

NOTE**DEMOCRATIC FAILURE AND EMERGENCIES: MYTH OR REALITY?***James McDonald**

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INTRODUCTION

OVER the course of American history, the need to respond to a handful of extraordinary emergencies has resulted in the suspension of traditional notions of governance. This Note will address the tension between our established system of governance and the emergency measures necessary to respond to extraordinary circumstances. The terrorist attacks of September 11, 2001, and the ensuing American response have focused this tension, and past national experiences have assumed a new relevance in the post-September 11th world. Modern academics have developed new legal arguments in an attempt to apply old lessons to novel challenges presented by the twenty-first century and the “War on Terror.” The relative roles and functions of the three branches of government during times of emergency have been focal points of these arguments. Can the functions of the three branches persist according to the peacetime baseline? Or do such emergencies trigger a unique shift in the traditional balance of power, transforming the peacetime power of one branch into the emergency-time power of another? If so, for how long? In attempting to answer these central questions, academics have posited a variety of theories. Invariably, however, before a commentator can set forth a theory of how best a government should respond to emergencies, that commentator must grapple with and formulate an answer to a prior question: what exactly happens to democracy during times of emergency?

Scholars have not reached a consensus on the ultimate question of how best a government should respond to emergencies, but one cadre’s attempt to answer the prior question, labeled “contrarian”

by one scholar, is gaining traction in the recent literature.¹ This “contrarian,” or revisionist, view, founded upon arguments set forth by Professors Eric Posner and Adrian Vermeule, asserts that nothing relevant happens during an emergency that inhibits the ability of a democratic government to function. Certainly, Posner and Vermeule recognize, *something* relevant happens—they concede that an emergency might shrink the size of the “societal pie”

¹ Jack L. Goldsmith, Reviews, Oxford Univ. Press, <http://www.oup.com/us/catalog/general/subject/Law/ForeignRelationsandNationalSecur/?view=usa&ci=9780195310252#reviews> (last visited Aug. 19, 2007) (reviewing Eric A. Posner & Adrian Vermeule, *Terror in the Balance* (2007)) (“[*Terror in the Balance* presents] incisive and contrarian analyses of contemporary issues . . .”). For examples of the “contrarian” view’s increasing popularity among scholars, see Eric A. Posner & Adrian Vermeule, *Terror in the Balance* (2007); Richard A. Posner, *Law, Pragmatism, and Democracy* (2003) [hereinafter Posner, *Law, Pragmatism, and Democracy*]; Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. Rev. 289, 299–303 (2007) (defending Posner and Vermeule’s account on originalist grounds); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2349–56 (2006); Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 Va. L. Rev. 1091 (2006) [hereinafter Posner & Vermeule, *Emergencies and Democratic Failure*]; Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 Stan. L. Rev. 605 (2003); Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 Fordham L. Rev. 631 (2006); Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons From Hamdan*, 91 Minn. L. Rev. 1451, 1469 (2007); see also Online Symposium, Eric Posner and Adrian Vermeule’s “Terror in the Balance,” *Opinio Juris*, http://www.opiniojuris.org/posts/chain_1187565405.shtml (last visited Sept. 2, 2007). For a counter to the “contrarian” view, emphasizing the importance of clear congressional authorization of executive action, see Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47, 66–68. For a discussion of the “contrarian” view and an argument that during times of emergency judges “should do nothing more and nothing less than assure that the proposed agency action is reasonable,” see Mark S. Davies, “Quotidian” Judges vs. Al-Qaeda, 105 Mich. L. Rev. 1107, 1108 (2007) (reviewing Eric A. Posner & Adrian Vermeule, *Terror in the Balance* (2007)). For examples of the “contrarian” view’s increasing popularity among popular writers, see Drake Bennett, *Who Cares About Civil Liberties?*, *Boston Globe*, Oct. 15, 2006, at E1 (discussing *Terror in the Balance* and the view of Professors Posner and Vermeule that democratic failure is no more likely to occur in times of emergency than in peacetime); Eric Posner, *Op-Ed.*, *A Threat That Belongs Behind Bars*, *N.Y. Times*, June 25, 2006, at 12WK. For a discussion of historical debates on the issue of law during times of emergency, see, for example, John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame*, 120 Harv. L. Rev. 754, 785–87 (2007) (book review) (“Like observers of twenty-first-century American law, many in 1860s Britain contended that British law ought to possess emergency suspension mechanisms that would create periods of exceptional, extralegal authority.”).

from which each individual takes his piece—but no systematic democratic failure occurs during an emergency that would cause one individual (or group of individuals) consistently to “lose” or to take a disproportionately smaller piece of that pie during an emergency.²

Professors Posner and Vermeule explain this theory with reference to what they have termed “democratic failure.” Posner and Vermeule discuss democratic failure in terms of government action, defining democratic failure as governmental actions that are “rational[] but not . . . well-motivated” and that may be motivated by “standing passions and ethnic animus.”³ Democratic failure could allow majorities to “scapegoat minorities during emergencies or seize on the emergency to harm minorities in opportunistic fashion.”⁴ But Posner and Vermeule deny that such democratic failure occurs during times of emergency. Rather, they contend that in times of emergency, the minority would “get the same proportional slice of the social product it had before, albeit from a smaller pie.”⁵ If individuals are worse off during an emergency, Posner and Vermeule claim, they are worse off only because society as a whole is worse off due to the increased outlay of resources on security measures. “The shrinking of the social pie,” Posner and Vermeule argue, “is something that happens all the time, due to random exogenous shocks, such as an economic downturn or a bad crop season.”⁶ “An emergency is just an[other] exogenous shock that reduces the size of the social pie but that need not change the proportions of the pie that are enjoyed by different groups.”⁷ Posner and Vermeule conclude, “There is little [historical] evidence

² Posner & Vermeule, *Emergencies and Democratic Failure*, supra note 1, at 1093–96 (discussing the “societal pie” metaphor).

³ *Id.* at 1101–02. Note that Professors Posner and Vermeule do not define democratic failure in countermajoritarian terms. That is, they do not view democratic failure as the failure of a majority in a democratic system to implement its desired policies. Rather, they define democratic failure in terms of the subjective motivations of the governmental actors and private voters. Where those individuals’ actions are based on animus, democratic failure might arise, even though the resulting policies may be “majoritarian.” See *id.* at 1100–05.

⁴ *Id.* at 1103.

⁵ *Id.* at 1093.

⁶ *Id.* at 1118.

⁷ *Id.* at 1096.

and no theoretical reason to believe that democratic failure is more likely in emergencies.”⁸ Accordingly, they give relatively little value to the impact that emergencies might have on democratic functions.

Professors Posner and Vermeule frame the operation of democracy during emergencies as the product of a binary tradeoff between democratic failure and national security, a characterization that allows (if not requires) their ultimate conclusion. And Posner and Vermeule define what they see as the appropriate role of the judiciary during emergencies in these terms—the role of the judiciary should be determined by the balance of the potential cost of unchecked democratic failure and the potential cost of judicial revision of the political branches’ legitimate attempts to provide national security.⁹ In their view, during emergencies, the courts could step in to protect citizens harmed by democratic failure, but any benefit achieved must be counterbalanced against the cost of hindering the political action attempting to respond to the emergency. If democratic failure is no more likely during times of emergency, then the benefit of judicial intervention does not change, and so any significant increase in the cost of a judicial check on the political branches during emergencies would counsel in favor of more deferential judicial review. Indeed, that is precisely their conclusion: because “[t]he risks and costs of [democratic failure] are constant across both normal times and emergencies, but in emergencies, the risks and costs of [judicial checks on political branches’ attempts to provide national security] spike upward,” it is “both desirable and predictable” to have a high level of judicial deference in times of emergency.¹⁰

This Note will not contest these authors’ ultimate conclusion. For it is entirely possible that, even if the risk of democratic failure increases during emergencies, the costs of judicial review of the political branches’ actions would still outweigh the cost of an increased likelihood of democratic failure. Rather, this Note’s objective is to assess the revisionists’ underlying calculation. In

⁸ Id. at 1093.

⁹ Id. at 1131–32.

¹⁰ Id. at 1097, 1145.

particular, this Note will question the revisionists' initial assertion that democratic government functions with equal facility during emergencies as during ordinary times. The aim of this Note is to ensure that, if the revisionists' ultimate conclusion stands, it is supported by historical evidence, rather than by simple assertions of its nonexistence.¹¹

Professors Posner and Vermeule discuss several historical emergencies during which a subscriber to the democratic failure theory might have expected such a failure to occur. Posner and Vermeule analyze these historical moments and conclude that the nonoccurrence of democratic failure during each emergency lends support to their argument. This Note will argue that their characterization of at least one historical response to an emergency—the World War II internment of individuals of Japanese ancestry—is incorrect and undermines their ultimate conclusion. By introducing primary-source research as well as by re-introducing forgotten or overlooked academic arguments, this Note will challenge the revisionist theory of democratic failure during emergencies. To be sure, the notion that post-Pearl Harbor anti-Japanese sentiment drove the internment program is not novel.¹² This Note is the first, however, to identify a well-organized coalition of anti-Japanese grass-roots groups on the West Coast of the United States as the orchestrator of the internment effort and the cause of that democratic failure.¹³

This Note will present a case study of the Japanese internment during World War II in order to test the revisionist characterization of democracy during emergency. This case study reveals that the internment of individuals of Japanese descent was not merely

¹¹ See *id.* at 1096 (arguing that “[t]here is little historical evidence that democratic failure is especially likely in times of emergency”).

¹² See, e.g., *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting) (“[The] exclusion [program] goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.”).

¹³ Others have touched on the role of West Coast anti-Japanese sentiment in the internment decision, but none has connected that sentiment to modern-day theories of democratic failure or to the impact that anti-Japanese sentiment had on the governmental decisionmakers and the functioning of American democracy during that time of emergency. See, e.g., Roger Daniels, *Concentration Camps USA* 26–42 (1971); Morton Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* 19–208 (1949); Peter Irons, *Justice at War* 9–13 (1983).

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the result of a continuation of the peacetime baseline, of persistent racial prejudices extant throughout the nation, or of rational concerns for national security, as Professors Posner and Vermeule contend.¹⁴ Rather, individuals of Japanese descent were interned because a well-organized West Coast coalition was able to capitalize on the democratic failure caused by the emergency of World War II.

The West Coast coalition had sought to exclude the Japanese from its region for more than a half-century preceding the attack on Pearl Harbor, and it had been pursuing measures to remove all individuals of Asian descent from its region for nearly a century. Yet before World War II, the anti-Asian cause lacked the mainstream appeal necessary to garner the political support required for its exclusionary efforts to succeed. World War II changed the political playing field, and the anti-Japanese coalition on the West Coast knew it. Contrary to the assertions of the revisionist authors, the coalition recognized the war as a golden opportunity to pursue its long-sought goal of complete Japanese exclusion. And the coalition exploited the democratic failure created by the war to gain the political capital necessary to achieve that goal.¹⁵

This Note will proceed in three Parts. Part I will examine the recent claims made by revisionist commentators who argue that democratic failure is no more likely to occur during emergency than during normal times. Part II will then offer a case study of the Japanese internment during World War II as an example to rebut this claim. Finally, Part III will respond to the revisionist description of democratic failure and World War II.

