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Necessary But Not Sufficient: Two Case Studies of Government Apologies Failing to Bring Closure

FRANK H. WU*

Introduction

This short essay presents two case studies in obtaining a remedy for an historic wrong: the Congressional passage of the 1988 Civil Liberties Act, paying reparations to Japanese Americans who had been sent to internment camps during World War II; and the Senate and House issuance of Statements of Regret of 2011 and 2012, respectively, for the Chinese Exclusion Act.¹ These examples show how a government can make progress toward its ideals by acknowledging prior errors. Yet they also reveal that such recognition, as necessary as it is for a diverse society, is not sufficient for a democratic one. Subsequent actions in each instance suggest that any lessons learned were ephemeral at best and illusory at worst.

I. The Example of the 1988 Civil Liberties Act

The 1988 Civil Liberties Act followed an investigation by a high-level, independent federal government commission, the “CWRIC,” established in 1980, which conducted extensive hearings and directed exhaustive archival research.² It concluded that the mass incarceration of Japanese Americans and Native Aleuts, without individual consideration of guilt or even probable

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1. Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 904. A resolution expressing the regret of the Senate for the passage of discriminatory laws against the Chinese in America, including the Chinese Exclusion Act, S. Res. 201, 112 Cong. (2011); expressing the regret of the House of Representatives for the passage of laws that adversely affected the Chinese in the United States, including the Chinese Exclusion Act, H. Res. 683, 112 Cong. (2012). A full account of the interment and the exclusion is beyond the scope of this essay. There are other such studies. This is the only analysis, however, of the two efforts to make amends.

2. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (“CWRIC”), PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (Washington D.C.: Civil Liberties Public Education Fund, 1997). The report is available at <https://www.archives.gov/research/japanese-americans/justice-denied> (last visited Jan. 21, 2019). The archives are available at <https://www.archives.gov/research/japanese-americans/hearings> (last visited Jan. 21, 2019).

cause, was not based on military necessity. Instead, the bipartisan body determined, the cause had been racial prejudice, wartime panic, and lack of leadership.³ The findings were based on the information available at the time the imprisonment was ordered. They were not the product of hindsight.

The documentation confirmed what was readily apparent before the Japanese attack on Pearl Harbor, December 7, 1941, the date, which President Franklin Delano Roosevelt declared would live in infamy: there was open hatred of Japanese immigrants and their American-born descendants, prior to any military conflict with Japan.⁴ The desire to be rid of the Japanese American presence did not spring up spontaneously due to war.⁵ The calls for the internment followed the segregation of Japanese Americans in public schools, their exclusion along lines similar to that of the Chinese before them, the passage of anti-miscegenation laws prohibiting intermarriage with whites, and Alien Land Laws preventing ownership of real property.⁶ These implemented *de jure* racial discrimination. Japanese immigrants, at the threshold, faced a racial bar on naturalization. In the 1922 *Ozawa* case, the Supreme Court decided that even an assimilated, and pale-skinned, individual did not qualify as a “free white person.”⁷ (Veterans of the Great War, as World War I was initially designated, benefited from

3. CWRIC, *supra* note 2, at 5.

4. Regarding the significance of Pearl Harbor, see EMILY S. ROSENBERG, *A DATE WHICH WILL LIVE: PEARL HARBOR IN AMERICAN MEMORY* (2003).

5. See generally ROGER DANIELS, *PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II*, (rev. ed. 2004); ROGER DANIELS, *CONCENTRATION CAMPS: NORTH AMERICA JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II* (1981); GREG ROBINSON, *A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA* (2009); ERIC Y. YAMAMOTO, ET AL., *RACE, RIGHTS & REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2d ed. 2013).

6. The San Francisco school board had sought to segregate Japanese Americans. President Theodore Roosevelt personally intervened to urge an end to the practice with the *quid pro quo* of Japan accepting extension of exclusion from Chinese to Japanese, in a “gentlemen’s agreement.” BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990* (1994), 32–33, 54, 129.

Roosevelt offers an account in his autobiography: THEODORE ROOSEVELT, *THE ROUGH RIDERS/AN AUTOBIOGRAPHY* (Library of America ed. 2004), 635–40; see also EDMUND MORRIS, *THEODORE REX* (2002), 483–84.

Regarding anti-miscegenation, see Hrishi Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, *ASIAN AMERICAN LAW JOURNAL*, v. 9 (2002): 1–40.

Regarding Alien Land Laws, see *Terrace v. Thompson*, 263 U.S. 197 (1923); Keith Aoki, *No Right to Own? The Early Twentieth-Century ‘Alien Land Laws’ as a Prelude to Internment*, *BOSTON COLLEGE THIRD WORLD LAW JOURNAL*, v. 19, n. 1 (1998), 37–72.

