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**Wartime Prejudice Against Persons of Italian Descent: Does the Civil Liberties Act of 1988 Violate Equal Protection?**

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WARTIME PREJUDICE AGAINST PERSONS OF ITALIAN DESCENT: DOES THE CIVIL LIBERTIES ACT OF 1988 VIOLATE EQUAL PROTECTION?

Joseph C. Mauro*

Most people know that the United States interned persons of Japanese descent during World War II. Few people know, however, that the government interned persons of German and Italian descent as well. In fact, the internment was part of a larger national security program, in which the government classified non-citizens of all three ethnicities as “enemy aliens” and subjected them to numerous restrictions, including arrest, internment, expulsion from certain areas, curfews, identification cards, loss of employment, and restrictions on travel and property.

Four decades after the war, Congress decided to compensate persons of Japanese descent who had been “deprived of liberty or property” by these restrictions. Congress has not, however, redressed the harm done to persons of German or Italian descent. This Note explores why Congress decided to distinguish between victims of Japanese and Italian descent, why the D.C. Circuit held that the distinction does not violate equal protection, and the potential impact of new historical evidence on both conclusions.

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INTRODUCTION

In 1993, Arthur Jacobs brought a class action lawsuit alleging that the Civil Liberties Act of 1988 violated equal protection under the Fifth Amendment. The Act compensated persons of Japanese descent who were "deprived of liberty or property" as a result of prejudicial government policies during World War II. It did not distinguish between Japanese Americans and permanent resident aliens of Japanese descent, compensating both groups equally. Jacobs, a German American who had been interned during the war, based his equal protection claim on the fact that the Act did not compensate other ethnic groups that had been interned. The D.C. Circuit denied his claim, holding that Congress'
decision to compensate only victims of Japanese descent “could survive the strictest level of scrutiny.” The court reasoned that persons of Japanese descent had been “detained en masse because of racial prejudice”—a historical wrong that Congress could redress—whereas wartime restrictions on persons of German and Italian descent had not been unlawfully motivated.

At about the time Jacobs was decided, a number of historians began researching the wartime restrictions on persons of Italian descent. By conducting personal interviews and reviewing internal memoranda of the Roosevelt Administration, these historians discovered that persons of Italian descent suffered nearly all of the wartime restrictions imposed on persons of Japanese descent, including arrests, curfews, identification cards, travel restrictions, geographic exclusions, property restrictions, loss of employment, and, for some, internment. As written, most of the restrictions applied only to non-citizens, who were labeled “enemy aliens.” In practice, however, the restrictions affected American citizens of German,

5. Id. at 318. The court noted that it was only required to apply “intermediate scrutiny” to the statute. Id. at 314 (citing United States v. Paradise, 480 U.S. 149 (1987)). Following Paradise, however, the court applied strict scrutiny “for demonstrative purposes only.” Id. It then addressed both standards at once, holding that “Congress’ decision to compensate Japanese but not German Americans is substantially related (as well as narrowly tailored) to the important (and compelling) governmental interest of compensating those who were interned during World War II because of racial prejudice.” Id. at 321.

6. Jacobs, 959 F.2d at 314, 313, 317, 322 (citing COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 317 (Univ. of Wash. Press 1997) (1982-83)). The Act also compensated Aleuts who were deprived of liberty and property, not because of racial prejudice, but due to oversight and disregard by American military commanders in Alaska. 50 U.S.C.A. app. § 1989a (West 2009). The D.C. Circuit did not address the claim that Mr. Jacobs was similarly situated to the Aleuts because he did not allege that the United States had failed to provide him with adequate care or held him longer than necessary. Jacobs, 959 F.2d at 314 (citing 50 U.S.C.A. app. § 1989a (West 2009)). Because the Italian experience was not at all similar to that of the Aleuts, but was arguably similar to the Japanese experience, this Note focuses on Jacobs’ reasons for holding that Congress did not violate equal protection by deciding to compensate persons of Japanese descent exclusively. See generally id.


Italian, and Japanese descent as well. Of course, American citizens of Japanese descent were eventually interned en masse, while American citizens of Italian descent were not. This difference likely explains why many people know about the Japanese experience yet have not heard about the restrictions imposed upon persons of Italian descent. It also probably explains why Jacobs held that the Civil Liberties Act of 1988 did not violate equal protection. Congress chose, however, to extend compensation under the Act beyond the mass citizen-internment, compensating aliens as well citizens and redressing other kinds of deprivations. For this reason, a significant gap exists between how the law treats persons of Japanese descent harmed by the “enemy alien” restrictions and how it treats persons of Italian descent harmed by the same provisions.

This Note asks, therefore, whether a person of Italian descent who was “deprived of liberty or property” during World War II as a result of the government’s enemy alien restrictions could bring a successful equal protection claim against the Civil Liberties Act of 1988. Part I details the restrictions imposed on persons of Japanese, German, and Italian descent during the war. Part II examines the extent to which racial prejudice motivated the wartime restrictions on persons of Italian descent. Part III considers whether the government should compensate persons of Italian descent who were deprived of liberty as a result of prejudicial wartime restrictions. This Note concludes that the newly-uncovered historical evidence at least undermines Jacobs to the extent that, if a court desired to uphold the Act again, it would need to find new and stronger reasons to do so.


10. PERSONAL JUSTICE, supra note 8.


13. Id. § 1989a.

I. WHAT HAPPENED TO ENEMY ALIENS DURING THE WAR?

A. Enemy Aliens in United States History

President Adams created the category of "alien enemy" when he signed the Alien Enemy Act of 1798.\(^\text{15}\) The Act authorized the President to impose travel, curfew, and property restrictions on male aliens from enemy nations during times of war.\(^\text{16}\) Although the Act was used during most wars, restrictions against enemy aliens were harshest during World War II, when the government deprived hundreds of thousands of persons of their property, homes, businesses, and other liberties such as travel, communication, and the right to one's person.\(^\text{17}\) The government detained over one hundred thousand enemy aliens—in jails or internment camps—for months or even years.\(^\text{18}\)

These restrictions were not conducted behind closed doors. They were the explicit and intentional policies of the United States. For example, the Immigration and Naturalization Service included this statement in a training lecture on May 13, 1943:

"[t]he declaration of war effects a great transformation in the status of aliens who are designated as alien enemies. These individuals then technically lose all their constitutional rights and privileges, and find that "what others [do] confidently and of right, they [do] by sufferance and doubtfully, uncertain of the restrictions of the morrow."\(^\text{19}\)"

While harsh, such policies were in fact a compromise between the politically- and constitutionally-minded Roosevelt Administration and the skittish military, which favored extending the restrictions to millions more.\(^\text{20}\)

\(^{15}\) U.S. DEP'T OF JUSTICE, supra note 11, at 16.

\(^{16}\) Id.; 50 U.S.C.A. § 21 (West 2009).

\(^{17}\) See generally U.S. DEP'T OF JUSTICE, supra note 11; PERSONAL JUSTICE, supra note 8.

\(^{18}\) See generally U.S. DEP'T OF JUSTICE, supra note 11; PERSONAL JUSTICE, supra note 8.

\(^{19}\) U.S. DEP'T OF JUSTICE, supra note 11, at 3 n.10 (emphasis added).

\(^{20}\) See id. at 9.
J. Edgar Hoover, director of the FBI, began a program in 1936 to collect information about U.S. residents, both aliens and citizens, who had “roots” in nations that would likely oppose the United States if the developing world conflict turned into war. Working with this information, in June 1939 the FBI, Navy, and Army sorted potentially dangerous aliens into three categories based on their perceived level of threat. Known as the “ABC List,” this project based each alien’s dangerousness on his level of involvement in “ethnic, cultural, or assistance organizations.” The most dangerous category (A) included leaders in such organizations, while the second most dangerous (B) included members.