¹⁴ Posner & Vermeule, *Emergencies and Democratic Failure*, supra note 1, at 1125–26.

¹⁵ Grodzins, supra note 13, at 20 (quoting Letter from “O.L. Scott,” Official, Grower-Shipper Vegetable Ass’n, to John Z. Anderson, Representative, U.S. Congress (May 12, 1942) (describing the “golden opportunity” provided by the war to achieve the goal of complete Japanese exclusion)).

I. THE DEMOCRATIC FAILURE THEORY AND EMERGENCIES

A. Theoretical Underpinnings: The Current Debate

Since September 11th, commentators, from legal academics to popular writers, have debated the most effective and appropriate method of governmental operation and balance of power during times of emergency. One camp of commentators has argued that judicial review should be more searching in emergencies than in normal times.¹⁶ On this account, the costs of self-interested and opportunistic actions of politicians in the executive and legislative branches will outweigh the benefits of having unchecked ability to respond to emergencies in the name of national security, and accordingly, the judicial branch should be less deferential to the political branches during emergencies than during normal times. A second group of commentators has advocated a case-by-case approach to judicial review of political actions during emergencies, in a sort of constitutional “bend but don’t break” analysis. During emergencies, they argue, the Constitution must be flexible enough, or “bend,” to allow the political branches to pursue appropriate measures necessary to respond to the unique problems of the situation, but the judicial branch must be on guard to prevent the “breaking” of the Constitution and the contravention of certain fundamental liberties. As might be expected, much of the debate among those who subscribe to the “bend but don’t break” theory centers on exactly where the “bend” turns into the “break.”¹⁷ Still

¹⁶ For recent expositions of this position, see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *Colum. L. Rev.* 237, 317–19 (2002); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 *Mich. L. Rev.* 2565, 2576–77 (2003).

¹⁷ See, e.g., Posner, *Law, Pragmatism, and Democracy*, *supra* note 1, at 296, 303–04. Judge Posner, expounding upon his interpretational methodology of pragmatic constitutional reasoning, criticizes civil libertarians for embracing an “unsound” approach to the “balance between liberty and security.” *Id.* at 296. Judge Posner argues that judges, in their quest to interpret and apply the Constitution, weigh “the competing interests at stake—call them public safety and liberty.” *Id.* Judge Posner declares that civil libertarians, in failing to recognize this tradeoff, give undue weight to constitutional rights. “Neither interest should enjoy priority over the other in the balancing process,” and because the relative importance of liberty and security will vary from time to time, the law “should be flexible.” *Id.*

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another camp, led by Posner and Vermeule, has argued that judicial review should be less searching during emergencies. These scholars contend that courts cannot systematically improve upon the political branches' first-order balancing of security and liberty. As proponents of this view have noted, "[w]hatever hope [courts] have of [balancing security and liberty] in normal times, . . . [that hope] is dramatically attenuated during times of emergency, because the judges' information is especially poor and the costs of judicial mistakes are especially high."¹⁸

Although the three positions come to different normative conclusions as to the appropriate role of courts during times of emergency, each position begs a critical and logically prior descriptive question: how well does a democratic government function during an emergency? Or, put differently—and in Posner and Vermeule's terms—how likely is an emergency to create democratic failure? Before reaching their ultimate conclusions, scholars must, at least implicitly, take a position on this prior question.

One formulation to this prior question, the "democratic failure theory" of emergencies, has been quickly gaining subscribers. As Professors Posner and Vermeule have explained, the democratic failure theory accepts that government officials are rational and act as agents for a majority of citizen-voters who are also rational.¹⁹ The citizen-voters, though, are not only rational but also self-interested, and this causes their governmental agents to supply security policies that benefit the majority at the expense of political, ideological, or ethnic minorities. In other words, the "[g]overnment chooses security policy rationally, but its goal is to maximize the welfare of current democratic majorities, rather than the overall welfare of the polity. From the social [maximization] point of view, government acts rationally but not in a well-motivated fashion."²⁰

Traditionally, this prior question—whether democratic failure is more likely to occur during emergencies—has been answered in

¹⁸ Posner & Vermeule, *Emergencies and Democratic Failure*, supra note 1, at 1104.

¹⁹ See *id.* at 1092.

²⁰ *Id.* at 1101.

the affirmative, albeit at a very high level of abstraction.²¹ Democratic failure has driven emergency-time governmental policy, the traditionalists argue, at least in part. The current trend of revisionism has recently entered the fray, asserting that any democratic failure cannot be disaggregated from rational and legitimate national security concerns. Where legitimate security concerns are at issue, they argue, deference must be given to those with the best access to the relevant information and with the tools best equipped to respond to the situation. In the case of emergency, those are the political branches, not the courts.²²

B. Theoretical Underpinnings: The Revisionist Claim

Specifically, the revisionists set forth two primary critiques of the traditional argument. First, they argue that the “democratic failure theory has no intrinsic connection to security [or emergencies].”²³ To support their claim, these revisionists call into question the abstract nature of the traditionalists’ arguments, noting the failure of traditionalists to present “historical evidence that democratic failures are systematically more likely, or more harmful, in emergencies.”²⁴ The revisionists assert that “[t]he majority has no greater ability to impose costs on a minority in the emergency case than in the non-emergency case.” Illustrating their point, they assume a situation in which the structure of voting and representation allows a sixty percent majority to take eighty percent of the “social pie.” “If an emergency shrinks the pie, the structure of voting does not change, and the minority will still get its 20%, just of a smaller pie.”²⁵

Second, the revisionists argue that minorities are not opportunistically scapegoated by majorities during emergencies. To be sure, revisionists concede, “[m]inorities undoubtedly are scapegoated during emergencies, but they are during normal times as well

²¹ See, e.g., Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 531 (2004); Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 *J. Pol. Phil.* 191, 191–92 (2003).

²² For expositions of that revisionist account, see *supra* note 1.

²³ Posner & Vermeule, *Emergencies and Democratic Failure*, *supra* note 1, at 1110.

²⁴ *Id.* at 1115.

²⁵ *Id.* at 1119.

It is not clear that emergencies change anything other than the rhetoric or rationalizations surrounding the majority's actions."²⁶ Thus, the revisionists argue that although the proposed justification for a certain policy might change in times of emergency, the bundle of policies available to the government actors will not be enhanced by the emergency. What is done in emergencies might just as well have been done in peacetime, although the professed justification might change. Because the structure of voting and representation does not change, they argue, majorities cannot opportunistically exploit a crisis to accomplish invidious goals unrelated to the emergency. Without a theory as to how majorities capitalize on such democratic failures, or at least evidence of a democratic failure even occurring in the first place, the revisionists maintain, the traditionalists fail to prove their claim.

In sum, the revisionists rest their claim at least in part on the nonexistence of historical evidence—or the nonexistence of legal scholarship incorporating what historical evidence might exist—to demonstrate that emergency risks democratic failure. They rely explicitly on the dearth of research in this area, arguing that until such research reveals that emergency politics are decisively worse for minorities due to democratic failure, the case for the democratic failure theory “remains conjectural.”²⁷ The traditionalists recently have called for additional research into this area to respond to the revisionists' claim.²⁸ This Note answers that call.

²⁶ Id. at 1122.

²⁷ Id. at 1121.

²⁸ See, e.g., Mark Tushnet, *Issues of Method in Analyzing the Policy Response to Emergencies*, 56 *Stan. L. Rev.* 1581, 1592 (2004) (“One can only hope that second- and third-generation legal scholarship about law and emergencies in the United States will extend and deepen [our understanding of that decisionmaking dynamic].”); see also Posner & Vermeule, *Emergencies and Democratic Failure*, *supra* note 1, at 1121.

II. WORLD WAR II, THE JAPANESE INTERNMENT, AND DEMOCRATIC FAILURE: A CASE STUDY

A. A Historical Prejudice: Anti-Japanese and Anti-Asian Sentiment in the United States

In 1940, there were 126,948 Japanese Americans in the continental United States—a number that “comprised less than one-tenth of 1 percent of the total population.”²⁹ Until 1885, emigration was illegal in Japan, and Japanese immigrants began to arrive in the United States in significant numbers only after 1890.³⁰ These Japanese immigrants “had two strikes against them” before they even reached American shores: nativism generally and anti-Orientalism specifically.³¹ Chinese immigration, which began in the late 1840s in response to the labor demands of the Gold Rush, created an “entirely new strain of American racism, from which the Japanese Americans were to suffer greatly.”³²

For nearly one hundred years leading up to World War II, West Coast attempts to exclude “Orientals” from the region were ubiquitous. What began as anti-Chinese prejudice quickly embraced anti-Japanese sentiment when the Japanese replaced the Chinese as the dominant Asian immigrant group around 1890. An informal West Coast coalition of anti-Japanese groups led the campaign to rid the West Coast of the “Orientals,” to halt the “yellow flood,” and to remove the “yellow peril.”³³ But the coalition had been unable to garner the national political support necessary to do so. World War II, however, offered the coalition the opportunity to

²⁹ Daniels, *supra* note 13, at 1.

³⁰ *Id.* at 2.

³¹ *Id.*

³² *Id.*

³³ This coalition consisted of a variety of anti-Asian groups. Labor and agricultural organizations comprised a majority of the coalition. The Western Growers Protective Association, one of the leading members, was a cooperative organization whose membership controlled approximately eighty-five percent of the row-crop vegetables shipped from California. The Grower-Shipper Vegetable Association of Central California was a smaller but similarly active group in the coalition. Traditional labor organizations, such as the American Legion, also belonged to this informal coalition. Finally, the coalition counted as members several local government bodies, such as the California Joint Immigration Committee and the Los Angeles Chamber of Commerce. See generally Grodzins, *supra* note 13, at 19–63.

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gain public support for its cause by couching its prejudicial arguments in the patriotic rhetoric available during the war.

