Without Due Process: The Eagle and the Beaver The Past, The Present

Keith D. Yamauchi†

This Article considers the racism that persons of East Asian ancestry faced when they arrived in North America. The racism was systemic. It was legislated, and courts frequently upheld the legislation. This discrimination led to the evacuation and internment of Canadians and Americans of Japanese ancestry during World War II. Was this the culmination of such discrimination or a continuation? The Fifth Amendment promises that "No person shall . . . be deprived of life, liberty, or property, without due process of law." But neither the United States nor Canada provided the Japanese with any due process. This Article looks at how the United States and Canada dealt, and are dealing, with persons of East Asian ancestry, and whether their different normative values make for differing results. The haiku that forms the title of this Article illustrates the major historical concern with the treatment of persons of East Asian ancestry on both sides of the forty-ninth parallel. This Article considers whether the treatment is merely historical or finds its way into current thinking.

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† Justice of the Court of King's Bench of Alberta, B.A. (Calg.), LL.B. (Sask.), LL.M. (B.C.). I am grateful to Professor Ken Norman of the University of Saskatchewan's College of Law, and former Chief Commissioner of the Saskatchewan Human Rights Commission, who provided me with guidance during my preparation of an original version of this Article, and for his comments following his review of a current draft. I also thank the Honourable Judge Donna Scott of the Saskatchewan Provincial Court and former Chief Commissioner of the Saskatchewan Human Rights Commission, for her comments on an earlier draft of this Article. All opinions and comments contained in this Article are my own, unless attributed to others through a quotation or footnote.

INTRODUCTION

On December 7, 1941, the Imperial Japanese Navy Air Service bombed Pearl Harbor on the Island of O'ahu, in the Territory of Hawai'i. The next day, President Franklin D. Roosevelt declared war on Japan. In his speech, he said that December 7, 1941, will be "a date which will live in infamy" and that he, as Commander in Chief, "directed that all measures be taken for our defense."[1] So began the American involvement in World War II against Japan. On that same date, Canada issued a proclamation of war between Canada and Japan.

On May 6, 1942, a member of the Royal Canadian Mounted Police ("RCMP") arrived at the front door of the farmhouse that Denjiro Okabe owned in Mission, British Columbia. Mr. Okabe came to Canada in 1907, and his wife, Taki, arrived ten years later as a "picture bride." Their children were Canadian citizens, having been born in Canada. The officer told Mr. Okabe that he and his family had twenty-four hours to vacate their farm and that each family member could take only one suitcase. The next day, the RCMP officer returned. When Mr. Okabe's youngest daughter, Yoshino, asked the RCMP officer if she could take her dog with her, the officer pulled out his firearm and shot the dog.

The RCMP took Mr. and Mrs. Okabe and their six children to an "Assembly Centre" located at the Hastings Park Exhibition Grounds in Vancouver. They lived in cattle stalls with other families. The family eventually boarded a cattle car that took them to a sugar beet farm in Picture Butte, Alberta, where the entire family lived in a one-room, uninsulated sugar beet shed.[2] They worked as farm laborers and were given just enough money to buy some food and clothing.

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1. Franklin D. Roosevelt, *Speech by Franklin D. Roosevelt, New York Transcript*, LIBR. OF CONG. (1941), https://www.loc.gov/item/afccal000483/ [https://perma.cc/TJW8-N3LV].

2. The decision to move families from the British Columbia coast to inland sugar beet farms was the result of negotiations between the British Columbia Security Commission, which was overseeing the evacuation, and the Sugar Beet Growers' Associations in Alberta and Manitoba. To qualify for such work,

Denjiro Okabe was my grandfather, and his youngest daughter, Yoshino, is my mother. My grandfather died in 1964 at the age of 78. I never spoke to him about his experiences. He spoke no English, and I spoke no Japanese. He was harassed by non-Japanese people when he tried to speak English, so he stopped trying. I spoke no Japanese, because my mother did not want her children to be seen as "non-Canadian." She thought the Canadian government would punish us if we were not "Canadian."[3] And she never talked about her wartime experiences.[4]

The Okabe family would never return to their farm in Mission, British Columbia. At the end of the war, the British Columbia Security Commission told Mr. Okabe that the Canadian government had sold his farm "to pay for the cost of moving all you Japs from here and detaining you."[5] Mr. Okabe received no compensation.

On February 19, 1976, President Gerald R. Ford signed Proclamation 4417, formally terminating the executive order that resulted in the forced removal of the Japanese from the West Coast. In his address to the nation, he said, "We now know what we should have known then—not only was that evacuation wrong but Japanese-Americans were and are loyal Americans."[6] But does the non-East Asian majority really know that, and do they really believe that the evacuation was wrong? More broadly, does this "knowledge" do anything to stop racial discrimination against persons of East Asian ancestry?

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a family had to have four workers for every non-worker. Professor Howard Palmer described the process the families faced when they arrived at their destinations:

> The beet farmers, informed by telephone that "their Japs" had arrived, would select one or more families, usually on the basis of the number of strong, young, male workers it contained. One evacuee has compared the selection process to a cattle auction, noting that some farmers felt their muscles and examined their teeth to make sure they were healthy.

Howard Palmer, *Patterns of Racism: Attitudes Towards Chinese and Japanese in Alberta 1920–1950*, 13 HISTOIRE SOCIAL/SOC. HIST. 137, 137 (1980).

3. This sentiment was not uniquely Canadian. Masuru Ben Kahora, a Seattle businessperson of Japanese ancestry, was arrested and imprisoned on December 7, 1941. Despite this, he wrote to his family urging them to buy American War Bonds. His wife responded, "I am determined to become a part of American soil to bring up a new American generation . . . My one point is to make an American of our daughter and a true one." RICHARD REEVES, INFAMY: THE SHOCKING STORY OF THE JAPANESE AMERICAN INTERNMENT IN WORLD WAR II 165 (2015).

4. This reticence was not unique to my mother. Reeves, whose book was "formed by the stories of the evacuated families," said, "Nobody talked about what had happened to them from 1942 to 1945. Parents and grandparents were ashamed to talk about the camps and the young ones learned not to ask." *Id*. at xiv, 272–73.

5. According to my mother, these are the precise words that the British Columbia Security Commission agent used when my grandfather inquired whether he and his family could return to their farm. This was consistent with the Canadian government's policy at the time. *See infra* notes 194–196 and accompanying text.

6. ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II 90–91, 148–49 (2004).

This Article discusses the systemic racism that persons of East Asian ancestry[7] faced in the United States and Canada from the moment their ships began landing on North American shores in the middle of the nineteenth century. Although each country differed in their respective constitutional underpinnings and approaches, the results were substantively and substantially the same. This Article begins with examining the direct and indirect ways in which the legislatures and courts sought to quell the arrival and settlement of the Chinese in the mid-1800s, followed by the Japanese in the latter part of the nineteenth century on the West Coast[8] of North America. Although there were no evidence or factual bases that pointed to East Asian people being a burden or threat to the non-East Asian majority, some non-East Asians wanted them removed from the West Coast. And Pearl Harbor provided the perfect opportunity to remove some of them.

Part I begins with a brief discussion of constitutional and normative differences between the American and Canadian landscapes. Part II examines the migration of the Chinese and Japanese to North American shores and the *de jure* and *de facto* discrimination they faced on their arrival. Part III contains a discussion of the evacuation and internment of the Japanese and how each country achieved the same result through different means. This Part also contains an analysis of the three important American cases in which citizens attempted to exercise their constitutional rights. Part IV concludes that the evacuation of the Japanese during World War II was not just a reaction to the hysteria of war, but part of a carefully orchestrated effort toward the removal of East Asian peoples from the West Coast that began on their arrival. It hypothesizes that the anti-Asian sentiment that began in the middle of the nineteenth century continued through the twentieth century and beyond.

I. CONSTITUTIONAL CONSIDERATIONS

The Canadian and American Constitutions form the foundation for legislation directed toward East Asian persons. This Part discusses how the Constitutions divide legislative powers between the federal governments and their respective provinces and states. This division of powers informs the tension that existed in the early legislation and jurisprudence, in which the Western provinces and states tried to control the immigration and the civil rights of East Asian persons within their territories.

7. "East Asian ancestry" refers to those who identify as descending primarily from Japan, China, and the Peninsula of Korea. This Article will not discuss, to any great extent, the *de facto* racism that East Asians faced. Professor Daniels discusses this topic. *Id.* Rather, it will discuss legislation and jurisprudence that had racism as their foundation.

8. In this Article, "West Coast" collectively refers to the Province of British Columbia in Canada, and the States of Washington, Oregon, and California in the United States.

During the period that this Article discusses, Canada's Constitution was the British North America Act, 1867 ("BNA Act").[9] The BNA Act "divides" powers between the federal government, or Parliament, and the provincial legislatures. It gives Parliament exclusive authority to enact laws on the subjects listed in BNA Act § 91 and the provinces exclusive authority to enact those listed in BNA Act § 92.[10] Of importance is BNA Act § 91(25), which deals with "Naturalization and Aliens," and BNA Act § 92(13), which deals with "Property and Civil Rights in the Province."

In the United States, the U.S. Constitution gives the federal government authority "[t]o regulate commerce with foreign nations, and among the several States"[11] and "[t]o establish an uniform Rule of Naturalization."[12] Further, the Fourteenth Amendment deals with citizenship and provides that no state shall deprive "any person within its jurisdiction the equal protection of the laws."[13] The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[14]

Before World War II, and for a time after, Canada and the United States differed in their fundamental normative values.[15] In the United States, Amendments to the U.S. Constitution make up its Bill of Rights, which provide individuals with certain protections, including protecting individuals from unreasonable search and seizure, deprivation of liberty and property without due process of law, forfeiture of private property for public use without just compensation, and cruel and unusual punishment.[16] Arguably, these provisions should have protected the rights of the Japanese during World War II and persons of East Asian ancestry before that. They did not.

Canada had no entrenched bill of rights until 1982, when the Canadian Charter of Rights and Freedoms ("Charter") became a part of Canadian

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9. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.). The BNA Act was renamed the Constitution Act, 1867 by Part VII, Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), § 53(2). During the period discussed in this Article, Canada was not completely independent from the United Kingdom. For example, this Article will refer to decisions of the Judicial Committee of the Privy Council ("Privy Council"), which was the court of last resort for all members of the British Commonwealth, including Canada. On December 31, 1949, An Act to amend the Supreme Court Act, S.C. 1949 (2nd sess.), c 37, § 3, came into force, which made the Supreme Court of Canada the court of last resort in Canada. Cases commenced before that date still had access to the Privy Council. *Id.* § 7.

10. PETER W. HOGG & WADE WRIGHT, CONSTITUTIONAL LAW OF CANADA ¶ 5.3(a) (5th ed. 2019); PATRICK J. MONAHAN, BYRON SHAW & PADRAIC RYAN, CONSTITUTIONAL LAW 110–12 (5th ed. 2017).

11. U.S. CONST. art. I, § 8, cl. 3.

12. *Id.* art. I, § 8, cl. 4.

13. *Id.* amend. XIV, § 1.

14. *Id.* art. IV, § 2, cl. 1.

15. *See* Henry F. Angus, *The Legal Status in British Columbia of Residents of Oriental Race and Their Descendants,* 9 CAN. BAR REV. 1, 2 (1931).

16. U.S. CONST. amends. I–X.

law.[17] Included in the Charter were many of the rights that Americans had enjoyed for almost 200 years.[18]

These normative differences in the protection of civil rights present challenges when comparing the way in which American and Canadian legislators and courts treated persons of East Asian ancestry. However, despite the normative and substantive divergences, the repercussions for individuals of East Asian ancestry coalesced.[19] At times, the legislators and courts cloaked the legislated and jurisprudential racism in a salutary or protective purpose. Frequently, the legislation itself and its results were blunt and direct.

Before the Charter, if a Canadian legislature were to enact a statute that affected a person's civil liberties or rights, courts theoretically could not provide any remedy, as the person suffered no damage. For example, courts would uphold discriminatory legislation so long as the legislature acted within its constitutional sphere of legislative competence. If the legislature stepped outside its sphere, a court could indirectly protect an individual's rights by striking down the legislation. However, that legislation still could be within the legislative competence of the other body.[20]

Even though the United States had an entrenched Bill of Rights at the time, arguably, Canadian resident non-citizens were in a stronger position than their American counterparts for three reasons. First, the Canadian provinces generally had a narrow jurisdictional field within which they could legislate. By virtue of BNA Act § 91(25), Parliament alone could deal with "Naturalization and Aliens." Provincial legislatures could deal only incidentally with non-citizens and could impose *de facto* limitations on their freedom, so long as they did not, in "pith and substance," deal with non-citizens as such.[21]

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17. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). Before the Charter, Canada had the Canadian Bill of Rights, S.C. 1960, c 44 (Can.). This legislation did not exist during the period discussed in this Article. As a federal statute, it had, and continues to have, no effect on provincial legislation. Many of the rights contained in this legislation have now been constitutionally entrenched in the Charter. Saskatchewan was the first provincial legislature in Canada to pass a bill of rights, with the passage of The Saskatchewan Bill of Rights Act, 1947, S.S. 1947, c 35 (Can. Sask.).

18. Before the Charter, there were concerns that individual rights would never be a part of Canadian law. The National Association of Japanese Canadians asked the Joint Parliamentary Committee on the proposed Constitution for an unconditional guarantee that individual rights be entrenched in the Canadian Constitution. The Honorable Thomas Berger supported this position when he said: "[T]he entrenchment of minority rights will limit the powers of Parliament and of the provinces. This is the whole point. These rights should never be subjected to the will of the majority." THOMAS BERGER, FRAGILE FREEDOMS: HUMAN RIGHTS AND DISSENT IN CANADA 261 (1981).

19. Canada and the United States also differed in their control and management of the evacuation and internment of the Japanese during World War II. In Canada, Parliament held control, pursuant to federal legislation. In the United States, the military primarily took responsibility. *See infra* Parts III, A.–C.

20. *See, e.g.*, Union Colliery v. Bryden, [1899] A.C. 580 (U.K.P.C.).

21. Cunningham v. Homma, [1903] A.C. 151, 157 (U.K.P.C.). BNA Act § 91(25), however, does give Parliament considerable power over "aliens." *See* Vaaro v. R., [1933] S.C.R. 36, 40 (Can.).

Second, through BNA Act § 90, the Governor General in Council[22] has the unfettered power to disallow any legislation that a provincial legislature passes.[23] The Governor General in Council could exercise this power whether the impugned legislation was within or outside the province's constitutional sphere of legislative competence.[24] As discussed later, the Governor General in Council used this power frequently during the pre-evacuation period to disallow certain provincial anti-immigration statutes.[25]

Third, pursuant to BNA Act § 132, Parliament could require a province to perform obligations "arising under Treaties between the Empire and such Foreign Countries."[26]

Despite these apparent protections, Canadian legislators enacted racist legislation while acting within their sphere of legislative competence. Moreover, *de facto* racial discrimination was occurring with no remedy for its victims. Similarly, in the United States, the protections apparently afforded by the U.S. Constitution through its Bill of Rights to those of East Asian ancestry did not protect them from a carefully worded statute, or one based on "military necessity."

II. DECADES OF HATE

Discriminatory legislation against persons of East Asian ancestry began from the time they landed on the shores of North America. This Part discusses how state and provincial legislatures, along with their respective federal counterparts, enacted legislation to control the immigration and civil rights of East Asian peoples. It will then present the arguments of those who wanted those of East Asian ancestry deported from North America, or at least removed from the West Coast. Finally, it will provide an example of how

22. Canada's system of government is a constitutional monarchy, with King Charles III being its head of state. *See* BNA Act § 9. His Majesty's representative is the Governor General. *Id.* § 10. The Governor General chooses and summons persons to serve on the King's Privy Council, the purpose of which is "to aid and advise in the Government of Canada." *Id.* § 11. The Governor General in Council, or Governor in Council, refers to the Governor General acting by and with the advice of the King's Privy Council in exercising certain powers, authorities, and functions under the BNA Act and other Canadian legislation. *Id.* §§ 12–13.