At the beginning of the war, Italian Americans were the largest foreign-born population in the United States, numbering 1,623,580 in 1940. For this reason, some considered them particularly threatening after the attack on Pearl Harbor. Even in California, the plurality of enemy aliens hailed from Italy, numbering 52,008 Italians against 38,171 Japanese and 19,417 Germans.

1. Early Arrests

On the day the Japanese bombed Pearl Harbor—December 7, 1941—Edward Ennis, director of the Department of Justice’s Enemy Alien Control Unit, began apprehending Japanese aliens who he believed were dangerous. Ennis took this action a few hours before President Roosevelt issued Proclamation 2525, which formally authorized various restrictions on Japanese aliens, including their immediate arrest by the Attorney General or the Secretary of War. Similarly, the next morning Ennis began arresting German and Italian aliens, and the President followed later that day with Proclamations 2526 and 2527, which covered...

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21. Id. at 2.
22. Lothrop, supra note 9, at 167. The lists were developed about two months before Hitler attacked Poland on September 1, 1939, eliciting declarations of war from England and France.
24. Id.
26. See id. Adding to their potential threat was the fact that they were “comparative newcomers, presumably more under the influence of their parent country than earlier immigrants . . . .” Id.
27. Lothrop, supra note 9, at 162.
28. Id. at 167.
29. Id.; U.S. DEPT. OF JUSTICE, supra note 11, at 4.
them with the same restrictions. All Japanese, German, and Italian citizens over the age of fourteen were labeled enemy aliens.

In the initial rush to action, the FBI arrested American citizens of Italian descent along with their alien friends and relatives. The arrests took place throughout the country, including in New York City, where international opera star Ezio Pinza was arrested and confined on Ellis Island. Many of these early arrests were made without credible evidence, as the government believed it needed to take immediate action. By the end of January, 1942, about 3000 aliens had been arrested.

Of those arrested during the first weeks after Pearl Harbor, none was to be interned without an individual hearing. The government did not have the means to conduct such hearings, however, until more than six weeks after the arrests began. Not until January 23, 1942, did Attorney General Francis Biddle announce the creation of the Alien Enemy Hearing Boards. Each federal judicial district managed one hearing board, which was comprised of three civilians from the locality tasked with determining whether the enemy aliens who appeared before them should be interned, released with parole, or released outright. During the hearings, enemy aliens could bring affidavits and call witnesses, but could not be represented by attorneys. As a result, about half of the Italians brought before the boards were interned, and some were given the choice of being interned or enlisting in the military. According to a recent report by the Department of Justice (DOJ), many of the internments likely violated immigration or registration laws and were influenced by little more than a neighbor’s suspicion. What is more, the hearing boards could not handle

30. U.S. Dep’t of Justice, supra note 11, at 4; J. Edgar Hoover, Alien Enemy Control, 29 IOWA L. REV. 396, 400 (1944). Thus, for each of the three ethnic groups, the first day of arrests was authorized solely by the Alien Enemies Act of 1798, after which the arrests were authorized by presidential proclamation. Lothrop, supra note 9, at 167; 50 U.S.C.A. § 21 (West 2009).
31. U.S. Dep’t of Justice, supra note 11, at 17. On July 17, 1942, the DOJ subjected Hungarian, Bulgarian, and Romanian aliens to enemy alien restrictions as well, with the exception of the travel restrictions. Hoover, supra note 30, at 403.
32. U.S. Dep’t of Justice, supra note 11, at 5.
33. Id. at 6.
34. Id.
35. Lothrop, supra note 9, at 168.
36. U.S. Dep’t of Justice, supra note 11, at 7.
37. Lothrop, supra note 9, at 172.
38. Id.
39. Id.; U.S. Dep’t of Justice, supra note 11, at 7.
40. Lothrop, supra note 9, at 172.
42. U.S. Dep’t of Justice, supra note 11, at 7.
the large number of aliens who had been arrested. By June 5, 1942, only 2548 of the 8500 enemy aliens arrested had been given a hearing before the boards. Thus, the vast majority of enemy aliens arrested were jailed for over six months without any kind of review.

2. Geographic Exclusions

On January 29, 1942, Biddle announced that enemy aliens would have to evacuate a number of areas along the west coast, including parts of the San Francisco waterfront and certain areas in Los Angeles. Two days later, he added sixty-nine areas in California and set the deadline for evacuation to February 15. He added fifteen areas in California on February 2 and thirty-one areas in Oregon and Washington on February 4. He also added eighteen areas in Arizona on February 7, which had to be evacuated within two weeks. In California alone, more than 10,000 persons of Italian descent, both aliens and citizens, were forced to abandon their homes and places of work. American citizens were affected as well because "[t]he aged and infirm [were] not . . . permitted to remain with naturalized sons and daughters in [the designated] areas." According to an announcement in the Los Angeles Times, the government planned to move the enemy aliens to "farm colonies" where they would be used for agricultural labor. Moreover, even in places where enemy aliens were not forced to move, they had to remain at all times within five miles of their homes except to go directly to and from work.

Violation of these geographic restrictions resulted in arrest and internment "for the duration of the war." Even for those who could comply with the restrictions, the effects were severe. Fishermen were most affected, as 80% of California's fishing fleet was of Italian descent. For example, between 2500 and 3000 fishermen of Italian descent were

43. Lothrop, supra note 9, at 173.
44. Id.
45. U.S. Dep't of Justice, supra note 11, at 19.
46. Id.
47. Id.
48. Id.
49. Rose D. Scherini, When Italian Americans Were "Enemy Aliens," in UNA STORIA SEGRETA, supra note 7, at 18.
51. Id. at 3.
52. U.S. Dep't of Justice, supra note 11, at 20.
forced to leave the city of Monterey, California. According to Stephen Fox, Professor of History at Humboldt State University, this relocation policy “broke up families, interrupted education, [and] forced bread winners to find new employment and new homes . . . .”

When President Roosevelt issued Executive Order 9066 on February 19, 1942, authorizing mass internment of both aliens and citizens, all parties involved believed that persons of Japanese, German, and Italian descent would be evacuated en masse from the West Coast. Indeed, Executive Order 9066 did not distinguish between the three groups, giving the Secretary of War the power to exclude anyone he considered a threat from sensitive areas. Wholesale evacuations on a massive scale were, in fact, nearly carried out. On February 2, 1942, Los Angeles and Orange County, California, asked the U.S. military to remove all enemy aliens, regardless of ethnicity, from their respective jurisdictions. The American Legion and the Council of California Women’s Clubs petitioned for all enemy aliens to be expelled from the state. Army Lieutenant General John DeWitt, leader of the Western Defense Command, also proposed internment all enemy aliens in California. Congress responded to these proposals in mid February 1942 by creating the Tolan Committee, which recommended mass internment for persons of Japanese descent only. Final authority, however, rested with the Army, which meant that DeWitt would have the final say about which groups to intern. His plan to intern all three ethnic groups was thwarted at the last moment by the President himself.

3. Identification Cards

Beginning on January 14, 1942, the DOJ ordered all enemy aliens to carry identification cards. The cards contained the carrier’s fingerprint, signature, and “likeness.” Enemy aliens were required to obtain the cards

56. UNKNOWN INTERNMENT, supra note 7, at xiii, 224.
57. U.S. DEP’T OF JUSTICE, supra note 11, at 9, 15.
58. Id. at 15. Public Law 77-503, in turn, provided criminal penalties for violations of military proclamations made pursuant to Executive Order 9066. Id. at 16.
59. Lothrop, supra note 9, at 178.
60. Id.
63. Id. at 46.
64. Scherini, supra note 49, at 21; PERSONAL JUSTICE, supra note 8, at 98.
65. Lothrop, supra note 9, at 173-75.
66. Id.
The Los Angeles Times reported that during the first two days of registration, a "block-long line" of 6800 people formed to apply for the cards. Still, more than 35,000 enemy aliens failed to meet the February 12 deadline. The penalty for failing to obtain a card was "internment for the duration of the war," though it is unclear whether this penalty was enforced against all 35,000 aliens who failed to register.