1. Anti-Chinese Prejudice in the Nineteenth Century

Chinese immigration increased steadily between 1850 and 1880, reaching its height between the end of the Civil War and 1880. Pulling Chinese to the western United States were the heightened labor demands of the California Gold Rush, the transcontinental railroad, and the Industrial Revolution more generally. This economic “pull” was coupled with the “push” of Chinese peasant poverty and, for the first time, the existence of cheap and available transpacific travel by sail and steamship. Working together, these “push” and “pull” factors produced a significant and consistent stream of Chinese migrants to the United States, and from 1860 to 1880, the number of Chinese immigrants increased from 41,000 to approximately 124,000.³⁴

A large majority of Chinese immigrants were adult males who competed directly with American workers. Thus, even though Chinese immigration was slight on a relative scale, that immigration greatly affected white workers in the West.³⁵ As the boom of the Gold Rush subsided and the transcontinental railroad neared completion, the demand for labor returned to normal levels, and the relatively scarce labor demand intensified the competition between the Chinese immigrants and the American working class. This competition reached its zenith after the completion of the Union-Central Pacific Railroad in 1869, which left the nearly 10,000 Chinese laborers it had employed looking for work, and anti-Chinese sentiment began to build more rapidly. One historian describes this sentiment: “From an economic point of view the almost unanimous hostility with which far-western workingmen viewed the Chinese was quite rational. Chinese labor was cheap labor, and far-western labor had been, due to its scarcity, expensive labor.”³⁶

That anti-Chinese sentiment had a substantial economic component is clear, but the prejudice extended beyond mere economics,

³⁴ Daniels, *supra* note 13, at 2–3.

³⁵ *Id.* at 3.

³⁶ *Id.*

and the anti-Chinese movement soon developed an ideology of white supremacy. Thus, “[n]ot only did ‘John Chinaman,’ as he was often called, ‘work cheap and smell bad,’ but he was also subhuman.”³⁷

By 1870, the West had what the whites considered a full-blown “Chinese problem,” and it would spend the rest of the century struggling to find a solution, causing the Chinese to suffer great hardship along the way. A small number of Chinese immigrants did find their way east, often serving as strikebreakers, but as a leading historian writes, “in essence, the Chinese question was a western question, and largely a California problem at that.”³⁸

Because many in the West viewed the “Chinese problem” as a uniquely western problem, the first attempted solutions were local ones. California courts refused to accept testimony of Chinese individuals, municipal ordinances were passed to harass the Chinese, state legislatures tried to stop further Chinese immigration, and the 1879 version of the California Constitution had an entire anti-Chinese section, thinly veiled by reference to “aliens” in general.³⁹ The California Constitution required the legislature to enact all regulations necessary to protect the state’s citizens “from the burdens and evils arising from the presence of aliens, who are and may become . . . dangerous and detrimental to the well-being or peace of the State.” The Constitution further authorized the legislature “to impose conditions upon which such persons may reside in the State, and to provide the means and modes of their removal.”⁴⁰ These “dangerous” aliens who would be “detrimental to the well-being” of the state were widely known to be the Chinese.

But as Westerners increasingly saw local legal options as offering only incomplete solutions to their “Chinese Problem,” they began to shift their focus to extralegal activities. Within their communities, the Chinese were subject to extralegal acts of force, fraud, and

³⁷ Id. at 3 (citing Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* 25–39 (1939); Gunther Barth, *Bitter Strength: A History of the Chinese in the United States, 1850–1870* (1964)).

³⁸ Daniels, *supra* note 13, at 4–5.

³⁹ Id. at 3–4. For a discussion of the various anti-Chinese measures, see Barth, *supra* note 37, at 129–56.

⁴⁰ Cal. Const. art. XIX (repealed 1952), *cited in* Daniels, *supra* note 13, at 4.

intimidation, ranging from having their traditional pigtailed cut off to mass murder.⁴¹ Because the Chinese lived in isolated communities or segregated urban ghettos, often the only witnesses of crimes against the Chinese were other Chinese, the testimony of whom was inadmissible in court.⁴² As a result, the individuals harboring anti-Chinese sentiment were able to engage in an extralegal course of action in an attempt to fill in the gaps left by the incomplete local legal solutions, often while suffering few or no legal repercussions.

The extralegal activities coupled with the local legal solutions offered anti-Asian groups in the West some success in excluding the Chinese from their region. But these groups soon realized that to achieve their ultimate goal—complete eradication of all “Orientals” from the West—they needed a national solution. Just as the anti-Japanese movement would roughly forty years later with the Immigration Act of 1924, the anti-Chinese movement eventually gathered enough political capital to achieve part of its desired solution. In 1882, just a few years after President Hayes vetoed a more extreme version, President Arthur unenthusiastically acquiesced to congressional pressure and signed a compromise bill that would bar all Chinese immigration for ten years.⁴³ Congress extended the ban for another ten-year term in 1892, and in 1902, Congress made the ban permanent.⁴⁴

By the turn of the century, the anti-Asian groups in the West had achieved limited solutions to their “Chinese problem.” But these solutions were only partial. The groups realized, as the anti-Japanese groups would a half-century later, that they could only

⁴¹ Daniels, *supra* note 13, at 4. During a night-long shooting assault in Los Angeles in 1871, “a white mob shot, hanged, and otherwise murdered some twenty Chinese.” *Id.* (citing William R. Locklear, *The Celestials and the Angels*, 42 S. Cal. Q. 239 (1960)). Outside California, the most violent incident was the 1885 Rock Springs, Wyoming massacre of Chinese who had been employed as strikebreakers in a Union Pacific coal mine. The casualties amounted to twenty-eight dead and fifteen wounded, with \$150,000 in property damage. *Id.* at 4 (citing Paul Crane & Alfred Larson, *The Chinese Massacre*, 12 *Annals of Wyo.* 47 (1940); Arlen Ray Wilson, *The Rock Springs, Wyoming, Chinese Massacre, 1885* (1967) (unpublished M.A. thesis, University of Wyoming)).

⁴² *Id.* at 4.

⁴³ *Id.* at 5.

⁴⁴ *Id.*

achieve a complete solution—total eradication—with unequivocal national support. During the peacetime era that marked the post-Civil War nineteenth century, the anti-Asian coalition was never able to muster this unequivocal national support, and so the group fell short of its ultimate goal of total Chinese exclusion.

2. Anti-Oriental and Anti-Japanese Prejudice: 1890 to Internment

By 1890, because of the increased demand for immigrant labor after the U.S. war on Chinese immigration, the Japanese government's legalization of emigration, and further advances in transpacific transportation, significant numbers of Japanese immigrated to the United States, replacing the Chinese as the dominant Asian-immigrant group migrating to the western United States. Census records reveal that in 1890, only 2,039 Japanese resided in the United States; about 25,000 immigrated during the 1890s; 125,000 immigrated during the high water mark of 1901 through 1908; and about 10,000 Japanese immigrated each year thereafter until the Immigration Act of 1924, which prohibited subsequent immigration from Japan.⁴⁵

Despite the fact that fewer than 300,000 Japanese were recorded as entering the United States, the West Coast perception of the immigration was that it created a “yellow flood,” and “yellow peril” was fostered in much of the western United States.⁴⁶ Especially when compared with the more than thirty million individuals who immigrated to the United States between the Civil War and 1924, the 300,000 Japanese immigrants might appear to be an insubstantial number. But because of the existing prejudices against “Orientals” and because of the Japanese immigrants' disproportionate economic success, especially in agriculture, even such a relatively small number of immigrants was unacceptable to many in the West.⁴⁷

⁴⁵ Id. at 5–6.

⁴⁶ See Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 38–41 (2004); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* 121–35 (1995).

⁴⁷ For a description of Japanese immigrants' contributions to and successes in the agricultural industry, see Masakazu Iwata, *The Japanese Immigrants in California Agriculture*, 36 *Agric. Hist.* 25 (1962).

The parallels between the anti-Japanese and the anti-Chinese movements are apparent. Just as decades before in the anti-Chinese movement, the anti-Japanese movement was initially instigated by San Francisco labor leaders. Both movements were led by the same anti-immigrant demagogue, Dennis Kearney, the leader of San Francisco's Workingmen's Party. The rallying cries against each group were even the same. For Chinese exclusion, cries of "The Chinese Must Go" led Kearney's charge. For the Japanese, the nativists merely inserted the new detested group for the old, and by 1890, cries of "The Japs Must Go" were heard from Kearney and his followers.⁴⁸

Leaders of the anti-Japanese movement made its connection with the anti-Chinese movement explicit. James Duval Phelan, the mayor of San Francisco, speaking at a meeting sponsored by organized labor to renew Chinese immigration bans, emphasized that in addition to restricting the immigration of the Chinese, the West needed to address a new danger: the Japanese. "The Japanese are starting the same tide of immigration which we thought we had checked twenty years ago [with the Chinese]. . . . The Chinese and the Japanese are not bona fide citizens. They are not the stuff of which American citizens can be made."⁴⁹ By the summer of 1900, these arguments began to affect the national political debate, with the three major political parties—the Republicans, Democrats, and Populists—taking at least preliminary positions against "Asiatic" immigration.⁵⁰

The prejudice against the Japanese was even more intense than against the Chinese because the nativists viewed the Japanese as more threatening. Although the Chinese were subjected to discrimination and attempts at exclusion between 1850 and 1880, at no time was China—almost inconsequential as an international power—viewed as a legitimate threat to the United States. By the end of the century, by contrast, Japan appeared to the nativists to be a potential predator.

⁴⁸ Daniels, *supra* note 13, at 3, 9.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.*

In 1894 Japan won its first modern naval battle. In 1895, then-Congressman Henry Cabot Lodge expressed to Congress his concern that the Japanese “understand the future . . . they have just whipped somebody, and they are in a state of mind when they think that they can whip anybody.”⁵¹ Amidst the 1898 debate regarding the annexation of Hawaii, Minnesota Senator Cushman Davis, the Chairman of the Senate Foreign Relations Committee, warned that the minor conflict with Japan over Hawaii was merely “the preliminary skirmish in the great coming struggle between East and West.”⁵² These fears were legitimized in 1905 after Japan defeated Russia in the war of 1904–05, which caused particular alarm because it was the first modern victory of Asians over Europeans. Shortly thereafter, the term “yellow peril” entered the mainstream, largely because of jingoist newspaper tycoon William Randolph Hearst and his *San Francisco Examiner*’s consistent discussion of the danger of Japanese invasion.⁵³

In response to these increased fears, the West sought increasingly more aggressive anti-Japanese measures. In 1906, San Francisco passed a school ordinance requiring the segregation of students of Asian descent. The ban created international controversy and was rescinded less than a year later as a result of the “Gentlemen’s Agreement” between the United States and Japan in which Japan acquiesced to increased limitations on Japanese immigration in return for San Francisco’s repeal of the ordinance.⁵⁴ In 1913, California passed the Alien Land Law, prohibiting aliens ineligible for citizenship—a category explicitly limited to Asians—from acquiring ownership of agricultural land.⁵⁵ Oregon, Arizona, New

⁵¹ Id. at 29.

⁵² Id. (internal quotations omitted).

⁵³ Id. at 29–30.

⁵⁴ For a discussion of the San Francisco school law, which threatened to bring the United States to war with Japan, and the ensuing Gentlemen’s Agreement of 1907, see Thomas A. Bailey, *Theodore Roosevelt and the Japanese-American Crises* (1934).

