in the United States. More importantly, the new rules failed to placate the deep hostility to Japanese immigration in California. While millions of people from southern and eastern Europe poured into the United States—including significant numbers to California—large numbers of people in the Golden State remained adamantly opposed to the relatively small numbers of Japanese coming into their state. Their hostility manifested itself at the official level in anti-Japanese laws, resolutions, and regulations, including a resolution by the San Francisco school board to segregate Japanese children in public schools. At the unofficial level, this hostility led to boycotts of Japanese businesses, destruction of property owned by Japanese, and violent attacks on Japanese visitors and immigrants.

²⁴¹ Oddly, there was no official published text of the agreements. Buell, *supra* note 3, at 631. For a statement on where the unofficial agreements can be found, see *supra* note 3.

²⁴² See *supra* Part VII.

²⁴³ ESTHUS, *supra* note 234, at 129, 150. In 1900, just over 12,600 Japanese arrived, this dipped to 5,269 in 1901 when the first Gentlemen’s Agreement went into effect, but then rose to 14,270 in 1902. From 1903 to 1909 over 100,000 Japanese immigrated to the United States. HISTORICAL STATISTICS, MILLENNIAL, *supra* note 76, at 567.

²⁴⁴ Act of Feb. 20, 1907, ch. 1134 § 1, 34 Stat. 898 (1907) (regulating the immigration of aliens into the United States).

²⁴⁵ *Id.*

These acts and events, while taking place mostly in California, had far-reaching consequences because they undermined United States foreign policy and violated an 1894 treaty with Japan granting Japanese immigrants the full and equal protection of American law.²⁴⁶ As noted above, initially, President Roosevelt attempted to protect Japanese rights and allow for Japanese immigration. This was in part due to his deep respect for the Japanese people—“What wonderful people the Japanese are!” he wrote in 1905²⁴⁷—and also to Roosevelt’s belief that antagonizing Japan would undermine American foreign policy and possibly lead to war. Roosevelt’s own Secretary of State, Elihu Root supported the president on this issue with strong legal arguments, asserting that California’s actions “clearly violated the treaty of 1894,”²⁴⁸ and thus under the Supremacy Clause of the Constitution, California’s laws were unconstitutional.²⁴⁹ However, in response to virulent anti-Japanese agitation in California, Roosevelt eventually abandoned his support for the rights of Japanese immigrants and pushed for a new diplomatic understanding, which led to the final Gentlemen’s Agreement of 1908.

Under the 1908 Agreement, the Japanese government voluntarily restricted the number of exit visas it gave Japanese citizens migrating to the United States, and promised to deny exit visas to common laborers trying to enter the United States.²⁵⁰ The result was a sudden and dramatic decline in Japanese migration to the United States. In 1907, 30,226 Japanese entered the United States, but only 3,111 came in 1909, when the Agreement was fully implemented.²⁵¹ In 1910, Japanese immigration dropped to 2,720.²⁵² Some scholars assert that after the agreement, “Japanese migration into California peaked in 1907 and then began a long decline.”²⁵³ But, the issue was in fact far more complicated. Supporters of this claim are obviously correct that immigration from Japan peaked in 1907 with over 30,000, and it bottomed out in 1910 at 2,720. But thereafter, Japanese immigration into the United States rose steadily, passing 6,000 in 1912, passing 8,000 in 1913, and passing 10,000

²⁴⁶ The most conspicuous hostility to Japanese immigration was in California, but other western states, including Oregon, Washington, and Idaho passed hostile legislation. See, *infra* note 296 for subsequent statutes limited in the rights of Japanese in other states. Treaty of Commerce and Navigation, *supra* note 167.

²⁴⁷ Letter from Theodore Roosevelt to Cecil Arthur Spring Rice (Mar. 19, 1904), in 4 LETTERS, *supra* note 192, at 759–61.

²⁴⁸ ESTHUS, *supra* note 234, at 139.

²⁴⁹ *Id.*

²⁵⁰ See generally Inui, *supra* note 235.

²⁵¹ HISTORICAL STATISTICS, *supra* note 6, at 58.

²⁵² HISTORICAL STATISTICS, MILLENNIAL, *supra* note 76, at 567.