4. Property Restrictions

On December 31, 1941, the DOJ announced a national ban on certain kinds of property for enemy aliens. Pursuant to this directive, all Japanese, Germans, and Italians had to relinquish short wave radios, radio transmitters, firearms, and cameras to government authorities. On January 6, Biddle added more articles to the list, including ammunition, explosive material, material used in the manufacture of explosives, signal devices, codes or ciphers, anything containing invisible writing, and all other "implements of war" (including binoculars) and pictorial representations thereof. Those who violated the property restrictions were arrested, leading to more than 1500 arrests. One can imagine the effect such restrictions must have had on self-employed persons who needed such tools for work.

The Coast Guard also seized boats in California from both aliens and citizens, without review, to patrol for submarines. Of course, with the predominance of Italian fishermen in California, they were most heavily affected by this policy. But since the government had already forbidden persons of Italian descent from fishing, losing the boats was secondary.

5. Travel Restrictions

On February 5, 1942, the DOJ restricted the travel of enemy aliens. Under regulations titled "Controlling Travel and Other Conduct

70. Id.
72. Id.
73. Aliens: Guns, Cameras Have Final Deadline, S.F. CHRON., Jan. 7, 1942, at 10; Lothrop, supra note 9, at 173–75.
75. Id. at 20.
76. Fox, supra note 55, at 43–45.
78. Id. at 17.
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of Aliens of Enemy Nationalities," the DOJ forbade enemy aliens throughout the country from traveling outside their communities except for work, worship, or to report to certain government agencies. When they did travel, they were required to file travel documents with the local U.S. Attorney, who would forward the information to the FBI. The DOJ could grant individual exceptions. On February 14, 1942, the DOJ narrowed the travel restrictions to specific areas along the West Coast that had been designated as important for the war effort.

6. Curfew Restrictions

On February 4, 1942, Biddle announced that all enemy aliens within a certain area were required to remain in their homes between 9:00pm and 6:00am. This “restricted area” was quite large, encompassing “the entire coastline of California from the Oregon border south to a point approximately fifty miles north of Los Angeles and extending inland for distances varying from thirty to one hundred and fifty miles.” The penalty for violating the curfew restriction was arrest and immediate internment. The DOJ made no exception for workers with night shifts.

C. End of Restrictions on Persons of Italian Descent

Enemy alien restrictions on persons of Italian descent ended gradually. In May, 1942, the President signed the Second War Powers Act, which waived residence, language, and literacy requirements for foreign-born members of the U.S. military who wanted to apply for citizenship. Two months later, he declassified all enemy aliens who satisfied any of these requirements: serving in the armed forces, continued residence in the U.S. since 1916, married to a U.S. citizen without having returned to his or her homeland since 1926, or having applied for citizenship before the attack on Pearl Harbor. On Columbus Day, 1942 (October 12), Biddle announced at Carnegie Hall, along with New York Mayor Fiorello LaGuardia, that Italians would not be included in the category of enemy

79. 28 C.F.R. § 30.1 (1942); U.S. DEP’T OF JUSTICE, supra note 11, at 17.
81. Lothrop, supra note 9, at 173–75.
82. U.S. DEP’T OF JUSTICE, supra note 11, at 18.
83. Id. at 19–20.
84. Id.
85. Id. at 20; Alien Crack-Down, supra note 53, at 13.
86. Alien Crack-Down, supra note 53, at 13.
87. Lothrop, supra note 9, at 187–88.
88. Id. at 188.
aliens after October 19, 1942. While Germans and Japanese would remain classified as enemy aliens until later in the war, this Note focuses on the first ten months after the attack on Pearl Harbor, when enemy alien restrictions applied to all three ethnic groups equally.

II. To What Extent Did Racial Prejudice Motivate Wartime Restrictions on Persons of Italian Descent?

Given the newly-uncovered historical evidence about the breadth of the enemy alien restrictions, persons of Italian descent almost certainly experienced the same kind of racial prejudice that persons of Japanese descent experienced. Though neither Congress nor Jacobs developed a comprehensive definition of racial prejudice, wartime restrictions on persons of Italian descent were probably prejudicial under any definition. First, the restrictions on persons of Italian descent were nearly identical to the restrictions on persons of Japanese descent, which both Congress and Jacobs found to be prejudicial. Moreover, the differences between the restrictions on persons of Italian descent and the restrictions on persons of Japanese descent are best explained by practical, economic, and political factors, not greater prejudice against the latter group. Although the government may have harbored more prejudice against persons of Japanese descent, and may have had legitimate reasons to fear resident aliens of Italian descent, the weight of the evidence suggests that the wartime restrictions on persons of Italian descent were motivated by the same racial prejudice that motivated the restrictions on persons of Japanese descent.

A. What is Racial Prejudice?

The congressional report detailing racial prejudice against persons of Japanese descent, upon which Congress relied when passing the Civil Liberties Act of 1988, does not provide a comprehensive definition of prejudice. In the introduction to the report, the commission outlines the conclusion that it aims to prove: that "the detention of Japanese Americans during World War II was ... an act of racial discrimination." Later, the report suggests two criteria that made such actions discriminatory. First, the fact that restrictions were motivated by public hostility toward persons of Japanese descent suggests that they were prejudicial. As the congressional report states, the "evacuation decision was ignited by the

89. Id.
90. See generally 50 U.S.C.A. app. § 1989a (West 2009); PERSONAL JUSTICE, supra note 8.
92. PERSONAL JUSTICE, supra note 8, at 28.
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fire of [impotent anger against the Japanese], especially in California.”

Second, the link between the wartime restrictions and the history of “institutionalized segregation” of Japanese Americans supports the conclusion that the former was prejudicial just like the latter. Both of these factors (public hostility and a history of institutionalized segregation) may have applied to restrictions on persons of Italian descent as well.

*Jacobs* provides a somewhat clearer definition of prejudice, although it is by no means comprehensive. First, the court did not actually find that the government had committed acts of prejudice against persons of Japanese descent, holding instead that it was required to defer to Congress’ finding with respect to such a complex empirical question. The court still reasoned, however, that when restrictions are imposed *en masse* against a certain ethnic group, they are presumptively evidence of racial prejudice. Perhaps, then, the key criterion under *Jacobs* for determining whether the government treated Italians with racial prejudice is simply whether it subjected them to race-based restrictions *en masse*. This Part argues that it likely did. Regardless, recognizing that neither the D.C. Circuit nor Congress meant to enunciate a comprehensive definition of “racial prejudice,” this Part explores other conceptions of prejudice as well, considering various kinds of evidence which may suggest that persons of Italian descent experienced “the same racial prejudice” as persons of Japanese descent. If they did, then the Civil Liberties Act of 1988 may indeed violate equal protection under the Fifth Amendment.

B. Evidence of Racial Prejudice Against Persons of Italian Descent

1. Historians’ Findings of Racial Prejudice Against Persons of Italian Descent

Most historians who have researched the wartime restrictions on persons of Italian descent believe that they were motivated by racial prejudice. Professor Lawrence DiStasi, for example, believes the

93. *id.*

94. *id.* at 45–46.

95. *Jacobs*, 959 F.2d at 318–19 (“‘With respect to [a] “complex” empirical question, we are required to give great weight to the decisions of Congress’...[and we see no difference between ‘great weight’ and ‘deference,’ which the Supreme Court and this Court have consistently treated as synonyms.”) (quoting Metro Broad., Inc. v. F.C.C., 497 U.S. 547 (1990)).

96. *Jacobs*, 959 F.2d at 319.