⁵⁵ Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Cal. L. Rev. 7, 7 (1947) (citing 1913 Cal. Stat. 206). The 1790 Naturalization Act provided that “free white person(s)” were eligible for naturalization. 1 Stat. 103 (1790), repealed by 2 Stat. 153 (1802). Persons “of African nativity and . . . descent” were made eligible to become naturalized citizens by an 1870 Naturalization Act. 16 Stat. 256 § 7 (1870). *In re Ah Yup* found that Chinese immigrants were neither

Mexico, Idaho, and Montana soon passed similar statutes.⁵⁶ When the question of the constitutionality of the Alien Land Laws came before the U.S. Supreme Court in the case of *Frick v. Webb*, Attorney General Ulysses S. Webb in defending the law nevertheless explicitly recognized those laws' prejudicial underpinnings: "It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship,—in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer."⁵⁷ Other laws passed in the early 1900s prohibited the Japanese from marrying outside of their race.⁵⁸ Explicitly demonstrating this anti-Japanese sentiment, every session of the California legislature from 1905 to 1945 pursued at least one piece of anti-Japanese legislation.⁵⁹

Notwithstanding these attempts to exclude the Japanese, as the anti-Asian groups had learned decades earlier when attempting to exclude the Chinese, purely local solutions would not suffice. Neither the Gentleman's Agreement nor the Alien Land Laws were successful in achieving the nativists' ultimate goal—to "ship all these Japanese, whether of foreign or American birth, back to Japan."⁶⁰ Thus, the anti-Asian groups on the West Coast once again sought a national solution.

Some anti-Japanese sentiment did exist at the national level, but that sentiment did not equate to support for the West Coast coali-

white nor of African descent and thus were ineligible for citizenship. 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104). Subsequent judicial decisions rendered Koreans, Japanese, and Asian Indians ineligible for naturalization. See, e.g., *United States v. Thind*, 261 U.S. 204 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922). Although the Alien Land Laws preceded some of these judicial determinations, the clear import of the laws was to exclude individuals of Asiatic descent from owning real property. See Ian F. Haney López, *White by Law* 129 (1996) ("Referring to 'aliens ineligible to naturalize' allowed Congress and several states to discriminate racially without running afoul of the social prohibitions against such action articulated in the Constitution.").

⁵⁶ McGovney, *supra* note 55, at 7–8. Two non-"Western" states, Louisiana and Kansas, also passed similar laws soon after California. *Id.*

⁵⁷ Stone, *supra* note 21, at 626 n.256.

⁵⁸ See *id.* at 287, 626 n.256.

⁵⁹ Daniels, *supra* note 13, at 11.

⁶⁰ Grodzins, *supra* note 13, at 20 (quoting Letter from "F.W. McNabb," Officer, W. Growers Protective Ass'n, to John Z. Anderson, Representative, U.S. Congress (May 19, 1942)).

tion's most extreme preferences. Indeed, many of the anti-Japanese policies endorsed by the West were at odds with the views of the majority of the nation, which, because of its distance from Japanese immigration was better able to balance any prejudicial instincts with foreign policy concerns and the basic principles of democracy. For example, while President Woodrow Wilson expressed anti-Japanese sentiments, stating during his 1912 presidential campaign that "[w]e cannot make a homogeneous population out of a people who do not blend with the Caucasian race,"⁶¹ he would not support the West's goal of total exclusion. The Alien Land Laws passed by western states are also illustrative, as few states outside of the West even contemplated similar exclusionary laws targeting the Japanese. In 1913, Connecticut's *Hartford Times* reflected the "not uncommon" eastern perspective on anti-Japanese measures, such as the proposed Alien Land Laws in California, stating that "[o]f the two it might be cheaper to go to war with California than with Japan."⁶² Additionally, Japan recognized that the most extreme prejudices were unique to the West, even going so far as threatening to "deal directly with the State of California, as with an independent nation."⁶³

But the anti-Japanese coalition was unable to muster the necessary support for a national solution and thus settled for the less extreme and, in its view incomplete, solution of immigration reform, culminating in the Immigration Act of 1924. Yet even this limited national solution took "extensive planning . . . under the most careful direction" of western anti-Japanese groups.⁶⁴

With rising anti-Japanese sentiment in the West and extensive lobbying from West Coast political leaders at both the local and federal level, Congress passed the Immigration Act of 1924, which

⁶¹ Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* 55 (1962) (quoting Wilson Against Immigration of Oriental Coolies, *S.F. Daily News*, May 4, 1912, at 1).

⁶² Grodzins, *supra* note 13, at 6 (citing Thomas A. Bailey, *A Diplomatic History of the American People* 548 (9th ed. 1974)).

⁶³ Grodzins, *supra* note 13, at 6 (quoting Syngman Rhee, *Japan Inside Out* 172 (1941)).

⁶⁴ *Id.* at 5.

excluded Japanese from further immigration to the United States.⁶⁵ To be sure, the restrictions of the act affected other minority groups, such as the Italians, but the law singled out only the Japanese for total exclusion. As one historian noted, “[a]rguments for the restriction of immigration from eastern and southern Europe, rooted in alleged ‘national’ differences, took on an overtly racist cast against the Japanese.”⁶⁶

By 1940, the West Coast coalition had been working for nearly a century to prevent individuals of “Oriental” ancestry from migrating to and from remaining in the West, but with only limited success. World War II and the attack on Pearl Harbor provided these nativists with an opening to pursue their long-term—and long-fought for—goals at a national level. World War II allowed the coalition for the first time to cloak its prejudicial preferences in the rhetoric of patriotism and national security. The coalition recognized the golden opportunity provided by the war, and it capitalized on it.

B. World War II, Democratic Failure, and Opportunism

Modern scholarship has overwhelmingly viewed the World War II internment of the Japanese as overdetermined, and indeed, the revisionists argue specifically in these terms.⁶⁷ Contrary to this conventional wisdom, however, the internment decision was not inevitable. The initial public and political reaction to Pearl Harbor was not dominated by “Pearl Harbor Panic,” but was characterized by restraint. Lieutenant General John L. DeWitt—the Commanding General of the Western Defense Command, the general charged with protecting the West Coast, and the man ultimately responsible for the internment decision—did not initially think internment was necessary.⁶⁸ The United States contemplated several competing

⁶⁵ The Immigration Act of 1924 barred entry of “alien[s] ineligible to citizenship.” Ch. 190, 43 Stat. 153, 162 § 13(c) (1924). Under the 1790 naturalization law, “whites only” could be naturalized as citizens. In *Ozawa v. United States*, the Supreme Court held that Japanese were not white, so they were excluded from naturalization and thus immigration. 260 U.S. 178, 198 (1922).

⁶⁶ Irons, *supra* note 13, at 12–13.

⁶⁷ Posner & Vermeule, *Emergencies and Democratic Failure*, *supra* note 1, at 1125.

⁶⁸ See *infra* text accompanying notes 109–11.

policies before deciding to take the first steps toward internment nearly ten weeks after its declaration of war, and even then, the government proceeded with an Executive Order that was formally race neutral.⁶⁹ In fact, the government seriously considered mass internment of Italian and German Americans, even convening a congressional committee to assess that possibility.⁷⁰ The government also considered a number of less drastic measures, which would have included an intermediate level of individualized review of enemy aliens. Just five months before Pearl Harbor, for example, a joint agreement between the Secretary of War and the Attorney General determined that, in the event that internment was necessary, a “review board” would be established “to pass on the merits of the cases of internees who have given notice of the desire for a review of their cases.”⁷¹

Within the first several months of the war, however, public opinion and official policy in the United States changed from one marked by restraint to one of prejudice and internment. And during this time, the West Coast coalition of anti-Japanese groups was hard at work. The coalition embarked on a public propaganda campaign, an extensive political lobbying effort, and a general plan of terror and prejudice in an attempt to orchestrate the long-sought solution to its “Oriental Problem”—to rid the region entirely of the Japanese. For a short period of time, because of the democratic failure caused by the war, they were able to garner the political and public support to do just that.⁷²

⁶⁹ See *infra* text accompanying notes 109–10.

⁷⁰ See *infra* text accompanying notes 111–20.

⁷¹ Joint Agreement of the Secretary of War and the Attorney General Respecting Internment of Alien Enemies (July 18, 1941), available at National Archives RG 389, Row 467A, Box 1536.

⁷² Of course, other factors were relevant to the internment decision. The Japanese in America were in many ways uniquely situated relative to other individuals with hereditary ties to the enemy. At the time the internment decisions were made, only Japan had initiated an attack on U.S. soil. The attack was the result of stealth and deception, occurring before Japan had formally declared war on the United States. Furthermore, Japanese immigration was more concentrated and had been more recent than that of other ethnic or racial groups linked to the enemy. The Japanese were less assimilated into mainstream American culture than either the Germans or Italians in America. Ngai, *supra* note 46, at 37–50. For discussions of the unique situation of the Japanese and the role this played in the internment decisions, see John W.

1. The Outbreak of War and Restraint

Despite the anti-Japanese coalition's attempt to seize the opportunity provided by World War II, the initial public reaction on the West Coast, the region seemingly most susceptible to fall prey to "Pearl Harbor Panic," was one of tolerance and understanding. On December 8, 1941, the day after the attack on Pearl Harbor, the *Los Angeles Times*, the leading paper in the city with the country's largest Japanese population, opined that a majority of the "thousands of Japanese here and in other coast cities . . . [were] good Americans, born and educated as such," and insisted that "there be no precipitation, no riots, no mob law."⁷³ The *Los Angeles Times* also prominently featured statements of loyalty offered by Japanese Americans⁷⁴ and cautioned its readers to "Not Get Rattled."⁷⁵ Although there was some vigilante activity, as one historian notes, "[s]cattered incidents of window breaking and assaults on Japanese Americans failed to mar the general record of restraint."⁷⁶

The initial national political reaction was similar. Prior to early January 1942, there was "no record, official or otherwise, showing that a single congressman or senator suggested the necessity of special control measures for [Japanese Americans]."⁷⁷ By December 1941, J. Edgar Hoover, the director of the FBI, was "confident that [his bureau] had identified all persons of Japanese descent who could pose a threat to national security," and he "insisted that the risk posed by other individuals of Japanese descent was minimal."⁷⁸ On December 10, 1941, three days after Pearl Harbor,

Dower, *War Without Mercy* 34–36, 71–73 (1986); Irons, *supra* note 13, at 40–55; La Vern J. Rippley, *The German-Americans* 214–22 (1976). This Note does not argue that the coalition's activities were the sole force behind the internment decision. This Note does claim, however, that the coalition's orchestration of the internment politics has largely been ignored by modern scholars—namely the revisionists discussed above—in their debate about democratic failure and emergency.

