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Immigration Policy in the United States of America

～Witnessing white supremacy/racism and irrationality of the American legal history～

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Introduction

Background

Living in Japan as a Korean citizen for 13 years, I have always interested in the themes such as rights of foreigners, minorities, globalization, and citizenship. Throughout theses years spent living as a foreigner have definitely influenced my perspectives. I personally think that I have been very critical about my surroundings and look at them objectively. I got a chance to study abroad as an exchange student at University of California Berkeley from August 2013 to May 2014 from Keio University. As I was greatly interested in the subject of sociological perspective of immigration law, I took various classes regarding immigration, citizenship, racism, and ethnicity.

I would also like to touch briefly upon the uniqueness of the Berkley area and California as a whole, where one can see a significant number of people from different backgrounds and ethnic diversity coexist. Asians make up almost 40% of the whole demographics of UC Berkeley's undergraduate students. California has the history of immigration policy and law and one can examine all the footprints of both cruelty and beauty of its history. One example would be an Angel Island, where Chinese attempting to enter United States were detained as of 1910. As a leading exemplary place of diversity and cohabiting, I wish that readers of my thesis would share the same urge to understand the importance of knowing what happened that makes up what is now and have as immigration policy today.

I felt that the writing about U.S. immigration policy is interesting in a way that the problems are more visible than situations in Japan. My perspective on the U.S. immigration policy has changed drastically after I studied abroad. Originally, I thought that the United States would have a sort of "lenient" policy than other countries. This is because people often hear that "America is a 'nation of immigrants.'" What I found out was quite different. Some of these stereotypical representations do not match the reality and explain enough about what is going on in the United States. For example why are Mexicans perceived as prototypical illegal aliens? Why are Asian Americans so often considered as alien citizens when European Americans are regarded to belong? Generally speaking, who are the original Americans anyways? To be able to answer all these questions, we need to understand intricate U.S. history.

Purpose of this thesis

Recently there was a huge protect against the cases in all parts of the United States where we saw injustice regarding the right of black man. One of them is Michael Brown, who was killed shot by a white police officer in Ferguson, Missouri, and the other is Eric Garner who died when the police chokehold him. It is questionable whether the police officers, both the white men, were indicted with justice. The main focus of this thesis will be historical white supremacy/racism and irrationality of the American immigration law. These recent news tell us that racism, especially what it seems like white supremacy, still prevails in the U.S. society. In fact, there were many cases where one can witness such irrationality throughout history.

The purpose of this thesis is to go through the U.S. historical legal cases, which formed what is now immigration policy, and clarify white supremacy/racism and irrationality. It is surprising to find out that how people have fought against such racism and strived for the justice and right as immigrants or even citizens. Laws once favored the white and tried to exclude certain races. By doing this, it will hopefully help the readers, to think about what citizenship means, other races, and foreigners. Especially because Japan is considered a racially homogeneous nation, it seems to me that its citizens are not keen to the presence of foreigners or globalized people around them. Reading this thesis would hopefully inspire those with insights to be more conscious about their surroundings, and rethink situations regarding immigration and globalization.

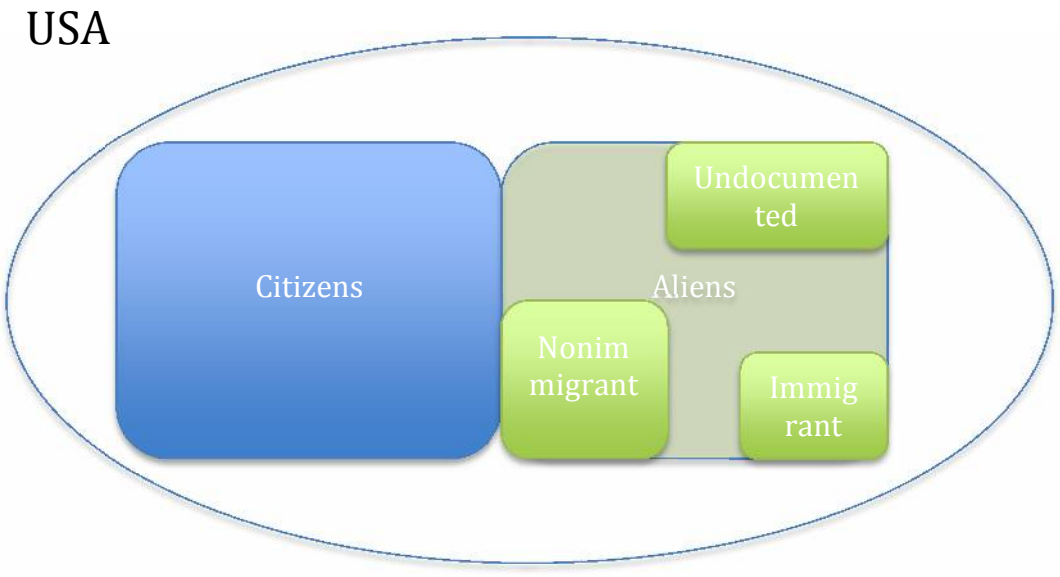
Methodology

Briefly touching upon the methodology, I have read the scholarly texts that had more emphasis on how the law has served to shape both immigrant communities and American national identity, compared to different approaches of sociology, political science, or ethnic studies. In addition to scholarly texts, I have read and analyzed excerpts of both cases and the statute that governs immigration and citizenship, the Immigration and Nationality Act (INA).

