### 1AC Rd 2

#### Contention 1: The Ruins of Law

#### We start in the ruins of democratic law. These ruins are legal remainders of past struggles against tyrannies and, as such, material for an archive of democratic remains.

Paul **PASSAVANT** Poli Sci @ Hobart and William Smith Colleges **’12** “Democracy’s ruins, democracy’s archive” in *Reading Modern Law: Critical Methodologies and Sovereign Formations* eds. Buchanan et al p. 49-50

Giorgio Agamben's work condemns sovereignty and aspires to found a new politics, or a 'coming community', beyond sovereignty and law. He describes sovereign power as determining, unitary, and absolute. This sovereign must be overcome by its equally absolute or all-encompassing other. This other to sovereignty has been conceptualized as pure potentiality, pure singularity, belonging itself, contingency, creativity, excess, or absolute democracy (Agamben 1993: 2, 67; Hardt and Negri 2000). I argue that Peter Fitzpatrick's work on sovereignty and law shows that absolute sovereignty is not capable of existing as such. Nor, for that matter, is absolute democracy capable of existing as such. 'Sovereignty' and 'democracy' are not absolutely opposed to each other. Instead, politics takes place in the torsion or these impossibilities. Many postmodernists today are allergic to anything with a whiff of sovereignty (Hardt and Negri 2000). Unfortunately, this has the consequence of asking those with democratic sensibilities to give up on the project of popular sovereignty at the exact moment that the right in the United States is seeking to ruin democracy by asserting sovereign prerogatives under various theories of **absolute** and **uncheckable** **presidential powers**.' .We are faced, presently, with the **ruins of a law** opposed to **unchecked** **presidentialism**, torture, and **camps**.2 Fitzpatrick's attention to sovereignty's paradoxical requirements, and to its near-mythic reliance upon law for temporary resolution of these contradictory demands, teaches us that law, and hence democracy, is always vulnerable to ruin of this sort. Instead of sharing the hopes of messianic postmodernists for a final resolution to these challenges, Fitzpatrick indicates where we must begin our political labours: **among democracy's ruins**. These ruins are **legal remainders** of past struggles against tyrannies and, as such, material for an **archive** of **democratic remains**. I contend that our political work should be mindful of **law as democracy's archive**. These reminders can help us to recollect the persistence necessary to take down or overcome tyrannies, to recall the fidelity necessary to keep a commitment to popular sovereignty. If we fail to labour on behalf of the future this archive anticipates, then the scriveners of George W. Bush's administration will continue to consign us to a dwelling among democracy's ruins.

#### We return to the failure of the American judiciary in the face of camps for incarcerating *Issei* and *Nisei*. Conservatives archive this story as an aberration in American policy, or as justifiable military necessity. Liberals teach it as a lesson in Japanese cultural stoicism (and the striving of a model minority).

#### Silence on the enduring trauma of America’s concentration camps continues the strategy of its organizers – that the spectacular display of war powers authority could shock the population into passive spectatorship.

#### Coverage by mass media, judicial oversight, and all the trappings of American democracy were brought to bear to emphasize the distinction between the U.S. and its totalitarian enemies.

Emily **ROXWORTHY** Theatre @ UCSD **‘8** *The Spectacle of Japanese American Trauma: Racial Performativity in World War II* p.1-6

