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#### Contention one is the master narrative

#### The American history of World War II makes one thing very clear—we were on the right side of it. The Nazis embodied the closest we’d ever seen to “pure evil”, and our good ‘ol boys sailed over there to show him whats what. All in all, we were the heroes.

#### Except for that sticky little issue of internment. If the Nazis were pure evil because of their concentration camps, and we detained over a hundred thousand Japanese individuals because of their race, what did that make us?

G. Edward White 11, Distinguished Professor of Law and University Professor, University of Virginia School of Law, December 2011, "Symposium: Supreme Mistakes: Determining Notoriety in Supreme Court Decisions," Pepperdine Law Review, 39 Pepp. L. Rev. 197, lexis nexis

II. Examples of Notorious Mistakes: A First Look¶ ¶ In the long history of Supreme Court jurisprudence, a small number of cases have been consistently identified as notorious mistakes by commentators. Those cases need to be distinguished from a much larger group of cases that were severely criticized at the time they were decided but over the years have secured a degree of acceptance. Martin v. Hunter's Lessee, n4 McCulloch v. Maryland, n5 Brown v. Board of Education, n6 and Miranda v. Arizona n7 are in the larger group of cases. The smaller group seems to include only a few cases, which appear to be distinguished by the fact that successive generations of commentators have continued to regard them as notorious. What gives those cases their notoriety? Perhaps a comparison of two cases regularly placed on the list of notorious mistakes will aid us in that inquiry.¶ [\*199] Dred Scott v. Sandford n8 and Korematsu v. United States n9 are likely to appear on nearly everyone's list of notorious mistakes. n10 Some sense of why can be gleaned from a characterization of Dred Scott by David Currie in 1985, and of Korematsu in a 1982 Congressional report on that case. Currie described Dred Scott as "bad policy and bad judicial politics ... [and] also bad law." n11 The Congressional report stated that Korematsu had been "overruled in the court of history." n12 Taken together, those characterizations of Dred Scott and Korematsu suggest that four characteristics have been attributed to notorious decisions: misguided outcomes, a flawed institutional stance on the part of the Court, deficient analytical reasoning, and being "on the wrong side" of history with respect to their cultural resonance.¶ The Dred Scott decision concluded that African-American slaves and their descendants were not "citizens of the United States" and hence ineligible to sue in the federal courts. n13 The decision further concluded that Congress could not outlaw slavery in federal territories because to do so would constitute an interference with the Fifth Amendment property rights of slaveholders. n14 The Korematsu decision allowed the federal government to evacuate American citizens of Japanese origin from the West Coast, where they were detained in internment centers during the course of World War II, even though the sole basis of their evacuation and detention was their national origin, and even though Americans of German or Italian extraction were not comparably treated**.** n15 Thus, Dred Scott committed the Court to the propositions that the Constitution protected the "rights" of humans to own other humans as property, and that African-Americans descended from slaves were a "degraded race" not worthy of United States citizenship, whereas Korematsu committed the Court to the proposition that American citizens of a particular ethnic origin could be summarily incarcerated by the government simply because of their ethnicity. Those [\*200] propositions, as policy statements, seem blatantly at odds with the foundational principles of American civilization that all persons are created equal and may not be arbitrarily deprived of their liberty by the state.¶ The outcomes reached in Dred Scott and Korematsu appear to suggest that the Court found the policies of slavery and discrimination on the basis of ethnicity to be constitutionally legitimate. The decisions could also be seen as reflecting an inappropriate institutional stance by the Court with respect to its role of determining the constitutionality of the actions of other branches of government.¶ In Dred Scott the Court was asked to decide whether an African-American slave who had been taken by his owner into a federal territory where slavery was not permitted, and then "voluntarily" returned to a slave state, could sue for his freedom in federal court. n16 A majority of the Court found that African-American slaves were ineligible to sue in federal court. n17 That finding made any inquiry into the constitutional status of slavery in the federal territories irrelevant to the decision, but Chief Justice Roger Taney's opinion, which was characterized as the "opinion of the court," went on to conclude that the Due Process Clause of the Fifth Amendment, which according to Taney protected the property rights of slave owners, prevented Congress from abolishing slavery in the territories. n18¶ The interaction of slavery and westward expansion has been recognized as one of the most deeply contested political issues of the antebellum period. The power of Congress to decide the status of slavery in federal territories had been acknowledged by supporters and opponents of slavery ever 1789, when Congress divided land acquired from Virginia, North Carolina, Pennsylvania, New York, and Connecticut into "northwest" and "southwest" portions, with the Ohio River serving as a boundary, and outlawed slavery in the northwest section while remaining silent on it in the southwest section. n19¶ As slavery became a polarizing national issue in the early nineteenth century, it was generally conceded that although the federal government had no power to abolish slavery in states, it appeared to retain that power in federal territories. n20 All of the political compromises related to the westward expansion of slavery that were fashioned by Congress between 1820 and 1850 proceeded on that assumption. Moreover, as the United States acquired a vast amount of new territory between 1803 and 1853, the attitude [\*201] of Congress toward slavery in portions of that territory was thought to foreshadow the attitude of residents of those portions when states formed from them sought to enter the Union. The process by which Congress gave permission to new states to enter the Union was heavily influenced by expectations about whether the states would be free or slave, and those expectations were influenced by Congress's treatment of slavery in the portions of territory from which prospective states were carved out. n21¶ By reaching out to decide the constitutional status of slavery in the federal territories in Dred Scott, the Taney Court treated the delicate balancing of free and slave territories, and free and slave states, as if it had been based on an erroneous assumption. Suddenly, Congress had no power to outlaw slavery in any federal territory. n22 That conclusion represented a dramatic intervention by the Court in an extremely sensitive political issue that Congress had sought to keep in equipoise. Moreover, the intervention was not necessary to the decision in Dred Scott.¶ Taney's conclusion that Congress had no power to outlaw slavery in the federal territories rested on two propositions. First, he announced that Congress's constitutional power to make rules and regulations for federal territories n23 extended only to territory within the United States in 1789. n24 Second, he maintained that the Due Process Clause of the Fifth Amendment protected property in slaves. n25 Both propositions were novel. Taney'sreading of the Territories Clause of the Constitution would have prevented Congress from exercising any of its enumerated powers outside the original thirteen states, n26 and Taney's interpretation of the Due Process Clause could not easily be squared with federal or state bans on the international or interstate slave trade, both of which were in place at the time of Dred Scott. n27¶ In short, Dred Scott can be seen as reaching a pernicious result, representing a categorical judicial resolution of an issue long regarded as deeply contested in the political branches of government, and resting on some dubious legal arguments. In addition, it was described as a mistake by [\*202] contemporaries, n28 the Republican Party adopted a platform in the 1860 election pledging to continue to outlaw slavery in federal territories in defiance of the decision, n29 and it was explicitly overruled by the Thirteenth and Fourteenth Amendments to the Constitution. n30¶ One could construct a similar analysis of the Korematsu decision. It gave constitutional legitimacy to the incarceration of large numbers of American residents of Japanese descent simply on the basis of their ethnicity. The internment program made no effort to distinguish aliens from citizens or Japanese loyal to the United States from those loyal to Japan. n31 Internments were of indefinite duration. They were often accompanied by the confiscation of property owned by Japanese residents. Detainees could not challenge their detentions through writs of habeas corpus. And even though Justice Hugo Black's opinion for the Court asserted that Japanese residents of the West Coast were "not [interned] because of [their] race" but "because we are at war with the Japanese Empire," n32 the United States was also at war with Germany and Italy at the time, and few residents of German or Italian descent were interned during the course of that war.¶ Whereas the Court's posture with respect to other branches of government in Dred Scott might be described as awkwardly interventionist, its institutional posture in Korematsu might be described as awkwardly supine. The Court in Korematsu merely posited that military authorities had determined that allowing Japanese to remain on the West Coast posed threats of espionage and sabotage because Japan might invade the West Coast, and that relocating all Japanese to internment centers was necessary because there was no easy way to distinguish "loyal" from "disloyal" members of the Japanese population. n33 Although the Korematsu majority maintained that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and courts "must subject them to the most rigid scrutiny," n34 it arguably did not subject the restrictions on Japanese residents of the West Coast to any scrutiny at all. It simply noted that exclusion of "the whole group [of Japanese]" n35 from the West Coast was justified because of military authorities' concerns about espionage and sabotage by the Japanese on the West Coast, and their inability to "bring about an immediate segregation of the disloyal from the loyal." n36 The [\*203] Korematsu majority made no effort to determine whether military authorities had attempted to ascertain the loyalty of particular Japanese, or whether they had attempted to detain Germans or Italians anywhere in the United States. Instead, it concluded that the military authorities who ordered Japanese residents on the West Coast to leave their homes and report to "Assembly Centers," the first stage in their internment, were **justified in doing so because they "considered that the need for action was great, and time was short."** n37¶ The legal arguments mounted by Black for the Korematsu majority were no more statured than those employed by Taney in Dred Scott. Although Black rhetorically endorsed strict scrutiny for acts restricting the civil rights of racial minorities, he failed to subject the internment policy to searching review while denying that the internment policy was racially motivated. Justice Robert Jackson pointed out in dissent that the standard of review implemented by Black's opinion - whether the military reasonably believed that one of its policies was justified by a grave, imminent danger to public safety - could not realistically be applied by courts. n38 Moreover, the Korematsu Court had not heard any evidence on what the military believed or whether they could distinguish loyal from disloyal Japanese. It would subsequently be revealed that most of the basis for the internment order rested on stereotyped assumptions about the "unassimilated" status of Japanese communities in America rather than on military necessity, and government officials concealed this evidence from the Court. n39¶ Part of the reason that Korematsu would be "overruled in the court of history" resulted from the Court's subsequent implementation of the strict scrutiny standard for racial classifications proposed by Black in a series of cases reviewing classifications of African-Americans on the basis of their race. n40 Once the Court began to put some teeth into its review of policies affecting the civil rights of racial minorities, its rhetorical posture in Korematsu appeared disingenuous. In addition, the factors that led to the internment policy being formulated and upheld (uninformed stereotyping of a racial minority by military and civilian officials and reflexive deference on the part of the Court to the decisions of military officials in times of war) suggested that unless the Court actually followed through on its promise to subject racial discrimination to exacting scrutiny, the Korematsu precedent [\*204] might become, as Jackson put it, "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." n41¶ III. Characteristics of "Mistaken" Decisions: A Further Analysis¶ ¶ Dred Scott and Korematsu thus share pernicious outcomes, a questionable institutional stance on the part of the Court, flawed legal reasoning, and, over time, a location on the wrong side of history. At first glance those criteria might appear to be useful baselines for identifying notorious Supreme Court decisions, but a closer look at the criteria suggests that three of them seem heavily dependent on the fourth.