Brief Overview and History of U.S. Immigration Law & U.S. Admissions Today

Origins of Federal Immigration Law

Basic terms we need to bare in mind are citizens, aliens, immigrants, nonimmigrants, and undocumented. (Diagram-*1*) These terms are often confused with one another and being able to differentiate these is quite important. Simply, citizens are those who are entitled the citizenship of the United States of America. Aliens are immigrants, nonimmigrants, or undocumented. Immigrants are those who are legal permanent residents (LPR) and green card holders. These people are similar to the concept of foreigners in Japan who have obtained the appropriate visa to stay in Japan, usually holders of "*Zairyu* 在留 card". There are nonimmigrants that are temporary visitors in U.S. a particular purpose. There are also undocumented, making a lot of socioeconomic problems in the States, who are either present without admission or overstayed or otherwise violated the terms of visa.



(Diagram-1: *the number of people is not shown correctly proportionate but rather just to help visualize*)

Another thing to bear in mind is that the term "alien" is quite dehumanizing. The term noncitizen, which is a synonym, could replace the word alien. This problem can be also seen in Japan, as the term alien ("*gaikokujin* 外国人" or "*gaijin* 外人") is replaced with the word "*Zairyu* 在留" (equivalent to "resident" in English) recently. In my personal opinion, I can analyze this change in a positive manner that the Japanese

government is trying to be more inclusive and understanding about foreigners in Japan by referring to "residents", than just "aliens".

From this observation, I want to emphasize the importance of being able to differentiate various statuses of foreigners living in one country.

Another important term we should understand is exclusion versus deportation and how the federal government has chosen to regulate immigrants through exclusion and deportation. Exclusion is when noncitizen is "at the gates" seeking to enter and the government seeks to keep them out. Deportation is when noncitizen is already inside and the government seeks to kick them out. Both exclusion and deportation fall under umbrella term of "removal."

Victor Romero described immigration law in his book (2008)[1], immigrant law as the rules governing when a noncitizen may enter and when a noncitizen must leave. Immigration law is perceived as both contract and property, more than a human rights policy. According to Hiroshi Motomura (2006)[2] argues that the concept of immigration law as contract between the United States and the noncitizens arose after 1965 when there were changes in the demographics of the immigrant (LPR) stream. Moreover, the concept of immigration law as property in a nutshell is, nation is a host while noncitizen is a guest. Noncitizens only have a privilege to be in the United States and their privilege can always be revoked. If one has no right, then one is considered to be "trespassing". In contrast to this "immigration law", Romero also refers to an "alienage law" that governs how noncitizens are treated once they are inside the country. For example, can the government (federal or state) bar a noncitizen from welfare benefits, voting, from certain jobs, and so on.

In general, there are more protections for noncitizens in terms of their lives inside the country and outside of immigration regulation. To sum up, one way to think about this is the "soft inside" with the regulation of the border as the "hard outside." Linda Bosniak (2006)[3], a theorist, has analogized this idea to a candy, hard on the outside, soft on the inside. The idea is that being in the United States gives the

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1 Victor Romero, "Overview and History of U.S. Immigration Law" in Everyday Law for Immigrants (2008)

2 Hiroshi Motomura, "Americans in Waiting" (2006)

3 Linda Bosniak, "The Citizen and the Alien: Dilemmas of Contemporary Membership," pg.19 (2006)

noncitizen "territorial personhood" that merits a softer treatment than the harsher realm of immigration law, which regulates entry and exit. The idea of political theorist Michael Walzer, in his book[4] (1984), said that a nation state has the right to control its borders, but that once here, persons should be treated leniently. However, this is a fiction in some ways, because so long as the noncitizen remains a noncitizen, she lives with the threat of deportation, the "hard edge" coming into the soft inside. Policies shaping admission and policies shaping rights regarding people who are once inside, are sometimes inseparable.

Chinese and Japanese Immigrants & Deportation

Yick Wo v. Hopkins 118 U.S. 356 (1886)[5]

This is an example of individual rights in alienage law (Romero) context. San Francisco city could not discriminate against Chinese noncitizens by denying them permits to operate laundries, as they, although aliens, were also "persons" with individual, Constitutionally protected rights. Chinese laborers in the United States do have some constitutional protections and other protections under the laws "in regard to their rights of person and of property."

Another big question arises as to who regulates immigration. Within the federal government, congress makes laws, executive enforces laws, and judiciary interprets laws. Since 1880s, immigration regulation been entrusted to the federal government.

The plenary power, legislative and executive branches have primary authority to regulate immigration, with only a very limited role for the judiciary, "allows Congress and the president to shape immigration policy in ways that reinforce the idea that immigration law is a contract not a human rights policy (Romero)". Shortly, plenary power allows the political branches (congress and executive) of government to regulate immigration policy (exclusion, deportation, and admission) and there is little room for the judiciary to review. Because of plenary power doctrine, attempts to argue that due

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[4] Michael Walzer, "Spheres of Justice", (1984)

[5] Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.408-411

process has been violated by Congressional or Executive regulation of immigration have been mostly unsuccessful, with a very few exceptions. Three cases that established plenary power were ***Chae Chang Ping 130 U.S. 581 (1889)***[6], ***Nishimura Ekiu 142 U.S. 651 (1892)***[7], and ***Fong Yue Ting 149 U.S. 698 (1893)***[8].

The question is that can an individual, noncitizen argue his or her right not to be excluded or deported because it violates its rights? What happens to those who illegally lived in the United States for a long term and have kids but is forced to move out once being found out? Today, it seems almost as impossible to fight against the legal structure.

Ironically, Bill of Rights of Constitution as U.S. "human rights" law, in the Fifth Amendment, which constrains the acts of the federal government, says, "No person shall…be deprived of life, liberty, or property, without due process of law." In the Fourteenth Amendment, which constrains the acts of the states, says "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." There are two kinds of due processes; procedural due process and substantive due process. Procedural due process deals with how process happens. For example, did noncitizen have notice, have hearing, have opportunity to present evidence, and such. Substantive due process deals with why process happens. For example, was noncitizen excluded or deported because of poverty, was suspected terrorist, or was Chinese, and so on.