97. *id.*

government developed the enemy alien restrictions primarily because Americans have always felt "insecure" about people born in other countries. He reasons that both Italians and Japanese suffered the restrictions because their "ways were racial, genetic, indelible," and they either had to be Americanized or excluded from the general population to neutralize their threatening nature in wartime. Guido Tintori reaches a graver conclusion, arguing that the military and FBI were infused with "old prejudices against 'dagos' and 'wops' [that] played an important part in shaping the fate of Italian resident aliens in the United States." Indeed, Tintori goes so far as to accuse J. Edgar Hoover and the Department of War of harboring "stubborn xenophobia" against all enemy aliens.

Rose Scherini takes a slightly different tack, reasoning that enemy aliens were simply easy to scapegoat for the attack on Pearl Harbor, thus bringing about the restrictions against all three ethnic groups. Stephen Fox agrees with Scherini, and although he does not state that persons of Italian descent suffered racial prejudice, he does conclude that the only reason they avoided the same fate as persons of Japanese descent (meaning mass internment of American citizens and aliens) was that it would have been too impractical to intern all three groups. In his words, persons of Japanese descent were the only "available scapegoats."

Some of the government actors realized that they had done wrong. Biddle, for example, in a letter to Hoover on July 16, 1943, criticized the theory that underlay the enemy alien restrictions: "[T]he notion that it is possible to make a valid determination of how dangerous a person is . . . without reference to time, environment, and other relevant circumstances is impractical, unwise, and dangerous." Thus, following Biddle and the historians, this Part asks whether the government substituted racial prejudice for those "relevant circumstances" when it imposed enemy alien restrictions on persons of Italian descent.

2. Similarity Between Restrictions on Persons of Japanese Descent and Restrictions on Persons of Italian Descent

Taking for granted that persons of Japanese descent suffered racial prejudice, as Jacobs and Congress did, the fewer the differences between
restrictions on persons of Japanese descent and restrictions on persons of Italian descent, the smaller the basis for concluding that persons of Japanese descent suffered racial prejudice while persons of Italian descent did not.

For the first four months after the United States entered the war, the restrictions on both groups were practically identical. This changed in April 1942, when President Roosevelt agreed to intern persons of Japanese descent en masse. Still, except for the mass internment, all the aforementioned restrictions—including arrests, geographic exclusions, property restrictions, travel restrictions, curfew restrictions, and identification cards—applied equally to both groups for over ten months. Moreover, the threat of internment was the same for both groups. As Biddle announced on January 7, 1942, “[A]ll alien enemies are subject to detention and internment for the duration of the war without hearing.” Thus, Jacobs was wrong to state that internment without individual review applied only to persons of Japanese descent.

What is more, even in the few instances where enemy alien policies diverged along racial lines, the same justification underlay the restrictions on both ethnic groups. In other words, even though the government applied different restrictions in a few instances to persons of Japanese descent and persons of Italian descent, all the measures were likely motivated by the same kind of racial prejudice.

J. Edgar Hoover appears to have supported this conclusion. Writing in the Iowa Law Review in 1944, Hoover remembered that the first time the government made any racial distinction between persons of Japanese descent and persons of Italian descent was on October 19, 1942, when Biddle officially lifted enemy alien status from Italians (the announcement had been made a week earlier on Columbus Day, a holiday traditionally celebrated by Italian Americans). Considering that persons of Japanese descent were interned en masse six months earlier in April 1942, it would seem that Hoover misremembered the facts. But of course Hoover knew about the mass internment, having played a significant role in it, yet he purposely stated that the government did not distinguish between the two...
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ethnic groups until October of that year. Perhaps what Hoover meant, then, is that the government viewed both groups in the same way until it removed enemy alien classification from persons of Italian descent. In other words, despite some variation in how the government treated the two groups, it lumped them into the same racial category following the attack on Pearl Harbor and did not change its view until it removed Italians from the enemy alien category altogether. While of course most persons of Italian descent did not suffer the same level of injury as persons of Japanese descent, having been spared the mass internment, they were still equally subject to prejudice by classification, i.e., the enemy alien restrictions aimed exclusively at certain ethnic groups. Thus, if the enemy alien restrictions constituted racial prejudice against persons of Japanese descent, then they must have constituted racial prejudice against persons of Italian descent as well, at least for the ten months that Italians were subject to the same policies.

Indeed, as Hoover remembered those ten months, one does not get the impression that he perceived any difference between Japanese and Italians at all. First, he mentions that the restrictions on Italians and Germans “incorporated” all the restrictions on the Japanese. He describes the property restrictions, identification cards, internment, home raids, military zones, imprisonment, and fines without reference to any difference between the two ethnic groups. In fact, Hoover praises policies that seem to have been based on nothing but one’s background. For example, he says that to deal with the problem of the “naturalized citizen whose cloak of citizenship is a sham and who is dangerous to the nation’s security,” the FBI used the “weapon” of “civil suit[s] to cancel the Certificate of Naturalization on the ground that it was fraudulently or illegally procured,” which was proven by showing the alien’s “lack of allegiance to the United States.” If such policies were prejudicial, which they seem to have been, then the fact that the government applied them to both Italians and Japanese suggests that both groups suffered prejudicial classification.

One would be hard pressed, however, to find stronger proof of racial prejudice than the agreement between the DOJ and the Western Defense Command in January 1942, which stated that “merely being an enemy

113. Hoover, supra note 30, at 407.
114. See supra text accompanying notes 108–112.
115. Contemporary historians make this argument as well. For example, Stephen Fox argues that there was no principled distinction in how the government treated all three ethnicities; it was simply more “convenient” to intern persons of Japanese descent en masse. UNKNOWN INTERNMENT, supra note 7, at xv.
117. Id. at 400.
118. Id. at 403–05.
119. Id. at 407.
alien would be sufficient cause” for unannounced raids into private homes in search of contraband. 120 If one’s ethnic background was enough to create probable cause of disloyalty, then it seems difficult to argue that the policy was not prejudicial. Hoover and the DOJ might respond that it was an alien’s connection to the enemy country, rather than his race or background, that motivated the restrictions against him. But the enemy alien restrictions were not designed in this way; for they did not address themselves to anyone with connections to an enemy nation, but applied rather only to people who were of the ethnicity of such nations.

In this way, perhaps nothing demonstrates racial prejudice more clearly than Biddle’s announcement of the decision to remove enemy alien classification from persons of Italian descent. Biddle proudly stated, “We found that 600,000 enemy aliens were in fact not enemies.” 121 If they were not enemies, however, then the only relevant factor was that they were aliens of a certain race.

The congressional report on the Japanese internment also suggests that restrictions on persons of Japanese descent were prejudicial in part because they were tied to widespread hostility among the populace public. 122 Such was the case for restrictions on persons of Italian descent as well. For example, although Biddle criticized the practice, many private employers fired enemy aliens after the attack on Pearl Harbor. 123 The government, instead of correcting the problem, continued with the enemy alien restrictions just as before. Worse, on February 1, 1942, the California State Personnel Board removed all descendants of enemy aliens—meaning American citizens of Japanese, German, and Italian descent—from state civil service positions. 124 The California State Congress also lobbied the federal government to remove all enemy aliens from both coasts, revealing an attitude harsher than DeWitt’s attitude toward persons of Japanese descent, whom he wanted to remove from the Pacific Coast only. 125

Italians clearly suffered the effects of such public hostility. Renzo Sereno, an analyst for the Office of War Information, stated in a report of January 1942 that “[t]he Italians suffer from mass guilt ... increased by the impact of discrimination .... [They] are forced to identify themselves with the clichés with which they are associated [and] enemy registration is per se a stigma.” 126 If this is the kind of harm that the Civil Liberties Act

120. U.S. Dep’t of Justice, supra note 11, at 23.
121. Lothrop, supra note 9, at 188.
122. Personal Justice, supra note 8, at 28 (reasoning that public hostility toward a certain ethnic group can support a finding that government policies directed at that group were racially prejudicial).
123. Lothrop, supra note 9, at 180.
124. Id. at 181.
125. Id.
126. Tintori, supra note 101, at 246.
of 1988 was designed to compensate, then perhaps it should compensate Italians as well.