²⁵³ LAKE & REYNOLDS, *supra* note 127, at 177 (citing BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990, at 207–12 (1993)). HISTORICAL STATISTICS, MILLENNIAL, *supra* note 76, at 567.

in 1918.²⁵⁴ Indeed, more Japanese immigrants came to the United States in 1918 and 1919 than in all but seven pre-Gentlemen’s Agreement years.²⁵⁵ This contrasts, for example, with the massive decline in Chinese immigration following the Exclusion Act. Thus, Chinese immigration dropped from 39,579 in 1882, on the eve of the Chinese Exclusion Act, to 279 in 1884, when the act was fully implemented, and remained below 5,000 a year until 1924.²⁵⁶ Indeed, Japanese immigration dramatically surpassed Chinese in every year from 1900 to 1924.²⁵⁷

Economic pressures in Japan and the United States undermined the unenforceable agreement. Japanese citizens still wanted to come to the United States, despite hostile state laws and growing anti-Japanese sentiment, and at the same time, employers in California, Hawaii, and elsewhere in the United States (especially the West Coast), wanted to hire them.²⁵⁸

In the Immigration Act of 1924, the United States unilaterally abrogated the Gentlemen’s Agreement, over the protest of the Japanese government, by prohibiting all Japanese immigration.²⁵⁹ This law did not single out Japan for special adverse treatment. Instead, the law provided that no immigrants could come to the United States if they were “ineligible for citizenship.”²⁶⁰ Because Japanese were not “white”²⁶¹ or of African ancestry

²⁵⁴ HISTORICAL STATISTICS, MILLENNIAL, *supra* note 76, at 567.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ On the increasing hostility to Japanese in California, see POLITICS OF PREJUDICE, *supra* note 3. One example of California’s pernicious, but creative, racism was the Alien Land Law of 1913 (officially known as the Webb-Haney Act), which prevented “aliens ineligible for citizenship” from owning agricultural land or leasing such land for more than three years at time. For an early discussion of this law, see Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61 (1947). This law was struck down in *Oyama v. California*, 332 U.S. 633 (1948).

²⁵⁹ Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (an “Act to Limit the Immigration of Aliens into the United States, and for Other Purposes”).

²⁶⁰ *Id.* On the Japanese protest, see Statement of Ambassador Masanao Hanihara to Secretary of State Charles Evans Hughes, 65 Cong. Rec. 6073 (1924). The 1924 law provided for a quota for general immigration from every nation in the world. However, the law barred the immigration under the quota system of persons who were “ineligible for citizenship.” Immigration Act of 1924, ch. 190 §§ 13 (c), 28 (c), 43 Stat. 153, 162, 168. Because American law did not allow the naturalization of Asians, Japanese and Chinese could not come into the United States under the quota. The law did allow wives, children, and parents of American residents and citizens to enter the country. From 1924 until 1941, a total of about 6,300 Japanese entered the United States. Contrast this with the 8,800 who entered just in the year 1924 (before the quota system went into effect) or the 30,000 who entered the year before the Gentlemen’s Agreement went into effect. HISTORICAL STATISTICS, MILLENNIAL, *supra* note 76, at 567–68.

²⁶¹ See HANEY LÓPEZ, *supra* note 58.

(the only categories of people who could be naturalized)²⁶² they were de facto excluded from moving to the United States.

The events that preceded the final Gentlemen's Agreement—including the San Francisco school segregation ordinance—were deeply humiliating and hostile to the Japanese government and Japanese immigrants. The Gentlemen's Agreement itself was essentially one sided and inherently insulting to Japan. In 1900 most Japanese believed “America was a friend.”²⁶³ But the racist state legislation directed at Japanese immigrants passed by the California legislature, the unpunished vigilante attacks on them, and the humiliation of the Gentlemen's Agreement altered Japanese attitudes towards the United States. After the negotiations over the Gentlemen's Agreement, most Japanese no longer believed that “America was a friend.”

As such, the final Gentlemen's Agreement was the first step in the long decline in relations between the two nations which culminated in the Japanese attack on Pearl Harbor and the devastating war that followed. The Gentlemen's Agreements, especially the second one of 1908, illustrate the corrosive effects of racism and discrimination on both foreign and domestic policy and support the arguments of some legal scholars that racial bias that has long affected American immigration and naturalization rules.²⁶⁴

From a constitutional perspective, the final Gentlemen's Agreement also underscores how federalism can endanger the nation and disrupt foreign policy. The negotiations that led to the 1908 Gentlemen's Agreement began in response to a decision by the San Francisco school board to segregate Japanese children in the public schools. The Japanese government correctly saw this action as deeply insulting to the Japanese people and argued that this decision by a local school board violated the 1894 treaty between the two nations.²⁶⁵

The actions of the San Francisco school board illustrate one of the great problems of the American constitutional system. In the early part of the 20th century the regulation of both race relations and public education were inherently state matters.²⁶⁶ (A century later, of course, the regulation of public education still remains largely in the hands of local and state officials.) Thus, in 1906, the national government could not easily undo the damage to international relations caused by the racism of the authorities in San Francisco. Federalism thus undermined and complicated diplomacy.