In 1882, 35,579 Chinese were admitted to US. In 1887, 10 Chinese immigrants were admitted to US. This was because of the Chinese Exclusion Act introduced in 1882, and other treaties as well. (Diagram-2) Most of these restrictions on immigrants have unreasonable reasons and contradict with each other. One of the examples is as there was a post civil war depression; organized labor began to demand restrictions on Chinese immigration. Chinese were seen as taking away US citizen's jobs. Another example is prohibiting entry of those coming for "lewd or immoral purposes" from "China, Japan or other Oriental country," but how would anyone know beforehand if those women would become prostitutes when entering the country? This is both racial

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6 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.414-418

7 https://supreme.justia.com/cases/federal/us/142/651/case.html

8 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.420-425

and gender discriminatory. Eithne Luibheid (2002) [9] argues that women's sexuality becomes subject double standards for judging whether she will likely be a public charge.

(Diagram 2- referred Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.397-486)

Chae Chang Ping v. United States 130 U.S. 581 (1889)[10]

The idea that Congress has the power to exclude was first upheld in this case, which is also known as the "Chinese Exclusion Case". To briefly explain this case, Chae Chang Ping had immigrated to US in 1875 and worked as a laborer. He left with a valid return certificate in 1887 for a visit to China. While he was on his way back, Congress passed the 1888 law discontinuing certificate program. He arrived on e week after the law was passed and was excluded. Chae Chang Ping had two arguments. His first argument was that this contradicted the Burlingame treaty. However, Supreme Court said that a statute (Chinese Exclusion Act) is equivalent to a treaty. His second argument was nowhere in the Constitution does it say, "Congress has the power to regulate immigration." However, Supreme Court stated that the power to exclude is a power of every nation to control its own territory. Inherent in a nation's sovereignty is the right to control its borders and exclude aliens. Moreover, there is no limitation on

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9 Eithne Luibheid *"Entry Denied: Controlling Sexuality at the Border" (2002)*

10 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.414-418

this power, and is linked to foreign relations. Since there was a massive number of Chinese people coming into the United States, if the legislature decides the "presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with China."

Erika Lee (2003) [11]argues that Chinese exclusion created legal architecture for immigration policy today. Typically, many people think of US as "nation of immigrants." Erika introduced the idea of "gatekeeping nation," and this is obviously a contradicting perspective. She suggests that Chinese exclusion "provided a powerful framework to be used to racialize other threatening, excludable, and undesirable aliens." R example, seeing Chinese as prototypical alien, other Asians as part of "Oriental invasion," Mexicans also lumped as foreign rather than native, as racially and culturally inassimilable, Italians as "Chinese" of Europe ("coolies"), French Canadians as "Chinese" of Eastern Sates, or Eastern Europeans as part Asiatic. These stereotypical labels of foreigners, not as strong as used to be, but still persist today.

Moreover, Chinese exclusion "ushered in drastic changes in immigration regulation," control and surveillance. There were appointments of first federal immigrant inspectors (before, it was through US Customs), the first federal attempt to identify and record movement, occupation and familial relationship tracking systems, the first requirement that aliens carry identification (then certificates, today green cards), the first definition of illegal immigration as criminal offense and the first definition of deportation.

Of course, not all the Chinese were excluded. Returning laborers with wife, child, and parent in US or $100 in debt or property were allowed to enter. Also, there were exempt classes like such as merchant, teacher, student, tourist, and diplomat who could enter as nonimmigrants. In addition to this, Chinese who became US citizens, of course, were allowed as well.

United States v. Wong Kim Ark 169 U.S. 649 (1898)[12]

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11 Erika Lee, ""At America's Gates", (2003)

12 https://supreme.justia.com/cases/federal/us/169/649/case.html

Chinese claiming to be citizens were admitted into the country, making up almost half of the total number of Chinese admitted. This was possible because of Wong Kin Ark, born in San Francisco in 1873, excluded after a visit to China, and arguing that he had the right to reenter as a "native-born citizen under the Fourteenth Amendment." The Court's decision states, "it is concede that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him." The question presented by the record is whether a child born in the United States, of parents of Chinese descent who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in nay diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States by virtue of the first clause of the Fourteenth Amendment of the Constitution.

Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. This is the birthright citizenship amendment.

At this time, and for many years after, Chinese were unable to naturalize as citizens. No one doubts that the Fourteenth Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the Constitutional Amendment. The fact that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution. Birthright citizenship was thus recognized for Chinese Americans as of 1898. However,

we can observe that these foreigners living in the United States long enough continue to be "aliens."

Nishimura Ekiu v. United States 142 U.S. 651 (1892)[13]

Ekiu was trying to meet here husband with $22 in hand; he was to meet her at hotel; and she did not know his address. Then she was excluded as "likely to become a public charge." She then brought writs of habeas corpus petition. However, her exclusion was upheld, "as to such persons decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." Was she excluded explicitly as likely to become a public charge, but quietly as a potential prostitute as well? Majority and J. Gray's opinion is that Ekiu establishes "every sovereign nation has the power, inherent in sovereignty, to forbid the entrance of foreigners, or to admit them only under conditions the nation prescribes."

Nayan Shah (2001) [14] wrote Chinese men and women were considered unhealthy, dangerous, and inadmissible. This was shaped through the norms of martial heterosexuality, through discourses of the nuclear family formation, adult male responsibility, and female domestic caretaking. Chinatown was characterized as an immoral bachelor society of dissolute men who frequented opium dens, gambling houses and brothels; the few visible Chinese women were considered to be prostitutes. Chinese men were considered deviant because of their lack of access to women.