3. Evidence from the Decision Not to Intern Italians En Masse

Ironically, the reasons for which the administration decided not to intern Italians en masse suggest that the government actually harbored the same kind of prejudice against them as it harbored against the Japanese. Specifically, if Italians were spared mass internment for practical reasons only, then the government must have viewed them—racially, at least—just like the Japanese; which is to say, subject to racial prejudice.

As late as March 1942, Lieutenant General Hugh A. Drum, commanding general of the Eastern Defense Command, announced his intention to evacuate all enemy aliens from sixteen states, which would have affected 52 million people. Similarly, General DeWitt advocated mass internment of all enemy aliens in California. Only in April 1942 did DeWitt and Drum give in to President Roosevelt and concede that the government would not intern persons of Italian or German descent en masse. As the congressional report on Japanese internment acknowledges, persons of German and Italian descent were saved from mass internment because of the “enormous practical difficulties ... economic dislocations ... public perceptions and ... political implications” that would have been involved if the government had interned those groups in the same manner as Japanese Americans. If these sorts of factors justified the harsher treatment of persons of Japanese descent, as opposed to greater racial prejudice against them, then Jacobs may have been mistaken to find that racial prejudice affected persons of Japanese descent more than persons of Italian descent.

a. Practical Difficulties

Simple administrative difficulties, not racial preference, may have been the saving grace for Italian enemy aliens. As the War Department stated in an Advisory Recommendation of Feb 4, 1942:

> Persons of Japanese descent constitute the smallest definable class upon which those with the military responsibility for defense would reasonably determine to impose restrictions .... Similar dangers of disloyal activities by citizens of other racial

127. Fox, supra note 55, at 48-49.
129. Lothrop, supra note 9, at 186.
130. PERSONAL JUSTICE, supra note 8, at 286-87.
stocks cannot . . . be handled in the same way [because of] the insuperable problem of administration [and] disruption of defense production.\textsuperscript{132}

As this statement suggests, even a military leadership rabid for mass detention eventually recognized that interning 1.6 million aliens of Italian descent, even excluding the millions of American citizens who would have been affected, would have been a much larger endeavor than interning the 120,000 total persons of Japanese descent in California.\textsuperscript{133} Even if Italian internment were to have been limited to DeWitt's proposal (California only), 145,000 additional people would have been moved (85,000 aliens and 60,000 citizens).\textsuperscript{134} This would have more than doubled the size of the internment project.\textsuperscript{135} What is more, Guido Tintori notes that the U.S. military had learned from the experience of the British, who, following France's surrender to the Nazis, immediately interned all enemy aliens within their borders (62,000 people).\textsuperscript{136} The British realized by December 1941 that such unthinking mass internment had wasted significant time and energy that could have been directed toward the war effort.\textsuperscript{137} Such considerations may have helped prevent the United States from making the same mistake on such a grand scale.

\textit{b. Economic Considerations and the War Effort}

The government eventually recognized that it could not intern persons of Italian descent \textit{en masse} without significantly impairing the war effort. The War Department issued an advisory recommendation that expressed concern that mass internment of Germans and Italians would cause a "disruption of defense production."\textsuperscript{138} This phrase—"disruption of defense production"—states clearly the primary economic concern attendant to proposals for interning the millions of Italians and Germans working in the United States.\textsuperscript{139} Warnings of economic disruption also

\begin{itemize}
  \item[132.] Fox, \textit{supra} note \textsuperscript{55}, at 41-42.
  \item[133.] See Panunzio, \textit{supra} note \textsuperscript{25}, at 771; \textit{Army Rules Coast, Orders All Japs Out}, S.F. CHRON., Mar. 4, 1942, at 1.
  \item[134.] Lothrop, \textit{supra} note \textsuperscript{9}, at 186-87.
  \item[135.] \textit{See id.}
  \item[136.] Tintori, \textit{supra} note \textsuperscript{101}, at 238-39. Approximately 50,000 of the British internees were refugees from Germany, a consideration that may have weighed on American minds as well. \textit{Id.} at 238.
  \item[137.] \textit{Id.} at 238.
  \item[138.] Fox, \textit{supra} note \textsuperscript{55}, at 41-42.
  \item[139.] For example, my grandfather, an Italian American attorney in New York City, was drafted to work in a factory that produced bottle caps for the duration of the war. Interview with Isabelle Alice Mauro, in Fairfax, Va. (Nov. 2006). He would not have been able to make this contribution to the war effort if he had been interned or forced to move inland.
\end{itemize}
came from both houses of Congress. The House Committee Investigating National Defense Migration issued a report stating that if the kind of movement forced upon persons of Japanese descent were also forced upon persons of German and Italian descent, the economic repercussions would be so costly that it would be impossible to win the war. The Senate Committee on Military Affairs reached a similar conclusion on March 19, 1942, stating that only persons of Japanese descent could be evacuated en masse, because they were smaller in number than persons of German or Italian descent and were largely committed to agricultural production, whereas Germans and Italians contributed to the economy in more diversified ways. Like the House Committee, the Senate Committee concluded that evacuating Germans and Italians was "out of the question if we intend to win this war."

Here, the example of Hawaii is instructive, for persons of Japanese descent were spared internment on the islands for the same reason that persons of German and Italian descent avoided internment on the mainland. As Stephen Fox explains, a letter from Secretary of War Edwin Stimson to Speaker of the House John McCormack shows how economic considerations underlay both decisions. On July 8, 1942, Stimson wrote, "The Japanese population is so interwoven into the economic fabric of the [Hawaiian] Islands that if we attempted to evacuate all Japanese aliens and citizens, all business . . . would practically stop." The congressional report on Japanese internment reached a similar conclusion, stating that economic considerations prevented the government from interning persons of Japanese descent in Hawaii. From this perspective, then, although racial prejudice likely affected all three alien groups, it could only be "satisfied" by wholesale internment of persons of Japanese descent in California, because the government believed that persons of Japanese descent in Hawaii and persons of German and Italian descent throughout the country were too essential to the war effort to place in internment camps. In other words, economics rather than racial preference saved the latter three groups.

Fear of revolt may have motivated the decision to scrap the Italian internment as well. Rose Scherini cites internal War Department memorandum that warned of the possibility that U.S. soldiers of Italian descent would mutiny if their enemy alien parents were interned. Biddle echoed the same concern in the San Francisco Chronicle on May 10, 1942, stating that "[i]t is very important to keep the loyalty of the great mass of
Italians and Germans in this country. While not exactly economic, concerns about revolt or mutiny also related to the possibility of harm to the war effort if Italians had been subjected to the same internment policies as the Japanese. Again, such non-racial motivations undermine Jacobs' assumption that the broader restrictions on persons of Japanese descent were caused by racial prejudice particular to that group.

c. Party Politics

As Rose Scherini and Stephen Fox assert, political concerns helped motivate President Roosevelt to exclude Italians from the mass internment. At the time, Italian Americans were the largest immigrant group in the country and the largest ethnic voting bloc. Moreover, they had consistently aligned with the Democratic Party since their mass immigration around the turn of the century. According to Fox, however, by 1940 Italian Americans had begun to leave the Democratic Party. This concerned Roosevelt throughout 1941 and 1942 because midterm congressional elections were set for November 3, 1942. Perhaps, then, the decision to lift enemy alien classification from Italians in October of 1942 was not simply a happy coincidence. The celebratory announcement was made only fifteen days before Democrats needed Italian Americans to go to the polls for them. As Fox explains, "[e]lectoral strategy mattered most ... and the vote counters vetoed General DeWitt's grandiose plans [for internment]."

