

Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity

Natsu Taylor Saito †

Those of Asian descent are often portrayed as the “model minority.” However, the very same elements which comprise the model minority can also be read as components of the “yellow peril.” The author argues that Neil Gotanda’s concept of “foreignness” rectifies the contradictory images simultaneously attributed to Asian Americans. By characterizing those of Asian descent as “foreigners,” dominant society is able to slip freely from the model minority to the yellow peril label. She posits that this freedom has historically enabled those of Asian descent to be used as cheap labor and as a mask to hide real issues of discrimination against Asian Americans and other minorities. Presently “foreignness” serve to reinforce racial hierarchy in the U.S. She concludes that recognizing that foreignness creates this duality for Asian Americans may allow society to more effectively combat the presumption that Asian Americans are foreign and thus entitled to lesser standards of protection

I.

INTRODUCTION: MISSING PIECES

Hardworking, studious, unassuming, thrifty. Inscrutable, sneaky, competitive. Those of Asian descent are sometimes portrayed as the “model minority,”¹ people who are succeeding in America despite their

© 1997 Asian Law Journal

† Associate Professor, Georgia State University College of Law. My thanks go to Robert Chang for organizing this symposium and for inviting me to participate, to Neil Gotanda for challenging and expanding my understanding of “foreignness,” and to Kelly Jordan for his thoughtful criticism of this essay. My work was greatly facilitated by the assistance of Soo Jo and Rand Csehy.

Many of the ideas in this essay are considered in greater detail in *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, ___ OREGON L. REV. ___ (forthcoming Spring 1997). I am grateful to Keith Aoki, Kelly Jordan, Robert Chang, Neil Gotanda, and Kevin Johnson for their comments on drafts of that piece, and to the many people who gave me comments at the second annual conference of Asian Pacific American Law Professors and the eighth annual Critical Race Theory Workshop, where versions of that paper were presented.

1. Su Sun Bai, *Comment, Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 744-46 (1991). See also *Asian-Americans: A “Model Minority,”* NEWSWEEK, Dec. 6, 1982, at 40; David A. Bell, *The Triumph of Asian-Americans: America’s Greatest Success Story*, NEW REPUBLIC, July 15 and 22, 1985, at 24; 60

status as minorities² by working and studying, saving and sacrificing for the future. However, as the "yellow peril,"³ Asians and Asian Americans⁴ are also depicted as military, cultural or economic enemies and unfair competitors for education and jobs.

The positive versions of these stereotypes include images of Asian Americans as hardworking, industrious, thrifty, family-oriented, and even mysterious or exotic. It is striking that the negative images almost invariably involve the same traits. Hardworking and industrious become unfairly competitive; family-oriented becomes clannish; mysterious becomes dangerously inscrutable.⁵ As Gary Okihiro notes:

The Asian work ethic, family values, self-help, culture and religiosity, and intermarriage—all elements of the model minority—can also be read as components of the yellow peril. . . . [T]he yellow peril and

Minutes: The Model Minority (CBS television broadcast, Feb. 1, 1987), cited in RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 474 (1989).

2. I use the term "minorities" in this context because of the juxtaposition of groups created by the designation "model minority." However, I am troubled by the general use of this term for several reasons.

One is that "minorities" is often used as a code word for people identified by this society as "non-white." But when convenient, the term is broadened to refer to all disadvantaged or relatively powerless groups, including women (who are not a numerical minority) and people with physical disabilities. Often this results in questions of racism being skirted. In addition, it creates tensions between groups, for it appears that an insistence on addressing one type of oppression or disadvantage is a discounting of the others. This problem also arises with the use of the term "diversity." Another problem is the implication that because the group, whatever it is, is a numerical minority, its lack of political, economic or social influence is simply a necessary by-product of a majoritarian democratic process and need not be taken too seriously.

3. Justice Murphy noted in his concurrence in *Oyama v. California*, "All the propaganda devices then known—newspapers, speeches, films, pamphlets, leaflets, billboards, and the like—were utilized to spread the anti-Japanese poison. The Japanese were depicted as degenerate mongrels and the voters were urged to save 'California—the White Man's Paradise' from the 'yellow peril' . . ." *Oyama v. California*, 332 U.S. 633, 658-59 (1948)(holding California's alien land laws unconstitutional).

4. By "Asian American" I refer to persons of Asian descent who live in the United States, regardless of citizenship status. This is a broad and diverse group, as illustrated by the 1990 Census Bureau definition, which includes persons from over sixteen nations or ethnic groups and over twenty Pacific Island cultures. I use "Asian American" rather than "Asian Pacific American" or "Asian/Pacific Islander" not to exclude those from Pacific Island cultures, but because I find the latter terms cumbersome. I also include in my usage those of "mixed" heritage, who might not fall within the government's definition of "Asian/Pacific Islander." See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 *ASIAN L. J.* 1 (1994), 81 *CAL. L. REV.* 1241 (1993) (defining Asian American); Neil Gotanda, *Chen the Chosen: Reflections on Unloving*, 81 *IOWA L. REV.* 1585 (1996) (discussing "Asian American" as a social category).

5. See GARY OKIHIRO, *MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE* 141 (1994); Keith Aoki, "Foreign-ness" & *Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 *UCLA ASIAN PAC. AM. L. J.* ____ (forthcoming) (manuscript at 139-42, draft of Mar. 4, 1996 on file with author); Frank Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 *B.C. THIRD WORLD L.J.* 225, 240-41 (1995). See also Sumi Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets "Suzie Wong"*, in *CRITICAL RACE FEMINISM* 203 (Adrien Wing ed., 1996).

the model minority are not poles, denoting opposite representations along a single line, but in fact form a circular relationship that moves in either direction.⁶

How can such apparently contradictory images be simultaneously attributed to Asian Americans? One piece of this puzzle came to me as I pondered another inadequately explained part of Asian American legal history—the Supreme Court's decisions in the Japanese American internment cases, *Korematsu*, *Hirabayashi*, *Yasui*, and *Endo*.⁷

The story of the incarceration of over 120,000 persons of Japanese ancestry by the United States government during World War II is a familiar one. I grew up hearing stories of my father's internment in Tule Lake, California; witnessed my uncle's participation in the drive for reparations in the Japanese American community; and, as a law student, followed with interest the coram nobis petitions⁸ through which the convictions of Fred Korematsu and Gordon Hirabayashi were vacated.⁹ But I always felt that something was missing in the legal and historical explanations of the internment.

In 1943 and 1944 the Supreme Court upheld the curfew and the evacuation and incarceration of Japanese Americans on the basis of military necessity. Most critiques of these decisions, including Justice Murphy's dissent in *Korematsu*¹⁰ and Eugene Rostow's uncompromising analysis,¹¹ have focused on the dangers of combining racism and wartime hysteria, implying that the military actions and their sanctioning by the judiciary were an aberration from an otherwise relatively straightforward march toward the protection of all Americans' constitutional rights.

The coram nobis petitions were based on the 1981 discovery of evi-

6. OKIHIRO, *supra* note 5, at 141. Keith Aoki has described this as "akin to the paradoxical topology of a mobius strip. If pressed, the so-called "good" attributes . . . easily transform into the "bad" attributes . . . and vice versa." Aoki, *supra* note 5, at 141. See also Wu, *supra* note 5, at 229 (commenting on the "Janus-like" nature of the phenomenon).

7. *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex Parte Endo*, 323 U.S. 283 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). See generally, PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983); ROGER DANIELS, *THE DECISION TO RELOCATE THE JAPANESE AMERICANS* (1975); Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

8. Under the All Writs Act, 28 U.S.C. § 1651(a), federal criminal convictions obtained by errors so fundamental that the underlying proceeding is rendered invalid may be challenged by a petition for a writ of error coram nobis. See *United States v. Morgan*, 346 U.S. 502 (1954).

9. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). See also IRONS, *JUSTICE AT WAR*, *supra* note 7; PETER IRONS, *JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES* (1989); Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985).

10. *Korematsu v. United States*, 323 U.S. at 233 (1944).

11. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

dence that the War Department had knowingly concealed information about the danger (or lack thereof) posed by Japanese Americans.¹² Accordingly, the convictions of Korematsu and Hirabayashi were vacated on the premise that the Court would probably have decided differently had it known these facts.¹³ But is it probable that if the Court had seen the original version of General DeWitt's Final Report¹⁴ or knew that the Justice Department did not consider Japanese Americans a major security concern, it would have decided differently in 1943 and 1944?