After the closure of the World War II internment camps and the "relocation" of former internees to new postwar homes, many observed the remarkable silence and stoic rebounding with which most first- and second-generation Japanese Americans (Issei and Nisei) closed that chapter of their lives. It was this silence and stoicism that contributed in large part to their designation, along with other Asian Americans, as the "model minority." 3 Conservative critics claimed this apparent lack of bitterness as proof that the internment camps were not unjust after all, that even their former inmates tacitly approved the "**military** **necessity**" that stripped them of civil liberties and segregated them from their fellow Americans after the Japanese Empire attacked Pearl Harbor. Liberal scholars have mostly chalked up this stoic silence to a diasporic retention of the Japanese cultural logic of shikata ga nai, or "it can't be helped"- a fatalistic philosophy that negates the efficacy of resistance or other political action. Although silence has been used to justify and minimize the impact of the internment, outside this context the concept of silence circulates widely as a telltale symptom of **trauma**. Shoshana Felman resurrects Walter Benjamin's term "expressionless" (das Ausdruchslose) in order to describe "the silence of the persecuted, the unspeakability of the trauma of oppression" experienced by "those whom violence has deprived of expression; those who, on the one hand, have been historically reduced to silence, and who, on the other hand, have been historically made faceless, deprived of their human face " 4 This seems an apt judgment of how historical events left Japanese Americans silent and then the historiography of these events rendered this silence expressionless and inhuman, as epitomized in the stereotype of the automaton-like "model minority." Americans have allowed the **symptoms** of wartime injustice **to stand as apology** for the injuries themselves. So what if- instead- we reinterpret former internees' silence not as a culturally conditioned response to adversity but rather as the structural outgrowth of the particular trauma of this particular internment? I emphasize the structure of the internees' silence because the recent wave of trauma scholarship makes clear that traumatized responses cannot be wholly explained by the catalyzing event or by "a distortion of the event, achieving its haunting power as a result of distorting personal significances attached to it." Rather than some inherent atrociousness adhering to the event or some inherent psychosocial predisposition causing an individual or group to react in a certain way, trauma should be understood in structural terms. The pathology of trauma, Cathy Caruth insists, consists "solely in the structure of the experience or reception: the event is not assimilated or experienced fully at the time, but only belatedly, in its repeated possession of the one who experiences it. To be traumatized is precisely to be possessed by an image or event." 5 I emphasize the particularity of the Japanese American internment because those who have written on the trauma of this experience have, by and large, bypassed these structural aspects, instead comparing the internment event with other more widely recognized atrocities such as the Nazi genocide of ]ews and other minorities, the experiences of U.S. soldiers during and after the Vietnam War, and generalized sexual abuse against women. By accessing Japanese American trauma through these other atrocities-none of which directly implicates the racist domestic policies of the U.S. government as the internment does-these "American concentration camps" inevitably find themselves subordinated once again in **hierarchies of suffering** that always **privilege the point of comparison** 6 Such strategies of **comparative analysis** end up posing the internment as a **debased** **mimicry** of unquestioned traumatic events. No genocide occurred against the Japanese American "evacuees" imprisoned in the "assembly centers" and "relocation centers," euphemistically named and controlled by the U.S. military's Wartime Civilian Control Agency (WCCA) and the U.S. government's War Relocation Authority (WRA), so when former internee Raymond Okamura wrote that "the linguistic deception fostered by the United States government" in regard to the internment "bears a striking resemblance to the propaganda techniques of the Third Reich," the comparison might have been instructive, but Japanese American trauma inevitably paled in comparison to the Holocaust.7 The material losses of $200 million in Japanese American property, homes, and businesses become profane concerns when juxtaposed with the Nazi genocide8 Likewise, Chalsa Loo recognized the posttraumatic stress disorder (PTSD) that plagued many former internees but only did so by discussing "parallels" with the symptoms of trauma widely associated with Vietnam War veterans who had witnessed, perpetrated, and suffered horrifying violence in Vietnam and returned home to find an American public that considered them "baby killers" and did not honor their military serviceY Although violent events did occur in many of the Japanese American camps and several internees were murdered both by U.S. soldiers guarding the camps and by fellow internees-and despite the fact that internees also experienced virulent prejudice and even violence when they returned to their prewar communitiesthe scale of this emotional and physical violence cannot compete (nor should it have to) with the PTSD of Vietnam veterans. Another common trope is the metaphoric equation of the violation inflicted upon internees by their own government with the experience of rape; this analogizing to the suffering of rape victims is most often voiced by male scholars of the internment and by male former internees, but the comparison also emanates from Amy Uno Ishii's oft-quoted statement: "Women, if they've been raped, don't go around talking about it. ... This is exactly the kind of feeling that we as evacuees, victims of circumstances, had at the time of evacuation." 10 Since sexual abuse was not a systemic part of the camps, comparing the trauma of Japanese Americans to that of rape victims belittles the wartime internment and renders invisible the more subtle but no less insidious violations that made up the everyday lives of internees, such as the total lack of privacy that plagued every aspect of camp life, including toilet facilities, and the utter degradation resulting from assigning inmates numbers and lining them up in dehumanized masses for every conceivable purpose. In this book I posit the importance of understanding the structural trauma of the internment as located in the spectacularization imposed upon Japanese Americans by the U.S. government and mass media. Unlike the Holocaust, the evacuation and internment of ]apanese Americans was perpetrated in full view of the public by capitalization upon the propaganda possibilities of the U.S. "free press." Unlike the abject treatment of Vietnam veterans, who were mostly drafted into war, the Federal Bureau of Investigation (FBI) and WRA coerced Japanese Americans into "voluntary" participation with their abjection from the rest of society, demanding that they cooperate with authorities and put on a happy face for reporters and other visitors to the barbed-wire-encircled camps11 And unlike the sexist contract of victim-shaming that protects rapists, American politicians and pundits broadcast far and wide the violations enacted during the mass evacuation and internment, leveraging-for an audience at home as well as in the European and Pacific theatres of war-the supposedly benign captivity of ethnic japanese as absurd proof of U.S. racial tolerance and, at the same time, melodramatically posing these "suspect" Americans as antagonists against the many heroes and heroines of the American home front. By thus spectacularizing the disenfranchisement and imprisonment of nearly 120,000 Japanese Americans, the U.S. government and mass media denied the gravity of what was taking place and disavowed the psychological suffering and material violence perpetrated against a persecuted ethnic minority. Thankfully, much has been written about the fictitiousness of the "military necessity" placed around the evacuation and used to justify the internment of all West Coast japanese Americans, regardless of citizenship status, for the duration of U.S. hostilities withjapanY But in this book I argue that an equally seductive framing device justified the camps for the wartime American public and continues to be uncritically deployed by conservative analysts like Michelle Malkin in her recent book, In Defense of Internment. 13 By framing the evacuation and internment as spectacles, the United States positioned the American public as **passive** spectators to the unconstitutional treatment of their ethnic japanese neighbors and, simultaneously, cast the public as heroic "patriots" opposite Japanese Americans, who were cast in one of two thankless roles: expressionless automata or melodramatic villains. So in the case of the internment, theories of trauma and theories of spectacle intersect and converge. Both trauma and spectacle are haunted by visuality, a visual scene/seen that inscribes its image deeply within one's psyche precisely to the extent that it alienates the subject from any comprehension of the material underpinnings of the transpired event. 14 On the side of trauma, Shoshana Felman finds that "the unexpectedness of the original traumatizing scene" is replayed in the compulsive repetitions that characterize traumatic symptoms 5 On the side of spectacle, Guy Debord finds that the images offered up by commodity culture violently foreground the presence of the visual realm in order to absent spectators' awareness of their own exploitation and disenfranchisement under advanced capitalism. In his classic book, The Society of the Spectacle, Debord claims that "The spectacle's function in society is the concrete manufacture of alienation," and he describes the means of this alienation as precisely visual: "Understood on its own terms, the spectacle proclaims the predominance of appearances and asserts that all human life, which is to say all social life, is mere appearance." For Debord, "spectacle's essential character" consists in "a negation of life that has invented a visual form for itself." 16 The refuge taken in the visual as a means to negate life leads performance theorist Diana Taylor to warn of spectacle's potential as an arrangement of events that rewards **passive** **spectatorship** and denies the need for **active witnessing**. Writing of the terrifying political spectacles staged by the Argentine government during the Dirty War (1976-1983), Taylor claims that "The onlookers, like obedient spectators in a theatre, were encouraged to suspend their disbelief. Terror draws on the theatrical propensity simultaneously to bind the audience and to paralyze it. Theatrical convention allows for splitting of mind from body, enabling the audience to respond either emotionally or intellectually to the action it sees on stage without responding physically." 17 Likewise, the failure to respond physically on the part of both the onlooker and the victim-causes psychoanalyst Dori Laub to characterize trauma as a "**collapse of witnessing**." He defines the corrective to this visual refuge as an **active listening**; as Taylor points out, Laub defines the witness as a listener rather than a see-er, if only in the post-traumatic setting of psychoanalytic therapy or testimony-taking1 8 In addition to listening, the engaged witness refuses the visual refuge of spectacle by resisting the objectification of the other that characterizes spectacular images. As Caruth (as well as Felman) emphasizes, the mute isolation of trauma can be redressed only by engaging the other as a subject of address in order to witness how "history, like trauma, is **never simply one's own**, that **history** is precisely the way we are **implicated in each other's traumas."** 19 My theoretical intervention comes at this convergence of trauma and spectacle: the spectacular structure of the japanese American internment removed the public-as-spectator from any participation, empathy, implication, or complicity in the dramatic disenfranchisement of racialized citizens that was taking place in full view. The political spectacles staged by the U.S. government and broadcast by the American media framed the internment event in visual terms that objectified the Japanese American other within an economy of Debordian "mere appearance" that was based on a racialized understanding of Japan as a culture of artifice and surfaces 20 But the most important sense in which the spectacle became the trauma of japanese Americans consisted in the demand placed on internees to comply with this spectacularization so as to provide "proof" of their loyalty to the United States-a command performance that actually prevented internees from fully processing the material violence enacted against them by the internment policy. Whether called upon to "voluntarily" relocate to internment camps under intense media scrutiny or, later, asked to offer their interned bodies (and those of their sons and brothers) up to military service on behalf of a nation that impugned their loyalty, many Japanese Americans found that the only way to prove the internment policy's baselessness was to comply with the terms of its spectacularization. Caruth's insights into trauma as a "missed" event (missed insofar as "the event is not assimilated or experienced fully at the time, but only belatedly") thus illumi- nate the experience of internees21 Japanese Americans "missed" the impact of their forced evacuation and imprisonment after Pearl Harbor because their persecution was staged-over and over again for the more than three years of the Pacific War-as a series of political spectacles that denied the psychological violence and material underpinnings of what was taking place. Every aspect of the U.S. government's (and its "fourth branch," the mass media's) framing of these events prevented those involved from fully grasping the injustice of what was taking place and from preparing to deal with a cataclysmic change. Caruth calls this aspect of trauma "the inability to fully witness the event as it occurs," so that the traumatic event carries within it "an **inherent forgetting** ." 22 The compulsion to forget was built into the government's overhasty institution of the internment policy from its first moments, as the U.S. military posted euphemistically devastating evacuation notices throughout West Coast communities. On these notices, "aliens and non-aliens" of Japanese descent were told to report to assembly stations, taking only what they could personally carry to the camps, sometimes with as little as forty-eight hours' notice. Not only were Japanese Americans rushed through the material and psychological processing of their forced evacuation as they quickly packed up their lives and boarded a bus or train to unknown destinations for an indeterminate duration, but the harsh glare of media attention and political rhetoric spectacularized the process in a way that encouraged fellow Americans to sit back and watch in **passive awe and silence**. Although trauma has been most easily associated with bodily injury, Caruth reminds us that in Freud's foundational Moses and Monotheism, the trauma "is first of all a trauma of leaving, the trauma of verlassen." 23 In their own forced leaving, Japanese American "evacuees," it should be clear, have a distinct claim on trauma.

#### The shock-and-awe script of U.S. national security demands the utter destruction of demonized cultural others.

Emily **ROXWORTHY** Theatre @ UCSD **‘8** *The Spectacle of Japanese American Trauma: Racial Performativity in World War II* p.6-12