#### We received internment as a historical footnote because United States national mythology conceives of history as a recurring push and pull between the objectively “good” and the objectively “evil”. Sure, we made mistakes but war is war, and even the noble crusaders of god had to make sacrifices for the greater good. Because we conceived of international relations as a bipolar opposition between the “right” and “wrong” side of history, us and them, masculine and feminine, we felt vindicated when we used the atomic bomb against Japan and simultaneously catalyzed the cold war. Failing to disrupt this historical narrative guarantees that the U.S. will continue to accelerate its ongoing genocidal massacres.

SLOTKIN 1985 (Richard, Olin Professor of American Studies @ Wesleyan, *The Fatal Environment,*  p. 60-61)

This ideology of savage war has become an essential trope of our mythologization of history, a cliche of political discourse especially in wartime. In the 1890s imperialists like Theodore Roosevelt rationalized draconian military measures against the Filipinos by comparing them to Apaches. Samuel Eliot Morison, in his multivolume history of naval operations in the Second World War, recounts the posting of this slogan at fleet headquarters in the South Pacific: "KILL JAPS, KILL JAPS, KILL MORE JAPS!" Suspecting that peacetime readers may find the sentiment unacceptably extreme, Morison offers the following rationale; This may shock you, reader; but it is exactly how we felt. We were fighting no civilized, knightly war . . . We were back to primitive days of fighting Indians on the American frontier; no holds barred and no quarter. The Japs wanted it that way, thought they could thus terrify an "effete democracy"; and that is what they got, with the additional horrors of war that modem science can produce.17 It is possible that the last sentence is an oblique reference to the use of the atomic bomb at the war's end. But aside from that, Morison seems actually to overstate the extraordinary character of the counterviolence against the Japanese (we did, after all, grant quarter) in order to rationalize the strength of his sentiments. Note too the dramatization of the conflict as a vindication of our cultural masculinity against the accusations of "effeteness." **The trope of savage war thus enriches the symbolic meaning of specific acts of war, transforming them into episodes of character building, moral vindication, and regeneration**. At the same time it provides advance justification for a pressing of the war to the extreme point of extermination, "war without quarter": and it puts the moral responsibility for that outcome on the enemy, which is to say, on its predicted victims. As we analyze the structure and meaning of this mythology of violence, it is important that we keep in mind the distinction between the myth and the real-world situations and practices to which it refers. Mythology reproduces the world with its significances heightened beyond normal measure, so that the smallest actions are heavy with cosmic significances, and every conflict appears to press toward ultimate fatalities and final solutions. The American mythology of violence continually invokes the prospect of genocidal warfare and apocalyptic, world-destroying massacres; and there is enough violence in the history of the Indian wars, the slave trade, the labor/management strife of industrialization, the crimes and riots of our chaotic urbanization, and our wars against nationalist and Communist insurgencies in Asia and Latin America to justify many critics in the belief that America is an exceptionally violent society.

#### The Korematsu Era decisions are among the worst in history by every criteria---the social and human impact of institutional violence is incalculable

Erwin Chemerinsky 11, Dean and Distinguished Professor of La w, University of California, Irvine School of Law, April 1st, 2011, "Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated," Pepperdine Law Review, pepperdinelawreview.com/wp-content/plugins/bag-thumb/bag\_thumb885\_07\_chemerinsky\_camera\_ready.pdf

III. WHY KOREMATSU WAS ONE OF THE WORST DECISIONS IN HISTORY¶ Applying the criteria described above, there is no doubt that Korematsu belongs on the list of the worst Supreme Court rulings. First, in terms of the social and human impact, 110,000 Japanese-Americans, aliens, and citizens—and 70,000 were citizens—were uprooted from their life-long homes and placed in what President Franklin Roosevelt called “concentration camps.” 18 For many, if not most of them, their property was seized and taken without due process or compensation. They were incarcerated. The only determinate that was used in this process was race. William Manchester, in a stunning history of the twentieth century, The Glory and the Dream, gives this description:¶ Under Executive Order 9066, as interpreted by General De Witt, voluntary migration ended on March 27. People of Japanese descent were given forty-eight hours to dispose of their homes, businesses, and furniture; during their period of resettlement they would be permitted to carry only personal belongings, in hand luggage. All razors and liquor would be confiscated. Investments and bank accounts were forfeited. Denied the right to appeal, or even protest, the Issei thus lost seventy million dollars in farm acreage and equipment, thirty-five million in fruits and vegetables, nearly a half-billion in annual income, and savings, stocks, and bonds beyond reckoning.19¶ Manchester describes what occurred:¶ Beginning at dawn on Monday, March 30, copies of General De Witt’s Civilian Exclusion Order No. 20 affecting persons “of Japanese ancestry” were nailed to doors, like quarantine notices. It was a brisk Army operation; toddlers too young to speak were issued tags, like luggage, and presently truck convoys drew up. From the sidewalks soldiers shouted, “Out Japs!”—an order chillingly like [what] Anne Frank was hearing from German soldiers on Dutch pavements. The trucks took the internees to fifteen assembly areas, among them a Yakima, Washington, brewery, Pasadena’s Rose Bowl, and racetracks in Santa Anita and Tanforan. The tracks were the worst; there, families were housed in horse stalls.¶ . . . .¶ The President never visited these bleak garrisons, but he once referred to them as “concentration camps.” That is precisely what they were. The average family of six or seven members was allowed an “apartment” measuring twenty by twenty-five feet. None had a stove or running water. Each block of barracks shared a community laundry, mess hall, latrines, and open shower stalls, where women had to bathe in full view of the sentries. 20¶ The human impact of the actions of the United States government towards Japanese-Americans during World War II cannot be overstated. It is almost beyond comprehension that our government could imprison 110,000 people solely because of their race.**¶** In terms of the judicial reasoning, Korematsu was also a terrible decision. Interestingly, Korematsu is the first case where the Supreme Court used the language of “suspect” classifications. 21 The Court did not use the phrasing of “strict scrutiny,” which came later, but the Court certainly was implying that racial classifications warrant what later came to be referred to as strict scrutiny. 22 Strict scrutiny, of course, means that a government action will be upheld only if it is necessary to achieve a compelling government interest.

#### Korematsu targeted the Japanese solely because of their national origin, but American Italians and Germans were not detained as a group. Racism must be rejected in every instance

Albert Memmi 2k, Professor Emeritus of Sociology @ U of Paris, Naiteire, Racism, Translated by Steve Martinot, p. 163-165

The struggle against racism will be long, difficult, without intermission, without remission, probably never achieved. Yet, for this very reason, it is a struggle to be undertaken without surcease and without concessions. One cannot be indulgent toward racism; one must not even let the monster in the house, especially not in a mask. To give it merely a foothold means to augment the bestial part in us and in other people, which is to diminish what is human. To accept the racist universe to the slightest degree is to endorse fear, injustice, and violence. It is to accept the persistence of the dark history in which we still largely live. it is to agree that the outsider will always be a possible victim (and which man is not himself an outsider relative to someone else?. Racism illustrates, in sum, the inevitable negativity of the condition of the dominated that is, it illuminates in a certain sense the entire human condition. The anti-racist struggle, difficult though it is, and always in question, is nevertheless one of the prologues to the ultimate passage from animosity to humanity. In that sense, we cannot fail to rise to the racist challenge. However, it remains true that one’s moral conduit only emerges from a choice: one has to want it. It is a choice among other choices, and always debatable in its foundations and its consequences. Let us say, broadly speaking, that the choice to conduct oneself morally is the condition for the establishment of a human order, for which racism is the very negation. This is almost a redundancy. One cannot found a moral order, let alone a legislative order, on racism, because racism signifies the exclusion of the other, and his or her subjection to violence and domination. From an ethical point of view, if one can deploy a little religious language, racism is ‘the truly capital sin. It is not an accident that almost all of humanity’s spiritual traditions counsels respect for the weak, for orphans, widows, or strangers. It is not just a question of theoretical morality and disinterested commandments. Such unanimity in the safeguarding of the other suggests the real utility of such sentiments. All things considered, we have an interest in banishing injustice, because injustice engenders violence and death. Of course, this is debatable. There are those who think that if one is strong enough, the assault on and oppression of others is permissible. Bur no one is ever sure of remaining the strongest. One day, perhaps, the roles will be reversed. All unjust society contains within itself the seeds of its own death. It is probably smarter to treat others with respect so that they treat you with respect. “Recall.” says the Bible, “that you were once a stranger in Egypt,” which means both that you ought to respect the stranger because you were a stranger yourself and that you risk becoming one again someday. It is an ethical and a practical appeal—indeed, it is a contract, however implicit it might be. In short, the refusal of racism is the condition for all theoretical and practical morality because, in the end, the ethical choice commands the political choice, a just society must be a society accepted by all. If this contractual principle is not accepted, then only conflict, violence, and destruction will be our lot. If it is accepted, we can hope someday to live in peace. True, it is a wager, but the stakes are irresistible.

#### The Internment Case precedents make future internment likely

Nathan Watanabe 4, J.D. Candidate, University of Southern California Law School, 2004, "Internment, Civil Liberties, and a Nation in Crisis," Southern California Interdisciplinary Law Journal, 13 S. Cal. Interdisc. L. J. 2003-2004, Hein Online