²⁶² Naturalization Act of 1870, ch. 254 16 Stat. 254 (1870) (“An Act to Amend the Naturalization Laws, and To Punish Crimes Against the Same, and for Other Purposes”).

²⁶³ LAKE & REYNOLDS, *supra* note 127, at 175.

²⁶⁴ See Chin, *supra* note 98; Kevin R. Johnson, *Immigration, Civil Rights, and Coalitions for Social Justice*, 1 HASTINGS RACE & POVERTY L.J. 181 (2003).

²⁶⁵ Treaty of Commerce and Navigation, *supra* note 167.

²⁶⁶ See, e.g., *Berea College v. Kentucky*, 211 U.S. 45 (1908); see also Finkelman, *Civil Rights in Historical Context*, *supra* note 169, at 973–1027 (discussing the development of segregation); Finkelman, *Original Intent and the Fourteenth Amendment*, *supra* note 169, at 1019–63.

As Roosevelt had explained to Baron Kaneko, American federalism made it difficult for the national administration to easily respond to the actions of the states and local governments which were passing anti-Japanese laws.²⁶⁷ When negotiations with California authorities failed, Roosevelt’s administration sued the school board.²⁶⁸ This cumbersome method of enforcing the treaty was hardly suited for quickly ending San Francisco’s policy. In March 1907, after meeting with President Roosevelt, the San Francisco school board rescinded its rule for Japanese and Japanese-American children.²⁶⁹ By this time though, relations between the two nations had been severely damaged and the “dismay, frustration and ultimately anger” the Japanese felt toward the United States would not be easily undone.²⁷⁰ There are modern corollaries to this problem.²⁷¹ Thus, for a variety of reasons, revisiting the Gentlemen’s Agreement offers us some historical perspective on the modern world, which is complicated by racial and ethnic diversity and competition. The history also sheds light on the “disadvantages,” as Roosevelt called them, of a United States constitutional structure that is hamstrung by a system of federalism developed more than two centuries ago. This history also points out the very real dangers to the nation stemming from state-based discrimination against aliens that impinges on national immigration policy. The school segregation in San Francisco, the California alien land laws, and the constant anti-Japanese agitation in California and elsewhere led to a massive deterioration in United States-Japanese relations that ultimately set the stage of war between the two countries.

X. THE ULTIMATE COSTS OF ANTI-JAPANESE POLICY

Theodore Roosevelt began his presidency with a strong sense of what might be called fairness in immigration, tainted by common racist notions of

²⁶⁷ Letter from Theodore Roosevelt to Baron Kentarō Kaneko (Oct. 26, 1906), in 5 LETTERS, *supra* note 144, at 473; *see also* ESTHUS, *supra* note 234 at 139–47, 167–68. There are obvious parallels to modern issues of immigration law today. State statutes purporting to enforce federal immigration laws often run in conflict with national policy. *See, e.g.*, Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, ARIZ. REV. STAT. ANN. § 11-1051, *invalidated by* Arizona v. United States, 132 S. Ct. 2492 (2012).

²⁶⁸ Letter from Theodore Roosevelt to Baron Kentarō Kaneko (Oct. 26, 1906), in 5 LETTERS, *supra* note 144, at 473.

²⁶⁹ AKIRA IRIYE, FROM NATIONALISM TO INTERNATIONALISM: UNITED STATES FOREIGN POLICY BEFORE 1917, at 201 (1977) [hereinafter FROM NATIONALISM TO INTERNATIONALISM]; *see also* Buell, *supra* note 3, at 631.

²⁷⁰ FROM NATIONALISM TO INTERNATIONALISM, *supra* note 269, at 201; *see also* Buell, *supra* note 3, at 631.