Nearly a century before Japanese Americans were forced to leave their communities on the West Coast, the U.S. government perpetrated the opposite but complementary deception against the internees' Japanese ancestors. In 1853, the United States came to them: with the government's blessing, Commodore Matthew C. Perry led an expedition of four battleships to forcefully but peacefully open Tokyo Bay, ending Japan's two-century policy of national isolation. For a Japan that had never laid eyes on such imposingly industrialized steamships, these uninvited vessels of American modernity immediately became known as "the Black Ships." Their forced opening of Japan-what one American historian recently called Breaking Open Japan-resulted in the proverbial equal and opposite reaction, in the form of a stream of Japanese immigration to the Americas that would culminate in the World War II persecution. 24 But Perry's arrival also inspired a spiritual and cultural "leaving," even for those who stayed, as Japanese people at large became sudden exiles from their long-standing traditions. In addition, with Commodore Perry, spectacle became established as the mode for obscuring the psychological violence and material underpinnings of Japanese disenfranchisement. In a self-conscious national image constructed against the imperial histories of its fellow Western powers, the U.S. State Department communicated to Perry that he was to be extremely concerned to avoid any "real" violence in his mission to end Japanese isolation-he was instructed, instead, "to show an imposing display of power"-and, through his study-at-a-distance of Japanese culture he devised in advance a strategy for manufacturing the other's consent that centered upon the staging of spectacle25 Upon the mission's victorious return to America, Perry's official chronicler described the commodore's strategy for deploying spectacle to conquer "these people of forms and ceremonies": In a country like Japan, so governed by ceremonials of all kinds, it was necessary to guard with the strictest etiquette even the forms of speech; and it was found that by a diligent attention to the minutest and apparently most insignificant details of word and action, the desired impression was made upon Japanese diplomacy; which, as a smooth surface requires one equally smooth to touch it at every point, can only be fully reached and met by the nicest adjustment of the most polished formality. 26 The "smooth surface" of Perry's strategy manifested itself in parodic heights of civilized pageantry-refined gift -giving receptions, theatrical entertainments (including blackface minstrelsy), and militaristic display, all performed under the assumption that "so ceremonious and artificial a people as the Japanese" would consent only to a military policy of spectacle Y The other option was to use outright force , but this explicit course of colonialist aggression would not conform to a component of the national self-image that nineteenth-century Americans increasingly referred to as Manifest Destiny. Perry's 1853-1854 opening of Japan prepared the ground for the convergence of spectacle and trauma that would characterize Japan-U.S. relations up to and through the **shock-and-awe bombings** of Hiroshima and Nagasaki that were seen as necessary to force the 1945 surrender of "so ceremonious and artificial a people as the Japanese." Perry's landing and its attendant spectacles serve as both the "original traumatizing scene" that obscures material violence throughout the history of Japanese-American relations, and as what Michel de Certeau calls the "**inaugural scene**" that historicizes **Western narratives of discovery and conquest**. 28 Diana Taylor derives from de Certeau's "inaugural scene" the notion of a "scenario" that **scripts** **intercultural** **encounters**; each consisting of "a paradigmatic setup" and "a schematic plot," these scenarios "exist as culturally specific imaginaries-sets of possibilities, ways of conceiving conflict, crisis, or resolution-activated with more or less theatricality" throughout the history of these ongoing encounters2 9 As the traumatic scene is replayed in the repetition compulsion, and the inaugural scene prepares the ground for the restaging of familiar spectacles, the logic of Perry's landing was reenacted by the U.S. government and mass media in the political spectacles staged in the wake of]apan's 7 December 1941 attack on Pearl Harbor. In chapter 1, I will start with this original traumatizing scene of the Perry spectacle in order to trace what I call a "theatricalizing discourse" constructed by the West (particularly America) around japanese "cultural" (racial) difference. In the remainder of the book, I will focus on the scenario's particular reenactment in the events of the japanese American internment.30 Spectacle When I use "spectacle" in this book's title, I mean to invoke the spectacular mode's propensity to disengage its audience- to render even its participants as passive spectators. Although numerous possibilities always exist for spectacle to be used as a tool for active, critical engagement (in the manner that Bertolt Brecht and his many followers intend), for the most part spectacle can be defined as the staging of an event and arrangement of an audience that rewards passive consumption and deters engaged witnessing, most often through what twenty-first-century Americans increasingly recognize as a strategy of "shock and awe." 31 When resistant spectacles seek to challenge their audiences' passivity and encourage some mode of critical participation- as I will argue that japanese American theatrical performances in the internment camps did- the term "spectacle" needs to be modified and qualified, not in a way that undermines this general definition, but instead so that the space for resistance can be recognized as always already in negotiation with what Debord calls the society of the spectacle's imposition of a normative "social relationship between people that is mediated by images." 32 Debord's 1960s formulation of the consumerist spectacle has different emphases but was prefigured by the witnesses to the 1930s and '40s political spectacles of Italian and German fascism. Recently, Henry Giroux has identified these two moments in the formulation of spectacle as "the spectacle of fascism and the spectacle of consumerism," labeling them "two different expressions of what I call the terror of the spectacle." According to Giroux, the terror of the spectacle inheres in its demand for "a certain mode of attentiveness or gaze elicited through phantasmagoric practices, including various rites of passage, parades, pageantry, advertisements, and media presentations [which] offers the populace a collective sense of unity that serves to integrate them into state power." Where the spectacle of consumerism that Debord writes about uses visuality to obscure the material underpinnings of commodity capital- ism-causing consumers to "miss" their own exploitation and disenfranchisement the spectacle of fascism uses visuality to distract the populace from the political reality underwriting the regime's ideology. Giroux concludes of both twentieth-century manifestations of spectacle: "Politics and power are not eliminated, they are simply hidden within broader appeals to solidarity." 33 Rey Chow has identified yet another reason that fascist ideology relies so heavily upon the visuality of spectacles. In her essay "The Fascist Longings in Our Midst," Chow departs from critics such as Louis Althusser and Roland Barthes who have attempted to explain fascism's rending of civilized internal feelings (morality, empathy, sociability) from external manifestations of atrocious behavior (racial persecution, witch hunts, genocide). On the contrary, Chow argues that fascism has no inside-or rather that under fascism the external becomes the internal-and that fascist regimes deploy spectacle as the ideal metaphor for a cognitive system that wholly consists of surface. She defines fascism as "a term that indicates the production and consumption of a glossy surface image, a crude style, for purposes of social identification even among intellectuals." The simultaneous ascendance of film technology and fascist ideology was no coincidence for Chow; rather, in the age of film, "If individuals are, to use Althusser's term, 'interpellated,' they are interpellated not simply as watchers of film but also as film itself. They 'know' themselves not only as the subject, the audience, but as the object, the spectacle, the movie." Under fascism, then, the motto for subjectivity is "to be is to be perceived" because the fascist spectacle positivistically proclaims that all judgments can be made based on the interplay of **surface** **images**. Difference and danger can be seen/scene just as certainly as unity and national security can be scene/seen.34 Although the japanese American internment took place between these two moments of spectacle's formulation, it should be clear that the U.S. government and mass media's spectacles staged around the internment event capitalized on the spirit and power (if not always the precise ideology) of both consumerism and fascism. In addition to theorizing the fascist spectacle, Rey Chow represents an important intellectual strand within Asian diasporic studies that emphasizes how "Asia" (as a Western-constructed conglomeration to begin with) has been spectacularized by the West. In her essay "Where Have All the Natives Gone?" Chow argues of Western racialization, "When that other is Asia and the 'Far East,' it always seems as if the European intellectual must speak in **absolute** **terms**, making this other an utterly incomprehensible, terrifying, and fascinating spectacle .... As such, the 'native' is turned into an absolute entity in the form of an image (the 'empty' japanese ritual or 'China loam'), whose silence becomes the occasion for our speech." Moreover, for Chow, the image of Asian difference "is always distrusted as illusion, deception, and falsehood," leading to an anxious Western fixation that masks the implication of the West's own identity. Instead, the logic of the spectacle renders East-West difference absolute, insofar as "the production of the West's 'others' depends on a logic of visuality that bifurcates 'subjects' and 'objects' into the incompatible positions of intellectuality and spectacularity." 35 Chow's theorization of the West's construction of Asian spectacularity allows us to see how "a social relationship between people that is mediated by images" underwrote (and continues to underwrite) an entire U.S. policy for containing the threat of Asian American difference by making the Asian other into an expressionless, dehumanized spectacle-pure surface, all image, so of course silent-**undeserving** of the **protection** of Western intellectuality and **U.S. constitutional law.** While this volume focuses on the manifestation of this spectacularity within the internment policy, spectacle is a traumatic structure potentially applicable to and resonant with many other instances in Asian American history and cultural studies. Trauma As a hidden psychic injury that results from the temporal delay occasioned by the shock and inexplicability of an atrocious event, the "trauma" of my title requires an interdisciplinary methodology to understand its history, structure, and ongoing repercussions. 36 Caruth poses trauma's scholarly challenge by saying "it brings us to the limits of our understanding: if psychoanalysis, psychiatry, sociology, and even literature are beginning to hear each other anew in the study of trauma, it is because they are listening through the radical disruption and gaps of traumatic experience." 37 Theatre and performance studies need to be added to this list of interdisciplines because of our intimate understanding of the operations made possible by the spectacular structure of trauma (as a repeated scene) and of the analytical richness of spectacle as an arrangement that seeks to reify Western binaries (such as mind-body, subject-object, reason-emotion, and actor-audience) but cannot live beyond the borderland in between. Diana Taylor focuses on the liminal quality of spectacle's visuality when she writes, "seeing also goes beyond us/them boundaries; it establishes a connection, an identification, and at times even a responsibility that one may not want to assume." 38 Even though spectacle is most often characterized by a failure to assume the responsibility of seeing-a refusal to actively witness or be personally implicated in the spectacularity- theatre and performance scholars are aware of spectacle's potential to unfold otherwise and of a lasting impact on actors and audience alike that outlasts the apparent ephemerality of the live event. These scholarly concerns have much to add to the interdisciplinary conversations happening around "trauma." Likewise, scholars in Asian American studies have increasingly argued that racialization is a national trauma (even when the word "trauma" is not used) whose understanding exceeds the oppressor-oppressed and perpetrator-victim binaries. In The Melancholy of Race, Anne Anlin Cheng rejects the concept of trauma in favor of "melancholia," arguing that "trauma, so often associated with discussions of racial denigration, in focusing on a structure of crisis on the part of the victim, misses the violators' own dynamic process at stake in such denigration. Melancholia gets more potently at the notion of constitutive loss that expresses itself in both violent and muted ways, producing confirmation as well as crisis, knowledge as well as aporia .... It is this imbricated but denied relationship that forms the basis of white racial melancholia." 39 Melancholia thus becomes an analytic through which Cheng can highlight the mournful but compulsively repeated structure of racialization in the United States from outside the limits of the violator-victim stratification. As compelling as Cheng's book is, I would argue that racial trauma can also be understood as a dynamic national process that particularly underwrites the racialization of every "American," **regardless** of the individual's **proximity to whiteness**. For instance, Felman reminds us that compulsive repetitions of "the unexpectedness of the original traumatizing scene" are not only experienced on an individual level but can also act as the fuel feeding the engine of history; in her reading, "Freud thus shows how historical traumatic energy can be the motive-force of society, of culture, of tradition, and of history itself." 40 The spectacle of Japanese American internment emerged as a traumatic repetition and reenactment transmitted from the "historical traumatic energy" reverberating throughout Japan-U.S. relations since Perry's 1853 landing at Tokyo Bay. In this "original traumatizing scene" of coerced contact (what Taylor might call the inaugural scenario) Perry established a transmittable energy for both spectacularizing the Asian other and self-consciously performing white privilege across the East-West divide; this traumatic scenario repeats itself in various moments of Asian American encounter throughout U.S. history, including the Japanese American evacuation and internment of World War II. Racial Performativity Even as these national traumas repeat themselves in various moments throughout U.S. history, the traumatic structure of spectacle does not manifest itself untouched by its particular historical context. The "racial performativity" in my subtitle refers to a two-faced mode for imagining American national belonging; the United States deployed such a mode during World War II in order to distance its "racial problems" from the fascist persecutions occurring throughout Europe and especially from the Nazi policy toward Jews. Within gender theory in particular, performativity (after Judith Butler) has been defined as the unconscious repetition of a repertoire of codified acts that render their performer legible within a given society's normative gender roles. To be a "real" man, society tells us, involves a scripted set of gestures, behaviors, and physical mannerisms that the performer internalizes and society scrutinizes. For more than a decade, scholars have pondered the applicability of gender performativity to our understanding of racialization, with the key stumbling block being the extent to which race is biologically inscribed onto one's skin rather than culturally available for performative construction. Butler herself has emphasized the primacy of the visual realm in racialization, suggesting that racial performativity is a conditioned mode of perceiving visual evidence that spectacularizes the other-in other words, the unconscious (or even conscious) enactment of codified acts would seem to have little impact because race will be predetermined through the reading practices of the interracial observer. In an essay on the 1992 Rodney King beating and the not-guilty verdict awarded to the Los Angeles Police Department (LAPD) officers caught on videotape, Butler makes clear how little the intentionality of the African American motorist's gestures of supplication meant when viewed by the white jurors at the trial. She writes of the verdict: "That it was achieved is not the consequence of ignoring the video, but, rather, of reproducing the video within a racially saturated field of visibility. If racism pervades white perception, structuring what can and cannot appear within the horizon of white perception, then to what extent does it interpret in advance 'visual evidence'?" The LAPD officers' defense attorneys edited the "visual evidence" of the explicit videotaped beating into a series of still images- including a closeup of King's hand raised in surrender, which was instead reinterpreted as raised in aggressive threat-and thereby converted the witnessing video into pure spectacle, pure visibility, by eliminating the accompanying soundtrack containing the officers' anti-black racial slurs. By thus spectacularizing the black body and activating a racialized mode of visually reading the other, the defense easily (and, for Butler, explicably) won a not-guilty verdict. In a subsequent interview, Butler extended her analysis of the King verdict to a tentative theorization of racialization through performativity: There is a performativity to the gaze that is not simply the transposition of a textual model [Austinian iteration] on to a visual one; that when we see Rodney King, when we see that video we are also reading and we are also constituting, and that the reading is a certain conjuring and a certain construction. How do we describe that? It seems to me that that is a modality of performativity, that it is racialization, that the kind of visual reading practice that goes into the viewing of the video is part of what I would mean by racialization, and part of what I would understand as the performativity of what it is 'to race something' or to be 'raced' by it.41 Consistent with Butler's hypothesis of a "racially saturated field of visibility," U.S. history clearly demonstrates the extent to which national belonging has been legislated to follow a stict brand of biological racism that uses a visual basis to exclude "non-whites" from full citizenship. Nonetheless, at various moments the nation-state has required a level of unity and patriotism possible only through the circulation of what I call "the myth of performative citizenship." 42 Karen Shimakawa has recorded the extent to which visually perceived racial characteristics have operated in the U.S. courts' upholding of restricted notions of citizenship-often posited on the assumed intentions of our Constitution's white forefathers-including the racial prerequisite laws and the adjudication of citizenship by birthright and by naturalization.43 These legislative and judicial decisions repeat their national traumas in the afterlife they live in the U.S. official archives, dramatically manifesting what Jacques Derrida calls the mal d'archive. 44 In his reading of Derrida's Archive Fever, Herman Rappaport suggests that mal (usually translated as "fever") could also be interpreted as trauma: "where there is regularity and efficiency in Foucault's archive, there is trauma in Derrida's. The trauma in the archive is what, I think, Derrida is referring to when he speaks of there being a mal d'archive." Rappaport goes on to argue that for Derrida, "mal d'archive concerns a forgetting or obliteration of the trauma that the trauma itself instantiates in its being repeated as discourse." 45

