THE CONSTITUTION GLIMPSED FROM TULE LAKE

PATRICK O. GUDRIDGE*

Old Man. But there are some
That do not care what's gone, what's left:
The souls in Purgatory that come back
To habitations and familiar spots.
Boy. Your wits are out again.
Old Man. Re-live
Their transgressions, and that not once
But many times; they know at last
The consequences of those transgressions
Whether upon others or upon themselves;
Upon others, others may bring help,
For when the consequence is at an end
The dream must end; if upon themselves,
There is no help but in themselves
And in mercy of God.[1]

I
INTRODUCTION

The accumulated texts that supply the working materials of constitutional law are not only written records of responses to problems of government organization and claims concerning the rights of individuals. They are also an archive, an accessible collective memory, means for readers (persons who choose to read later as well as writers in the process of writing) to re-experience controversies and their conclusions, to consider and to accept, reject, or revise explanations for conclusions, and to become, in the process, more or less partici-

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* Professor, University of Miami School of Law.
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1. WILLIAM BUTLER YEATS, *Purgatory*, *in* SELECTED POEMS AND TWO PLAYS OF WILLIAM BUTLER YEATS 203 (M.L. Rosenthal ed., 1962).

pants (more or less complicit) in those controversies and conclusions. If constitutional law is therefore a version of purgatory and not hell, it may be because its readers and writers are able to imagine a terminus, an "end" to "[t]he consequences" of "those transgressions" in which they are implicated. *Korematsu* as Justice Black wrote it seems to have supposed a short stay indeed: whatever wrong this decision did would be undone in *Ex Parte Endo* only a few pages further in the United States Reports.[2]

If Justice Black was wrong, if neither he nor his readers are as yet purged of *Korematsu*'s "transgressions," if *Endo* is not "absolution" (Jerry Kang's freighted term),[3] it may be because "the consequence" of *Korematsu* for the persons who were forcibly evacuated into concentration camps could not be declared "at end" in 1944 and cannot even now. Perhaps *Endo* did not—could not—accomplish what Black seemed to have hoped it would. Perhaps "the consequence" fell also upon Justice Black himself and now falls upon his readers. Reading *Endo* always requires remembering *Korematsu*, just as reading *Korematsu* always sets the stage for reading *Endo*. There is no "end" (it would have seemed to Yeats).

Korematsu and *Endo* are not, however, the only pertinent texts.[4] This Article begins by sketching something of the content of *The Spoilage*, one of two principal publications issued after an ambitious contemporary study of what its organizers called "Japanese American Evacuation and Resettlement," undertaken by University of California social scientists and funded by the Columbia, Giannini, and Rockefeller Foundations.[5] *The Spoilage* is a complex and controversial record of the efforts of camp residents, chiefly at Tule Lake, to identify and put to use effective forms of political action notwithstanding the resistance of camp administrators, sometimes dramatic and sometimes confoundingly passive.[6] These political efforts conclude—in *The Spoilage* at least—with mass renunciation of American citizenship by thousands of Tule Lake residents after

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2. *See* Korematsu v. United States, 323 U.S. 214 (1944); Ex parte Endo, 323 U.S. 283 (1944). For elaboration on this interpretation of *Korematsu* and *Endo*, see Patrick O. Gudridge, *Remember* Endo?, 116 HARV. L. REV. 1933, 1939-47 (2003).

3. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 958 (2004) [hereinafter *Denying Prejudice*].

4. There is also, importantly, Hirabayashi v. United States, 320 U.S. 81 (1943), and there are also, as Eric Muller has reminded us, the draft resistance cases, *see* ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY (William M. O'Barr ed., 2001); Eric L. Muller, *A Penny for their Thoughts: Draft Resistance at the Poston Relocation Center*, 68 L. & CONTEMP. PROBS. 119 (Spring 2005). Within this essay, however artificially and (of course) ultimately wrongly, there is not much discussion of these other judicial efforts.

5. DOROTHY SWAINE THOMAS & RICHARD S. NISHIMOTO, THE SPOILAGE: JAPANESE AMERICAN EVACUATION AND RESETTLEMENT DURING WORLD WAR II (1946) [hereinafter THE SPOILAGE]. For discussion of foundation support, see *id.* at xiv. The second publication was DOROTHY SWAINE THOMAS, THE SALVAGE (1952).

6. The University of California research effort—usually called the JERS study—is usefully described, and some of its difficulties noted, in Yuji Ichioka, *JERS Revisited*, *in* VIEWS FROM WITHIN: THE JAPANESE AMERICAN EVACUATION AND RESETTLEMENT STUDY 3-23 (Yuji Ichioka ed., 1989) [hereinafter VIEWS FROM WITHIN]. For further discussion of critics, see *infra* Appendix pp. 108-18.

Endo issued and after announcement of the closing of the camps.[7] The legal aftereffects of this renunciation and *The Spoilage* account of it soon became subjects of decisions by the United States Court of Appeals for the Ninth Circuit, in *Acheson v. Murakami*[8] and its implementing successor *McGrath v. Abo*.[9] In many ways remarkable if today largely forgotten, *Murakami* and *Abo* substantially blocked official enforcement of the Tule Lake renunciations. These decisions and their constitutional context are explored at some length in this Article—like *Endo*, along with *Korematsu*, confronting and testing readers and writers caught in constitutional purgatory.

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Chief Judge Denman's opinions in *Murakami* and *Abo*, it will become clear, may be grouped with Justice Douglas's effort in *Endo* and Judge Goodman's decision in *Kuwabara*[10] blocking draft resistance prosecutions of Japanese American internees. In their several ways, however cautious or seemingly idiosyncratic their arguments, these cases all reach results that *Korematsu* would not have signaled. *Korematsu* still looms large, of course, and hardly stands alone. There is also *Hirabayashi*—the Supreme Court's initial approval of the curfew enforced against Japanese Americans in the months after Pearl Harbor. There are still other decisions of the period—in the district courts and courts of appeals—that reach results similar to those in *Korematsu* and *Hirabayashi*. Even so, *Murakami* and *Abo*, along with *Endo* and *Kuwabara*, surely constitute too much work to ignore, too many decisions to be classed simply as outliers.

The question of what to make of these latter cases is not easy. In considering why this is so, it may be helpful to begin dialectically, by considering the eloquent recent work of Jerry Kang, deploying a jurisprudence within which *Endo*—and quite probably also *Kuwabara*, *Murakami*, and *Abo*—indeed figure at most as ironic counterpoints.[11] Professor Kang writes to judge—to enforce "corporate responsibility"—to demand that the Supreme Court hold itself accountable as an institution for *Korematsu* and its companion cases.[12] He means to seek out, identify, and explode efforts at evasion. Obviously, he undertakes this effort not to re-fight sixty-year-old controversies, but to introduce (or to reinforce) what he takes to be an important note within contemporary twenty-first century politics. He means to mark *Korematsu* (especially) as wrong in or-

7. S. Frank Miyamoto, a junior contributor to the *The Spoilage*, noted in 1989 that "80 percent of the Kibei [Japanese American citizens who had received some education in Japan] and 60 percent of the Nisei [American-born persons of Japanese ancestry], 17.5 years of age and over at Tule Lake (over 5,000 citizens) renounced their citizenship. . . . Even granting the injustices of the evacuation, why should thousands of youths have taken so drastic a step?" S. Frank Miyamoto, *Dorothy Swaine Thomas as Director of JERS: Some Personal Observations*, *in* VIEWS FROM WITHIN, *supra* note 6, at 48.

8. 176 F.2d 953 (9th Cir. 1949).

9. 186 F.2d 766 (9th Cir. 1951).

10. United States v. Kuwabara, 56 F. Supp 716 (N.D. Cal 1944).

11. Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 L. & CONTEMP. PROBS. 259 (Spring 2005).

12. *Id*. at 277; Kang, *Denying Prejudice*, *supra* note 3, at 966-70.

der to mark as wrong (or at least highly questionable) government actions today—including (especially) court decisions—that in any way resemble *Korematsu* and Japanese American internment. More precisely, he means to associate *Korematsu* with official racism—including judicial complicity in (or tolerance of) that racism. *Korematsu* becomes a "moral parable."[13] In order to do what he means to do, Kang needs to read *Korematsu* as clear-cut: there can be no doubt that Justice Black was evasive and complicit. He also needs to show that *Endo* is of a piece even though it reaches an opposite result. It, too, must appear evasive—to this end, Professor Kang depicts Justice Douglas's opinion as itself an exercise in avoidance, to be therefore *Korematsu*'s adjunct.[14]

This is a too summary summary, of course. Still, something at least of the force of Kang's argument should be evident: Why not encourage judges to acknowledge institutional sin, the risk of recurring wrong-doing, and thus the need to put *Korematsu* and its companions off limits? Kang recognizes that something like this has occurred regarding *Korematsu* itself, but he fears that the quarantine is too narrowly drawn—that *Endo* (and presumably other like cases) read in too celebratory a way will put judges off their guard. There is, however, another twenty-first century politics. The adversary is now the notion that in war law is silent. "*Korematsu* is wrong," some might say, "but what can you do? If we proceed similarly today, it's just proof that war is hell." On this view, *Korematsu* is recalled in order to reiterate Justice Jackson's famous (and famously equivocal) dissent. If Jackson was wrong, if we want Jackson to be wrong, *Endo*, *Kuwabara*, *Murakami*, and *Abo* (among other cases) become more central. They show at least some judges working hard to identify sometimes obscure resources in American constitutional law available for purposes of criticizing officials and vindicating individuals. Acknowledging their efforts reveals that constitutional law is not a collection of settled rules, but rather a collection of conflicting perspectives—a setting for dissent as well as acquiescence.

The internment cases, within this approach, fit with other examples of wartime constitutional innovation, with decisions like Learned Hand's in *Masses Publishing Co. v. Patten*[15] and the several Warren Court Cold War free speech improvisations[16]—and also, it may yet appear, *Hamdi* and *Padilla*.[17] To be sure, there is within this approach a certain methodological naïveté, a willful refusal to recognize that, at any particular moment, much in constitutional law is

13. Kang, *Watching the Watchers*, *supra* note 11, at 259. This project, of course, is not uniquely Professor Kang's. *See, e.g.*, Roger Daniels, *The Japanese American Cases, 1942-2004: A Social History*, 68 L. & CONTEMP. PROBS. 159 (Spring 2005) (drawing on Professor Daniels's larger body of work).

14. *See* Kang, *Denying Prejudice*, *supra* note 3, at 960-61. *See also* Kang, *Watching the Watchers, supra* note 11, at 19-20 n.104.

15. 244 Fed. 535 (S.D.N.Y. 1917).

16. See Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L. J. 1801, 1850-65 (2004).

17. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 2646-50; Padilla v. Rumsfeld, 352 F.3d 695, 722-24 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004). For Professor Kang's readings, see *Watching the Watchers*, *supra* note 11, at 10-18, 22.

treated either as though it were well-settled or as though it were simply a set of easily manipulated categories. This is not, however, Pangloss redux—there is no inconsistency in also acknowledging that positive elements, as a matter of fact, were and are often swamped. Rather, this alternative approach, insisting on contingency, means to be a demonstration of resources, a call to the individual responsibility of judges and advocates, and a suggestion that the moral politics of adjudication works with exemplars as well as with horrors.

II

THE SPOILAGE NARRATIVE

Much like newspaper headlines, the chapter titles of *The Spoilage* suggest a kind of summary narrative. The book begins with the "evacuation" or "[e]xpulsion"[18] of West Coast residents austerely described in the first sentence of the first chapter as "having common ancestry with the enemy that launched the Pearl Harbor attack";[19] the "detention" or "[c]onfinement" of these persons;[20] and the process of "registration" or "[a]dministrative [d]etermination of "[l]oyalty" and "[d]isloyalty" to which they were subject.[21] Thereafter attention narrows, addressing "segregation" of the "'[d]isloyal'" at Tule Lake,[22] and a sequence of events occurring at that camp, including "[s]trikes, [t]hreats, and [v]iolence";[23] "[m]artial [l]aw";[24] a "[p]eriod of [a]pathy";[25] "[s]uspicion, [b]eatings, and [m]urder";[26] "[p]ressure [t]actics";[27] and ultimately "[m]ass [r]elinquishment of American [c]itizenship."[28]

The Spoilage closely engages the events that it describes, often proceeding in painstaking detail, its account largely eschewing any effort to characterize its own theoretical framework, limiting overt authorial intervention (apart from the preface) to occasional transitional recapitulations. The result is something very much like a nonfiction novel, enlisting the reader as collaborator, committing the reader to the work of interpreting and judging depicted events as they unfold. However successful this approach may be as a matter of the politics of reading (quite successful in fact), it leaves *The Spoilage* very much dependent on the agendas and energies of its readers (more conspicuously, at least, than is usually the case) insofar as either abstracted or pointed uses of the work are concerned. Thus, the propositions that follow, characterizing what appear to be

18. THE SPOILAGE, *supra* note 5, at xvii; *see id*. at 1-23.
19. *Id*. at 1.
20. *Id*. at xvii; *see id*. at 24-52.
21. *Id*. at xvii; *see id*. at 53-83.
22. *Id*. at xvii; *see id*. at 84-112.
23. *Id*. at xvii; *see id*. at 113-46.
24. *Id*. at xvii; *see id*. at 147-83.
25. *Id*. at xvii; *see id*. at 236-60.
26. *Id*. at xvii; *see id*. at 261-82.
27. *Id*. at xviii; *see id*. at 303-32.
28. *Id*. at xviii; *see id*. at 333-61.

principal emphases within *The Spoilage* narrative, should not be understood as straightforward exercises in condensation.