²⁷¹ *See* Medellin v. Texas, 552 U.S. 491 (2008) (discussing the State of Texas refusing to follow United States treaty obligations to inform the Mexican embassy when a Mexican national was arrested by state authorities).

the age. Thus, he endorsed restrictions on Chinese immigrants and others “who are ignorant, vicious, and with low standards of life and comfort”²⁷² At the same time, early in his presidency, Roosevelt supported Japanese immigration and at one point urged Congress to allow for the naturalization of Japanese aliens. These sentiments are in part tied to Roosevelt’s respect for the Japanese that came from his friendship with Baron Kaneko. Roosevelt and Kaneko had been classmates at Harvard, although they had not met at that time.²⁷³ But, by the time he became President, Roosevelt knew and respected Kaneko and thus understood that the Japanese could be the “right sort”²⁷⁴ of immigrants. He also gained great respect for the Japanese during the Boxer Rebellion and the Russo-Japanese War. During his negotiations to end the Russo-Japanese War, he told a confidant that “I thoroughly admire and believe in the Japanese. They have always told me the truth, and the Russians have not.”²⁷⁵ His respect for Japan was tied to his fear that poor relations between the two nations might lead to war. And as a famous soldier and military hero, he, in part, admired the Japanese because “they have the kind of fighting stock I like.”²⁷⁶ Thus, his immediate response to the anti-Japanese agitation in California was anger and frustration at the “foolish offensiveness” of the “idiots” and the “infernal fools” in California.²⁷⁷

By the end of his presidency and in his post presidential years, Roosevelt’s ideology shifted from seeking cooperation and peace, toward displaying his “big stick” in an attempt to cow the Japanese. In 1905 and 1906, he instinctively understood that insulting the Japanese and increasing tensions between the two nations was not in America’s best interest. Indeed, as one scholar has noted, the school segregation crisis would “leave such ugly memories on both sides of the Pacific that the cordiality that had characterized previous relations could never be fully recovered.”²⁷⁸ But, he began to move away from his smart diplomatic instincts. Thus, he sought to intimidate the Japanese when he sent the Great White Fleet across the Pacific to impress the Japanese with America’s military power. At the same time, he aggressively

²⁷² ROOSEVELT CYCLOPEDIA, *supra* note 158, at 244.

²⁷³ See MASAYOSHI MATSUMURA, *BARON KANEKO AND THE RUSSO-JAPANESE WAR (1904-05): A STUDY IN THE PUBLIC DIPLOMACY* (Ian Ruston trans., 2009).

²⁷⁴ Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), in 15 RICHARDSON, *supra* note 184, at 7007.

²⁷⁵ Letter from Theodore Roosevelt to George Kennan (1905), in ROOSEVELT CYCLOPEDIA, *supra* note 158, at 273.

²⁷⁶ *Id.*

²⁷⁷ Letter from Theodore Roosevelt to George Kennan (May 6, 1905), in 4 LETTERS, *supra* note 192, 1168–69; Letter from Theodore Roosevelt to Kermit Roosevelt (Oct. 27, 1906), in 5 LETTERS, *supra* note 144, at 475–76.

²⁷⁸ ESTHUS, *supra* note 234, at 128.

pushed for the second “Gentlemen’s Agreement” of 1908 that was neither gentlemanly nor much of an agreement.

Part of the reason for this ultimate result—and Roosevelt’s about face on seeking harmonious relations with Japan—was the failure or inability of the national government to adequately respond to the racism in California. Federalism, political considerations, and Roosevelt’s unwillingness to use all of his power to confront California left him unable to recover the high level of friendship and cooperation that he had built while negotiating an end to the Russo-Japanese War. Secretary of State Root believed that California’s actions “clearly violated the treaty of 1894,”²⁷⁹ and thus under the Supremacy Clause of the Constitution, he thought the federal government had a legal duty, a moral right, and a constitutional obligation to intervene to protect Japanese rights. But, racism, the Supreme Court’s jurisprudence on segregation, and Roosevelt’s own political values took him elsewhere.

Roosevelt initially told the Japanese he would do everything necessary to protect their rights, and the Japanese responded warmly. After Roosevelt’s 1906 message to Congress suggesting that the naturalization laws be extended to Japanese immigration, Baron Kaneko told the President that Japanese editorials “showered upon you all the praises they have in store.”²⁸⁰ But, within a year, Roosevelt had squandered this good will by caving in to the racist demands of California to end Japanese immigration. Moreover, he no longer seemed to care about getting along with Japan because, as he told his Secretary of State, “we have the navy in good shape.”²⁸¹

By 1913, in the wake of his unsuccessful attempt to regain the presidency,²⁸² Roosevelt had also abandoned his previous respect for the Japanese and no longer recognized the differences between Japanese immigrants and those from China. He noted the “strong feeling in California against the immigration of Asiatic laborers,” and agreed this was “fundamentally a sound and proper attitude, an attitude which must be insisted upon.”²⁸³ He still argued that this policy should be carried out with a “sense of

²⁷⁹ *Id.* at 139.