#### Thus the plan,

#### The United States federal judiciary should overrule Korematsu.

#### Contention 2: Counter-Archives

#### The trauma of incarceration haunts war powers authority. Marking that trauma demands we re-activate the democratic potential of law against the camps.

#### Contributing to a democratic archive of equal protection and due process prevents the law from becoming nothing more than John Yoo’s tool.

Paul **PASSAVANT** Poli Sci @ Hobart and William Smith Colleges **’12** “Democracy’s ruins, democracy’s archive” in *Reading Modern Law: Critical Methodologies and Sovereign Formations* eds. Buchanan et al p.

Here is where we can dramatically contrast Derrida's and Fitzpatrick's attention to law with Agamben's aversion to the concept of responsibility because of its relation to the juridical (Agamben 2002: 20ff.; Mills 2008: 102-4). If one is motivated by justice, if one wants to give force to the requirements of justice or make the powerful more just, then one must calculate, with a spirit of justice, what decision to make.9 One cannot simply maintain the point of suspense. Not if one wants to prevent the **awful possibility** of **camps**. Therefore, the experience of passivity, this openness to innumerable possibilities described by Agamben, is like the infinite responsiveness required by considerations of justice in the suspended moment prior to a legal decision. To leave matters at this suspended point is consistent with Agamben 's **antijuridicism**, since responsiveness is only one dimension of the law; **pure receptivity** would be **vacuous** and **ultimately nothing**. The demands of justice, however, mean that we must make a determination - one that admittedly will come too late. Consequently, to leave matters at a moment of passivity or receptivity, as Agamben does with his embrace of pure potentiality, is to do neither law nor the work ofjustice. The categories of **ontology** in themselves do not enable us to address the **most pressing injustices** in contemporary law and politics today, such as the **revival of camps.** To translate our terms of political theory into the terminology of ontology, as the new ontologists do, leads to significant confusions. To embrace pure, infinite, or **unthinkable possibilities** for their own sake gives us **no normative grounds** on which to resist camps. To contend that the opposite of sovereignty is contingency or potentiality does not suggest another force or capacity of greater normative value than sovereignty. Furthermore, if pure sovereignty is 'determinant', for example, then it cannot be described ontologically as 'absolute necessity'. Absolute democracy, exterior to sovereignty, is also an impossibility. 10 In contrast to Agamben, though, let us give credit to the achievements of the people in the centuries of struggle against the tyranny of absolute monarchy, and consider the quest for popular sovereignty. Democracy is already an articulated concept - an articulation of demos or people, and kratos (or kratein), which refers to having power, the force of law, rule, or to have or to be right (Derrida 2005: 22). That is, 'democracy' itself refers to popular sovereignty, a situation where people are sovereign, or where people govern themselves. In a democracy, people give themselves laws, and share power equally. By referring to popular sovereignty, I emphasize the normative element of democracy: it is right that the people should rule, the people have a right to rule. This is the rule or law of democracy. A new beginning is always both less and more than democratic. A new beginning must borrow its terms. Likewise for a democratic beginning: the people of popular sovereignty do not invent the language of their self governance out of nothing. Indeed, the possibility of democracy is given by language, and the many discourses of democracy, with meanings attributed to these words, rules of grammar, and discourses that the people did not give to themselves. The beginning of democracy cannot be absolutely democratic. When we begin - even a project of democracy - we begin from a place or a position already given to, or imposed upon, us (Derrida 2000, 2002b) . Our beginnings are always less than democratic as they have been legislated in advance of us. Additionally, because we must borrow our terms, the 'people' of popular sovereignty are always more than themselves. The 'people' of popular sovereignty share their power with others who preceded them. Furthermore, democratic acts are oriented to the future, to keeping democracy that is, they are oriented towards future incarnations of democratic subjects. Moreover, because democracy opens itself to others, the 'anyone' of democratic participation may include those who lack a commitment to democracy. Therefore, the 'people' of democracy are always more than themselves. There is never just democracy here. There is always democracy plus something else. The 'people' of popular sovereignty are also always less than themselves. Never fully present, and defying origins, democracy reaches out to others in order to be. These others are past and future. Because we must begin somewhere, on some **haunted grounds**, using terms the meaning of which has, to some extent, been previously determined by others, democratic beginnings are always less than democratic. Concrete democratic acts are necessary to fulfil promises or claims for democracy. But, like considerations regarding justice, there is always a limit to our knowledge, or a finite limit to our accounting of a problem, or our memory. In these ways, democracy is always lacking. There is never just democracy here. Because popular sovereignty is lacking at any moment, it requires a supplement. This is law. When we take a position - such as a position for democracy - we rely on law to recall the commitments necessarily implicated within this position. To bring our (democratic) selves back to ourselves. Law occupies the area of a-position, in between the determinate commitments necessary to making life more democratic or more just, and the infinitely responsive dimension of democracy, of justice; in between our democratic position and that to which we must respond if we are to maintain our democratic position. Like 'law', democracy's condition is always unresolved, calling for incessant decisions and judgements. Demacracy also persists through a relation of negativity - in condemning and addressing manners of tyranny. Democracy takes a position - comes from a position- as law 'comes from and returns to a position'. Law is where we keep our commitments to democracy, **reinstituting** and **re-sending** these commitments in the **moments of decision**, when, as always, our commitment to democracy seems to be dissipating and we must respond to a different challenge. Democracy must be open, but in this opening it risks becoming something other than democracy. Alternatively, democracy risks being trapped by past determinations in the face of new and different challenges - an enclosure that would render democracy less than democratic in its lack of responsiveness. Law resolves, for the time being, these paradoxical dimensions of popular sovereignty. 11 In sum, displacing inquiry from politics to the categories of ontology will not resolve pressing injustices. Moreover, both absolute sovereignty and absolute democracy are impossibilities. While sovereignty must take on certain democratic attributes to achieve extension- like sharing power through institutional assemblies and assemblages - democracy always begins in a place with terms in some way legislated for it by an other in advance. Both sovereignty and democracy must contain paradoxical, if not contradictory, attributes in order to be. And both rely on law for temporary and unstable resolution of these ambivalent tendencies. That which enables either the absolute sovereignty of a tyrant or a recording of a democratic success, however, makes these forms of power vulnerable to ruin. Tyranny requires the assistance of scriveners. Likewise, democratic struggles produce victories that can never be absolute as its plural institutional assemblages create opportunities for ruinous resistance to democracy's commitments. Democratic victories are always partial - succeeding in one place or another, while remaining vulnerable to the **John Yoos of the world** who remain embedded deep within the bureaucracies of the modern state or who remain in its assemblies. They will come with remainders and they will be lacking in some way. Camps, or democracy's ruins In his book The Powers of War and Peace, which finds that the president is not bound by international law, John Yoo, a member of the Office of Legal Counsel (OLC) between 2001 and 2003 in George W. Bush's administration, and the author of the infamous 'torture memo' of August 2002,justifies the internment of Japanese Americans in concentration camps during the Second World War by the US government (Yoo 2005). He does this in the context of illustrating a distinction he makes between 'total war', in which Congress augments executive war powers with a public declaration of the [actual existence of hostilities, and other wars that are conducted without such a public declaration by Congress. He finds internment camps to be constitutional when they are created under the **'pressing public necessity'** of a **'total' war**. Nevertheless, Yoo is typically ambiguous about whether the wholesale round-up of Americans or others would still be constitutional without such a congressional declaration. He says, 'one doubts' whether 'courts' would have allowed 'wholesale internment' of 'Panamanian Americans', 'Yugoslavs', or 'Iraqis Americans [sic]', in reference to recent conflicts conducted without the benefit of a congressional declaration of war, although he does not clearly rule out the possibility that courts might have upheld such actions. Moreover, his speculations are on the subject of court action; he does not clearly state whether he believes such an action to be properly constitutional even if he is clear that internment should be considered permissible when there is a congressional declaration of war (ibid.: 151, 333). To support this position he cites favourably in a singular endnote the repudiated, though **never overruled**, Supreme Court decision Korematsu v. United States (1944), which sustained Fred Korematsu's conviction for refusing to abide by the military's internment order applicable to 'all persons of Japanese ancestry', and remaining in a prohibited area: his hometown (Yoo 2005; Irons 1983) . During the 1940s the United States fought a war against the Nazis' camps. Today, however, the United States maintains a camp at a military base in Guantanamo Bay, Cuba, and another at the Baghram airbase in Afghanistan. 