Fong Yue Ting v. United States 149 U.S. 698 (1893)[15]

How is deportation different from exclusion exactly? Law challenged in this case is 1892 Geary Act (Diagram-2). This act extended 10-year exclusion of Chinese laborers. Moreover, Chinese laborers inside the U.S. would now be subject to deportation if could not prove lawful residence with a certificate of residence. If no such certificate would have to produce testimony of one credible white witness that Chinese was in fact a resident at the time of the act. Briefly describing the case, Fong Yue Ting and two other Chinese laborers were arrested within U.S. for failure to produce either a residence certificate or the testimony of a white witness who would swear they had been living in

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13 https://supreme.justia.com/cases/federal/us/142/651/case.html

14 Nayan Shah "*Contagious Divides: Epidemics and Race in San Francisco's Chinatown"* (2001)

15 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.420-425

the U.S. at time 1892 Geary Act was passed. In fact, other evidence indicates they had lived in the United States since 1879, 1877, and 1874.

The majority and J. Gray think that the right to expel or deport foreigners rest upon the same grounds as *Ekiu,* and is as absolute and unqualified. The power to deport, like the power to exclude, is vested in the political departments (executive and legislative). Their main argument would be "Deportation is not punishment." On the other hand, as one can witness from the J. Brewer's dissent, "They have lived here almost as long a time as some of those who were members of the Congress that passed this act of punishment and expulsion. They are not just passing through." On the basis of the dissent, their argument would be "Deportation is punishment. Before receiving punishment, one must receive a trial. But here, the process is arbitrary."

Then the question arises, whether the United States is a nation of immigrants or a deportation nation. Deportation is not just about immigration control but also about discretionary social control. There are two basic types of deportation laws. One is extended border control, which thinks of foreigners or noncitizens as contractors. Another is post entry social control, which regards foreigners or noncitizens as country's property; therefore they are seen as eternal probation and guests. Three recent trends in deportation law are, post 9.11 US using border control for social control of certain groups in "war on terrorism", increase in post entry social control via criminal grounds in "war on crime," and expansion into US soil of mechanisms of deportation created originally for the border, which professor Volpp used a metaphor as "war on illegal aliens."

Mae Ngai (2004)[16] described the trend of numbers of noncitizens deported. Deportation became phenomenon as response to numerical immigration restriction of 1921 and 1924. New discussion emerged of deserving and undeserving illegal immigrants, with the creation of discretion to unmake illegal immigrants. These processes helped create racialization. Ngai's research shows how Mexicans became the stereotypical illegal immigrant, and function as the opposite to the European immigrants who were presumptively legal and on the path to citizenship.

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[16] Mae Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," in Impossible Subjects: Illegal Aliens and the Making of Modern America (2004)

Removal Grounds and Procedure

Many persons who the government seeks to exclude or deport are put in detention. That government detention is what would be challenged via writs of habeas corpus. The reasons why the government frequently detains noncitizens are flight risk, risk to community or danger to society, disincentive to noncitizens to challenge removal order, or disincentive to noncitizens to come to U.S. in the first place. The U.S. government detains approximately 380,000 people in immigration custody each year in about 350 facilities at an annual cost of more than $1.7 billion. Some groups of noncitizens face mandatory detention pending their removal proceedings because they are inadmissible or deportable on crime related grounds, terrorism related grounds, or they are subject to "expedited removal," meaning they arrived with no documents or with what appear to be fake documents.

This categorical, mandatory detention was unsuccessfully challenged in ***Demore v. Kim 538 U.S. 510*** **(2003)**[17]. Hyoung Joon Kim was a UC Santa Barbara student and LPR from Korea facing deportation on criminal grounds. Kim had shoplifted computer games, batteries, and an extension cord from the UCSB bookstore, and a computer game and three phone cards from Costco, after he had been put on probation when he was 17 for bringing a BB gun to school and breaking into a tool shed where he and his friends found handguns. He served two years in state prison and was put into INS custody. He wanted to be released while he fought his removal, but the Supreme Court said no. There is no limit on how long a person can be held in detention while their case is being heard. This social problem still persists today as an ACLU lawsuit yielded a list from the administration of 350 immigrant detainees in the Los Angeles area in May 2010, who have been held for periods longer than six months while waiting for their cases to be heard. People like Damdin Borjgin, a Mongolian man seeking asylum in the United States who has been in custody since November 2007, which makes approximately two years, and has never had a hearing to decide if he is eligible for release.

Furthermore, historically, noncitizens could be held indefinitely after the removal proceeding ended, if there was no country to which the noncitizen could be

[17] https://supreme.justia.com/cases/federal/us/538/510/

returned. This could happen if the person was stateless, or the person came from a country with no repatriation agreement with the United States.

How did Japanese American internments of over 120,000 people occur? It began with imposing the military order of a night curfew, exclusion from certain areas and required reporting to assembly centers, and detention in internment camps. All these happened without any charges or trials. Late 1930s, Justice Department compiled list of over 2,000 Japanese resident aliens who were potentially subversive and dangerous. These were leaders of civic groups, businessmen, language teachers, Buddhist priests, editors of Japanese language press, and martial arts instructors. They made up nearly entire leadership of first generation West Coast Japanese Americans. This was known as the "ABC list." December 7, 1941, the bombing of Pearl Harbor occurred. 2,192 Japanese, 1,393 German, and 264 Italian nationals were arrested. Enemy alien review boards conducted individual loyalty hearings. Most of Italians and Germans were released whereas two thirds of the Japanese were detained in internment camps.

The U.S. Joint Immigration Committee of California legislature stated that Japanese are "fundamentally inassimilable, those born in this country are American citizens by right of birth but they are also Japanese citizens, liable to be called to bear arms for the Emperor, either in front of, or behind, enemy lines." This shows the fear and doubt that the U.S. had of Japanese Americans that they could always betray the United States. Compared to Italians and Germans, DeWitt stated that "the Japanese race is an enemy race and while many second (Nisei) and third (sansei) generation Japanese born on U.S. soil, and possessed of U.S. citizenship have become Americanized, the racial strains are undiluted. It makes no difference whether he is an American citizen, he is still a Japanese."