²⁸⁰ Letter from Kentarō Kaneko to Theodore Roosevelt (Dec. 1, 1906), in ESTHUS, *supra* note 234, at 147.

²⁸¹ Letter from Theodore Roosevelt to Elihu Root (July 13, 1907), in 5 LETTERS, *supra* note 144.

²⁸² Roosevelt did not run for reelection in 1908, and instead supported Secretary of War William Howard Taft. But in 1912, Roosevelt opposed Taft for the nomination and after being denied the nomination by the Republican Party, Roosevelt ran as a third party candidate on the Progressive Party, more commonly known as the Bull Moose Party. His running mate was Hiram Johnson of California, who supported the anti-Japanese movement in California. Roosevelt ran second in the popular vote and the electoral vote, with the incumbent President Taft running third. See 2 JAMES T. HAVEL, U.S. PRESIDENTIAL CANDIDATES AND THE ELECTIONS: A BIOGRAPHICAL AND HISTORICAL GUIDE 99 (1996).

²⁸³ ROOSEVELT CYCLOPEDIA, *supra* note 158, at 244.

mutual fairness and reciprocal obligation and respect as not to give any just cause of offense to Asiatic peoples,”²⁸⁴ even though he surely knew that the policies he had developed in his last few years in office would certainly lead to “offense.” Two years later he extolled the virtue of “[t]ravellers, scholars, men engaged in international business, all sojourners for health, pleasure, and study” being “heartily welcomed in both countries,” but had now thoroughly rejected immigration, arguing that “[f]rom neither country should there be any emigration of workers of any kind to, or any settlement in mass in, the other country.”²⁸⁵

It would be too much to blame the subsequent total deterioration of Japanese-American relations on the San Francisco school segregation ordinance, Gentlemen’s Agreements, or later laws in California such as the alien land law. Later immigration policies surely were even more important not only in international affairs, but also in the domestic sphere. In 1922, in *Ozawa v. United States*, the Supreme Court held that a Japanese immigrant could not be naturalized because he was not “white,” as required by the 1870 Naturalization Act.²⁸⁶ The Immigration Act of 1924 constituted a unilateral abrogation of the Gentlemen’s Agreement, because “persons ineligible for citizenship”—such as the Japanese—were unable to immigrate under the new quota system.²⁸⁷ Congress did take this action openly, by simply banning Japanese immigration. Instead, the Congress did it indirectly by banning immigrants “ineligible for citizenship” and relying on the Supreme Court’s decision in *Ozawa v. United States* to ban Japanese immigrants by implication. Ironically, in 1901, the U.S. Industrial Commission had said the Japanese were “as a class tricky, unreliable, and dishonest.”²⁸⁸ But, in the 1924 Immigration Act, it was the U.S. Congress that was “tricky” and “dishonest.” The Japanese government was furious over this unilateral abrogation of existing diplomatic relations.²⁸⁹ The Japanese understood that Congress and the President had deeply insulted them by, in effect, saying they were unfit to migrate to the United States.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 273 (Originally published in *The Metropolitan* (Mar. 1915)).

²⁸⁶ See *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that Japanese were not “white” and thus could never be naturalized citizens even though Ozawa was “well qualified by character and education” to become an American citizen); see also Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case*, reprinted in 2 *ASIAN AMERICANS AND THE LAW* 397 (Charles McClain ed., 1994). The Court reaffirmed this analysis in *United States v. Thind*, 261 U.S. 204 (1923), holding that a person from India was also not “white” for purposes of immigration.

²⁸⁷ Immigration Act of 1924, ch. 190, §§ 13(c), 28(c), 43 Stat. 153, 162, 168 (repealed 1952).

²⁸⁸ TENBROEK ET AL., *supra* note 105, at 23–24.

²⁸⁹ On Japanese reaction, see 65 CONG. REC. 6073–74 (1924); see also Inui, *supra* note 235, at 188.

The ultimate collapse of United States-Japanese relations was of course also a function of Japanese imperial designs in China and the Pacific. Even before the Japanese attack on Pearl Harbor, on December 7, 1941, United States-Japanese relations were close to the breaking point. Japanese aggression in Asia, including the Japanese annexation of Manchuria, the invasion of China, and the horrendous slaughter of hundreds of thousands of civilians and captured Chinese troops in the "rape of Nanking" in late-1937 and early-1938 had fatally destroyed United States-Japanese relations.²⁹⁰ By this time, Japan was intent on totally dominating east Asia and the western Pacific, and short of a change in Japan's political leadership, war between the United States and Japan was virtually inevitable.