First, *The Spoilage* is chiefly concerned with events occurring at Tule Lake or other camps as perceived from the point of view of occupants of the camps. Camp administrators figure prominently, but almost always distantly. By and large, their actions are described, but their thinking or their aims, although not ignored entirely, receive limited attention. The effects on camp occupants of administrative acts or failures to act matter most.[29]

Second, camp occupants are largely preoccupied with the demands of ordinary life inside the camps. *The Spoilage* depicts evacuation and resettlement as immediately catastrophic.[30] Evacuees must confront the brute facts of loss of home, loss of livelihood, loss of most personal property; pressing needs, and attendant concerns, thus, become organization of living space, maintenance of family integrity, solutions to food requirements, and (absent accessible savings) arrangements for remunerative work. For camp occupants, ordinary life-needs drive politics. At points, *The Spoilage* distinguishes, in then customary ways, between first and second generation Japanese Americans (Issei and Nisei), and (within the second group) between individuals who had traveled and studied in Japan (Kibei) and those who had not.[31] But as the narrative proceeds, although the impact of these differentiations does not appear as negligible, distinctive aspects of camp life as such, if often unevenly or inconsistently manifested, are the mainsprings of camp politics.

Third, camp administrators are often uninformed or uninformative, slow to respond to occupant concerns, and heavy-handed or otherwise maladroit in dealing with unrest.[32] In particular, the War Relocation Authority effort to assess the loyalty of camp occupants figures in *The Spoilage* as an exemplary, remarkably disruptive fiasco.[33] Officials in some camps fail to explain what is at stake. Occupants judge the loyalty questions from the perspective of what will happen to them next. The association of the inquiry with the prospect of military conscription marks "yes/yes" answers as difficult or even dangerous.[34] In some camps, significant numbers of individuals refuse to complete question-

29. For the assumptions explaining this focus (and criticism), *see infra* Appendix pp. ___.

30. THE SPOILAGE, *supra* note 5, at 14-23.

31. *Id.* at 3.

32. *See id*. at 40-52 (discussing developments at Tule Lake, Poston, and Manzanar).

33. *Id*. at 53-84.

34. Two items in a larger questionnaire that camp occupants were required to complete were crucial to loyalty assessments:

> Question 27: Are you willing to serve in the armed forces of the United States on combat duty, wherever ordered?
>
> Question 28: Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power, or organization?

Id. at 57. For the slightly different versions of these questions put to individuals not potentially subject to military service obligations, see *id*. at 58.

naires; a surprisingly large number of individuals (the percentage varying considerably from camp to camp) fail to avow loyalty to the United States within the terms put forward.[35] It is difficult, *The Spoilage* concludes, to read the results as anything other than an artifact of the administrative process.[36] "[T]he strong contrasts among relocation projects reflected, in large measure, administrative variations in the handling of the program and conflicting evacuee-administrative definitions of the issues involved."[37]

Fourth, the subsequent segregation of "disloyal" individuals at Tule Lake once more disrupts and puts in question elements of ordinary life. Attempts to organize representative political institutions positioned to deal effectively with camp officials founder—at least partly because the "disloyal" cohort is, in fact, a rather heterogeneous group.[38] Camp political processes fail to influence official action in any regular or predictable way, or even to elicit meaningful official communications. Resort to forms of oppositional politics—work stoppages, demonstrations, and the like—leads to military intervention and assertion of authority, incarceration of political representatives, and renewed, largely ineffectual efforts by camp occupants to deal with officials (now military officers).[39] Another round of attempts at organizing representative processes for dealing with officials, mostly after control of Tule Lake reverts to the WRA, also collapses because of the continued imprisonment of the first group of representatives, because the second group is unable to make much visible progress in ending this imprisonment (except one individual at a time), and because officials remain largely unresponsive to work-related demands.[40] Active public support

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35. *Id*. at 61.

36. Analysis of the data, and description of administrative processes at various camps, proceed at considerable length. *See id*. at 61-83.

37. *Id*. at 82. Professor Miyamoto emphasizes that the statistical analysis in *The Spoilage* also shows that "those who chose segregation at Tule Lake [responded "incorrectly" to the "loyalty" questions] were those who had experienced the greatest amount of discrimination and segregation before the war." Miyamoto, *supra* note 7, at 45; *see id*. at 43-46.

38. *See id*. at 88-89.

> Under the segregation program, the "disloyal," as defined at registration [the survey process], had to decide whether they would stand by their declaration or retract. . . . [D]ecisions were often made for reasons highly irrelevant to the matter of political allegiance. The most seemingly irrelevant of these reasons, and the one having the greatest influence on the evacuees was their belief that a declaration of "loyalty" would imply eventual forced resettlement. Residents of the segregation center . . . could not resettle for the duration of the war whereas residents of relocation projects were being given leave clearance and subjected to intensive WRA pressure to resettle. Many evacuees therefore believed that WRA was planning to force them out of camps to face the hostile American public responsible for their evacuation and detention. To these people, the choice offered was not between Japan and America, in a political sense, but between Tule Lake and the rest of America, in a security sense.

Id. at 88.

39. *The Spoilage* account of this sequence is notably detailed and complex. *See id*. at 113-83.

40. *See id*. at 184-220.

for official political action, aimed at working with (and against) administrators, largely dissipates.[41]

Fifth, with the failure of this second round, politics changes: more efforts now focus on community organization as such, increasingly emphasizing "Japanese" identity. This new politics reinforces a chronic fear of informers (not ungrounded) and a corresponding insistence upon shows of "loyalty" defined in identity terms. Politics becomes increasingly personal individuals suspected of disloyalty (*inu*) are physically threatened, assaulted, or (in at least one instance) killed.[42]

> The administration was weakened with the thorough discrediting of many of the evacuees upon whom it had depended as a channel of communication and a means of collaboration. Failure to apprehend assailants and assassins weakened the official forces devoted to the maintenance of law and order. The more radical elements emerged from the underground and sponsored openly, and with impunity, programs that a short time before would have led to arrest and incarceration.[43]

The Spoilage depicts both the origins of this "radical element" and the forms of their political action—including efforts to inculcate and celebrate Japanese culture—in terms that call attention to aims and dynamics interior to camp politics as such.[44]

Sixth, announcement that the camps will close provokes another crisis at Tule Lake. Camp occupants have access to relatively few sources of information, often obviously skewed or simplified, especially regarding the progress of

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41. As noted in *The Spoilage*,

> [E]fforts . . . preparing the groundwork for an election were met with a general indifference by the residents. Even persons who felt that the election of a representative body might do much to bring order into the camp were pessimistic, for they believed that responsible persons, realizing the difficulty of getting caught between the administration and the people, and the possibility of incurring criticisms for dissatisfactions for which they could not be responsible would, if elected, refuse to accept positions on the central body.

Id. at 215.

42. *Id.* at 261-82, 271 (describing the murder of Takeo Noma).

43. *Id.* at 282.

44. These are representative passages—the first showing the "radical element" taking over ordinary processes of camp political organization; the second interpreting ideological or cultural claims within the terms of ordinary camp life stresses:

> By the beginning of July the underground group had become a powerful and systematically integrated organization. Representatives had been appointed in every block and had been coordinated under ward representatives, who in turn formed a central committee.
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> . . .
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> The new transferees [to Tule Lake], both the undetermined and the determined "disloyals," found themselves at an immediate disadvantage with respect to the old Tuleans, who had the best housing and the best jobs, were in positions of power and prestige and were favored by the administration. The resulting jealousies and dissatisfactions provided fertile ground for the growth of the belief, fostered by the more determined "disloyals," that the essential difficulty was that Tule Lake was not composed entirely of "like-minded" people or "true disloyals" who had cast themselves off from America and were devoted to the pursuit of the Japanese way of life. Soon, even the least determined "disloyals" among the transferees were blaming the lack of determined "disloyalty" among the old Tuleans for the frictions in camp.

Id. at 307, 304.

the war and the state of public opinion outside the camps.[45] Occupants conclude that they will be once more left to fend for themselves, to relive (in other words) the experience of the original catastrophic dislocation, and left also to face the dangerous, prejudiced hostility of persons living outside the camps.[46] Renunciation of citizenship is understood as an expression of opposition and also as a way of forcing administrators to maintain camp residence for their families—and thus as a means of assuring an important measure of personal safety and economic support.[47] The political environment of the camp—the ascendant insistence on "Japanese" identity—adds its own pressure.[48] Large numbers of Tule Lake occupants renounce American citizenship.[49]

> With mass renunciation of citizenship by Nisei and Kibei, the cycle which began with evacuation was complete. Their parents had lost their hard-won foothold in the economic structure of America. They, themselves, had been deprived of rights which indoctrination in American schools had led them to believe inviolable. Charged with no offense, but victims of a military misconception, they had suffered confinement behind barbed wire. They had been stigmatized as disloyal on grounds often far removed from any criterion of political allegiance. They had been at the mercy of administrative agencies working at cross-purposes. They had yielded to parental compulsion in order to hold the family intact. They had been intimidated by the ruthless tactics of pressure groups in camp. They had become terrified by reports of the continuing hostility of the American public, and they had finally renounced their irreparably depreciated American citizenship.[50]

III

AFTERWORDS

The Spoilage concludes leaving thousands of former occupants of Tule Lake, having renounced American citizenship, still living in the United States, their futures and their legal status uncertain.[51] In 1948, three of these individuals applied for United States passports, were refused, and brought suit in federal district court in California, successfully obtaining a court order canceling their previous acts of renunciation.[52] Judge William Mathes concluded: "[T]he purported renunciation of the plaintiffs . . . was not as a result of their free and intelligent choice but rather because of mental fear, intimidation, and coercions depriving them of . . . their will."[53] Mathes characterized conditions at Tule Lake in these terms:

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45. *See id*. at 345-47.
46. *Id*. at 346-47.
47. *See id*. at 347-52.
48. *See id*. at 353-55.
49. *See id*. at 357-61.
50. *Id*. at 361.
51. *Id*.
52. *See* Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949).
53. *Id.* at 965-66. The findings of fact and conclusions of Judge Mathes are published as Exhibit 1 included with the decision of the United States Court of Appeals for the Ninth Circuit affirming the district court order. *See id*. at 960.

> The residents . . . had for almost four years been subject to the demoralizing effects of center life; They had suffered physical hardship and loss of property from the evacuation. They had been stigmatized by the press as rioters. Those who desired work were not given employment. They had been subject to misinterpretation of the renunciation procedure. They had been subject to rumors which had produced an irrational state of mind, which accompanied long detention, isolation, tension, and insecurity in the form of mass hysteria.[54]

His main justification for canceling the renunciation declarations, however, was "[l]awlessness, gangsterism, and hoodlumism" within the Japanese American population at Tule Lake.[55]

The United States introduced *The Spoilage* into evidence[56]—not surprisingly, given the book's depiction of renunciation (in many cases, anyway) as a product of "thinking" precisely illustrative of "perspective," "balance," and "free will."[57] On appeal, the Ninth Circuit panel repeatedly cited *The Spoilage*[58] and plainly understood its account of camp politics, but it also affirmed the district court, elaborating an overlaying defense of the district court findings framed from a dramatically different perspective. Chief Judge Denman,[59] joined by Judge Orr,[60] insisted it was the United States, not "the Japanese community" depicted by Judge Mathes, that was ultimately responsible for "all the particular factors . . . found as leading to a condition of mind and spirit of the American citizens imprisoned at Tule Lake Center. . . ."[61]

The principal headings subdividing the opinion not only summarize but suggest something of the tone of Denman's opinion:

> A. The racial deportation. Its unnecessary hardships and cruelty as affecting the attitude of scores of thousands of loyal Americans towards their citizenship in a country so ordering them into imprisonment.[62]

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54. *Id*. at 965.

55. *Id*. The specific finding concerning one plaintiff—Miye Mae Murakami—is illustrative:

> She lived in an atmosphere of fears, threats, and scares stirred up by gangsters and hoodlums of the pro-Japanese organizations. She was threatened with her life unless she renounced, even in the supposed privacy of the women's washroom when rough-looking men invaded such room to put the women in fear of physical harm. She lived in an atmosphere of assaults, batteries, stabbings, and pressures from neighbors; [s]he had heard of the mysterious murder of a leader of the Japanese community and that other residents would meet the same fate unless they renounced their citizenship. These threats and fears resulted in her losing completely any sense of perspective or balance in her thinking. She renounced her citizenship not of her own free will but by the pressure exerted upon her by the life in the community and by the fears that prevailed in the center.

Id.

56. AUDRIE GIRDNER & ANNE LOFTIS, THE GREAT BETRAYAL: THE EVACUATION OF THE JAPANESE-AMERICANS DURING WORLD WAR II 453 (1969).

57. *See Abo,* 176 F.2d at 965 (capacities that Judge Mathes found to be denied Miye Mae Murakami by persistent pressure and threats).

58. *See Murakami*, 176 F.2d at 957 n.2, 958 n.5, 959 nn.6-10.

59. For one view of Denman, a complex figure (to say the least), *see* PETER IRONS, JUSTICE AT WAR 175-76, 183-85, 265-68 (University of California Press 1993) (1983).

60. The third judge (Judge Stephens) did not participate. *See Murakami*, 176 F.2d at 960.

61. *Id*. at 954.

62. *Id*.