Outside the camps, the courts had begun to consider the cases that challenged the internment. Three prominent cases that show meaningless of the citizenship and unreasonable treatment of Japanese ancestry and court decision were ***Minoru Yasui v. United States 48 F. Supp. 40 (D. Or. 1942)***[18], ***Gordon Kiyoshi Hirabayashi v. United States* 46 F. Supp. 657 (W.D. Wash. 1942)** [19], ***Fred Korematsu v. United States 323***

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[18] Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.440-446

[19] Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.458-462

U.S. 214 (1944)[20]. The question here is, even after a person has the citizenship, he was suspected as a threat and treated as a foreigner not a citizen, then when and whether a person can really be admitted as a citizen ever.

Minoru Yasui v. United States 48 F. Supp. 40 (D. Or. 1942)[21]

Yasui was born in Oregon, and graduated from University of Oregon as well as University of Oregon Law School, while serving in the Army Infantry Reserve. He found it difficult to land a job as a lawyer. His father introduced him to the Japanese consul in Portland, so Yasui secured a position as an attaché. The day after Pearl Harbor, he resigned his consular post, and tried to report for duty. He was refused. He tried eight times to report, and each time was refused. His father was then arrested for membership in the "ABC list" and was sent to an internment camp in Montana. He decided to challenge the curfew order by turning himself to the police, which is quite an interesting fact. He was then found guilty of violating the curfew orders while the judged found that the curfew orders were unconstitutional as applied to US citizens, he also found that Yasui had indirectly renounced his US citizenship through his service at the Japanese Consulate. Yasui did not lose his citizenship through his service at the Japanese consul.

***Gordon Kiyoshi Hirabayashi v. United States* 46 F. Supp. 657 (W.D. Wash. 1942)**[22]

Hirabayashi was born near Seattle, where his father operated a roadside fruit market. His parents belonged to a Quaker like group called Friends of the World. He became a pacifist, and registered with the draft board as conscientious objector. Because of family finances, he alternated study at University of Washington with work as a houseboy and farmhand. When was declared, he was 24 and in his senior year at university. He violated the curfew repeatedly because he thought it was absurd as he was American, and then decided to challenge the evacuation order. The Court only addressed the constitutionality of the curfew order. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose

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[20] Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.446-453

[21] Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.440-446

[22] Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.458-462

institutions are founded upon the doctrine of equality. We many assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas." The Court argued that there was a reasonable basis to make the decision to require all persons of Japanese descent to obey the curfew.

Fred Korematsu v. United States 323 U.S. 214 (1944)[23]

Korematsu was born in Oakland, graduated from Oakland high school, and worked as a shipyard welder. He lost this job after the Boiler Makers Union expelled its members of Japanese descent after Pearl Harbor. The Navy turned down his attempt to volunteer for service. He wanted to stay with his girlfriend, Ida Boitano. He, in fact, had had plastic surgery to change his appearance so as not to be ostracized when they moved to East Coast in the future. When he was arrested, he was found in San Leandro, walking down the street with Boitano. He claimed to be of Spanish-Hawaiian origin and had a fake draft registration card in the name Clyde Sarah. He then found guilty. The Court stated "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. There was evidence of disloyalty on the part of same, the military authorities considered that the need for action was great, and time was short."

J. Murphy dissents these cases "fall into the ugly abyss of racism. This forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity. The reasons appear half-truths and insinuation. I dissent from this legalization of racism." J. Jackson dissents, "Korematsu was born on our soil. No claim is made that he is not loyal to this country."

Racial Restrictions on Naturalization and U.S. citizenship

Acquisition of citizenship in the U.S. can be done in two ways, by birth and by naturalization. There are birthright citizenship, jus soli, and citizenship by descent, jus sanguinis, within the category of by birth citizenship. Racial restrictions on birthright citizenship (jus soli) can be seen in cases like Dred ***Scott v. Sandford 60 U.S. 393***

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23 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.446-453

(1856)[24], ***U.S. v. Wong Kim Ark 169 U.S. 649 (1898)***[25], and ***Elk v. Wilkins 112 U.S. 94 (1884)***[26].

Scott v. Sandford 60 U.S. 393 (1856)[27]

Dred Scott, plaintiff, was the descendants of African slaves sold to the defendant, John Sandford. Scott sued Sandfrod for his freedom and the freedom of his family. Whether Scott was free or enslaved, he including other blacks was not and could not become citizens.

Elk v. Wilkins (1884)[28]

John Elk was born on a reservation and subsequently moved to non-reservation U.S. territory, Omaha, Nebraska, where his attempt to register to vote on April 5, 1880 was denied. The Supreme Court held that Elk was not "subject to the jurisdiction of the United States" since at birth he owed allegiance to his tribe. In 1924 Congress conferred citizenship on all Native Americans born within the territorial limits of the United States; in 1940 Congress passed the Nationality Act specifically bestowing citizenship to persons born in the United States "to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe." This shall not impair the right of such person to tribal or other property.

In the Constitution, Congress is granted the power "to establish a uniform rule of Naturalization." Historically, the Constitution had a clause "any alien, being a free white person over the age of twenty-one who shall have resided within the limits and under the jurisdiction of the United States for a term of at least two years" may naturalize. In 1870, added "aliens of African nativity and person of African descent" could naturalize. However in 1882, Chinese were specifically prohibited from naturalizing within the Chinese Exclusion Act. In 1940 "descendants of races indigenous to the Western Hemisphere," in 1946 "Philippines and India," and in 1950 "Guam." Finally in 1952, became all; "the right of a person to become a naturalized citizen of the United States

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24 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.130-132

25 https://supreme.justia.com/cases/federal/us/169/649/case.html

26 https://supreme.justia.com/cases/federal/us/112/94/

27 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.130-132

28 https://supreme.justia.com/cases/federal/us/112/94/

shall not be denied or abridged because of race or sex or because such person is married."