However, if the United States had treated Japan as an equal in the world, by implementing a less racist foreign policy, it might have diminished Japanese fears, reduced the aggressive and imperialistic policies of Japan, and could have even improved relations to the point where war between the two nations was less likely to occur. A different American policy might even have altered Japan's internal politics. We can only wonder if events would have been different if there was fair trade, robust commerce, and friendly relations between the two nations, along with the decent treatment of Japanese citizens living in the United States and a non-racist immigration policy. On the other hand, while the American immigration policy was deeply insulting to the Japanese, it surely did not justify Japan's imperial moves in the 1930s, the slaughter of at least a million civilians in China, and the attack on Pearl Harbor in 1941. But, a different American policy might have set the stage for a less aggressive Japan and enabled the two nations to peacefully negotiate their differences.

By the 1930s, more than two decades of racist policies pursued by various presidents, Congresses, and many state legislatures—and approved by the Supreme Court—made any understanding between the two nations difficult. Leadership from the executive branch and different legislation in Congress would have gone a long way towards redirecting Japanese-American relations. On the other hand, American federalism, and the weakness of the federal government made it impossible for the national government to totally reign in the states. As California, Oregon, and other states pursued their own racist policies toward Japanese immigrants and their children—developing what might be considered their own state immigration policies—they forced the

²⁹⁰ After the fall of Nanking, the Japanese slaughtered thousands of captured Chinese soldiers, murdered some 20,000 young men and boys in the city, raped tens of thousands of women, and ultimately murdered at least 200,000 Chinese civilians and probably as many as 370,000 or more. See IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997); see also *The Rape of Nanking or Nanjing Massacre (1937)*, PACIFICWAR.ORG, http://www.pacificwar.org.au/JapWarCrimes/TenWarCrimes/Rape_Nanking.html (last visited Apr. 10, 2015).

United States into a relationship with Japan that helped push both countries towards war.

A different jurisprudence by the Supreme Court might also have altered the trajectory of Japanese-American relations. In *Ozawa v. United States*,²⁹¹ the Supreme Court interpreted the federal law to exclude naturalization of East Asians on the ground that they were not “white.” This of course was a highly subjective categorization. From his skin color, Ozawa looked “white,” and surely had lighter skin than some Europeans, Mexicans, or Middle Easterners whom the courts did consider “white.” A different jurisprudence on race would have altered the politics of the immigration laws and certainly would have been more respectful of the Japanese. Similarly, the Court’s support of segregation at the state level only encouraged the racists in the California legislature to increase their attacks on Japanese immigrants and their children. Significantly, William Howard Taft—who had been Secretary of War when the Gentlemen’s Agreement was negotiated—was the Chief Justice when the Supreme Court unanimously ruled against Japanese naturalization in *Ozawa*.²⁹² In 1925, the Court also denied naturalization to Hidemitsu Toyota, who came to the United States in 1913 and served in the U.S. Coast Guard and the Navy during World War I. Federal law allowed honorably discharged veterans to immediately claim citizenship. The federal court in Massachusetts granted him citizenship, but the United States government appealed and the Supreme Court reversed this ruling. To his credit, Chief Justice Taft dissented, but no other justice joined him.²⁹³

A more enlightened American immigration policy in 1908 and 1924 might have led to very different relations between the two nations. The Gentlemen’s Agreement was insulting to the Japanese, who were essentially told that they were not “good enough” to move to the United States. The unilateral abrogation of the Agreement in the 1924 Immigration Act was a direct, and unnecessary, assault on Japanese pride. Under the 1924 Act many nations received the minimum quota of 100 immigrants per year.²⁹⁴ Had Japan received this quota, there would have been no perception of insult. But Japan was denied any immigrants under the quota system, through the façade of banning all aliens “ineligible to citizenship.”²⁹⁵

It is also possible that if the United States had developed a different immigration policy before 1908, Japan itself might have been fundamentally changed. Instead of viewing the United States as a hostile rival, the Japanese might have seen America as a good friend, welcoming Japan into the world

²⁹¹ See *Ozawa v. United States*, 260 U.S. 178 (1922).

²⁹² *Id.*

²⁹³ *Toyota v. United States*, 268 U.S. 402 (1925).

²⁹⁴ Immigration Act of 1924, ch. 190, §§ 13(c), 28(c), 43 Stat. 153, 162, 168 (repealed 1952).