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians which held nationwide hearings. Its final report concluded, "The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it . . . were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership."¹⁵ Based on this report, the President issued an official apology and Congress passed legislation providing for at least symbolic redress.¹⁶ These, too, imply that the experience was an unfortunate detour in an otherwise honorable history of respect for the rights of citizens.

Ruling in 1986 on motions for reconsideration in the Hirabayashi case, Judge Voorhees stated, "It is now considered by almost everyone that the internment of Japanese-Americans during World War II was simply a tragic mistake for which American society as a whole must accept responsibility."¹⁷ However, it is not clear to me that the internment and the judicial decisions upholding it were aberrations, or a "tragic mistake." They are a quite logical extension of a history of law that tended, on the whole,

12. IRONS, JUSTICE DELAYED, *supra* note 9, at 4-6.

13. Regarding Korematsu's petition for a writ of error coram nobis, Judge Patel noted that "Whether a fuller, more accurate record would have prompted a different decision cannot be determined. Nor need it be determined." *Korematsu v. United States*, 584 F. Supp. 1406, 1419 (N.D. Cal. 1984). However, in granting Hirabayashi's writ, Judge Voorhees pointed out that one of the requirements for a writ of coram nobis was that the petitioner "must demonstrate that *it is probable that a different result would have occurred* had the error not been made." *Hirabayashi v. United States*, 627 F. Supp. 1445, 1455 (W.D. Wash. 1986), citing *United States v. Dellinger*, 657 F.2d 140, 144, n.9 (7th Cir. 1981) (emphasis added).

14. JAPANESE EVACUATION FROM THE WEST COAST, FINAL REPORT 9 (1942) (initial version) [hereinafter FINAL REPORT], *quoted in* *Korematsu v. United States*, Petition for Writ of Error Coram Nobis, *in* IRONS, JUSTICE DELAYED, *supra* note 9, at 140.

15. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (1982), *reprinted in part in* IRONS, JUSTICE DELAYED, *supra* note 9, at 120.

16. *See* An American Promise by the President of the United States of America, A Proclamation, *quoted in* *Korematsu v. United States*, Transcript of Arguments on Coram Nobis Petition, *in* IRONS, JUSTICE DELAYED, *supra* note 9, at 221-22; 50 App. U.S.C.A. § 1989, Pub.L. No. 100-383. *See also*, IRONS, JUSTICE DELAYED, *supra* note 9, at 46; Eric K. Yamamoto, *Friend or Foe or Something ELSE: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223 (1992).

17. *Hirabayashi v. United States*, Memorandum Opinion of the Court on Reconsideration Motions, U.S. District Court for the Western District of Washington, Apr. 28, 1986. Voorhees, J. *Quoted in* IRONS, JUSTICE DELAYED, *supra* note 9, at 384.

to exclude those of Asian descent from mainstream society. They fit in quite well with the Chinese Exclusion Act,¹⁸ the "Gentlemen's Agreement" of 1908¹⁹ excluding Japanese immigrants, the laws prohibiting the naturalization of persons of Asian descent,²⁰ license and head taxes on immigrants,²¹ and laws which prohibited the ownership of land by aliens ineligible to citizenship.²² They also comport with a social history of discrimination, segregation, exclusion and race-based violence against Asian Americans. Yet this history is rarely discussed in the legal analyses of the internment cases.

Wartime hysteria overlaid on prejudice does not adequately explain the historical course taken. *Korematsu* is generally cited for establishing that race-based distinctions require strict scrutiny. How did the decision withstand its own test? Pondering these questions, I found Neil Gotanda's analysis:

A broader historical perspective is possible. Such a perspective would view the status of Japanese-Americans in American legal history as one component in the larger question of race in American law. . . . One of the critical features of legal treatment of [non-Black racial minorities—"Other non-Whites"—] has been the inclusion of a notion of "foreignness" in considering their racial identity and legal status. This previously unexamined dimension of the relationship between race and law helps shed light not only on the [Japanese American internment], but on contemporary debate as well.

“. . . It is within this dynamic—the evolution of the treatment of Other non-Whites—that the concentration camp cases are best understood. . . . [T]hese cases were crucial steps in the development of the complex links of the social and legal categories of race and alienage. Most important in this development has been the persistence of the view that even American-born non-Whites were somehow

18. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214. See also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (Chinese Exclusion Case). The repeal of Asian exclusion acts is discussed by Neil Gotanda in *Towards Repeal of Asian Exclusion: The Magnuson Act of 1943, the Act of July 2, 1946, the Presidential Proclamation of July 4, 1946, the Act of August 9, 1946, and the Act of August 1, 1950*, in *ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY* (Hyung-chan Kim ed., 1996).

19. TAKAKI, *supra* note 1, at 27, 46-50.

20. The Naturalization Act of Mar. 26, 1790, Ch. 3, §1, 1 Stat. 103, limited naturalized citizenship to "free white persons." Following passage of the 14th Amendment, this was expanded to include "persons of African nativity or descent." The restrictions on the naturalization of Japanese Americans were not removed until 1952. See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) for a thorough discussion of the racial prerequisite to naturalized citizenship.

21. See text accompanying notes 55-57 *infra*.

22. Alien Land Law of 1913, ch. 113, 1913 Cal. Stat. 113; TAKAKI, *supra* note 1, at 203-07, 272.

“foreign.”²³

Here was a piece that I had been searching for. The Japanese American internment cases could not be explained merely by race or, alternately, by alienage.²⁴ Acts that could not be justified in the name of race were done in the name of alienage and vice versa. There was overlap and slippage, a legalistic sleight of hand. The racialized identification of Japanese Americans as foreign—regardless of their citizenship—allowed for otherwise unlawful actions to be taken against United States citizens.

I then realized that “foreignness” was also a missing piece in the model minority/yellow peril puzzle. The underlying constant of foreignness allows for the magical right-before-your-eyes transformation of the images of Asian Americans from positive to negative and back to positive again. Each of the images has been painted with the brush of foreignness, and it is this tinting that provides the continuity behind the changing values attributed to them.

These realizations led me wonder what ends were served by the attribution of foreignness to the racialized identity²⁵ of Asians, and to conclude that it helps reinforce racial, social and economic hierarchies in the United States in two ways: first, by placing Asian Americans as a buffer zone (the “model minority”) between those identified as “black” and “white”²⁶ and, second, by constructing Asian Americans as instant outsiders²⁷ against whom “real Americans”²⁸ (black and white) can unite in times of crisis.²⁹

This essay describes some key aspects of this process. Part II considers how foreignness evolved in the construction of an Asian racial identity. Part III discusses the role of foreignness in the portrayal of Asians as enemies; and the use of foreignness in maintaining a supply of cheap Asian labor is the focus of Part IV. Ways in which the perception of foreignness has been used to reinforce racial, social and economic hierarchies are examined in Part V. Part VI concludes the essay with a summary of these dynamics.

23. Gotanda, *Other Non-Whites*, *supra* note 9, at 1188.

24. By “alienage” I mean the status of not being a citizen.

25. Harold Koh has noted that the history of Asian Americans and the Supreme Court is “an account of Americans who have been treated as unwanted foreigners.” Harold Hongju Koh, *Foreword to ASIAN AMERICANS AND THE SUPREME COURT* ix (Hyung-chan Kim ed., 1992).

26. See Mari Matsuda, *We Will Not Be Used*, 1 UCLA ASIAN PAC. AM. L. J. 79, 79 (1993) (“If white, historically, is the top of the racial hierarchy in America, and black, historically, is the bottom, will yellow assume the place of the racial middle?”)

27. See generally text accompanying notes 82-90 *infra*.

28. I recognize that using “American” to mean “of the United States” may offend others in the Americas—Mexicans, Canadians, Central and South Americans. In some instances I use the term because we do not have another adjective meaning “of the United States.” More significantly for present purposes, I use the terms “America” and “American” in this article to invoke the social meanings that become associated with those terms as they are commonly used in the United States.

29. See generally Angelo Ancheta, *Community Lawyering*, 1 ASIAN L. J. 189, 81 CAL. L. REV. 1363 (1993) (discussing unity and community empowerment).

II.