23. In *Re Powers of Dissolution and Reservation*, Chief Justice Duff and Justice Davis held that the power of disallowance was "subsisting." [1938] S.C.R. 71, 78 (Can.). This decision preceded the evacuation, and citing *Wilson v. Esquimalt & Nanaimo Ry. Co.*, [1922] 1 A.C. 202, 210 (Can.), Justice Crocket held that the authority to disallow is "unrestricted." *Id*. at 86.

24. *Id.* One wonders whether Parliament would use this power today given that courts appear to be the proper fora within which to deal with questions of jurisdiction, wisdom, or consistency of a provincial statute with federal law. HOGG & WRIGHT, *supra* note 10, ¶ 5.3(e).

25. Professor Ryder stated, "Of the twenty-two disallowances of [British Columbia] anti-Asian statutes between 1878 and 1921, eighteen occurred between 1898 and 1908." Bruce Ryder, *Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884–1909*, 29 OSGOODE HALL L. J. 619, 629 (1991).

26. This results from Canada being a constitutional monarchy. BNA Act §§ 9–13; G.J. Szablowski, *Creation and Implementation of Treaties in Canada*, 34 CAN. BAR REV. 28 (1956).

systemic racism against East Asians was not limited to the West Coast but worked its way into the heart of the Canadian prairies.[27]

A. Immigration

In both Canada and the United States, the federal governments had the constitutional power to control immigration. In the United States, that power flowed from the U.S. Constitution, which gave Congress the authority "[t]o regulate commerce with foreign nations, and among the several States"[28] and "[t]o establish an uniform Rule of Naturalization."[29] In Canada, that authority came through the BNA Act, which authorized Parliament to deal with "Naturalization and Aliens."[30] Despite these superseding federal powers, both the Western American states and Canadian provinces attempted to limit immigration.

1. The Chinese

Chinese immigration to the West Coast began with the Gold Rush during the mid-1800s.[31] In the United States, the post-Civil War economic depression resulted in the Chinese being a glut on the California labor market. As employers considered the Chinese to be "cheap labor," economic competition between Chinese laborers and the White working class resulted in an anti-Chinese movement as early as 1869.[32] This tension culminated with the "Chinese Massacre of 1871," in which a 500-person mob invaded Old Chinatown in Los Angeles and hanged twenty Chinese individuals.[33]

The California legislature passed legislation that empowered the Commissioner of Immigration to determine who could enter the United States through California. In *Chy Lung v. Freeman*, the U.S. Supreme Court found the statute to be "void."[34] The Court emphasized that the regulation of immigration "belongs to Congress, and not to the States."[35] But this ruling did not stop California. The state's Constitution, as re-written in 1879, contained an anti-Asian section allowing the state legislature to enact any means necessary to protect California from non-citizens who were considered detrimental to the peace or well-being of the state, including foreigners who were ineligible to become U.S. citizens.[36] Additionally,

27. The Canadian prairies include the Provinces of Alberta, Saskatchewan, and Manitoba.

28. U.S. CONST. art. I, § 8, cl. 3.

29. U.S. CONST. art. I, § 8, cl. 4.

30. BNA Act § 91(25).

31. JACK CHEN, THE CHINESE IN AMERICA 11–13 (1980).

32. ROGER DANIELS, CONCENTRATION CAMPS U.S.A.: JAPANESE AMERICANS AND WORLD WAR II 3 (1972).

33. CHEN, *supra* note 31, at 139; GUNTHER BARTH, BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES 1850–1870 144 (1964); WILLIAM L. TUNG, THE CHINESE IN AMERICA 1820–1973 13 (1974).

34. 92 U.S. 275, 281 (1875).

35. *Id.* at 280.

36. DANIELS, *supra* note 32, at 4.

Article II of the new state Constitution denied the right of suffrage to all "natives of China, idiots and insane persons."[37]

In the face of this anti-Chinese sentiment from state governments and the public, Congress bowed to public pressure and passed two acts limiting Chinese immigration to the United States. First came "An Act to execute certain treaty stipulations relating to Chinese," known as the Chinese Exclusion Act of 1882.[38] It suspended immigration of Chinese laborers for ten years and prohibited the naturalization of Chinese immigrants, but contained certain exceptions, such as to those who were already in the United States. Congress then passed the "Act to Prohibit the Coming of Chinese Persons into the United States" (the "Geary Act") in May 1892.[39] The Geary Act allowed Chinese immigrant laborers who were already in the United States to travel to China and re-enter the United States. However, it also required them to register and secure a certificate as proof of their right to be in the United States in the first place. Those who did not have the required certificate faced imprisonment or deportation. In 1902, Congress extended the Geary Act indefinitely.[40]

Canadian provinces, like their counterpart in the United States, wanted to limit immigration, despite Parliament's power over "Naturalization and Aliens."[41] As part of its bargain to admit British Columbia into confederation, Parliament committed to extending the Canadian Pacific Railway through British Columbia. To facilitate this, the Canadian Pacific Railway required an inexpensive labor force. Chinese laborers fit perfectly. This apparent influx of Chinese immigrants led to a local campaign to rid the Chinese from British Columbia. They complained that Chinese laborers "were not only introducing 'loathsome diseases' and 'demoralizing habits' but were incapable of assimilation and provided unfair competition, because they were able to undercut wages owing to their low standard of living."[42]

British Columbia legislators began introducing carefully worded legislation to avoid encroaching on federal jurisdiction. For example, Chinese men often wore their hair in a pigtail or queue, so the British Columbia legislature introduced legislation in 1876, imposing a tax of ten dollars per year "on every male of eighteen years who wears long hair in the shape of a tail or queue."[43] Similarly, in 1878, the legislature introduced

37. FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS 9 (1976). This Article will discuss the right to vote. *See infra* Part II.B.1.

38. Professor Daniels noted that this was "the first federal law to discriminate against an immigrant group and thus set an important precedent." DANIELS, *supra* note 6, at 7.

39. Geary Act, Pub. L. No. 52–60, 27 Stat. 25 (1892).

40. Act of Apr. 29, 1902, ch. 641, 32 Stat. 176 (1902).

41. *See* BNA Act §§ 9–13.

42. KEN ADACHI, THE ENEMY THAT NEVER WAS 39 (1976).

43. Jay M. Perry, *"The Present of California May Prove … the Future of British Columbia": Local, State, and Provincial Immigration Policies Prior to the American Chinese Exclusion Act and Canadian Chinese Immigration Act*, 201 B.C. STUDIES, 13, 21 (2019).

legislation which stated that "no man with hair longer than five and one-half inches could be employed by the [Canadian Pacific Railway]."[44]

Although the British Columbia courts upheld some racist legislation, they struck down others. In 1878, the British Columbia legislature passed the Chinese Tax Act,[45] which required every Chinese person over the age of twelve to apply for a license every three months at a cost of ten dollars. If the person did not have a license in their possession, they would be liable to monetary and other penalties. In *Tai Sing v. Maguire*, the British Columbia Supreme Court held the Chinese Tax Act to be *ultra vires* the provincial legislature because "it was not intended to collect revenue, but to drive the Chinese from the country."[46] For that reason, the Chinese Tax Act interfered with Parliament's authority over trade and commerce, aliens, and Empire treaties.[47]

Not to be deterred, the British Columbia legislature passed the Chinese Regulation Act of 1884, which required every Chinese person over the age of fourteen to pay an annual amount of ten dollars for a license.[48] The preamble to this Act stated:

> Whereas the incoming of Chinese to British Columbia largely exceeds that of any other class of immigrant, and the population so introduced are fast becoming superior in number to our own race; . . . are dissimilar in habits and occupation from our people; . . . are governed by pestilential habits; are useless in instances of emergency; habitually desecrate grave yards by the removal of bodies therefrom; and generally the laws governing the [W]hites are found to be inapplicable to Chinese, and such Chinese are inclined to habits subversive of the comfort and wellbeing of the community.

In *R. v. Wing Chong*, the British Columbia Supreme Court held that the Chinese Regulation Act of 1884 was *ultra vires* the British Columbia legislature, largely for the same reasons as those articulated in *Tai Sing*.[49]

Like Congress, Parliament eventually capitulated to pressure from British Columbia and passed the Chinese Immigration Act of 1885.[50] The Act imposed a fifty-dollar duty on "[e]very person of Chinese origin" entering Canada. This was known as the "Chinese head tax."[51] Most Chinese persons who immigrated to Canada around that time possessed only their life savings, which was far less than fifty dollars.

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44. ADACHI, *supra* note 42, at 38.
45. Chinese Tax Act, S.B.C. 1878, c 35 (Can. B.C.).
46. [1878] 1 B.C.R. pt. I, 101, 112 (Can. B.C. S.C.).
47. *Id.*
48. Chinese Regulation Act of 1884, S.B.C. 1884, c 4 (Can. B.C.).
49. [1885] 1 B.C.R. pt. II, 150, 157, 164 (Can. B.C. S.C.).
50. Chinese Immigration Act of 1885, S.C. 1885, c 71 (Can.).
51. ADACHI, *supra* note 42, at 39.

2. The Japanese

For internal political reasons, there was no emigration from Japan until the middle of the nineteenth century.[52] At that time, the ruling Emperor embraced a new era during which Japan would seek worldly knowledge, but he allowed only the upper and educated classes to seek such knowledge. In 1884, the Japanese government expanded those who could emigrate by including the laboring classes. Despite this broadening of who could emigrate, the Japanese government "erected formidable barriers to indiscriminate emigration."[53] W.M. Rice, the U.S. Commissioner of Immigration, reported that the Japanese government acted selectively, believing that "the character of the Japanese abroad will be taken as an index of the character of the nation at home."[54]

This migration of the Japanese to North America was poorly timed in the light of the conflict that had been building between the Chinese and non-Asians. Because Congress and Parliament reacted to this tension by essentially halting Chinese immigration through legislation, the anti-Asian sympathizers turned their attention to the Japanese.[55] In 1891, Parliament considered increasing the Chinese head tax from fifty dollars to 200 dollars and amending the Chinese Immigration Act of 1885 to include the Japanese.[56]

Congress passed the Immigration Act of 1891, which gave immigration officers unfettered authority to deny entry to the United States on the ground that a person was "an idiot, insane, pauper or person likely to become a public charge."[57] The U.S. Supreme Court upheld this authority in *Nishimura Ekiu v. United States*, a case involving a Japanese woman from Yokohama, Japan.[58]

During this period, Japan continued to help the cause of its nationals who were seeking to emigrate. In 1894, Japan signed treaties with the United States and Britain, known individually as the "Treaty of Commerce and Navigation."[59] Those treaties granted subjects of the other country the

52. *Id.* at 1.

53. BILL HOSOKAWA, NISEI: THE QUIET AMERICANS 46 (1969).

54. *Id.*

55. Professor Daniels noted that the "mass" Japanese migration to the United States was only "mass" in the eyes of the non-Japanese labor force because Japanese immigration made up about one percent of total U.S. immigration from the end of the Civil War to the Immigration Act of 1924. DANIELS, *supra* note 32, at 5.

56. ADACHI, *supra* note 42, at 39. The Japanese and Chinese were melded together to form the "Oriental problem." However, this melding together was only in the minds of the non-Asian majority, as there was historical tension between the Chinese and Japanese that prevented them from joining together to defend themselves from the non-Asian majority. *Id.* at 40.

57. Immigration Act of 1891, Pub. L. No. 51-551, 26 Stat. 1084 (1891).

58. 142 U.S. 651, 652 (1892).

59. Treaty of Commerce and Navigation Between Great Britain and Japan, Gr. Brit.-Japan, July 16, 1894, U.K.T.S. 1894 no. 23; Treaty of Commerce and Navigation Between the United States and Japan, U.S.-Japan, Nov. 22, 1894, 29 Stat. 848.

privileges of "full liberty to enter, travel or reside in any part of the territories of the other contracting party" and "full and perfect protection for their persons and property."[60]

The Japan-Britain treaty frustrated the British Columbia legislature's attempts to restrict the rights of the Japanese, as Canada was bound, through the BNA Act § 132, to abide by "Treaties between the Empire and such Foreign Countries."[61] For example, the Governor General in Council would not permit the British Columbia legislature to enact the Alien Labour Act, 1897, whose long title was "An Act relating to the employment of Chinese or Japanese persons on Works carried on under Franchises granted by Private Acts."[62] Also, the Governor General in Council disallowed the British Columbia Immigration Act, 1900,[63] which provided that the immigration of a newcomer who failed to complete an application in "the characters of some language of Europe" would be unlawful. This Act, along with other similar legislation, were struck down for being *ultra vires* the province or contrary to the Japan-Britain treaty.

The Canadian and American federal governments continued seeing a need to restrict the number of Japanese persons immigrating to North America. In 1907 and 1908, the countries concluded so-called "Gentlemen's Agreements" with Japan under which Japan would restrict emigration.[64] These agreements were not treaties, but executive bilateral agreements. Japan lived up to its obligation. Consequently, the number of Japanese persons immigrating to both countries dropped substantially.[65] Separately, during this time, many Japanese persons returned to Japan. Members of Parliament in the Canadian House of Commons expressed concern that through these "Gentlemen's Agreements," "Canada has handed over to Japan that control of immigration which Canada herself ought to exercise."[66]

Not to be deterred by previous disallowances, the British Columbia legislature passed the British Columbia Immigration Act, 1907, which required newcomers to pass an "educational test."[67] The Governor General in Council did not disallow the 1907 Act, as it had on previous occasions

60. Treaty of Commerce and Navigation Between the United States and Japan, U.S.-Japan, Nov. 22, 1894, 29 Stat. 848.

61. *Id.*

62. Alien Labour Act, S.B.C. 1897, c 1 (Can.).

63. British Columbia Immigration Act, S.B.C. 1900, c 11 (Can.).

64. In the United States, these agreements were negotiated among U.S. Secretary of State Elihu Root, Japan's Ambassador Kogoro Takahira, and Japan's Foreign Minister Tadasu Hayashi. HOSOKAWA, *supra* note 53, at 92. In Canada, they were negotiated between Canada's Minister of Labor Rodolphe Lemieux and Minister Hayashi. ADACHI, *supra* note 42, at 81. Unlike a treaty, a "Gentlemen's Agreement" is a non-binding agreement between parties, that relies on the honor of the parties to ensure fulfilment of the terms of the agreement. In *Pocklington Foods Inc. v. Alberta*, the Court said, "Words like 'gentleman's agreement' have no real meaning in law. They are, however, generally well-known concepts from a moral perspective." *Pocklington Foods Inc. v. Alberta* (1998), 159 D.L.R. 4th 81 (Can. Alta. Q.B.).