12 In these camps, hundreds of people have been subjected to executive detention, and many have been tortured (ICRC 2007). Every law is a sending, and this deeply worried a dissenter from the majority's opinion in Korematsu, Justice Jackson, who was concerned that the validation of racial discrimination would lie around like a **'loaded weapon'**, to be picked up by a future tyrant claiming 'urgent need'. Law, Jackson realized, has a 'generative power of its own', and every repetition of the principle of 'racial discrimination in criminal procedure' and the 'transplanting' of 'American citizens' would embed the principle more deeply in Americans' 'law and thinking', enabling its expansion to 'new purposes' (Korernatsu v. United States, with Justice Jackson dissenting at 246). These, as Jackson recognized, would be ruinous repetitions. Legal struggles, or democracy's archive Bow are we to resist the ruinous aspects of tyranny and keep faith with democracy? Messianic postmodernism would have us abandon law to oppose absolute and total sovereignty in the name of absolute democracy, for Hardt and Negri, or to experience pure potentiality, for Agamben . 1 have shown, however, that neither absolute sovereignty nor absolute democracy can exist as such. The perfect absence of democracy and its pure presence are both foreclosed by the force of necessary iteration, iteration that enables both democracy and tyrannical sovereignty to be, spectrally. Moreover, pure potentiality gives us no position from which to oppose the particularities of tyranny, such as camps. Drawing from Fitzpatrick, I have also indicated that law facilitates the resolution of (popular) sovereignty's - of democracy's - paradoxical dimensions for the time being: the determinate political position of democracy with democracy's openness and responsiveness, for example. Law subjects political power to sharing. It is where democracy is claimed, permitted, and promised. Even as law is always already 'ruined, in ruins, ruinous', law also provides for democracy being posited and preserved (Derrida 2002a: 273). Law is where sovereignty is divided or shared, and it is how we (re )send democracy (Derrida 2005: 34). It is where we enact our fidelity to democracy where we cut into history and take a position on democracy (Derrida 2002a: 289). Law is where we take a position on democracy. Law must come from a position, and there must be a position, or a place, to which law can then return. Law is how we enact our commitment or responsibility to democracy and to justice, the commitments and responsibilities we have made here to those impossibly necessary tasks. In this, law assists our memory and acts as a resistance to forgetting even as law's repetitions are generated by the fact that we have always already forgotten some of these commitments. We cannot keep such infinite responsibilities in mind at once. In this **resistance** to a **forgetting** that constantly tracks us, **law is like an archive** (Derrida 1995: 76, fn. 14). An archive is where archives, and archiving, take place (Derrida 1995: 2). There where a social order is exercised. Archive, deriving from the Greek arkhe, articulates a principle of beginning, a law according to which a practice was begun, a place of depositing, and the question of who exercises legitimate **hermeneutic authority**- who has the 'right to make or represent the law' (ibid.: 1-3). The notion of an archive implies a particular region of thought or place, as well as a law - no archiving without law (ibid.: 40). An archive both conserves and generates. It gathers in preparation for a future. It is a promise to others, to our legatees (ibid.: 36). On the one hand, when one interprets an object of an archive, one's interpretation becomes inscribed into the archive. The archive is a spectral corpus that never closes since the archivist produces more archive: the archive opens out to the future (ibid.: 67- 8). Yet, on the other hand, an archive must also exclude: 'No archive without outside' (ibid.: 11 , emphasis removed). The laws of an archive - principles of value and classification will regulate not only that which has been included and how it is to be included, but also that which should be excluded to conserve this trust, so we know how to go on in the future (ibid.: 40). Nevertheless, as Derrida points out, even that ':h.ich we exclude shapes our laws as its phantom continues to haunt us (Ibid .: 61). By thinking of law as where we take a position, for democracy, for example, and by thinking of law as an archival practice, we cross a conceptual argument with an ontological one. The conceptual argument that we share our powers, our law-making, with others indicates the impossibility of either the pure absence of democracy or democracy's pure presence. Therefore, even if law and politics do not have in essence a tendency towards democracy (which is implicated in the conceptual argument) , there remains an ineradicable democratic element. 13 Law as archive meets this conceptual argument with on tic and ontological principles. An archive takes place. It is deposited somewhere. There is no archive without substance: there is no archive without a trace (Derrida 1995: 26-7). Could the claim of popular sovereignty, could a democratic beginning or performative speech act, could the exercise of self-government, could politics take place where the people, there, decide to give themselves laws, and could this democratic sending or legacy disappear without a trace? Could the struggles against tyranny disappear, totally, without a trace? Would it be responsive or responsible to democracy or to justice to try to make these things disappear in order to constitute an absolutely new ontology? Such a beginning, like any beginning, would have to take place somewhere and therefore it would have to account for what had given place to such a beginning. This is the paradox of a democratic beginning: it is never equal to itself, it is never just democracy. It begins in ruins. This is where and how we begin, even if we want to begin democratically. But this is not all bad. Not if there is a resistance to forgetting these struggles against tyranny as we begin again. We are constituted by democracy's archive, by democracy's remainders. By its echoes. We are not totally foreign to democracy. Not now, and perhaps not ever. Our contemporary politics takes place within the echoes of languages (some even dead? Or would that be an impossibility?), making possible our constitution as political subjects and even as subjects capable of democracy in ways beyond or perhaps behind our ability to comprehend (Heller-Roazen 2005). Constitutional law in the United States bears the impression of confronting fascism nowhere more disturbingly than in the internment of Japanese Americans, and the Supreme Court's infamous decision Korernatsu v. United States upholding the conviction of Korematsu for violating the Order, which Yoo cites favourably. How has this case been archived previously? The dissenters in Korernalsu recognized at the time that the decision had fallen into the 'ugly abyss of racism' , that the ' legalization of racism' plays no justifiable part in a 'democratic way of life' (with Justice Murphy dissenting at 233, 242). One of the dissenters expressed concern regarding the decision's dangerous repetitive potential, as I have already mentioned. Peter Irons is the author of the definitive study of the law and politics around the internment of Japanese Americans. Discussing his sources, Irons notes that the decision faced immediate and scathing criticism in major law review articles published as early as 1945. Writing in 1983, Irons finds that in the 'years since the publication of these articles ... not a single legal scholar or writer has attempted a substantive defense of the Supreme Court opinions' (1983: 371). Aside from the fact that this legal decision found that courts must apply 'strict scrutiny' (a legal term of art meaning that the classification in question must be subjected to the most searching inquiry and that there is the greatest presumption against the constitutionality of the governmental policy at issue) to racial classifications, legal scholars do not view this legal opinion as 'good law'. The decision was made at a time when racial segregation was still allowed in the United States, but the Supreme Court found racial segregation to be unconstitutional in Brown v. Board of Education (1954). Law students and others who study constitutional law are taught how the racial classification in Korernatsu cannot stand up to the most basic forms of equal protection analysis (because the classification is underinclusive by failing to include German or Italian Americans, and because it is also over-inclusive by including both loyal and disloyal Japanese Americans; all of this lets us see that the governmental policy is motivated less by security concerns and more by racism) .14 The conviction of Korematsu has been overturned because the government was found to have committed misconduct through the suppression of evidence and the inclusion of misinformation. And the United States has both apologized and paid reparations to those interned or their families (Sullivan and Gunther 2004: 668- 9, fn. 3). As matters of law and policy, everything about Korematsu, except the notion that there is the strongest presumption against racial classifications, has been repudiated and apologized for. The democratic narrative of Korernatsu, based on this archive, is shame and a sense of responsibility for overcoming the outcome of the case, while maintaining the strongest presumption against invidious racial classifications. The ruling was represented as a failure in the struggle against tyranny when it was issued, and in the manner it has been archived since. Yoo's legal opinions attempt to eviscerate the narrative archiving the outcome of Korernatsu as wrong, and the principle of racial discrimination as wrong for a democratic society. These, as Justice Jackson recognized, are ruinous iterations. The ideas that a president's word is law or that racial guilt is an acceptable premise for government must be excluded to keep democratic commitments or to send the possibility of a legacy hospitable for democracy. Any archive must have an outside. But an archive also constitutes resources to be drawn upon- at present, and for the future.