THE "RACING"³⁰ OF ASIAN AMERICANS AS FOREIGN

[W]ithin the United States, if a person is racially identified as African American or white, that person is presumed to be legally a U.S. citizen and socially an American [but] these presumptions are *not* present for Asian Americans, Latinos, Arab Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners; or, if they are U.S. citizens, then their racial identity includes a foreign component.³¹

The racialized identification of Asian Americans as foreign came about through a process that involved, first, the social construction of an Asian "race"³² which served as the basis for placing Asian Americans in the racial hierarchy which had emerged in the United States; and second, the initial association of "American" with "white"³³ and the subsequent perception, reinforced by legal barriers to immigration and naturalization,³⁴ that "non-whites" were probably "non-American" as well.

Immigrants from Asia began arriving in the United States in significant numbers in the mid-1800s.³⁵ They did not arrive thinking of themselves as "Asian" or of a common "race," but rather as any of dozens of nationalities or ethnic groups.³⁶ Nonetheless, because this society was organized around principles of stark racial classification,³⁷ a racialized iden-

30. The recognition that "race" is not an immutable biological characteristic, but a socially created identity has led to the use of "race" as a verb which means the ascribing of racial identity. See Lani Guinier, *(E)Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994); Barbara Phillips Sullivan, *The Song That Never Ends: New Verses About Affirmative Action*, 23 S.U. L. REV. 157, 161 (1996) (noting that "de-racing" is "routinely done by whites and usually noticed by African-Americans").

31. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1088, 1096 (Hyung-chan Kim ed., 1992).

32. On race as a social construct, see generally Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in "RACE," WRITING, AND DIFFERENCE 21 (Henry Louis Gates, Jr. ed., 1985); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed., 1994); Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C. R.-C.L. L. REV. 1 (1994).

33. See Juan Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 272-76 (1992) (discussing early perceptions of what it meant to be an "American"); HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1 (1996) ("From the earliest years of this country until just a generation ago, being a 'white' person was a condition for acquiring citizenship.").

34. See, e.g., Naturalization Act, ch. 3, 1 Stat. 103 (1790) (limiting naturalized citizenship to "free white persons"); Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (prohibiting any further immigration of Chinese laborers); Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (prohibiting the immigration of aliens ineligible to citizenship).

35. See SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 3-17 (1991); TAKAKI, *supra* note 1, at 21-31.

36. TAKAKI, *supra* note 1, at 4-6.

37. I discuss this process in *Aliens and Non-Aliens Alike* *supra* note †. Neil Gotanda also considers the development of racial classifications in his thesis, *Origins of Racial Categorization in Co-*

tification formed quickly. In Ronald Takaki's words, early Asian immigrants to the United States "encountered a prevailing vision of America as essentially a place where European immigrants would establish a homogeneous white society and where nonwhites would have to remain 'strangers.' The distinguishing physical features became what Robert E. Park termed 'racial uniforms,'"³⁸

United States law originally limited naturalized citizenship to "white" persons,³⁹ a provision broadened after 1870 to include persons of "African nativity and descent."⁴⁰ The cases in which Asians attempted to obtain citizenship provide some of the clearest illustrations of the racialization of Asian American identity.⁴¹ Decided in 1878, *In re Ah Yup*⁴² was the first naturalization case brought, in the words of the court, by a "native Chinaman."⁴³ The California federal district court posed the question: "Is a person of the Mongolian race a white person within the meaning of the [Naturalization Act]?"⁴⁴ It first noted that various dictionaries and encyclopedia classified races in different ways, but all of them distinguished the "Mongolian or yellow race" from the "white, or Caucasian."⁴⁵ The court concluded that the law "was intended to exclude some classes, and as all white aliens and those of the African race are entitled to naturalization under other words, it is difficult to perceive whom it could exclude unless it be the Chinese."⁴⁶ In 1894 the Massachusetts district court concluded in *In re Saito* that Japanese were also of the "Mongolian race" and, therefore, excluded from naturalization for the same reasons as the Chinese.⁴⁷

The impact of the racialization of Asian identity could soon be seen. Under the terms of the Burlingame Treaty of 1868⁴⁸ the United States guaranteed that Chinese citizens in the United States, "shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."⁴⁹ Yet Chinese citizens in the United States found themselves segregated and discriminated against in both their private and public lives.⁵⁰ In

lonial Virginia: 1619-1705 (1980) (unpublished LLM thesis, Harvard Law School)(on file with author).

38. TAKAKI, *supra* note 1, at 472-473.

39. Naturalization Act of 1790, ch. 3, §1, 1 Stat. 103 (1790).

40. Naturalization Act Amendment of 1820, Ch. 254, § 7, 16 Stat. 254 (1820).

41. A concise summary of the naturalization laws and cases as applied to Asian Americans can be found in Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN L.J. 33 (1995).

42. *In re Ah Yup*, 1 F.Cas. 223 (D. Cal. 1878).

43. *Id.* at 223.

44. *Id.*

45. *Id.* at 224.

46. *Id.* at 225.

47. *In re Saito*, 62 F. 126 (D. Mass. 1894). *See also*, *In re Takuji Yamashita*, 30 Wash. 234, 70 P. 482 (1902).

48. The Burlingame Treaty, July 28, 1868, U.S.-China, 16 Stat. 739 (1869-71).

49. *Id.* at 740.

50. CHAN, *supra* note 35, at 56-57, 140; *see also* TAKAKI, *supra* note 1, at 115.

some cases Chinese residents were lynched or driven out of towns;⁵¹ they were prevented from testifying in court against white persons;⁵² their children were assigned to segregated schools,⁵³ and they were not allowed to become naturalized citizens.⁵⁴

In 1862 California passed an "Act to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California."⁵⁵ Other laws, such as California's Foreign Miners Tax⁵⁶ were worded in racially neutral terms, but were strongly supported by anti-Chinese and anti-Mexican sentiment. Thus, for example, there were attempts to enforce license taxes against all persons of Chinese descent, rather than on those engaged in a particular occupation.⁵⁷ In 1876, a California state senate committee concluded that "the Chinese are inferior to any race God ever made. . . ."⁵⁸

As long as citizenship itself involved racial prerequisites, alienage easily became a proxy for race. In 1913 California passed a law which prohibited "aliens ineligible to citizenship" from owning real property or leasing agricultural land for terms of more than three years.⁵⁹ Although

51. See Chang, *supra* note 4, at 14-15 [1254-55]; CHAN, *supra* note 35, at 48-51. See generally ANTI-CHINESE VIOLENCE IN NORTH AMERICA (Roger Daniels ed., 1978).

52. *People v. Hall*, 4 Cal. 399 (1854) (overturning the murder conviction of a white defendant because it was based, in part, on the testimony of Chinese witnesses). The California statute in question stated that "no black or mulatto person, or Indian, shall be allowed to give evidence in favor of, or against, any white person." Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, repealed by omission in 1872, officially repealed in 1955. See also *People v. Brady*, 40 Cal. 198 (1870) (holding the ban on Chinese testimony constitutional under the 14th Amendment and the California Constitution).

There was a parallel provision for testimony in civil cases. See Charles McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 549 & n.113 (1984).

53. In 1906, the San Francisco Board of Education instructed its school principals to send "all Chinese, Japanese and Korean children to the Oriental School." TAKAKI, *supra* note 1, at 201.

54. See text accompanying note 20 *supra*.

55. Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (officially repealed, Act of May 16, 1939, ch. 154, 1939 Cal. Stat. 1274, 1376); known as the Chinese Police Tax, this was ultimately struck down as an infringement of federal powers in *Lin Sing v. Washburn*, 20 Cal. 534 (1862). See McClain, *supra* note 52, at 555, n.152.

56. Act of Apr. 13, 1850, ch. 97, §§ 1, 5, 1850 Cal. Stat. 221, 221-22; Act of May 4, 1852, ch. 37, 1852 Cal. Stat. 84, repealed and superseded by Act of Mar. 30, 1853, ch. 44, 1853 Cal. Stat. 62 (officially repealed, Act of Apr. 26, 1939, ch. 93, 1939 Cal. Stat. 1067, 1215) (entitled "An Act to Provide for the Protection of Foreigners, and to define their liabilities and privileges"). See McClain, *supra* note 52, at 539 n.49.