The Internment Cases' Court failed to address the "necessity" aspect of heightened scrutiny. The Courts' analyses granted the government with far more "wiggle room" than any modern court would dare provide. The term "necessary" entails a close-fit between the government's means to achieving its compelling end; it cannot be substantially over or under- inclusive.66 For example, even if preventing terrorism represents a worthwhile pursuit, the government cannot exclude Arabs from large buildings as such a policy would be both substantially over-inclusive (because all Arabs are not terrorists) and under-inclusive (because all terrorists are not Arabs). Hirabayashi literally did not address the potential burdens and overbreadth of the military imposed curfew for Japanese Americans.67 On the other hand, Korematsu did briefly ponder the higher burden of being excluded from one's home versus being subject to a curfew.68 Despite mentioning these hardships, the Court seems to have merged the "means-ends fit" analysis with the "compelling interest" portion of heightened scrutiny as it completely dismisses the burdens as a necessary wartime hardship and part of maintaining national security.69 It did not independently address whether the hardships incurred by the Japanese Americans were so "overreaching" or "burdensome" that there had to exist a less restrictive alternative to bolster national security. If anything, the Korematsu majority's terse mention of the hardships appears almost perfunctory as shown in Justice Owen Robert's dissent.7° The Court's language in the Internment Cases also indicates a somewhat ambiguous definition of what exactly constitutes a "compelling government interest." Admittedly, judicial scrutiny represents a value judgment based on the totality of the circumstances, such that determining the level of deference owed to the government in scrutinizing its actions becomes a daunting task for the Court. Justice Stone, however, deployed his "newly forged" invention of heightened scrutiny before the legal community could explore its intricacies. As such, heightened scrutiny appeared before scholars characterized it as "strict in theory and fatal in fact.",71¶ Korematsu states that while "a pressing public necessity" may sometimes justify classification, "racial antagonism never can.72 Taken as they are, the words "pressing public necessity" imply absolutely anything the government finds to be gnawing at its heel. The only limitation the Court places on a "pressing public necessity" is the absence of any openly racist justifications. Within the context of the Court's analysis, one can find some rigidity to the "pressing public necessity" requirement as it explained the special circumstances of war and the dangers of an unascertainable number of enemy saboteurs among the Japanese American population.73 Then again, any justification can appear "necessary" with competent lawyering. The Court offered little on the basis of comparison to give teeth to the standard of review, basing most of its analysis on the equally ambiguous Hirabayashi case.74¶ Justice Stone's language in Hirabayashi seems to imply that the court's conception of "rigid scrutiny" is not necessarily rigid when compared to modern formulations of judicial scrutiny for facially racial classifications. The Court stated that it was "enough" that circumstances within the knowledge of the military afforded a "rational basis for the decision which they made.75 Modern "rational basis review" is extremely deferential to the government interest - so much so that any conceivable constitutional purpose, even if it is not the government's actual purpose, will justify upholding the law.76¶ Contextually, however, Justice Stone probably meant for this rational basis formulation to possess less government deference than the rubberstamp interpretation it holds today. Within the decision, he prefaced his application of the standard by generally condemning government racial classifications.77 It would not make sense logically to condemn a practice and then excuse it without any compelling justification. Furthermore, it is clear that the standard by which Justice Stone conducted his equal protection analysis followed his Carolene Products footnote, as it fell in stride with a series of post-Carolene dissents in which he appealed for greater minority protection.78¶ Although Stone offered precedents to further explicate the components of heightened scrutiny for racial classifications in Hirabayashi, the cases do little to elaborate on his original query posed in Carolene Products. Setting up the standard for heightened scrutiny, he listed Yick Wo v. Hopkins ("Yick Wo"), 79 Yu Cong Eng v. Trinidad ("Yu Cong Eng"), 80 and Hill v. Texas ("Hill") 81 as examples of racial classifications failing to meet the standard.82 However, he conceded that these precedents would be controlling, "were it not for the fact that the danger of espionage and sabotage, in time of war ... calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."83 Stone's language, "were it not for," seems to distinguish the use of heightened scrutiny altogether in the face of military necessity, and the decision itself fails to debate the validity of the government's justification or the means with which to achieve it.¶ Even the cases themselves shed little light on the intricacies of heightened scrutiny.84 Although the Court generally deplored the discriminatory results and application of the laws considered in those cases, its lengthy discussions on the merits of the government's purposes were unnecessary since, in all three cases, they were clearly discriminatory.85 Therefore, in Hirabayashi, Stone did not compare the government purpose of military necessity to any cases involving government purposes that were outright irrational. Consequently, the majority simply "shot from the hip" in making its value judgment.¶ Despite the circumstances under which they were decided, the Internment Cases have not been overruled and represent good law today. Some may argue that even without the formality of a Supreme Court ruling, lower courts have overturned the convictions of Gordon Hirabayashi and Fred Korematsu, placing the original decisions in jeopardy.86 In fact, a recent article in the Georgetown Immigration Law Journal commented that Korematsu is dead law in light of the 2001 Supreme Court decision, Zadvydas v. Davis.87 These criticisms, however, fail to actually phase out the Internment Cases' core legal analysis.¶ Lower courts overturned Hirabayashi and Korematsu's convictions on the basis of a factual error, but they did not overrule the legal analysis relied upon in the original Internment Cases. Hirabayashi and Korematsu challenged their convictions in the mid-1980s after the Commission on Wartime Relocation and Internment of Civilians ("CWRIC") unearthed a drove of information suggesting that the government knowingly suppressed and altered evidence during the original trial.88 Their cause of action, however, limited them to only challenging the factual errors leading to their convictions and not the law itself. Hirabayashi and Korematsu each petitioned the court under a writ of coram nobis, which allows petitioners to challenge a federal criminal conviction obtained by constitutional or fundamental error that renders a proceeding irregular and invalid.89 Although Korematsu argued that under current constitutional standards his conviction would not survive strict scrutiny, the Court dismissed his argument, noting that "the writ of coram nobis [is] used to correct errors of fact," and "[is] not used to correct legal errors and this court has no power, nor does it attempt, to correct any such errors."90 The court hearing Hirabayashi's coram nobis petition simply ignored the issue entirely.9' Although the Georgetown article interprets Zadvydas' reasoning to overrule the Internment Cases, the actual holding of the case is limited to modifying a post-removal-period detention statute, and, even if applied broadly, does not rule out the possibility of infinitely detaining "specially dangerous individuals."92 Zadvydas concerned a statute which allows the government to detain a deportable alien if it has not been able to secure the alien's removal during a 90-day statutory "removal period.93 The Court held that the statute implies a limit on the post-removal detention period, which the article interprets as an all-out ban on indefinite detentions of immigrants or citizens without due process.94 Factually, the Zadvydas statute applies to a procedurally narrower class of people than the Internment Orders (aliens adjudged to be deported versus aliens suspected of espionage) and appears to serve a less "urgent" purpose in "ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community.,95 Therefore, it may be argued that the two cases are not factually analogous. Even if they are, Zadvydas' holding itself does not preclude the possibility of indefinitely detaining particularly dangerous individuals without due process.96 The Court set aside this particular exception to the general rule, stating that such detainment is constitutionally suspect.97 The Zadvydas statute did not target dangerous individuals, such as terrorists; therefore, it did not fit within the exception because it broadly applied to even the most innocuous tourist visa violators.98 In Hirabayashi and Korematsu, the Court upheld the orders because the government, despite falsifying the evidence, convinced the Court that Japanese Americans and immigrants presented an acute danger to national security. Lastly, Zadvydas did not contain any references to either Internment Case, so it is probably safe to assume that the Court did not intend to overrule them in the process.¶ The greatest evidence, however, that the Internment Cases are still live precedents is that current cases still cite to them. Ninth Circuit decision Johnson v. State of California 99 cited to Hirabayashi on February 25, 2003, and American Federation of Government Employees (AFL-CIO) v. United States referred to Korematsu on March 29, 2002.0° Both cases used Hirabayashi and Korematsu as authority for strictly scrutinizing government racial classifications. Additionally, the United States Supreme Court cited the Internment Cases as authority on the relationship between strict scrutiny and race.'0' In fact, many cases have referred to the Internment Cases for this purpose, as they represent the Supreme Court's first formulation of heightened scrutiny. The scope of the Internment Cases' precedent, however, extends beyond simply establishing strict scrutiny for racial classifications, and includes the Supreme Court's commentary on the circumstances in which such "odious'1T2 measures are justifiable. The recalcitrant position that this justification occupies in Supreme Court case history poses the greatest threat to present-day civil liberties.¶ With respect to the current cases challenging the executive orders invoked in the wake of the September l1th attacks, Korematsu and Hirabayashi may offer virtually unlimited deference **to the government in its efforts to maintain national security in times of war.** Hirabayashi (upon which Korematsu based its analysis) characterized the war power of the federal government as the "power to wage war successfully" that "extends to every matter so related to war as substantially to affect its conduct, and embraces every phase of the national defense[.]"'103 By approving the wholesale detainment of an entire ethnic group in order to prevent potential sabotage, the Court provided the government a very wide berth in determining the neccesary actions in waging a successful war. Such a precedent ostensibly allows the government to use a "declaration of war" as a proxy for any action it sees fit. "War" then releases the government from any obligations to equal protection and other Constitutional rights. Thus, Padilla's characterization of the current terrorist scenario as one in which the President's war powers are invoked'04 renders Hirabayashi and Korematsu applicable.¶ The government has already crept toward the direction predicted by the Internment Cases. Prior to Hamdi and Padilla, Congress passed a joint resolution empowering the President to take all "necessary and appropriate" measures to prevent any future acts of terrorism against the United States.105 Hamdi itself implicitly acknowledged the Internment Cases' precedent in its explanation of the President's war power, by referencing the Supreme Court's tendency to defer to the political branches when "called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs."' Coincidentally, both Hamdi and Hirabayashi cite to Ex parte Quirin ("Quirin"), a case involving the due process rights of German saboteurs caught on American soil, to derive the broad authority given to the President during times of war.'07 Although Hamdi paid lip service to the idea that executive wartime authority is not unlimited,108 it also stated, "the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally."'109¶ Even if the President's war power is invoked, one might argue that in 1971 the legislature statutorily curtailed the President's discretionary power to detain citizens by first requiring an "Act of Congress."10 Although argued in the government's brief in the Korematsu coram nobis case as a pre-existing legislative barrier to future mass-internments, the statute does little to limit the Internment Cases' authority.' The legislature did, in fact, approve the executive order under which Korematsu was convicted.' 2 The government may have characterized this approval as an isolated incident that was repealed in 1976,13 but Hamdi and Padilla subsequently refuted any notion that occurences of congressional approval are few and far between. Both cases exempted President Bush's detainment executive order stating that the prior joint resolution granting the President "necessary and appropriate" authority constituted an "Act of Congress."' 14 Although in theory the 1971 statute makes it more difficult for the President to detain citizens by requiring congressional approval, the joint resolution that quickly followed the terrorist attacks demonstrates that Congress is not reluctant to give its authorization.¶ **The** broad presidential war authority precedent **established in the Internment Cases appears to act as an all-purpose compelling government interest, which may** allow the government to openly target ethnic and religious groups **associated with terrorism**. The current executive orders tiptoe around equal protection issues given that they do not specifically call for the detention of Arabs or Muslims. Even if the government detains a disproportionate number of people who are members of these groups, the government's actions are unchallengeable on these grounds without proof of a discriminatory purpose. Now, with Hirabayashi and Korematsu as accessible precedents, the government may openly profile suspect groups by entirely quashing the equal protection issue. Even if the government bases its correlations off of unreliable research tainted with racial prejudice, as long as the Court is unaware of these transgressions, the government can argue in the vein of Hirabayashi that such classifications are logically related to preserving national security. Though neither Hamdi nor Padilla involved an equal protection issue, their deference to government war authority foreshadows a Hirabayashi extension of that authority to facially racial classifications.¶ One factor hindering the use of the Internment Cases is that they were decided in a very different time and under a dated legal standard. The fact that the Internment Cases emerged under a less-developed form of strict scrutiny makes it less tenable that something as extreme as a full-scale exclusion and internment of an ethnic group will occur again. Moreover, it is always possible that the Hirabayashi and Korematsu Courts' ambiguity in defining a compelling interest may even limit the clout "national security" carries as an end-all government purpose.¶ Even with these historical and contextual roadblocks, cases decided after the Internment Cases effectively touched up their anachronistic blemishes. Adarand Constructors, Inc. v. Pena referred to Korematsu and Hirabayashi in delineating its standard of heightened scrutiny, confirming that the two previous cases did, in fact, employ some version of strict scrutiny at the time.1"5 Furthermore, Adarand explicitly rejected the long- held notion that "strict scrutiny is strict in theory, and fatal in fact," which although more of an academic characterization, highlights the surmountability of heightened scrutiny. Still, it is almost impossible for the government to intern an entire ethnic group because it is not narrowly tailored to, nor the least restrictive alternative for, the government's interest in protecting national security. This construction of strict scrutiny, however, does not rule out inconveniences slightly less than Internment and leaves open the possibility of, for example, mandatory baggage searches for all Arab-American airplane passengers. Furthermore, **there is always the possibility of a Court resorting to Korematsu's "balancing out" of the narrow tailoring requirement for "hardships are part of war, and war is an aggregation of hardships."**'17 Moreover, even if the Internment Cases' outdated methodology of judicial review precludes them from being applied in a modern equal protection analysis, it still does not affect the broad authority given the President to "wage war successfully." Indeed, no precedent explicitly bars uses of the Internment Cases**, and** in the crises- minded state of our present times, these relics of the past are factually analogous and legally applicable.