> B. The incarceration at the Tule Lake stockade. Its effect upon the minds of our fellow citizens as to the value of their citizenship.[63]
>
> C. General De Witt's doctrine of enemy racism inherited by blood strain. Its paramount effect on the minds of the imprisoned citizens.[64]

Passage after passage of the opinion amplified the main themes:

> One has no difficulty imagining the thousands of families in which the mother must carry the babies, measuring the carrying capacity of each of the other children able to walk against the sacrifice of one or another household utensil, or book, or family treasure. The emotion of free citizens contemplating the pathetic testing of the carrying capacity of stumbling infants lifting their bundles is not pertinent here. What is pertinent is what our incarcerated fellow citizens felt about it in their several years behind barbed wire under the machine guns of the soldiers in their prison's turrets. For, so far as concerns the psychology of the renunciations to those renouncing and their surrounding companions, the beguiling words "evacuation" meant deportation, "evacuees" meant prison and their single rooms, some crowding in six persons, meant cells, as they in fact were. Their true character is recognized in this opinion.[65]
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> As if to drive it in to their already shocked spirits that their treatment was to be like criminals in a penitentiary, they were paid the prison wage of $12 a month to the unskilled and $16 to those skilled, while their free fellow citizens, working beside them, were paid the prevailing $12 to $20 per day. . . . The buildings were covered with tarred paper over green and shrinking shiplap—this for the low winter temperatures of the high elevation of Tule Lake. . . . No federal penitentiary so treats its adult prisoners. Here were the children and babies as well.[66]
>
> The identity of [De Witt's] doctrine with that of the Hitler generals towards those having blood strains of a western Asiatic race as justifying the gas chambers of Dachau must have been realized by the educated Tule Lake prisoners of Japanese blood strain. The German mob's cry of "der Jude" and "the Jap is a Jap" to be "wiped off the map" have a not remote relationship in the minds of scores of thousands of Nisei, . . . though the map referred to may have been the area of exclusion.[67]

The particular camp incidents stressed by Judge Mathes in the district court opinion needed to be set within the context constructed by the United States government itself, as well as the circumstances outside Tule Lake as internees perceived them. Denman reproduced a series of statements (all taken from *The Spoilage*) of Japanese American renouncers.[68] These are representative:

> "I did not expect this of the Army. . . . But [to] a General De Witt, we were all alike. 'A Jap is a Jap. Once a Jap, always a Jap.'
>
> * * *
>
> I swore to become a Jap 100 percent, and never do another day's work to help this country fight this war. My decision to renounce my citizenship there and then was absolute."[69]

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63. *Id*. at 955.
64. *Id*. at 957.
65. *Id*. at 955.
66. *Id*. at 956.
67. *Id*. at 958.
68. *See id*. at 958-59.
69. *Id*. at 958.

> "What do they want us to do? Go back to California and get filled full of lead? I'm going to sit here and watch."[70]

It is easy to wonder, reading the Ninth Circuit opinion, why the added argument was thought to be necessary. *Murakami*, after all, considered the claims and circumstances of only three individuals. Chief Judge Denman did not directly criticize the analysis that Judge Mathes had put forward.[71] But a second suit was already underway, and would reach the appellate court relatively quickly: *McGrath v. Abo*,[72] at the time involving some 4315 plaintiffs (more would join later), almost all occupants of Tule Lake, who were being held for deportation under the Alien Enemy Act of 1798, and who sought a judicial declaration setting aside their renunciations. The district court judge—Judge Louis Goodman[73]—had ruled in favor of the plaintiffs.[74] The Court of Appeals reversed the district court and remanded the case, but on terms that ultimately resulted, although not always quickly, in the cancellation of the citizenship renunciations of over ninety percent of the plaintiffs.[75] In *Abo*, the Ninth Circuit panel approach to *Murakami* mattered much.

Chief Judge Denman again wrote for the panel, the same judges who had heard *Murakami* (with all three joining in the opinion this time). The problem *Abo* posed was, in the first instance, procedural. Initially, counsel for plaintiffs brought suit on behalf of just under one thousand named plaintiffs, and added the names of several thousands more as litigation proceeded in the district court.[76] The Ninth Circuit ruled that the case was properly regarded as a class action—within the language of Rule 23 as it then stood, there was "a common question of law or fact . . . and a common relief is sought."[77] In retrospect, as Jack Greenberg observed, this conclusion may seem to have been "a neat and probably foreordained outcome."[78] But Judge Denman was obviously aware that, as the jargon of the day put it, the class action was at bottom "spurious," concerned conceptually with the enforcement of "several" rights, and not one true class right.[79] "[T]he massing in one suit of thousands of cases of individual

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70. *Id*. at 959.

71. *See id*. at 954.

72. 186 F.2d 766 (9th Cir. 1951).

73. On Judge Goodman's now well-known efforts to bring constitutional norms to bear in the context of draft resister prosecutions of interned Japanese Americans, see MULLER, FREE TO DIE FOR THEIR COUNTRY, *supra* note 4, at 131-60.

74. Abo v. Clark, 77 F. Supp. 806 (N.D. Cal. 1948).

75. The total number of plaintiffs apparently increased substantially as the case proceeded. "By the spring of 1959, the tally was as follows: 5,766 Japanese Americans had renounced. Of these, 5,409 had applied for restoration of their citizenship. And 4,987 were successful." John Christgau, *Collins versus the World: The Fight to Restore Citizenship to Japanese American Renunciants of World War II*, 54 PAC. HIST. REV. 1, 30 (1985).

76. *Id*. at 10, 13; *see* McGrath v. Abo, 186 F.2d 766, 769-70 (9th Cir. 1951).

77. *See id*. at 769 (quoting F.R.C.P. 23(a)(3)).

78. Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 575 (1997).

79. *See Abo*, 186 F.2d at 769-71. *See generally Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1331-53 (1976).

several rights to renunciation in which each had his several burden of proof places a heavy burden on the court . . . ."[80]

Burden of proof became the central question in the case. "The record shows the certainty that many of the 4315 plaintiffs who voluntarily renounced were disloyal to the United States."[81] The importance of the task of identifying these "disloyal" citizens, Denman argued, was obvious: "In a cold war, already existing when the case were tried and now with the hot war in Korea, the federal courts should be more vigilant than ever that the massing of 4315 plaintiffs . . . does not conceal the facts as to such enemy minded renunciants."[82] Thus, at least with respect to adult plaintiffs, "the burden of proof is on each to show that he was brought to a condition of mind by his treatment while interned which destroyed his free action in renouncing."[83] This conclusion, by itself, would seem to echo the analysis of Judge Mathes in *Murakami*.[84] But in *Abo*, Chief Justice Denman immediately recalled and applied his own analysis in the earlier case:

> The evidence shows that all such plaintiffs, save 83 . . . , were imprisoned at Tule Lake when they renounced. It further shows the oppressive conditions prevailing there were in large part caused or made possible by the action and inaction of those government officials responsible for them during their internment. Because of the oppressiveness of this imprisonment by the government officials, a rebuttable presumption arises as to those confined at Tule Lake that their acts of renunciation were involuntary.[85]

A procedural choreography followed: "This presumption requires the defendants to go forward with the evidence and produce evidence rebutting it. When such evidence is introduced, the presumption disappears, but the fact of the coercive conditions remains as a part of each plaintiff's showing to support his individual burden of proof."[86]

In the course of the hearings below, it appeared, the government had already satisfied its burden in many cases by identifying groups of individual plaintiffs and indicating evidence the government could introduce concerning each group. Judge Goodman had ruled otherwise—wrongly, from the perspective of the appellate panel.[87] But the government had also agreed that, in almost all instances, it would treat as decisive written statements of individual plaintiffs

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80. *Abo*, 186 F.2d at 774.

81. *Id*. at 771.

82. *Id*. at 772.

83. *Id*. at 773. Concerning individuals under the age of eighteen, *see id*. at 772.

84. "The facts of the wrongful conditions prevailing at Tule Lake, common to each of the plaintiffs imprisoned there, are substantially the same as those in the findings in the case of *Murakami v. Acheson*, reported on appeal here in *Acheson v. Murakami* . . . where they are fully set forth. In that case, however, evidence was offered by each plaintiff showing that she individually was coerced into an involuntary renunciation of her citizenship." *Id*. at 771.

85. *Id*. at 773.

86. *Id*.

87. *See id*. at 773-74.

as to why they had felt coerced.[88] There was thus no "necessity of proof in each individual case of the conditions at Tule Lake"—both "a large saving" procedurally, and (it seemed) a just acknowledgement of both government concerns as to particular individuals and the adverse consequences, for the class as a whole, of the government's own improper conduct.[89] Chief Judge Denman noted that "[t]he Attorney General has indicated an appreciation of the wrongs done to those whose renunciations were forced by the conditions at Tule Lake, described in the *Murakami* decision, . . . and has announced that the decision 'would be accepted and applied by . . . the Department of Justice . . . in all future cases of this kind.'"[90]

IV

CONSTITUTIONS AND RECONSTITUTIONS

Together, *Murakami* and *Abo* are remarkable—judicial outrage and ingenuity uncommonly conjoined—yet the two opinions are only occasionally noted.[91] It is not as though contested claims of renunciation of citizenship no longer arise.[92] The approach that Judge Denman took in the two cases, however, differs markedly from the usual forms of argument about renunciation prominent in the past half century or so. This difference might explain the marginal status of *Murakami* and *Abo* (although there may be many other explanations as well). Juxtaposing the two opinions and their mainstream counterparts is useful anyway as a first step. The premises organizing the Denman efforts carry associations that, once evident, mark the politics at Tule Lake, glimpsed in *The Spoilage*, as surprisingly resonant, indeed emblematic of constitutional fundamentals.

A. Usual Forms of Argument

The question of renunciation appears, most of the time, to be bound up with the question whether the United States government can revoke American citi-

88. *Id*. at 774. The work involved in gathering the written statements from the class members, it seems, accounts for the long life of the case after remand. *See* Christgau, *supra* note 75, at 28-31.

89. *Abo*, 186 F.2d at 774. Renunciants who proceeded individually, outside the context of the class action, sometimes faced much harder going. *See, e.g.*, Murakami v. Dulles, 221 F.2d 588 (9th Cir. 1955) (Denman, C.J.).

90. *Abo*, 186 F.2d at 771.

91. *Murikami* is included, in usefully edited form, along with a helpful introduction and notes, in ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION 227-32 (2001). In the course of an important essay, Neil Gotanda pointedly discusses renunciation at Tule Lake, but does not explore the Ninth Circuit opinions as such. *See* Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People,"* 76 ORE. L. REV. 233, 242-45 (1997). As Professor Gotanda notes, Japanese American renunciation of citizenship at Tule Lake and elsewhere does not figure in PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985), notwithstanding the central place of expatriation in the (controversial) argument of this well-known work. *See* Gotanda, *supra*, 76 ORE. L. REV. at 242.

92. *See, e.g.*, David A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 GEO. IMMIGR. L.J. 1 (1999).

zenship for reasons of state—even if contrary to the wishes of the individuals affected—or whether citizenship is instead to be understood as a matter of individual choice and right.[93] In *Perkins v. Elg*,[94] decided just before World War II, Chief Justice Hughes depicted citizenship as a matter of individual election – if not necessarily exclusively so. His opinion deftly blended constitutional language, international understandings, executive practice, and statutory language as it then stood. In principle, it appeared, "loss of citizenship" might be the result of "voluntary action" by an individual amounting to "binding choice," at least in the absence of a "treaty or statute having that effect."[95] Almost twenty years later, Justice Frankfurter's majority opinion in *Perez v. Brownell*[96] treated the question whether Congress could strip Americans of their citizenship for voting in foreign elections as chiefly a question of governmental necessities and therefore of power, and not individual right:

> The Government must be able not only to deal affirmatively with foreign nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.[97]

Frankfurter also acknowledged, though, that "Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily"—this conclusion, the *Perez* opinion suggested opaquely, followed as a matter "[o]f course."[98] Chief Justice Warren dissented, invoking what he took to be basic principles: "the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government."[99] Individual U.S. citizens were free to "exercise . . . the right of expatriation," and thereby to renounce citizenship themselves, or to disclose their choices by taking "other actions in derogation of undivided allegiance to this country."[100] But voting in a foreign election was not, in and of itself, such an action.[101]

Afroyim v. Rusk overruled *Perez*.[102] Justice Black emphasized the language of the Fourteenth Amendment: "'All persons born or naturalized in the United States . . . are citizens of the United States . . . .'"[103] The constitutional declaration, he argued, pointed to a conclusion much like Chief Justice Warren's:

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93. Addressing somewhat different questions, Professor Aleinikoff draws (and persuasively elaborates on) a similar distinction between sovereignty-based and citizen-based conceptions of the state. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 12-18, 39-46 (2002). Reason of state and individual rights, of course, need not be conceived entirely separately. *See, e.g.*, RICHARD TUCK, PHILOSOPHY AND GOVERNMENT, 1572-1651, at xii-xv (1993).

94. 307 U.S. 325, 334 (1939).

95. *Id.*

96. 356 U.S. 44 (1958).

97. *Id.* at 57.

98. *Id.* at 61; *accord* Nishikawa v. Dulles, 356 U.S. 129, 133 (1958).

99. *Perez*, 356 U.S. at 65 (Warren, C.J., dissenting).

100. *Id.* at 68 (Warren, C.J., dissenting).

101. *See id.* at 75-78 (Warren, C.J., dissenting).

102. 387 U.S. 253, 268 (1967).

103. *Id.* at 262 (Justice Black's ellipses).