⁷³ Irons, *supra* note 13, at 6 (quoting Editorial, *Death Sentence of a Mad Dog*, *L.A. Times*, Dec. 8, 1941, at 2).

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting Editorial, *Let's Not Get Rattled*, *L.A. Times*, Dec. 10, 1941, at 1).

⁷⁶ *Id.* at 7.

⁷⁷ Grodzins, *supra* note 13, at 63.

⁷⁸ Stone, *supra* note 21, at 289.

Hoover reported that almost all of the persons the FBI intended to arrest had already been taken into custody.

In addition to the FBI investigations and arrests, President Roosevelt commissioned an independent analysis of the threat of potential Japanese subversion. Chicago businessman Curtis Munson headed the commission, and his final report concluded that “the Japanese are more in danger from the whites than the other way around” and that Japanese in the United States would not “be any more disloyal than any other group in the United States with whom we went to war.”⁷⁹ The early congressional reaction was similarly restrained: the three instances after Pearl Harbor in which Congress gave specific attention to the Japanese resulted in statements of support for, and faith in, individuals of Japanese descent.⁸⁰ Amidst the United States’ early involvement in World War II, Attorney General Biddle reassured the public “that no one would be detained on the score of nationality alone.”⁸¹

2. The West Coast Coalition’s Influence and the Japanese Internment

a. The West Coast Coalition’s Orchestration of “Pearl Harbor Panic”

In contrast to the general reaction of restraint, the West Coast coalition immediately recognized the unique opportunity provided by the war and aggressively pursued its anti-Japanese campaign. California Congressman Edouard V. Izac recalled the extent to which this regional coalition orchestrated national internment policy: “the Army was only slightly more willing than the Justice Department to evacuate the Japs. Evacuation would never have taken

⁷⁹ *Id.*

⁸⁰ Grodzins, *supra* note 13, at 63. For example, on December 8, Congressman John M. Coffee expressed his “fervent hope” that “residents of the United States of Japanese extraction will not be made the victim of pogroms directed by self-proclaimed patriots and by hysterical self-anointed heroes.” 77 Cong. Rec. A5551, A5554 (1941). Congressman Coffee further urged citizens to respect the Bill of Rights and to remember that “these folks” were also “the victims of a Japanese war machine, with . . . which they had nothing to do.” *Id.*

⁸¹ Stone, *supra* note 21, at 291 (quoting Eric K. Yamamoto et al., *Race, Rights and Reparation: Law and the Japanese American Internment* 98 (2001)).

place if the united Pacific Coast delegations had not applied pressure—not only upon the Attorney-General and the Secretary of War—but also on the President himself.”⁸²

The anti-Japanese West Coast groups were powerful and well-connected, and they had the organizational capabilities to affect national policy. The groups were invited to speak before congressional hearings, and their reports were cited by congressional committees.⁸³ They had strong connections to U.S. Senators and Representatives,⁸⁴ they had access to influential federal agencies,⁸⁵ and their activities were well publicized by newspapers that carried complete descriptions of their efforts and of the congressional support the groups secured.⁸⁶ Before Pearl Harbor, however, notwithstanding these well-developed political connections, the coalition was never able to affect national policy in order to implement its most extreme preferences. This coalition saw the post-Pearl Harbor political climate to be the perfect one in which finally to achieve these goals.

Seizing the opportunity provided by the Japanese attack on Pearl Harbor, the coalition drew upon its political connections and used the war as a means to package its anti-Japanese message in a way that would have broad public appeal, exploiting wartime fears by advocating its prejudicial policies in a militaristic tone. The patriotic patina now available to the group allowed its message to

⁸² Grodzins, *supra* note 13, at 62 (quoting Interview with Edouard V. Izac (Oct. 14, 1942)).

⁸³ National Defense Migration: Hearings on H. Res. 113 Before the H. Sel. Comm. Investigation National Defense Migration, 77th Cong., pt. 29, 11,000–01 (1942) [hereinafter Tolan Committee Hearings].

⁸⁴ See, e.g., Grodzins, *supra* note 13, at 11 n.28 (noting that California Senator Hiram Johnson attended a meeting of the California Joint Immigration Committee in May 1927, “at which he ‘referred to the excellent standing which our Committee has before the Senate Immigration Committee [of which Senator Johnson was the chairman] and suggested that an organization such as ours . . . would always wield much influence in Congress’” (quoting Cal. Joint Immigration Comm., Minutes of Meeting, (May 10, 1927))). Senator Johnson was just one of “many other local and national political leaders [who] maintained a close cooperative relationship with the committee.” *Id.* at 11.

⁸⁵ See, e.g., Frank J. Taylor, *The People Nobody Wants*, Saturday Evening Post, May 9, 1942, at 66 (recounting the meetings of group leaders with federal authorities).

⁸⁶ See, e.g., Walter Lippmann, *Today and Tomorrow: The Fifth Column on the Coast*, Wash. Post, Feb. 12, 1942, at 9.

resonate with political leaders, local groups, and residents who ordinarily might not have shared the group's racist agenda. These citizens and local bodies, invigorated by the appeals of the regional coalition, pressured officials in Washington to adopt the coalition's extremist measures.⁸⁷

At the first post-Pearl Harbor meeting of the California Joint Immigration Committee, one of the most vigorous and prominent anti-Japanese groups, the executive secretary stated, "the Committee has received more active and more general support in the last month than it has received in the last thirty years of its existence, and what we want, we ought to get now."⁸⁸ Another member added, "This is our time to get things done that we have been trying to get done for a quarter of a century."⁸⁹

An officer of the Western Growers Protective Association, a leading West Coast agricultural group, wrote California Congressman John Z. Anderson in reference to a bill introduced by the Congressman in May 1942. The bill would require the relocation of all Japanese in California to Japan, and the Western Growers, as part of the West Coast coalition, predictably offered their full support: "[N]ow is the time to do this and to do it right. If we wait until after the war is over the 'sob sisters' are going to hold sway again

⁸⁷ The Immigration and Naturalization Service's administrative history reveals that public apprehensions and wartime hysteria played a central role in the formulation of the internment policy. The administrative history states that the government's response to potentially subversive activities served two functions: first, it "assured the public that our government was taking firm steps to look after the internal safety of the nation, thereby preventing the growth of war hysteria; and [second,] it took out of circulation men and women whose loyalty to the United States was doubtful . . ." U.S. Dep't of Justice, Report to the Congress of the United States: A Review of the Restrictions on Persons of Italian Ancestry During World War II, at 6 (Nov. 2001) [hereinafter *Restrictions on Persons of Italian Ancestry*] (quoting Hugh Carter et al., U.S. Dep't of Justice, Administrative History of the Immigration and Naturalization Service during World War II, at 278 (1946)). For an example of the citizen appeals to Washington officials, see Letter from William Bittle Wells, Special Representative, N.Y. Life Ins. Co., to Henry L. Stimson, Sec'y, Dep't of War (Feb. 9, 1942), available at National Archives RG 389, Row 451, Box 1351 ("When we know that the treacherous Japanese are not to be trusted in any way whatsoever, we are still so damnably soft and foolish as to go our fool way with our heads in the skies and treading a primrose path of idiocy.").

⁸⁸ Grodzins, *supra* note 13, at 20 (quoting Cal. Joint Immigration Comm., Minutes of Meeting 6 (Feb. 7, 1942)).

⁸⁹ *Id.*

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and we will never be able to get such a Resolution through Congress and the various State Legislatures.”⁹⁰

Consistent with this sentiment, the Western Growers Protective Association adopted a recommendation on February 8, 1942, that “no individual alien Japanese, or . . . American citizen of Japanese parentage, can be judged as to his loyalty solely by past experience.”⁹¹ Those who were loyal, the recommendation suggested, “would be willing to endure any hardship to eliminate the possibility of any disloyal action on the part of any of their group.”⁹²

The Grower-Shipper Vegetable Association also saw the war as a golden opportunity to solve the “Japanese problem.” A leading official wrote to Congressman Anderson, “I am convinced that if [permanent removal of Japanese from the United States] is not done or at least the action completed before the war is over, it will be impossible to get rid of them.” The official emphasized the urgency of the situation: “we must do everything we can to stop them now as we have a golden opportunity now and may never have it again.”⁹³

The stance taken by members of the California Farm Bureau Federation during a meeting in November 1942, discussing the eventual return of interned Japanese, is similarly illustrative of the coalition’s prejudicial sentiment. One account of the meeting reported that “California vegetable growers have no intention of inviting the banished Japanese back after the war to compete with them.”⁹⁴ “The vegetable growers, more keenly appreciative of what they face in Japanese competition than other groups, appear[ed] to be unanimous in wanting the Nipponese kept out. A number of growers frankly admitted they preferred white competition.”⁹⁵

The Los Angeles Chamber of Commerce took a similar stance less than two weeks after the attack on Pearl Harbor, recommending that “all Japanese nationals in Continental United States and property owned or operated by them within this Country be im-

⁹⁰ Id. at 20 (quoting Letter from F.W. McNabb, supra note 60).

⁹¹ Tolan Committee Hearings, supra note 83, at 11,005.

⁹² Id.

⁹³ Grodzins, supra note 13, at 20 (quoting Letter from O.L. Scott, supra note 15).

⁹⁴ Grodzins, supra note 13, at 59 (quoting Oakland Trib., Nov. 17, 1943).

⁹⁵ Id. at 60.

mediately placed under absolute Federal control; [and] that this be accomplished by internment of alien Japanese resident[s] here . . . and by direct Governmental control of these businesses and property.”⁹⁶

Members of the coalition explicitly relied upon regional differences to support their arguments for massive internment. William Bittle Wells, the Special Representative of New York Life Insurance Company in Portland, Oregon, wrote to Secretary of War Stimson, “You people in the effete East have no conception of the unreliability of the Japanese or how great liars they are. In treachery they are in a class wholly by themselves, and not one of them . . . should be permitted within 500 miles of the coast line of the Pacific.”⁹⁷

The Grower-Shippers’ managing secretary, Austin Anson, “honestly” revealed his group’s motivations behind a trip to meet with federal authorities in Washington in order to stress the necessity of removing all Japanese from the state. Anson told the *Saturday Evening Post*, “We’re charged with wanting to get rid of the Japs for selfish reasons. We might as well be honest. We do. It’s a question of whether the white man lives on the Pacific Coast or the brown men. . . . And we don’t want them back when the war ends, either.”⁹⁸

b. Evidence of the Influence of the West Coast Coalition and DeWitt’s Change of Tune

Congressman Izac’s perception of the Army’s initial unwillingness to evacuate the Japanese is supported by Lieutenant General DeWitt’s change of position on the issue. DeWitt—the military official eventually responsible for the internment decision—remained unconvinced that internment of the Japanese was necessary for nearly two months after the attack on Pearl Harbor. On December 26, 1941, for example, in response to a suggestion that the Japanese on the West Coast be interned, DeWitt stated, “I’m

⁹⁶ Letter from Agric. Comm., L.A. Chamber of Commerce, to Henry L. Stimson, Sec’y, Dep’t of War (Dec. 19, 1941), available at National Archives RG 389, Row 451, Box 1351.