#### Plan

#### The ongoing legacy of the Korematsu Era war powers authority cases should be repudiated and ended.

### 1ac- solvency

#### Contention Two is the revision

#### While Korematsu should be repudiated for its racist underpinnings, a singular focus on explicit discrimination is insufficient. Korematsu was not decided along racial lines, which illustrates how presidential war powers justification serves as a vector for opression. Furthermore, Bush lawyers revived Korematsu and concurrant military cases to justify the war on terror, and insufficient exposure to this historical legacy prevented effective legal opposition. Resistance to presidential war powers must begin with an investigation and repudiation of the “Korematsu era”. This will faciliate meaningful restraints on the executive and reclaim the narrative of war on terror legality.

Craig Green 11, Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School, 2011, "Ending the Korematsu Era: An Early View from the War on Terror Cases," Northwestern University School of Law, Vol. 105, No. 3,www.law.northwestern.edu/lawreview/v105/n3/983/LR105n3Green.pdf

INTRODUCTION

When President George W. Bush started the Global War on Terror (GWOT) in response to the 9/11 attacks, the United States legal community was as unprepared as the country.1 Bush immediately asserted presidential wartime prerogatives and drew analogies to the last great war, World War II.2 Yet as the Bush Administration designed policies of “executive detention” and “military commissions,” most civilian lawyers had never heard those terms, much less analyzed their constitutional limits.3 In this instance, **unfamiliarity bred power**, as executive lawyers seized political initiative and created unforeseen opportunities for abuse. A main element of the Bush legal strategy was reliance on cases from what I call the “Korematsu era.”5 Every American lawyer knows Korematsu v. United States as a discredited precedent.6 Yet conventional wisdom has too often viewed Korematsu narrowly as a singular error in Supreme Court history concerning the racist internment of United States citizens.7 That portrayal allowed President Bush’s legal advisers to sideline Korematsu’s “negative precedent” as categorically separate from twenty-firstcentury events even as the Administration cited other World War II deci- sions as “good law” to support unrestrained executive power.8 Unlike the government’s actions in Korematsu, modern detention policies do not typically involve United States citizens, explicit racial classifications, wholesale detention, or restraint in the American homeland. For lawyers who focus on those differences, any comparison between modern detention and the internment in Korematsu must seem wildly exaggerated.9 This Article offers a different view of Korematsu with correspondingly different implications. **By revisiting Korematsu’s historical context, I suggest that the decision extends beyond its racist facts and embodies a general theory of presidential war powers**. Controversies continue today over the President’s authority to fight terrorism and pursue American policy. And this Article’s hindsight about precedents from the Roosevelt, Truman, and Bush Administrations may offer valuable foresight about what is yet to come. The Article proceeds in three steps. Part I applies a mix of doctrine and history to identify the Korematsu era as a category of Supreme Court cases and thereby disputes narrow conventions about Korematsu’s meaning. Commonalities among Korematsu and other mid-century precedents concerning executive detention and military commissions show that these cases all implemented Korematsu’s distinctive view of executive authority. As with the “Lochner era’s” approach to economic liberty or the “Civil Rights era’s” approach to legal equality,10 conceptualizing war power precedents as a distinct Korematsu “era” can make a real difference for legal culture and judicial results, augmenting lawyers’ litigative vocabulary and offering distinct perspectives on past and future problems.11 Analysis of the Court’s votes, language, and context12 shows that the originally dominant feature of Korematsu-era case law was not racism but a permissive approach to asserted military necessity and unsupervised presidential activity. Korematsu’s sixty-five-year-old bigotry, which so deeply offends modern morals, was secondary to the Court’s judgments about war powers and executive deference. In addition to descriptively synthesizing an era of cases applying high deference to asserted military necessity, Part I uses subsequent history to show that the Korematsu era has—apart from issues of racism—earned its eponymous place in the legal hall of shame. With each passing decade, Korematsu- era case law has become less defensible and authoritative. However, even as Korematsu’s significance has waned as a precedent concerning race and equal protection, the Korematsu era remains highly relevant to a certain type of war powers case: “Youngstown One” decisions where Congress has approved the presidential policy under review.13 Part II applies my revisionist perspective14 to the recent past, documenting how Bush Administration lawyers used Korematsu-era precedents to bolster theories of Article II and the unitary executive.15 Expansive theories of executive power have sometimes been derided as lawless or even arrogant. 16 Yet I suggest that some of the Bush Administration’s supporting precedents were facially plausible even though they were ultimately rejected. 17 Because few modern lawyers would defend Korematsu itself, presidential advisers relied on other Korematsu-era cases that embodied the same stance toward presidential power without Korematsu’s racist taint.18 In effect, however, Korematsu-era precedents were a constitutional time capsule from the distant and forgotten past. When the Bush Administration had occasion to invoke such authorities, they had become antiquated, ineffective, and even dangerous. From this Article’s viewpoint, the diminution of Korematsu-era precedents’ doctrinal force is a major theme in recent jurisprudence. Since 2004, the Supreme Court has issued a historically unmatched number of decisions limiting executive war powers.19 Each of these cases has been decided narrowly, on specific legal grounds, with little effort to explicitly contradict Korematsu-era precedents or upset the constitutional status quo.20 Nonetheless, I propose that the Court’s recent decisions undermine the Korematsu era’s most basic principle: that courts are institutionally unable to second guess presidential claims of military necessity. Even as the modern Court has focused on doctrinal technicalities, it has repeatedly set aside military claims about what is necessary to keep our country safe. My approach suggests that these rulings mark an important repudiation of the Korematsu era, which might thereby guard against future executive abuse. Part III explores how this Article’s arguments against the Korematsu era might affect modern legal culture. Correcting abusive executive policies— whether or not they include racial classifications—requires more than shame and regret over past wrongs. Vigilance against future repetition is important, and attorneys have a crucial role to play. In the twenty-first century, one set of lawyers designed and approved policies concerning presidential war powers, another group of lawyers litigated to overturn those policies, and yet a third set of lawyers decided who should prevail.21 Future war powers controversies will probably follow a similarly law-intensive pattern. Recent repudiations of Korematsu-era attitudes could offer an important defense against future presidential excess, but the Court’s subtle language illustrates that “[n]ot every epochal case has come in epochal trappings.”22 It can be hard to draw broad lessons from war powers cases because—compared to other constitutional topics—such issues arise in fitful clusters and under enormous political pressure. Every war powers crisis seems different from the last, and responsive Presidents will use every available means to undermine limits on their authority.23 With a different President and several new Justices, the next decade could influence how future generations of lawyers and judges comprehend separation of powers and wartime prerogatives. And if the GWOT precedents’ meaning is up for grabs, now may be just the time to recognize and explain the Court’s rejection of the Korematsu era. As a matter of legal cul- ture, Korematsu’s shift from a generally applicable war powers case to a narrower case about race demonstrates how the fade of doctrinal memory can operate. If we cannot even today understand the GWOT cases as renouncing Korematsu’s essence, presidential lawyers in the future will more easily dismiss such precedents as idiosyncrasies, old cases that should not govern new crises. The characteristic infrequency of such crises means that each one will typically involve different facts. By contrast, if the United States were to suffer an attack in the short run, this decade’s jurisprudence might be the only chance to avoid past mistakes. In either event, it is not too early to discuss modern steps to reject the Korematsu era; such analysis should begin before collective forgetting is complete. In American law, great judicial decisions are important because they reflect much more than their strict doctrinal holdings. Iconic cases like Korematsu, Marbury, Dred Scott, Lochner, Erie, and Brown are unquestionably important, but their interpretations prompt endless debate and struggle.24 Although the meanings of these iconic cases are partly determined by other judicial decisions, **legal commentators and academics can indirectly shape doctrinal interpretation as they educate and train each new crop of judges and presidential lawyers.** These latter advisers- and jurists-in-training will someday determine the authoritative meaning of Korematsu and the GWOT as well. This Article’s historical perspective aspires to help current and future generations in confronting their own debates over how judicial and presidential powers interact during wartime.

#### Internment based on Korematsu precedent is inevitable unless it is repudiated [Antonin Scalia chuckles to himself]

Ilya Somin, 2/8/2014. Professor of Law at George Mason University School of Law. “Justice Scalia on Kelo and Korematsu,” The Volokh Conspiracy, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/08/justice-scalia-on-kelo-and-korematsu/.

In a recent speech in Hawaii, Supreme Court Justice Antonin Scalia made some interesting predictions about two of the Supreme Court’s most notorious decisions:Kelo v. City of New London (2005), which ruled that government can condemn private property and give it to other private owners to promote “economic development,” and Korematsu v. United States (1944), which upheld the internment of over 100,000 Japanese-Americans in concentration camps during World War II.

On Kelo, Scalia reiterated his 2011 prediction that the decision will eventually be overruled, stating that it “will not survive.” Kelo was a closely divided 5-4 decision (Scalia voted with the dissenters) that generated an unprecedented political backlash across the political spectrum, and has also been repudiated by every state supreme court which has considered the question of whether to adopt it as a guide to the interpretation of their state constitutions’ public use clauses. In 2011, Justice John Paul Stevens, the author of the Kelo majority opinion, conceded that he made a significant, “embarrassing to admit” error in his analysis of precedent (though he continues to defend the result on other grounds).