> There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it.[104]

Vance v. Terrazas[105] started from the same assumption. "[E]xpatriation depends on the will of the citizen rather than on the will of Congress"[106]—as a result, acts of individuals deemed by the government to be acts of renunciation must be not only voluntary, but specifically intended as renunciatory.[107]

Terrazas, it is easy to think, "reaffirmed the central message of *Afroyim*."[108] But in *Terrazas,* Justice White also declared that specific intent, like voluntariness, need only be established by a preponderance of the evidence. Congress was free, as it already had, to specify acts that were presumptively voluntary, leaving individuals with the burden of arguing otherwise (the government retaining the burden to show specific intent to renounce).[109] White's burden of proof ruling in particular marked a sharp break with previous Supreme Court thinking.[110] In *Nishikawa v. Dulles*,[111] Chief Justice Warren, writing for the Court, had stated that the government bore "the burden of persuading the trier of fact by clear, convincing and unequivocal evidence that the act showing renunciation of citizenship was voluntarily performed."[112] Justice Frankfurter, concurring, agreed.[113] *Terrazas* concluded that *Nishikawa* "was not rooted in the Constitution," Justice White noting the *Nishikawa* court's own acknowledgement that it "was acting in the absence of legislative guidance."[114] Congress was free to jettison the clear and convincing standard. Warren and Frankfurter indeed wrote their opinions in *Nishikawa* in ways that emphasized judicial thought processes more than constitutional texts. Cases they cited, however, plainly signaled that constitutional presuppositions both underlay and organized evidentiary analyses and statutory constructions.[115]

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104. *Id.*

105. 444 U.S. 252 (1980).

106. *Id.* at 260.

107. *See id.* at 260-63.

108. T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1483 (1986).

109. *See Terrazas*, 444 U.S. at 264-70.

110. Two of the dissents in *Terrazas*—like *Afroyim* and *Perez*, a five-four decision—are insistent in this regard. *See id.* at 271-72 (Marshall, J., dissenting in part); *id.* at 273-74 (Stevens, J., dissenting in part). Justice White, notably, had joined Justice Harlan's dissent in *Afroyim*. *See* Afroyim v. Rusk, 387 U.S. 253, 268.

111. 356 U.S. 129 (1958).

112. *Id.* at 135.

113. *Id.* at 141-42 (Frankfurter, J., concurring in the result).

114. *Terrazas*, 444 U.S. at 265.

115. Thus, Chief Justice Warren linked Schneiderman v. United States, 320 U.S. 118, 122 (1943), in which Justice Murphy emphasized his own sense of equity in justifying the clear and convincing standard, with Justice Douglas's concurring opinion in United States v. Minker, 350 U.S. 179, 197 (1956) (Douglas, J., concurring), juxtaposing constitutional considerations and statutory construction. *See* Nishikawa v. Dulles, 356 U.S. 129, 134-35 & n.6. Warren also characterized the clear and convincing evidence standard as of a piece with what he took to be the clear statement requirement announced in Perkins v. Elg, 307 U.S. 325, 337 (1939), given constitutional resonance by Justice Jackson, writing for the Court in Mandoli v. Acheson, 344 U.S. 133, 133 (1952), which Warren also cited. *See Nishikawa*,

It should be apparent that *Terrazas* was something of a back-door revival of *Perez*. To be sure, the government now needed to proceed case-by-case.[116] But the focus on individual "will"—on voluntariness and specific intent—afforded the government the opportunity to further its agendas obliquely by questioning assertions of individual renunciants rather than by asserting its own interests directly as before. The relaxation of the government's burden of proof marked this opportunity as often realizable. *Terrazas* organized a new casuistry. Depending on whether the government wished to claim that renunciation had occurred or instead chose to resist the individual's claim of renunciation, individuals would be characterized as acting inconsistently, given all the circumstances, and therefore as failing to evince a specific intent to renounce citizenship,[117] or their acts of renunciation, taken alone, would be depicted as sufficiently clear to overshadow complicating facts.[118] In every case, thanks to the preponderance standard, government characterizations and individual assertions figured as equally plausible initially—however the final balance was struck in any particular case.[119] Ex ante, at least, there would have seemed to be no real priority afforded an individual's rights.

B. The Constitution Glimpsed From Tule Lake

Abo, it might seem, anticipates *Terrazas*. The burden of proof ends up with the government—but (on its face) does not appear to be substantial. There is, though, a large difference. Chief Judge Denman reserves judgment even after the government satisfies its burden of production: "[T]he fact of the coercive conditions remains."[120] The government is still on trial. In *Terrazas*, Justice White treats the individual as the exclusive focus.

It is the individual, after *Terrazas*, who is interrogated; it is the government that plays the part of the critic. The structure of politics at Tule Lake, as it appears in *The Spoilage* recounting, was precisely opposite. Individuals repeatedly beset by government acts—initial evacuation, internment, loyalty testing, segregation, inadequate provisions for housing, food, work—repeatedly attempted to organize means of holding officials to account, to undo or to mitigate official acts. These attempts repeatedly failed. Processes of political organization did not therefore terminate, but changed—in response they became

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356 U.S. at 136, 133. Justice Frankfurter's *Nishikawa* concurrence cited his own opinion for the Supreme Court in Baumgartner v. United States, invoking substantive constitutional commitments to explain application of a clear and convincing standard, 322 U.S. 665, 675-76 (1944). *See Nishikawa*, 356 U.S. at 141.

116. Chief Justice Warren's critique of the overbreadth of the statute addressed in *Perez* retained its force. *See* Perez v. Brownell, 356 U.S. 44, 76-77 (Warren, C.J., dissenting).

117. *See, e.g.*, Action S.A. v. Marc Rich & Co., 951 F.2d 504, 507 (2d Cir. 1991)

118. *See, e.g.*, Richards v. Secretary of State, 752 F.2d 1413, 1421 (9th Cir. 1985).

119. Government argumentative strategies do not prevail in every case. *See, e.g.*, Breyer v. Ashcroft, 350 F.3d 327 (3rd Cir. 2003). And it is not enough, of course, for government officials simply to argue that they were not persuaded by an individual's claims. *See, e.g.*, Rivera v. Ashcroft, 387 F.3d 835, 841-43 (9th Cir. 2004).

120. McGrath v. Abo, 186 F.2d 766, 773 (1951).

increasingly confrontational, both formally and informally. Official reactions in turn reinforced an atmosphere of conspiracy and suspicion, of diffusion and escalation of hostility (ultimately encompassing acts of violence). A politics of engagement increasingly gave way to a politics of repudiation—as a means throughout the period of achieving immediate ends (personal safety, family unity, community) and also of expressing opposition to official acts and failures to act. Renunciation of citizenship was simply one form of political action within this larger context.

For the reader of *The Spoilage*, renunciation does not appear to have been a result of hysteria; rather, it seems an understandable response under the circumstances—a response that may have promised short-term safety, a response marked by the cumulative failures of official processes as one of the few available. Within these terms, labeling renunciation as not "voluntary" seems inapt. The decision to renounce citizenship is easy to depict as considered and as justifiable in context. Of course, if renunciation is thought to have been a judicious or prudent choice, the conclusions of Chief Judge Denman in *Murakami* and *Abo* that most Tule Lake renunciations were not "voluntary" and therefore need not have legal effect would seem to become open to question. In *Abo* Denman himself had quoted language of the Supreme Court that might have been thought to fit the case: "'[T]he forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress.'"[121] But if Denman used the term "voluntary" (available legal formulas would seem to have required its use[122]), he appears to have been working with a somewhat different notion in fact. In a later case, he summarized *Murakami* this way:

> [B]y orders of an American General, carried out by American police and other officers, 70,000 Nisei American citizens of the Pacific Coast States were indiscriminately confined for over two years in barbed wire stockades where they were placed in overcrowded prison-like structures. This was done though no act of sabotage by any Japanese citizen or much less any Nisei had been committed. That is to say, American officers . . . treated the Nisei as "outcasts" in the full sense of that word. They were cast out of their homes for over two years, their families often separated, with a huge loss of property sold under the evacuation pressure of from one to ten days notice, and they had destroyed their businesses, their established professions and the earning power of mechanics and laborers. Over four thousand such Nisei under pressure of that outrageous treatment gave up their citizenship. We held . . . that such acts of denaturalization were involuntary.[123]

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121. *Id.* at 772, (quoting Savorgnan v. United States, 338 U.S. 491, 502 n.18 (1950), quoting Doreau v. Marshall, 170 F.2d 721, 724 (3rd Cir. 1948)).

122. *See* Dos Reis v. Nicolls, 161 F.2d 860, 862, 868 (1st Cir. 1947).

123. Fukumoto v. Dulles, 216 F.2d 553, 554 (9th Cir. 1954). Fukumoto, an American citizen living in Japan in September, 1941, at that point renounced his Japanese citizenship, but (unable to leave Japan) successfully applied to recover that citizenship in 1943. He argued after the war that his renewal of Japanese citizenship was not tantamount to renunciation of his American citizenship because his renewal was a response to his outcast status in Japan and his consequent harsh treatment by police and other authorities there. *See id.* at 553-55. Chief Judge Denman discussed *Murakami* in the course of assessing the plausibility of Fukumoto's contentions concerning his mistreatment by Japanese officials.

Because the internment regime—in particular at Tule Lake—was "outrageous," Japanese Americans were able to argue that their renunciations of American citizenship were without effect.

"Outrageous": Renunciation should not count because the Tule Lake occupants should not have been put in a position in which renunciation appeared to be a reasonable choice. The great part of the *Murakami* opinion is given over to demonstrating that government acts and failures to act underlay the circumstances arguing in favor of renunciation. This did not mean that renunciation was utterly legally irrelevant. It meant, rather, that the Tule Lake occupants had the option to revoke renunciation if they chose to do so. Such an option is extraordinary, it might seem, however appropriate in the circumstances. Are the *Murakami* and *Abo* decisions also extraordinary? Their acknowledgements of the "outrageousness" of internment and their recognition of the option afforded Tule Lake renunciants may be notable examples of ad hoc equity, but nothing more.

In *Abo* Chief Judge Denman indicated, as though anticipating criticism, that he thought the rebuttable presumption that acts of renunciation were involuntary could claim an analog in contract law. He cited Samuel Williston[124]—this (it appears) is the pertinent passage:

> In the absence of a relationship between the parties to a transaction which tends to give one dominance over the other, undue influence must generally be proved by the party setting it up, and will not be presumed. . . . When such a relationship of dominance of one party exists, however, as is ordinarily the case where there is a fiduciary or confidential relation between the parties, the courts of equity hold that it raises a presumption of undue influence and throws upon the dominant party the burden of establishing the fairness of the transaction and that it was the free act of the other party. . . . Indeed this doctrine is applicable to any situation where influence was acquired or confidence reposed in fact, whether the basis of the relation is moral, social, domestic, or merely personal.[125]

At first glance, Williston simply raises a new set of explanation-demanding terms—"relationship," "fairness," "confidence"—in place of "voluntariness" or "outrageousness." The pertinent relationship, though, is plain: At the time they renounced citizenship, the Japanese Americans at Tule Lake were, of course, United States citizens. (Chief Judge Denman labeled the occupants of Tule Lake, over and over, as "American citizens," "loyal Americans," "free citizens," "our incarcerated fellow citizens."[126]) As such, they were participants along with the United States government in a distinctive and complex web of mutual obligations. This is, it turns out, starting point enough.

"It is well in cases of human motivation of people of other races that we consider our own psychology." *Id.* at 554.

124. *See Abo*, 186 F.2d at 773.

125. 5 SAMUEL WILLISTON, CONTRACTS § 1625A, pp. 4542-45 (rev. ed. 1937), *quoted in* Trustees of Williams Hospital v. Nisbet, 14 S.E.2d 64, 76-77 (Ga. 1941).

126. *See, e.g.*, Acheson v. Murakami, 176 F.2d 953, 954, 955.

1. A Jurisprudential Context:

A central passage of one of the great documents of American constitutional law, an opinion issued by Attorney General Edward Bates on November 29, 1862, identifies fundamental propositions organizing this relationship. Bates addressed "the question whether or not *colored men* can be citizens of the United States."[127] He responded affirmatively:

> In my opinion, the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other. And I have no knowledge of any other kind of political citizenship, higher or lower, statal or national, or of any other sense in which the word has been used in the Constitution, or can be used properly in the laws of the United States. The phrase, "a citizen of the United States," without addition or qualification, means neither more nor less than a member of the nation. And all such are, politically and legally, equal—the child in the cradle and its father in the Senate, are equally citizens of the United States. And it needs no argument to prove that every citizen of a State is, necessarily, a citizen of the United States; and to me it is equally clear that every citizen of the United States is a citizen of the particular State in which he is domiciled.[128]

The Bates opinion is noteworthy, in part, precisely because its notion of "the reciprocal obligation of allegiance . . . and protection" was not at all original. Main themes in the Declaration of Independence are elaborations or applications of this formula,[129] and the idea was not new in 1776.[130] Edward Coke, fixing the status of Scottish residents within English law after the King of Scotland's accession to the English throne (James I), could readily depict allegiance and protection as reciprocal in *Calvin's Case* in 1608, as already well-grounded in English law, treated there as a matter of natural and not local law, and thus as a principal basis for concluding that Scots (*postnati* at least) were no longer "aliens" within English law.[131] Henry VIII's surrender and regrant "Irish consti-

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127. *Citizenship*, 10 Ops. Atty. Gen. 382, 382 (1862) (Bates, A.J.) (emphasis in original). The question had been put by Secretary of the Treasury Chase, ostensibly to determine whether African Americans might captain ships required by law to be commanded by American citizens.