7. *Ozawa v. United States*, 260 U.S. 178 (1922). For an analysis, see IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (New York: New York University Press 1996).

special legislation. In appreciation of their service and sacrifice, they were allowed to naturalize.⁸)

The racial aspect of the internment would be difficult to deny. The criterion for the curfew, the exclusion from the war zone, and then the prolonged confinement was heritage. It was Japanese Americans on the West Coast who were put into internment camps (as well as Native Aleuts⁹). Lieutenant General John L. DeWitt, commander of the Western Defense, famously opined, “A Jap’s a Jap, and that’s all there is to it.”¹⁰ Approximately two-thirds of those who lost their liberty were United States citizens, but their legal status was irrelevant. Men, women, children, the elderly, the disabled, and even veterans of the Great War, were locked up. In contrast, those of German and Italian descent were not reckoned, as a community, to be suspect.¹¹ Yet German Americans and Italian Americans were similarly situated, in constitutional parlance, due to their lineal relationship to a hostile foreign power, Japan, Germany, and Italy together making up the “Axis” powers. A few individuals of German and Italian genealogy were rounded up with the Japanese Americans, but they were primarily foreign nationals (who could have naturalized, not facing a racial bar as did the Japanese Americans).

The Civil Liberties Act was not expected to pass. It was divisive among Japanese Americans. There had been earlier legislation, and there was a concurrent litigation effort.¹² Among the many opponents of any reparations

8. See Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918-1935*, THE JOURNAL OF AMERICAN HISTORY, v. 91, no. 3 (2004): 847–76. See also Tokutaro Slocum, DENSHO ENCYCLOPEDIA, http://encyclopedia.densho.org/Tokutaro_Slocum/ (visited Jan. 21, 2019).

9. See Erin Blakemore, *The U.S. Forcibly Detained Native Alaskans During World War II*, SMITHSONIAN, Feb. 22, 2017, available at <https://www.smithsonianmag.com/smart-news/us-forcibly-detained-native-alaskans-during-world-war-ii-180962239/> (last visited Jan. 21, 2019); Julia Rubin, *Alask’a Aleuts – Forgotten Internees of WWII*, L.A. TIMES, Mar. 1, 1992, available at http://articles.latimes.com/1992-03-01/news/mn-5571_1_southeast-alaska-fish (last visited Jan. 21, 2019); John Smelcher, *The Other WWII American-Internment Atrocity*, NATIONAL PUBLIC RADIO CODE SWITCH, Feb. 21, 2017, available at <https://www.npr.org/sections/codeswitch/2017/02/21/516277507/the-other-wwii-american-internment-atrocity> (last visited Jan. 21, 2019).

10. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES (1983), 193. See also John L. DeWitt, Headquarters Western Defense Command and Fourth Army, Office of the Commanding General, Final Report: Japanese Evacuation from the West Coast (1942); the report is available <http://www.sfmuseum.org/war/dewitt1.html> (visited Sept. 28, 2018).

11. The CWRIC report addresses Germans and German Americans in detail. CWRIC, *supra* note 2, 283–293. The Crystal City, Texas, internment camp that housed alien Germans and Italians, as well as Japanese, with their American-born children, is discussed in JAN JARBOE RUSSELL, THE TRAIN TO CRYSTAL CITY: FDR’S SECRET PRISONER EXCHANGE PROGRAM AND AMERICA’S ONLY FAMILY INTERNMENT CAMP (2015). The title is somewhat of a misnomer, as the main internment camps housed Japanese American families.

12. The earlier legislation offered token monetary compensation. Japanese-American Evacuation Claims Act, 50 U.S.C. Appendix sec. 1981 (2013). The concurrent litigation culminated

was Senator S.I. Hiyakawa, a Japanese American (originally Canadian), respected as a professor of linguistics. He had become politically prominent while serving as President of San Francisco State University due to his suppression of student movements perceived to be radical.¹³ Testifying to the CWRIC in Los Angeles, he argued the internment accelerated assimilation, and he added that he was ashamed of demands for redress.¹⁴ During debate over the Civil Liberties Act, there were those who insisted Japan should make amends for its war crimes, again associating Japanese Americans with Japan rather than America, confusing the claim they were pressing against their own government with a claim foreigners would bring against another sovereignty.¹⁵ Yet a grassroots campaign prevailed. The contributions of Japanese American soldiers, who served in the segregated 442nd Infantry Regiment and 100th Infantry Battalion, the most highly decorated units in United States military history for their size and length of service, was customarily cited as an indication of Japanese American patriotism, and, accordingly, a basis for the Japanese American claim.¹⁶ The measure ultimately provided \$20,000 to each internee.¹⁷ A fund, furthermore, was set up for educational projects that would prevent a recurrence of the internment.¹⁸ (Japanese Latin Americans, kidnapped from their countries of origin to be held as potentially useful in hostage trades,

in a Supreme Court decision holding the Federal Circuit lacked jurisdiction, without addressing the merits. *United States v. Hohri*, 482 U.S. 64 (1987).

13. J.Y. Smith, *Outspoken U.S. Senator S.I. Hayakawa Dies at 85*, WASH. POST (Feb. 28, 1992), available at https://www.washingtonpost.com/archive/local/1992/02/28/outspoken-us-senator-si-hayakawa-dies-at-85/761fd45-6557-4b88-99fc-1a66d5628e43/?utm_term=.652a3f8739eb. A biography is available in UNITED STATES HOUSE OF REPRESENTATIVES, ASIAN AND PACIFIC ISLANDER AMERICANS IN CONGRESS, 1900-2017 (2018), 388–395. The text is available at <https://history.house.gov/People/Detail/15032451323> (last visited Jan. 21, 2019).