It is difficult to say whether Scalia’s prediction about Kelo will turn out to be correct. In the short run, a complete reversal is unlikely, because none of the five majority justices in Kelo has since been replaced by a successor likely to vote the other way in a similar future case. But history does show that closely divided, unpopular decisions are more likely to be overruled than lopsided and relatively uncontroversial ones. Justice Stevens’ admission might potentially further undermine Kelo’s reputation, thereby increasing the odds of a reversal.

On Korematsu, Scalia unequivocally stated that the ruling was “wrong,” thereby differing with the small but noteworthy group of conservatives who have defended the decision in recent years, such as Judge Richard Posner and columnist Michelle Malkin. But he also predicted that a similar internment might be upheld in the future:

“But **you are kidding yourself if you think the same thing will not happen again**,” he said.

He used a Latin expression to explain why. “Inter arma enim silent leges … In times of war, the laws fall silent.”

“That’s what was going on — the panic about the war and the invasion of the Pacific and whatnot,” Scalia said. “That’s what happens. It was wrong, but I would not be surprised to see it happen again — in time of war. It’s no justification but it is the reality.”

There is some validity to this pessimistic prediction. Courts have often let the government get away with unconstitutional actions in time of war. On the other hand, the Court has been more assertive in wartime in recent years, striking down several Bush administration policies during the War on Terror. If an unconstitutional internment enjoys overwhelming support from political elites and the general public, as happened during World War II, the Court may well not act. But it is more likely to do so in a case where public and elite opinion are at least substantially divided, as happened during the Bush Administration or the Korean War, when the Court curbed the Truman administration in the famous Youngstown case. **In my view, the errors of Korematsu are less likely to be repeated if the Court clearly repudiates that ruling**. There are also other good reasons to explicitly overrule the Japanese internment cases.

#### Debate should be a site for critical interrogation of our national history – this prevents colonial nostalgia and reinvocation of problematic narratives.

TROFANENKO 5 (Brenda, Professor in the Department of Curriculum and Instruction, University of Illinois, The Social Studies, Sept/Oct)

The debates about the overwhelming problems, limitations, and disadvantages of social studies education noted in the Fordham report attempt to reconcile and advance the idea of nation through a collective history. Our more pressing role as educators, in light of the Fordham report, is to discuss a more nuanced understanding of the U.S. history. This would advance, as noted in La Pietra Report, an understanding about “the complexity and the contexts of relations and interactions, including the ways in which they are infused with a variety of forms of power that define and result from the interconnections of distinct but related histories” (OAH 2000, 1). Taking the U.S. nation as only one example of social analysis involves recognizing the meanings and conditions out of which nations are formed. There is no one experience of belonging to a nation, no single understanding or enactment of sovereignty, and certainly no one meaning or experience of colonization or being colonized. There is, then, a need for these issues to be realized and to be a part of the questioning occurring within our classrooms. That would allow for the substantial reframing of the basic narrative of U.S. history (OAH 2000, 2). Toward a More Global Sense of the Nation Knowing how history is a site of political struggle, how we engage with social studies education means emphasizing how power, processes, and practices bear tangible effects on forging a national (and common) history by reproducing and vindicating inclusions and exclusions. Such a critique requires questioning how a singular, fixed, and static history celebrates the U.S. nation and its place in the world as that “common base of factual information about the American historical and contemporary experience” (27) argues for in the Fordham report. Our world history courses are central to defining, understanding, and knowing not only other nations but also the position of each nation in relation to the United States. **The centrality that the west holds (notably the United States as an imperial power) is ingrained and willful in framing specific representations of the west that normalize the imperial practices that established this natio**n. The role that the United States holds on the world stage frequently remains unquestioned in social studies classrooms. Certainly, we engage with various images and tropes to continue to advance how the colonialist past continues to remain present in our historical sensibilities. Moreover, the increasing number and choices of archival sources function as a complement to further understanding the nation. If students are left to rely on the variety of historical resources rather than question the use of such resources, then the most likely outcome of their learning will be the reflection on the past with **nostalgia** that continues to celebrate myths and colonial sensibility. To evaluate the history narrative now is to reconsider what it means and to develop a historical consciousness in our students that goes beyond archival and nostalgic impulses associated with the formation of the nation and U.S. nation building. We need to insist that the nation, and the past that has contributed to its present day understanding, is simultaneously material and symbolic. The nation as advanced in our histories cannot be taken as the foundational grounds. The means by which the nation is fashioned calls for examining the history through which nations are made and unmade. To admit the participatory nature of knowledge and to invite an active and critical engagement with the world so that students can come to question the authority of historical texts will, I hope, result in students’ realizing that the classroom is not solely a place to learn about the nation and being a national, but rather a place to develop a common understanding of how a nation is often formed through sameness. We need to continue to question how a particular national history is necessary as an educational function, but especially how that element has been, and remains, useful at specific times. My hope is to extend the current critique of history within social studies, to move toward understanding why history and nation still needs a place in social studies education. In understanding how the historicity of nation serves as “the ideological alibi of the territorial state” (Appadurai 1996, 159) offers us a starting point. The challenge facing social studies educators is how we can succeed in questioning nation, not by displacing it from center stage but by considering how it is central. That means understanding how powerfully engrained the history of a nation is within education and how a significant amount of learning is centered around the nation and its history. History is a forum for assessing and understanding the study of change over time, which shapes the possibilities of knowledge itself. We need to reconsider the mechanisms used in our own teaching, which need to be more than considering history as a nostalgic reminiscence of the time when the nation was formed. We need to be questioning the contexts for learning that can no longer be normalized through history’s constituted purpose. The changing political and social contexts of public history have brought new opportunities for educators to work through the tensions facing social studies education and its educational value to teachers and students. Increasing concerns with issues of racism, equality, and the plurality of identities and histories mean that there is no unified knowledge as the result of history, only contested subjects whose multilayered and often contradictory voices and experiences intermingle with partial histories that are presented as unified. This does not represent a problem, but rather an opportunity for genuine productive study, discussion, and learning.

#### Japanese internment is currently remembered as a vacated history because we foreground the legal impact of Korematsu over the cultural impact of the era. By complicating binary conceptions and prioritizing the active process of doing and revising history, we disrupt ongoing incorporation and cooption of the era’s deep significance

Caroline Chung SIMPSON, Associate Professor of English @ Washington, 1 [2001, *An Absent Presence*, p. 1-9]

#### Card is on paper

#### Korematsu survives silently as a precedent for future violence---only public debate can prevent history from repeating itself

Dean Masaru Hashimoto 96, Assistant Professor of Law at Boston College, “ARTICLE: THE LEGACY OF KOREMATSU V. UNITED STATES: A DANGEROUS NARRATIVE RETOLD”, Fall 1996, 4 UCLA Asian Pac. AM. Law Journal 72, Lexis

During times of war, citizens must bear tremendous costs and burdens; indeed, sometimes they even surrender their lives. So was the nation's treatment of Japanese Americans so intolerable in view of wartime exigency? Part I examines the constitutional analysis considering this question in Korematsu v. United States. n35 Declaring that "hardships are part of war," n36 the Court upheld a military order that excluded persons of Japanese ancestry from designated coastal areas. The Court began, however, by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." n37 But it ultimately relied on the precedent set by United States v. Hirabayashi, n38 which upheld a similar curfew. The Court's analysis turned on whether the military order was within the war powers of the President and Congress.¶ [\*77] However, the Court's opinion in Korematsu has been aptly called "a muddled hodge-podge of conflicting and barely articulate doctrine." n39 Its mixed messages later were misinterpreted by the Court itself. The popular wisdom is that Korematsu has been, in fact, overruled as evidenced by the criticism it has received. n40 Nevertheless, the Court continues to cite and rely on Korematsu in modern cases. Most recently, in Adarand Constructors, Inc. v. Pena, n41 for example, the Court explicitly claimed that it relied on Korematsu in overruling more recent precedent that had applied intermediate scrutiny to federal affirmative action programs. The Court offered two conflicting interpretations of Korematsu and described its result as "inexplicable." n42 In its first interpretation, the Court concluded that although it had set forth the "most rigid scrutiny" standard in Korematsu, it "then inexplicably relied on 'the principles we announced in the Hirabayashi case,'" n43 which held that the "Fifth Amendment 'restrains only such discriminatory legislation by Congress as amounts to a denial of due process.'" n44 In this interpretation, the Court indicated that it had not applied a strict scrutiny test in Korematsu. Later, in the same opinion, however, the Court offered yet a different interpretation of Korematsu. The Court noted that Korematsu has been repeatedly cited for the proposition that racial classifications made by the federal government must be subject to strict scrutiny n45 and concluded that Korematsu teaches that "even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification." n46 The Court's second interpretation of Korematsu assumes that it had applied strict scrutiny. Part I explores these two contradictory views.¶ Part I also considers the role of Korematsu as legal precedent. n47 Since the 1980s, various individuals, groups, and courts have pronounced Korematsu insignificant. [\*78] Yet, despite declarations that Korematsu is of little precedential significance in the modern day, the Court has not explicitly overruled it. Instead, the Court gives Korematsu meaning in several different ways. Part I describes and criticizes the logic of those who claim that Korematsu is no longer influential as precedent. Part I also shows how Korematsu has been perpetuated as precedent. The Court has abandoned its reliance on traditional stare decisis in interpreting Korematsu. Instead, it has relied on interpretive methods that either exaggerate the amount of judicial scrutiny imposed or perpetuate the legal principles of Korematsu without citation to the case. The Court also uses Korematsu based on its historical meaning. The Court's modern interpretation of Korematsu places more emphasis on the persuasive quality of the case as precedent instead of confronting its logic. This rhetorical orientation allows the legal principle contained in Korematsu to survive and flourish silently.¶ The modern Court's difficulty in understanding Korematsu and its distortion as precedent had its genesis in the Korematsu Court's failure to provide a logical explanation for reaching its result and choosing instead to rely on persuasive rhetoric. To describe and explain the opinion's lack of an integrated analysis, I take a narrative-based approach to interpreting Korematsu. n48 This technique is sensitive to the intertwined roles of rhetoric and logic as well as to social influences involved in the creation of narratives and their subsequent transformations. Part II traces the origins of the narratives incorporated into the Court's written opinion and considers other available narratives ignored by the Court, particularly those of the parties most intimately involved: Korematsu and DeWitt. Part II also describes how the Court integrated and attributed meanings to the narratives contained within Korematsu. The section next offers and analyzes a two-tiered decisionmaking model for how narratives [\*79] may have been selected for integration into the Court's opinion. Then, I develop the idea that the Court's emphasis on choosing narratives and assigning them meaning based on persuasive appeal, rather than on their logical relevance resulted in the disjointed quality of the written opinion. This practice led to the failure to establish what I term the "interpretive-narrative link" -- a meaningful connection between the narrative and the Court's rule of law. The failure to establish this link caused the disharmony among messages within the opinion about the standard of review imposed.¶ Part III explains why the Court should privilege adjudication based on the narrative-interpretive link. This is not a call for less rhetoric; it would be naive to deprecate its importance. Instead, this is a plea for more explicit logical connections. The Court has excessively favored persuasive appeal over logical analysis in its use of Korematsu as precedent. The Court should confront Korematsu when it is logically relevant to a case. The Justices ought to provide explanation about how Korematsu is interpreted, despite rhetorical cost. Emphasis on the importance of the interpretive-narrative link in doctrinal interpretation would mean explicitly acknowledging Korematsu's legal presence through the traditional method of stare decisis as well as through historical interpretation. I call, however, for an abandonment of interpretive methods that rely on exaggeration based on the rhetoric contained within Korematsu and also for discarding those that permit reliance sub silentio. Only through continuing public conversations about the modern-day meaning of Korematsu can its potentially dangerous principles and rhetoric be limited effectively.

