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Comment: The Stranger who Resides with You: Ironies of Asian-American and American Indian Legal History

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THE STRANGER WHO RESIDES WITH YOU: IRONIES OF ASIAN-AMERICAN AND AMERICAN INDIAN LEGAL HISTORY†

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> *When a stranger resides with you in your land, you shall not wrong him. The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I am the Lord your God.*
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> —*Vayikra (Leviticus) 19:33–34*

I want to begin by noting the personal poignancy of the timing of this conference on the *Korematsu* decision. Tomorrow I will be building a *sukkah* with my family and friends to prepare for the Jewish holiday of *Sukkot.* We build a shack that has an imperfect roof, open to the elements, so that we can both see the stars and feel the rain, to connect with the heavens and the earth. We do this to commemorate the time of exile after the Jews had been miraculously freed from slavery but had not yet reached the promised land—the time of wandering in the desert. This was a time of homelessness and a time of mutual support, a time of fear and a time of manna from heaven—a time, in other words, of terrible contradiction.

In celebrating *Sukkot,* we remember that we were slaves in the land of Egypt so that it will never happen again, to us or to anyone else. We remember that we were freed so that God would give us the Torah, so that we could accept the covenant with God in which we agreed to abide by divine commandments and accept certain obligations. Among those obligations are our obligations to the dispossessed—the widow, the stranger and the orphan—those who have no property, or whose family ties have been shattered. We remember that the stranger "shall be as one of your citizens" and "you shall love him as yourself." We are reminded that property is not permanent, that injustice can rule, that people can be treated as slaves. We remember that property is both something we own and something owned by the non-owner. We have

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obligations to the widow, the stranger, the orphan; they have a claim on social resources—a property right, if you will. We remember being strangers ourselves. We remember that it is our obligation to remember. And this memory has consequences for us—consequences of earth-shattering importance. "You shall not oppress a stranger, for you know the feelings of the stranger, having yourselves been strangers in the land of Egypt."[1]

In light of this injunction, when I read Professor Keith Aoki's study of the Alien Land Laws and Professor Sumi Cho's study of Earl Warren's role in both enforcing those laws and supporting the internment of Japanese Americans, I was struck by a series of terrible ironies.

The Irony of Invasion

The first irony is the incredible fear of foreign invasion voiced by people who had just completed their own invasion of foreign lands. Asian immigrants were seen as foreign invaders—different, inassimilable, dangerous. The imagery of an invasion by a fearful racial "other" was widespread and motivated both the Chinese Exclusion Act of 1882 and the Immigration Act of 1924 which ended Japanese immigration. The timing of each of these acts is ironic. The Chinese Exclusion Act of 1882—passed to stem the horde of invaders from the "Far East"—followed two much larger invasions, also from the east. In 1846, the United States invaded Mexico and seized roughly two-thirds of its territory.[2] And between 1850 and 1880, we saw the wholescale invasion of American Indian lands west of the Mississippi River by the United States in response to the discovery of gold in California.[3] The discovery of gold in California reversed the former policy of separating the "savage Indians" from the civilized white man. The seizure of two-thirds of Mexico, the discovery of gold and the settlement of California ended any hope of separation. Manifest Destiny ruled the day.

The fear of invasion by Asian immigrants followed right after the United States' own invasion and seizure of Indian lands. The timing of the Chinese Exclusion Act makes one wonder whether white leaders of the United States possessed a guilty conscience about their own invasion of foreign lands. Through legislation about the Chinese, they could indeed have been speaking about themselves and their own actions. The timing of the 1924 Immigration Act, closing Japanese

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[1] *Shemot* (Exodus) 23:9.

[2] *See* Alan Brinkley, The Unfinished Nation 333–37 (1st ed. 1993).

[3] *See* Francis Paul Prucha, The Great Father 609–758 (1993).

immigration, coincided with the 1924 Citizenship Act, by which all American Indians were made citizens of the United States, whether they wanted to be or not. Absorbed into the United States, colonized, and subordinated—the 1924 Citizenship Act was one more step along the path of conquest and invasion of Indian lands.

The great irony of the Alien Land Laws story is that they simultaneously denied both property and citizenship to people who wanted these things while forcing American Indians to accept both property and citizenship against their will. When we juxtapose the legal treatment of Japanese immigrants and American Indians, we see that the means of oppression are various. People can be oppressed by denying them citizenship and by granting them citizenship. They can be oppressed by denying them property and by granting them property.