57. Ex parte Ah Pong, 19 Cal. 106 (1861), for example, involved a Chinese laundryman who refused to pay the Foreign Miners' License Tax and was ordered to work on the country roads. He refused the road work as well, was convicted, and sentenced to twenty days in prison. The California Supreme Court issued a writ of habeas corpus, holding unanimously that Ah Pong could not be taxed simply for being Chinese and living in a mining district. See McClain, *supra* note 52, at 558 for a discussion of this and related cases.

58. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT (1981) [hereinafter SCIRP], quoted in THOMAS A. AL-ENIKOFF ET AL., IMMIGRATION: POLICY AND PROCESS 48 (3rd ed. 1995).

59. See *supra* note 20. See also TAKAKI, *supra* note 1, at 203.

the Japanese were not specifically named in the statute, they were nevertheless targeted, "based on a concern for 'race undesirability.' The law sought to limit their presence by curtailing their privileges. . . for they would not come in large numbers and stay if they could not acquire land."⁶⁰

The conflation of race with citizenship led to the perception that being an "alien"⁶¹ meant more than one's citizenship status. The west coast evacuation orders during World War II did not apply to "aliens and citizens" but to "all persons of Japanese ancestry, both alien and *non-alien*."⁶² This presumption of foreignness that attached to being of Japanese descent is also reflected in regulations used to confiscate the property of those who were interned. One regulation promulgated under the Trading with the Enemy Act stated, "The term 'evacuee national' shall mean any Japanese, German, or Italian alien, or any person of Japanese ancestry, resident on or since Dec. 7, 1941 For the purpose of this regulation all evacuee nationals are nationals of a foreign country."⁶³

Thus the construct of foreignness, based more on what is perceived as not-American than on the realities of another nationality or culture, conflates the national and the international. Referring to the caricatured "foreign" accents attributed to the Asian Americans connected to the O.J. Simpson trial, Gotanda observes, "[T]he mangled accent. . . is NOT an ethnic image. . . . [N]o one ever spoke like that. . . . The accent stereotype is not about real foreignness. It is not about being an immigrant from Vietnam or a tourist from Korea. It's about a particular imposed racist image which has never really existed anywhere."⁶⁴

Whether portrayed in a positive or negative light, this concept of foreignness is held together only by the construct of an Asian "race." Gotanda describes this in the context of the model minority: "The perception of economic gains of Asian American small businesses. . . the dramatic presence of Asians at U.S. colleges and universities, and Japanese automobile sales are blended together in a confusing mix. These various images of the successful Asian have only the Asian racial image in common."⁶⁵ This section has briefly described how Asian Americans have

60. TAKAKI, *supra* note 1, at 204.

61. Despite its negative connotations, I use the term "alien" here in order to distinguish an "aliens", defined in strictly legal terms, from those who are *perceived* as foreign or non-American. See also Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993) (noting that the category of undocumented immigrant or "illegal alien" did not exist until immigration restrictions began to be passed in 1875).

62. Military evacuation order of Apr. 30, 1942, *quoted in* TAKAKI, *supra* note 1, at 392 [emphasis added].

63. Special Regulation No. 1, 7 Fed. Reg. 2184 (1942), in Comment, *Alien Enemies and Japanese-Americans: A Problem of Wartime Controls*, 51 YALE L. J. 1316, 1327 n.69 (1942).

64. Neil Gotanda, *House Party's Orientalist Express*, RAFU SHIMPO, July 18, 1995 at 1.

65. Gotanda, *Miss Saigon Syndrome*, *supra* note 31, at 1089.

Drawing on Edward Said's work, Keith Aoki defines "orientalism" as "that process with which

been "raced" as foreign. The following section will consider the transition from not-American to un-American, or how this presumption of foreignness has contributed to the perception of Asian Americans as threats to the national security.

III.

THE PORTRAYAL OF ASIANS AS THE ENEMY

A. Disloyalty as a feature of foreignness

"American" is a concept has been identified with political loyalty, as well as perceptions of race, ethnicity and national origin, since the founding of the nation.⁶⁶ The first federal restrictions on immigration came with the Alien and Sedition Acts of 1798.⁶⁷ The Alien Enemies Act and the Alien Friends Act allowed the President, in his discretion, to seize and summarily deport an alien.⁶⁸ The Sedition Act "essentially made strong criticism of government officials a crime"⁶⁹ and was mainly enforced against foreign-born critics.⁷⁰

A strong association between foreignness and disloyalty was also evident in the early 1900s. Although President McKinley was killed by a U.S.-born anarchist, his assassination catalyzed nativist feelings, which were reinforced by anti-foreign sentiment during World War I.⁷¹ During this period, restrictionist immigration laws such as literacy tests were proposed explicitly to weed out immigrants from southern and eastern Europe.⁷² Quotas limiting immigration according to national origin were included in immigration legislation in 1921⁷³ and 1924.⁷⁴ Restrictions based on political beliefs were also imposed, beginning in 1903 with legislation excluding "anarchists, or persons who believe in or advocate the

Eurocentric nation-states for at least the past five centuries defined themselves in opposition to 'Oriental' others." He notes that the subject position occupied by Asian Americans reflects this tension between global "Orientalism" and American understandings of "race." In addition to being "race-ed" as "non-whites," Asian Americans are also "race-ed" as "foreign"—the palimpsest of Asian origin is never fully erased in the United States; it instead acquires a racialized charge. Aoki, *supra* note 5, at 12.

66. "The American identification of foreign origins with disloyalty to the United States and its form of government has been a prominent theme throughout American legal history." Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 855 (1994).

67. Alien Enemy Act, ch. 58, 1 Stat. 577 (1798); Sedition Act, ch. 73, 1 Stat. 596 (1798).

68. SCIRP, *quoted in* ALENIKOFF ET AL., *supra* note 58, at 43-44; *see* Alien Enemy Act, ch. 58, § 2, 1 Stat. 577 (1798); *see also* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 317 (1986).

69. Karst, *supra* note 68, at 317.

70. *Id.* at 317.

71. SCIRP, *quoted in* ALENIKOFF ET AL., *supra* note 58, at 51 ("World War I brought nervousness about the loyalty and assimilability of the foreign born to a fever pitch.")

72. *Id.* at 50-51.

73. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5 (1921).

74. National Origins Act of 1924, ch. 190, 43 Stat. 153 (1924).

overthrow by force or violence of the Government of the United States or of all government or of all forms of law."⁷⁵

During World War II, the association of foreignness with disloyalty was compounded by the presumptions attributed to Japanese Americans "as a race."⁷⁶ The original version of General DeWitt's Final Report did not claim that the decision to evacuate and imprison Japanese Americans was based on time pressure, but on presumptions about the foreignness of the group as a whole: "It was impossible to establish the identity of the loyal and disloyal with any degree of safety. . . . [A]n exact separation of the 'sheep from the goats' was unfeasible."⁷⁷ On another occasion DeWitt said, "It makes no difference whether he is an American citizen, he is still a Japanese."⁷⁸

Despite the lack of evidence of espionage or subversive activity on the part of Japanese Americans in World War II, the Supreme Court justified its decision in the Korematsu case by stating:

Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. . . . To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He⁷⁹ was excluded because we are at war with the Japanese Empire

As Lorraine Bannai and Dale Minami point out, the Supreme Court first denied that there was any connection between race and the exclusion, and then accepted the argument that exclusion (and, implicitly, incarceration) was necessary because of a race-based affinity Japanese Americans were presumed to have for Japan.⁸⁰ Thus, disloyalty became part of the racialized identity of Japanese Americans. Gotanda says:

[T]he separability of the juridical categories of "citizen" and "alien"

75. Act of Mar. 3, 1903, 32 Stat. 1213, § 2, *quoted in* Kleindienst v. Mandel, 408 U.S. 753, 761 (1972).

76. For example, during the Yasui trial, the U.S. Attorney attempted to introduce an "expert witness" to testify as to "*the Japanese as a race of people and their ideals and culture and their type of loyalty. . . .*" *Quoted in* Korematsu v. United States, Petition for Writ of Error Coram Nobis, U.S. District Court for the Northern District of California, Jan. 19, 1983, in IRONS, JUSTICE DELAYED, *supra* note 9, at 167.

77. FINAL REPORT, *supra* note 14.

78. *Id.* at 146 n.4.

79. 323 U.S. at 223.

80. Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations, in* ASIAN AMERICANS AND THE SUPREME COURT 755, 774 (Hyung-chan Kim ed., 1992); *see also* Reggie Oh & Frank Wu, *Essay, The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165 (1996).

is clear, as is the parallel social distinction between “American” and “foreign.” But when the individuals concerned are Other non-Whites, the racial considerations render the “natural” coincidence of citizen and American much less certain. A Japanese-American citizen in 1942 was easily considered “foreign,” thus making possible the judgment that likelihood of disloyalty was high enough to justify wholesale internment.⁸¹

B. *The Fungibility of Asian Enemies*

The assumptions made about Japanese Americans on the basis of their national origin were extended to other Asian Americans on a racialized basis. This was particularly ironic, given that the national origin of these other groups often pitted them squarely against the Japanese. Korean Americans had a particularly hard time during World War II because Korea was fighting the Japanese invasion and occupation, yet Korean Americans were often treated as if they were Japanese.⁸² Even the U.S. government, in the 1940 Alien Registration Act, identified Korean immigrants as Japanese subjects—because Korea was occupied by Japan—and after the United States declared war on Japan, Koreans were classified as “enemy aliens.”⁸³

Because the Chinese were allies of the United States during World War II, efforts were made to distinguish Chinese from Japanese. To help with this process, the December 22, 1941 *Time* Magazine printed the following explanation, accompanied by pictures of a smiling, friendly Chinese and a stern, unfriendly Japanese:

HOW TO TELL YOUR FRIENDS FROM THE JAPS: Virtually all Japanese are short. Japanese are likely to be stockier and broader-hipped than short Chinese. Japanese are seldom fat; they often dry up and grow lean as they age. Although both have the typical epicanthic fold of the upper eyelid, Japanese eyes are usually set closer together. The Chinese expression is likely to be more placid, kindly, open; the Japanese more positive, dogmatic, arrogant. Japanese are hesitant, nervous in conversation, laugh loudly at the wrong time. Japanese walk stiffly erect, hard heeled. Chinese, more relaxed, have an easy gait, sometimes shuffle.⁸⁴

81. Gotanda, *Other Non-Whites*, *supra* note 9, at 1191. Gotanda goes on to note that the linkage between those he terms “Other non-Whites” and foreignness in Supreme Court decisions has “eroded considerably” since the end of World War II. *Id.*

82. Takaki quotes a Korean American’s story about her family’s decision to move to Southern California after the Japanese American internment, where the Japanese Americans’ farms were being sold very cheaply. When they “arrived at their new home, they found whites staring at them and shouting, ‘Japs go home!’ [She said.] ‘They were ready to stone us with rocks and descend on us’” TAKAKI, *supra* note 1, at 365, quoting Jean Park.

83. TAKAKI, *supra* note 1, at 365. See Alien Registration Act of 1940, 54 Stat. 671 (1940).

84. TAKAKI, *supra* note 1, at 370; see also Aoki, *supra* note 5, at 151.

As Ronald Takaki says, "Previously maligned as the 'heathen Chinese,' 'mice-eaters,' and 'Chinks,' the Chinese were now friends and allies engaged in a heroic common effort against the 'Japs.'"⁸⁵

But this bifurcation did not last long. In 1949 Mao Zedong's army prevailed in the civil war in China, and the Chinese became part of the "red menace." Chinese intervention in the Korean war fueled anti-Chinese sentiment in the United States, and the Chinese were no longer a favored minority.

The new peril was seen as yellow in race and red in ideology. . . . In late 1950, Congress passed the McCarran Internal Security Act, which provided for the internment of Communists during a national emergency. Authorizing the Attorney General to detain all persons for whom there was "reasonable ground" for believing they would "probably" engage in espionage or sabotage, this law became an ominous and menacing reminder to the Chinese: what happened to the Japanese on the West Coast during World War II could happen to them during the Cold War.⁸⁶

Asian Americans participated in the United States' military efforts and Asians were allies as well as enemies in each of these situations. The United States supported Chiang Kai-shek's government in Taiwan, and fought with the South Koreans in the Korean War. But this did not seem to matter much. The stereotypes which portrayed Asians in these conflicts as evil and inhuman affected the perception of all who were raced as Asian.⁸⁷

The same pattern was seen during the war in Vietnam. Although many of the refugees from Southeast Asia now residing in the United States were forced to flee their countries precisely because they supported the United States, they have borne the brunt of the negative images of Asians-as-enemy promoted by the war in Vietnam. As Cynthia Lee notes, "Ironically, the reason America fought in Vietnam was to protect the Vietnamese people from the Communists (who were also Vietnamese). Somehow, all Vietnamese people came to be seen as the enemy by many American soldiers."⁸⁸

And, one might add, by many other Americans. Southeast Asians in the United States are often treated as if they are fungible with other Asians.⁸⁹ And their presence, combined with the traumatic experiences

85. TAKAKI, *supra* note 1, at 370.

86. TAKAKI, *supra* note 1, at 415; *see also* Aoki, *supra* note 5, at 159.

87. Aoki, *supra* note 5, at 155-57.

88. Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN'S L.J. 165, 192 n.132 (1995).

89. Takaki notes how Asian Americans are often called "Chink" and told to "go back to China"

brought to American society through the Vietnam War, has resulted in yet another enemy image that is imputed to all Asian Americans. According to a thirteen-year-old Tibetan now living in the United States,

They call me names like “nip” and “gook.” . . . [W]e Asians need to stick together. Some of my best friends in our gang are Chinese. It’s strange to have Chinese friends when my family has been treated so badly by the Chinese, but this is America—I gotta live here with my own karma. Some skinhead doesn’t care whether I’m Tibetan or Chinese. He just wants to stomp my head.⁹⁰

The portrayal of Asians as the enemy in virtually all recent armed conflicts involving the United States has contributed to the perception of Asian Americans as foreign. Groups identified as Asian can be distinguished on the basis of nationality, with one group praised and another vilified through racialized stereotypes.⁹¹ However, because the stereotypes rest on racial imagery they can then be turned against any of the other subgroups of the “Asian race.”

Today, despite the extensive legal, governmental and social acknowledgment that the internment was wrong, popular imagery still reflects the World War II portrayal of Japanese Americans as the enemy, reinforcing the conclusion that something more than wartime hysteria was at work. In 1995, during the trial of O.J. Simpson, the following text appeared next to a buck-toothed caricature of Judge Lance Ito, a third generation Japanese American, in what was described as a “spoof” on the legal pad used by Simpson:

Ito, Ito, Bag of Fritos
Hiroshima, Nuke Judge Ito
Banzai, Banzai, Nagasaki,
Use His Head for Backyard Hockey!⁹²

Also confusing Japanese Americans with the actions of the Japanese government, in 1988 Senator Jesse Helms argued that reparations should not be paid to Japanese Americans unless the Japanese government compensated the families of Americans killed during the attack on Pearl Harbor.⁹³

regardless of their ethnic background or family history. TAKAKI, *supra* note 1, at 454, 463.

90. Chris Helm, *One Tough Lama* (interview of Pema Jones), HARPER’S MAGAZINE, Aug. 1996, at 11.

91. See Aoki, *supra* note 5, at 153-54; see generally Frank H. Wu, *supra* note 5.

92. HENRY BEARD & JOHN BOSWELL, O.J.’S LEGAL PAD 5 (1995), reproduced in Lee, *supra* note 88, at 183.

93. Pat Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 37 (1994), citing Roy H. Salgo, *The Barriers of Racism: Righting the Wrongs of Past & Present*, CHANGE, Nov-Dec 1989, at 8.

Keith Aoki notes:

From precipitating the breakup of the Beatles *to* bringing the U.S. auto industry to the brink of disaster *to* flagrant piracy on the global information superhighway *to* “sneak attacks” on the Speaker of the House Newt Gingrich’s mother *to* perpetuating revisionist history (gasp) by suggesting that the fiftieth anniversary of the atomic bombing of Hiroshima and Nagasaki may be something less than an unalloyed moment of joyous patriotism, the “Orient” and “Orientals” as a source of threat have never been very far from the American consciousness.⁹⁴

One pervasive theme in this “enemy” imagery is the conflation of military threat and economic competition. Frank Wu refers to “the threat of ‘Japan, Inc.,’ the so-called ‘Pacific Century,’ and the rise of the East and the decline of the West” as the “contemporary counterpart” of the yellow peril.⁹⁵ The following section addresses some of the economic incentives for portraying Asians as foreign.