#### Student debate about internment is critical to actual political development---influences the durable shifts in checks and balances

Dominguez and Thoren 10 Casey BK, Department of Political Science and IR at the University of San Diego and Kim, University of San Diego, Paper prepared for the Annual Meeting of the Western Political Science Association, San Francisco, California, April 1-3, 2010, “The Evolution of Presidential Authority in War Powers”, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1580395

Students of American institutions should naturally be interested in the relationships between the president and Congress. However, the evolution of war powers falls into a category of inquiry that is important not just to studies of the presidency or to students of history, but also to the field of American Political Development. Among Orren and Skowronek’s recommendations for future work in American Political Development, they argue that “shifts in governing authority,” including and especially shifts in the system of checks and balances, “are important in historical inquiry, because they are a constant object of political conflict///

and they set the conditions for subsequent politics, especially when shifts are durable” (Orren and Skowronek 2004, 139). How an essential constitutional power, that of deploying military force, changed hands from one institution to another over time, would certainly seem to qualify as a durable shift in governing authority. Cooper and Brady (1981) also recommend that researchers study change over time in Congress’ relations to the other branches of government.

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### Case

#### Overreliance on utility principles to justify executive detention power turns the lesser evil into the greater by obliterating restraints on the conduct of war – balancing legal checks and balances with security is necessary to create optimal outcomes for both

Richard Ashby Wilson 5, the Gladstein Distinguished Chair of Human Rights and Director of the Human Rights Institute at the University of Connecticut, Human Rights in the War on Terror, p. 19-21

Michael Ignatieff’s ‘lesser evil’ ethics and overreliance on a consequentialist ethics place him much closer to the anti-rights philosophical tradition of utilitarianism than the liberal tradition of human rights. Philosophically and politically, utilitarian consequentialism is about as far from an ethics of human rights as one can travel, and this is borne out in the DOJ memo’s dramatic bolstering of executive power and the sweeping away of the rights of prisoners of war. Jonathan Raban might have a point in suggesting that Ignatieff has become the ‘in-house philosopher’ of the ‘terror warriors’ (2005: 22). Lesser evil reasoning makes a virtue out of lowering accepted standards and surrendering safeguards on individual liberties. In the hands of government officials, it enables unrestrained presidential authority and a disregard for long-standing restraints on the conduct of war. Anyone remotely familiar with the history of twentieth-century Latin America will also be accustomed to ‘lesser evil’ excuses for human rights abuses, given their pervasiveness in the National Security Doctrine of numerous military dictatorships. Ignatieff is aware that a lesser evil ethics can take us down a slippery slope: ‘If a war on terror may require lesser evils, what will keep them from slowly becoming the greater evil? The only answer is democracy itself . . . The system of checks and balances and the division of powers assume the possibility of venality or incapacity in one institution or the other’ (2004: 10-11). This argument now seems rather credulous. Evidence gathered from Abu Ghraib, Guantanamo Bay and U.S. prisons in Afghanistan suggests that torture, the keeping of ‘ghost detainees’ and other violations of the Geneva Conventions were endemic within the system of military custody. By the time government officials weakly diverted blame to by denouncing a few low-ranking ‘bad apples’ in the 272nd Military Police Company, the damage had already been done, to the prisoners and to America’s standing in Iraq and the world. Even if the connection between a lesser evil ethics and a disregard for prisoners’ human rights is coincidental rather than intrinsic, lesser evil advocates have been wildly overconfident about the probity of government and the ability of democratic institutions to monitor closely the boundary between coercion and torture. The evidence points to the contrary view; that the executive branch, at the very least, fostered a legal setting in which prisoner abuse could flourish and excluded any congressional oversight. The monitoring procedures that were in place did not prevent such abuse from becoming widespread and symptomatic. The ‘lesser evil’ moral calculus that simplifies difficult decision making in an ‘age of terrorism’ is a little more complicated for others, and the DOJ memo should have at least demonstrated an awareness that the standard necessity defence case has been challenged comprehensively in jurisprudence and moral philosophy. In the 1970s, the late philosopher Bernard Williams carried out a critique of utilitarianism’s philosophy of the law so devastating that he concluded ‘the simple-mindedness of utilitarianism disqualifies it totally…the day cannot be far off in which we hear no more of it’ (1973: 150). Alas, this was the only part of Williams’ critique that was wide of the mark, since utilitarianism will probably always appeal to those longing for greater executive power. Williams examines a scenario analogous to the necessity defence cases found in the DOJ memo. He considers the case of a man, Jim, who is dropped into a South American village where he is the guest of honor. There, a soldier, Pedro, presents him with the dilemma of intentionally killing one man and saving another nineteen souls, whom Pedro was about to execute. Williams finds the utilitarian answer, that obviously Jim should kill one man to save nineteen, inadequate on a number of grounds. Generally stated, Williams’ position is that utilitarianism ignores individual integrity in its quest for the general good and it neglects the point that each of us are morally responsible for what we do, not what others do. Jim is responsible for his own actions and his not killing one man is not causal to Pedro’s subsequent killing of twenty. To advise Jim to torture or kill the one to save the many is to treat Jim as an impersonal and empty channel for effects in the world, or in Williams’ words, as a janitor of a system of values whose role is not to think or feel, but just to mop up the moral mess. The utilitarian perspective portrays an anxiety about the long-term psychological effects on the agent, say, a person’s feelings or remorse for an act of murder, as self-indulgent. It ignores the life projects to which Jim is committed, and his obligations to friends and family to act in a certain way It treats these commitments as irrational and of no consequence in its moral calculus of the greater good. In this critique, utilitarianism, of the kind that has characterized the legal counsel to President Bush in the ‘war on terror’, ignores individual moral agency and strips human life of what makes it worthwhile. Seeing persons as ends in themselves and not as means to other ends corresponds with a Kantian defence of human rights and liberal democracy more generally. In the struggle against Islamist terrorists, we are well advised to temper our desire for good consequences (which can seldom be predicted in advance) with an equal concern with intentions and integrity of motives. Consequences matter and integrity and good intentions are not in themselves sufficient. Yet developing an approach that is not overreliant on consequentialism and which foregrounds human agency, motivations and intentions could provide enduring grounds for defending human rights in the present climate. It could better equip us with the fundamental ethical principles to go about recombining human rights and security, and work through more carefully which suspensions of ordinary domestic laws and international rule of law are defensible, and which are not.

#### Deciding on the basis of the 1% risk calculation erodes priority-setting & triggers paralysis when action is needed.

David Meskill 9, professor at Colorado School of Mines and PhD from Harvard, “The "One Percent Doctrine" and Environmental Faith,” Dec 9, <http://davidmeskill.blogspot.com/2009/12/one-percent-doctrine-and-environmental.html>

Tom Friedman's piece today in the Times on the environment (http://www.nytimes.com/2009/12/09/opinion/09friedman.html?\_r=1) is one of the flimsiest pieces by a major columnist that I can remember ever reading. He applies Cheney's "one percent doctrine" (which is similar to the environmentalists' "precautionary principle") to the risk of environmental armageddon. But this doctrine is both intellectually incoherent and practically irrelevant. It is intellectually incoherent because it cannot be applied consistently in a world with many potential disaster scenarios. In addition to the global-warming risk, there's also the asteroid-hitting-the-earth risk, the terrorists-with-nuclear-weapons risk (Cheney's original scenario), the super-duper-pandemic risk, etc. Since each of these risks, on the "one percent doctrine," would deserve all of our attention, we cannot address all of them simultaneously. That is, even within the one-percent mentality, we'd have to begin prioritizing, making choices and trade-offs. But why then should we only make these trade-offs between responses to disaster scenarios? Why not also choose between them and other, much more cotidien, things we value? Why treat the unlikely but cataclysmic event as somehow fundamentally different, something that cannot be integrated into all the other calculations we make? And in fact, this is how we behave all the time. We get into our cars in order to buy a cup of coffee, even though there's some chance we will be killed on the way to the coffee shop. We are constantly risking death, if slightly, in order to pursue the things we value. Any creature that adopted the "precautionary principle" would sit at home - no, not even there, since there is some chance the building might collapse. That creature would neither be able to act, nor not act, since it would nowhere discover perfect safety. Friedman's approach reminds me somehow of Pascal's wager - quasi-religious faith masquerading as rational deliberation (as Hans Albert has pointed out, Pascal's wager itself doesn't add up: there may be a God, in fact, but it may turn out that He dislikes, and even damns, people who believe in him because they've calculated it's in their best interest to do so). As my friend James points out, it's striking how descriptions of the environmental risk always describe the situation as if it were five to midnight. It must be near midnight, since otherwise there would be no need to act. But it can never be five \*past\* midnight, since then acting would be pointless and we might as well party like it was 2099. Many religious movements - for example the early Jesus movement - have exhibited precisely this combination of traits: the looming apocalypse, with the time (just barely) to take action.