The Irony of Assimilation

The Chinese Exclusion Act, the 1924 Immigration Act and the Alien Land Laws were premised on the notion that Asian immigrants could not be assimilated. It is ironic, as Professor Aoki points out, that United States law prohibited Japanese immigrants from becoming United States citizens, and that the United States then used the fact that such immigrants retained a connection with the Japanese emperor as proof that they were dangerous and could not be assimilated. This belief in the savage, inassimilable "other" replayed the arguments for removal of Indians from east of the Mississippi to Indian Territory (in what later became Oklahoma) in the 1830s. The Cherokees, Choctaws and Creeks in the South, and the Shawnees, Potawatomies and Miamis in the Northwest Territory, were removed from white society because they were viewed as savages. The patent falsity of this proposition did not matter. The Cherokees, for example, developed an agricultural lifestyle, a written language and a constitution. They were so "civilized" that some Cherokees even owned slaves. The same arguments used to justify removal of Indians were used to justify the Alien Land Laws, immigration restrictions and, ultimately, internment. Again, their truth or falsity did not matter. They were believed to be true by the whites, and that was enough.

Similarly, Japanese immigrants were denied the right to own property on the ground that they could not be assimilated. They were denied the right to become United States citizens on the same ground. Yet at the same time the Alien Land Laws were being passed and enforced between 1913 and the 1940s, the United States had instituted a policy of *forced* assimilation of American Indians. The Dawes Act of

1887 provided for the wholesale dismantling of tribal lands; title was taken from the tribes and transferred to individual tribal members. Rather than communal ownership managed by the tribe, individual ownership of particular parcels was required.

The allotment policy was part of a larger assimilation policy. Granting individual rights to tribal members was intended to break tribal allegiances and eventually result in the dismantling of tribal government. It was intended to make Indians into settled agriculturalists and ranchers, to accept the idea that the pursuit of self-interest is the highest good. Communal obligations were to be eradicated; private property would instill values of individualism, independence, self-reliance and liberty. At the same time, Congress created the Courts of Indian Offenses, which, among other things, punished Indians for practicing tribal religion and custom. Congress funded religious schools to Christianize the Indians. Boarding schools were created and children taken from their parents to turn them into "Americans." Their hair was cut, they were dressed in "civilized" clothing and they were punished for speaking their native languages or engaging in customary religious practices.

This process of forced assimilation culminated in the 1924 Citizenship Act by which all American Indians were made citizens of the United States. While the granting of citizenship might be viewed as a good thing, it is important to remember that it was part of a policy designed to eventually destroy tribal citizenship. It was not a policy of dual allegiance but a policy of shifting allegiance to the United States from the tribes. Although the act might be viewed as a long overdue recognition of citizenship, it can also be viewed as a policy of forced citizenship that undermined the strength of tribal governments and traditions.

The irony is apparent. At the same time the states were passing Alien Land Laws designed to prevent Japanese immigrants from becoming property owners, the federal government was forcibly granting individual property rights to Indians who, for the most part, did not want those rights. They did not want these property laws because they came at a terrible price—the price of forced assimilation and conquest.

The Irony of Property

The third irony of the Alien Land Laws is the willingness of the Supreme Court that decided *Lochner v. New York*[4] to sacrifice its emerg-

[4] 198 U.S. 45 (1905).

ing view of the sanctity of freedom of contract and private property in order to protect white supremacy. The theory of *Lochner* was that the state could not interfere with the "right of contract" and that any such interference constituted a deprivation of "liberty" in violation of the Fourteenth Amendment. Yet in *Terrace v. Thompson*[5] and *Porterfield v. Webb*,[6] the Court ruled that the Alien Land Laws did not violate the Constitution, even though they clearly interfered with the liberty to buy and sell property—a central component of the freedom of contract ideology. Likewise, in *Plessy v. Ferguson*,[7] the Court upheld the Jim Crow laws of the 1890s, even though they similarly interfered with the freedom to contract between persons of different races.

The American Indian situation not only reflected the *Plessy* philosophy but was supported by the view that foreign relations and citizenship were areas beyond the rule of law. Immigration and citizenship policies were treated as subjects within the competence of the legislative and executive branches. Denial of property to non-citizens was perfectly appropriate since the polity had the power to determine membership. Accordingly, in *Lone Wolf v. Hitchcock*,[8] decided two years before *Lochner*, the Supreme Court ruled that Indian affairs were political questions within the sole discretion of Congress and the President. Thus, abrogation of treaty-based property rights did not amount to a deprivation of property without due process of law (as one might have assumed under the reasoning of *Lochner*), but was a proper exercise of Congress's "plenary power" over Indian nations, a power apparently without any constitutional limits whatsoever. The protection of freedom of contract as a constitutional right sits uneasily with the proposition that Congress could take tribal property without any constitutional limit.