The congressional report on Japanese internment attests to the "advantages which numbers, political voices and comparative assimilation provided in 1942's hour of crisis." If these advantages accounted for the fact that only persons of Japanese descent were interned en masse, then racial prejudice particular to the Japanese did not. Thus, if Jacobs were to appear again before the D.C. Circuit, perhaps the court would need to find new evidence to support its conclusion that racial prejudice affected persons of Japanese descent exclusively. For any evidence stemming from

147. 8000 More Japanese are Ordered out, S.F. CHRON., May 10, 1942, at 8.
148. See Jacobs, 959 F.2d at 317.
149. Fox, supra note 55, at 49; Scherini, supra note 49, at 21.
150. Fox, supra note 55, at 49.
151. Id.
152. Id.
154. Fox, supra note 55, at 49.
155. PERSONAL JUSTICE, supra note 8, at 98.
the Japanese internment, upon which Congress (and thus Jacobs) primarily relied, seems better explained by politics instead.\footnote{Jacobs, 959 F2d at 321.}

d. The Dangers of Panic

Leaders in the Army also feared that evacuating Germans and Italians \textit{en masse} would cause widespread panic among the American populace.\footnote{\textit{Id.} at 47-48.} Alfred Jaretski, who had been appointed by General DeWitt to manage the evacuations in California, expressed concern about widespread panic in a letter to Secretary of War Stimson on March 26, 1942.\footnote{\textit{Id.} at 48.} Regarding DeWitt's proposal to intern all enemy aliens in California, Jaretski wrote, "of more importance \[than the question of injustice\] would be the undoubted national repercussions of such a movement . . . . If public apprehension is unnecessarily aroused in respect \[to\] these alien groups \[by their mass internment\], public clamor for protection will greatly impede the war effort."\footnote{\textit{Id.} at 48.}

Thus, Stephen Fox appears to have a valid point when he concludes that "\[e\]conomics, politics, and morale rather than Californians' prejudices drove U.S. internment policy during World War II, with race as a reinforcing element."\footnote{\textit{Id.} at 52.} The greater the extent to which these practical considerations prevented the government from interning Italians \textit{en masse}, the less reason one has to credit Jacobs' presumption that Italians were spared simply because the government was more prejudiced toward persons of Japanese descent.

e. If Not Mass Internment, Then Intimidation?

After recognizing that it could not intern Italians \textit{en masse}, the government may have decided that the second-best way to deal with the danger they posed was to scare them into submission. Much of the newly-uncovered historical evidence seems amenable to this interpretation, for the policies imposed on persons of Italian descent appear to have been enforced with intimidation in mind. While perhaps less harmful than internment, purposely intimidating persons of a certain ethnicity to prevent them from supporting the enemy seems just as prejudicial as interning them for the same reason.

Some government statements explicitly revealed an intention to break the morale of enemy aliens. For example, the Tolan Committee stated in May 1942 that relocating the Japanese might "serve as an inci-
dent sufficiently disturbing to lower seriously the morale of vast groups of foreign-born among our people." In other words, interning the Japanese would scare Italians and Germans such that they would not dare to sabotage the war effort. Fear tactics may have appeared especially appropriate since the government could not, for practical reasons, intern Germans and Italians in the same way as the Japanese.

Other policies may have achieved the goal of intimidation more underhandedly. I have already argued that racial prejudice was evident in the agreement between the DOJ and the Western Defense Command that provided that "merely being an enemy alien would be sufficient cause" for house raids in search of contraband. The manner in which these and other raids were carried out, however, suggests that the agreeing parties had more in mind than simply enforcing the letter of the law. For example, Gloria Lothrop describes how FBI agents and local police would crash into Italian households in the dead of night, ostensibly to make sure the residents were obeying the curfew. Citizens were affected along with aliens, for with just one enemy alien in a house, none of the residents could possess the forbidden items. Apparently, Italian American households were so disrupted that L’Italo Americano, an Italian language newspaper that had been unquestioningly supportive of the government, finally criticized the raids, arguing in an editorial that it was inhumane to “waken and frighten people in the middle of the night” just to verify that they were at home.

But frighten people they did. According to Lothrop, many persons of Italian descent took it upon themselves to burn anything they owned that represented Italian culture, in hopes that the authorities would not find a reason to take them away. L’Italo Americano was probably intimidated as well, for it appears to have skipped its December 12, 1941 issue, the first issue that would have been published after the application of enemy alien status to persons of Italian descent. In sum, this evidence

161. Id. at 50.
162. My great aunt was certainly scared by the Japanese American internment. Living in San Francisco at the time, she decided to move to New York in 1942 because she feared Italian Americans would be interned along with Japanese Americans. Interview with Isabelle Alice Mauro, in Fairfax, Va. (Nov. 2006).
163. Lothrop, supra note 9, at 173-74.
165. See PERSONAL JUSTICE, supra note 8, at 62.
166. Lothrop, supra note 9, at 176.
167. Id.
168. Id.
169. Id. at 177.
170. The roll of microfilm containing the publication skips directly from December 5 to December 19, 1941. See L’ITALO AMERICANO, Dec. 1941, microformed on WorldCat OCLC # 11933312 (Rutgers Univ). While this is speculation, I can think of no better reason why only that issue was skipped.
seems to suggest that the effect, and likely the purpose, of many enemy alien policies was to intimidate persons of Italian descent.

C. Evidence Against Racial Prejudice Toward Persons of Italian Descent

1. Evidence that Racism Accounted for the Differences Between Restrictions on Persons of Japanese Descent and Restrictions on Persons of Italian Descent

Regardless of whether racial prejudice motivated the restrictions on persons of Italian descent, the evidence does seem to suggest that the government decided to intern persons of Japanese descent en masse at least partly because of racial prejudice particular to that group. Indeed, despite her detailed exposition of the government's mistreatment of Italians, Gloria Lothrop ultimately concludes that the only explanation for why mass internment continued against the Japanese is racial discrimination.171

Both military and civilian leaders perceived significant racial differences between persons of Japanese descent and persons of Italian descent. For example, the Tolan Committee concluded that mass internment should continue only with persons of Japanese descent because they "all look alike."172 In other words, the committee believed that the Alien Enemy Hearing Boards could not distinguish between loyal and disloyal persons of Japanese descent, though evidently it believed the boards could perceive disloyalty in Italian and German faces.173 Also, DeWitt made what is probably his most infamous statement before Congress in January 1942, saying, "You needn't worry about the Italians at all except in certain cases . . . But we must worry about the Japanese all the time until he is wiped off the map."174 Such particular concern about persons of Japanese descent was borne out in executive policy, for of all the immigrant groups serving in the military, only persons of Japanese descent fought in segregated combat units.175 Moreover, when the President made agreements with certain Latin American nations to receive and intern their Japanese, German, and Italian citizens, most of the people interned were of Japanese descent (approximately 2300 of 3000).176 Thus, to the extent that racial prejudice accounted for the harsher treatment of persons of Japanese descent, perhaps Congress was justified in deciding that only they experienced enough prejudice to merit compensation.

171. Lothrop, supra note 9, at 187.
172. Fox, supra note 55, at 45.
173. Id.
174. PERSONAL JUSTICE, supra note 8, at 66.
175. Id. at 193.
176. Id. at 305.
2. Evidence Suggesting Enemy Alien Restrictions on Persons of Italian Descent were Justified by Military Concerns

If the government had legitimate reason to fear enemy aliens of Italian descent, then the wartime restrictions imposed on them may have been motivated by legitimate concerns rather than racial prejudice. In other words, if the DOJ and the military had legitimate reasons to believe that persons of Italian descent posed a threat to the war effort—for example, if they supported Mussolini or planned acts of sabotage—then perhaps historians have less reason to believe that racial prejudice motivated the wartime restrictions against them.

a. Italian American Support for Mussolini and Fascism

The government may have had good reason to believe that U.S. residents of Italian descent supported Mussolini. Indeed, such persons did favor fascism generally, and Mussolini specifically, well into the 1930s. As Constantine Panunzio explained in the *Yale Review* in 1943, Italian Americans felt humiliated by the Immigration Acts of 1921 and 1924, both of which limited the number of immigrants who could come to the United States from Italy each year. By implying that Italians were unwelcome in the United States, these laws hurt their sense of ethnic pride. Mussolini, on the other hand, restored this pride by making Italy and Italians appear strong and successful throughout the world, at least during the 1920s and 1930s. Pride in Mussolini’s fascism was bolstered by reports from family members living in Italy who said that Mussolini had cleaned up many of the country’s traditional problems.