⁹⁷ Letter from William Bittle Wells, *supra* note 87.

⁹⁸ Taylor, *supra* note 85, at 66.

very doubtful that it would be common sense procedure” to initiate large-scale Japanese internment on the West Coast.⁹⁹ DeWitt believed that “[s]tate and local authorities, aided by the FBI and military intelligence agents . . . could adequately handle the problems of espionage and sabotage.”¹⁰⁰ DeWitt unequivocally stated that “wholesale internment” of Japanese Americans was unnecessary, and instead, he argued, the government should “weed the disloyal out of the loyal and lock them up if necessary.”¹⁰¹ “An American citizen, after all,” DeWitt reminded his colleagues, “is an American citizen.”¹⁰²

By February 1942, after the West Coast anti-Japanese machine had been at work for more than two months, DeWitt changed his tune. DeWitt admitted feeling the pressure of “a tremendous volume of public opinion now developing against the Japanese [in the West] . . . , to get them off the land.”¹⁰³ The West Coast coalition was “bringing pressure on the government to move all the Japanese out.”¹⁰⁴ The group included “the best people of California” who “[felt] that they [were] living in the midst of a lot of enemies. They [didn’t] trust the Japanese, none of them.”¹⁰⁵ As a result of this “tremendous volume” of public pressure, DeWitt now felt that wholesale internment was desirable, and by the time he issued the internment proclamations, in late March 1942, DeWitt had completed his about-face. “[A] Jap is a Jap,” DeWitt now believed, and any attempt to distinguish between them would be impossible.¹⁰⁶ DeWitt reiterated his new position in testimony before a congressional committee, in April 1943, arguing that the internees should be forced to remain in the camps. “A Jap’s a Jap,” he said, and “[y]ou can’t change him by giving him a piece of paper.”¹⁰⁷ The general concluded by stating that the Germans or the Italians were

⁹⁹ Irons, *supra* note 13, at 29.

¹⁰⁰ *Id.* at 29–30.

¹⁰¹ *Id.* at 30.

¹⁰² *Id.*

¹⁰³ Daniels, *supra* note 13, at 51 (quoting Telephone Conversation, John DeWitt & Karl Bendetsen (Jan. 29, 1942)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Dower, *supra* note 72, at 80–81.

¹⁰⁷ *Id.* at 81.

not a concern, but “the Japs we will be worried about all the time until they are wiped off the face of the map.”¹⁰⁸

c. Implementation of the West Coast Coalition’s Prejudicial Preferences as National Policy

On February 19, 1942, ten weeks after the attack on Pearl Harbor, President Roosevelt, drawing on his dual constitutional authority as Chief Executive and Commander-in-Chief of the armed forces, signed Executive Order 9066. The order delegated to the Secretary of War and military commanders the authority to exclude any and all persons—both citizens and aliens—from designated “military areas” to ensure security against sabotage and espionage.¹⁰⁹

Executive Order 9066 was formally race neutral, causing some Germans and Italians to fear they would face exclusion under the order to the same extent as the Japanese. Attorney General Francis Biddle and other officials, however, believed the order affected only Japanese. Soon after the order, Biddle’s view was vindicated—it became clear that individuals of Japanese descent, both citizens and aliens, were the targets.¹¹⁰

Lieutenant General DeWitt, however, even after his about-face on the issue of Japanese internment, was one of a few government officials who thought the order could apply to the three groups equally. On March 2, DeWitt issued Public Proclamation Number 1, creating Military Area Number 1 and noting that individuals could be excluded from those zones in the future. Public Proclamation Number 1 also required “all Japanese, German, and Italian aliens, and Japanese American citizens who resided in Military Area Number 1, to file change of address forms with the post office when they moved.”¹¹¹ DeWitt stated his intention was to remove

¹⁰⁸ Id.

¹⁰⁹ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

¹¹⁰ For evidence that Attorney General Biddle and other officials believed the order would only be implemented against the Japanese, see Francis Biddle, In Brief Authority 210 (1962).

¹¹¹ Restrictions on Persons of Italian Ancestry, *supra* note 87, at 20 (citing Public Proclamation No. 1, Western Defense Command (Mar. 2, 1942), *reprinted in* H.R. Rep. No. 77-2124, pt. 15, at 317 (1942)).

only the Japanese immediately, but DeWitt made clear that the Germans and Italians would soon follow.¹¹² DeWitt articulated his position in conversations with Major (later Colonel) Karl R. Bendetsen, chief of the Alien Division, Provost Marshal General's office. "I think we might as well eliminate talk of resettlement and handle these people as they should be handled . . . put them to work in internment camps," DeWitt stated.¹¹³ Several days later, in a conversation with Bendetsen and Gullion, DeWitt elaborated, "I place the following priority. . . . First the Japanese . . . as the most dangerous . . . the next group, the Germans . . . the third group, the Italians. . . . We've waited too long as it is. Get them all out."¹¹⁴

DeWitt's threat eventually to include the Germans and Italians was never realized, as it met harsh resistance from the public, the Department of Justice, a congressional committee, and the President himself. Members of the Department of Justice openly opposed the relocation en masse of individuals of *any* ancestry—arguing that it was not only unnecessary but also unconstitutional—which meant they would oppose any extension of the internment program.¹¹⁵ President Roosevelt specifically ordered Secretary of War Stimson to "take no action against Germans and Italians" without first consulting him. Alien control, he said, was "primarily a civilian matter except of course in the case of the Japanese."¹¹⁶

Congress did not openly debate the internment of all enemy aliens, but the House of Representatives did establish a Select Committee Investigating National Defense Migration (the "Tolan Committee") to investigate, among other things, whether the Ital-

¹¹² Evacuation to be Carried Out Gradually, S.F. News, Mar. 3, 1942, at 3 ("After the military areas are cleared of Japanese, the general indicated, Germans and Italian aliens would be next in line for evacuation.").

¹¹³ Daniels, *supra* note 13, at 54 (quoting Telephone Conversation, John DeWitt & Allen Gullion (Jan. 31, 1942)).

¹¹⁴ *Id.* at 54–55 (quoting Telephone Conversation, John DeWitt, Allen Gullion & Karl Bendetsen (Feb. 1, 1942)).

¹¹⁵ For a summary of these arguments presented by the Department of Justice, see Irons, *supra* note 13, at 50–58.

¹¹⁶ Staff of H. Comm. on Interior & Insular Affairs, 102d Cong., *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* 287 (Comm. Print 1992) [hereinafter *Personal Justice Denied*].

ians and Germans should be interned along with the Japanese. The Tolan Committee held hearings on the West Coast from February 21 to March 12, 1942, during which it heard testimony from numerous witnesses discussing the merits of applying the removal plan to the European groups. “Adroitly steered” by John Harvey Tolan, a sixty-five-year-old California Congressman, the Committee exerted a calming influence in the frenzied relocation debate.¹¹⁷ Tolan, “a resident of Oakland since 1914, personally knew many of the civic leaders and community organizers who appeared before the panel, and he deftly extracted their testimony in a way that evoked sympathy for the Italians.”¹¹⁸ In March, the Tolan Committee issued its preliminary report indicating that mass evacuation of individuals of German and Italian descent was not prudent.¹¹⁹ In its final report in mid-May, the Tolan Committee made this position formal, recommending that local hearing boards be created to “obviate mass evacuation” of individuals of German and Italian descent residing in the military areas.¹²⁰

But by the time the Tolan Committee issued its final report the issue was already moot. In April 1942, DeWitt formally agreed with the War Department “not to hold a mass evacuation of the Germans and Italians provided he be granted the power to individually exclude members of these groups or members of any other groups, whether citizen or alien, from the critical area upon finding

¹¹⁷ Stephen Fox, *The Unknown Internment* 105 (1990).

¹¹⁸ *Id.* Some even argue that the testimony sympathetic to the Italians helped to persuade the War Department to oppose massive internment of the European groups. See, e.g., *id.* The testimony before the Congressional Committee Investigating National Defense Migration regarding the internment of individuals of Japanese ancestry was markedly different from that before the Tolan Committee. San Francisco publisher Miller Freeman’s testimony is typical: “Although the American-born are strongly organized for proclaimed patriotic purposes, why have they taken no stand against the aggressions of Japan in the Orient over the past ten years?” Statement of Miller Freeman Before the Congressional Committee Investigating National Defense Migration (Mar. 2, 1942), available at National Archives RG 389, Row 451, Box 1351. Freeman continued by arguing that “the Japanese government as part of its ambitious program of colonization of North and South America, and as a preliminary to conquest, planted its immigrants in the United States by the combined use of fraud, collusion, political and military force.” *Id.*

¹¹⁹ H.R. Rep. No. 1911, at 21–25 (1942).

¹²⁰ H.R. Rep. No. 2124, at 2, 21–22, 29–31, 33 (1942).

the individual was potentially dangerous.”¹²¹ Civilian Exclusion Order Number 1, issued by Lieutenant General DeWitt on March 24, 1942, specifically applied to “all persons of Japanese ancestry,” and it gave these persons one week to leave Bainbridge Island in Seattle’s Puget Sound.¹²² By June 7, 1942, 108 exclusion orders had been issued,¹²³ and three months later, more than 90,000 residents of Japanese descent had been interned. Over the next five months, approximately 15,000 more would be interned.¹²⁴

When legislation imposing penalties for violating military orders issued pursuant to Executive Order 9066 reached a vote on March 21, 1942, the West Coast coalition’s anti-Japanese campaign was fully underway, and the pending bill was signed into law with little debate.¹²⁵ The House, after a mere ten minutes of discussion, passed the bill by voice vote without any recorded dissent or discussion.¹²⁶ The Senate’s debate was longer because North Carolina Senator Robert Price Reynolds, the Chair of the Senate Military Affairs Committee, “indulged his long-winded proclivities with a speech that denounced Japanese Americans as ‘fifth-column’ agents and saboteurs,” clearly identifying them as the target of the bill.¹²⁷ In his statement, Reynolds repeatedly relied upon allegations, which were subsequently disproved, that Japanese Americans aided the attack on Pearl Harbor. Without citing his source, he claimed that in Hawaii “canefields were cut in the form of arrows pointing to military objectives,” that Japanese American

¹²¹ Restrictions on Persons of Italian Ancestry, *supra* note 87, at 9 (quoting Western Defense Command, Individual Exclusion Program of Non-Japanese, Supplemental Report on Civilian Controls Exercised by Western Defense Command 836 (Jan. 1947)).