128. *Id.* at 388. This austere answer was, at the time, both legally and politically deft. It showed that Bates (and thus the Lincoln administration) regarded Dred Scott v. Sanford as beside the point and the analysis pointed to a properly emancipatory conclusion, but it stopped short of addressing (well in advance of the end of the Civil War) the precise rights—for example, the right to vote—that freed slaves would possess.

129. Jefferson's notes are explicit:

> That as to the king, we had been bound to him by allegiance, but that this bond was now dissolved by his assent to the late act of parliament, by which he declares us out of his protection, and by his levying war on us, a fact which had long ago proved us out of his protection; it being a certain position in law that allegiance and protection are reciprocal, the one ceasing when the other is withdrawn[.]

Thomas Jefferson, *Notes of Proceedings in the Continental Congress (June 7-Aug. 1, 1776)*, *in* 1 THE PAPERS OF THOMAS JEFFERSON 311 (Julian P. Bond et al. eds., 1950).

130. Concerning American use of the formula in the run-up to the Revolutionary War, see JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 165-72, 174-75, & 179 (1978).

131. Calvin's Case, 7 Co. Rep. 1a (1608), *reprinted in* 77 Eng. Rep. 377, 379 (King's Bench) (1907). Concerning English law, Coke glossed Glanville (among others):

tutional revolution" structured its legal merger of England and Ireland precisely within these reciprocal terms.[132] The gist of the idea is visible in early medieval politics.[133] At least from the perspective of political theory, Thomas Hobbes was the most important of Bates's predecessors. The last paragraph of *Leviathan* begins:

> And thus I have brought to an end my Discourse of Civill and Ecclesiasticall Government, occasioned by the disorders of the present time, without partiality, without application, and without other designe, than to set before mens eyes the mutuall Relation between Protection and Obedience; of which the condition of Humane Nature, and the Laws Divine, (both Naturall and Positive) require an inviolable observation.[134]

Familiar Hobbesian preoccupations figure prominently in *Respublica v. Chapman*,[135] a notable early case in American constitutional law. Chapman resided in Pennsylvania until December 26, 1776, when he left, joined the British army, and was ultimately captured and charged with treason. Chapman contended that, at the time he left Pennsylvania, "no government existed to which he could owe allegiance as a subject."[136] Chief Justice McKean, charging the jury in the case, concluded that the government under the new Pennsylvania

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> But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject owed to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects, *regere et protegere subditos*: so as between the Sovereign and subject there is *duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad obededietiam, ita rex subdito tenetur ad protectionem: merito igitur ligeantia dictur a ligando, quia continet in se duplex ligamen*.

Id. at 382. On the common law characterization of the reciprocal obligation as natural law, see *id*. at 391-94. Useful discussions of Calvin's Case include, *e.g*., GLENN BURGESS, THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603-1642, at 127-29 (1992); KETTNER, *supra* note 130, at 13-28; Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence,* 21 LAW & HIST. REV. 439 (2003); Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case (1608), 9 YALE J.L. & HUMAN. 73 (1997).

132. "Surrender and regrant" was the legal ritual within which Irish nobility acknowledged the authority of Henry VIII as King of Ireland, gave up their prior claims to status and property, and accepted Henry's grant to them of more or less the same status and property (now defined within the terms of English law). For more and less enthusiastic accounts, *see* BRENDAN BRADSHAW, THE IRISH CONSTITUTIONAL REVOLUTION OF THE SIXTEENTH CENTURY 196-200, 213-16 (1979); CIARAN BRADY, THE CHIEF GOVERNORS 25-40 (1994); STEVEN G. ELLIS, IRELAND IN THE AGE OF THE TUDORS, 1447-1603, at 149-60, 254-55 (1998).

133. *See* BARBARA H. ROSENWEIN, NEGOTIATING SPACE: POWER, RESTRAINT, AND PRIVILEGES OF IMMUNITY IN EARLY MEDIEVAL EUROPE 106-12, 130-34 (1999).

134. THOMAS HOBBES, LEVIATHAN 560 (Barnes & Noble 2004) (1651). David Hume restated the proposition in more immediately subversive terms:

> I seek, therefore, some such interest more immediately connected with government, and which may be at once the original motive to its institution, and the source of our obedience to it. This interest I find to consist in the security and protection, which we enjoy in political society, and which we can never attain, when perfectly free and independent. As interest, therefore, is the immediate sanction of government, the one can have no longer being than the other; and whenever the civil magistrate carries his oppression so far as to render his authority perfectly intolerable, we are no longer bound to submit to it. The cause ceases; the effect must cease also.

DAVID HUME, A TREATISE OF HUMAN NATURE 352 (David F. Norton & Mary J. Norton eds., 2000) (1737-40).

135. 1 Dall. 53 (Pa. 1781).

136. *Id*. at 55.

constitution dated from November 28, 1776, when members of the Executive Council were selected (the new legislature having already assembled), even though the Council did not actually meet for the first time until March 4, 1777:

> [A]ll its members were chosen, and the legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of high treason might have been committed by any person, who was then a subject of the commonwealth.[137]

Straightforward enough. But McKean also observed that "Pennsylvania was not a nation at war with another nation; but a country in a state of *civil war*."[138] "In civil wars, every man chooses his party"—Did that mean that residents possessed "an unrestrainable right to remove" within "a reasonable time" (as they would have if an "old government" were dissolved and a "new one" formed)?[139] The state legislature had, on February 11, 1777, declared that "'all and every person . . . *now* inhabiting, &c. within the limits of this state; or that shall *voluntarily* come into the same *hereafter* to inhabit, &c. *do* owe, and shall pay allegiance, &c.'"[140] McKean made much of the limits of this language:

> [A] discrimination is evidently made . . . meaning that this election to adhere to the British government, should not expose the party to any future punishment. . . . [W]e think the design and intention of the Legislature sufficiently appears to have been, to allow a choice of his party to every man, until the 11th of February, 1777; and that no act savoring of treason, done before that period, shall incur the penalties of the law.[141]

2. *The Implicit Constitution of Murakami and Abo*

Murakami and *Abo*—like *Chapman*—are "election" cases. It is not clear what precisely Chief Justice McKean meant by "civil war," crucially his precondition for "choice of . . . party." Thomas Hobbes, however, knew: "every man, against every man," not just actual conflict, but "the known disposition thereto,"[142] a state of nature conceived as a state of mind—"the mutual fear of one another."[143] It followed, for Hobbes, that "the Office of the Soveraign" was therefore "the procuration of *the safety of the people*."[144] This did not mean simply "bare Preservation," but that "Justice be equally administered to all degrees of People," and before this, that "every Soveraign Ought to cause Justice to be taught . . . to cause men to be taught not to deprive their Neighbors, by violence, or fraud, of any thing which by the Soveraign Authority is theirs."[145]

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137. *Id.* at 57.

138. *Id.* at 58 (emphasis in original).

139. *Id.* at 57.

140. *Id.* (emphases in *Chapman*'s quotation).

141. *Id.* at 58. On *Chapman* and other cases of the period effectively recognizing the right of election, see KETTNER, *supra* note 130, at 193-98.

142. HOBBES, *supra* note 134, at 91.

143. THOMAS HOBBES, THE ELEMENTS OF LAW: NATURAL AND POLITIC 100 (Ferdinand Tonnies ed., 2d ed. 1969) (1640).

144. HOBBES, LEVIATHAN, *supra* note 134, at 259.

145. *Id.* at 259, 264, 266.

"But if it be the duty of princes to restrain the factious, much more does it concern them to dissolve and dissipate the factions themselves."[146] Chief Judge Denman's conclusions in *Murakami* and *Abo* follow immediately—perhaps even more straightforwardly than Chief Justice McKean's ruling in *Chapman*. Absent protection, allegiance is no longer obligatory. Absent protection, allegiance becomes, again, a matter of choice.[147]

The Constitution, it might be said, "does not enact Mr. Thomas Hobbes's *Leviathan*."[148] But the opinion of Attorney General Bates associating citizenship and protection obviously anticipated the wording of the not-yet drafted first section of the Fourteenth Amendment.[149] The Civil War and Reconstruc-

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146. THOMAS HOBBES, DE CIVE: PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY, *reprinted in* MAN AND CITIZEN 266 (Bernard Gert ed., 1972).

147. As Hobbes put it,

> The end for which one man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his own power, is the security which he expecteth thereby, of protection and defence from those to whom he doth so relinquish it. . . . And therefore when there is not such a sovereign power erected, as may afford this security; it is to be understood that every man's right of doing whatsoever seemeth good in his own eyes, remaineth still with him.

THOMAS HOBBES, THE ELEMENTS OF LAW, *supra* note 143, at 110 (Ferdinand Tonnies ed., 2d ed. 1969) (1640). Remarkably, much the same point is made in Scholer v. United States, 75 F. Supp. 353 (N.D. Ill. 1948), one of the cases that the Supreme Court cited in Savorgnan v. United States (itself cited in *Abo*, 186 F.2d at 772) as an example of "real duress." *See* 338 U.S. 491 at 502 n.18:

> The court believes that American citizenship is a priceless heritage involving not only privileges but duties and responsibilities, and that among those duties and responsibilities are primarily loyalty and allegiance to the United States. However, . . . the court also recognized that self-preservation is nature's first law, and that it is quite natural for mothers and fathers to seek in every way to preserve the lives of their children when their safety is threatened. Where an American citizen finds himself and his family . . . in a theatre of war, . . . facing the gravest of dangers, even possible death or internment, and in this extremity, on the advice of officials of the foreign state where he happens to be, makes application for foreign citizenship in an effort to preserve the lives and safety of his family, . . . I am of the opinion that under such circumstances . . . [there] is not such a voluntary renunciation or abandonment of . . . nationality as to forfeit . . . American-born citizenship.

Scholer, 75 F. Supp. at 355 (the case itself concerned Mrs. Scholer).

148. *Cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."). It should not matter whether Edward Bates, or Lyman Trumbull and Jacob Howard (the Senators seemingly chiefly responsible for drafting the citizenship clause of the Fourteenth Amendment) read *Leviathan* or, even if they did, understood themselves as taking a Hobbesian approach. It should not be the case, either, that something akin to a well-defined "constitutional unconscious" or other inescapable "deep structure" must be deemed to be part of the generally agreed-upon content of American constitutional law. To be sure, any sufficiently elaborate accumulation of constitutional materials might invite exercises in indexing—formulation of propositions perceived to be implicit within, and thus organizing, the larger body of materials. *See, e.g.*, Patrick O. Gudridge, "The Rule of Law Without and Within Constitutional Law" (2004) (unpublished manuscript on file with author). The notion of the reciprocal obligations of allegiance and protection, it appears, is one such index. Hobbes addresses this notion especially helpfully because he deploys it so straightforwardly. There are, of course, other indexing terms that might also be put to use (with respect, inter alia, to the language of the Fourteenth Amendment). All such indexing terms are plainly overlays—should be understood as arguments, as proposed means of understanding and organizing other materials, as welcome only insofar as they indeed deepen the resonance of the constitutional provisions (or judicial, administrative, or legislative pronouncements) that they pick out. Constitutional law can encompass more than "enactments" even if "enactments" supply its persisting elements and thus ultimate identifiers.

149. This is the well-known language:

tion are surely reminders that Hobbesian themes are readily discernible within the American experience. The Fourteenth Amendment specification of who were (and are) United States citizens is enough, moreover, within the reciprocating accounts of allegiance and protection, to impose an obligation upon the federal government very much akin to the duties owed by state governments that the Fourteenth Amendment took as its immediate task to make newly federally enforceable.[150] It seems hardly necessary, in thinking constitutionally about the circumstances of the renunciants at Tule Lake, to proceed within ordinary doctrinal filigree—but if a more recent judicial response seems necessary to second Chief Judge Denman's reactions, Justice Kennedy's majority opinion in *Romer v. Evans* is surely sufficient.[151]

These observations suggest several overlapping corollaries:

Within the logic of citizenship, the reciprocal responsibilities of allegiance and protection replace sometimes problematic, seemingly ad hoc notions of affirmative obligations with accounts of persistent preexisting duties. The Fourteenth Amendment inscribes this logic. Criteria for citizenship are not presented as matters of choice for federal or state governments. Criteria are defined constitutionally, imposed on these governments, in the process also im-

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> 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

U.S. CONST. amend. XIV, § 1. The juxtaposition of citizenship and the state's duty to protect is obscured somewhat by the drafting history. One version or another of what would become the Equal Protection Clause was present from the start. Representative Bingham began the process on January 12, 1866, by proposing: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property." BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46 (1914). But the first sentence of section 1 was not the work of the drafting committee; it was added in the course of final Senate debate. *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 306-07 (1935). The roughly similar citizenship language of the Civil Rights Act of 1866—immediately antecedent—provoked more congressional discussion; that debate clearly shows the influence of the Bates opinion. *See* ROGERS M. SMITH, CIVIL IDEALS 306 (1997). Thomas Cooley—the great constitutional commentator of the period—also referenced the Bates opinion in a discussion of the citizenship clause that emphasized the conjunction of citizenship, allegiance, and protection. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 654 (4th ed. 1873) (notes and additions by Thomas M. Cooley).