14. Regarding assimilation, Smith, *supra* note 13. Regarding being ashamed, see AP, *Hayakawa Denounces Claims of Nisei for Internment Pay*, N.Y. TIMES (Aug. 5, 1981), <https://www.nytimes.com/1981/08/05/us/hayakawa-denounces-claims-of-nisei-for-internment-pay.html>.

15. For histories of the redress movement, see LESLIE T. HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 (1994) (offering a history of the redress movement). See also WILLIAM MINORU HOHRI, REPAIRING AMERICA: AN ACCOUNT OF THE MOVEMENT FOR JAPANESE-AMERICAN REDRESS (1988); THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS (Charles McClain ed., 1994); MITCH MAKI ET AL., ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS (1999); NIKKEI FOR CIVIL RIGHTS & REDRESS, NCRR: THE GRASSROOTS STRUGGLE FOR JAPANESE AMERICAN REDRESS AND REPARATIONS (2018).

16. Regarding Japanese American military service, see TAD ICHINOKUCHI ET AL., JOHN AISO AND THE M.I.S.: JAPANESE-AMERICAN SOLDIERS IN THE MILITARY INTELLIGENCE SERVICE, WORLD WAR II (1988); JAMES C. MCNAUGHTON, NISEI LINGUISTS: JAPANESE AMERICANS IN THE MILITARY INTELLIGENCE SERVICE DURING WORLD WAR II (2007); C. DOUGLAS STERNER, GO FOR BROKE: THE NISEI WARRIORS OF WORLD WAR II WHO CONQUERED GERMANY, JAPAN, AND AMERICAN BIGOTRY (2015).

17. Civil Liberties Act of 1988, *supra* note 1.

18. The author was a recipient of funding under the legislation.

were initially excluded.¹⁹⁾ The Solicitor General also “confessed error.”²⁰ That admission that the Justice Department had withheld exculpatory evidence and misrepresented the alleged factual basis for the internment was another remarkable official action.

Following the terrorist attacks of September 11, 2001, however, the calls for racial profiling (and religious profiling, race and religion also being confused with one another) were renewed. They were said to be justified by national security, as with the internment, and to be rational, also as with the internment. Even before then, none other than Chief Justice William Rehnquist published a book with a lengthy analysis favoring the internment.²¹ After the national tragedy, commentators such as Michelle Malkin and Stuart Taylor, among many, argued the internment set a positive precedent to be followed, not a negative one to be avoided.²² Figures formerly dismissed as extremists on the fringe, such as Lillian Baker, continued to deny that the internment had any severity, insisting Japanese Americans had been coddled despite disloyalty; among her efforts, Baker had assaulted an internee at a redress hearing, attempting to abscond with his papers.²³ The Patriot Act was passed as a response to 9/11.²⁴ The “travel ban” then was ordered by the Trump administration, curtailing the availability of visas for individuals from predominantly Muslim nations and those identified as dangerous, and it was

19. Approximately 600 Japanese Latin Americans received, a decade later, \$5,000 each, and an apology, from the Justice Department Office of Redress Administration. The class action that was settled is reported at *Mochizuki v. United States*, 43 Fed. Cl. 97 (1999). An official statement is available at <https://www.justice.gov/archive/opa/pr/1998/June/276.htm.html> (visited Jan. 21, 2019). See generally Yamamoto, *supra* note 5, 343–350; HARVEY C. GARDINER, PAWNS IN A TRIANGLE OF HATE: THE PERUVIAN JAPANESE AND THE UNITED STATES (1981); Evelyn Iritani, *The Other Japanese Internment America Still Hasn't Fully Acknowledged*, L.A. TIMES (Mar. 20, 2017), available at <https://www.latimes.com/opinion/op-ed/la-oe-iritani-japanese-latin-american-internment-20170320-story.html> (visited Jan. 21, 2019).

20. Regarding confession of error, Neal K. Katyal, *The Solicitor General and Confession of Error*, FORDHAM L. REV., v. 81, n. 6: 3027–3037. An official statement by Acting Solicitor General Katyal is available here <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> (visited Aug. 14, 2018).

21. WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (2000).

22. MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR RACIAL PROFILING IN WORLD WAR II AND THE WAR ON TERROR (2004); Stuart Taylor Jr., *Politically Incorrect Profiling: A Matter of Life or Death*, THE ATLANTIC (Nov. 1, 2001), <https://www.theatlantic.com/politics/archive/2001/11/politically-incorrect-profiling-a-matter-of-life-or-death/378044/>.

23. Regarding Baker, see Myrna Oliver, *Lillian Baker; Denied Japanese Incarceration*, L.A. TIMES (Oct. 29, 1996), available at http://articles.latimes.com/1996-10-29/news/mn-58953_1_lillian-baker (visited Jan. 21, 2019).