IV.

FOREIGNNESS AND THE DESIRE FOR CHEAP AND DISPOSABLE LABOR

Neil Gotanda has noted that the “emergent racial stratification” in United States history correlates with “the economic rungs of the socio-economic ladder—with Whites at the top, African Americans at the bottom and Asians and Latinos in between.”⁹⁶ Combined with the placement of Asian Americans in the “middle,” the attribution of foreignness has served to reinforce both racial and economic hierarchy.

Asian immigration to the United States was initially encouraged as a source of cheap and relatively easily controlled labor. In this process, there were several advantages to keeping the workers identified as foreign.

One was that the labor force was more easily controlled when it was composed of groups which could be played off against each other. Referring to the planters in Hawaii in the 1880s, Ronald Takaki states,

realizing they had become too dependent on Chinese laborers, the planters turned to Portuguese workers. “We need them,” they explained, “especially as an offset to the Chinese We lay great stress on the necessity of having our labor mixed. By employing different nationalities, there is less danger of collusion among laborers, and the employers [are able to] secure better discipline.” Meanwhile, planters initiated the importation of Japanese laborers as “the princi-

94. Aoki, *supra* note 5, at 174-76 (citations omitted).

95. Wu, *supra* note 5, at 229.

96. Gotanda, *Miss Saigon Syndrome*, *supra* note 31, at 1090.

ple check upon the Chinese, in keeping down the price of labor.”⁹⁷

A second advantage of utilizing “foreign” labor was that those workers could be pitted against American labor,⁹⁸ driving down wages and preventing unification of the American working class. In 1871, Calvin Sampson, the owner of a North Adams, Massachusetts, shoe factory, responded to the demands of his newly-organized workers for higher wages and better working conditions by bringing in Chinese workers from San Francisco.

Sampson’s daring action had sobering effects on white workers in other North Adams shoe factories. Ten days after the arrival of Sampson’s “Mongolian battery,” Parker Brothers, Cady Brothers, Millard and Whitman, and E.R. and N.L. Millard forced laborers to return to work with a 10 percent wage reduction. . . . [A] writer for *Scribner’s Monthly* wrote: “If for no other purpose than the breaking up of the incipient steps toward labor combinations and ‘Trade Unions’ . . . the advent of Chinese labor should be hailed with warm welcome.” The “heathen Chinese,” he concluded, could be the “final solution” to the labor problem in America.⁹⁹

A third advantage to keeping Asian labor “foreign” was the ability to match the labor supply more quickly to the demand. As with migrant labor today,¹⁰⁰ when labor was scarce, workers could be easily imported. When no longer needed, the foreign workers could be easily disposed of.¹⁰¹ The supply could be shut off and the workers deported or, as in the case of the Chinese bachelors, they would die without reproducing.¹⁰² In the aftermath of the Civil War, as those who had regarded slavery as an

97. TAKAKI, *supra* note 1, at 25, quoting from PLANTER’S MONTHLY, Nov. 1883, at 177, 245-47; A.S. Cleghom in REPUBLIC OF HAWAII, REPORT OF THE BUREAU OF IMMIGRATION 256-57 (1895). Workers were sometimes successful in overcoming these differences, as illustrated by the formation of the Japanese-Mexican Labor Association in 1903. Cf. TAKAKI, *supra* note 1, at 198.

98. Initially, “foreign” workers were used against white labor in its attempts to unionize, much as African American workers were used as strikebreakers. In more recent times, “foreigners” have been used against “American” workers, both black and white. This can be seen as part of the larger trend of moving manufacturing operations overseas, where cheap foreign labor can be used without the social costs involved in bringing workers to the United States.

99. TAKAKI, *supra* note 1, at 98-99, quoting Frank Norton, *Our Labor System and the Chinese*, SCRIBNER’S MONTHLY, May 1871, at 70.

100. Special provisions allowing for the temporary admission of agricultural workers under the current Immigration and Naturalization Act are found at 8 U.S.C. § 1101(a)(15)(H)(ii)(A) (1996).

101. See generally Wade Graham, *Masters of the Game: How the U.S. Protects the Traffic in Cheap Mexican Labor*, HARPER’S MAGAZINE July 1996, at 35.

102. In 1852, of the 11,794 Chinese in California, only seven were women. Even by 1870, out of 63,199 Chinese persons, only 4,566 were women. TAKAKI, *supra* note 1, at 121. The numbers also illustrate the way in which the supply of labor was turned on and off, and the on-going struggle between those who wanted to protect jobs for white workers and those who simply wanted cheap labor. In 1890, shortly after passage of the Chinese Exclusion Act, there were just over 2,000 Japanese on the U.S. mainland. By 1910, there were over 72,000—almost the same as the number of Chinese. In the meantime, the 1908 Gentlemen’s Agreement had been negotiated, ensuring that the flow of Japanese laborers would be stopped. TAKAKI, *supra* note 1, at 46, 180.

acceptable or desirable source of cheap labor struggled with the implications of citizenship and equal rights for African Americans, the prospect of cheap labor that could be easily disposed of must have been appealing.

The working conditions of Asians in the United States illustrate this "disposability." Most Japanese workers were initially hired as contract labor:

The labor contract arrangement and the migratory nature of work precluded paternalism and employer responsibility. Constantly moving from field to field and carrying blankets for bedding, migratory farm laborers were called *buranke-katsugi*—persons who shouldered blankets. They did not live in permanent camps where they could build stable communities: they were literally here today and gone tomorrow.¹⁰³

Conditions were similar for Japanese railroad and cannery workers, as they were sometime later for Chinese, Korean, Indian and Filipino workers.¹⁰⁴

Replacing the labor force with succeeding groups of Asian immigrants accomplished the employers' purposes of keeping a supply of cheap, disposable labor. It also antagonized white labor. In the early 1900s the Asiatic Exclusion League condemned both Korean and Japanese immigrants as undesirable aliens and the San Francisco Building Trades Council urged that Japanese and Koreans be covered by the provisions of the Chinese Exclusion Act.¹⁰⁵ Responding to pressure from organized labor, in 1907 President Theodore Roosevelt prohibited the re-migration of Japanese and Korean laborers from Hawaii to the mainland United States, and in 1912, California's Democratic Party called for "immediate federal legislation for the exclusion of Japanese, Korean and Hindoo laborers."¹⁰⁶

The social response parallels in many ways the anti-immigrant sentiment that is so prevalent today.¹⁰⁷ Employers still lobby to have readily available, cheap labor, and U.S. workers—and the politicians who cater to their fears—still agitate for exclusion. As Angelo Ancheta notes:

Cycles of intolerance, economic decline, racism. These have been the constants in the century-plus debate on immigration. . . . The parallels with the past are striking: We encourage the importation of

103. *Id.* at 183.

104. *Id.* at 273-74; 316-20.

105. *Id.* at 272.

106. *Id.* at 272, citing H. BRETT MELENDY, *ASIANS IN AMERICA: FILIPINOS, KOREANS, AND EAST INDIANS* 133-34 (1977).

107. See, e.g., 1994 Cal. Legis. Serv. Prop. 187 (West); CAL. WELF. & INST. CODE §10001.5 (West 1997); CAL. HEALTH & SAFETY CODE §130 (West 1997); CAL. EDUC. CODE § 48215 (West 1997); CAL. EDUC. CODE § 66010.8 (West 1997); CAL. GOV'T CODE § 53069.65 (West 1997). See also, Kevin Johnson, [Prop. 187].

foreign labor during economic booms. . . . We give immigrants the jobs that no one else will perform. . . . We pay immigrants the lowest wages. . . .

And just as predictable are the popular responses during economic downturns. Immigrants are inassimilable. They take away our jobs. They use up all our resources. Indeed, they threaten our very existence, our culture, our "American" way of life.¹⁰⁸

Foreignness has been used to keep a large pool of labor cheap and disposable. In turn, this history of workers who "look alike" and are easily replaced has reinforced popular social conceptions of Asians as fungible.

V.