Gender raised another problem in naturalization. In 1855, white women who married U.S. citizen husbands automatically became U.S. citizens themselves. However, women who were racially barred form citizenship could not become citizens through marriage. Thus, Chinese women who married U.S. citizen husbands did not become U.S. citizens themselves. Black women who married U.S. citizen husbands did become U.S. citizens after 1870. In 1907, Expatriation Act stated that U.S. citizen women, of any race, who married noncitizen men, lost their citizenship. In 1922 Cable Act allowed white or black women who had been expatiated for marrying white or black noncitizen men to regain citizenship, and guaranteed that future marriages would not lead to expatriation. On the other hand, this act expatriated U.S. citizen women who married noncitizen mean who were ineligible to citizenship. It also did not allow women who had been divested of citizenship to regain it if they, themselves, were ineligible to citizenship. The Act also kept women who themselves were eligible to citizenship from naturalizing, so long as they were married to men who were ineligible. IN 1931 Act, first statute passed by Congress to rescind racial barrier to citizenship was passed to fix some of the problems created by the Cable Act.

The Prerequisite Cases, 52 cases starting in 1878 referring to the racial prerequisite to naturalization, question the white identity, meaning what is the definition of "white"? Ian Haney Lopez (2006)[29] discusses how the four distinct rationales were used to answering this question of what is white in the prerequisite cases. Those four rationales are common knowledge, scientific evidence, congressional intent, and legal precedent. However, in many cases, between 1878 and 1909 common knowledge and scientific evidence pushed in the same direction: denying naturalization. From 1909 to 1923 one can see the conflict between science and common knowledge with lost of contradictory rulings as to who is "white." The definition of "Caucasian" was often ambiguous and the conclusions of cases were also contradicting with each other. One can conclude, as Ian also pointed out we could see conflict between used rationales,

[29] Ian Haney Lopez, "Racial Restrictions in the Law of Citizenship," "The Prerequisite Cases," and "Ozawa and Thind," in White By Law: the Legal Construction of Race (2006)

that interpretations of law were varied in that period which can be witnessed in many cases, and nobody actually knew the exact definition of "white."

Takao Ozawa v. United States 260 U.S. 178 (1922)[30]

In this case, it was suggested, "the words 'white person' are synonymous with the words 'a person of the Caucasian race.'" Clearly, Ozawa is not Caucasian. The Court held that the words were meant to indicate only persons of what is popularly known as the Caucasian race. But the conclusion that the phrase "white persons" and the word "Caucasian" are synonymous does not end the matter. Ozawa then claimed that his skin made him "white." Ian Haney Lopez focuses on this argument and obviously has interest in the nature of race and how it is socially constructed. Ian's argument is that "white" is what we believe it is. However the Court said they could not base naturalization on this, because it differs greatly among persons of the same race, even Anglo Saxons. Ozawa then argued again, "In name, I am not an American, but at heart I am American." Ozawa was proficient in English, educated in American Schools, never attended Japanese churches or schools, chose wife as educated in American schools, not Japan, spoke English at home, children have no "Oriental" friends, and go to American church and school. Tehranian (2006)[31] suggests that we could think of this as "performance" of whiteness. This basically equals to the idea that one could be white through doing certain things, holding certain values.

United States v. Bhagat Singh Thind 261 U.S. 204 (1923)[32]

In this case, showed a turn away from science to common knowledge: "free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man." While Thind may be Caucasian, the common man would not believe Thind to be white. Thind was a "high caste Hindu of full Indian blood." Actually Thind was a Sikh. "Hindu" was used as a general reference to mean "Indian" and not meant here as a religious reference. "The words of the statute are to be interpreted in accordance with the understanding of the common man from whose

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30 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.497-499

31 John Tehranian, "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America," 109 Yale L.J. 817 (2000)

32 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.500-504

vocabulary they were taken." "Caucasian does not include the body of people to whom the appellee belongs. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population…. it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry."

Laura Gomez (2007)[33], talks about the collective naturalization in 1848 of Mexicans under Treaty of Guadalupe Hidalgo. It meant that Mexicans were purportedly white in terms of federal citizenship. At the same time, at the local level, Mexicans were often not perceived as white. David Montejano, who is a professor at UC Berkeley, Chicano studies stated "relationship of Mexican Americans to whiteness is complicated." In his study of Texas, where Mexicans held land, were less likely to be excluded from schools and other public accommodations. Where Mexicans were sharecroppers, they were more likely to be excluded. Laura Gomez argues that local practices and institutions, which excluded Mexican Americans from full rights, fell more harshly on those who were predominantly indigenous and of lower socioeconomic status.

Finally Moustata Bayoumi (2006)[34] said whiteness is about politics. Political expediency affects state definitions of race. Racial formation is about contemporary politics. That explains that it was necessary to "promote friendlier relations between the United States and other nations and so as to fulfill the promise that we shall treat all men as created equal." There is an American state of exception as a Christian, not Muslim people, visible in the naturalization cases, and visible in the dropping of Armenia from the list of countries for special registration. However, Bayoumi's own blind spot is that his list of which countries were covered by special registration includes, correctly North Korea, but he stated, "they are all Muslim majority nations." His argument, in my opinion, does make sense in a way that there is an obvious unjust racial profiling to Muslim population especially post 9/11.