¹²² Civilian Exclusion Order No. 1, 7 Fed. Reg. 2581 (Mar. 24, 1942).

¹²³ Jerry Kang, Denying Prejudice: Internment, Redress, and Denial, 51 *UCLA L. Rev.* 933, 939 (2004).

¹²⁴ Personal Justice Denied, *supra* note 116, at 149.

¹²⁵ Indeed, neither House consulted the Department of Justice for its opinion of the constitutionality of the law: “[I]n the conferences that I had with Mr. Biddle and Mr. McCloy and Mr. Ennis of the Department of Justice, they said that they thought the law was unconstitutional and that they hadn’t been consulted before it was proposed and they didn’t want to undertake any prosecution under it . . .” Telephone Conversation, Allen Gullion & Judge Patterson (Sept. 4, 1942), available at National Archives RG 389, Row 436, Box 16.

¹²⁶ Irons, *supra* note 13, at 67.

¹²⁷ *Id.*

saboteurs had “wrecked cars and otherwise obstructed traffic” in the vicinity of Pearl Harbor, and that “Japanese pilots shot down above Pearl Harbor were found to be wearing Honolulu high school insignia and United States college rings.”¹²⁸ Like the House, the Senate passed the bill with minimal discussion. Senator Howard Taft from Ohio briefly objected, questioning the constitutionality of the bill, calling it the “‘sloppiest’ criminal law I have ever read or seen anywhere,” and arguing that it could never be enforced in peacetime.¹²⁹ Reynolds did not even answer Taft’s objection, and the bill passed the Senate by voice vote with no other recorded dissent.¹³⁰

By late March and early April 1942, the exclusion system was in place. The Army, under the authority of Executive Order 9066, would issue proclamations of exclusion or evacuation from the areas it declared “sensitive,” and the Justice Department would enforce those proclamations through the courts, under the authority provided by Public Law 503. Thus, it became clear that between the attack on Pearl Harbor and April 1942, the government’s definition of military necessity, as well as its view of which groups posed threats to national security, had changed. In January 1942, the U.S. government took the position that Italian, German, and Japanese aliens were similarly situated, and that their similar treatment was consistent with the military exigencies of the war. By April 1942, the Japanese, both citizens and aliens, had been singled out as the most dangerous group, requiring unique treatment, with loyalty determined on a group basis according to ancestry, race, and ethnicity, rather than after individualized inquiries.

¹²⁸ 88 Cong. Rec. 2722–23 (1942); see also Irons, *supra* note 13, at 67 (“Reynolds relied for these allegations on sensational but erroneous press accounts, perhaps unaware that an exhaustive FBI investigation had concluded that each of these charges had been totally unfounded.”).

¹²⁹ 88 Cong. Rec. 2726 (1942). Taft described the sloppiness of the bill: “It does not say who shall prescribe the restrictions. It does not say how anyone shall know that the restrictions are applicable to that particular zone. It does not appear that there is any authority given to anyone to prescribe any restriction.” Taft conceded that the bill “would be enforced in wartime” but said, “I have no doubt that in peacetime no man could ever be convicted under it, because the court would find that . . . it could not be enforced under the Constitution.” *Id.*

¹³⁰ Irons, *supra* note 13, at 68.

3. *Continued Resistance*

The anti-Japanese West Coast coalition did not stop after it had succeeded in attaining the internment order; it continued its attempt to make the eradication of the Japanese from the West Coast permanent. In April 1942, the War Department called a meeting of the top officials of the western states in an attempt to determine where the interned Japanese would be placed. Milton Eisenhower was the head of the War Relocation Authority, the agency jointly responsible with the War Department for the evacuation procedures. After outlining his resettlement plan's provisions and appealing for state cooperation with his proposed plan, Eisenhower asked for comments. "The barrage of racism that greeted his appeal for tolerance and assistance literally stunned Eisenhower."¹³¹

Governor Maw of Utah led the barrage by commenting that the federal government was "too concerned about the constitutional rights of Japanese-American citizens," and if necessary, "the constitution could be changed" to allow internment.¹³² He demanded that the evacuees be "put into camps" rather than be given freedom in the rural areas. Governor Clark of Idaho agreed, demanding that the Japanese Americans "be put in camps under guard."¹³³ Idaho Attorney General Bert Miller advocated putting "all Japanese . . . in concentration camps[] for the remainder of the war, and [argued] that no attempt should be made to provide work for them. . . . We want to keep this a white man's country."¹³⁴ Governor Smith from Wyoming emphatically stated that the citizens of Wyoming "have a dislike of any Orientals, and simply will not stand for being California's dumping ground."¹³⁵ Finally, Governor Smith threatened, if there was a plan to relocate the Japanese to

¹³¹ Irons, *supra* note 13, at 71 (citing Report on Meeting at Salt Lake City with Governors, Attorneys General, and Other State and Federal Officials of 10 Western States (Apr. 7, 1942)); see also Irons, *supra* note 13, at 71.

¹³² Report on Meeting, *supra* note 131; see also Irons, *supra* note 13, at 71.

¹³³ Irons, *supra* note 13, at 71.

¹³⁴ *Id.* at 72.

¹³⁵ *Id.* at 71.

his state, “[t]here would be Japs hanging from every pine tree” in Wyoming.¹³⁶

The anti-Japanese sentiment forced Eisenhower’s resettlement plan to yield to internment. Eisenhower became deeply distraught and emotionally disturbed by the changes to his plan, and he ultimately submitted his resignation on June 13, 1942.¹³⁷ In his letter to President Roosevelt, he stated his belief that “relocation of the evacuees [from the internment camps] to American life” could only come after the war, when, he hoped, “the prevailing attitudes of increasing bitterness have been replaced by tolerance and understanding.”¹³⁸

Those “prevailing attitudes of . . . bitterness” persisted well beyond the end of the official internment program, and the West Coast coalition, illustrating the pretextual nature of its national security arguments for internment, staunchly opposed readmission of the Japanese. Colonel William P. Scobey, discussing with the Provost Marshal General’s Office the readmission of the Japanese to the West Coast, described his perception of the coalition’s prejudicial motives. “[P]rotest [to the readmission] will come from the West Coast. . . . [T]here’s a lot [behind the protest] and part of it is economic.” Scobey continued, “[The] West Coast saw a way to get rid of the Japs, they got rid of them, now they don’t want them out there, they want to take the property over. It isn’t all patriotic, by any means.” Recognizing the West Coast coalition’s opportunistic capitalization on the democratic failure created by the war, Scobey concluded, “[o]f course, they couch their protests under the guise of security and patriotism. . . . [T]he most violent opponent of the Government will wave the flag. And whatever the Government does, these people will wave the flag all the time.”¹³⁹

¹³⁶ Id. at 71–72. A notable exception to this sentiment existed in New Mexico. Governor John E. Miles, writing to Secretary of War Stimson, made clear that New Mexico “will cooperate to the fullest extent in aiding the federal government.” Letter from John E. Miles, Governor, New Mexico, to Henry L. Stimson, Sec’y, Dep’t of War, n.d., available at National Archives RG 389, Row 451, Box 1351.

¹³⁷ Irons, *supra* note 13, at 72.

¹³⁸ Id.

¹³⁹ Telephone Conversation, Colonel William P. Scobey & Colonel Alton C. Miller (Feb. 4, 1943), available at National Archives RG 389, Row 35, Compartment 19, Shelf 2, Box 1740.

III. THE REVISIONIST RESPONSE

A. The Revisionist Claim

Advocates of the revisionist view have attempted to incorporate the history of the Japanese during World War II into their argument that democratic failure during emergencies does not exist. Discussing “opportunism” and “scapegoating,” Professors Posner and Vermeule claim that “it is dubious that scapegoating increases during emergencies.”¹⁴⁰ When minorities are scapegoated during emergencies, they argue, the scapegoating occurs because of the “connection between the minority group and the enemy, not the political weakness of the minority group.”¹⁴¹ Thus, the revisionists contend, there is nothing inherent about an emergency that makes a politically weak minority susceptible to majoritarian oppression.

Responding specifically to the treatment of the Japanese during World War II, Professors Posner and Vermeule make three claims: first, “only the [Japanese] were geographically concentrated near a potential invasion front”; second, “[p]olitically, German- and Italian-Americans were too numerous [and well assimilated] to intern or subject to legal disabilities”; and third, “peacetime discrimination against Japanese-Americans was greater than peacetime discrimination against German- and Italian-Americans.”¹⁴² Posner and Vermeule thus conclude, “The differential treatment of these groups during World War II is not evidence for the proposition that emergency increases the probability of political failure; rather, it is consistent with the view that the peacetime baseline holds.”¹⁴³ The revisionists end their analysis with an attack on the traditionalist argument: “the failure to discriminate against German- and Italian-Americans during World War II is a problem for the failure theorists: it cuts against the claim that enhanced discrimination against emergency-relevant minorities is predictable during emergencies.”¹⁴⁴

¹⁴⁰ Posner & Vermeule, *Emergencies and Democratic Failure*, supra note 1, at 1122.

¹⁴¹ *Id.* at 1124.

¹⁴² *Id.* at 1125–26.

¹⁴³ *Id.* at 1126.

¹⁴⁴ *Id.*

B. Rebuttal

The revisionists' account of the treatment of the Japanese during World War II fails because of those revisionists' disregard for the historical evidence—a charge they attempt to levy against the traditionalists. Their first claim—that only the Japanese were geographically concentrated near a potential invasion front—is simply factually incorrect. The Germans and Italians had concentrated near potential invasion sites on the East and West Coasts.¹⁴⁵ The German U-boats caused significant damage to the neutral merchant vessels under the protection of the American naval fleet on the East Coast,¹⁴⁶ and military experts believed that these attacks were aided by the subversive activities of individuals on the mainland.¹⁴⁷ Indeed, two groups of German soldiers were captured after landing in New York and Florida, respectively, on sabotage and espionage missions.¹⁴⁸ A larger-scale invasion of the East Coast was a realistic threat, and military officials had undertaken significant measures in response to these threats.¹⁴⁹ Rightfully, military leaders did fear invasion on the East Coast.

¹⁴⁵ See, e.g., *Restrictions on Persons of Italian Ancestry*, supra note 87, at 1 (noting that Italians settled in large numbers in New York City and particularly high concentrations in “South Philadelphia, Boston’s North End, Bridgeport and New Haven in Connecticut, Providence, Chicago, Detroit, Cleveland, St. Louis, Denver, San Francisco, and every large city in between”).