Regarding the assault, see the DENSHO ENCYCLOPEDIA, <https://encyclopedia.densho.org/sources/en-denshopd-i236-00002-1/> (visited Jan. 21, 2019). Baker's main work was LILLIAN BAKER, DISHONORING AMERICA: THE COLLECTIVE GUILT OF AMERICAN JAPANESE (1988). The title had multiple editions.

24. USA PATRIOT Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).

modified to pass judicial scrutiny.²⁵ (Before the first Gulf War, an internal memo had surfaced detailing a government plan for “quarantine camps” in the event of war with Arab nations. Publicized in 1987, the Immigration and Naturalization Service study then was disavowed.²⁶)

Thus the World War II consensus that the internment was right gave way to the revision that the internment was wrong. The Supreme Court, in overruling *Korematsu* in order to uphold the travel ban, in turn undid that new consensus. In its 2018 decision on the travel ban, the 5-4 majority wrote that *Korematsu* “was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”²⁷ Chief Justice Roberts could have distinguished, and did in a cursory manner, the situations on the basis that the internment affected citizens, while the travel ban affected foreigners, but the reasoning was not limited in scope.²⁸ Within well-settled law, the Court could have relied on the distinction between citizens and noncitizens to reach the same outcome. Yet even as it repudiated *Korematsu*, it embraced the core concept of Justice Hugo Black’s rationale in that case. The former Klansman adjudged the internment to be something other than racial, as follows, distinguishing racial prejudice from rational profiling:

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. . . .²⁹

A final controversy internal to the Japanese American community was the divide between military veterans and draft resisters.³⁰ These included individuals within the same family. Three generations later, there was mutual resentment lingering between those who believed the best course of action was to prove patriotism through assimilation and those who preferred protest.

25. *Trump v. Hawaii*, 585 U.S. __, __ (2018).

26. See Jack Anderson and Dale Van Atta, *Arab Americans Suspects Without Probable Cause*, WASH. POST (Jan. 27, 1991), available at https://www.washingtonpost.com/archive/opinions/1991/01/27/arab-americans-suspects-without-probable-cause/2f82b663-42e3-454c-9fa9-4d461dc4b19d/?utm_term=.2fa81f16ccf9. See also Lisa Belkin, *For Many Arab-Americans, F.B.I. Scrutiny Renews Fears*, N.Y. TIMES (Jan. 12, 1991), at A1.

27. *Trump v. Hawaii*, 585 U.S. __; 138 S. Ct. 2392, 2423 (2018).

28. *Id.*

29. *Korematsu v. United States*, 323 U.S. 215, 223–23 (1944).

30. See ERIC L. MULLER, *FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN WAR RESISTERS IN WORLD WAR II* (2003); Chris K. Iijima, *Reparations and the ‘Model Minority’ Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B. C. L. REV. 385 (1998).

When in 2000 a memorial in Washington, D.C. was opened, commemorating the Japanese American war experience, there was upset that the words of Mike Masaoka, president of the Japanese American Citizens League (JACL), were to be chiseled into the stone.³¹ Some regarded him in particular and the organization in general as having been complicit in the internment. The Broadway musical, *Allegiance*, starring social media icon George Takei, presented a fictional version of the dilemma provoking estrangement.³² The characters whose anger had not abated decades later had chosen different responses to the internment.

II. The Example of the Statements of Regret

The 2011 and 2012 Statements of Regret came generations after repeal of the Chinese Exclusion Act of 1882 (later expanded to an Asiatic Barred Zone).³³ The Magnuson Act was an initial repeal albeit with the token amount of 105 Chinese to be allowed in per annum.³⁴ Passed in 1943, it advanced the alliance between the United States and China. In the Pacific theatre of World War II, they were allies against Imperial Japan. The 1952 McCarran-Walter Act brought the formal end of Asian exclusion.³⁵ In the post-war period, Taiwan, as the Republic of China (to which the Kuomintang government retreated), then was an American ally against mainland China, which became the People's Republic of China, with which America refused

31. FRANKLIN ODO, ED., *THE COLUMBIA DOCUMENTARY HISTORY OF THE ASIAN AMERICAN EXPERIENCE* (2002) 256–27. Melissa Lambert, *A Place of Honor for Japanese Americans*, L.A. TIMES (Nov. 7, 2000), available at <http://articles.latimes.com/2000/nov/07/news/mn-48383> (last visited Jan. 21, 2019); Annie Nakao, *Furor Over Memorial to Japanese Americans Name of Man Hailed as Rights Leader*, S.F. EXAMINER (July 7, 2000), available at <https://www.sfgate.com/news/article/Furor-over-memorial-to-Japanese-Americans-name-of-3054662.php> (last accessed Jan. 21, 2019). See also Cherry Tsutsumida, *Today's Sensibilities Don't Apply to Voices from the Past*, L.A. TIMES, (July 28, 2000), available at <http://articles.latimes.com/2000/jul/28/local/me-60783> (last visited Jan. 21, 2019).