²⁹⁵ *Id.*

community as a full and equal partner. This, in turn, might have altered the way Japan viewed the United States and the rest of the world. It might also have altered Japanese domestic politics and allowed the nation to veer away from its catastrophic journey to war under Tojo.

In addition to the immigration policy, the racism of California and other states also exacerbated tensions in international relations. Following the Gentlemen's Agreement, California and other states passed laws to restrict Japanese land ownership.²⁹⁶ Reflecting the views of most easterners, the *Hartford Times* [Connecticut] recognized that such actions were detrimental to the entire nation, noting that "of the two, it might be cheaper to go to war with California than with Japan."²⁹⁷ In addition to restricting land ownership, the western states found other ways to limit the ability of Japanese to participate in regulated economic activities.²⁹⁸ These laws clearly undermined the nation's ability to work with Japan in the international setting.

The decline in Japanese immigration after 1908 also had adverse long-term consequences for the Japanese-American community. The arbitrary limitation on Japanese immigration slowed the growth of the Japanese-American community and made it less able to resist the discriminatory legislation after 1908. In the long run, these immigration policies also left the Japanese community on the West Coast unable to fend off the internment of

²⁹⁶ See Act of Mar. 12, 1917, ch. 43, 1917 Ariz. Sess. Laws 56, 56–58; Act of May 19, 1913, ch. 113, 1913 Cal. Stat. 206, 206–08; Act of Mar. 10, 1923, ch. 122, 1923 Idaho Sess. Laws 160, 160–65; La. Const. of 1921, art. XIX, § 21; J.R. No. 9 of Mar. 8, 1921, Const. Amend. No. 2, 1921 N.M. Laws 469; Act of Feb. 16, 1923, ch. 98, 1923 Or. Laws 145, 145–150; Act of Mar. 8, 1921, ch. 50, 1921 Wash. Sess. Laws 156, 156–60; *Porterfield v. Webb*, 263 U.S. 225 (1923); see also *Frick v. Webb*, 263 U.S. 326, 333–34 (1923); Aoki, *supra* note 5; Buell, *supra* note 3; Kevin Shawn Hsu, *Empowerment, Discrimination, and the Façade of Leadership: Asian American Political Elites' Failed Assimilationist Strategy*, 14 ASIAN AM. L.J. 85, 88 n.14 (2007). These laws were struck down in *Oyama v. California*, 332 U.S. 633 (1948). See generally, Dudley O. McGoveney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7 (1947).

²⁹⁷ See BOSWORTH, *supra* note 4, at 38.

²⁹⁸ *In re Takuji Yamashita*, 70 P. 482 (Wash. 1902) (denying otherwise qualified applicant the right to practice law in Washington State on the grounds that Japanese born immigrants could not be citizens of the United States, and the State of Washington made citizenship a prerequisite for admission to the bar. Not all states had such a requirement); see also *In re Hong Yen Chang*, 24 P. 156 (Cal. 1890) (stating that California would not admit to the bar a Chinese immigrant even though he had been admitted to practice in New York). In 1943, California also prohibited Japanese immigrants from obtaining commercial fishing licenses. See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (overturning California law denying commercial fishing licenses to "persons ineligible for citizenship," which applied almost entirely to Japanese born aliens). The State of Washington prohibited aliens who had not declared their intention to become citizens—which meant Asians who could not become citizens—from owning firearms, obtaining hunting licenses, becoming public school teachers, or engaging in commercial fishing. See PAULI MURRAY, *STATES' LAW ON RACE AND COLOR* 491–503 (University of Georgia Press 1997) (1951).

1942. Had Theodore Roosevelt, the Congress, and the Supreme Court stood up to the bigots in California, it is likely that the Japanese-American population would have been much greater in 1942 and better integrated into the society. Had the land laws (and other restrictions on Japanese economic development) been struck down, the Japanese-American community would have been in a stronger position and less vulnerable to the racist forces that led to the Internment. This might have prevented the wholesale incarceration of the Japanese-Americans on the West Coast,²⁹⁹ and instead of an interment program, it would have resembled the targeted and selected policy carried out in both Hawaii and the mainland against those Germans and German-Americans who were legitimately seen as threats to the nation's security.