65. CHUMAN, *supra* note 37, at 36.

66. Canada, Parliament, *House of Commons Debates*, 10th Parl., 4th Sess. (1908), at 2042.

67. British Columbia Immigration Act, S.B.C. 1907, c 21A (Can. B.C.).

concerning similar statutes. Two *Issei*[68] individuals presumably "failed" the educational test, and the government detained them under a "warrant of commitment."[69] The individuals filed writs of *habeas corpus* seeking their release. The British Columbia Supreme Court unanimously struck down the impugned legislation as being repugnant to the Canada-Japan treaty but made no mention of the "Gentlemen's Agreements."[70]

In the United States, the "Gentlemen's Agreements" did not ban Japanese immigration to North America,[71] so anti-Asian lobbyists continued their pressure on Congress to seek a complete ban.[72] In 1921, Congress passed the Emergency Quota Act,[73] which limited immigration of any one nationality to three percent of the total number of foreign-born persons of that nationality living in the United States.[74] Even still, this restriction did not satisfy the anti-Asian majority. Washington Congressman Albert Johnson and Pennsylvania Senator David Reed proposed legislation to reduce further immigration into the United States. Secretary of State Charles Evans Hughes opposed the bill. Japanese Foreign Minister Matsui Keishirō recommended that Ambassador Masanao Hanihara send a letter to Secretary of State Hughes. However, a careless choice of words in that letter tipped the balance in favor of enacting the proposed legislation. Ambassador Hanihara took offense to the wording of the bill, which appeared to single out the Japanese. He warned of the "grave consequences" that such an enactment "would inevitably bring upon the otherwise happy and mutually advantageous relations between our two countries."[75]

The bill's supporters claimed this language constituted a veiled threat and persuaded others to support the bill. Though votes were almost evenly split before the letter, the bill passed with a 76-2 vote after the letter was publicized.[76] The legislation was officially known as the Immigration Act of 1924[77] and unofficially known as the Japanese Exclusion Act. The Japanese felt they had dealt with the perceived American immigration problem in

68. *Issei* are first generation or newcomers to North America. Japanese who are born in Canada or the United States to *Issei* parents are *Nisei*. Children of *Nisei* are *Sansei*, or third generation North Americans.

69. *See In re* Nakane and Okazake, [1908] 13 B.C.R. 370, 373 (Can. B.C. S.C.).

70. *See id.* at 374–77.

71. California had barred almost all other immigrants from Asia and Southeast Asia through statute. DANIELS, *supra* note 6, at 7–13.

72. DANIELS, *supra* note 32, at 19.

73. An Act to Limit the Immigration of Aliens into the United States, Pub. L. No. 67-5, 42 Stat. 5 (1921).

74. This "total number" would be based on the U.S. Census (1910) figures.

75. DANIELS, *supra* note 32, at 20–21, *reproduced from* 86 ADVOCATE OF PEACE THROUGH JUSTICE 311 (1924).

76. LON KURASHIGE, TWO FACES OF EXCLUSION: THE UNTOLD HISTORY OF ANTI-ASIAN RACISM IN THE UNITED STATES 137 (2016); DANIELS, *supra* note 32, at 21.

77. An Act to Limit the Immigration of Aliens into the United States, and For Other Purposes, Pub. L. No. 68-139, 43 Stat. 15 (1924).

good faith through the "Gentlemen's Agreements."[78] They formally protested to President Calvin Coolidge, who declined to use his veto power to block the bill.[79] The Japanese Exclusion Act dominated American immigration policy until 1952.

B. The Right to Vote

The right to vote is an important hallmark of any democratic society. Along with the legislatures' attempts to control immigration, the legislatures also attempted to control voting rights of East Asians, which indirectly controlled their livelihoods.

1. Canada

In Canada, the power to determine who can vote is divided between Parliament and the provincial legislatures. Federal election officials, however, used provincial voting lists to determine who could and could not vote in federal elections. In 1875, the British Columbia legislature passed the Qualification and Registration of Voters Act, which prohibited any "Chinaman" from having his name placed on the Register of Voters or entitling him to vote.[80] In 1895, the British Columbia legislature passed the Provincial Voters' Act Amendment Act, 1895, which provided, "No Chinaman, Japanese, or Indian shall have his name placed on the Register of Voters . . . or be entitled to vote at any election."[81] It went on to say that any Collector of Voters who placed the name of any such person on the Register of Voters would be liable on conviction to a fine or imprisonment. As the federal government used the provincial voters' lists to establish the right to vote in federal elections, this act prevented Japanese, Chinese, and Indian persons from voting in federal elections. It also prevented them from pursuing certain occupations, such as law, pharmacy, politics, policing, forestry, or post office employment, as those occupations required qualified persons to be on the voters' list.[82]

Tomekichi (Tomey) Homma, a naturalized Canadian citizen of Japanese ancestry, challenged this legislation. He approached Thomas Cunningham, Collector of Voters, to put his name on the voters' list. Cunningham refused. Homma appealed Cunningham's decision.[83] British Columbia Supreme Court Chief Justice Angus McColl held that the statute was *ultra vires* the British Columbia legislature. In so doing, he followed *Bryden*, which held that a law that prevented "Chinamen" from working in coal mines was *ultra vires* the province because it pertained to non-citizens

78. *See* KURASHIGE, *supra* note 76, at 112.
79. *Id.* at 137.
80. Qualification and Registration of Voters Act, S.B.C. 1875, c 2, § 1 (Can. B.C.).
81. Provincial Voters' Act Amendment Act, S.B.C. 1895, c 20, § 3 (Can. B.C.).
82. Angus, *supra* note 15, at 2.
83. *In re* the Provincial Elections Act and *In re* Tomey Homma, A Japanese, [1900] 7 B.C.R. 368, 371 (Can. B.C. S.C.) [hereinafter *In re* Homma].

and naturalized subjects.[84] Chief Justice McColl held that persons who were British subjects in name would be "doomed to perpetual exclusion" by legislation that affected their property and civil rights and that such an approach "would surely not be to the advantage of Canada, and might even become a source of national danger."[85]

On appeal, the Privy Council reversed Chief Justice McColl's judgment. The Lord Chancellor said BNA Act § 91(25) "reserves these subjects for the exclusive jurisdiction of the Dominion," but once a non-citizen becomes a naturalized citizen, the province has jurisdiction to deal with the incidents that flow from such status.[86] The Privy Council distinguished *Bryden*, saying:

> [*Bryden*] depended upon totally different grounds . . . [T]he regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.[87]

Arguably, *Bryden* is not distinguishable on such a ground. If a provincial statute barring a racial group from certain employment is *ultra vires* because it prohibits that group from earning a living, an act that denies the right to vote to a racial group which then bars them from certain occupations should also be *ultra vires*. Regretfully, the Privy Council did not allude to that argument in its judgment.

Thus, even though Parliament could confer citizenship on non-citizens, the province could enact legislation that could deny them the trappings of that citizenship. This leads to the anomalous situation of putting non-citizens in a better position than naturalized or Canadian-born citizens.[88] As mentioned earlier, the Governor General in Council disallowed provincial legislation that dealt with Japanese non-citizens pursuant to Canada's treaty obligations. However, once the non-citizen became a Canadian citizen, the province could enact legislation that affected that person's rights due to BNA § 92(13), which gives the provinces jurisdiction over property and civil rights, and, as a result, the *consequences* flowing from naturalization and alienage.[89]

Issues concerning the right to vote continued into the next century. During World War I, 191 *Issei* fought for Canada in Europe. Fifty-four were

84. Union Colliery v. Bryden, [1899] A.C. 580 (U.K.P.C.).
85. *In re* Homma, 7 B.C.R. at 372.
86. Cunningham v. Homma, [1903] A.C. 151, 156–57 (U.K.P.C.).
87. *Id.* at 157.
88. FORREST E. LA VIOLETTE, THE CANADIAN JAPANESE AND WORLD WAR II 298 (1948).
89. *Id.*

killed. The Canadian military awarded thirteen military medals for bravery to this group.[90] After the war, the surviving soldiers could not vote. In the early 1930s, the British Columbia legislature gave men of Japanese ancestry who served in the Armed Forces during World War I the right to vote.[91] The legislation passed by a one-vote margin. There was a public concern that the veterans' descendants might seek voting rights.[92] And they did. Denial of the right to vote to all but military veterans, continued to trouble the Japanese, especially the Canadian-born *Nisei*.[93] As Canadians, the *Nisei* felt they had the right to participate in the fruits of citizenship, especially given that they were educated in Canadian schools and held the ideals of "democracy and fair play" in high regard.[94]

The *Nisei* felt they could best meet this objective with a collective voice, so in the 1930s they formed the Japanese Canadian Citizens League ("JCCL").[95] The JCCL sent a delegation to Ottawa to appear before a Special Committee on Elections and Franchise Acts.[96] Although the delegates were *Nisei*, the Committee was shocked at the delegates' fluency in English.[97] Their presentation was strong, but it proved no match for the now-proficient anti-East Asian Members of Parliament, headed by Alan W. Neill and Thomas Reid, who presented their "peaceful penetration" argument.[98] The "peaceful penetration" hypothesis was that every activity in which the Japanese participated, whether occupational, social, or educational, was part of a grand plan of the Japanese Imperial Government to take over North America.[99] The reason the Japanese appeared so quiet and withdrawn was to catch their victims by surprise when they made their concerted assault.[100] They also argued that "high birthrate" among the Japanese was a device to overrun North America.[101] The provinces controlled the franchise in their jurisdictions and both major political parties opposed extending the federal franchise to the Japanese.[102] As Adachi noted, "The outcome of the hearings was predictable."[103] The Special Committee rejected the JCCL's submissions and it denied the franchise to all persons of Japanese descent.

With Canada's entry into World War II in Europe, the JCCL sent a wire to Prime Minister Mackenzie King pledging "deepest loyalty and devotion"

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90. ADACHI, *supra* note 42, at 102.
91. Provincial Elections Act Amendment Act*,* S.B.C. 1931, c 21 (Can. B.C.).
92. ADACHI, *supra* note 42, at 155–56.
93. *Id.* at 157.
94. *Id*. at 158.
95. In the United States, the *Nisei* formed the Japanese American Citizens League, with goals like those of the JCCL.
96. LA VIOLETTE, *supra* note 88, at 12.
97. ADACHI, *supra* note 42, at 161.
98. *Id.* at 163; BERGER, *supra* note 18, at 103–04.
99. ADACHI, *supra* note 40, at 153–54.
100. *See id.*
101. *Id.* at 154.
102. *Id.*
103. *Id*. at 164.

to Canada.[104] Because the British Columbia legislature gave Japanese World War I veterans the right to vote, this became the central issue of whether the *Nisei* would be allowed to serve in the Canadian Armed Forces. Vancouver City Council asked the federal government for an assurance that it would not grant the franchise to *Nisei* who served in the Canadian Armed Forces and British Columbia's premier also asked for the same assurance provincially.[105] Prime Minister Mackenzie King felt compelled to hold a special inquiry to determine whether the Japanese should be exempted from military service. The inquiry recommended that, despite the apparent loyalty that manifested itself at its hearings, the Japanese be exempt from service.[106] It opined that the volatile situation on the West Coast could erupt into race riots if it permitted the Japanese to enlist. For the Japanese, the most important result of the hearings was the inquiry's express finding that there was no threat of a "peaceful penetration" and that the Japanese were a law-abiding and loyal people.[107]

2. The United States

Though Canadian citizens were not guaranteed the franchise, the Fifteenth Amendment gave American "citizens" the right to vote. Thus, in the United States, the *Nisei* could vote because they were "citizens" by birth. Moreover, states could not abridge those citizenship rights by virtue of the Fourteenth Amendment of the U.S. Constitution.[108] However, because the *Issei* were not born in the United States, they did not enjoy the benefit of those Amendments.

The U.S. Constitution gives Congress the power "[t]o establish an uniform Rule of Naturalization."[109] Pursuant to that power, on March 26, 1790, Congress enacted a statute, which says, "any alien, being a free [W]hite person who shall have resided within the limits and under the jurisdiction of the United States for a term of two years, may be admitted to become a citizen thereof."[110] In 1870, Congress amended the statute to include all "aliens of African nativity and to persons of African descent."[111] Did this statute provide an opening for the *Issei* to become American citizens and thereby acquire the right to vote?

In 1894, the Circuit Court District of Massachusetts considered this question in *In re Saito*.[112] In that case, Shebata Saito, an *Issei*, applied for

104. *Id.* at 187–88.
105. *Id.* at 189.
106. *Id.*
107. *Id.* at 190. In Canada, the Japanese were not given the right to vote in federal elections until 1948: An Act to amend The Dominion Elections Act, 1938, S.C. 1948, c 46, §6.
108. U.S. CONST. amend. XIV, § 1.
109. *Id.* art. I, § 8, cl. 4.
110. Naturalization Act of 1790, Pub. L. No. 1-3, 1 Stat. 103 (1790).
111. Naturalization Act of 1870, Pub. L. No. 41–254, 16 Stat. 254 (1870).
112. 62 F. 126 (C.C.D. Mass. 1894).

naturalization. In a brief judgment, the court dismissed Saito's application on the basis that Saito belonged to the "Mongolian or yellow" race.[113] The court held that when Congress chose the word "[W]hite" in designating the class of persons who could be naturalized, it intended to exclude "all alien races except the Caucasian."[114] The legislative history of the 1870 amendment demonstrated that Congress preferred to add Black people to the statute rather than strike out the word "[W]hite."[115] The court held that Congress took this approach to avoid extending "the privilege of naturalization to the Mongolian race."[116]

3. Summary

In Canada, the *Nisei* could not vote (or be employed in certain occupations) because of the language of provincial statutes such as the British Columbia Qualification and Registration of Voters Act. The *Issei* could not vote because they were "aliens," and once they became "naturalized British subjects," the province could deal with the incidents that flowed from such status, including disenfranchisement. In the United States, the *Issei* could not vote as they could not become naturalized citizens. Only the *Nisei*, as American citizens, could vote.

C. The Exclusionists

Those who sought the deportation of East Asians from North America, or, at least, their exclusion from the West Coast, had a strong, organized lobby. One of the leading organizations was the Asiatic Exclusion League, which was formed in San Francisco, California in 1905, and which primarily comprised San Francisco labor union members.[117] By 1906, it had a membership of more than 75,000.[118] In 1907, a Canadian Chapter of the Asiatic Exclusion League was formed. This section will discuss some of the exclusionists' arguments.

1. The Economic Argument

The exclusionists argued that the Japanese were satisfied with a low standard of living. Thus, the exclusionists concluded that the Japanese did not aspire to become upwardly mobile North American citizens and that the Japanese Imperial Government financed them to facilitate espionage work.

The brief recession following World War I provides an example of how the exclusionists attempted to facilitate a redistribution of money. After the war, returning non-Japanese soldiers struggled to find work. In Canada, the exclusionists pressured the federal government to resolve this. In 1919, the

113. *Id.* at 127–28.
114. *Id.* at 126.
115. *Id.* at 127–28.
116. *Id.* at 127.
117. ROGER DANIELS, THE POLITICS OF PREJUDICE 28 (1970).
118. HOSOKAWA, *supra* note 53, at 83.

federal Department of Marine and Fisheries decided gradually to eliminate the Japanese from the fishery by reducing the number of fishing licences it issued to them and cancelling outstanding ones.[119] By 1925, the Department had cut the number of Japanese-owned fishing licenses in half.[120] It also prohibited Japanese fishermen from using gasoline-powered boats on the Skeena River near Prince Rupert, British Columbia. This hampered the Japanese fishermen's livelihoods from 1921 to 1930.[121]

In *In the Matter of a Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914*, the Supreme Court of Canada unanimously held that the Department's refusal to issue fishing licences to Japanese fishermen pursuant to the Fisheries Act was *ultra vires* Parliament.[122] The court held that a person who otherwise qualified for a license was entitled, upon submitting an application and paying the proper fee, to be issued one. The Privy Council affirmed the Court's decision.[123] Parliament cured this by giving the Minister of Marine and Fisheries "absolute discretion" when issuing fishing licences.[124] The Department exercised its discretion by continuing to issue licenses to Japanese fishermen. Adachi hypothesized that the Department continued to issue fishing licenses to Japanese fishermen not to appease the Japanese, but to protect other industries to which the Japanese would turn if they could not fish.[125]

2. The Unassimilable Argument

The exclusionists argued that the Japanese were unassimilable. Most *Issei* could not speak English and their limited contact with English-speaking Canadians and Americans restricted their opportunities to learn English. Besides, any attempts to assimilate might have been fruitless given the attitudes that were prevalent at that time. For example, in the House of Commons Debates of May 8, 1922, William G. McQuarrie, a Member of Parliament from New Westminster, British Columbia, supported exclusion by saying, "It is desirable that we should have a [W]hite Canada and that we should not become a yellow or mongrel nation."[126] Earlier in his speech,

119. BERGER, *supra* note 18, at 101; Fisheries Act, R.S.C. 1927, c 73, § 7 (Can.).

120. ADACHI, *supra* note 42, at 142; BERGER, *supra* note 18, at 101.

121. BERGER, *supra* note 18, at 101. Adachi said:

> Those fishermen were thus placed in an almost insuperable disadvantage because lack of power limited the range, mobility and speed of operations in an industry in which survival depended not only on special skills and aptitude but also on the utilization of technological changes in equipment. It was not until 1930 that the Japanese were allowed to use gasoline engines and to fold up their sails. ADACHI, *supra* note 42, at 145.