In re Rodrigues 81 Fed. 337 (1897)[35]

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33 Laura Gomez, "Manifest Destiny's Legacy: Race in America at the Turn of the Twentieth Century," in Manifest Destinies: The Ma king of the Mexican American Race (2007)

34 Moustafa Bayoumi, "Racing Religion," The New Centennial Review (2006)

35 Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.303

This was the first case presenting question whether Mexican citizen can be individually naturalized. The Court rationale was that he is a "pure-blooded Mexican bearing no relation to the Aztecs or original races of Mexico." Ethnologists would not say he is white. If the strict scientific classification of the anthropologist should be adopted, he would probably not be classed as white. Historically, though, the United States admitted Mexicans to citizenship. Rodrigues is embraced within the sprit and intent of our laws upon naturalization, and his application should be granted if he is shown by the testimony to be a man attached to the principles of the constitution. He is "lamentably ignorant" but a very good man, peaceable and industrious. By his "daily walk, during a residence of 10 years in the city of San Antonio, he has illustrated and emphasized his attachment to the principles of the Constitution." Ian Haney Lopez interpreted this, as, while science of the day would have denied naturalization, since Rodriguez was not considered white, this is the "exception that proves the rule" – the rule being that in this initial period, courts virtually always opposed claims of whiteness. Laura Gomez wrote, "Not truly white, but white enough." It was precedent through previous collective naturalization. Also, she continues that granting Mexicans legal whiteness meant Mexicans could distinguish themselves from blacks, Indians, Chinese, and Japanese, which she coined as comparative racialization. This mutually reinforces racial logics that one drop rule in opposite directions. One drop of black blood meant blackness after 1920s; one drop of European ancestry for Mexicans could confer some modicum of white status.

Plessy v. Ferguson 163 U.S. 537 (1896)[36]

This was a test case of Louisiana statute requiring all railway companies to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations." Homer Plessy as 7/8 white, test case where it was arranged to be arrested for traveling in white car. In Plessy, court notes that some think ¼ black is black, other think that preponderance black is black, and others think any visible black is black. Court's ruling fueled most extreme

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[36] Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007) p.149-155

definition – hypodescent (one drop rule). (Juan, 2007)[37] The majority opinion considers that the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this were so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so gain, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. On the contrary, in Justice Harlan's dissent in Plessy v. Ferguson, stated "the white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

Bracero Program & Latino/a Immigrants

Braceros are the imported contract workers from Mexico. It was the United States' largest experiment with guest worker program from 1942 to 1964. In the book "Impossible Subjects," Mae Ngai begins a chapter with ***Perez v. Brownell 356 U.S. 44 (1958)***[38]. (Ngai, 2004)[39] Perez, the defendant, was an American citizen with birthright

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[37] Juan Perea, et al., Race and Races: Cases and Resources for a Diverse America, 2nd ed. (2007)

[38] https://supreme.justia.com/cases/federal/us/356/44/case.html

[39] Mae Ngai, "Braceros, 'Wetbacks,' and the National Boundaries of Class" in Impossible Subjects (2004)

citizenship. However, his citizenship was revoked as he failed to report U.S. military force for voting in Mexican election. J Earl Warren's dissents that "citizenship is man's basic rights, because it is nothing less than the right to have rights." Ngai began with Perez case because he was not only a U.S. citizen who lost citizenship, but was also a bracero worker, an "illegal alien," and a deported Mexican national. In one body, he encompassed all these identities in the border region.

Immigration law and practices shaped political economy of Southwest with following features: commercial agriculture, migratory farm labor, Exclusion of Mexican migrants and Mexican Americans from mainstream American society. From this history, it is fairly easy to point out why stereotypical "illegal workers" label even now has been following around Mexican Americans. On the same note, immigration policies helped create a "Mexican migratory agricultural proletariat," including Mexican Americans, legal immigrants, undocumented migrants and braceros.

Bracero or "wetback" labor force was a kind of imported colonialism. In 1990's farming shifted to large farms, which meant a shift from family to commercial. By 1920s labor market became migratory. Average number of Mexicans in migrant labor workforce per year in 1920s was 62,000 legal, and estimated 100,000 undocumented entries. Agricultural business wanted a large number of transient Mexican laborers. Obviously, it was better for the United States for having more cheap labor workers, and for Mexicans the chance of working in the United States was better or even following American dream. In 1920s, one can observe the hardening of borders with restrictive policies creating "illegal aliens" because a lot of people started crossing border without going through formal entry and inspection.

It is interesting to notice that Mexicans were seen as foreigners, even though Anglos were themselves migrants as well. Foreignness as racialized concept adhering to all Mexicans, including those American citizenship, carrying the idea of illegitimacy and inferiority. Mexicans and Mexican Americans experienced segregation in border region like Jim Crow system in the south U.S. Mexicans became one dimensional "commodity function and utility," which meant disposable "seasonal stoop labor" equated with everything Mexican. The United States casted Mexicans as foreign and distanced them

culturally and spatially in terms of belonging even while the Southwest had been Northern Mexico. This attitude was different from the stance towards Native Americans, who were to be converted, civilized, remolded in colonist's image. The attitude towards Mexicans was if "imported labor," there was no responsibility to incorporate into self. By 1930s Mexican migrants started settling and moving to North. Growers wanted surplus of workers so they could obtain workers on demand, at low wages, big supply to pick crops early and quickly. Growers pushed for cheap disposable labor force under their control. Meanwhile, there were no social or legal protections for farmworkers.