THE USE OF FOREIGNNESS TO REINFORCE RACIAL HIERARCHY

As noted above,¹⁰⁹ the attribution of foreignness, or the portrayal of Asians as outsiders, takes what are ostensibly both positive and negative forms. That these characterizations are so fluid, yet so persistent, indicates that they serve some significant functions in this society. These include, I believe, the reinforcement of a racial hierarchy which, in turn, supports existing social and economic relationships. The portrayal of Asian Americans as foreign, whether model minority or yellow peril, not only fosters anti-Asian hostility and resentment,¹¹⁰ but also allows racial and economic tensions to be vented upon them without any real changes being made to the underlying social structures. Kathy Imahara describes this process:

This country depends on immigrant labor to pick the produce in the fields, work long hours for little pay in sewing factories, wash dirty laundry, care for children, clean homes and hotel rooms, wash dishes in restaurants, and tend gardens. But when the economy goes into a recession, government leaders prefer to see immigrants, most of whom are at the very bottom of the socio-economic ladder, fight amongst themselves for the lowest of jobs because scrutiny is shifted away from inept and racist government policies.¹¹¹

This section looks at some ways in which the attribution of foreignness to Asian Americans serves to reinforce racial hierarchy in the United States.¹¹²

108. Angelo N. Ancheta, *Our Immigrant Heritage: A Struggle for Justice*, 2 UCLA ASIAN PAC. AM. L.J. 102-03 (1994).

109. See text accompanying notes 1-5 *supra*.

110. This is not to discount the very real consequences of such hostility. See note 121 *infra*.

111. Kathryn K. Imahara, *Speech, We Are the "Illegal Immigrants,"* 2 UCLA ASIAN PAC. AM. L.J. 107, 109 (1994).

112. Neil Gotanda discusses three functional political messages which come from the model mi-

A. Denying the existence of racism

One effect of the model minority image is the popular perception that racism has an insignificant effect on Asian Americans. Neil Gotanda calls this the "Miss Saigon Syndrome."¹¹³ Referring to the "angry tone of the mainstream reaction to the Asian American protest"¹¹⁴ over the casting of an actor of Welsh descent to portray the Eurasian lead in the Broadway production of *Miss Saigon*, he says, "I provide a name for the phenomenon of the controversy surrounding *Miss Saigon* . . . because my assessment is that the mainstream denial of racism towards Asian Americans is a pervasive and deeply held belief."¹¹⁵

The model minority image inaccurately promotes the belief that Asian Americans as a whole have achieved economic success and social acceptance. Misrepresentations of the extent to which Asian Americans as a whole have "succeeded" are based in part on the promulgation of inaccurate and misleading information. Income comparisons often fail to take account of regional disparities (i.e., the high concentrations of Asian Americans in states with higher incomes and higher costs of living) or are based on family incomes, which often reflect a larger number of workers per family, rather than higher individual incomes.¹¹⁶ In 1980 the mean personal income of Korean, Chinese, and Filipino men in California were, respectively, 82%, 68% and 62% of the income of white men. Japanese men earned a comparable income, but only by working more hours and acquiring more education. In New York, the mean personal income of Chinese men was only 52% of that of white men.¹¹⁷

The monolithic image of success also lumps all Asian Americans together, implying that the needs of recent Southeast Asian refugees can be ignored because third- or fourth-generation Japanese or Chinese Americans have been relatively successful. In fact, according to William Tamayo, the overall rate of poverty among Asian Americans is roughly twice that of whites.¹¹⁸

nority myth: the "benefit denying" function, the "system preserving" function, and the "minority blaming" function. These in many ways parallel the dangers identified here. Gotanda, *Miss Saigon Syndrome*, *supra* note 31, at 1089, citing Su Sun Bai, *supra* note 1, at 746, quoting Kwang Chung Kim & Won Moo Hurh, *Korean Americans and the "Success" Image: A Critique*, 10 AMERASIA J. 3 (1983); Wu, *supra* note 5, at 244-246; Chang, *supra* note 4, at 20-25 [1260-65].

113. Gotanda, *Miss Saigon Syndrome*, *supra* note 31, at 1087.

114. *Id.* at 1088.

115. *Id.*

116. TAKAKI, *supra* note 1, at 475. See also Chew, *supra* note 93. See generally William R. Tamayo, *When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1 (1995).

117. TAKAKI, *supra* note 1, at 475.

118. Tamayo, *supra* note 116 at 15, n.97, citing to WILLIAM P. O'HARE & JUDY C. FELT, ASIAN AMERICANS: AMERICA'S FASTEST GROWING MINORITY GROUP 6-7 (1991).

B. Facilitating Discrimination

In his famous dissent in *Plessy v. Ferguson*, Justice Harlan said of the Chinese, "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States."¹¹⁹ If one substitutes "Americans" for "citizens of the United States," this attitude is still common today.

Exclusion of or discrimination against those identified as aliens has often been justified on the basis of racial, cultural, or religious difference. As it has become less acceptable to openly discriminate against people because of their racial identities or their cultural practices or beliefs, foreignness is often used to accomplish the same ends. Part of the problem with being identified as an outsider¹²⁰ is that while it is considered unfair to treat someone poorly because of a characteristic believed to be immutable, such as race or gender or physical disability, status as an outsider or a visitor is construed as voluntary. "If you don't like how we treat you, why don't you leave?" is the question, sometimes implied, sometimes spoken. This in turn seems to make a broader range of treatment, or mistreatment, acceptable.¹²¹

This is frequently seen in language and accent discrimination.¹²² According to Juan Perea, "Persons who speak English with a 'foreign-sounding' accent regularly are assumed to be 'less intelligent' than persons who speak English with a more socially accepted accent."¹²³ This proposition is supported by the findings of the United States Congress which, in considering the 1975 amendments to the Voting Rights Act, found that voting discrimination against "citizens of language minorities is pervasive and national in scope."¹²⁴

119. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896).

120. See generally Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 Cornell L. Rev. 1258 (1992).

121. Almost all cases of reported violence against Asian Americans has involved "foreigner" or "enemy" imagery. See, e.g., Jerry Kang, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993); U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s (1992); GABRIEL CHIN ET AL., BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE (A POLICY ANALYSIS OF AFFIRMATIVE ACTION) 22-23 (1996); NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, 1995 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS (1995).

122. See Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991).

123. Perea, *supra* note 66, at 836, citing Matsuda, *Voices*, *supra* note 122, at 1348, 1351. See also *State v. Gonzalez*, 538 A.2d 210, 215 (Conn. 1988) (upholding the prosecution's exclusion of a Latino juror with a "highly perceptible accent" on the grounds that he might have difficulty understanding questions, despite the juror's demonstration that he understood all questions posed). Some accents—British, for example—may not carry this presumption. It would be interesting to see if there is a racialized hierarchy of accents as well.

124. 42 U.S.C. § 1973b(f)(1)(1988); S. REP. NO. 295 at 30-31 (1975). Juan Perea says, "Furthermore, Congress found that '[p]ersons of Spanish heritage [are] the group most severely affected by discriminatory practices, while the documentation of discriminatory practices concerning Asian Americans . . . [is] substantial.'" Perea, *Demography and Distrust*, *supra* note 33 at 349-50.

Identification as outsiders not only has these obviously negative results; it has more insidious effects. Being perceived as a foreigner is in some ways like being a guest in someone's house. Problems do not only arise when one is an unwelcome guest. Though treated with courtesy and respect, a guest is expected to respond politely, to accept the way things are done in the household, and certainly not to try to change anything. Guests are expected to stay in their place.¹²⁵ For those who do not, there is always the unspoken understanding that they will be asked to leave.

Thus, one result of being treated as outsiders, whether the treatment is friendly or hostile, is that it keeps Asian Americans focused on getting or staying in. The goal becomes being part of American society, often translated as assimilation, rather than assuming that one is part of the society and then being able to concentrate on making it a good place to be.

C. *Legitimizing the Subordination of Other People of Color*

The model minority myth often serves to divide Asian Americans from other people of color, and to justify the subordination of other groups. The term first identifies Asian Americans as a minority group, setting up Asians for comparison and, thereby, competition, with other minorities.¹²⁶ Then Asian Americans are identified as a "model" for these groups, i.e. the successful minority that others should emulate.