Taking a position No wonder, then, that messianic postmodernists - those who wait for being alien to law - wind up invoking law either to denounce present injustices or to seek a better, more just, or indeed a more democratic and Jess tyrannical future. If these are our purposes - if we are taking a position against tyranny- then being passively open to infinite possibilities or potentialities will not actively further those commitments. This is why, when we have specific purposes or commitments to which we are faithful, such as taking a position for democracy, or when we critique a process of repetition sedimenting the tyranny of camps in order to open the space for their rejection , we invoke the law and draw from democracy's archive. Likewise, when Agamben seeks to preserve a community of the faithful who will think the 'relation of every instant to the Messiah', who will 'strain forward' towards salvation, he puts aside the antinomialism of Homo Sacer to embrace 'messian ic law', or the law of faith (2005b: 76-8, 95). There would be an infinite number of actions (not) to do if the faithful are to make messianic potential become active or operative, if they are to live exclusively in the joyful announcement ( euaggelion). To be sure, these infinite actions and inactions implicated in pistis (faith) would exceed any finite list of dos and don 'ts exemplified by the Mosaic law of the Ten Commandments, and messianic law, or nornos pisteos, refers to this excessive aspect. How can the faithful know or remember what is required of them at each moment to dwell within messianic law iflaw is not textualized? Agamben explains, ' [I]t is not a letter written in ink on tables of stone; rather, it is written with the breath of God on hearts of flesh'. It is 'not a writing but a form of life ... ''You are our letter"' (2005b: 122, quoting 2 Cor. 3:2, emphasis in original). This privileging of the spirit over the letter of the law attempts to make calculable, measured law identical to incalculable, immeasurable life by emphasizing the excessive aspect of law, and maintaining law's openness or responsiveness to the future. Through infinite openness, law and life are one, with no ruins or remainders. If, however, 'law' is not to be merely vacuous, infinitely open to anything and everything, hence no law at all, then we must not forget what it means to be faithful to the rnessiah. Appropriately, then, Agamben does not fully forgo textualizing law, citing St Paul 's recapitulation of the entirety of God's law with the formula 'Love your neighbor as yourself.' It helps to learn, to know, to remember what is required of the faithful, to recall the messianic. To this end, Agamben refers to law as a '"pedagogue" leading to the messiah' (2005b: 76, 120, citing Gal. 3:24, emphasis added). Law is an archive even for those faithful to the messianic. Similarly, in State of Exception Agamben critiques recent practices in the United States, such as the camps at Guant<inamo Bay and the USA PATRIOT Act of 2001. He argues, 'At the very moment when it would like to give lessons in democracy to different traditions and cultures, the political culture of the West does not realize that it has entirely lost its canon' (2005a: 18). Here, Agamben denounces the United States, among others, for having lost its law. He condemns people in the United States for forgetting their law and losing their archive, their aide-memoire. Indeed, Agamben rightly denounces them - us - for it. His denunciation - accusing them, us - for forgetting our law pays homage, as Jean Baudrillard would have noted, to the law (1988: 173). His denunciation relies on recalling a law, an archive, and its presently forgotten, suppressed, or repressed democratic commitments. Thus, to the extent that messianic postmodernists are actually concerned with specific principles of justice, democracy, or even the messianic, as opposed to whatever, they contradict their postmodern antinomialism and invoke law. When we take a position against the abusive exercise of tyrannical sovereign power, as Agamben does, **we invoke law**. Coming from a position, law combines determinate political commitment with a responsiveness to future circumstances. This paradoxical, if not impossible, combination of determinacy with responsiveness required by popular sovereignty is 'resolved', as we can understand in light of Fitzpatrick's work, by law. The paradoxical co-implication of determination and responsiveness, necessary for popular sovereignty to be, is why democracy relies on law. The sense of pure whatever potentiality Agamben promotes corresponds with the dimension of law as infinite openness tending to vacuity. If law is figured solely as **vacuous**, then it is open to anything, even to Yoo. Law, however, comes from and returns to a position, and understanding law as democracy's archive is an attunement to the determinate place and commitments from which we begin, again. Any archival practice supplementing our memory of positive commitments to democracy, of re-calling our (democratic) selves to our selves, of re-calling society's commitment to democracy or principles of justice to society, must necessarily have an outside. So, an **archive** of **democratic** **commitments**- a law dedicated to democracy- must also be constituted through exclusions if we seek faithfully to keep or to promise the prospect of democracy. This legal archive is animated through a **negative relation to tyrannies**. As we enumerate tyrannical mentalities and deeds, we will be engaged, in part, with the project of constituting an archive for democracy, a law to keep democracy for the future. When we labour, in our fidelity to resisting tyranny, among democracy's ruins, we are engaging in a practice of re-calling and re-sending democracy, faithful to its coming, labouring for its return. Perhaps. Therefore, when we engage in **critique of camps,** and the way that some legal thought reintroduces this potentiality, we re-send our archived commitments against this tyranny as a faithful pledge to the future. In other words, the constituent force of law may indeed generate the 'very social bond of modernity, the means of our relation and being-with each other' (Golder and Fitzpatrick 2009: 85). But what manner of sociality, of 'being-with each other', shall we endure, share, or aspire to? What manner of being are we starting from, orienting towards, or have we vowed to keep for the time being? If our position is a democratic resistance to camps, then we will not be content to remain open to all potentialities, including camps- not when we have commitments to which we must remain faithful. Law as democracy's archive is our resistance to forgetting these commitments. An archive is a 'pledge' of the future (Derrida 1995: 18) . Likewise, law as democracy's archive is a pledge of and for the future, a future we have no certain grounds for knowing will keep this pledge, much as we have no certain grounds to count on just democracy ourselves, not as we begin again among democracy's ruins. There is, however, no democracy 'without an act offaith' (Derrida 2005: 48). Much as we must begin our labours among democracy's ruins, John Yoo has been hard at work already. Yoo's numerous legal memos written on behalf of the Bush administration, many of which remain secret as of this writing, constitute a warp. As geological layers evidence a protrusion, or another force repressed by layers of sediment, so too do these memos. Even their very numerousness serves to remind us of the doubts they are intended to cover over, the democratic doubt they are meant to contain. Yoo is also currently at work writing books, publishing law review articles, uploading SSRN (Social Science Research Network) papers, crafting op-eds, presenting congressional testimony, giving interviews, teaching law school courses, and responding to government reports questioning his faithfulness to the law. He is an archivist as well, seeking to **invent the legal archive** that will have **justified his earlier work**. This is why we must persist in our faithful labours among democracy's ruins. Otherwise, democracy's archive will be put to a 'new use' and will be 'play[ed] with just as children play with disused objects'. It will become like the dead letter Agamben's 'new attorney' reads bemusedly, but without attachment, 'leafing through "our old books"' (2005a: 63-4) . Conclusion In this chapter I have argued that recent postmodern aversions to law and sovereignty, such as the work of Agamben, which favours the coming of a new ontology - a messianic preoccupation with the absolute arrival of new being exterior to law or sovereignty- is not helpful in addressing present tyrannies and injustices. Fitzpatrick's work on sovereignty, emphasizing its tension between finite determination and extensive, encompassing responsiveness, indicates a more productive post-structuralism. Rather than a picture of absolute determination, Fitzpatrick shows how sovereignty must also be determinate. The impossibility of pure sovereignty elucidates the vulnerabilities popular sovereignty faces - the way that democracy is vulnerable to ruin. Any beginning, such as a democratic beginning, must commence on terms not of its own making. Therefore, the re is never just democracy here. Fitzpatrick's understanding of sovereignty, and the way that a fraught combination of d eterminacy and responsive ness takes place through law, allows us to comprehend, then, the dual impossibilities of absolute sovereignty and absolute democracy. Contemporary law and politics take place within the torsion of these impossibilities. Law, which is where popular sovereignty undergoes continual constitution , must come from a position, and it must also return to a position or a place. It is where we take a position on democracy, and it is where we archive democracy's ruins in resistance to the n ecessary finitude of our being forgetful human beings. If an archive is a pledge to the future, then considering law as democracy's archive means that it is with-in law that we recall principles of democracy and justice to ourselves, and send, again, this legacy to the future. In other words, we do not begin our struggles against the camps with a vacuous receptivity to pure potentiality that cannot take a position. We begin, again, in democracy's archive, with democratic remains. It is there that we find the legal principles that gave place to us, those of **equal protection**, **due process**, and that political leaders must take care that those laws are faithfully executed that are anathema to the camps. We can find these determinate commitments in democracy's archive, **recall them,** and **extend** these determinations faithfully as a response to the tyrannies of today, for the future. It is with-in democracy's archive where democracy undergoes a process of 'continual constitution'. What is the fate of law and democracy after Yoo? Rather than a messianic aversion to law or politics, Fitzpatrick's work points us in the direction of recommencing our labours among democracy's ruins. It points us to the **persistence** of law, the possibility of democracy, and the faithful labours necessary to resist tyranny. We cannot expect a messianic blow to replace, totally, a non-existent absolute sovereignty, without ruin or remainder. Because of the impossibility of absolute democracy and absolute sovereignty, **we must start where we are**, in the torsion of politics, labouring among democracy's ruins, reconstructing its archive, if we want better than Yoo gives us. Democracy is never just here. It is n ever just here. **This is the urgency of law and of politics**.