32. Jay Kuo, *Allegiance* (opened at Broadway's Longacre Theatre on November 8, 2015). The official website for the production is <http://allegiancemusical.com/#TBb9CUmKGSsMooz.97> (last visited Jan. 21, 2019).

33. Chinese Exclusion Act, Public Law 47-126, 22 Stat. 58 (1882). The Asiatic Barred Zone was created by the Immigration Act of 1917, Public Law 64-301, 39 Stat. 874 (1917). For a history of Chinese immigration during the Exclusion period, see ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE ERA OF EXCLUSION, 1882-1943* (2007); SUCHENG CHAN, ED., *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943* (1991). The classic account, which emphasizes European immigration, is JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (rev. ed. 2002).

34. An Act to Repeal the Chinese Exclusion Acts, to Establish Quotas, and for Other Purposes, Public Law 78-199, 57 Stat. 600 (1943).

35. An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, Public Law 82-414, 66 Stat. 163 (1952), codified as 8 U.S.C. 1101 et seq. (revised).

to entertain diplomatic relations; however, later rapprochement and eventual normalization of relations with the PRC was a move against the Soviet Union. As numerous observers have pointed out, American domestic race relations were influenced by American foreign policy.³⁶ With the United States emerging as a global superpower in a struggle against Nazi Germany in World War II and then the Communist Soviet Union in the ensuing Cold War, American politicians made efforts to promote racial equality in order to win over the non-aligned bloc of nations, many of which had populations that were heavily non-white. The statements of regret reiterated that the “American-Chinese alliance during World War II” had been “undermine[d]” by “enemy forces” alluding to anti-Chinese attitudes, and to the “furtherance of American war objectives” by permitting Chinese to naturalize and partially repealing exclusion.³⁷

Then the former National Origins Act, which had limited immigration with an express mandate for maintaining ethnic balance (to the exclusion altogether of Asians, other than under strict quotas; and the detriment of Europeans who were more Eastern and Southern in origin rather than sharing ancestry with “old-stock” WASP Americans), was superseded by the Immigration and Nationality Act.³⁸ Passed in 1965, after the Civil Rights Acts of 1964, the Hart-Celler Act was in part an homage to the slain President John F. Kennedy. He had been a proponent of immigration reform, speaking eloquently of America as a “city upon a hill” that beckoned the world over.³⁹ The Kennedys, as Irish Catholics, had faced religious prejudice, based on the concern that, in the pejorative phrase, “Papists,” would exhibit dual loyalty, between the United States and the Vatican. He stated that the prior system “[was] an anachronism for it discriminates among applicants for admission

36. See CINDY I-FEN CHENG, *CITIZENS OF ASIAN AMERICA: DEMOCRACY AND RACE DURING THE COLD WAR* (2014); Xiaohua Ma, *The Sino-American Alliance During World War II and the Lifting of the Chinese Exclusion Acts*, 38 *AMERICAN STUDIES INTERNATIONAL* 39 (2000); see also THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* (rev. ed. Cambridge, Mass: Harvard University Press, 2003); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (Princeton, N.J.: Princeton University Press, 2011).

37. Statements of Regret, *supra* note 1.

38. Immigration and Nationality Act of 1965, Pub.L. 89-236, 79 Stat. 911. For a general history of immigration, see HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007). See also ALEJANDRO PORTES AND RUBEN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* (4th ed. 2014).

39. The Kennedy “city upon a hill” speech, delivered on January 9, 1961, in Boston, made the phrase popular in contemporary politics. John F. Kennedy, Address of the President-Elect at the State House, Boston, Massachusetts (Jan. 9, 1961), available at <https://www.jfklibrary.org/learn/about-jfk/historic-speeches/the-city-upon-a-hill-speech> (last visited Jan. 21, 2019). The metaphor is analyzed in RICHARD M. GAMBLE, *IN SEARCH OF THE CITY ON A HILL: THE MAKING AND UNMAKING OF AN AMERICAN MYTH* (2012). See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 *N.C. L. REV.* 273 (1996).

into the United States on the basis of accident of birth.”⁴⁰ His younger brothers, Attorney General Robert Kennedy, and Senator Edward (Teddy) Kennedy were crucial as advocates for the Immigration and Nationality Act. The former noted: “Everywhere else in our national life, we have eliminated discrimination based on one’s place of birth. Yet this system is still the foundation of our immigration law.”⁴¹

The vestiges of the Chinese Exclusion Act, which comprised multiple bills that reinforced one another with ever harsher measures (some of which were struck down by the Supreme Court as violating due process protections), were eliminated.⁴² Among the changes wrought, hardly noticed but symbolically significant, was in the treatment of citizenship as distinguished from race. The former regime embodied ethnic nationalism but affected only the limited class of persons whose ethnicity and nationality did not match and who were disadvantaged by the former but not the latter. For purposes of measuring whether any visas remained in the allotment, individuals were deemed not to be citizens of the nation from whence they legally were coming and whose papers they held but instead the nation with which they had ancestral affiliation. Counting in this manner meant in particular that citizens of Latin American nations who had Asian backgrounds were disadvantaged, because they, regarded not as Latin American but as Asian, would run up against the limited space made available for the latter.⁴³