The Irony of Warren

We also have the irony of Earl Warren. Professor Sumi Cho points out the contrast between Warren's reputation as a liberal growing out of *Brown v. Board of Education*[9] and its progeny, and his role in enforcing the Alien Lands Laws and promoting internment of Japanese Americans before his joining the Court. To this comparison, I add another.

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[5] 263 U.S. 197 (1923).
[6] 263 U.S. 225 (1923).
[7] 163 U.S. 537 (1896).
[8] 187 U.S. 553 (1903).
[9] 347 U.S. 483 (1954).

In 1955, just one year after the celebrated *Brown* decision, the Supreme Court decided another, much less well-known case, *Tee-Hit-Ton Indians v. United States.*[10] In that case, the Supreme Court unanimously held that tribal property that had not been recognized by treaty or statute was not "property" within the meaning of the Fifth Amendment and therefore, could be taken by the United States without compensation. Thus, the United States could take timber belonging to the Tee-Hit-Tons without incurring any constitutional obligation to pay just compensation, as would be required for any other property owner in America. The arguments proffered by the Court are both remarkably unpersuasive and decidedly racial.[11]

Although Chief Justice Warren did not write the *Tee-Hit-Ton* decision, he did join it. The opinion was unanimous and he found nothing to quarrel with in the Court's reasoning. Following one year after the famous *Brown* decision, one wonders at the limits of the meaning of equal protection under the law. Tribal affairs remained, to a significant extent, an area in which the rule of law did not apply. The *Brown* era was also the termination era, in which the United States was busy ending the government-to-government relationship it had established with many tribes. Many tribes were "terminated" in the sense that federal recognition of tribal sovereignty was revoked. Each act of termination violated a pre-existing treaty and each act was predicated on the policy of forced assimilation. But the failure to define pre-existing Indian property rights—so-called "original Indian title"—as property within the meaning of the Fifth Amendment's Takings Clause does not sit well when compared with the rulings of the Marshall Court which held that Indian title is "as sacred as the fee simple of the whites."[12]

Warren may stand as a liberal icon, but his upholding of the Alien Land Laws, his refusal to invalidate internment and his approval of uncompensated seizures of Indian lands contrast strongly with this image.

The Irony of the Stranger

We are a nation of immigrants. The only residents of the United States who do not fit in this statement are the descendants of those who were here when the rest of us arrived. And yet our nation of

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[10] 348 U.S. 272 (1955).

[11] *See, e.g.*, Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994).

[12] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

immigrants has told immigrants who become needy while they are here among us that they have no entitlement to basic subsistence. If they do not like this, they can work, even if they are elderly or disabled, or they can go back where they came from.[13] Those of us who were welcomed to this country by the words of the Jewish poet Emma Lazarus on the Statue of Liberty wonder at the hypocrisy and callous disregard shown to our newest residents.

> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore,
> Send these, the homeless, tempest-tossed, to me:
> I lift my lamp beside the golden door.[14]

My father and my grandparents passed by those words as they escaped pogroms in Russia and Poland. The safe haven here protected them from the Nazi scourge that killed their relatives who remained behind. Do we not mean those words anymore? Should we wipe them from the face of the statue? Do we want only the vigorous, the wealthy, the young?

The Alien Land Laws, the internment of Japanese Americans and the various programs to subdue and absorb American Indian nations strike us now as terrible errors. Yet in their time, they were supported by people who believed they were doing the right thing. What are we doing now that we will regret in a hundred years?

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[13] In the summer of 1997, President Clinton pressured Congress to restore disability payments to immigrants who were legally here on or before August 22, 1996, and who are or who become disabled in the future. *See* Eric Pianin, *Republicans Agree to Restore Some Welfare Benefits*, WASH. POST, July 26, 1997, at A10, *available in* 1997 WL 11975836. Those disabled immigrants had lost benefits as a result of the welfare reform laws passed in 1996. Legal immigrants are still ineligible for food stamps. *See Welfare Reform Act Upheld in Federal Court; Ruling Allows Aid Cuts to Infirm Legal Aliens*, WASH. POST, July 25, 1997, at A12, *available in* 1997 WL 11975726.

[14] JOHN BARTLETT, FAMILIAR QUOTATIONS 664 (15th ed. 1980) (quoting Emma Lazarus).