Caveat: There is a longstanding line of thinking challenging attempts to take too seriously possibilities of associating theoretical underpinnings with the language of section 1 of the Fourteenth Amendment. *See, e.g.*, PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION 96-131 (1999) (exploring the Fairman/Crosskey debate). Thus, William E. Nelson concluded, even after he had recognized (inter alia) the prominence of *Calvin's Case* and the allegiance/protection reciprocal within the antebellum legal thinking that was the first context for the Fourteenth Amendment: "The framers and ratifiers understood their task in office to be the moral one of proclaiming vague principles of civic reformation, not the academic or bureaucratic one of engaging in precise conceptual definition. "WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 89 (1988); *see id.* at 25-26 (discussing *Calvin's Case*).

150. If the interrelationship of duties of allegiance and protection is understood as a constitutional proposition, no notion of "reverse incorporation" is necessary to account for equal protection constraints on federal officials.

151. Romer v. Evans, 517 U.S. 620, 631, 633-34 (1996).

posing the duty of protection.[152] As a result, there is an always already established responsibility on the part of governments not simply to steer clear of affirmative misconduct, but to protect citizens in need. Chief Judge Denman's *Murakami* opinion plainly takes as one of its points of departure the prejudices of General De Witt, but it just as conspicuously underscores the myriad failures of camp administrators to address satisfactorily the needs of Tule Lake occupants. *The Spoilage* marks this administrative attention deficit as one of its central themes. For individuals, there is a corollary responsibility accompanying the constitutional declaration of citizenship, also always already established, to respond to the demands of government under siege or otherwise in need.[153] These reciprocal duties do not lapse—except in cases of clear refusal of responsibility, by either government (as at Tule Lake) or citizens ("hard war" strategies adopted by Union forces in the Civil War claimed this justification[154]). Because their coexistence threatens to become a cacophony of competing demands, claims of protection or allegiance may be recognized outright only in unambiguous circumstances—even if often addressed in terms one step removed otherwise.[155]

The situation at Tule Lake, especially as depicted within *The Spoilage* account, highlights the co-existence of double perspectives within constitutional

152. The Fourteenth Amendment's definitions of citizenship stand somewhat outside the recurring debate about the meaning of "full" citizenship and historically and presently persisting forms of discrimination regarding political rights in the United States (and elsewhere). (For a notably magisterial overview, *see* David Abraham, *Citizenship Solidarity and Rights Individualism: On the Decline of National Citizenship in the U.S., Germany and Israel*, Working Paper No. 53, Center for Comparative Immigration Studies, University of California—San Diego (May, 2002).) Insofar as definitions of citizenship are put to work in order to impose obligations (duties to protect) on governments, the citizenship definitions themselves need take only the minimal form of jurisdictional identifiers ("born or naturalized in the United States") and qualifiers ("and subject to the jurisdiction thereof"). The difficult work—and the attendant possibility of falling short—shows up in the course of specifying the meaning of "protection," work aided only somewhat by addition of a prefix term like "equal." In addition, jurisdictional citizenship—because its first concern is government, not the individual—carries strong implications with respect to when and whether governments can revoke citizenship, but does not (it would seem) necessarily derive those implications from straightforward notions of consent. In principle, allegiance (and thus its repudiation) might be grounded otherwise. *See, e.g.*, HUME, *supra* note 134, at 347-52. Perhaps not surprisingly, Reconstruction legislators treated expatriation as a question not resolved by the Fourteenth Amendment itself. For discussion of the Expatriation Act of 1868, in the course of arguing in favor of the priority of consent, see PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT 72-89 (1985).

153. In *Korematsu*, Justice Black invoked this duty. *See* Korematsu v. United States, 323 U.S. 214 at 219. Notably, he did not consider the reciprocal duty imposed upon government, or the consequences of governmental failure to meet its obligation. Instead, he appears to have read governmental obligations in light of constitutional restrictions whose content he defined (seemingly narrowly) without regard to their role in holding government to its duty.

154. *See* MARK GRIMSLEY, THE HARD HAND OF WAR: UNION MILITARY POLICY TOWARDS SOUTHERN CIVILIANS, 1861-65, at 171-204, 213 (1995). Of course, other considerations—most notably, logistics—were also pertinent. *See, e.g.*, *id*. at 213-15.

155. The Supreme Court's equal protection jurisprudence only occasionally focuses on failures of protection as such. *See, e.g.*, *Romer*, 517 U.S. at 631, 633-34; Plyler v. Doe, 457 U.S. 202, 223-24 (1982) (addressing the government's duty to protect as implicated by the government's obligation not to deny education to children). More often, emphasis falls on (the quintessentially Hobbesian) problems posed by legal reinforcements of popular antipathies and on failures of state governments to take sufficiently seriously those interests marked as significant within, e.g., the overall federal constitutional structure.

law. Government and population ordinarily interact as though they are separate entities. Government processes present individuals with risks or opportunities, present individuals with matters with which they deal—as individuals—as part of the progress of day-to-day life. The conduct of individuals in turn defines an environment within which government similarly proceeds. The language of allegiance and protection is precisely consonant—provides a schematic within which this interaction might be discerned and judged.

Popular sovereignty taken seriously appears to confuse the language of allegiance and protection. Government of the people, by the people, for the people: It is the population (as government) that demands allegiance (of itself); it is the population (as government) that owes the duty of protection (to itself). There are, of course, many famous attempts to make sense of the idea of popular sovereignty, to reconcile it with the existential experience of governments and populations as separate.[156] One distinctive tack—taken by John Marshall, for example—does not treat the rhetoric of popular sovereignty as describing immediate facts of life. Rather, popular sovereignty figures obliquely, as something like a hermeneutic stance: It motivates and organizes distinctive understandings of a set of interrelated propositions by government officials who accept these propositions as constitutive of their offices, sometimes conceived broadly and sometimes narrowly. These conceptions, in combination, thereby restrict the way that the officials act vis à vis the interests of ordinary people. The overall scheme—the interaction of individual elements interpreted broadly or narrowly in view of the premise of popular sovereignty—becomes a complex mechanism of protection. In the tenth *Federalist*, James Madison had already showed how government institutions conceived in this way would precisely implement the Hobbesian program, reducing popular factionalism (the risk of civil war), and securing both allegiance and protection.

It is important to distinguish between popular sovereignty as it figures (however it figures) *within* the constitutional scheme, and acts of individuals that are *exterior* to the scheme as such that are nonetheless also constitutional in character. Individuals often hold their own views concerning the substance or worth of all or parts of the extant constitutional scheme. Large-scale changes in public opinions, expectations or commitments may significantly influence elements of official exercises in constitutional interpretation. These propositions, undoubtedly true, can pose important questions (not always easily addressed) within constitutional law conceived as an already relatively well-defined map of governmental preoccupations. But there is also a more fundamental class of cases: instances in which individuals themselves in effect redraw the map—through their own actions themselves invoke, confirm, and bring to bear consti-

156. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962). These efforts explore terms within which officials can (and should) regard the public at large as part of government. Another approach considers circumstances in which officials are to be understood as part of the populace—to be treated on the same terms. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 386 (Peter Laslett ed. 1960) (1698).

tutional premises.[157] It may well be, for example, that the acts of free (some only newly free) African Americans during and immediately after the Civil War, claiming and exercising the national citizenship that Attorney General Bates had asserted was theirs, contributed much to the sense of what had to be taken as already given, as "facts" not to be ignored, and thus helped (at least) drive the increasingly thorough-going drafting of the Fourteenth Amendment.[158] The boycotts, sit-ins, and demonstrations of civil rights protestors in the 1950s and 1960s surely themselves amended conceptions of constitutional rights.[159] Renunciation of citizenship at Tule Lake, as it appears within *The Spoilage* account and the subsequent judicial response, is a similar—similarly constitutional—event. It marks one of the few occasions (perhaps the only occasion) in which American citizens claim and exercise (and are understood to possess and exercise) a freedom to choose their government. In renouncing American citizenship, the Tule Lake internees dramatized the fundamental premises of that citizenship. In renouncing citizenship, they proclaimed themselves constitutionally quintessentially "American."

157. Bruce Ackerman's complex accounts of transformative and consolidating elections are (by now famous and famously controversial) efforts to describe instances in which officials and the voting public together engaged in "higher law" reformulations outside the bounds of constitutional texts as such. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). Larry Kramer proposes to reinvigorate the notion of "popular constitutionalism"—but ultimately as a means to motivate the Supreme Court to understand its work as part of a process of government within which the public is also a participant. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES 207-8, 249-53 (2004). Public action is not, it seems, independent instantiation of constitutional norms.

158. For suggestive illustrations, *see, e.g.*, STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 107-09 (2003); ERIC FONER, RECONSTRUCTION 110-19 (1988).

159. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

APPENDIX

The Spoilage *and Its Critics*

The preface introducing *The Spoilage* advertises its methodological precariousness. Five Berkeley faculty members initially organized the effort, but four soon left the project to assume wartime responsibilities, leaving Dorothy Thomas in charge.[160] The initial program for the study was not implemented, partly because of these exits, but "mainly because the course of events which were to be investigated could not be anticipated."[161] Some standard forms of investigation were not usable. "[W]e realized that we could not utilize attitude surveys or questionnaires to get valid (or any) information from people whose recent experiences had led to an intense preoccupation with the real and imagined dangers of verbal commitments and to growing suspicions of the intentions of persons who asked them to commit themselves on even the most innocuous questions."[162] On-site reporting therefore served as the principal method of study:

> [W]e had to depend on a day-to-day record, as complete as possible, of the maneuvers and reactions of an insecure, increasingly resentful people to policies imposed by government agencies and to incidents developing from the application of these policies. . . . [T]he main part of the record of what was going on inside the camps could be obtained only by "insiders," that is, by trained observers who were themselves participating in and reacting to the events under observation. Most of the staff observers were evacuees. . . . All these observers had had university training in one or more of the social sciences, but only three of them had any prior experience in field investigation. In addition to the Japanese American staff observers, three "Caucasian" members of our staff resided for long periods in the camps we were studying. Two of these were graduate students in anthropology; one was a sociologist, with graduate training in political science.[163]

There were obvious risks raised by this sort of fieldwork: "ad hoc selection," "emotional identification" of observers with the persons under study, "linguistic and cultural distortion."[164] "[N]o techniques could be devised to assure complete success in overcoming all these methodological difficulties."[165]

As published, *The Spoilage* presents itself as a straightforward expression of the research strategy that lay behind it—as a narrative of "maneuvers and reactions" emphasizing "the experiences of that part of the minority group whose status in America was impaired: those of the immigrant generation who returned, after the war, to defeated Japan; those of the second generation who re-

160. THE SPOILAGE, *supra* note 5, at vi n.1.

161. *Id.* "Planning was on a point-by-point basis: old questions were discarded and new questions raised as the ramifications of a highly dynamic situation became apparent; ad hoc techniques had to be devised to meet the exigencies of data collection in an ever-changing, emotionally charged situation." *Id.*

162. *Id.* at vii.

163. *Id.* at vii-viii.

164. *Id.* at x.

165. *Id.*

linquished American citizenship."[166] This recounting, it was thought, was "a unique record and analysis of the continuing process of interaction between government and governed, through the point-by-point reproduction of stages in the process of attitude formation."[167] Seemingly evoking the procedure organizing its writing, the book named two principal authors—Dorothy Thomas and Richard Nishimoto—and four contributors—Rosalie Hankey, James Sakoda, Morton Grodzins, and Frank Miyamoto.

The Spoilage, though, proved to be a complex and controversial effort.

Initial reviewers recorded doubts. "As valuable as this volume is . . . ," Kimball Young wrote, "the authors failed to make use of their materials to combine sociological theory with empirical findings. Nowhere is there a systematic presentation of the processual changes which might have been given if only in schematic and summary form."[168] "There should have been an additional chapter," it seemed to Solon Kimball, "which would share with us the sociological insights which the authors undoubtedly gained."[169] There was also harsh, emphatic denunciation. Anthropologist Marvin Opler charged that too much of *The Spoilage* revealed "incomplete coverage and sensationalistic opinion," that the end result was "a factional interpretation" rooted in the "undue credence" given some "two dozen factional leaders who happened to impress" a single fieldworker.[170] Opler invoked his own work: "After three years at Tule Lake, with a staff of sixteen technical assistants, hundreds of contacts, and a tendency to sample opinion by block, area of the center, faction, personality variant, age and status group, I am greatly dubious of such oversimplifications."[171] He noted that neither of the principal authors of *The Spoilage* had "attempted any field work warranting the name" at Tule Lake.[172] In particular, Opler thought, *The Spoilage* account of renunciation of citizenship at Tule Lake was utterly useless:

> [I]t fails to explain the cultural revivalism which flourished there and is implicit in the steps leading to citizenship renunciation. . . . The anthropologist interested in cultural revivalistic phenomena must look elsewhere, though this case is perhaps the most striking and controlled experiment in social psychology to be found anywhere. As a result, Tule Lake is given too much the cast of a "disloyal" center where "disloyals" were treated badly. . . . [T]here is practically nothing on Center art and religion, recreation, welfare and economic status. Obviously, the 19,000 men, women and children

166. *Id.* at vii, xii.

167. *Id*. at xii.

168. Kimball Young, Book Review, 12 AMER. SOC. REV. 362, 363 (1947).

169. Solon T. Kimball, Book Review, 53 AMER. J. SOC. 228, 229 (1947).

170. Marvin K. Opler, Book Review, 50 AMER. ANTHROPOLOGIST 307, 308, 309 (1948). Rosalie Hankey—the fieldworker to whom Opler refers—remains a controversial figure because she departed from JERS norms on at least two occasions, sharing information she had acquired from camp residents with FBI agents. For measured discussion of Hankey's conduct, see S. Frank Miyamoto, *supra* note 7, at 52-58.