40. JOHN F. KENNEDY, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 594–96 (1964).

41. Robert F. Kennedy, Statement of the Attorney General before Subcommittee No. 1 of the House Judiciary Committee Regarding H.R. 7700 (July 22, 1964), available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/07-22-1964.pdf> (last visited Jan. 21, 2019). It appears in the record as *Immigration: Hearings on H.R. 7700 Before the H. Subcomm. On the Judiciary*, 88th Cong. 409–437 (1964) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

42. For general background on the Chinese Exclusion Act and the movement leading up to it, see MARTIN B. GOLD, FORBIDDEN CITIZENS: CHINESE EXCLUSION AND THE U.S. CONGRESS, A LEGISLATIVE HISTORY (ALEXANDRIA, VA: THECAPITOL.NET, 2012). See also JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS (Berkeley, Calif.: University of California Press 2008); LUCY SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (Chapel Hill, N.C.: University of North Carolina Press, 1995). A more recent synthesis is BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018); see also Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN AM. L.J. 33 (1995). The imposition of hard labor, for example, was struck down. *Wong Wing v. United States* 163 U.S. 228 (1896).

43. *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466 (2nd Cir. 1965). This was a deliberate change, because, as Attorney General Robert Kennedy testified, the prior “provision has little effect except needlessly to insult Asians.” See Kennedy testimony, *supra* note 41, at 7. The current rules for “chargeability” reference the nation of birth, with exceptions. 8 U.S.C. 1152(b).

The Chinese Exclusion Act was racial—or, ethnic, which at the time was no different, experts and laypeople alike speaking of “the Chinese race” or “the Irish race.”⁴⁴ The Chinese Exclusion Act was racial on its face rather than as applied. The name of the legislation contained the racial reference. The agitation against the Chinese was openly bigoted. Of course, the era enshrined “separate but equal” as a Constitutional doctrine, and African Americans were subjected to *de jure* racial segregation, so the treatment of the Chinese was consistent with such a paradigm.⁴⁵

The regulation could not be described accurately as regulation of immigrants in general or immigration as a phenomenon, because it distinguished among immigrants on a racial basis (and white foreigners were among those who argued for exclusion of their Chinese competitors). It drew a line not between citizens and foreigners, but among immigrants between non-Chinese and Chinese. As Representative Henry Napfen summarized, “In other cases, we admit the people and exclude the individual. In the Chinese case, we admit the individuals and exclude the people.”⁴⁶ Along those lines, of race trumping other factors, the Solicitor General opposed birthright citizenship for native-born persons of Chinese descent on the grounds of their Chinese lineage. He wrote in his *Wong Kim Ark* briefs:

There certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage. Are Chinese children born in the country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth? If so, then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having.⁴⁷

44. With respect to white ethnicities being considered separate races, NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2011); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* (2006); THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE* (2012). Early case studies include KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (Routledge Classics ed. 2008).

45. *Plessy v. Ferguson*, 163 U.S. 537 (1896). The role of Chinese Americans in the Harlan dissent is analyzed in Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, *IOWA L. REV.* (1996), v. 82: 151–182.

46. 35 Congressional Record 3695 (1902).

47. Brief for the Government, 34, in *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898).

Like the redress movement for Japanese Americans, the statement of regret for the Chinese Exclusion Act was not predicted to have great odds. Congresswoman Judy Chu took up the task. Chair of the Asian Pacific American Caucus, she represented Monterey Park, California, a bedroom community not far from Los Angeles, which had become “the first suburban Chinatown.”⁴⁸ In 2011, the Senate unanimously passed the statement; in 2012, the House followed. Such statements are rare, having been issued on only fewer than a half dozen occasions previously.⁴⁹

Yet as with the redress movement for Japanese Americans, the meaning of the statement of regret was cast into doubt soon enough. The statements of regret contained a standard disclaimer that they did not create any legal claim against the United States.⁵⁰ With the rise of China, and fear of a Chinese threat, China became a strategic enemy.⁵¹ Leading officials,

48. TIMOTHY FONG, *THE FIRST SUBURBAN CHINATOWN: THE REMAKING OF MONTEREY PARK, CALIFORNIA* (1994).

49. Other statements of regret passed by Congress include the following. A resolution apologizing for the enslavement and racial segregation of African Americans: S.Con. Res. 26, 111th Cong. (2009); A resolution apologizing for the enslavement and racial segregation of African Americans: H. Res. 194, 110th Cong. (2008); a resolution apologizing to the victims of lynching and the descendants of those victims for the failure of the Senate to enact anti-lynching legislation: S. Res. 39, 109th Cong. (2005); a Resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii: S.J. Res. 19, 103rd Cong. (1993). An apology to Native Americans was incorporated into the defense appropriations act of 2010, Pub. Law No. 111-18, 123 Stat. 3409.