#### Appearing as friends-of-the-court on behalf of detainees counteracts a cycle of revenge and exclusion.

#### Fred Korematsu’s contribution of amicus brief in the Padilla case demonstrates that war powers law should recognize even those deemed inimical to national security.

Ian **BAUCOM** Professor of English and director of the John Hope Franklin Humanities Institute @ Duke **‘9** ““Amicus Curiae”: The Friend, the Enemy, and the Politics of Love” *PMLA* 124.5 p.1714-1717

Let me take as my point of departure a question of genre, one raised in the realm of jurisprudence by the **amicus brief**—that is, the brief of the amicus curiae, or friend of the court: one who is not a party to a case but holds a pressing interest in it. I was drawn to the genre, most immediately, by a reading of the amicus briefs filed in the case of Lakhdar Boumediene et al. v. George W. Bush, which came before the United States Supreme Court on 5 December 2007 and raised the question of whether the detainees held at Guantánamo Bay, Cuba, possessed the habeas corpus rights guaranteed by the United States Constitution. My attraction to the genre extends beyond the question of how one who had (or has) some interest in this urgent matter might have been afforded standing to speak before and to the court. (One gains this standing by attesting a willingness to adopt a subject position— “friend”—and a kind of friendship: for the court, for the law the court exists to uphold, or for the law enshrined in the United States Constitution.) More broadly, my reading of these briefs has left me wondering how their generic conventions might animate, or depart from, other extrajuridical modes of expressing an interested relation to this case, the world-historical situation emblematized in it, and an opposition to the logic and discourse of “**enmity**” on which the conduct of the Bush administration’s war on terror so long depended. Even after the transition to a new administration, even after President Obama’s promise to close the Guantánamo Bay prison, the question has persisted. Is there a dissenting speaking position, other than that of the friend, for a matter or a case such as this? Is there an alternative to the language of enmity other than the language of friendship?

Let me approach these questions from a different starting point. In Theory of the Partisan, Carl Schmitt writes: In discussing the world-political context it was clear that the interested third party played an essential function in providing the link for the [political] irregularity of the partisan to a regular [state actor] so that he [the partisan] remains within the realm of the political. The core of the political is not enmity per se but the distinction of friend and enemy: it presupposes both friend and enemy. The powerful third party who is interested in the partisan . . . functions as [a] political friend . . . and [expresses] a kind of **political recognition,** even if it is not expressed in terms of public and formal recognition as a warring party or a government. (91) Schmitt’s concerns in this text are multiple. Most crucial, however, is his belated determination to account for a figure he had sought (not entirely successfully) to hold extraneous to the theoretical framework of his earlier Concept of the Political: a figure repeatedly haunting the long archive of modern international law and appearing in the late sixteenth and seventeenth centuries as the inimicus, in the eighteenth century as the unjust enemy, in the twentieth century (Schmitt here indicates) as the partisan, and in the twenty-first century as a figure I understand as the **unlawful enemy combatant.** The problem this figure occasions for Schmitt’s political theology arises, centrally, from his inability to think of it as bearing anything but a criminal character. The inimicus, the unjust enemy, the partisan, the unlawful enemy combatant is not (in the terms of The Concept of the Political) the “real” enemy, the “public” enemy, the “sovereign” enemy that a properly political entity (a state) is obliged to recognize and hold within the boundaries of the law (28). Lacking sovereign personality, the partisan threatens to undo the carefully balanced system of mutual recognition through which, Schmitt contends, the European state system in the “modern” (postWestphalian) period of public law had managed to bracket and contain war by decriminalizing the adversary (Nomos 140–92). If the sovereign is the one who is able to decide on the friend-enemy distinction, by Schmitt’s reasoning the paradox of the partisan is not simply that this figure lacks reciprocal sovereign standing but that (precisely because a sovereign state cannot formally recognize the partisan as a proper enemy) no properly political decision can be made regarding this figure. In the presence of such an enemy, the sovereign state fails its own normative test of sovereignty, and war, Schmitt argues, thus risks shifting from the political to the criminal domain, from a practice predicated on recognition to one predicated on the “annihilation” of the “worthless” (Theory 93). Or it almost fails. For by Schmitt’s terms politics entails a decision not only on enmity but on **friendship**. And it is here that the interested third party comes to the rescue of his system. For the third, he argues, can recognize the partisan, can draw this figure’s political “irregularity” within the bounds of the “regular” through an expression of interest: a sovereign act of friendship. That friendship, it is worth noting, is bidirectional—it attaches itself to the partisan on one side and a regular sovereign order on the other; it returns the partisan to the domain of the political not by standing outside the sovereign sphere of politics but by **expanding the reach of sovereignty**. That at least is the formula for **sovereign** **friendship**, which plays itself out in the **amicus briefs** I have mentioned. The Brief of Legal Historians as Amici Curiae in Support of Petitioners, written in support of the Guantánamo petitioners, for example, rests one of its fundamental arguments on a legal history that, from the seventeenth century onward, “demonstrates the gradual expansion of the territorial ambit of habeas corpus” (Wishnie et al. 8). The brief takes pains to sketch that history because President Bush’s solicitor general had argued that Guantánamo Bay falls outside the sovereign territorial domain of the United States and that, therefore, United States constitutional law had no binding application in that territory. By way of counterargument, the legal historians insisted that sovereignty exceeds territoriality, for two reasons. First, because under “common law habeas attaches to the wrongs of the jailer, not the rights of the petitioner” (5). Where the jailer is, the brief argued, so too is the law. And second, because the law is a **law of subjects**, **not citizens**. The brief advances that second argument since, as all the parties to the case seem to have agreed, the application and reach of habeas corpus is (and long has been) governed under United States constitutional law by the meaning of the Great Writ as it existed in 1789. Citing Sir Matthew Hale’s The Prerogatives of the King, the legal historians’ brief noted Hale’s insistence that according to this understanding “the goals are all in the king’s disposal . . . for the law has originally trusted none with the custody of the bodies of the king’s subjects . . . but the king or such to whom he deputed it”; they then proceeded to explain, “The term ‘subject’ as used by Hale and his contemporaries, arises in a specific historic context and cannot be equated with modern notions of a nation’s ‘citizens.’ . . . Subjecthood was a more fluid and permeable category than present-day American citizenship: mere physical presence within territory under de facto English control could subject a person to the King’s authority” (Wishnie et al. 4–5). To the degree that the law attached to the wanderings of the king’s jailers and the bodies of the subjects over whom the king possessed de facto sovereign authority, so the writ of habeas corpus applied (then) to the king’s subjects and so too do the sovereign authority of the court and the sovereign stipulations of United States constitutional law apply (now) to the detainees in Guantánamo Bay. What are we to make of the paradoxes of a case in which the Bush administration was strenuously arguing against its own sovereignty and an eminent collection of legal historians, writing, bidirectionally, on behalf of the detainees and as friends of the court, were arguing for the expansion of sovereignty and a return to the notion of the subject (rather than the citizen) as the fundamental object of law? First, that there might be some virtue in discriminating among our conceptions of sovereignty and in not assuming that sovereignty is anywhere and everywhere a **bankrupt** thing. In the terms I have adapted from Schmitt, the amicus brief represents a generic articulation of a practice of **friendship sovereignty**, one capable of **strategically deploying** the notion of **sovereignty** to **limit the power of the state**. Antonio Gramsci’s conception of the war of positions has some relevance here, as does his general understanding that, at each point of its unfolding, **hegemonic power** contains the grounds and **speaks the grammar** of its **own potential opposition**. But second, and conversely, a case such as this indicates that we might also wish to continue to seek a concept of the political that is not predicated on the Schmittean discrimination between friend and enemy. Bearing in mind the late-Renaissance provenance of the partisan and of the unlawful enemy in the figure of the inimicus, let me cite a potential alternative code for politics, one that Schmitt’s Concept of the Political was insistent we not adopt: “The enemy is solely the public enemy. . . . [T]he enemy is hostis, not inimicus in the broader sense. . . . The often quoted ‘Love your enemies’ reads ‘diligite inimicos vestros’ . . . and not diligite hostes vestros. No mention is made of the political enemy. . . . [I] n the private sphere only does it make sense to love one’s enemy” (28). To which my response is: why? Or, alternatively: if in place of the friendship enmity distinction we were to take **love for the inimical**—or, more accurately, for what has been named inimical—as a ground of politics, what would that politics look like? Is there a political language and a genre for it? That question is not my own. It is one that Jacques Derrida, among others, has taken up in the course of a discussion of this very passage in Schmitt: When Jesus says “Ye have heard that it hath been said, Thou shalt love thy neighbor, and hate thine enemy [but I say to you, love your enemies],” he refers in particular to Leviticus 19: 15–18, at least in the first part of the sentence (“Thou shalt love thy neighbor”) if not the second (“hate thine enemy”). Indeed, there it is said, “Thou shalt love thy neighbor as thyself.” But in the first place, vengeance is already condemned in Leviticus and the text doesn’t say “thou shalt hate thine enemy.” In the second place, since it defines the neighbor in the sense of fellow creature [congener], as a member of the same ethnic group (’amith), we are already in the sphere of the political in Schmitt’s sense. It would seem difficult to keep the potential opposition between one’s neighbor and one’s enemy within the sphere of the private. . . . If one’s neighbor is here one’s congener, someone from my community, from the same people or the same nation (’amith), then the person who can be opposed to him or her (which is not what Leviticus but indeed what the Gospel does) is the non-neighbor not as private enemy but as foreigner, as member of another nation, community, or people. That runs counter to Schmitt’s interpretation: the frontier between inimicus and hostis would be more permeable than he wants to believe. At stake here is the conceptual and practical possibility of founding politics or of forming a rigorous conception of political specificity by means of some dissociation: not only that between public and private but also between public existence and the passion or shared community affect that links each of its members to the others. . . . (103–04) From this, Derrida takes as minimal **starting points** for a renovated conception of the political both an injunction against vengeance and a determinate refusal to banish not only the “private” but also “shared community affect” from the domain of the political. If, following Derrida’s lead, love, or love’s affects, are rigorously to be included as grammatical to that refounded language and concept of politics, then the challenge is not only to derive from the affects of neighborly love (and the rich ethical tradition of the imperative to love the neighbor) but from the affects derived from the imperative to **love the enemy**, in all its inimical guise, a political specificity and a political language appropriate to the moment we have recently been living through and with whose consequences we are still living. Or perhaps those are not separate forms of love. In either case, one of love’s core affects is what Judith Butler has identified as an experience of **precariousness**, of **insecurity**, of knowing that we cannot secure ourselves from being undone. Perhaps a politics of love (whether of the neighbor or of the inimical) begins with a willingness to experience what Butler describes, to live with a fear of having our own subjectivity radically, inimically, extraneously undone by what might threaten us. In living so, in seeking to frame a language of living so, the first word of a politics of love might be to refuse an obligation to seek to expel or contain the fearsome by contracting our shared passions (as a still-dominant Hobbesian “modern” political theory instructs us to do) to a commonwealth, or state, or other sovereign power that pledges to deliver us from fear so long as we accede to its **reasons of state**. To put things another way, perhaps the opening articulation of a politics of love is to refuse that offer of exchange, through which our various states, commonwealths, and sovereign authorities make us safe from fear if we will **license** them to quarantine (or **annihilate**) all that we have been instructed to hold inimical to ourselves. This politics asks that we refuse to abandon love as, itself, a **fearsome thing**— something, in all its urgent capacity to undo us, more than capable of reminding us that in our lives as subjects and as citizens we are, and must continue to be, “fluid and permeable.”