However, in 1941 and 1942, Japanese-Americans were politically weak and economically vulnerable. When the war began, California's leaders defended the loyalty of the much larger Italian-American community in California and elsewhere, and successfully opposed interning Italian nationals—such as the parents of Joe DiMaggio who lived in San Francisco but had never bothered to learn much English or become citizens.³⁰⁰ Similarly, no one considered incarcerating the Italian-American mayor of New York, Fiorello LaGuardia, or his counterpart in San Francisco, Angelo J. Rossi.³⁰¹ Nor did anyone imagine the government should monitor such German-Americans as General Dwight D. Eisenhower or Admiral Chester W. Nimitz, who were two of three men to command a theater of operations during the War.³⁰² When Eisenhower was the Supreme Allied Commander in Europe, planning and coordinating the Allied invasion of Europe (the Normandy landing), no one suggested he was a security threat, or that his German-American family in the United States was a security threat.³⁰³ But, reaching

²⁹⁹ The literature on the Japanese internment is huge. See PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES* (1983); see also COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1982), available at <http://www.archives.gov/research/japanese-americans/justice-denied/summary.pdf>; see also *Korematsu v. United States*, 323 U.S. 214 (1944), vacated by *Korematsu v. United States*, 584 F. Supp. 1406 (D. Cal. 1984) (granting writ of coram nobis to vacate original conviction).

³⁰⁰ See RICHARD BEN CRAMER, *JOE DIMAGGIO: THE HERO'S LIFE* (2001).

³⁰¹ See ROGER DANIELS, *THE DECISION TO RELOCATE THE JAPANESE AMERICANS* 51 (1975); see also ROGER DANIELS, *CONCENTRATION CAMPS U.S.A.: JAPANESE-AMERICANS AND WORLD WAR II* 75 (1971). For a discussion of the DiMaggio family, see CRAMER, *supra* note 300, at 16–25, 33–34.

³⁰² Lloyd J. Graybar, *Nimitz, Chester William*, AM. NAT'L BIOGRAPHY ONLINE (Feb. 2000), <http://www.anb.org/articles/06/06-00474.html>.

³⁰³ This contrasts of course with members of the Nisei Brigade (the 442nd Infantry Regiment and the 100th Regimental Combat Battalion, which were made up entirely of Japanese-American soldiers, many of whom had relatives in internment camps in the United States). See LYN CROST, *HONOR BY FIRE: JAPANESE AMERICANS AT WAR IN EUROPE AND THE PACIFIC* (1994); ERIC MULLER, *FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT*

back to a long tradition of hostility to the Japanese in California, the Congressional delegation from that state was able to push policies and legislation that led to the internment of some 120,000 elderly Japanese aliens and their American-born children, who were citizens of the nation.³⁰⁴

Without the Agreement of 1908, the path that ultimately led to Pearl Harbor and the devastation that followed, might have led to a different destination. In 1900, as the Japanese intellectual Inazo Nitobe noted, even the peasants in Japan “were aware that . . . America was a friend.”³⁰⁵ The diplomat Viscount Tadasu Hayashi “declared fulsomely that Japan regarded America as its benefactor.”³⁰⁶ But, the school segregation crisis and the treatment of Japanese immigrants as a pariah race—at a time when millions of less-educated Europeans were pouring into the United States—set the two nations on a course for conflict. A different legal resolution to both issues might have fundamentally altered Japanese-American relations and internal Japanese attitudes toward the United States, discouraging anti-American Japanese militarism and imperialism in the 1920s and 1930s, and leading to peaceful resolutions of conflicts between the two nations.

Even if conflict between Japan and the United States had eventually taken place, a different immigration and naturalization policy might have still led to a better outcome on the home front. A larger, more integrated, and more politically successful Japanese-American community would have been less vulnerable to the racism leading to the internment. Thus, with a different policy in 1908 and beyond, it is likely that Japanese-Americans, and the whole American nation, might have fared better after Pearl Harbor. Ironically, when Franklin D. Roosevelt issued Executive Order 9066,³⁰⁷ interning almost all Japanese-Americans, he was following a path created by his distant cousin who had pushed for the Gentlemen’s Agreement in 1907 and 1908. The circumstances of the internment—the Japanese attack on Pearl Harbor and the war that followed—are also rooted in these events of the early 20th century. They also provide lessons for Americans of today as Congress debates immigration policy and some states try to develop what amounts to their own foreign policy and immigration policy.

RESISTERS IN WORLD WAR II (2001); MASAYO UMEZAWA DUUS, UNLIKELY LIBERATORS: THE MEN OF THE 100TH AND 442ND (2006).

³⁰⁴ See Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (instituting a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, and committing any act in military areas or zones).

³⁰⁵ LAKE & REYNOLDS, *supra* note 127, at 175.

³⁰⁶ *Id.* at 176.

³⁰⁷ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).