Mussolini also expended significant effort to convince American businessmen that his fascist project was successful and worthy of investment. He funded free Italian language classes for children of Italian immigrants in the United States, distributed fascist propaganda through Italian American organizations in the United States, arranged trips to Italy for 300–500 Italian American children each year, and sent allegedly charming consuls to woo American diplomats and businessmen. Thus, Italian Americans understandably developed a favorable impression of

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177. Panunzio, *supra* note 25, at 774–79.
178. *id.* Such statutes, however, are likely evidence of the kind of “institutionalized segregation” that Congress believed supported a finding of racial prejudice. See *Personal Justice, supra* note 8, at 45–46.
180. *id.*
181. *id.* at 774–79; Interview with Isabelle Alice Mauro, in Fairfax, VA (Nov. 2006).
Mussolini. As Panunzio writes, “with a number of important persons in industry, commerce, and finance, in education and politics, singing Il Duce’s praises, what Italian Americans could resist?”

As it became clear, however, that Allied interests were not going to align with Mussolini’s, it seems understandable that the government would have worried about the loyalty of the 1.6 million Italian aliens within its borders. Indeed, Mussolini consistently reminded Italian Americans that, under Italian law, they retained Italian citizenship up to the seventh generation born outside Italy, meaning that practically any Italian American could have enlisted in Mussolini’s army at any time. What is more, after Mussolini joined the Axis Powers in 1936, not all Italian Americans rejected his decision. While most Italian Americans expressed shock and dismay when he aligned with Hitler, some Italian American groups began to associate with German and White Russian clubs. For example, the National Protective Order of Gentiles, an Italian American cultural group, began to meet in the headquarters of the German American Bund. Also, the Italian language program in Los Angeles public schools expelled a number of teachers who refused to use fascist propaganda in the classroom. Given these facts, perhaps Hoover and the FBI had good reason to begin compiling information in 1936 about potentially subversive Italian Americans and their resident alien friends and relatives.

Whether the government had reason to continue to suspect such persons, however, seems largely to depend on how quickly they rejected Mussolini as he moved closer to Hitler and the United States moved closer to war. Panunzio argues that persons of Italian descent in the United States began to turn away from Mussolini when he invaded Ethiopia in 1935, for they began to realize that the pact with Hitler was being used to advance German interests at Italy’s expense. Panunzio goes on to assert that by the time of his writing in 1943, “almost one hundred percent” of Italian Americans had come to support the Allies in

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184. Panunzio, supra note 25, at 777.
185. Lothrop, supra note 9, at 163.
186. Id. at 164. And even with respect to Italian Americans who did turn against Mussolini, authorities often had no way of knowing that their feelings had changed. See Fox, supra note 55, at 40.
187. Lothrop, supra note 9, at 164. My grandmother remembers hearing on the radio that Mussolini had joined with Hitler. Interview with Isabelle Alice Mauro, in Fairfax, Va. (Nov. 2006). Apparently, the prevailing sentiment in her Italian American community in Manhattan was confusion. Id. As she recounted in 2006, “We couldn’t understand why he would do that.” Id.
188. Lothrop, supra note 9, at 164.
189. Id.
the war effort. By that time, however, the government had recognized this fact as well, having removed enemy alien status from persons of Italian descent. Thus, whether the restrictions on Italians were justified seems to depend on whether the DOJ and the Army had reason to believe that Italians had come to oppose Mussolini by December 8, 1941, the day on which the restrictions were instituted. In the panicked situation of the days and months following Pearl Harbor, it is less than clear that the government had sufficient evidence to assure it of Italian loyalty.

b. The Pressing Military Situation After Pearl Harbor

Perhaps it is difficult today to understand the kind of fear that struck the United States following the attack on Pearl Harbor. For the first time in over a century, American citizens legitimately feared that they would be attacked, and soon. If the government did not have time to craft a more reasonable enemy alien policy, then its actions against persons of Italian descent would seem less suggestive of racism and more like the best it could do with the time it had.

As J. Edgar Hoover explained in the *Iowa Law Review* in 1943, enemy alien policies during World War II were designed to be as different as possible from the enemy alien policies of the First World War. In the first twenty-four hours after the United States’ declared war in 1916, only sixty-three enemy aliens were taken into custody. Hoover remembered this number with regret, explaining that it was only by fortune that the United States did not suffer more sabotage during the first days and months of World War I. Determined not to make the same mistake again, Hoover bragged that during the first twenty-four hours after the attack on Pearl Harbor, 1771 enemy aliens were detained, with nearly a thousand more to follow in the next week. Such protective attitudes likely motivated enemy alien policies throughout the war.

What is more, early losses in the Pacific to the Japanese increased fears of a mainland invasion. In fact, Gloria Lothrop argues that the losses in the Pacific, and the resulting fear of invasion, actually legitimized concerns about “fifth column” saboteurs, i.e., fascist supporters waiting patiently in the United States to spring into action whenever the enemy neared our borders. If Stephen Fox is correct to assert that April 1942 was the low point of the war for the United States (following the fall of

192. *Id.* at 782.
193. *Lothrop* supra note 9, at 166.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Lothrop* supra note 9, at 178.
Bataan and Corregidor to Japanese forces), then it becomes easier to understand why the Army and DOJ found it necessary to move swiftly—perhaps even recognizing the harm to civil liberties—to protect the greater good of national survival.199

III. IS COMPENSATION APPROPRIATE FOR PERSONS OF ITALIAN DESCENT HARMED BY PREJUDICIAL WARTIME RESTRICTIONS?

Faced with the new historical evidence of government prejudice against persons of Italian descent, should the government compensate them similarly to persons of Japanese descent? If so, should Congress provide the relief, or might it come through a lawsuit like Jacobs?

In 2000, Congress passed the Wartime Violation of Italian American Civil Liberties Act, which found that the government had committed a “fundamental injustice against Italian Americans” during the war.200 The Act found that 600,000 persons of Italian descent were deprived of liberty as a result of the enemy alien restrictions.201 It ordered the DOJ to investigate the restrictions on persons of Italian descent and publish a report of its findings.202 The Act did not address the issue of compensation.203

Although the Act did not explicitly agree with Jacobs, its language appears to track the case in that it seems carefully worded to avoid the words “prejudice,” “discrimination,” and “hysteria.”204 On one hand, the Act does speak of “fundamental injustice,” which might imply that Congress believed that racial prejudice affected persons of Italian descent as well as persons of Japanese descent. On the other hand, such language still seems purposely limited when compared with the Civil Liberties Act of 1988, which states in its first paragraph that wartime restrictions on persons of Japanese descent were “motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”205 Whether Congress crafted the language regarding persons of Italian descent to avoid a challenge similar to Jacobs, or whether Congress simply decided that it was prudent and/or historically accurate to avoid stronger wording, the choice was almost certainly conscious. This decision, in turn, suggests that Congress did not consider it appropriate to compensate persons of Italian

199. Fox, supra note 55, at 40.
201. Id. § 2(1).
202. Id. § 3.
203. See id.
204. See id. (using instead phrases such as “injustices,” “violations of civil liberties,” and “violations [of] freedom”). But see 50 App. U.S.C.A. § 1989a (“[the wartime restrictions on persons of Japanese descent were] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership”).
descent, nor even necessary to consider the question. Indeed, the statute merely recommends that the President “formally acknowledge that these events ... represented a fundamental injustice against Italian Americans,” a statement not even rising to the level of an apology.