50. Statements of Regret, *supra* note 1.

51. For the government perspective, see THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017), available at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> (last visited Jan. 21, 2019); OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA (2018), available at <https://media.defense.gov/2018/Aug/16/2001955282/-1/-1/2018-CHINA-MILITARY-POWER-REPORT.PDF> (last visited Jan. 21, 2019). National Security Advisor John Bolton’s October 12, 2018, radio interview was widely reported as setting forth the Trump administration attitude of “getting tough” on China. Hugh Hewitt, National Security Advisor John Bolton On His Trip to Russia, the Missing Saudi Jamal Khashoggi, Iran, China, and Big Tech, Oct. 12, 2018, available at <http://www.hughhewitt.com/national-security-advisor-john-bolton-on-his-trip-to-russia-the-missing-g-saudi-jamal-khashoggi-iran-china-and-big-tech/> (last visited Jan. 21, 2019). Attorney General Jeff Sessions announced a major law enforcement initiative targeting China on November 1, 2018. Jeff Sessions, Remarks (Nov. 1, 2018, Washington, D.C.), available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage> (last visited Jan. 21, 2019); see also U.S. Dept. of Justice, *Attorney General Jeff Session’s China Initiative Fact Sheet*, available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage> (last visited Jan. 21, 2019). See Larry Diamond, ed., *Chinese Influence & American Interests: Promoting Constructive Vigilance*, HOOVER INSTITUTION (Nov. 29, 2018), available at <https://www.hoover.org/research/chinese-influence-american-interests-promoting-constructive-vigilance> (last visited Jan. 21, 2019); see also Michael J. Mazarr et al., *China and the International Order* (2018) (RAND Corporation

including FBI Director Christopher Wray and allegedly the President himself, made statements about the risk that Chinese presented an “all of society” threat or that “all” Chinese students were spies.⁵² Proposals circulated to limit Chinese students and researchers entering the United States even, perhaps especially, on a temporary basis.⁵³ The possibility of war with China became a popular subject of speculation.⁵⁴ Some commentators had earlier raised the prospect of internment camps in such circumstances, and this continued to be the subject of speculation.⁵⁵ In spectacular cases, Chinese Americans, immigrants who had naturalized, were falsely accused of espionage. Sherry Chen, a mid-level civil servant specializing in predicting floods, and Dr. Xiaoxing Xi, a physics professor, among others, were prosecuted before all charges were dropped.⁵⁶

study with more optimistic opinions), available at https://www.rand.org/pubs/research_reports/RR2423.html (last visited Jan. 21, 2019).

52. Regarding Wray, see Hearing on Worldwide Threats, Before the Senate Select Committee on Intelligence, 115th Cong. 2nd session (Feb. 13, 2018); available at <https://www.intelligence.senate.gov/hearings/open>; Christopher Wray, *A Chat with the Director of the FBI*, July 18, 2018, THE ASPEN INSTITUTE, Aspen, CO, Video, 57:55, <https://www.youtube.com/watch?v=NoFqNFxBECU>; Kimberly Yam, *FBI Director Defends Remarks That Chinese People in U.S. Pose Threats*, HUFFINGTON POST, last modified Mar. 23, 2018, https://www.huffingtonpost.com/entry/fbi-christopher-wray-chinese-immigrants_us_5ab3d47fe4b008c9e5f51975. Regarding the president, see Elizabeth Redden, *Did Trump Call Most Chinese Student Spies?*, INSIDE HIGHER ED (Aug. 9, 2018), available at <https://www.insidehighered.com/news/2018/08/09/politico-reports-trump-called-most-chinese-students-us-spies>.

53. The White House considered banning all student visas for Chinese nationals, but the proposal was rejected. Elizabeth Redden, *Report: Stephen Miller Pushed Ending Chinese Student Visas*, INSIDE HIGHER ED (Oct. 3, 2018), available at <https://www.insidehighered.com/quick-takes/2018/10/03/report-stephen-miller-pushed-ending-chinese-student-visas>; Elizabeth Redden, *Will U.S. Restrict Visas for Chinese Students?*, INSIDE HIGHER ED, (Mar. 16, 2018), available at <https://www.insidehighered.com/news/2018/03/16/reports-trump-administration-considering-limit-visas-chinese-citizens-cause-concern>.

54. War with China is the subject of serious analysis. See GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THE THUCYDIDES’S TRAP?* (2017); AMITAI ETZIONI, *AVOIDING WAR WITH CHINA: TWO NATIONS, ONE WORLD* (2017). See also James Dobbins et al., *Conflict with China Revisited: Prospects, Consequences, and Strategies for Deterrence* (2017) (RAND Corporation white paper), available at <https://www.rand.org/pubs/perspectives/PE248.html> (last visited Jan. 21, 2019); David C. Gompert et al., *War With China: Thinking Through the Unthinkable* (2016) (RAND Corporation white paper), available at https://www.rand.org/pubs/research_reports/RR1140.html (last visited Jan. 21, 2019).

55. John Derbyshire, *Thinking About Internment*, CHRONICLES (Dec. 1, 1999), 42; Thomas E. Ricks, *The Next Internment: Would Chinese in the U.S. Be Rounded Up During a War?*, FOREIGN POLICY (June 19, 2017), available at <https://foreignpolicy.com/2017/06/29/the-next-internment-would-chinese-in-the-u-s-be-rounded-up-during-a-war/>.