171. Opler, *supra* note 170, at 308.

172. *Id*.

> cramped in a square-mile of tar-papered "theater of operations" barracks do not emerge as people.[173]

The Spoilage, it might be thought, was neither sociology nor anthropology.[174]

In the years since its publication, a second line of criticism of *The Spoilage* has also emerged. Its principal focus is Dorothy Thomas, the book's senior author and director of the larger study. Stephen Murray wrote in 1991:

> It is no exaggeration to say that Thomas was compulsively concerned with verification or that she had a strong aversion to speculative conclusions, and indeed to any linking of research results to existing social theory. Her comments on staff reports throughout the course of the project are a litany of "How do you know this?" and "Unwarranted speculation!" challenges . . . . [I]t is probably true that no one, including herself, ever met Thomas's standards of proof.[175]

One result was that the participant observers whose reports supplied the starting points for *The Spoilage* were seemingly left at sea.[176] Murray suspects that

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173. *Id.* at 310. Professor Miyamoto responds to Professor Opler's criticisms at some length. *See* Miyamoto, *supra* note 7, at 46-52.

174. For purposes of assessing these criticisms, several contextual dimensions should perhaps be noted. Marvin Opler and many other social scientists studying the camps worked for or with the War Relocation Authority, or with other government agencies, and published either with government support or with an eye to assisting government efforts. *See, e.g.*, EDWARD H. SPICER, ASAEL T. HANSEN, KATHERINE LUOMALA & MARVIN K. OPLER, IMPOUNDED PEOPLE (1969) (first published as a WRA report in 1946); ALEXANDER H. LEIGHTON, THE GOVERNING OF MEN: GENERAL PRINCIPLES AND RECOMMENDATIONS BASED ON EXPERIENCE AT A JAPANESE RELOCATION CAMP (1945). There was, it appears, some tension in the interaction of JERS and government-associated social scientists—in particular, concerning the usual refusal of Dorothy Thomas to share JERS working documents as such with camp officials. *See* Ichioka, *JERS Revisited*, *supra* note 6, at 13-16. The theoretical models with which the government social scientists worked incorporated distinctive presuppositions, even assuming otherwise disinterested study. The emphasis fell, predominantly, on individual and social psychology, with priority going to individual psychology. Alexander Leighton's discussion is especially clear and elaborate in this regard: principal concluding chapters consider (in order) "Individuals Under Stress," "Systems of Belief Under Stress," and "Social Organizations Under Stress." *See* LEIGHTON, *supra,* at 252-354. More anthropological investigations also treated individual psychological states—to be sure, responding to camp circumstances—as the fundamental unit. Thus "cultural revivalism" at Tule Lake figured as "a type . . . which could be duplicated among any American Indian revivalism ghost-dance cult in the early stages of reservation life, . . . the refurbishing of the habitual stock in trade of a defeated or frustrated older generation." Renunciation was a product of "fears and motivations" of a piece with cultural revivalism—to be sure, deepened by administrative mistakes—understandable as "psychological and mass responses," "hysterical or coerced," but also simply one cycle, a "swing in sentiment" followed by a "second and final cycle," an ultimate "recoil from relocation fears and escapism." SPICER ET AL., *supra,* at 271, 272, 273, 275. This emphasis is quite similar to the focus of district judge Mathes in *Murakami*. *See supra* text accompanying notes 53-55.

175. Stephen O. Murray, *The Rights of Research Assistants and the Rhetoric of Political Suppression: Morton Grodzins and the University of California Japanese-American Evacuation and Resettlement Study*, 27 J. HIS. BEHAV. SCI. 130, 147 (1991). Dorothy Thomas's earlier work with William O. Douglas at the Yale Law School displayed a similarly skeptical rigor. *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 102-05 (1995).

176. "[T]he participant observers from the project still alive in the late 1980s remained perplexed by what they were supposed to have done, and frustrated at the lack of theoretical guidance." Murray, *supra* note 175, at 150 n.16. "By standard criteria of sociological research, Thomas clearly failed to give adequate direction to her staff." Miyamoto, *supra* note 7, at 40. Professor Miyamoto believes that Dorothy Thomas's aversion to structured theory reflected, at least in part, a distinctive approach to sociology, emphasizing close study of particular situations (often associated with her husband W.I. Thomas) urging "a pragmatic open-mindedness that precluded the use of any particular theory of human behavior." *Id.* at 37. The axiom provoking this approach first appeared in a book that W.I. Thomas and Dorothy Thomas published in 1928: "[I]f men define situations as real, they are real in their con-

Thomas was proceeding without a compass, "collecting every kind of documentation which could be found . . . . [T]he paucity of published results, especially when contrasted to the vast amount of unused data, suggests that she did not know what to do with the data collected . . . ."[177] Responsibility for the missing chapter that Young and Kimball noted,[178] and the field work that Opler found to be so unsatisfactory, should (it appears) rest with Dorothy Thomas.

Thomas extended her censorship of ungrounded speculation to include independent efforts proposed by *Spoilage* contributors Mortin Grodzins and James Sakoda. Grodzins ultimately published his work—the well-known *Americans Betrayed*[179]—but only after an at times fierce dispute between the University of California and the University of Chicago framed by Thomas's insistence that the California study could, as a matter of right, regulate any publication by Grodzins (a research assistant and graduate student at the time) that was based on California data.[180] Sakoda abandoned his project.[181] Strikingly, Lane Ryo Hirabayashi argued in *The Politics of Fieldwork* that, with respect to Japanese Americans employed in the study, Dorothy Thomas's exercise of authority amounted to an exercise in colonialism:

> Much of the . . . data . . . were generated by "natives," on site, for the ultimate use of a Euro-American scholar who was not, herself, physically present. This person, Dorothy Thomas, paid minimal wages, expropriated the data, and took control of the final analysis as well as the production of formal studies (as products) and their publication. In the end, Thomas simply forced the raw data that . . . fieldworkers had gathered back into a conceptual framework with which she was familiar. . . . It is interesting to conjecture whether senior scholars' practices along these lines engender a dramatic narrowing of perspectives, potentially very deleterious to social sciences that revolve around a deep commitment to a comparative understanding of societies, cultures, and worldviews.[182]

It might seem that *The Spoilage* is a book better left unread.

Or perhaps *The Spoilage* is a somewhat different book from the book that its critics suppose it to be or the book that they think it should be. The distinction that Lane Hirabayashi draws between "the raw data that . . . fieldworkers . . . gathered" and the "conceptual framework" into which the data were

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sequences." WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, THE CHILD IN AMERICA 572 (1928). (Robert Merton declared this to be "probably the single most consequential sentence ever put in print by an American sociologist." ROBERT K. MERTON, *Social Knowledge and Public Policy*, *in* SOCIOLOGICAL AMBIVALENCE 156, 174 (1976).) For a discussion of W.I. Thomas and his thinking, see DONALD N. LEVINE, VISIONS OF THE SOCIOLOGICAL TRADITION 260-68 (1995).

177. Murray, *supra* note 175, at 132. For evidence supporting this conclusion, see James M. Sakoda, *Reminiscences of a Participant Observer*, *in* VIEWS FROM WITHIN, *supra* note 6, at 222-24.

178. *See* text accompanying notes 168-69.

179. MORTON GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION (1949).

180. This controversy—exhaustively explored—is the chief topic of Stephen Murray's article. *See* Murray, *supra* note 175.

181. *See id*. at 152 n.41. For a later summary of the project, see James M. Sakoda, *The "Residue": The Unresettled Minidokans, 1943-1945*, *in* VIEWS FROM WITHIN, *supra* note 6, at 247-84.

182. LANE RYO HIRABAYASHI, THE POLITICS OF FIELDWORK: RESEARCH IN AN AMERICAN CONCENTRATION CAMP 169 (1999) [hereinafter THE POLITICS OF FIELDWORK]. *See also* Miyamoto, *supra* note 7, at 41-43.

"simply forced" is usefully provocative. There appears to be little doubt that "fieldworkers" were "forced" to use a set of simple demographic categories in writing their reports—prominently, terms distinguishing camp occupants who were born in Japan from occupants born and continuously resident in the United States and occupants born in the United States but educated in Japan. But there also seems to be agreement among most readers of *The Spoilage* that these terms did little theoretical work and conspicuously failed (if this were their purpose) to generate a "conceptual framework." A likely actual use for the required terminology becomes easier to discern after considering Dorothy Thomas's description of the study's processes, put forward in her 1952 presidential address to the American Sociological Society:

> Data on behavior and attitudes were collected both by evacuee members of our research staff, and by other field works who, with official approval, lived in the quarters assigned to administrative personnel. Among the evacuees who worked on the study, and whose participation in the situations they were observing was a matter over which they could exercise little control, were persons of diverse background and training, including sociologists, an anthropologist, an engineer, an agricultural economist, a psychologist, a social worker, and a journalist, while the nonevacuee field workers included two anthropologists and a historian. Each of them prepared many reports on special topics, which followed outlines developed in terms of our ever-changing "interdisciplinary conceptualization," but more important were the undirected journals kept by most of the participant observers and field workers. These journals included running accounts of "current events," information obtained from wide circles of "participating informants" (both evacuees and administrative personnel), and accounts of the actions and conversations of many persons who did not know either that the study was being made or that they were under observation. Each journal-keeper also recorded the course of his own experiences and his attitudes towards these experiences with the maximum possible frankness, and appended all documentary material that he could collect. Each brought to his journal something of the standpoint of his own discipline and his own biases, in the very process of selecting events, words, and acts to record. And as the anthropologist Tsuchiyama remarked, whatever his background, each observer and field worker soon found himself functioning more as a "foreign correspondent" than as a social scientist, for good reporting was essential in a study where the "preconceptualized" lines of inquiry were often vague and inadequate. These day-to-day on-the-spot records were a principal and essential source for retrospective analyses.[183]

In Thomas's account, the observers and field workers were valued not so much as "social scientists"—(as such inadequate in numbers and preparation, Marvin Opler had concluded)—rather, they were appreciated as camp occupants (albeit occupants of importantly different parts of the camps) who reported their own experiences and reactions to the events occurring around them, and supplied whatever seemingly relevant documents came their way.[184]

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183. Dorothy Swaine Thomas, *Experiences in Interdisciplinary Research*, 17 AMER. SOC. REV. 663, 668 (1952).

184. It is clear that observers and field workers sometimes resisted this redefinition. (Not always, however: for a clear example of an instance in which a JERS observer recognized his own status as a participant, see S. Frank Miyamoto, *Reminiscence*s, in VIEWS FROM WITHIN, *supra* note 6, at 154-55.) Rosalie Hankey, a graduate student in anthropology and non-Japanese American observer who became the principal Tule Lake reporter (and who would be acknowledged for her "contributions" on the title page of *The Spoilage*), included this revealing passage in an autobiographical account that she wrote shortly after concluding her field work:

If fieldworkers were understood first as "participants," and only thereafter as "observers," the structure of the California project looks quite different. Fieldworkers (borrowing Hirabayashi's term) were indeed "natives"—whether they were Japanese American or not. But they did not "gather[]" "raw data"— they were themselves "raw data," or, more precisely, their "undirected journals" (Thomas's revealing term) were.[185] The fieldworkers "prepared many reports on special topics," but their "day-to-day on-the-spot records," their personal and informal reactions and accounts, were the "principal and essential" resources. The formal reports and their required vocabularies, it appears, were provocations—means of inserting fieldworkers into camp life (more, perhaps, than they would be otherwise inclined) and thus means (in the best behaviorist tradition) of provoking fieldworker responses.[186]

But fieldworkers were not "participants" in camp life just like all other occupants. Because they were identified as "observers," they were more or less protected (although never entirely) from risks of especially hostile acts of either administrators or "ordinary" internees.[187] More importantly, insofar as they were also "observers," these "participants" could function as a kind of controlled sample: their accounts and reactions might be subjected to an intense scrutiny impossible to bring to bear with regard to other occupants and thus could be judged carefully as representations of the conduct and reactions of other occupants. This is precisely what was done. *The Spoilage* preface reports that there were

> frequent conferences of observers and other staff members with the director of the study and its advisers. Because California was a "prohibited area," to our Japanese American staff members, these conferences could never be held at the University of

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> Just as I was finishing this report I received a letter curtly ordering me to abandon my time-wasting interest in the Japanese language and in quaint Japanese customs and to report what was going on. Under the circumstances, I could do little but laugh. I wrote in reply that I would not defend my strange field techniques in detail but would allow the inclosed report to justify them. Needless to say, my techniques were not criticized again.

Rosalie Hankey Wax, *Twelve Years Later: An Analysis of Field Experience*, 63 AMER. J. SOC. 133, 139 (1957). "[T]he anthropologist Tsuchiyama" whom Dorothy Thomas credited for the "'foreign correspondent'" characterization, is the chief subject of Lane Hirabayashi's rich and powerful *The Politics of Fieldwork*, *supra* note 182. Tamie Tsuchiyama, an obviously gifted Japanese American anthropology graduate student, ultimately proved unsuccessful, sadly, in her attempt to assert her status as an anthropologist as such within the context and demands of the University of California project. *Id.* She no doubt appreciated the irony of the recognition accorded her in Thomas's presidential address, accompanied as it was by the immediately reductive recharacterization of Tsuchiyama's own work in the camps (for which Tsuchiyama herself was cited!).