#### A democratic legal archive links us in an ongoing constitutional struggle against subordination to racialized national security narratives.

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V. CONCLUSION: THE SECURITIZATION OF RACE "The tradition of the oppressed teaches us that the 'emergency situation' in which we live is the rule."298 The Japanese **internment** constitutes a thematic **common denominator** in practically all post-September 11 legal analyses of state security powers. This is actually somewhat surprising since the internment jurisprudence had not been viewed as a precedential centerpiece in the sub-discipline of national security and foreign affairs prior to September 11.299 The internment, however, has become important for the ways it symbolizes a trauma or an evil that the nation as a whole somehow acknowledges (as past), survives and transcends. 300 Viewing the internment as symbolic of a **nationally transcended** **evil** parallels the **dominant constitutional** "**survivor story**" that **legal** **liberalism** in the United States tells with regard to slavery.3 01 Such survivor stories, according to which everyone within the nation is equally a "victim" and survivor of the past evil, along with related regimes of "survivor justice," assume a strategic role in moving the "nation" forward in the aftermath of systemic evil, while also in purging the state of accountability. Unsurprisingly, the winners under conditions of survivor justice are not the real victims of the past or present evils, but rather those who benefit under the hegemonic conditions of such systemic injustice. 30 2 Under the logic of survivor justice, equal protection principles can be interpreted as being void of **anti-subordinationist** **commitments** such that would legitimate robust substantive and effects-based "victim justice."3 03 Indeed, just as Lincoln viewed demonization of the defeated South as an evil in itself, attempts to rectify injustices at the expense of "innocent" beneficiaries-cum-victims of that injustice can be viewed as evil under survivor justice. 3 0 4 In the immediate context of the war on terrorism, treating the internment as transcended/survived has the effect of de-historicizing the current repression of Muslims, Arabs and South Asians, disconnecting it from the ongoing related national traumas of racist psychologization of security and threat, reactionary assertions of white national identity and the attendant subjection of liberal democratic values to the paranoidic closures of the **security state.** 305 When the internment is instead taken to **symbolize** an **imperative** of **political accountability** toward **racial injustices**, it underwrites a model of **constitutional justice** as a continuation of the various justice struggles that Japanese Americans and their supporters have waged, from the "no-no" movement and other resistance efforts in the internment camps themselves, to the reparations and redress campaign of the 1980s and 90s. 306 Viewing the "**internment this time**" as **rooted** in these **ongoing traumas** puts into play strategies and models of constitutional justice that form part of an **unbroken** **chain**-call it a **constitutional** **solidarity**-with **anti-internment justice struggles**. Under such models of justice the state in distinction from the security state with its racialized friend-enemy logic, overweening assurance imperative, legitimation issues, etc.-links the present with the past, in Benjamin's terms, messianically. Accountability is insured in a present that is "shot through" with the traumatic past. Contemporary institutions and actions are rooted in a-temporal solidarity with anti-subordinationist struggle. There can be no easy redemption through "transcendence" of past evil, a notion premised on a positivist view of history that Benjamin rejects. Past and present form a constellation, and grasping that constellation is a redemptive act that itself necessarily transcends positivist management of the past. As ambitious as such an anti-subordinationist vision may sound under current conditions, it seems entirely in sync with the spirit of Justice William Brennan's pragmatic security jurisprudence, summed up in a speech he gave at the Law School of Hebrew University in 1987: A jurisprudence capable of braving the overblown claims of national security must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact, explores their relation to the exercise of civil freedoms, and probes the limits of their compass. This sort of true familiarity cannot be gained merely by abstract deduction, historical retrospection, or episodic exposure, but requires long-lasting experience with the struggle to preserve civil liberties in the face of a continuing national security threat.30 7 Though framed literally in the familiar terms of individual civil liberties, Brennan's jurisprudence entails a substantive and processual pre-commitment to combat security-induced injustices, especially in light of "overblown" national security claims. Brennan also incorporates a critical understanding of the constructedness of security threats themselves and an awareness of the complex linkages between the realm of national security and threat construction and the realm of social freedom. Brennan's vision, then, comprises substantive and processual commitments as well as conceptual complexity in a way that appears wholly in accord with the primacy afforded here to group-based dimensions of state security overreach. The record from the new war on terror makes it abundandy clear that in order to be effective now our venerated liberal democratic tradition of resisting and containing state security overreach must be nurtured by our "long-lasting experience" and "intimate familiarity" with the subordinationist, group-based effects of national security law. Otherwise, we will fail to engage the central crisis of the time, involving at once the various devils the state tells us it knows and the sort of subordinationism that our society knows all too well.