The Control of Migration and Crime and Undocumented Immigration

Bracero program totaled 4.6 million workers, on average 200,000 imported per year. They worked in 26 states, most in California, Southwest. It was believed that bracero program would eliminate illegal immigration, but it did not turn out quite well. Also, this created the structure and relationship of the U.S. being the "employer," and Mexicans "worker." Migrant Labor Agreement was supposed to guarantee transportation, housing, food, repatriation, exemption from US military service, wages at domestic prevailing rate, and no discrimination. However, workers registered at least several thousand formal complaints a year, including widespread violations of wages, housing conditions and so on. Because of this cruel working condition, there were people known as "skips" that left the program, and turned into illegal aliens from legal workers (Ngai, 2004)[40]. Those were seeking a smaller "farmer who needs one man, as a bracero he was treated like a number, not like a man." Bracero program did not end illegal immigration but it generated more illegal immigration. Between 1952 and 1955, 801,609 Mexican migrants were apprehended and returned. There were some efforts clearing the border areas as the number of illegal immigrants was increasing, and the program ended in 1964. However this did not terminate entirely the fundamental root of push and pull factors for undocumented migration. A lot of Mexican Americans empathized with these braceros and undocumented workers.

[40] Mae Ngai, "Deportation Policy and the Making and Unmaking of Illegal Aliens," in Impossible Subjects: Illegal Aliens and the Making of Modern America (2004)

Ngai (2004)[41] concludes that while program ended, imported colonialism continued through the ongoing, informal importation of undocumented Mexican migrants, on which agriculture in the U.S. relies today. After that there were many new proposed guest worker programs or efforts to provide undocumented or illegal workers visas temporarily with conditions that might give them LPR or green card depending on their working. However these never came to a realization. Furthermore, there is a big question as to should the United States create a guest worker program, because historically guest worker programs always produce people who do not leave.

Findings

After all these arguments, the immigration law and policy have developed throughout adapting to a vast history and social changes. The United States has had a double standard in many legal cases. It is interesting to note that while it is fairly easier to obtain the citizenship in the United States than Japan, as previously discussed, there were cases where those naturalized citizens or American born citizens were still racially discriminated or unfairly treated because of their color skin or ancestries. Edmund Burke (1790)[42] quoted "those who do not know history are destined to repeat it." We should not repeat history but at the same time what we have now is made up by history. My point is that what we see as social problems regarding immigrants and policies/laws, are the product of what they used to be in the history, therefore they are inevitably racist and irrational. However, by understanding and disclosing the history itself, we realize what went wrong and what to fix.

Going back to introduction, the United States has faced riot against racism again recently as possibly have been innocent black men killed without even making to justice trial. Of course we would not see "visible" racism as seen in historical legal cases, but the fundamental mindset or the tradition still persists in the society. It is hard not to think when looking back at history that tragic incidents resemble somewhat. If the white supremacy still exists in the American society, it all started with creating law and immigration policy back in the history.

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41 Mae Ngai, The Johnson-Reed Act of 1924 and the Reconstruction of Race in Immigration Law, in Impossible Subjects (2004)

42 Edmund Burke, Reflections on the Revolution in France (1790)

Suggestion

As for Japan, it has been doing its best to politically deal with immigration as to fulfill the obligation and responsibility as a nation country. Of course, there are many different conditions compared with the United States, the largest being the geography, yet it was interesting to find some similarities, mostly reasons behind why certain laws or policies were enacted.

Kuwahara (2001)[43] explains the reason why he did comparative study between Japan and the United States. The United States has had a long history of immigration and immigrants made up today's country. Japan, on the other hand, has a little experience dealing with immigration, only before and after the war being the country of sending people out. Moreover, it is not possible to exclude the fact that Japan has a history of bringing foreigners into Japan forcibly for many reasons, such as laborers. Some had an opinion that foreign workers in Japan would not stay long because Japan had higher living costs. Later in 1980s, with a sudden increase in a number of immigrants, Japan struggled in dealing with foreign workers and the way Japan dealt with them was trial and error.

The problem regarding foreign workers, the relationship between countries concerned, especially the country that accepts and let in those foreigners has a big responsibility and significance with the immigration control policy. As of Japan and the United States being the world biggest economy, it used to be that Japan has had relatively fewer foreign workers in the labor market compared with other advanced countries. One of the reasons why Japan has had a few foreigners, amongst American scholars, they had a prejudice that Japan had too strict restrictive policy. Japan had a huge geographical advantage over the U.S. when it comes to border control for being an island country.

Problems regarding foreign laborers became even more complicated. They were once about coming in and working only, but there was a shift in dynamics towards social dimension such as houses, education, social security, human rights, community, and political participation. We can now clearly see "Globalization of People," which is a situation where a diverse body of people from all around the world come and go over borders, accompanied by globalized economic activities. Kuwahara (2008)[44] coined this new term, "Invisible Border." To briefly

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[43] 桑原靖夫 (2001)『グローバル時代の外国人労働者―どこから来てどこへ』東洋経済新報社

[44] 桑原靖夫・香川孝三・坂本恵 (2008)『外国人労働と地域社会の未来』公人の友社

explain its concept, for example when between people, there is an invisible barrier that divides them. A good example of this is Japanese Brazilian's living community. There are complicated causes and backgrounds behind why such barrier exists, but when thinking about foreign workers problems, "Invisible Border" needs to be pointed out and understood.

It is controversial when it comes to acquiring citizenship, or naturalization, that whether it should be discussed in the context of the people's right or discretion of the country's administration. In Miyahara's book (2005)[45] , Kosa describes that Japan takes the same stance as United Kingdom, in which even when a person has qualified all the legal requirements, it is still up to the administrative institutions that decides whether he or she should be naturalized. The United States, already described earlier in thesis, takes a different stance that when a person has met all the legal requirements; the country endows the right to naturalize understandably. In other words, foreigners who wish to naturalize in Japan, not only have to meet all the conditions, but also have to get a permission to do so from the administration. This difference might explain why the United States reacted in a way that even after naturalization they still doubted the loyalty or the American-ness. On the contrary, it seems like Japan did not have to deal with any legal challenges after people being naturalized.

[45] 宮川成雄 (2005)『外国人法とローヤリング』学陽書房