### 2AC T – Prohibit

#### We meet---plan is across the board since we can’t use Korematsu for indefinite detention

#### Restriction means a limit or qualification, and includes conditions on action

CAA 8,COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT A, STATE OF ARIZONA, Appellee, v. JEREMY RAY WAGNER, Appellant., 2008 Ariz. App. Unpub. LEXIS 613

P10 The term "restriction" is not defined by the Legislature for the purposes of the DUI statutes. See generally A.R.S. § 28-1301 (2004) (providing the "[d]efinitions" section of the DUI statutes). In the absence of a statutory definition of a term, we look to ordinary dictionary definitions and do not construe the word as being a term of art. Lee v. State, 215 Ariz. 540, 544, ¶ 15, 161 P.3d 583, 587 (App. 2007) ("When a statutory term is not explicitly defined, we assume, unless otherwise stated, that the Legislature intended to accord the word its natural and obvious meaning, which may be discerned from its dictionary definition.").

P11 The dictionary definition of "restriction" is "[a] limitation or qualification." Black's Law Dictionary 1341 (8th ed. 1999). In fact, "limited" and "restricted" are considered synonyms. See Webster's II New Collegiate Dictionary 946 (2001). Under these commonly accepted definitions, Wagner's driving privileges were "restrict[ed]" when they were "limited" by the ignition interlock requirement. Wagner was not only [\*7] statutorily required to install an ignition interlock device on all of the vehicles he operated, A.R.S. § 28-1461(A)(1)(b), but he was also prohibited from driving any vehicle that was not equipped with such a device, regardless whether he owned the vehicle or was under the influence of intoxicants, A.R.S. § 28-1464(H). These limitations constituted a restriction on Wagner's privilege to drive, for he was unable to drive in circumstances which were otherwise available to the general driving population. Thus, the rules of statutory construction dictate that the term "restriction" includes the ignition interlock device limitation.

### 2ac role playing bad

#### You should be an informed citizen, not the government – they shut down critical thinking and deliberation

Steele, 10 – Associate Professor of Political Science at the University of Kansas

(Brent, Defacing Power: The Aesthetics of Insecurity in Global Politics pg 130-132, dml) [gender/ableist language modified with brackets]

When facing these dire warnings regarding the manner in which academic-intellectuals are seduced by power, what prospects exist for parrhesia? How can academic-intellectuals speak “truth to power”? It should be noted, first, that the academic-intellectual’s **primary purpose** should not be to re-create a program to replace power or even to develop a “research program that could be employed by students of world politics,” as Robert Keohane (1989: 173) once advised the legions of the International Studies Association. Because academics are denied the “full truth” from the powerful, Foucault states, we must **avoid a trap** into which governments would want intellectuals to fall (and often they do): “**Put yourself in our place and tell us what you would do**.” This is **not a question** in which one has to answer. To make a decision on any matter requires a knowledge of the facts **refused us**, an analysis of the situation we aren’t allowed to make. There’s the trap. (2001: 453) 27 This means that any alternative order we might provide, this hypothetical “research program of our own,” will also become imbued with authority and **used for mechanisms of control**, a matter I return to in the concluding chapter of this book. When linked to a theme of counterpower, academic-intellectual parrhesia suggests, **instead**, that the academic should use his or her pulpit, their position in society, to be a “friend” “who **plays the role** of a parrhesiastes, of a truth-teller” (2001: 134). 28 When speaking of then-president Lyndon Johnson, Morgenthau gave a bit more dramatic and less amiable take that contained the same sense of urgency. **What the President needs**, then, is an intellectual ~~father~~-confessor, who dares to remind him[/her] of **the brittleness of power**, of its arrogance and ~~blindness~~ [ignorance], of its **limits** and **pitfalls**; who tells him[/her] how empires rise, decline and fall, how power turns to folly, empires to ashes. He[/she] ought to **listen to that voice** and **tremble**. (1970: 28) The primary purpose of the academic-intellectual is therefore not to just effect a moment of counterpower through parrhesia, let alone stimulate that heroic process whereby power realizes the error of its ways. So those who are skeptical that academics ever really, regarding the social sciences, make “that big of a difference” **are missing the point**. As we bear witness to what unfolds in front of us and collectively analyze the testimony of that which happened before us, the purpose of the academic is to “**tell the story**” of what actually happens, to document and faithfully capture both history’s events and context. “The intellectuals of America,” Morgenthau wrote, “can do only one thing: live by the standard of truth that is their peculiar responsibility as intellectuals and by which men of power will ultimately be judged as well” (1970: 28). This will take time, 29 but if this happens, if we seek to uncover and practice telling the truth free from the “**tact**,” “**rules**,” and **seduction** that constrain its telling, then, as Arendt notes, “humanly speaking, no more is required, and **no more can reasonably be asked**, for this planet to remain a place **fit for human habitation**” ([1964] 2006: 233).

### 2ac ptx

#### Latin America doesn’t escalate

Cárdenas, 3-17-11

[Mauricio, senior fellow and director of the Latin America Initiative at the Brookings Institution, was cabinet minister during the Gaviria and Pastrana administrations in Colombia. Think Again Latin America, Foreign Policy, <http://www.foreignpolicy.com/articles/2011/03/17/think_again_latin_america?page=full>]

"Latin America is violent and dangerous." Yes, but not unstable. Latin American countries have among the world's highest rates of crime, murder, and kidnapping. Pockets of abnormal levels of violence have emerged in countries such as Colombia -- and more recently, in Mexico, Central America, and some large cities such as Caracas. With 140,000 homicides in 2010, it is understandable how Latin America got this reputation. Each of the countries in Central America's "Northern Triangle" (Guatemala, Honduras, and El Salvador) had more murders in 2010 than the entire European Union combined. Violence in Latin America is strongly related to poverty and inequality. When combined with the insatiable international appetite for the illegal drugs produced in the region, it's a noxious brew. As strongly argued by a number of prominent regional leaders -- including Brazil's former president, Fernando H. Cardoso, and Colombia's former president, Cesar Gaviria -- a strategy based on demand reduction, rather than supply, is the only way to reduce crime in Latin America. Although some fear the Mexican drug violence could spill over into the southern United States, Latin America poses little to no threat to international peace or stability. The major global security concerns today are the proliferation of nuclear weapons and terrorism. No country in the region is in possession of nuclear weapons -- nor has expressed an interest in having them. Latin American countries, on the whole, do not have much history of engaging in cross-border wars. Despite the recent tensions on the Venezuela-Colombia border, it should be pointed out that Venezuela has never taken part in an international armed conflict. Ethnic and religious conflicts are very uncommon in Latin America. Although the region has not been immune to radical jihadist attacks -- the 1994 attack on a Jewish Community Center in Buenos Aires, for instance -- they have been rare. Terrorist attacks on the civilian population have been limited to a large extent to the FARC organization in Colombia, a tactic which contributed in large part to the organization's loss of popular support.

#### Courts shield

Whittington 5 Keith E., Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### Obama won’t push the plan---it restricts his authority so he wouldn’t expend PC

NYT 12 – Becker and Shane – NYT Staff

Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will, By JO BECKER and SCOTT SHANE, Published: May 29, 2012, New York Times, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&\_r=0

Walking out of the Archives, the president turned to his national security adviser at the time, Gen. James L. Jones, and admitted that he had never devised a plan to persuade Congress to shut down the prison.¶ “We’re never going to make that mistake again,” Mr. Obama told the retired Marine general.¶ General Jones said the president and his aides had assumed that closing the prison was “a no-brainer — the United States will look good around the world.” The trouble was, he added, “nobody asked, ‘O.K., let’s assume it’s a good idea, how are you going to do this?’ “¶ It was not only Mr. Obama’s distaste for legislative backslapping and arm-twisting, but also part of a deeper pattern, said an administration official who has watched him closely: the president seemed to have “a sense that if he sketches a vision, it will happen — without his really having thought through the mechanism by which it will happen.”¶ In fact, both Secretary of State Hillary Rodham Clinton and the attorney general, Mr. Holder, had warned that the plan to close the Guantánamo prison was in peril, and they volunteered to fight for it on Capitol Hill, according to officials. But with Mr. Obama’s backing, his chief of staff, Rahm Emanuel, blocked them, saying health care reform had to go first.

#### Congress has already passed detention legislation---pounds DA

Janet Cooper Alexander 13, professor of law at Stanford University, March 21st, 2013, "The Law-Free Zone and Back Again," Illinois Law Review, [illinoislawreview.org/wp-content/ilr-content/articles/2013/2/Alexander.pdf](http://illinoislawreview.org/wp-content/ilr-content/articles/2013/2/Alexander.pdf)

Congress also passed legislation requiring suspected members of al- Qaeda or “associated forces” to be held in military custody, again making it difficult to prosecute them in federal court. The bill as passed contained some moderating elements, including the possibility of presidential waiver of the military custody requirement, 7 recognition of the FBI’s ability to interrogate suspects, 8 and a disclaimer stating that the statute was not intended to change existing law regarding the authority of the President, the scope of the Authorization for Use of Military Force, 9 or the detention of U.S. citizens, lawful residents, or persons captured in the United States. 10 All the while, Republican presidential hopefuls were vying to see who could be the most vigorous proponent of indefinite detention, barring trials in civilian courts, and reinstating a national policy of interrogation by torture.¶ 11¶ During the same period, the D.C. Circuit issued a series of decisions that effectively reversed the Supreme Court’s habeas decisions of 2004 and 2008. 12 The Supreme Court’s failure to review these decisions has left detainees with essentially no meaningful opportunity to challenge their custody. ¶ Thus, a decade that began with the executive branch’s assertion of sole and exclusive power to act unconstrained by law or the other branches ended, ironically, with Congress asserting its power to countermand the executive branch’s decisions, regardless of detainee claims of legal rights, in order to maintain those law-free policies. And although the Supreme Court had blocked the Bush administration’s law-free zone strategy by upholding detainees’ habeas rights, the D.C. Circuit has since rendered those protections toothless.

#### No immigration pre midterms – GOP doesn’t want the fight

THE HILL 2 – 12 – 14 [Election mode hits the Capitol, <http://thehill.com/homenews/198160-election-mode-hits-the-capitol>]

Boehner and other House GOP leaders tested the political waters for a potential push on immigration reform last month when they released a set of principles at the House Republican retreat in Cambridge, Md.

Senate Minority Leader Mitch McConnell (R-Ky.), facing a primary and general election challenge, quickly helped douse the initiative by saying getting such a measure to the president’s desk is unrealistic this year.

Republican strategists warned that the party could wreck itself on a bitter internal debate over immigration reform.

Weekly Standard editor William Kristol warned of a “a circular GOP firing squad.” Sen. Ted Cruz (R-Texas) said anyone pushing “an amnesty bill right now should go ahead and put a ‘Harry Reid for Majority Leader’ bumper sticker on their car.”

“In the House, the leaders have made pretty clear they’re not going to rock the boat,” Manley said.

#### Election mode means all controversies being put off

THE HILL 2 – 12 – 14 [Election mode hits the Capitol, http://thehill.com/homenews/198160-election-mode-hits-the-capitol]

Democrats and Republicans are clearing the decks of dangerous political issues that could sink their chances in the midterm elections.