122. [1928] S.C.R. 457 (Can.).

123. [1930] 1 D.L.R. 194 (Can. P.C.).

124. Act to Amend the Fisheries Act, S.C. 1929, c 42, § 2 (Can.).

125. ADACHI, *supra* note 42, at 145.

126. Canada, Parliament, *House of Commons Debates*, 14th Parl., 1st Sess., No 2 (May 8, 1922), at 1516 (Hon. William G. McQuarrie). Sir John A. Macdonald, the then-Prime Minister of Canada, made a similar speech concerning the Chinese forty years earlier when he said:

McQuarrie suggested that the ultimate test of assimilation is intermarriage, and that such a marriage between East Asians and White people would never "perpetuate the good qualities of either race." He then quoted an article from the March 14, 1921, edition of *The Vancouver World*, which read:

> Marriage between [O]rientals and [W]hites has never been known to produce anything but degradation for both because it is an unnatural thing. Therefore, as the Japanese can never in a thousand years assimilate with [W]hites to produce a race desirable as future Canadians, their influx into the country and the hold they are taking thereof is unwise and undiplomatic.[127]

In the United States, the exclusionists went further. Not only did they argue that the Japanese were unassimilable, but they also argued that they should be segregated.[128] In 1906, the San Francisco Board of Education segregated twenty-five Japanese public-school children on the grounds that children should not have "their youthful impression . . . affected by association with pupils of the Mongolian race" and that Japanese children "were vicious, immoral, of an age and majority too advanced for safe association with the younger American children."[129]

Because of the 1894 Treaty of Commerce and Navigation between the United States and Japan, Congress felt compelled to intervene in the

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> I share very much the feeling of the people of the United States, and the Australian colonies, against a Mongolian or Chinese population in our country as permanent settlers. I believe they would not be a wholesome element for this country. I believe that it is an alien race in every sense, that would not and could not be expected to assimilate with our Arian population . . . The government have not had their attention called to this subject of late; but it is a matter of so great importance that it will engage our attention, and that of every public man in this House, to discover how far we can admit Chinese labour without introducing a permanent evil to the country by allowing to come into it, in some respects, an inferior race, and, at all events, a foreign and alien race. Of course, British Columbia, from its geographical position and proximity to the ocean, is of that portion of the Dominion that will chiefly suffer from an influx of this description of settlers.

Canada, Parliament, *House of Commons Debates*, 4th Parl., 4th Sess. (May 12, 1882), at 1477 (Sir John A. Macdonald). Timothy J. Stanley stated, "Macdonald is the only member of the House of Commons or of the Canadian Senate to speak of the 'Aryan' nature of Canadian society. Indeed, the term is so unfamiliar in 1882, when he first used it, that the clerks recording the debate in the House of Commons spelled it 'Arian.'" Timothy J. Stanley, *John A. Macdonald, "The Chinese" and Racist State Formation in Canada*, 3 J. CRITICAL RACE INQUIRY 6, 23 (2016).

127. *Id*. Decades earlier, Sir John A. Macdonald made a similar speech concerning the Chinese, "The Chinese bring no women to British Columbia with them, and are not likely, therefore, to be permanent settlers. Nor do I hear that there is any danger of miscegenation or a mingling of the races." Canada, Parliament, *House of Commons Debates*, 4th Parl., 4th Sess. (May 12, 1882), at 1477 (Sir John A. Macdonald). He said in a later speech:

> I am sufficient of a physiologist to believe that the two races cannot combine, and that no great middle race can arise from the mixture of the Mongolian and the Asian. I believe it would be a great mistake and would tend to the degradation of the people of the Pacific; and that no permanent immigration of the Chinese people into Canada is to be encouraged as a body of settlers, but under the present system there is no fear of that.

Canada, Parliament, *House of Commons Debates*, 5th Parl., 1st Sess., No 2 (Apr. 30, 1883), at 905 (Sir John A. Macdonald).

128. Americans are familiar with racial segregation. In 1896, the U.S. Supreme Court sanctioned segregation in public facilities in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

129. CHUMAN, *supra* note 37, at 20.

segregation debate. After much discussion, the issue was resolved in favour of non-segregation, with the proviso that the Japanese students had to meet the requirements for any given grade.[130] Moreover, Japan promised that it would not object to the United States prohibiting immigration from Hawai'i to the mainland, though it refused to prohibit emigration from Japan to Hawai'i.[131] Thus, the assimilability argument began to weigh into broader questions about Japanese immigration.

The Canadian exclusionists picked up on the American exclusionists' argument and sought segregation in schools. They made the same arguments as those the exclusionists made in the United States. Once the Vancouver School Board completed its investigation, it refused to segregate students.[132] The Treaty of Commerce and Navigation between Britain and Japan undoubtedly had some influence on the Vancouver School Board's decision. However, there might have also been a practical reason. In the early part of the twentieth century, most Japanese persons lived around the area of Powell Street in downtown Vancouver.[133] In fact, that area was known as *Nihonmachi*, or "Japantown."[134] As a result, there were few Japanese children in schools beyond those around Powell Street. Thus, arguably, the Vancouver School Board saw no need to call for segregation where none was necessary.

Because of the "deal" that prohibited immigration of Japanese persons from Hawai'i to the United States mainland, the Japanese began immigrating into Canada. This prompted the federal government in 1907, to secure an agreement with Japan to limit emigration.[135] However, this move did not satisfy the Canadian exclusionists. One of the Canadian Asiatic Exclusion League's first activities was an "anti-Oriental" demonstration in Vancouver, which took place on September 7, 1907.[136] A member of the Seattle branch of the Asiatic Exclusion League spoke at the demonstration. He demanded that Parliament declare a total exclusion of Asians from Canada.[137] and referred to an incident in which a club-wielding mob drove a group of South Asians out of Bellingham, Washington.[138] This story ignited the Canadian demonstrators to destroy Chinatown in Vancouver. They moved on to "Little

130. *Id.* at 30.

131. *Id.* at 29–30.

132. ADACHI, *supra* note 42, at 107.

133. Stevie Wilson, *On the Rise And Tragic Fall Of "Nihonmachi" on the Downtown Eastside*, SCOUT VANCOUVER (Apr. 15, 2014), https://scoutmagazine.ca/2014/04/15/ghost-hoods-on-the-rise-and-tragic-fall-of-nihonmachi-on-the-downtown-eastside/ [https://perma.cc/8LKJ-DNSN].

134. *Id.*

135. ADACHI, *supra* note 42, at 63.

136. *Id.* at 73.

137. *Id.*

138. *Id.*

Tokyo" where they were met by a mob of Japanese people. After a brief tussle, the mobs dissipated.[139]

Despite these arguments, assimilation ensued. The *Nisei*, like all children of newcomers, were never a part of their parents' country of origin. Many were not proficient in the Japanese language, if they could speak it at all, and had never been to Japan. Most attended school with non-Japanese children where they were adopting many of the cultural ways of their classmates. Together, these factors created a cultural generation gap between the *Issei* and *Nisei*.[140]

3. The "Peaceful Penetration/Yellow Peril" Argument

The exclusionists argued that the Japanese were undertaking a "peaceful penetration" into North America and that the Japanese were a "Yellow Peril."[141] The most influential proponent of the "Yellow Peril" argument in the United States was the military, which issued reports saying that the most probable enemy in a war would be Japan. Interestingly, this was the view of the military immediately following World War I, after Japan had fought on the side of the Allies. Among those who supported this view was then-Assistant Secretary of the Navy Franklin Delano Roosevelt.[142]

In Canada, not even naturalized citizens could escape the accusation that they were a "Yellow Peril." George Black, a Member of Parliament from the Yukon, argued that naturalization was a "farce" for the Japanese and that a "naturalized Japanese remains a Jap."[143] He went on to say that even naturalized Canadians of Japanese descent "are never released from their allegiance to Japan."[144]

D. The Canadian Prairies

The systemic racism that East Asians faced along Canada's West Coast began to work its way into the Canadian prairies. In 1912, the Saskatchewan legislature passed "An Act to Prevent the Employment of Female Labour in

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139. The "attacks" were not "directed against the Japanese, because they were Japanese." DEPUTY MINISTER OF LAB., REPORT ON THE LOSSES SUSTAINED BY THE JAPANESE POPULATION OF VANCOUVER, B.C. ON THE OCCASION OF THE RIOTS IN THAT CITY IN SEPTEMBER, 1907–20 (1908). Rather, they were "a matter begotten of alarm occasioned in consequence of the increased immigration from the Orient generally." *Id.*

140. Professor Daniels noted that "the Japanese-Americans [are] the most upwardly mobile non-white [sic] minority in the United States." DANIELS, *supra* note 32, at 7.

141. *See* ADACHI, *supra* note 42, at 153–54, 163; BERGER, *supra* note 18, at 103–04; DANIELS, *supra* note 6, at 10. The "Yellow Peril," in this context, hypothesizes that with its victory in the Japanese-Russo War in the early twentieth century, Japan was extending its military and populous strength throughout Asia and across the Pacific. ADACHI, *supra* note 42, at 44.

142. CHUMAN, *supra* note 37, at 75–76.

143. Canada, Parliament, *House of Commons Debates*, 14th Parl., 1st Sess., No 2 (May 8, 1922), at 1521 (Hon. George Black). The notion that the Japanese sought to take over the continent continued for a short time even after World War II. *See* Canada, Parliament, *House of Commons Debates*, 20th Parl., 1st Sess., No 2 (Nov. 22, 1945), at 2414 (Hon. Thomas Reid).

144. *Id*.

Certain Capacities" ("Female Employment Act").[145] The Female Employment Act provided:

> No person shall employ . . . any [W]hite woman or girl or permit any [W]hite woman or girl to reside or lodge in or to work in or, save as a *bona fide* customer . . . to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Japanese, Chinaman or other Oriental person.[146]

At the time the Saskatchewan legislature passed the Female Employment Act, there were few Asians in Saskatchewan.[147] The 1911 Census of Canada indicates that there were 1,519 Asians in the province.[148]

In *R. v. Quong Wing*, the Saskatchewan Court of Appeal held the Female Employment Act to be valid and not in conflict with the federal government's jurisdiction dealing with "Aliens and Naturalization" under BNA Act § 91(25).[149] Quong owned a restaurant and employed two White women. Chief Justice Haultain of the Saskatchewan Court of Appeal described Quong as "a Chinaman by birth and a naturalized Canadian subject of the King." Following the reasoning in *In re Homma*,[150] Justice Lamont for the majority held that the purpose of the Female Employment Act was "in the interests of morality and for the protection of [W]hite women."[151] The Chief Justice in dissent instead followed the *Bryden*[152] approach and asserted that the province was acting *ultra vires*.[153]

The Supreme Court of Canada dismissed Quong's appeal.[154] Justice Davies said that the Act's "object and purpose is the protection of [W]hite

145. An Act to Prevent the Employment of Female Labour in Certain Capacities, S.S. 1912, c 17 (Can. Sask.).

146. *Id.* at §1.

147. *See* Constance Backhouse, *The White Women's Labor Laws: Anti-Chinese Racism in the Early Twentieth-Century Canada*, 14 L. & HIST. REV. 315, 319–20 (1996).

148. 2 CANADA CENSUS & STATS. OFF., FIFTH CENSUS OF CANADA 1911 442–45 (1913).

149. Quong-Wing v. R., [1913] 4 W.W.R. 1135, 1144 (Can. Sask. C.A.) [hereinafter *Quong-Wing I*]. The reported decisions deal with the division of powers aspects. Professor Backhouse provides an interesting "narrative" to the case and an account of the trial decisions, along with a more detailed account of the forces that were at play when the Saskatchewan legislature passed the legislation. In particular, she noted that it was organized labour and small businessmen that were the "central forces behind the bill." Backhouse, *supra* note 146, at 327–30.

150. *In re* Homma, 7 B.C.R. at 368.

151. *Quong-Wing I*, 4 W.W.R. at 1145. The moral turpitude of Chinese people was based on a stereotype that they were involved in gambling and the drug trade. *See generally* EMILY MURPHY, THE BLACK CANDLE (1922) (in which the famous Canadian women's rights activist, Emily Murphy, perpetuates this stereotype).

152. *See* Union Colliery v. Bryden, [1899] A.C. 580 (U.K.P.C.).

153. *Quong-Wing I*, 4 W.W.R. at 1139.

154. Quong-Wing v. R., [1914] 49 S.C.R. 440, 469 (Can.) [hereinafter *Quong-Wing II*].

women and girls."[155] Accordingly, the Court upheld the legislation "even though it may operate prejudicially to one class or race of people."[156]

In 1919, the Saskatchewan legislature repealed the express discriminatory principle on which it based the Female Employment Act.[157] The new statute applied to all persons involved in the restaurant or laundry businesses.[158] East Asians dominated those businesses.

The Saskatchewan Court of King's Bench seemed to agree with a principle of "non-discrimination on racial grounds" by looking at the history of the Female Employment Act and its amendments. In *Yee v. City of Regina*, Yee, an individual of Chinese ancestry, sought a special license under the amended Female Employment Act, which would permit him to employ White women to work in his restaurant and rooming-house premises.[159] Yee had lived and worked in the city of Regina for some years and was well and favorably known.[160] The city's license inspector and its chief constable recommended that the city grant him the license.[161] The city refused Yee's application.[162] One basis of its refusal was that Yee employed several Chinese men who were not permitted to bring their wives to Canada.[163] The city "feared that such employees would constitute a menace to the virtue of the [W]hite women if the latter were allowed to work on the same premises with them."[164] Justice Mackenzie rejected this argument and said that had the plaintiff employed single White men rather than single Chinese men, the council would have expressed no concern even though the "menace to the virtue of the [W]hite women might well be greater . . . since there would exist no racial antipathy to be overcome."[165] Justice Mackenzie found that the city's decision was discriminatory and invalid based on the legislative history of the enactment.[166]

E. A Confluence

155. *Id.* at 448. Professor Backhouse explained how the legislation and the cases affected the three "working-class women" who could no longer be employed by their well-paying, respectful, and respectable Chinese employers. Backhouse, *supra* note 146, at 362–64. Backhouse said, "[These cases] . . . permit some assessment of the contribution of White women to the development of racially discriminatory law. White male legislators, police, prosecutors, and judges were quick to utilize racist definitions of '[W]hite womanhood' in their campaign against Chinese-Canadian businessman, drawing deeply upon the symbolic 'purity' of women of their own race." *Id.* at 319.

156. *Quong-Wing II*, 49 S.C.R. at 449.

157. An Act to Prevent the Employment of Female Labour in Certain Capacities, S.S. 1918–19, c 85 (Can. Sask.).

158. This statute was in force until the Labour Standards Act, S.S. 1969, c 24 (Can. Sask.), superseded it in 1969.

159. Yee v. City of Regina, [1925] 4 D.L.R. 1015, 1015 (Can. Sask. K.B.).

160. *Id.* at 1016.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1016–17.