185. "[M]ost of the observers were genuine participants in the events they were recording. Evacuee observers were, like other evacuees, involuntarily detained in camps and their fate was closely bound up with the course of events they were observing, while Caucasian observers tended to develop an emotional identification with the group they were studying. The observers' subjective reactions, under these tense conditions, were considered important data in and of themselves . . . ." THE SPOILAGE, *supra* note 5, at x.

186. Insofar as the formal reports were based on outlines "developed in terms of . . . ever-changing "interdisciplinary conceptualization," Thomas, *supra* note 183, at 668, individual reports might have possessed some social science value per se, but it is not easy to see how the reports in the aggregate would have been analyzable as academic work.

187. *But see* Miyamoto, *Reminiscence*s, *supra* note 184.

> California. They were, therefore, arranged every few months in Denver, Phoenix, Salt Lake City, or Chicago, and extended over a period of a week or more, during which each observer and staff member presented his problems and findings for the detailed criticism and appraisal of his colleagues. Interspersed between these general conferences were visits of the director and advisors of the study to the several camp "laboratories" and of both evacuee and Caucasian observers from one camp to another, as well as constant interchange of field notes and reports.[188]

This re-characterization of the processes from which *The Spoilage* emerged does not recast the University of California study as ethically or politically uncontroversial. Participant observers, whether Japanese American or not, were obviously manipulated and subjected to stresses unique to their particular roles—they were treated as laboratory animals, even as they thought of themselves as laboratory workers. But it is not easy to describe the study, cast in these terms, as straightforwardly "colonial." It is important to emphasize not only the overlapping situations of Japanese American and "Caucasian" participant observers, but also the in many respects shared setting in which participant observers and the larger population of camp occupants found themselves. Furthermore, the tendency to associate *The Spoilage* and the larger University of California study exclusively with Dorothy Thomas, perhaps especially prevalent in postwar decades, now increasingly appears to be a significant oversimplification. Thomas's own astonishing career, her struggles and successes in the face of gender bias, both obvious and subtle, rightly marks her as an important figure; so too, usual dynamics of reception in cases of collaborative work tend to highlight (sometimes unduly) senior participants.[189] But Lane Hirabayashi's writing in particular calls attention to Richard S. Nishimoto, as does *The Spoilage* itself, naming Nishimoto along with Thomas as its author. Acknowledging Nishimoto's role in the University of California study, it is easy to see, changes much.

Richard Nishimoto is ubiquitous in the background in Hirabayashi's account of Tamie Tsuchiyama's experiences.[190] Indeed, it easy to read *The Politics of Fieldwork* as not only a narrative of Tsuchiyama's difficult dealings with Dorothy Thomas, but as also the story of Nishimoto's whirlwind rise within the world of the California study. He begins as a Stanford educated engineer and an ordinary internee at Poston, emerges as an unusually effective political organizer opposing camp administrators, becomes Tsuchiyama's principal informant and collaborator, and ultimately becomes a staff member of the University of California study, sent by Dorothy Thomas along with Tsuchiyama to evaluate the work of Rosalie Hankey at Gila, empowered to assist Hankey but also to fire her if necessary.[191] Elsewhere, Hirabayashi publishes three reports that Nishi-

188. THE SPOILAGE, *supra* note 5, at xi.

189. Concerning both Thomas's career and collaborative dynamics, see Robert K. Merton, *The Thomas Theorem and the Matthew Effect*, 74 SOC. FORCES 379 (1995).

190. *See* HIRABAYASHI, *supra* note 182, at 112-17.

191. *See* HIRABAYASHI, *supra* note 182.

moto wrote at Poston,[192] and (with James Hirabayashi) discusses Nishimoto's "central role" in the writing of *The Spoilage*.[193]

Hirabayashi and Hirabayashi carefully note: "Documentary evidence which would clarify Nishimoto's substantive and conceptual contributions to the . . . JERS publications is extremely limited."[194] Nonetheless, the primary emphasis of *The Spoilage* in particular—its preoccupation with the history of political action (chiefly at Tule Lake), its description of politics largely in terms of immediate tactics and goals—finds clear parallels in Nishimoto's own political work,[195] and in reports of advice he gave other field workers (notably Rosalie Hankey).[196] Nishimoto, it might be thought, would have served at minimum as a crucial interpreter and "double-check" with respect to the reports of Hankey and others. Perhaps he therefore becomes a sort of superstar "native informant." Or perhaps his role really was much more—"co-author," as *The Spoilage* itself asserts—proof (once again) that the whole idea of "the native informant" is artificial, an imposed "reader's perspective," and therefore contestable and revisable.[197] If in fact a large part of the responsibility for *The Spoilage* should be attributed to Richard Nishimoto, it becomes easier to accept and judge the book on its own terms—as an account of a distinctive political sequence. Much of the methodological debate becomes more or less beside the point. *The Spoilage*, it would seem, is neither sociology nor anthropology. The reports from which it draws, thus, are inappropriately judged from the perspectives of those disciplines. The pertinent question becomes: What, precisely, is of lasting interest in the politics that Thomas and Nishimoto describe?

The Spoilage, Yuji Ichioka observed, depicts "a historical vacuum." Its analysis appears to "rule out" any "historical linkage between the pre-war past and the wartime present, and therefore narrowly restrict[s] explanations of behavior to the wartime present."[198] Brian Hayashi reverses emphasis in his recent, likely controversial, *Democratizing the Enemy*.[199] Drawing on a wide range of archives, he reconstructs in considerable detail politics within principal California Japanese American communities in the half-century or so before World War II. This politics, he argues, explains much of what would later occur in the

192. *See* RICHARD S. NISHIMOTO, INSIDE AN AMERICAN CONCENTRATION CAMP (Lane Ryo Hirabayashi ed., 1995). Hirabayashi also reprints an autobiographical letter that Nishimoto wrote in 1942. *See id*. at 9-33.

193. Lane Ryo Hirabayashi & James Hirabayashi, *The "Credible" Witness: The Central Role of Richard S. Nishimoto in JERS*, *in* VIEWS FROM WITHIN, *supra* note 6, at 65-94.

194. *Id*. at 77.

195. *E.g*., RICHARD S. NISHIMOTO, *All Center Conference and Director Myer's Visit*, *in* INSIDE AN AMERICAN CONCENTRATION CAMP, *supra* note 192, at 171-233.

196. *See* Hirabayashi, *supra* note 193, at 87.

197. GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 66, 67 (1999).

198. Yuji Ichioka, *JERS Revisited: Introduction, in* VIEWS FROM WITHIN, *supra* note 6, at 21, 22.

199. BRIAN MASARU HAYASHI, DEMOCRATIZING THE ENEMY: THE JAPANESE AMERICAN INTERNMENT (2004).

camps. It was complexly fractured, but its divisions also disclosed an ongoing contest between Japanese and American identities.[200]

Hayashi calls attention as well to the interplay of the Japanese and American governments, both before and during the war. Japanese efforts to involve persons of Japanese origin in projects—including espionage—in the Philippines were well known within American military circles. Japanese officials wished to proceed similarly in the United States. The views of General DeWitt and his associates—linking race, culture, and political loyalty—mirrored Japanese government views (as well as the assumptions of many "California Japanese"). DeWitt's military worries—and the worries of other American officials—were real and complex, even if espionage fears were misplaced.[201] In any event, the internment orders responded not just to DeWitt (and local racist agitation),[202] but also to American government needs to appear to act in parallel with other North and South American governments dealing with Japanese-origin residents,[203] and to the perceived demand for "hostages" to temper surprisingly harsh Japanese treatment of American nationals.[204]

In the camps, it appears, successive periods of political clash and quietude revealed not only the effects of the residents' divided attitudes, but also the conflicts between "liberal" administrators and residents who regarded race and loyalty as independent variables, and their disagreeing counterparts who linked the two notions. At least as importantly, camp politics reflected—throughout the period—resident perceptions of the progress of the war, and predictions of likely post-war circumstances in the event of Japanese victory or a negotiated peace. Camp residents were transnational actors, carefully gauging the costs and benefits of "Japanese" and "American" identities in light of available information. [205]

The evident importance of *The Spoilage* shrinks substantially within the terms laid out in *Democratizing the Enemy*.[206] Professor Hayashi recasts camp

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200.

> [M]any California Japanese . . . followed popular trends in Japan toward fusing "race" with "culture" and "political loyalty" as they built their intra-ethnic political organizations . . . . [T]heir community politics was often contentious and their image of ethnic solidarity or factional disputes along generational lines was more apparent than real. They were also divided by class, immigration status, occupation, prefectural origins [in Japan], regionalism, and gender, fissures readily apparent in their struggle with one another for political control over the right to speak for and determine the direction of the California Japanese community. The racial formation process they experienced, combined with their varying political practices and intra-ethnic divisions, set the stage for conflict once they were incarcerated in wartime concentration camps.

Id. at 40.

201. "However misguided, Roosevelt's fears were not without merit." *Id.* at 39.

202. Professor Hayashi suggests that DeWitt's racism was also more nuanced than usual depictions suppose. *See, e.g., id.* at 79, 90-91.

203. *See id.* at 82.

204. *See, e.g., id*. at 81, 83-84.

205. *See id.* at 106-79.

206. *See id.* at 3.

politics as mostly epiphenomenal. "California Japanese" are conscious of their possible alternate identities, sensitive to politics and prospects in Japan, and especially attentive to the possible consequences of war. American officials pursue multiple agendas and their own global preoccupations. Hayashi studies the camps in order to glimpse the world outside—not just at that moment, but also as it stood and would stand previously and subsequently.[207] At times, his book exhibits an almost Olympian detachment.[208]

There is, however, this qualification:

> [I]t is also important to explain what the findings do *not* indicate. They do not justify internment of Japanese Americans despite the obvious presence of Japanese nationalistic sentiments before and during the camps, since people cannot and should not be locked up on the basis of political sentiment . . . . Nor does the presence of a small number of individuals willing to pass on information of military value to the Japanese government justify mass removal or internment. . . . The findings here also do not support the argument that the victims suffered little during World War II. Camp life had many oppressive aspects to it—the roll calls, the contraband searches, the spies, the poor living accommodations—and was without a doubt racially discriminatory . . . . And finally, . . . the study does not find that the United States government treated enemy aliens relatively well because of a "liberal" tradition. Rather, the American concentration camps did not become oppressive because of the need to ensure humane treatment of over twenty-one thousand American servicemen and fourteen thousand civilians in Japanese hands by 1942.[209]

Passing judgment, Professor Hayashi treats the norms that he invokes as self-evident truths. They are just as readily characterized, though, as familiar propositions within American constitutional law—part of the mechanics, say, of free speech protection, due process of law, and the equal protection of the laws. Hayashi's declaration in this regard also bears a marked family resemblance to a comment of the Japanese-nationalist gang leader (and renounced American citizen) "Kira" prominent in the final phases of Tule Lake politics reported in *The Spoilage*:

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207. In this regard, he addresses the question of why it was that the global perspective he maps did not figure much in post-war accounts of internment—identifying "a particular spin . . . appropriat[ing] the analogy of the Holocaust" that "narrowed the cause of removal and internment to 'race'" akin to anti-Semitism, in the process prompting "rapid dismissal of security issues . . . as a mere fig leaf for racism," and "narrowing Japanese American responses to their victimization largely in terms of accommodation or resistance." *Id.* at 217; *see id.* at 2-4.

208.

> In contrast to the actions of politicians in other countries, President Franklin Roosevelt's treatment of Japanese Americans seems relatively benign. . . . British officials . . . arrested twenty-six thousand Austrians, Germans, and Italians, many without trial, and allowed their guards to separate some families, steal their property, and were partly responsible for the death of hundreds who drowned at sea in route to Canada. National leaders of . . . Commonwealth countries . . . expanded their definition of "enemy aliens" to arrest and detain those with long-term residency or British citizenship, separated interned families, and even conscripted enemy alien labor. Other Allied leaders simply confiscated their property and expelled them from the country. . . . "Captivity is as old as war itself," Jonathan Vance reminds us, and it also involves civilians who, though not prisoners of war in a strict sense, are nevertheless "prisoners in wartime."

Id. at 6-7.

209. *Id.* at 11 (emphasis in original).

> The Denationalization Bill is a wartime law, and I think it's unconstitutional, because you can't discriminate against a certain portion of the people just because of their color and race. They evacuated us, and they try to pin us down to a citizen's duties. Once a person is thrown into camp and pushed around, he looks at things emotionally. We cannot be held responsible for what we do in camp. After the war the entire picture will be changed. The United States will not deport those who renounced their citizenship.[210]

These juxtapositions—and the easy overlap of "technical" and "moral" registers that they show—point to an important conclusion: American constitutional law is an insular domestic language of apologetics and critique and also, *somehow simultaneously*, an apt instrument for framing suitable global standpoints. It is, in other words, a microcosm or model, an accessible context for articulating and testing commitments. It is akin to (and may sometimes itself put to work) the Hobbesian state of nature, for example, or the Rawlsian original position, the prisoner's dilemma game, or indeed the internee's lot at Tule Lake that its readers glimpse in such considerable detail in *The Spoilage*. *The Spoilage* too, therefore, can be understood to display large as well as small dimensions.

210. THE SPOILAGE, *supra* note 5, at 326. For discussion of "Kira," his background, and Rosalie Hankey's controversial dealings with him, see S. Frank Miyamoto, *supra* note 7, at 54-58.