If Asian Americans have been given a racialized identity and placed in the middle of the racial hierarchy in order to help preserve and maintain racial stratification in the United States, it follows that division and competition among groups identified as minorities would further these ends. The model minority myth has, in fact, contributed to tensions between African American and Asian American communities.¹²⁷ Neil Gotanda examined this phenomenon as it appeared in the sentencing colloquy of Judge Karlin in *People v. Soon Ja Du*,¹²⁸ a case in which a Korean store owner shot and killed a young African American girl, Latasha Harlins. By invoking gang imagery in association with the girl and describing Du Soon Ja as

125. My experiences as a foreigner growing up in Japan were very similar. Although I have frequently been treated as Japanese in the United States, in Japan I am regarded as a "gaijin" (literally, "outside-person") As such, I have been treated extremely well, but nonetheless have never felt comfortable criticizing social policies or advocating for change.

126. See *supra* note 2 discussing the use of the term "minority."

127. See, e.g., Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581 (1993); Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15 (1993); Tamayo, *supra* note 116.

128. Neil Gotanda, *Re-Producing the Model Minority Stereotype: Judge Joyce Karlin's Sentencing Colloquy in "People v. Soon Ja Du,"* in RE-VISIONING ASIAN AMERICA: LOCATING DIVERSITY, (Soo-Young Chin, et al. eds., 1995). See also Neil Gotanda, *Tales of Two Judges: Joyce Karlin In People v. Soon Ja Du; Lance Ito in People v. OJ Simpson*, (Dec. 13, 1995) (draft on file with the author); Neil Gotanda, *Multiculturalism and Racial Stratification*, in MAPPING MULTICULTURALISM (Avery F. Gordon & Christopher Newfield eds., 1996).

an “innocent shopkeeper,” Gotanda notes that:

Judge Karlin characterizes Du Soon Ja as a successful shopkeeper and by implication Karlin presents the Korean community as a successful “model-minority.” This presentation thus provides Judge Karlin with an ideological framework to both distance herself from Latasha Harlins individually, and also more generally to absolve non-Blacks . . . of any social responsibility for the effects of racial subordination upon African Americans.¹²⁹

But the model minority myth does not simply divide minority groups from each other. It also justifies the subordinated position of each of these groups. One of its messages is that “[s]ince model minority Asian Americans have succeeded, . . . African Americans [are] themselves responsible for their situation.”¹³⁰ This was clearly the subtext of a 1984 speech by then-President Ronald Reagan, who noted that Asian Americans were preserving the American dream by living up to the “bedrock values” of America, “the sacred worth of human life, religious faith, community spirit and the responsibility of parents and schools to be teachers of tolerance, hard work, fiscal responsibility, cooperation and love.”¹³¹

“It’s no wonder,” Reagan emphatically noted, “that the median incomes of Asian and Pacific-American families are much higher than the total American average.” Hailing Asian and Pacific Americans as an example for all Americans, Reagan conveyed his gratitude to them: we need “your values, your hard work” expressed within “our political system.”¹³²

Recent debates on affirmative action illustrate how the purported success of Asian Americans has been used to justify the elimination of remedial programs, and the concomitant effort to convince Asian Americans to actively oppose such measures. Frank Wu notes that “House Speaker Newt Gingrich has carefully included Asian Americans in his attack against affirmative action. Gingrich has asserted that ‘Asian Americans

129. Gotanda, *Re-Producing the Model Minority Stereotype*, *supra* note 128, at 87. This is also illustrated by recent public opinion polls. Keith Aoki summarizes one such survey:

Respondents were questioned about which other group—White, African American, Latino or Asian American—they felt they had the most or least in common with. A majority of White respondents felt they had the most in common with African Americans, and least in common with Asian Americans. African Americans felt they had the most in common with Latinos and least in common with Whites and Asian Americans. Latinos felt they had most in common with Whites and least with African Americans. Asian Americans felt they had most in common with Whites and least with African Americans. *What is striking in this survey is that no group had its feelings of kinship reciprocated by any other group.* Aoki, *supra* note 5, at 71-72, n.186, summarizing a Survey on Inter-Group Relations undertaken by LH (Lou Harris) Research for the National Conference of Christians and Jews. (Emphasis added.)

130. Gotanda, *Miss Saigon Syndrome*, *supra* note 31, at 1089-90.

131. Speech of Feb. 23, 1984, *reprinted in ASIAN WEEK*, Mar. 2, 1984, *quoted in TAKAKI*, *supra* note 1, at 474-75.

132. *Id.*

are facing a very real danger of being discriminated against' because they are becoming too numerous at prestigious universities which have affirmative action."¹³³

Neil Gotanda points out that the positing of Asians and Latinos in the middle of the racial hierarchy serves to minimize the importance of the social and economic disparities between African Americans and European Americans, making it appear that such disparities "are the product of 'natural' and 'normal' socioeconomic forces. . . . The presence of more successful Asian Americans and Latinos, located between Whites and African Americans, proves that the social and economic barriers can be overcome and are not rooted in 'race.'"¹³⁴

VI. CONCLUSION

Understanding that "foreignness" is part of the racialized identity of Asian Americans first helped me to understand what was missing in most explanations of the Japanese American internment cases. Acknowledging the role of foreignness in this history helped me see why, rather than an unfortunate aberration, the internment was in many respects a logical, if extreme, extension of a social and legal history that identified all Asians as foreign, ascribed both model minority and yellow peril characteristics to them, and identified them as enemies. This allowed me to see that an underlying notion of foreignness tied together the model minority and yellow peril images that are so often used to describe Asian Americans, and explained why it was so easy to slip from one to the other.

But why did this attribution of foreignness continue, even after some Asian Americans had been in the United States for many generations? The presumption of foreignness has made it easier for Asian Americans to be used as cheap labor; easier to turn them into the yellow peril on an instant's notice; and easier to hold them up as a model minority in a way that masks real issues of discrimination and uses Asian Americans against other minorities. These phenomena, in turn, help support and maintain racial hierarchy and relationships of social and economic subordination that exist in the United States.

These patterns, of which the internment is but one manifestation, are reflected in contemporary developments as well as Asian American history. Nearly every day there is another story in the news—a new anti-immigrant initiative, an incident of anti-Asian violence, a speculation that Asian economic interests are consuming America.¹³⁵ A common thread in

133. Wu, *supra* note 5, at 225, referencing a congressional press conference (CNN television broadcast, Feb. 22, 1995). See also Chin et al., *supra* note 128; Robert A. Lauer, *Hopwood v. Texas: A Victory for Equality that Denies Reality*, 28 ST. MARY'S L. J. 109 (1996).

134. Gotanda, *Miss Saigon Syndrome*, *supra* note 31, at 1090-91.

135. See, e.g., Marcus W. Brauchli, *Asian-American Politicians Worry That Scandal Over Cam-*

these incidents is the perception that the people affected are foreign and the presumption that it is acceptable to apply lesser standards of protection to them. Recognizing this may allow us to more effectively change these patterns, both legally and socially.¹³⁶

paign Funds May Slow Their Gains, WALL ST. J., Apr. 17, 1997, at A24; Celia W. Dugger, *Immigrant Study Finds Many Below New Income Limit*, N.Y. TIMES, Mar. 16, 1997, § 1, at 6; James R. Lilley, *The 'Fu Manchu' Problem: Why America and China Tend to Think of Each Other as Cartoonlike Enemies*, NEWSWEEK, Feb. 24, 1997, at 36 n; William Safire, *Beware the Princlings*, N.Y. TIMES, Feb. 13, 1997, at A5; *U.S. Officials See Threat from Asia*, Associated Press, Feb. 5, 1997.

136. Some proposals for legal recourse are outlined in *Alien and Non-Alien Alike*, *supra* note †. Much of Neil Gotanda's work addresses these issues. *See generally* Gotanda, *Origins of Racial Categorization*, *supra* note 37 (examining the creation of racialized classifications in early United States history); Neil Gotanda, *Race, Citizenship and the Search for Political Community Among "We the People,"* Review Essay on "Citizenship Without Consent" (1987)(draft on file with author)(considering the relationship between race and citizenship); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 Stan. L. Rev. 1 (1991); and Gotanda, *Failure of the Colorblind Vision: Race, Ethnicity and the California Civil Rights Initiative*, ___ Hastings Const. L.Q. ___ (forthcoming) (noting dangers in a "colorblind" approach to race); Gotanda, *Other Non-Whites*, *supra* note 9 (analyzing the Japanese American internment within the context of the American racial hierarchy); and Neil Gotanda, *Re-Producing the Model Minority Stereotype*, *supra* note 128; *Miss Saigon Syndrome*, *supra* note 31 (outlining some of the insidious effects of the model minority stereotype).