166. *Id.*

The foregoing discussion illustrates that despite the historical and constitutional differences between the United States and Canada, both countries observed a confluence of approaches when dealing with persons of East Asian ancestry: enacting discriminatory legislation directed against them. In some cases, the legislation was carefully worded such that it could only apply to East Asian persons. In others, the legislation was bluntly discriminatory, based on the person's race alone. At times, the courts struck down the legislation. Often, however, they upheld it.

There was also a confluence of societal attitudes toward persons of East Asian ancestry, originating on the West Coast of the United States and gradually moving to the North and East. The well-organized Asiatic Exclusion League moved from San Francisco to Vancouver, where the xenophobia grew passionate and violent. And although the Canadian Prairies took a more measured approach, theirs was no less effective.

III. THE EVACUATION

The culmination of racist sentiments and government actions set the stage for the evacuation of the Japanese from the West Coast and their subsequent internment or forced employment as farm labor. Rumblings of Japanese internment were prevalent during the late 1930s, even before Japan had entered the war. The Canadian Committee on the Treatment of Aliens and Alien Property recommended compulsory registration of all Japanese, including naturalized *Issei* and *Nisei*, if war broke out with Japan.[167] The Committee enforced the registration procedure only against the Japanese, whose country of origin was a *potential* enemy—unlike Germany and Italy, against which Canada was already at war.

In the United States, there was a growing concern during the early days of World War II in Europe that Nazi spies had infiltrated Western Europe. Although the United States took steps to limit the civil rights of non-citizens of German and Italian ancestry, the focus shifted westward. President Roosevelt set up a secret White House intelligence unit to investigate the Japanese on the West Coast. One agent, Curtis B. Munson, reported that although most Japanese were loyal and posed no threat to the United States, "There were still Japanese in the [United States] who [would] tie dynamite around their waist and make a human bomb out of themselves."[168] There was no reference in his report to indicate the source or accuracy of this statement. Later, Agent Munson reported, "The *Nisei* are universally estimated from 90 to 98 percent loyal to the United States . . . The *Nisei* are pathetically eager

167. *See* INTERDEPARTMENTAL COMM. ON THE TREATMENT OF ALIENS & ALIEN PROPERTY, FIRST INTERIM REPORT 6–7 (1939).

168. DANIELS, *supra* note 6, at 25.

to show his loyalty. They are not Japanese in culture. They are foreigners to Japan."[169]

The decision to evacuate the Japanese during World War II was not an immediate or spontaneous reaction to the bombing of Pearl Harbor. In fact, there was initial support for the Japanese in the United States, especially the *Nisei*, whom Agent Munson argued "must not be made to suffer for the sins of a government for whom they have no sympathy or allegiance."[170] The *San Francisco News* wrote, "To subject these people to illegal search and seizure, then arrest them without warrant to confinement without trial, is to violate the principles of Democracy as set forth in our Constitution."[171]

Despite this initial support of Japanese Americans, the executive branches of each of the Canadian and American governments began to consider evacuating the Japanese from the West Coast. In the United States, the decision was in the hands of the military.[172] Each government made various subordinate rules soon after Pearl Harbor. It was not until February 19, 1942, in the United States and February 24, 1942, in Canada that the respective decision-makers issued the official direction to relocate all Japanese persons, citizen and non-citizen alike, from the West Coast.

No action on the part of any Japanese person triggered these decisions. Neither the military nor the police had charged any Japanese person with a crime. Nor did the police or military give the Japanese any type of hearing or opportunity to contact legal counsel. They were not apprised of their rights. Many had to evacuate their homes on twenty-four hours' notice, and some were taken without any notice at all. Their real and personal property were confiscated and, in Canada, sold very shortly after seizure, with all proceeds going to the government. There was no due process. The naturalized *Issei* and *Nisei* were citizens of the very country that incarcerated them. Some had fought for the very freedom of which they were now being stripped, and some even had family members fighting the war in Europe.[173]

It is no coincidence that the policies adopted by the Canadian and American governments were aligned. On December 10, 1941, the Canadian federal government consulted with the American Ambassador; together, they developed a policy to synchronize any actions to be taken concerning the Japanese.[174] Given the similarity of circumstances and attitudes of West Coast Canadians and West Coast Americans, this joint effort was

169. REEVES, *supra* note 3, at 16.

170. *Id.* at 17.

171. *Id*.

172. In fact, some in the U.S. executive branch did not support a mass evacuation, such as U.S. Attorney General Francis Biddle, Assistant Attorneys General Edward Ennis and James Rowe, and the Director of the Federal Bureau of Investigation, J. Edgar Hoover. REEVES, *supra* note 3, at 39–40.

173. Much of the information in this paragraph is gleaned from discussions that I have had with evacuees. *See also* ADACHI, *supra* note 42; REEVES, *supra* note 3.

174. M. Ann Sunahara, *Federal Policy and the Japanese Canadians: The Decision to Evacuate, 1942*, *in* VISIBLE MINORITIES AND MULTICULTURALISM: ASIANS IN CANADA 87 (K. Victor Ujimoto & Gordon Hirabayashi eds., 1980).

unsurprising. However, how they could synchronize their respective approaches given the differences in their normative values and constitutional histories remains a question.

A. Canada

A proclamation published in the *Canada Gazette* on September 12, 1939, pursuant to § 24(7) of the Defence of Canada Regulations ("Defence Regulations"), marked the beginning of the governmental actions against the Japanese in Canada.[175] Parliament promulgated the Defence Regulations pursuant to the War Measures Act.[176] Defence Regulations § 24(1) provided that all "enemy aliens" would not be arrested or detained unless there were reasonable grounds to believe that "they [were] engaged in espionage or are engaging or attempting to engage in acts of a hostile nature, or [were] giving or attempting to give information to the enemy."[177] Defence Regulations §24(4) authorized the police to release the person on their signing an "undertaking" to obey the law.[178] If the person refused to sign the undertaking, they would be "interned" as a prisoner of war.[179]

The Defence Regulations defined "enemy alien" as "a person who, not being a British subject, possesses the nationality of a State at war with His Majesty."[180] At that time, persons born or naturalized in Canada were considered British subjects. Therefore, all *Nisei* and many *Issei* were "British subjects."

On December 8, 1941, the Governor General in Council issued a proclamation of war between Canada and Japan "as and from the 7th day of December, 1941."[181] Around 1,200 fishing boats that were owned or operated by naturalized *Issei* or *Nisei* were immediately impounded and sold.[182] All Japanese language schools and Japanese language newspapers were shut down as a precautionary measure.[183]

On December 16, 1941, Order-in-Council ("OC") 9760 required "all persons of the Japanese race" to register with the RCMP.[184] OC 9760 was promulgated under the authority of the War Measures Act.[185] A "person of the Japanese race" included persons whose father or mother "is of the

175. 73 *C. Gaz. pt. II, at 54 (1939).*
176. *See* War Measures Act, R.S.C. 1914, c 2 (Can.) (repealed 1988).
177. Defence Regulations, § 24(1).
178. *Id.* § 24(4).
179. *Id.*
180. *Id.* § 2(1)(c).
181. 75 C. Gaz. pt. I, at 2071 (1941).
182. The "gradual elimination" of the Japanese from the fishing industry was now complete. BERGER, *supra* note 18, at 107.
183. ADACHI, *supra* note 42, at 200.
184. 74 C. Gaz. pt. I, at 2313 (1941).
185. *See* War Measures Act, R.S.C. 1927, c 206 (Can.) (repealed 1988).

Japanese race,"[186] and included all Japanese persons residing anywhere in Canada, whether those persons were non-citizens, naturalized Canadian citizens, or *Nisei*. It applied to every Japanese person age sixteen years or older.[187] If a person failed to register, they would be liable to a fine, imprisonment, or both, with the offender bearing the burden to prove their compliance with OC 9760.[188] Any peace officer could demand to see an individual's registration card, which the individual was required to carry at all times.[189]

OC 9760's preamble stated that it was made pursuant to a recommendation of a Special Committee on Orientals in British Columbia.[190] The Committee's mandate was to investigate, among other things, "the problem of Japanese and Chinese in that province from the point of view of national security."[191] The preamble went on to state that the Committee had previously recommended "for purposes of civil security" that British Columbia's Japanese population be "re-registered." The term "civil security" lacked clarity. Was registration intended to prevent civil disobedience against the Japanese, or was it intended to protect the "civil security" of the nation? For the latter, there was no evidence of any Japanese person threatening Canada's national security. For the former, it is unclear how registration would protect the Japanese.

OC 9760's preamble also refers to the "voluntary co-operation" of the Japanese in the previous registration program. OC 9760 made registration compulsory.

Canada was the first to move against the Japanese. An Order-in-Council dated January 16, 1942 ("OC 365"),[192] amended the Defence of Canada Regulations (Consolidation) 1941, under the authority of the War Measures Act[193] ("Amended Regulation"). The Amended Regulation gave the Minister of Justice the power to designate a geographic area as a "protected area" and detain "enemy aliens" from the protected area "if it appear[ed] necessary or expedient so to do in the public interest." The purpose of this power was "for the efficient prosecution of the War."

Amended Regulation § 4(2)(a) gave the Minister the power, "[t]o require all or any enemy aliens to leave such protected area." Amended Regulation § 4(2)(e) allowed the Minister of Justice "[t]o authorize the detention, in such place and under such conditions as he may from time to time direct, of all or any enemy aliens ordinarily resident or actually present in such protected area." Practically, OC 365 authorized the "partial"

186. *See* War Measures Act, R.S.C. 1970, c W-9, § 14 (Can.) (repealed 1988).
187. *See id.* § 1.
188. *See id.* § 2.
189. *See id.* § 3.
190. DANIELS, *supra* note 6, at 31.
191. DANIELS, *supra* note 6, at 81–82.
192. 75 C. Gaz. pt. I, at 2945 (1942).
193. *See* War Measures Act, R.S.C. 1914, c 2 (Can.) (repealed 1988).

evacuation of the Japanese from Canada's West Coast, as it applied only to Japanese men who were between the ages of eighteen and forty-five.[194] This resulted in the separation of families. The exclusionists, however, continued their campaign for the exclusion of *all* Japanese from the West Coast, using propaganda that was now flowing freely from the United States.

In Canada, the government enacted four Orders-in-Council which, taken together, dictated the lives of the Japanese until the end of the 1940s. OC 1457, dated February 24, 1942,[195] amended the Defence of Canada Regulations (Consolidation) 1941 by adding Regulation 39E. This regulation stated that no Japanese person or company could "acquire or hold land or [grow] crops in Canada" for the duration of the war, "for the security, defence, peace, order and welfare of Canada." OC 1486 dated February 24, 1942,[196] further allowed the Minister of Justice to order any or all persons to leave a protected area and detain them in such places and under such conditions as he directed. It also provided for the scrutiny and censorship of all communications and activities of those persons. Professor Palmer observed, "[t]he campaign to uproot the B.C. Japanese took only twelve weeks despite opposition by the military, the R.C.M.P., and the Department of External Affairs, all of which recognized that Japanese Canadians were loyal Canadians."[197]

The most important of the four was OC 1665 dated March 4, 1942.[198] This order established the British Columbia Security Commission ("BC Commission"). The powers of the BC Commission were to designate the mode and method of the evacuation as described in §§ 10 and 11. Section 12 dealt with the custody of Japanese property. All property, real and personal, that the evacuee could not take with them would vest in and be subject to the control of a custodian.[199] This was to be "as a protective measure only." On its face, the section appeared to protect Japanese property against vandals, thieves, and the like. However, on January 19, 1943, OC 469 authorized the custodian to "liquidate, sell or otherwise dispose of such property."[200] The custodian could sell the evacuees' real and personal property without their consent and without any compensation.

B. The United States

Very soon after the shock of Pearl Harbor, employers began dismissing Japanese employees without cause. Violence was committed against persons of Japanese ancestry. Their property was vandalized. A new wave of

194. ADACHI, *supra* note 42, at 208–09.
195. 75 C. Gaz. pt. I, at 3476 (1942).
196. *Id.* at 3475.
197. Palmer, *supra* note 2, at 149.
198. 75 C. Gaz. pt. I, at 3628 (1942).
199. *Id*.
200. 76 C. Gaz. pt. II, at 224 (1943).

propaganda began against the "Yellow Peril," and demands for the expulsion of the Japanese from the West Coast increased.[201] The U.S. Department of Justice closed American land borders to "all persons of Japanese ancestry, whether citizen or alien."[202]

On December 15, 1941, Secretary of the Navy William Franklin Knox stated, "The most effective fifth column work of the entire war was done in Hawaii," following his trip to Hawai'i to inspect the damage to Pearl Harbor.[203] This comment formed the foundation of rumors concerning espionage by the Japanese and Japanese Americans. It only later became clear that Secretary Knox had meant that special agents sent from Japan—not Japanese Americans—undertook the fifth column activities. By that time, however, the damage had been done.[204]

American authorities discovered no incidents of espionage in Hawai'i by Japanese Americans for the duration of the war, even though they comprised approximately thirty-eight percent of the local population.[205] In fact, although the Japanese on the mainland were imprisoned or interned, the Japanese in Hawai'i were not. The local Japanese population was so large in number that "there was no way they could be evacuated or incarcerated without destroying" the Hawaiian economy.[206]

In the United States, military agencies were the driving force behind the Japanese evacuation and internment, headed up by Lieutenant-General John L. DeWitt, the Commander of the Western Defense Command in San Francisco. General DeWitt shared the sentiments of many lay exclusionists. He told the Subcommittee of the House Committee on Naval Affairs that the United States need not worry about the Italians or Germans, but "must worry about the Japanese all the time until he is wiped off the map."[207]

Although General DeWitt thought that a mass evacuation of the Japanese would be administratively infeasible, Army Provost Marshall General Allen Gullion said that the U.S. military must carry out the program to prevent sabotage, notwithstanding the difficulties.[208] Unfortunately for Army Provost Gullion, the Justice Department, not the War Department, was responsible for investigating and quashing subversive activities.[209] Army

201. ADACHI, *supra* note 42, at 201.

202. DANIELS, *supra* note 6, at 27.

203. Professor Daniels wrote that this is the "worst example of [Knox's] deliberate lying." *Id.* at 28. As early as 1933, Knox supported the internment of Japanese Americans. GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 77 (2001).

204. ADACHI, *supra* note 42, at 204.

205. Lieutenant Commander Kenneth Ringle noted that after "careful investigations on both the West Coast and Hawaii, there was never a shred of evidence found of sabotage, subversive acts, spying, or Fifth Column activity on the part of the *Nisei* or long-time local residents." REEVES, *supra* note 3, at 14.

206. *Id.* at 221. Reeves explained, "Hawaii was not ripped by the racism, the political hysteria, and the [W]hite greed that swept the West Coast." *Id*.

207. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489, 532 (1945).

208. DANIELS, *supra* note 6, at 31.

209. *Id*.