56. Regarding Chen, see Nicole Perlroth, *Cleared of Spying for China, She Still Doesn’t Have Her Job Back*, N.Y. TIMES (May 17, 2018), B3; Nicole Perlroth, *Chinese-American Cleared of Spying Charges Now Faces Firing*, N.Y. TIMES (Sept. 15, 2015), B3; Nicole Perlroth, *Accused of Spying for China, Until She Wasn’t*, N.Y. TIMES (May 9, 2015), B1. Regarding Xi, see Matt Apuzzo, *U.S. Drops Charges That Professor Shared Technology with China*, N.Y. TIMES (Sept. 11,

Another problem, anticipated by none of the proponents of the statement of regret, was, with barely any pause, a petition drive for an apology as distinguished from the more mild statements of regret—on the grounds that the former “fell short.”⁵⁷ The careful wording of the proclamations disappointed those who demanded that the legislators actually say they were sorry. The semantic sensitivity, not uncommon with apologies, especially public and racial, rendered the more modest language insufficient.⁵⁸ Despite the difficulty of obtaining even that much, members of the community who were more aggressive wished for more.

Conclusion

Redress for the internment and statements of regret for the exclusion were great, heroic accomplishments, which seemed even to sympathetic onlookers highly unlikely. Yet as successful as the movements were, culminating in the passage of legislation in each instance, they confirm the importance of ongoing efforts to maintain justice. They could not but fail in bringing about closure. That is no slight to the organizers of these campaigns. It is, rather, praise for their dedication, because continued efforts must be made. Collective memory contains stories that conflict.⁵⁹ The contradictions never cease. As this essay was headed to press, Congress approved and the President bestowed a Gold Medal on Chinese American military veterans who had fought in World War II, following the same homage paid Japanese Americans and Filipinos; simultaneously, the Pentagon, at the behest of the Trump administration, was attempting to drum out of the armed services foreigners, even those holding lawful permanent resident status.⁶⁰

2015), A1; Matt Apuzzo, *Former Espionage Suspect Sues, Accusing F.B.I. of Falsifying Evidence*, N.Y. TIMES (May 10, 2017), A11.

57. Shirley N. Lew, ASAM NEWS (June 21, 2016), <https://asamnews.com/2016/06/21/asian-americans-petition-obama-to-say-sorry-for-1882-chinese-exclusion-act/>. See also Chris Fuchs, *NY Lawmakers Ask Obama to Formally Apologize for Chinese Exclusion Act*, NBC NEWS (June 20, 2016), <https://www.nbcnews.com/news/asian-america/ny-lawmakers-ask-obama-formally-apologize-chinese-exclusion-act-n595536>.

58. EDWIN L. BATTISTELLA, *SORRY ABOUT THAT: THE LANGUAGE OF PUBLIC APOLOGY* (2014); ROY L. BROOKS, ED., *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (1999); AARON LAZARE, *ON APOLOGY* (2005); MELISSA NOBLES, *THE POLITICS OF OFFICIAL APOLOGIES* (2008); NICK SMITH, *I WAS WRONG: THE MEANINGS OF APOLOGIES* (2008); NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (1993). See also JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* (2006).

59. The classic work is PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING* (2006) (trans. Kathleen Blamey and David Pellauer).

60. Regarding the Japanese Americans and Filipinos, Act of Oct. 5, 2010, Pub. L. No. 111-254, 124 Stat. 2637 and Filipino Veterans of World War II Congressional Gold Medal Act of 2015, Pub. L. No. 114-265, 130 Stat. 1376. Regarding the Chinese Americans, Chinese-American World War II Veteran Congressional Gold Medal Act, Pub. L. No. 115-337, __ Stat. __ (2018).

The satisfaction of defeating discrimination is bound to be temporary. The same issues recur. The exhortation to remember history is in vain, not only because some never agreed that a wrong had been done while others insist this new example is different than the last episode. Skepticism is advisable.⁶¹

Regarding the expulsion of immigrants from the U.S. military, see Dave Philipps, *The Army Stopped Expelling Immigrant Recruits, But an Email Suggests It's Still Trying*, N.Y. TIMES (Sept. 19, 2018), A12; Dave Philipps, *They Came Here to Serve, But for Many Immigrants, the Army Isn't Interested*, N.Y. TIMES (July 7, 2018), A15. President George W. Bush had expedited naturalization for this class of aliens. *Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism*, EXEC. ORDER. 13269 (July 3, 2002).

61. This essay has been influenced by the contrarian work of David Reiff. DAVID REIFF, *IN PRAISE OF FORGETTING: HISTORICAL MEMORY AND ITS IRONIES* (2017); DAVID REIFF, *AGAINST REMEMBRANCE* (2011). See also JEFFREY K. OLICK, *THE POLITICS OF REGRET: ON COLLECTIVE MEMORY AND HISTORICAL RESPONSIBILITY* (2007); PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* (2000).