¹⁴⁶ Samuel Eliot Morison, *The Battle of the Atlantic: September 1939–May 1943*, at 126–44 (1947). Morison describes German U-boat attacks in which unconvoyed American ships were torpedoed and destroyed along the Atlantic Coast. In January and February 1942, the period of time during which the crucial internment decisions were made, the German fleet sunk a total of 118 American ships in the Atlantic and Arctic areas, totaling 698,081 gross tons. *Id.* at app. I. The Navy described the damage inflicted by the U-boat attacks during this time as “as much a national disaster as if saboteurs had destroyed half a dozen of our biggest war plants.” *Personal Justice Denied*, supra note 116, at 283–84. The same government report notes that “Japanese attacks on the West Coast were insignificant by comparison.” *Id.* at 284.

¹⁴⁷ Samuel Eliot Morison, the eminent historian of American naval operations in World War II, expressed these sentiments: “the U-boats were undoubtedly helped by enemy agents and clandestine radio transmissions from the United States.” Morison, supra note 146, at 128.

¹⁴⁸ See, e.g., *Ex Parte Quirin*, 317 U.S. 1, 21 (1942).

¹⁴⁹ Indeed, the 1942 “War Department Counter Fifth Column Plan” explicitly addressed subversive threats outside of the West Coast. The Plan stated, “It may be expected that the Fifth Column will strike simultaneously at different plants, facilities and critical points. Wholesale explosions and fires may be instigated simultaneously

The revisionists' second claim—that the Germans and Italians were not targeted or viewed as threats to national security—likewise is not supported by the weight of the historical evidence. In fact, for the first two and a half months after the attack on Pearl Harbor, individuals of German, Italian, and Japanese descent were treated similarly. Within hours of Pearl Harbor and the United States' declaration of war, President Roosevelt issued Presidential Proclamations 2525, 2526, and 2527, deeming all Japanese, German, and Italian aliens “enemy aliens” and subjecting them to various restrictions based on this classification.¹⁵⁰ During the first two and a half months of the war, the Department of Justice implemented a two-tiered structure of restrictions against the “enemy aliens”: one for aliens who lived in “dangerous” areas, labeled “prohibited zones”; and the other for pre-selected “dangerous” aliens arrested by the FBI and brought before hearing boards to determine their loyalty individually.¹⁵¹ Under neither tier was a

by the Fifth Column in a limited area such as New England and New York.” War Department Counter Fifth Column Plan, 1942 Revision, at 5, available at National Archives RG 389, Row 468, Box 1940; see also Report of Commander and His Staff on Civilian Defense Activities, West New York, New Jersey, Feb. 1941–Feb. 1945, at 1–5, available at National Archives RG 389, Row 468, Box 1945 (describing civilians' preparation for potential attacks on the East Coast).

¹⁵⁰ Restrictions on Persons of Italian Ancestry, *supra* note 87, at 4.

¹⁵¹ The FBI began composing a list in November 1939 of specific individuals, labeled the “Custodial Detention Index,” *id.* at 8, who it had determined would be a “menace to the public peace and safety of the United States Government” if they were free in the United States in time of war or national emergency. S. Rep. No. 94-755, at 413 (1976). The Custodial Detention Index formed a comprehensive list, known as the “ABC list,” which separated security risks into three categories of severity. Restrictions on Persons of Italian Ancestry, *supra* note 87, at 2–3. Within hours of Pearl Harbor and the United States' declaration of war, President Roosevelt began taking steps to implement the FBI's preparations for war. With Presidential Proclamations 2525, 2526, and 2527, targeting Japanese, German, and Italian aliens, respectively, President Roosevelt authorized the FBI to apprehend those individuals identified as “dangerous” by the Custodial Detention Program. *Id.* at 3–7. For more on the individualized process of determining loyalty before the hearing boards, see Tolan Committee Hearings, *supra* note 83, at 11, 634–35; Restrictions on Persons of Italian Ancestry, *supra* note 87, at 7. For anecdotal accounts of these hardships on the Italians, see Stephen Fox, *The Relocation of Italian Americans in California During World War II*, in *Una Storia Segreta* 39, 42–43 (Lawrence DiStasi ed., 2001); Rose Viscuso Scudero, *You Can Go Home Now*, in *Una Storia Segreta*, *supra*, at 55, 55–57.

formal distinction made based on race or ethnicity among the three groups of enemy aliens.¹⁵²

In the FBI's initial detention of dangerous aliens, the agency took 14,807 enemy aliens into custody, including 3,503 Italians and 5,977 Germans. After individualized hearings, only 5,705 of all those arrested under this program were interned.¹⁵³ The exact number of German and Italian aliens required to relocate from "prohibited zones" is not known, but an estimated 10,000 Italian aliens alone were required to move from prohibited areas on the West Coast during February and March 1942.¹⁵⁴ In addition to being excluded from "prohibited zones" and being subject to individualized detention, Japanese, Italian, and German aliens living in "restricted areas" were subject to numerous additional restrictions.¹⁵⁵ Unlike those enemy aliens who lived in "prohibited zones," those living in "restricted zones" were not barred from the area, but they were subjected to specific restrictions.¹⁵⁶

¹⁵² But see Irons, *supra* note 13, at 24 (arguing that the individual hearing boards were prejudiced against the suspects of Japanese descent).

¹⁵³ Fox, *supra* note 117, at 163.

¹⁵⁴ Restrictions on Persons of Italian Ancestry, *supra* note 87, at v ("During World War II more than 10,000 Italian Americans on the West Coast were forced to leave their homes."); Rose D. Scherini, When Italian Americans Were "Enemy Aliens," *in* *Una Storia Segreta*, *supra* note 151, at 11, 19 ("An estimated 10,000 Italian aliens had to move from prohibited areas in California during February and March 1942."). Some sources, however, attribute the figure 10,000 to the total number of enemy aliens relocated, which includes German and Japanese in addition to Italian aliens. See Harrop A. Freeman, *Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law*, 28 *Cornell L.Q.* 414, 418 (1943) ("These regulations necessitated the removal of approximately 10,000 German, Italian, and Japanese aliens.").

¹⁵⁵ On February 4, 1942, Attorney General Francis Biddle, acting under the authority of Presidential Proclamations 2525, 2526, and 2527, declared the "entire coastline of California from the Oregon border south to a point approximately fifty miles north of Los Angeles and extending inland for distances varying from thirty to one hundred and fifty miles, had been declared a 'restricted area' for all enemy aliens." Restrictions on Persons of Italian Ancestry, *supra* note 87, at 19–20 (quoting Press Release No. 10, U.S. Dep't of Justice (Feb. 4, 1942)).

¹⁵⁶ For example, aliens in "restricted zones" were required to be in their home between nine p.m. and six a.m.; or, when not in their home, to be at their place of employment as indicated on their certificate of identification, to be going between their home and their employment, or to be within a distance of no more than five miles from their home. If the enemy aliens violated any of these restrictions, they were "subject to apprehension and internment." *Id.* at 20 (quoting Press Release No. 10, U.S. Dep't of Justice (Feb. 4, 1942)).

As a recent government report investigating the internment has recognized, even those enemy aliens who were not deemed “dangerous” by the FBI were subject to specific restrictions, even if they did not live in a “prohibited” or a “restricted” zone.¹⁵⁷ Additionally, enemy aliens were required to apply for, to acquire, and to carry at all times, certificates of identification¹⁵⁸ and were “restricted from entering areas surrounding forts, camps, arsenals, airports, electric or power plants, docks, piers, railroad terminal[s], depots, yards, and other storage facilities.”¹⁵⁹ Moreover, “aliens were unable to change residences or jobs without complying with regulations of the Attorney General and filing the required change of address notice or change of employment form.”¹⁶⁰

In sum, “[t]he freedom of more than 600,000 Italian-born immigrants in the United States and their families was restricted during World War II by Government measures.”¹⁶¹ Thus, the revisionists’ claims that the government did not discriminate against German and Italian Americans are not supported by the historical evidence.

The government did take measures against individuals of German and Italian descent, and for the first two and a half months of the United States’ involvement in the war, the Japanese were treated similarly to the Germans and Italians. Only after the West Coast anti-Japanese machine had been at work for more than two months did national leaders, including Lieutenant General DeWitt, change their tune and determine that internment of the Japanese was necessary.

Finally, the historical evidence again belies the revisionists’ third claim—that the differential treatment of the three groups is evidence that “the peacetime baseline holds.”¹⁶² Certainly, anti-Japanese and anti-Asian sentiment existed long before World War

¹⁵⁷ Id. at 23 (“Enemy aliens were not allowed to possess contraband items, including firearms or weapons of war, short-wave radio receiving and sending sets, cameras, or other items that were essentially instruments of possible espionage and/or sabotage.”).

¹⁵⁸ Proclamation No. 2537, 3 C.F.R. 287, 288 (1943).

¹⁵⁹ Restrictions on Persons of Italian Ancestry, *supra* note 87, at 24.

¹⁶⁰ Id. at 24.

¹⁶¹ Id. at iv (quoting Wartime Violation of Italian American Civil Liberties Act, Pub. L. No. 106-451, 114 Stat. 1947 (2000)).

¹⁶² Posner & Vermeule, *Emergencies and Democratic Failure*, *supra* note 1, at 1126.

II, and it is clear that those espousing these prejudicial views were successful in affecting federal policy. It does not follow, however, that the internment of nearly 112,000 Japanese, including almost 80,000 American citizens, is simply a logical extension of this peacetime baseline. One senator explicitly noted the deviation from the peacetime baseline, arguing that legislation targeting the Japanese could never be enforced in peacetime.¹⁶³ The massive internment of Japanese citizens and aliens in the United States during World War II differed not only in degree but also in kind from the immigration restrictions imposed by the Gentlemen's Agreement and the Immigration Act of 1924. Importantly, the anti-Japanese coalition advocating internment agreed. They recognized the opportunity provided by the war to exclude the Japanese from the region, seeing it as their "golden opportunity" to enact policies they had been seeking for decades but could not achieve through the normal political process. Through opportunistic behavior during an emergency, however, they were able, temporarily, to achieve these long-held but elusive goals.

CONCLUSION

In post-September 11th America, questions about the functioning of democracy during times of emergency have assumed new relevance. Recent commentators have argued that judicial review should be more deferential to the political branches during emergency than during normal times. These revisionist commentators, though presenting thoughtful analysis and compelling arguments, rest their ultimate conclusion in part on a flawed underlying premise. These commentators assume that democratic failure is no more likely to occur during times of emergency than during normal times. They rely explicitly on the dearth of historical evidence and the nonexistence of legal arguments incorporating historical evidence to the contrary. The World War II Japanese internment, and the interest group orchestration of the exclusion, rebuts this revisionist claim. This historical evidence need not disprove those

¹⁶³ 88 Cong. Rec. 2726 (1942) (statement of Senator Howard Taft) ("I have no doubt an act of that kind would be enforced in wartime. I have no doubt that in peacetime no man could ever be convicted under it")

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commentators' ultimate conclusion, but hopefully the history will lead them to reassess their underlying calculation to ensure that, if their ultimate conclusion stands, it stands on firm historical and legal ground.