Provost Gullion sought General DeWitt's support for his objectives. General DeWitt initially rebuffed Army Provost Gullion's suggestions.[210] However, Army Provost Gullion eventually drew the attention of the Department of Justice.[211] On December 30, 1941, Attorney General Francis Biddle advised Army Provost Gullion's office that "he had authorized warrantless raids on Japanese American homes in which at least one of the residents was an enemy alien."[212] Professor Daniels noted that the protection against unreasonable searches and seizures no longer applied and that a "literal reign of terror was conducted in Japanese American communities in the following weeks; hundreds and perhaps thousands of individual homes were searched."[213] Attorney General Biddle later admitted that despite these warrantless searches, "no Japanese saboteu[r] . . . and no illegal radio transmitter was found at all."[214]

Near the end of January 1942, General DeWitt opined that the Japanese on the West Coast did not want to attract attention through overt espionage, but that when Tokyo gave the order, there would be a mass attack. He stated in his *Final Report: Japanese Evacuation from the West Coast, 1942* that it was "something more than a coincidence" that almost all Japanese in the United States lived on the West Coast.[215] He went on to say that by being so situated, they could undertake "a tremendous program of sabotage on a mass scale."[216] Even the Attorney General of California, Earl Warren, agreed that Americans were being lulled into a false sense of security and their "day of reckoning" was bound to come.[217]

To be clear, there was no evidence of sabotage by the Japanese in the United States or Canada at any time before, during, or after World War II.[218] Had there been evidence of sabotage, individuals like General DeWitt and Attorney General Warren might have had an excuse to remove the Japanese from the West Coast based on military necessity. But since there was no evidence of sabotage, they hypothesized that the Japanese were conspiring to sabotage the United States once it dropped its guard. The military decided on a drastic solution: to remove all potential saboteurs.

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210. *Id*. at 31–32.

211. *Id*. at 32.

212. *Id.* at 32.

213. *Id*.

214. HOSOKAWA, *supra* note 53, at 253.

215. JOHN L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942 10 (1944).

216. *Id.*

217. DANIELS, *supra* note 6, at 37; REEVES, *supra* note 3, at 55.

218. *See Immigration and Relocation in U.S. History*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/immigration/japanese/behind-the-wire/ [https://perma.cc/XXW9-CUKG]; *1939 to 1945—World War II and the Japanese Internment*, LEGIS. ASSEMBLY OF B.C., https://www.leg.bc.ca/dyl/Pages/1939-to-1945-World-War-II-and-the-Japanese-Internment.aspx [https://perma.cc/2T4F-CNM6].

On February 11, 1942, Secretary of War Henry L. Stimson sent a memorandum to President Roosevelt asking whether the President would authorize the evacuation of citizens as well as non-citizens.[219] President Roosevelt gave informal authority by telephone to Secretary Stimson and Assistant Secretary of War, John J. McCloy to do whatever they "thought the best."[220] Secretary Stimson felt it necessary to move *Issei* and *Nisei* from the West Coast.[221] On February 19, 1942, President Roosevelt signed Executive Order ("EO") 9066, which authorized the Secretary of War and Military Commanders to prescribe certain areas as "military areas . . . from which any or all persons may be excluded."[222]

Pursuant to that authority, General DeWitt promulgated Public Proclamation No. 1 on March 2, 1942, which designated the entire Pacific Coast as a military area.[223] A press release that accompanied the promulgation predicted "the eventual exclusion of all persons of Japanese ancestry from [that military area]."[224]

On March 18, 1942, EO 9102 established the War Relocation Authority ("WRA"),[225] which was similar to the BC Commission. Its purpose was to establish a program for removing persons from areas designated under EO 9066.[226] Although EO 9066 did not specifically mention the Japanese, the WRA used it against only the Japanese.[227] The WRA was responsible for "the relocation [of evacuees] in appropriate places, providing for their needs in such manner as may be appropriate, and supervising their activities."[228] General DeWitt implemented the evacuation program through various Public Proclamations and Civilian Exclusion Orders, which designated the military areas from which the WRA excluded the Japanese.

On that same date, General DeWitt issued Public Proclamation No. 3, which created "certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones."[229] It imposed a curfew on, among others, "all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1."[230] Violations of the regulations resulted in criminal penalties.

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219. 108th Cong., 149 Cong. Rec. S3341, E08 (2003).

220. HOSOKAWA, *supra* note 53, at 274.

221. *Id*.

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

223. 7 Fed. Reg. 2320–21 (Mar. 2, 1942).

224. DANIELS, *supra* note 32, at 84.

225. Exec. Order No. 9102, 7 Fed. Reg. 2165 (Mar. 18, 1942).

226. *Id.*

227. Exec. Order No. 9066, *supra* note 172; *see Executive Order 9066: Resulting in Japanese-American Incarceration (1942)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/executive-order-9066 [https://perma.cc/3AXF-ATKG].

228. DEWITT, *supra* note 208, at 50.

229. 7 Fed. Reg. 2543 (Mar. 18, 1942).

230. *Id.*

Beginning on March 24, 1942, the military commanders issued a series of Civilian Exclusion Orders pursuant to Public Proclamation No. 1.[231] Each exclusion order applied to a specific area within the territories they commanded. The exclusion orders directed that all persons of Japanese ancestry, citizen and non-citizen, were to be excluded from the designated military areas starting at a specified time in the exclusion order. The orders also required a member of each family, as well as all individuals living alone affected by the order, to report to a designated Civil Control Station by a specified time. On March 27, 1942, General DeWitt issued Public Proclamation No. 4, which prohibited all non-citizens and all persons of Japanese ancestry from leaving Military Area No. 1.[232] The specified purpose of this proclamation was "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration."[233]

The relocation sites were not thrilled to receive the evacuees. During a meeting among the WRA, the Wartime Civil Control Administration and the governors of the ten Western states, all governors except for Governor Ralph Carr of Colorado opposed the relocation of the Japanese into their states.[234] Governor Chase Clark of Idaho remarked, "The Japs live like rats, breed like rats and act like rats. I don't want them coming to Idaho."[235] Governor Nels Smith of Wyoming declared, "The people of Wyoming have a dislike for Orientals and simply will not stand for being California's dumping ground. If you bring Japanese into my state, I promise you they will be hanging from every tree."[236]

C. Resistance

The Japanese showed little resistance, legal or otherwise, to the evacuation in both Canada and the United States.[237] In Canada, the War Measures Act precluded any such resistance.[238] Then-Professor Tarnopolsky said the War Measures Act allowed Parliament to interfere in matters that were within the provinces' jurisdiction, including property and "the personal liberties of the people in the country."[239] The War Measures Act § 3(2) gave

231. *See* Civilian Exclusion Orders Nos. 1–65, *reproduced at* https://digitalassets.lib.berkeley.edu/jarda/ucb/text/cubanc6714_b016b01_0001_1.pdf.

232. 7 Fed. Reg. 2601 (Mar. 27, 1942). This included all persons of Japanese ancestry, such as children adopted by non-Japanese parents and orphans. *See* REEVES, *supra* note 3, at 48–49.

233. *Id.*

234. REEVES, *supra* note 3, at 98.

235. *Id.* at 99.

236. *Id.* at 98–99; DANIELS, *supra* note 6, at 57.

237. For the cultural norms that contributed to this, see ADACHI, *supra* note 42, at 225–28; HOSOKAWA, *supra* note 53, at 211–12, 495–97.

238. War Measures Act, R.S.C. 1914, c 2 (Can.) (repealed 1988).

239. *See* WALTER S. TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 327 (2d ed. 1975).

the Governor General in Council discretion in the Act's enforcement.[240] There was no Charter or Bill of Rights, so the Governor General in Council's decisions were not subject to review.

Unlike their Canadian counterparts, American citizens had a legal basis to challenge the U.S. government's actions. The American Bill of Rights appeared to provide the Japanese with *some* limited foundation on which to seek protection. Additionally, individual rights are entrenched within the U.S. Constitution.[241] However, those individual rights can be diluted in times of "military necessity."[242]

Congress had not declared martial law in the United States mainland, as it had done in Hawai'i.[243] As a result, courts continued to operate on the mainland during the evacuation process. At the beginning of the war, those courts were receptive to arguments from Japanese litigants. For example, in *Ex parte Kawato*,[244] Kawato, a Japanese-born U.S. resident, was injured while working on a fishing vessel. His employer denied his claim for wages and argued that he did not have a right of action because he had become an "enemy alien." The lower courts agreed, but on further appeal to the U.S. Supreme Court, Justice Hugo Black wrote:

> The policy of severity toward alien enemies was clearly impossible for a country whose life blood came from an immigrant stream . . . Harshness toward immigrants was inconsistent with that national knowledge, present then as now, of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth.[245]

In the end, Justice Black found that resident "enemy aliens" could "proceed in all courts until administrative or legislative action is taken to exclude them" and "the doors of our courts have not been shut to peaceable law-abiding aliens seeking to enforce rights growing out of legal occupations."[246]

In *Regan v. King*, an individual sought to have "2600 Japanese of the full blood born in the United States and the State of California, of alien parents born in the Empire of Japan" struck from the register of voters.[247] District Judge Adolphus St. Sure found that a *Nisei* was an American citizen. In so finding, he followed the U.S. Supreme Court's decision in *Morrison v. California*, in which the Court held that "[a] person of the Japanese race is a citizen of the United States if he was born within the United States."[248]

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240. War Measures Act, R.S.C. 1914, c 2, § 3(2) (Can.) (repealed 1988).

241. *See* U.S. CONST. amends. I–X.

242. *See* Angus, *supra* note 15, at 1–2.

243. The Suspension Clause of the U.S. Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9.

244. 317 U.S. 69, 70–71 (1942).

245. *Id.* at 73.

246. *Id.* at 78.

247. 49 F. Supp. at 223 (N.D. Cal. 1942).

248. *Morrison*, 291 U.S. at 85.

As the war progressed, the executive and military branches implemented various programs, proclamations, and orders that eroded the civil liberties of the Japanese. Individuals tried to challenge these discriminatory government initiatives. For example, in *Ex Parte Ventura*, Mary Asaba Ventura filed a petition for *habeas corpus*.[249] Ventura was a *Nisei* who resided in Seattle, Washington. Before the evacuation began, Ventura challenged Public Proclamation No. 3, in which General DeWitt imposed a curfew on all persons of Japanese ancestry, as being an unlawful and arbitrary restraint on her liberty.[250]

District Judge Lloyd Black dismissed her petition. He held that *habeas corpus* "is only available to one unlawfully restrained of their liberty. The restraint must be both unlawful and physical. Mere moral restraint is not enough. Ordinarily unlawful imprisonment or unlawful custody is essential."[251] He found Ventura's application to be premature, as she endeavored to be "relieved of an imprisonment before any such occur[ed]."[252] District Judge Black's ruling might have ended with that finding, but he instead chose to repeat the views of General DeWitt and Attorney General Warren: those of Japanese ancestry were conspiring to sabotage the United States. Judge Black opined that if Ventura were as loyal and devoted as she claimed, she would be glad to abide by congressional and military direction "to preserve the Constitution, laws and institutions for her and all Americans, born here or naturalized."[253]

Under a writ of *habeas corpus*, the judge had no power to inquire as to Ventura's guilt or innocence, but only as to the legality of her detention.[254] Ventura's liberty was restrained under General DeWitt's curfew, as she could not leave her house during certain hours. Her petition challenged the curfew contained in Public Proclamation No. 3, but not its punitive provisions.

Gordon Kiyoshi Hirabayashi and Minoru Yasui challenged the curfew order directly, along with other aspects of General DeWitt's proclamations. Both Hirabayashi and Yasui had breached the curfew, so they did not face the same standing difficulties as did Ventura.

Hirabayashi was a *Nisei* who was born in Seattle, Washington. He attended Seattle public schools and, at the time of his arrest, was a senior at the University of Washington.[255] He had never been to Japan, nor did he have any other connection to the country. Hirabayashi refused to follow General

249. 44 F. Supp. 520, 521–22 (W.D. Wash. 1942).

250. Public Proclamation No. 3, 7 Fed. Reg. 2543 (Apr. 2, 1942). The curfew ran from 8 p.m. to 6 a.m. daily.

251. *Ventura*, 44 F. Supp. at 521.

252. *Id.* at 522.

253. *Id*.

254. *See, e.g.*, *Ex parte* Feinberg, 1901 CarswellQue 274 at para. 12, 4 CCC 270 (K.B.).

255. Hirabayashi v. United States, 320 U.S. 81, 84 (1943).

DeWitt's curfew order.[256] On May 16, 1942, he surrendered himself to the Federal Bureau of Investigation's Seattle office for disobeying the curfew order.[257] He advised the officers that he also planned to disobey the impending removal order. The jury found him guilty of the curfew violation and breach of the exclusion order. Judge Black sentenced Hirabayashi to two concurrent ninety-day sentences at the Catalina Federal Honor Camp outside Tucson, Arizona.[258]

Hirabayashi's lawyers appealed his conviction. After the Ninth Circuit Court of Appeals declined to rule on the case, his lawyers appealed to the U.S. Supreme Court.[259] Hirabayashi admitted his guilt but mainly argued that his compliance with General DeWitt's orders would be a waiver of his rights as an American citizen.[260] Thus, he argued that such orders should apply to all American citizens or to none of them.[261]

The Court dismissed his appeal.[262] As Hirabayashi's sentences for the curfew violation and exclusion order breach were concurrent, the Court ruled only on the curfew issue.[263] The Court did not rule on the validity of the exclusion order, even though the exclusion order affected 110,000 Japanese persons.[264]

Since Congress ratified EO 9066, the issue reduced itself to "whether, acting in co-operation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of."[265] Chief Justice Harlan Stone, for the majority, held that "the power to wage war successfully" involved every facet of national defense, and the Executive and Congress held broad discretion in determining the nature and extent of the threatened danger and the means to resist it.[266] The Court refused to review the reasons for the actions taken by Congress and the Executive.[267] However, the Court stated that, notwithstanding the broad discretion provided to the two branches of government, the government needed "reasonable grounds for believing that the threat is real."[268]

The majority held that General DeWitt based his actions on facts and rationally drawn inferences, and that the curfew order was an appropriate measure by which to meet the threats. One such fact was "in time of war, residents having ethnic affiliations with an invading enemy may be a greater

256. *See id.*
257. Hirabayashi v. United States, 627 F. Supp. 1445, 1447 (1986); Hirabayashi v. United States, 828 F.2d 591, 595 (1987).
258. *See Hirabayashi*, 320 U.S. at 84.
259. *See id.* at 84–85.
260. *Id.* at 84.
261. *Id.* at 95.
262. *See id.* at 105.
263. *See id.* at 85, 105.
264. *See id.* at 85.
265. *Id.* at 91–92.
266. *Id*. at 93.
267. *Id.*
268. *Id.* at 95.

source of danger than those of a different ancestry."[269] The Court went on to say, "Here the findings of danger from espionage and sabotage, and of the necessity of the curfew order to protect against them, have been duly made."[270] The Court acknowledged that even though some Japanese were admittedly loyal, the exigencies of war did not permit military authorities and Congress to ascertain precisely and quickly the number and strength of those who were disloyal.[271] Thus, the curfew was within General DeWitt's discretion to implement in the name of national security.[272]

Justice William Douglas, in his concurrence, addressed the issue of attempting to differentiate the loyal from the disloyal. He concluded, "To say that the military in such cases should take the time to weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it."[273]

Justice Frank Murphy acknowledged that the military, Congress, and the Executive, working together, could employ such measures necessary and appropriate to provide for the common defense and to wage war.[274] He expressed reservations concerning the "substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry."[275] Nonetheless, he concurred with the majority's decision.[276]

Minoru Yasui was a *Nisei* who was born in Oregon.[277] He earned undergraduate and law degrees from the University of Oregon in 1937 and 1939, respectively.[278] He was a member of the U.S. Army's Reserve Officer Training Corps program at the university.[279] The Army commissioned Yasui on December 8, 1937, as a second lieutenant in the Army's Infantry Reserve.[280] After graduation, he practiced law in Portland, Oregon, but found it difficult to retain employment.[281] Through his father's connections, he started working for the Japanese consulate in Chicago, Illinois.[282] After the bombing of Pearl Harbor, Yasui returned to Oregon to report for military duty. The military rejected him nine times.[283]

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269. *Id.* at 101.
270. *Id.* at 103.
271. *Id.* at 99.
272. *Id.*
273. *Id.* at 107.
274. *Id.* at 109.
275. *Id.* at 111.
276. *Id.* at 113.
277. PETER IRONS, JUSTICE AT WAR 81 (1983).
278. LAUREN KESSLER, STUBBORN TWIG 103 (1994); REEVES, *supra* note 3, at 91–92; JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS 65 (1984).
279. United States v. Yasui, 48 F. Supp. 40, 54 (D. Or. 1942).
280. *Id.* at 55.
281. IRONS, *supra* note 270, at 82.
282. *Id.*
283. IRONS, *supra* note 270, at 82–83.