If Italians are going to be compensated, then, it will likely have to be through an equal protection challenge similar to Jacobs. Those in favor of compensating persons of Italian descent could argue that Jacobs made both factual and legal errors. Legally, the D.C. Circuit was wrong to assume or imply that the Civil Liberties Act of 1988 compensated only those who had been interned. If the Act only compensated those who had been interned, then the decision to single out persons of Japanese descent would make sense, for only they were interned en masse without individual review. The statute, however, compensated both those who were interned and those who were “confined, held in custody, relocated, or otherwise deprived of liberty or property” during the relevant period. All of these measures applied to persons of Italian descent as well. Indeed, those in favor of compensating persons of Italian descent could point to Congress’ finding in 2000 that 600,000 persons of Italian descent were deprived of “freedom” as a result of the wartime restrictions.

As for Jacobs’ statement of historical facts, hopefully this Note has at least drawn into question the court’s assumption that racial prejudice did not motivate the wartime restrictions on Italian Americans. As mentioned above, neither the District Court nor the D.C. Circuit specifically found this fact; rather, the D.C. Circuit deemed the issue an “empirical question” with respect to which it was required to defer to Congress’ factual findings. On one view, then, those in favor of compensating persons of Italian descent could argue that factual deference to Congress now actually supports a finding of racial prejudice against persons of Italian

206. Wartime Violation of Italian American Civil Liberties Act § 4(5).
207. Jacobs, 959 F.2d at 319, 322 (holding that the decision to compensate only Japanese and Aleuts constituted “a perfect fit between means and ends [because it was] substantially related ... to the end of ... compensating those who were interned because of racial prejudice”) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526-27 (1989) (Scalia, J., concurring in the judgment)). To the extent the statute was actually passed to compensate other kinds of harms, which applied equally to persons of Italian and Japanese descent, the fit between means and ends seems less perfect.
208. PERSONAL JUSTICE, supra note 8, at 112.
211. 959 F.2d at 319.
212. Id. at 318-19 (citing Metro Broad., Inc. v. F.C.C., 497 U.S. 547 (1990) (holding that “[w]ith respect to a complex empirical question, we are required to give great weight to the decisions of Congress ...”) (internal citations omitted)) (“We see no difference between ‘great weight’ and ‘deference,’ which the Supreme Court and this Court have consistently treated as synonyms”) (internal citations omitted).
descent, given that the Wartime Violation of Italian American Civil Liberties Act may have reversed some of Congress' earlier statements about the Italian experience. On the other hand, the fact that Congress specifically avoided finding racial prejudice against Italians most likely means that a person of Italian descent who wanted to bring an equal protection challenge would need to point to the research of those historians' who have concluded that racial prejudice motivated the restrictions imposed upon them.\footnote{213. Which might, in turn, require the plaintiff to argue around the holding in Jacobs that Metro Broadcasting, Inc. v. F.C.C. required courts to defer to Congress when deciding complex empirical questions. See 959 F.2d at 319 (citing Metro Broad., Inc. v. F.C.C., 497 U.S. 547 (1990)).}

Yet these considerations do not address the normative question whether Congress or the courts, by whatever means, ought to provide compensation for persons of Italian descent. Nothing in the legal academic literature to this point has argued for such compensation, which makes me hesitant to do so absent overwhelming justification. Even Paula Branca-Santos, author of the most recent and most complete legal academic article regarding the internment of persons of Italian descent, only mentions the compensation provisions of the Civil Liberties Act of 1988 to show that the wartime experience of Japanese Americans is more widely known.\footnote{214. Paula Branca-Santos, Injustice Ignored: The Internment of Italian-Americans During World War II, 13 PACE INT'L L. REV 151, 152, 182 (2001).} Thus, she argues simply that "the true story [about Italian internment] should be revealed."\footnote{215. Id. at 182. Her article, however, was published in the spring of 2001, before the DOJ issued its report that November. Id.; U.S. DEP'T OF JUSTICE, supra note 11, at 1. One wonders if she was pleased with the DOJ's report.} In fact, most legal academic articles that mention the enemy alien restrictions do so with reference to the current war on terror, an important but wholly different inquiry.\footnote{216. See, e.g., Karen Engle, Constructing Good Aliens and Good Citizens: Legitimizing the War on Terrorism, 75 U. COLO. L. REV. 59 (2004); Paul Lyon, The Presidential Internment Power Established by the 1942 Internment of Americans Suspected of Disloyalty, 13 SAN JOAQUIN AGRIC. L. REV 23 (2003).} Moreover, some have questioned the wisdom of monetary compensation for historical wrongs in general.\footnote{217. See, e.g., Max du Plessis, Reparations and International Law, 22 WINDSOR Y.B. ACCESS TO JUST. 41, 66 (2003) (proposing a system of compensation for historical wrongs under which, "instead of doling out money on the principle that past victims deserve justice, the compensation becomes a vehicle for rectifying the social and economic problems that underpin today's victims' continuing marginalisation").}

On the other hand, the issue is not really whether compensation is necessary or appropriate, but rather, as Mr. Jacobs tried to argue, whether our system of laws is marred by its unequal treatment of certain ethnic groups.\footnote{218. Jacobs, 959 F.2d at 314.} If persons of Japanese descent have been legally protected against a certain kind of harm, while other ethnic groups who suffered
the same harm have not been protected, then the principle of equal protection suggests that the law must be changed to protect both groups equally. Indeed, *Jacobs* is consistent with such a statement, reasoning that if Mr. Jacobs could have shown that he suffered the same kind of harm as the Japanese, then the Fifth Amendment's equal protection clause would have supported his claim.\(^\text{219}\) In this way, it is less important whether compensation is appropriate for Italian victims, for compensating persons of Italian descent would be only one of many possible ways to correct an equal protection violation.

### CONCLUSION

Ultimately one must decide whether the two ethnic groups suffered the same kind of harm, which of course has been the central factual inquiry of this Note. In my opinion, the newly-uncovered historical evidence demonstrates that persons of Italian descent suffered the same racial prejudice as persons of Japanese descent. The only difference is the extent to which the government was able to act upon its prejudice. In other words, because of practical, political, and economic considerations, the government could not intern Germans and Italians in the same way that it could intern the Japanese, which is to say, *en masse*. Thus, even if government leaders were more prejudiced toward persons of Japanese descent—as they may have been—their increased prejudice was probably incidental to, and not determinative of, the kinds of restrictions eventually imposed upon both groups.

If Congress still desires to compensate victims of the government's wartime prejudice, as it clearly did when it passed the Civil Liberties Act of 1988, then it should compensate such prejudice against persons of Italian descent as well. If, on the other hand, it no longer desires to compensate past racial prejudice, then it should remove compensation for persons of Japanese descent or devise some other strategy to satisfy equal protection. The only impermissible option, in my opinion, is to leave the law unchanged, for as it stands it protects only one of two ethnic groups that were harmed by the same kind of government prejudice during the war.\(^\text{220}\)

I recognize, however, that this conclusion rests on my interpretation of the facts, and reasonable minds can of course differ with respect to whether the new historical evidence supports the conclusion that persons of Italian descent suffered the same kind of prejudice as persons of

\(^{219}\) *Id.* at 319.

\(^{220}\) Persons of German descent may have suffered the same prejudice as well, but this Note has only investigated such prejudice as it applied against persons of Italian descent. I think an inquiry into the German experience would be a good one; perhaps also an inquiry into the restrictions on Romanian, Hungarian, and Bulgarian aliens.
Japanese descent. Yet it seems beyond question that this new evidence at least casts significant doubt on Jacobs' assumption that the government neither acted out of prejudice nor imposed widespread restrictions upon persons of Italian descent. Clearly, it did both to some extent. Thus, if a person of Italian descent were to bring a claim similar to that of Mr. Jacobs, the court hearing his claim would at least need to grapple with the new historical evidence and the factual questions posed in this Note. Then, if it were to decide that Congress' decision to compensate only persons of Japanese descent was still "a perfect fit between means and ends," it would have to provide much more justification than Jacobs.221

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