On March 28, 1942, Yasui broke curfew and presented himself to a police station to test the curfew's constitutionality.[284] A grand jury indicted him. After the military gave Yasui notice to evacuate, he notified the authorities that he did not intend to comply with the order, and returned to his family's home in Hood River, Oregon.[285] This violated another law that restricted travel by the Japanese, and he was subsequently arrested.[286]

At Yasui's trial, District Judge James Alger Fee concluded that a law that targeted a specific race was unconstitutional when applied to American citizens. He found that Yasui had renounced his American citizenship and was therefore no longer an American citizen. Because Yasui was employed in the Japanese consulate, he "made an election and chose allegiance to the Emperor of Japan, rather than citizenship in the United States at his majority."[287] The judge reasoned that Yasui renounced his citizenship, despite the fact that Yasui was born in the United States, had an American law degree, and was a commissioned officer in the U.S. military.[288] Judge Fee found Yasui guilty, sentenced him to one year in prison, and gave him a $5,000 fine.[289] Yasui served nine months at the Multnomah County Jail in Portland awaiting his appeal.[290] He was later sent to the Minidoka War Relocation Center in Idaho.[291]

Yasui's case made its way to the U.S. Supreme Court. In *Yasui v. United States*, the Court unanimously ruled that the government had the authority to restrict the lives of civilians during wartime.[292] Unlike in the lower court, however, the "Government" chose not to controvert Yasui's citizenship.[293] As a result, the Court remanded the case back to the District Court to afford it an opportunity to strike its findings concerning Yasui's surrender of his U.S. citizenship.[294] Judge Fee struck that finding[295] and removed the fine. He went on to decide that the time that Yasui had already served was sufficient punishment, so he released Yasui, who was then moved to an internment camp.[296]

Fred Toyosaburo Korematsu, a *Nisei*, was born in Oakland, California.[297] Once he finished high school, he attempted to enlist in the U.S.

284. Yasui, 48 F. Supp. at 44.
285. TATEISHI, *supra* note 271, at 72–73.
286. *Id.*; *see also* Conduct of Enemy Aliens in Military Areas, 7 Fed. Reg. 2543 (Mar. 24, 1942).
287. *Yasui*, 48 F. Supp. at 55.
288. *Id.*
289. ROGER DANIELS, THE JAPANESE AMERICAN CASES 39 (2013); TATEISHI, *supra* note 271, at 78.
290. DANIELS, *supra* note 282, at 39.
291. *Id.* at 31.
292. Yasui v. United States, 320 U.S. 115, 116–17 (1943).
293. *Id.* at 117.
294. *Id.*
295. United States v. Yasui, 51 F. Supp. 234 (1943).
296. TATEISHI, *supra* note 271, at 82–83.
297. IRONS, *supra* note 270, at 94.

Navy but was rejected.[298] He eventually became a welder.[299] However, because he was of Japanese ancestry, he could not find or retain employment.[300] Korematsu refused to comply with two of General DeWitt's exclusion orders. He was arrested on May 30, 1942.[301]

On September 8, 1942, Korematsu was tried and convicted for a violation of Public Law No. 503,[302] which criminalized the violation of military orders issued under EO 9066. The court sentenced him to five years' probation.[303] He appealed this decision to the Ninth Circuit Court of Appeals, which upheld the original verdict.[304] He then appealed that decision to the U.S. Supreme Court, which granted certiorari on March 27, 1944. On December 18, 1944, in a 6–3 decision, the majority held that compulsory exclusion, though constitutionally suspect, was justified during circumstances of "emergency and peril."[305] Writing for the majority, Justice Hugo Black found that there was no question of Korematsu's loyalty to the United States.[306] However, following the principles articulated in *Hirabayashi*,[307] Justice Black reasoned that exclusion was necessary "because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country."[308]

The majority declared that the Court was not dealing with a case of imprisonment of an American citizen in a "concentration camp" solely because of his ancestry.[309] Rather, the court was dealing with "nothing but an exclusion order."[310] The Court held:

> 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. He was excluded because we are at war with the Japanese Empire . . . because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.[311]

298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 93.
302. Act of Mar. 21, 1942, Areas or Zones, Restrictions, Pub. L No. 77-503, 56 Stat. 173 (1942).
303. Korematsu v. United States, 140 F.2d 289, 289 (1943).
304. *Id.* at 290.
305. Korematsu v. United States, 323 U.S. 214, 219–20 (1944). Justice Black continued to hold firm to the position he articulated in *Korematsu* when, in 1971, he said that Japanese people "all look alike to a person not a Jap" and it would be dangerous to have given any Japanese American their liberty. DANIELS, *supra* note 6, at 61–62.
306. *Korematsu*, 323 U.S. at 216.
307. *See* Hirabayashi v. United States, 320 U.S. 81 (1943).
308. *Korematsu*, 323 U.S. at 218–19.
309. *Id.* at 223.
310. *Id.*
311. *Id.*

In his dissent, Justice Owen Roberts declared the exclusion order unconstitutional, stating, "It is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States."[312]

Justice Murphy also dissented. He found that the exclusion order "falls into the ugly abyss of racism."[313] Justice Murphy asserted that the exclusion order breached Korematsu's constitutional rights of equal protection of the law and procedural due process.[314]

Justice Robert Jackson also expressed concerns over the lack of evidence to support a military necessity for General DeWitt's actions. He wrote, "[T]he Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable."[315] Justice Jackson explained the danger of adopting an approach that constitutionally legitimizes military or executive orders of this nature:

> [O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.[316]

Perhaps enlightened by the dissentients' opinions in *Korematsu* or a better understanding of the plight of the Japanese, the U.S. Supreme Court rendered a favorable decision in *Ex parte Endo* on December 18, 1944.[317] A *Nisei,* Mitsuye Endo grew up in an English-speaking Methodist home in Sacramento, California.[318] The U.S. Army drafted her older brother, who served in the military.[319] After she graduated from high school, Endo completed secretarial school and worked as a clerk in the California Department of Motor Vehicles in Sacramento.[320]

Following the attack on Pearl Harbor, the Department of Motor Vehicles fired Endo from her clerical position.[321] The government transported Endo and her family to the Sacramento Assembly Center, on the

312. *Id.* at 226.
313. *Id.* at 233.
314. *Id.* at 234–35.
315. *Id.* at 245.
316. *Id.* at 246.
317. *Ex parte* Endo, 323 U.S. 283, 283 (1944).
318. IRONS, *supra* note 270, at 102; DANIELS, *supra* note 282, at 37.
319. TATEISHI, *supra* note 271, at 60.
320. *Id.*; DANIELS *supra* note 32, at 140–41.
321. TATEISHI, *supra* note 271, at 60.

outskirts of Sacramento in May 1942. The following month, the government transferred her and her family to the Tule Lake War Relocation Center.[322]

In July 1942, Endo filed a petition for a writ of *habeas corpus* in the U.S. District Court for the Northern District of California.[323] Judge Michael J. Roche denied Endo's petition in July 1943, and she appealed Judge Roche's decision to the Ninth Circuit in August 1943.[324] The U.S. Supreme Court certified Endo's case for review and her appeal was argued in October 1944.[325] During this time, Endo was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center in Topaz, Utah, where she was detained until the Court heard her case.[326] During their argument before the Court, the Department of Justice and the WRA conceded that Endo was a loyal and law-abiding citizen.[327]

On December 18, 1944, Justice Douglas, writing for the majority, granted Endo's petition for *habeas corpus* and held that the WRA had "no authority to subject citizens who are concededly loyal to its leave procedure."[328] However, the majority ultimately refused to censure the exclusion order.

Justice Murphy concurred with the majority decision but held his own justification for his decision. He stated that detaining the Japanese was "another example of the unconstitutional resort to racism inherent in the entire evacuation program [and] racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people."[329]

IV. THE AFTERMATH

On December 16, 1944, the Commander of the Western Defense Command, U.S. Major General Henry C. Pratt, issued Public Proclamation No. 21, declaring that effective January 2, 1945, detained Japanese individuals could return to their homes.[330] It was not until April 1949 that the Japanese population in Canada were free to move about and re-enter the "protected zone" along Canada's West Coast.[331] Many chose to remain in the

322. *Id.*
323. *Endo*, 323 U.S. at 285.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.* at 294.
328. *Id.* at 297.
329. *Id.* at 307–08.
330. DANIELS, *supra* note 32, at 157; REEVES, *supra* note 3, at 251; HOSOKAWA, *supra* note 53, at 435.
331. ADACHI, *supra* note 42, at 343–44; Patricia E. Roy, *Lessons in Citizenship, 1945-1949: The Delayed Return of the Japanese to Canada's Pacific Coast,* 93 PAC. NW. Q. 69, 76 (2002).

provinces and states to which they were relocated while some returned to the West Coast.[332]

Despite significant constitutional, military, political, and jurisprudential distinctions between Canada and the United States, Japanese people in both nations faced the same fate during the World War II: banishment from the West Coast.[333]

The Japanese evacuation was not borne out of "military necessity." No evidence of espionage or sabotage existed on the part of the North American Japanese before Pearl Harbor, nor any evidence of resistance or sabotage on their part during World War II. Furthermore, they complied with the government's forced removal from their homes.

Why do individuals having ethnic affiliations with an invading enemy pose a greater source of danger than those of a different ancestry? What were the facts on which General DeWitt based his decisions? Does the time to effect due process trump individual rights? What military dangers did Japanese men, women, and children pose? In *Korematsu*, Justice Murphy captured it best after extensively quoting General DeWitt's report:[334]

> The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.[335]

The evacuation and internment were the culmination of decades of systemic racism that targeted East Asian peoples from the moment they arrived on North American shores. With each case and piece of legislation, the anti-East Asian factions got closer to their goal until the Japanese Empire bombed Pearl Harbor, which provided the perfect opportunity for the factions to realize what they had been fighting for all along.[336] There is no doubt that the evacuation and internment were the culmination of decades of *de jure* and *de facto* racial discrimination.

Racial discrimination against the Japanese did not end with the winding-down of World War II.[337] Professor Palmer re-told a story that was burned into my mother's memory:

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332. REEVES, *supra* note 3, at 251; HOSOKAWA, *supra* note 53, at 436; ADACHI, *supra* note 42, at 337–38.

333. KURASHIGE, *supra* note 76, at 1; STEPHANIE HINNERSHITZ, A DIFFERENT SHADE OF JUSTICE: ASIAN AMERICAN CIVIL RIGHTS IN THE SOUTH (2017) 203–04.

334. DEWITT, *supra* note 215.

335. *See* Korematsu v. United States, 323 U.S. 214, 239 (1944).

336. *See* COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED—PART 2: RECOMMENDATIONS 5 (1983) ("The broad historical causes that shaped these decisions were race prejudice, war hysteria and a failure of political leadership.").

337. The State of California, where most of the Japanese had lived before the war, did not want them back. Then-Governor Earl Warren still held to the belief that the Japanese were "potential saboteurs." REEVES, *supra* note 3, at 177. Berger discusses the "repatriation" (deportation) of certain Japanese, including *Nisei*, post-War. BERGER, *supra* note 18, at 112–18.

> Each time Japanese Canadians tried to work temporarily in the vegetable cannery at Lethbridge, or attend school in Calgary, or work as domestics in any of these centres, some city councillors would object. Typical of these controversies was the attempt by one Canadian-born Japanese, Ted Aoki, to attend teachers' college in Calgary in February 1945. Calling Japanese Canadians "well-educated cultural devils," Calgary Alderman E. H. Starr shouted in response to Aoki's application, "If I had my way, I'd take them to the middle of the Ocean and pull the cork out![338]

Despite these statements, the City of Calgary named a hockey arena after Alderman Starr.[339]

Did we use the evacuation as an opportunity to learn from our mistakes? Could history repeat itself, once again subjugating East Asians or another ethnic minority? There is no easy answer to such a complicated question. An appropriate starting point involves reflecting on a conversation that I had with Dr. Hirabayashi, who was the subject of *Hirabayashi*. During our conversation while I was a law student and he was a tenured professor at the University of Alberta, I naively said to him, "It could never happen to the Japanese today." Dr. Hirabayashi warned that he, as an American citizen and enthusiastic young college student, felt the same way before he was arrested and incarcerated. He went on to say that even today, the onset of difficult economic conditions or other social tensions "would relegate you from a Japanese to a Jap." In other words, his message was simple: Asians are always at risk.

Dr. Hirabayashi's comment was prophetic. Soon after my conversation with him, autoworkers and politicians blamed the high unemployment rate in the American automobile manufacturing industry on imported Japanese vehicles. In June of 1982, Vincent Chin, a Chinese American, was murdered in a suburb of Detroit, Michigan when his murderers thought he was Japanese.[340] His murderers were a Chrysler worker and his laid-off stepson. Although charged with second degree murder, they pleaded guilty to manslaughter, and received no jail time.[341] Instead, the Court sentenced them to probation, fines, and court costs saying, "These weren't the kind of men

338. Palmer, *supra* note 2, at 153.

339. Discrimination continued in Saskatchewan against the Japanese post-World War II. Premier Tommy Douglas, who was sympathetic to the plight of the Japanese during the war, informed Ottawa that his government would permit evacuated Japanese to make their homes in Saskatchewan. Soon after, the federal government transferred a number of Japanese men and women from their internment camp in Anglin, Ontario to Moose Jaw, Saskatchewan. Moose Jaw officials and the press condemned this act on the federal government's part. Newspaper headlines read, "Protest Japs Located Here [in] Moose Jaw" and "Vets Need Houses More Than Japs." Kam Teo, *Kiyoshi Izumi: Saskatchewan Nisei Architect – Part 1*, DISCOVER NIKKEI (Feb. 1, 2016), https://discovernikkei.org/en/journal/2016/2/1/kiyoshi-izumi-1/ [https://perma.cc/4EJY-KZ8H].

340. Many journal articles, books, and other media have reported on this case. *See, e.g.*, Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 399–407 (1996).

341. United States v. Ebens, 800 F.2d 1422, 1425 (6th Cir. 1986).

you send to jail . . . You don't make the punishment fit the crime; you make the punishment fit the criminal."[342] Then came other murders, including Thong Huynh (1983), Jim Loo (1989), Luyen Phan Nguyen (1992), Sophy Soeung (1993), Sam Nhang Nhem (1993), Tuong Phan (1994), Thanh Mai (1995), Eddy Wu (1995), Thien Minh Ly (1996), Kuan Chung Kao (1997), Naoki Kamijima (1999), Won Joon Yoon (1999), Joseph Ileto (1999), Thao Q. Pham (2000), and Ji-Ye Sun (2000). All were Americans. All were East or Southeast Asian by descent. Most faced racial epithets before being killed.[343] And it continues. As recently as the last couple of years, Delaina Ashley Yaun, Xiaojie Tan, Daoyou Feng, Yong Ae Yue, Soon Chung Park, Hyun Jung Grant, Suncha Kim Yong Yue, Michelle Go and Christina Yuna Lee were murdered. In May of 2022, Ban Phuc Huang and Hung Trang were beaten to death in Edmonton, Alberta.[344] Canada is not immune.

Anti-Asian sentiment remains rampant throughout North America, without justification. All we need is a reason to associate a traumatic event with a particular racial or religious group, and then to develop a fear-based hatred from it. Consider the bombing of Pearl Harbor, the war in Vietnam, or the terrorist attacks of September 11. But maybe we do not even need a reason. The Ku Klux Klan and its splinter groups and progeny have fostered racial and religious hatred for over 150 years in the United States and Canada. More recently, far-right organizations like the Proud Boys and Diagolon have inherited the mantel of white supremacy and racial hatred. How can we extinguish the flames of intolerance when our governments do little to quell them, and even, at times, stoke them?

Indeed, the recent, and current, novel coronavirus ("COVID-19") pandemic has exacerbated anti-East Asian sentiment. In the United States, the New York Police Department created an Asian Hate Crime Task Force

342. HELEN ZIA, ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE 58–64 (2001). Although one of Chin's murderers was eventually convicted of violating Chin's civil rights, for which he received a twenty-five-year carceral sentence, the Sixth Circuit Court of Appeals overturned his conviction. *Id*.

343. There have also been many murders of South Asian people, such as Mukesh Patel and Kanu Patel who were shot to death in 1998, while working in a Dunkin' Donuts shop in Maryland. Before killing them their murderer "shouted racial epithets, taunted their accents and halting English." A.P. Kamath, *Dunkin' Donut Double Murder Trial Opens*, REDIFF ON THE NET (June 15, 1999), https://www.rediff.com/news/1999/jun/15us.htm [https://perma.cc/P6SS-6RE7]. Srinivas Kuchibhotla was murdered at a restaurant in Kansas by Adam Purinton, who yelled "get out of my country" and "terrorist" before he shot Kuchibhotla. Joshua Barajas, *Kansas Man Sentenced to Life in Prison for 2017 Shooting That Targeted Indian Men*, PBS (Aug. 7, 2018), https://www.pbs.org/newshour/nation/kansas-man-sentenced-to-life-in-prison-for-2017-shooting-that-targeted-indian-men [https://perma.cc/AT9Y-W7EC]. When referring to South Asians, former Justice Berger said, "[t]here has been a recrudescence of racial feeling, directed against these most recent Asian immigrants. There have been beatings, vandalism, and fire bombings in communities with significant East Indian populations." BERGER, *supra* note 18, at 123.

344. Matthew Black, *Second Death in Edmonton's Chinatown District Ruled a Homicide*, EDMONTON J. (May 25, 2022), https://edmontonjournal.com/news/local-news/second-death-in-edmontons-chinatown-district-ruled-a-homicide [https://perma.cc/UX29-WP95].

because of a spike in the attacks on East Asians since the onset of COVID-19.[345]

Angela Gover, Professor of Criminology and Criminal Justice from the University of Colorado, led a study on the resurgence of hate crimes against Asian-Americans since the beginning of the COVID-19 pandemic. She reported, "COVID-19 has enabled the spread of racism and created national insecurity, fear of foreigners, and general xenophobia, which may be related to the increase in anti-Asian hate crimes."[346]

To assess the level of anti-Asian hate crimes during the pandemic, Professor Gover referenced statistics she collected from the Stop Asian American Pacific Islander Hate ("Stop AAPI Hate") self-reporting tool. In its National Report, Stop AAPI Hate reported that between March 19, 2020, and March 31, 2022, it received reports of over 11,467 hate incidents against Asian American and Pacific Islander persons, which included physical assaults, coughing and spitting, verbal harassment, workplace discrimination, and refusal of service.[347]

Canada is no better.[348] Statistics Canada showed that anti-Asian hate crime increased by 300 percent in 2020.[349] As early as the first month of the pandemic, the Vancouver Police Department reported eleven anti-Asian hate crimes, including one against a 92-year-old man who was pushed to the ground by a man yelling anti-Asian racist remarks at the victim, including comments about COVID-19.[350] A month later, a Vietnamese mother was approached on the street in Vancouver by a man she had seen in London

345. Taylor Romine, *NYPD Creates Asian Hate Crime Task Force After Spike in Anti-Asian Attacks During Covid-19 Pandemic*, CNN (Aug. 18, 2020), https://www.cnn.com/2020/08/18/us/nypd-asian-hate-crime-task-force/index.html [https://perma.cc/PDT3-EBD30].

346. Robby Berman, *COVID-19 and the Surge in Anti-Asian Hate Crimes*, MED. NEWS TODAY (Aug. 20, 2020), https://www.medicalnewstoday.com/articles/covid-19-and-the-surge-in-anti-asian-hate-crimes [https://perma.cc/C7TY-RM6X].

347. A. J. Yellow Horse et al., *Stop AAPI Hate National Report*, STOP AAPI HATE, at 2 (Mar. 4, 2022), https://stopaapihate.org/wp-content/uploads/2022/03/22-SAH-NationalReport-3.1.22-v9.pdf [https://perma.cc/M9R9-2D4P].

348. From March 10, 2020, to February 28, 2021, there were 1,150 cases of such racist attacks in Canada. *A Year of Racist Attacks: Anti-Asian Racism Across Canada One Year Into the COVID-19 Pandemic*, CHINESE CANADIAN NAT'L COUNCIL FOR SOC. JUST., at 6, 12 (Mar. 23, 2021), https://mcusercontent.com/9fbfd2cf7b2a8256f770fc35c/files/35c9daca-3fd4-46f4-a883-c09b8c12bbca/covidracism_final_report.pdf [https://perma.cc/8K7H-PGD3]; *Another Year: Anti-Asian Racism Across Canada Two Years Into the COVID-19 Pandemic*, CHINESE CANADIAN NAT'L COUNCIL FOR SOC. JUST., at 1, 5 (Mar. 2022), https://ccncsj.ca/wp-content/uploads/2022/03/Anti-Asian-Racism-Across-Canada-Two-Years-Into-The-Pandemic_March-2022.pdf [https://perma.cc/Y96S-Z5L6] (noting a 47% increase in reported incidents of anti-Asian racism and xenophobia in Canada in 2021).

349. *Experiences of Discrimination During the COVID-19 Pandemic*, STATS. CAN. (Sept. 17, 2020), https://www150.statcan.gc.ca/n1/daily-quotidien/200917/dq200917a-eng.htm [https://perma.cc/683F-D9Z3].

350. Tiffany Crawford, *Man Charged in Allegedly Racist Attack on Elderly Man in Vancouver*, VANCOUVER SUN (July 23, 2020), https://vancouversun.com/news/local-news/man-charged-in-racist-attack-on-elderly-man-in-vancouver [https://perma.cc/7TUC-NVME].

Drugs, who said to her, "Don't give me your [redacted] disease."[351] In July of 2020, on the pathways in Calgary, a young woman was skateboarding, when a man on a bicycle called her a racial slur and spat on her.[352] In February of 2021, two patrons of a Vietnamese restaurant in Saskatoon, Saskatchewan were asked to put on masks while in the restaurant, whereupon they went on a racial tirade against the restaurant's proprietors accusing them of bringing "the virus" to Canada and telling them to "go back to China."[353]

Immigration is a major political issue in the United States.[354] It is also a "hot topic" in Canada.[355] The issues now are the types of issues that faced East Asians before World War II. Painting citizens from a certain geographic area or country with a negative brush is the type of stereotyping that resulted in the incarceration of loyal Japanese-American and -Canadian men, women, and children in internment camps and their forced placement into farm labor at the hands of sugar beet farmers. There was no presumption of innocence. There was no due process.

In Canada, Parliament has taken steps in an attempt to protect vulnerable minorities. It repealed the War Measures Act in 1988 and replaced it with the Emergencies Act.[356] The Emergencies Act differs from the War Measures Act in several important ways by providing certain checks and balances. For example, Emergencies Act § 4 provides no power on the part of the Governor in Council to make orders or regulations allowing for the detention of Canadian citizens or permanent residents based on, among others, race, national or ethnic origin.[357] However, § 30 gives the Governor in Council substantial powers that affect the rights and liberties of individuals through warrantless searches of places and persons, as well as

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351. Tiffany Crawford, *Vancouver Mother Shares 'Terrifying' Ordeal as City's Hate Crimes Rise*, VANCOUVER SUN (Apr. 26, 2020), https://vancouversun.com/news/vancouver-mother-shares-terrifying-ordeal-as-citys-hate-crimes-rise [https://perma.cc/SE2P-W7H9]. Offensive language redacted by the Author.

352. National Post Staff, *Man Arrested for Alleged Racial Attack on Calgary Woman*, NAT'L POST (July 20, 2020), https://nationalpost.com/news/canada/we-are-outraged-cyclist-spits-at-calgary-woman-calls-her-a-racial-slur-on-park-path [https://perma.cc/9T2Y-YDLM]. The actual wording that the cyclist used was tweeted by Phil Yu, "Calgary police arrested a man … after a video surfaced of him spitting on an Asian woman and using a racial slur against her." Phil Yu (@angryasianman), TWITTER (July 22, 2020, 8:34 PM), https://twitter.com/angryasianman/status/1285961338813112323?lang=en [https://perma.cc/VY7Z-SKUR].

353. Bryn Levy, *Saskatoon Restaurant Staff Thankful for Support after Customer's Racist Tirade*, SASKATOON STAR PHOENIX (Feb. 5, 2021), https://thestarphoenix.com/news/local-news/saskatoon-restaurant-staff-thankful-for-support-after-video-of-racist-tirade [https://perma.cc/H89D-CKNE].

354. Claire Klobucista, Amelia Cheatham & Diana Roy, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS. (Aug. 3, 2022), https://www.cfr.org/backgrounder/us-immigration-debate-0 [https://perma.cc/QQ8V-JQSC].

355. Daniel Béland, Jennifer Elrick & Mireille Paquet, *Canada's Immigration Policy is at a Crossroads*, INST. FOR RSCH. ON PUB. POL'Y (Dec. 19, 2022) https://policyoptions.irpp.org/magazines/december-2022/immigration-policy-crossroads/ [https://perma.cc/8BHS-42JC].

356. Emergencies Act, R.S.C. 1985, c 22 (4th Supp.)

357. *Id.* § 4.

seizure of "evidence."[358] The Governor in Council also has the power to appropriate, control, forfeit, use and dispose of property, and to designate and secure protected places.[359] There are penal provisions for breaching any such orders or regulations.[360]

An important difference between the War Measures Act and the Emergencies Act is contained in the preamble to the Emergencies Act, which states that actions taken pursuant to it are subject to the Charter and the International Covenant on Civil and Political Rights. Because of this wording, it is worthwhile to consider Charter § 1:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[361]

Charter § 15 is Canada's "equal protection" provision. It provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[362]

Would Charter § 15 provide protection to individuals in the face of "military necessity," or some other reason? Or, would a curtailment of a person's rights and freedoms be "demonstrably justified," pursuant to Charter § 1, as they were under the U.S. Constitution?

What can we learn from the foregoing discussion? It is clear that it does not take much for society to blame an entire group—based on skin color, beliefs, appearance, or any other arbitrary difference—for the woes that befall it. Of course, those woes could result from something for which that group cannot be blamed. But that "something"—be it a bombing, or a

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358. *Id.* § 30(1)(c).

359. *Id.* §§ 30(1)(b), 30(1)(f).

360. *Id*. The scope of the Emergencies Act is currently being tested. Prime Minister Justin Trudeau invoked the act on February 14, 2022, in response to the "Freedom Convey", which was made up of thousands of people who opposed, among other things, the COVID-19 public health measures. Catharine Tunney, *Federal Government Invokes Emergencies Act for First Time Ever in Response to Protests, Blockades*, CBC (Feb. 14, 2022), https://www.cbc.ca/news/politics/trudeau-premiers-cabinet-1.6350734 [https://perma.cc/6KL3-53B4]. The protestors and their semi-trailer trucks occupied downtown Ottawa and closed many U.S.-Canada border crossings. *Id*. Pursuant to Emergencies Act § 63, the Governor in Council established the Public Order Emergency Commission to inquire into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency. Emergencies Act § 63. The Commission held public hearings from October 13, 2022, through to December 2, 2022, and it is currently in its policy phase. *Public Hearings*, PUB. ORDER EMERGENCY COMM'N (2022), https://publicorderemergencycommission.ca/public-hearings [https://perma.cc/H6G9-YWET]. The policy phase consists of a series of round-table discussions to assist the Commissioner with the development of recommendations, including the use of the Emergencies Act, any necessary modernization of the act, and recommendations on areas for further study or review. *Id*. The report that results from the inquiry might provide insight into how far the government might curtail a person's rights in the face of a real or perceived emergency.

361. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 1 (U.K.) (emphasis added).

362. *Id.* § 15.

virus—could lead to the legally sanctioned diminution of the rights or freedoms previously enjoyed by that entire group. If the danger is serious enough, or inexplicable, or if military or medical expediency so requires, Canadian legislatures can invoke Charter § 33, which allows Parliament or a provincial legislature to pass legislation that will operate "notwithstanding" equal protection under Charter § 15. And Congress could curtail a group's rights in the name of military security, public health, or some other cause deemed necessary by the government.

Professor Hogg, when discussing *Homma* and *Quong*, remarked, "[These cases] took place long ago when racist attitudes were socially acceptable, and no Charter of Rights existed. Discrimination on the basis of race, colour or ethnic or national origin is now expressly prohibited by Section 15 of the Charter of Rights."[363] This may be so, but if that "something" can be tied to a group based on race, colour, or ethnic or national origin, how will their Charter § 15 rights be protected?

The Criminal Code of Canada,[364] for example, dedicates an entire part to "Terrorism."[365] The regulations promulgated pursuant to the Criminal Code contain a lengthy list of "entities" which the Minister of Justice has reasonable grounds to believe are involved in terrorist activity.[366] What if an attack occurs on domestic soil, and one or more of the "entities" claims responsibility for the attack? What happens to the rights of those who are of the same ethnic origin of the alleged terrorists? The statutory language suggests that their Charter § 15 rights could be curtailed pursuant to either Charter § 1 or Charter § 33.

Berger made the cautious observation that "[a]lthough our institutions and our laws no longer foster racial prejudice, it still exists in Canada, disfiguring the face of society."[367] He then made the following near-prescient comment, "A knowledge and understanding of the Japanese Canadians' experience may enable us to isolate the virus of racial prejudice—endemic in history—when it threatens to escape again."[368]

The pain that East Asians endured throughout the period before World War II, and the treatment of Japanese-American and -Canadian citizens during World War II, epitomize the reprehensible consequences of normalizing racism at the systemic level. These decisions will live in infamy. Just as the bombing of Pearl Harbor produced the concurrence of *de jure* and *de facto* racism, the deep and continued presence of individual and systemic racism still threaten to move us toward legislated and jurisprudential racism. And with the flexible way in which the American courts interpreted the U.S.

363. HOGG & WRIGHT, *supra* note 10, ¶ 26.2.

364. The British North America Act § 91(27) gives Parliament exclusive legislative authority over criminal law. British North America Act 1867, 30 Vict., c 3, § 91(27).

365. Criminal Code, Part II.1, R.S.C. 1985, c C-46 (1st Supp.), § 83.01.

366. *Id.* § 83.05.

367. BERGER, *supra* note 18, at 93.

368. *Id*.

Constitution when its citizens most needed its protection, the aegis of the Charter and the U.S. Constitution might simply be a hollow bundle of rights. As Professor Daniels wrote, "While most optimists would argue that, in America, concentration camps are a thing of the past—and one hopes that they are—many Japanese Americans, the only group of citizens ever incarcerated simply because of their genes, would argue that what has happened before can surely happen again."[369]

We hope that this will never happen again. However, given the way we have reacted during times of real or perceived threat—whether that threat manifests itself through a gun barrel, job loss, or an inexplicable virus—the danger of history repeating itself remains ever-present. Uncertainty exists.

369. DANIELS, *supra* note 6, at 114.