This unusually cautious approach comes nine months before Election Day and illustrates how both parties are reluctant to tackle anything that doesn’t poll well. With the battle for control of the Senate projected to be extremely close, neither side wants to drift into a sudden political storm.

Speaker John Boehner (R-Ohio), who is likely to hold his majority in the House, made clear Tuesday he does not want to squander his political capital in another vicious fiscal fight.

The GOP’s approval rating dropped to historically low levels in October, after a conservative rebellion helped lead to a government shutdown.

Last week, Boehner all but pronounced immigration reform — another dangerous issue for the GOP — dead for the remainder of 2014.

Senate Majority Leader Harry Reid (D-Nev.) is using the same playbook.

He slammed the brakes on trade promotion authority legislation — which labor unions staunchly oppose — less than a day after President Obama called for it at the State of the Union address. And Reid is not expected to bring a Democratic budget resolution to the floor this year, either.

Obama, meanwhile, has postponed various facets of the implementation of the unpopular Affordable Care Act, including yet another delay to the employer mandate.

Political operatives say the actions of both parties show there no longer is a respite from election-year maneuvering.

“The pattern has always been closer to the election, the less controversial activity takes place,” said Stuart Roy, a Republican strategist who formerly worked for Senate and House GOP leaders. “Instead of happening a few months out from the election, now we’re seeing the entire legislative year becoming a legislative and regulatory graveyard.”

Obama on Tuesday downplayed the delay of the employer mandate as something that would give businesses a chance “to get right with the law” and said it would affect only a “small percentage” of them.

“Any negative impact of the employer mandate, in terms of companies changing or dropping insurance coverage, those notices would have gone out to employees in some fashion prior to the election and caused problems and turmoil,” Roy said. “Delaying the employer mandate is absolutely tied to November.”

#### Immigration is dead

WSJ 2 – 14 – 14 [Carol E. Lee, Obama Seeks Progress Abroad, http://blogs.wsj.com/washwire/2014/02/14/after-muted-triumphs-at-home-obama-seeks-progress-abroad/]

The White House arguably had one of its best weeks in what seems like a very long time. Yet you’d hardly know it.

That’s mainly because after the fierce, partisan battles of the last five years, President Barack Obama‘s victories now often manifest the status quo.

It’s a reality that seems set to define Mr. Obama’s domestic legislative agenda for the remainder of his term, and one he probably would have found hard to imagine during his 2008 campaign. As a candidate, Mr. Obama regularly chastised the “status quo.” Now his White House sometimes considers it a triumph.

There are two cases in point from this week: the debt limit and the health-care law.

The administration announced that some 3.3 million people signed up for health-care coverage under the new law as of January. It was much-welcome news for a White House that has been for months digging out from its botched rollout of the law.

The House and Senate also passed a so-called clean debt-limit increase, meaning it came with no legislative demands or spending cuts attached that Republicans have insisted on in the past. There were no eleventh-hour negotiations or default countdown clocks like in previous battles. The votes happened pretty much drama-free, save some remarkable GOP infighting in the Senate.

A White House that spent much of its energy, and political capital, in 2013 trying to create that very scenario had a relatively stoic reaction. “An end to that kind of brinksmanship for now is a very welcome thing,” White House press secretary Jay Carney said before adding: “It says something about the expectations that the American people have of Congress that people notice when Congress actually doesn’t do direct harm to the economy.”

Yet in another sign it’s a second term, the status quo that the White House claims as a victory at home falls short of Mr. Obama’s foreign-policy goals.

That’s in part why the president is spending Valentine’s Day on a sprawling Palm Springs, Calif., resort with plans for multiple rounds of golf and some quality time with…the king of Jordan.

Mr. Obama is beginning to turn his sights on foreign policy more than we’ve seen recently. It’s a typical shift for presidents in their final years in office. But for Mr. Obama, it may be the one area where he can achieve significant goals.

In September, during a speech at the United Nations, Mr. Obama outlined his top three focal points on foreign policy in his second term – Iran, Syria and Middle East peace.

Now that U.S. policy with each has reached an important moment – talks with Iran over a long-term nuclear deal begin next week, a deadline is approaching in Middle East peace talks, and Syria continues to deteriorate – the president plans to get more personally involved in the process.

That’s where King Abdullah II of Jordan comes in. He’s Mr. Obama’s first in a string of sit-downs with leaders from the region.

Mr. Obama has little to hope for in a robust legislative agenda this year, particularly now that House Speaker John Boehner (R., Ohio) has cast doubt on any passage of immigration reform. The White House’s emphasis on executive action so far hasn’t yielded the kind of major change Mr. Obama initially arrived in Washington promising.

He’s expected to get more aggressive in his use of executive action, and is likely to attempt big strides on climate change. But in the meantime, he’s often content with the status quo.

#### Obama has no capital – no trust and no reason for others to compromise

DICKERSON 2 – 7 – 14 Chief Political Correspondent for Slate [John Dickerson, Dead on Arrival, http://www.slate.com/articles/news\_and\_politics/politics/2014/02/immigration\_reform\_is\_dead\_in\_2014\_why\_house\_speaker\_john\_boehner\_is\_right.html]

Dead on Arrival

Why the forces trying to kill immigration reform are far stronger than those trying to keep it alive.

In the famous scene from Monty Python's Holy Grail, a man tries to convince an undertaker with a cart full of bodies that the old man he is carrying on his shoulder is dead. The alleged corpse protests, "I'm not dead yet." They debate the point. "I don't want to go on the cart," says the old man. "Don't be such a baby," says his captor.

Twice people referenced this scene as I called around looking for the latest on immigration reform. It was not dead yet, various people suggested, even though House Speaker John Boehner just announced that progress was stalled because Republican members didn't trust the president. If that was the hurdle, it was the equivalent of idling the hearse, because trust is not likely to bloom afresh in the bosom of House Republicans in an election year on this volatile topic.

But immigration reform backers were not taking this dark view. White House Press Secretary Jay Carney said Boehner's remarks were merely a sign that the process will take time. Sen. Chuck Schumer was not discouraged either. "I think Boehner has tried," said Simon Rosenberg, president of the New Democrat Network, and a longtime advocate of immigration reform. "We are as close as we've ever been. I haven't given up."

Boehner’s remarks were interpreted as an attempt to settle down his bifurcated and spiky conference. Last week House Republican leaders put forward vague principles that would guide immigration reform. Conservatives didn't like them, even in their vague, amorphous state. Boehner's remarks were an effort to lower the boil by showing he wasn’t rushing to a deal. He was also sending a signal to the business groups, evangelical leaders, and agricultural interests who are lobbying Republicans to support reform: Right now the votes are not there and getting them will be hard. (How hard? About as easy as convincing Republicans to trust the president.)

Democrats also could empathize. They recognize that Boehner has a sequencing problem. He is going to irritate conservatives soon enough by agreeing to a debt limit increase which won’t extract sufficient concessions from the president. He has to get that skirmish out of the way first before the immigration fight.

It's a little surprising to hear Democrats giving the House speaker room to maneuver rather than rushing to denounce him. It is actually a sign of trust that they think he really does want to pass some form of immigration reform. It's also a recognition that little else would do much good. President Obama has not made a showy and sustained public push for reform, which Republicans working the issue say has been helpful, on the theory that when the president touches an issue, Republicans shy away from it, regardless of the merits. If anything is going to happen on reform, Boehner is going to have to shepherd it, so beating up on him isn't going to help matters.

Immigration reform advocates are hoping that the lobbying groups and the GOP’s fears of permanently alienating Latinos will keep the pressure on for action. Those in the Republican Party who believe that improving relations with the Latino community is necessary for the GOP’s survival worry that putting off immigration reform until next year will be too late. The presidential jockeying will begin in early 2015, which will force the conversation to the right as the party's most public voices compete for its most conservative activists who are cool to sweeping reform. Rosenberg, of the New Democrat Network, also warns Republicans that by failing to act after having gotten a bipartisan bill through the Senate, they won't simply be missing an opportunity to court Latinos, they will be doing further damage to an already battered brand.

So despite the public signs of gloom from Boehner, a case can be made for hope. That’s always nice. But in the Monty Python scene, the moral is not that hope wins out in the end, but that a stronger determined force typically triumphs. "I feel happy," sings the old man, trying to prove his vitality. Just as he does, the mortician dispatches him with a club, sending him to his reward and ending the debate. This is the inevitable truth of immigration reform. The forces trying to kill this reform are stronger than those trying to keep it alive.

People working this issue see it this way: The House Republican conference can be divided into thirds. In this view, one third will never vote for any immigration reform that could actually be signed into law, one third would like to get an immigration bill, and one third is highly reluctant either because they lack trust or think it is politically dumb.

Here is a key point: The conservative activists and grassroots groups who can punish members who vote for a bad immigration bill are stronger than the forces that are pushing for passage of the immigration bill. This is the shorthand Republicans use to explain the political balance of power. "The Chamber [of Commerce] and downtown [lobbyists] want it," says one GOP leadership aide, "but they're not going to primary anyone." Absent the clarifying force of an outside group putting a lot of money or enthusiasm behind a challenger, Republicans in individual districts don't face pressure from minority voters. There are 108 majority-minority districts and Republicans only hold nine of them. Of the 24 House Republicans who represent a district where the Latino population is 25 percent or higher, only a handful are vulnerable and could therefore be affected by a bold move on this issue that would affect voter opinions.

As Democratic pollster Stan Greenberg points out in a recent memo, only 34 percent of Republicans favored a way to accommodate undocumented workers in a recent CNN poll. Only 29 percent of Tea Party supporters did. Republicans need base voters in nonpresidential years and the GOP base is more likely to be motivated by what they see as a capitulation on immigration than the Democratic base is likely to be motivated by a lack of action.

Given this political landscape, why would Republicans want to have a fight over legislation that will divide their party, especially when they could spend their time attacking Democrats over Obamacare? It won't just be the policy that will divide Republicans. Any deal would require some kind of arrangement with President Obama. That's where the trust comes in. The substantive reason Republicans cite is that they don’t think Obama will enforce the stricter border security that would be a prerequisite for any deal that would allow some kind of permanent status for undocumented workers. Democrats point out that Obama has quite a strong deportation record and that he'll be out of office when the enforcement would take place. But facts are beside the point. The lack of trust in Obama is a toxic mix of anger over Benghazi, the IRS, and the president’s shifting promises on health care. A Republican politician is very nervous about making any deal that can be characterized as requiring faith in Obama. That would irritate their most ardent constituents and the next thing they know, they might find themselves arguing for their political life.

#### Relations poor because of anti-U.S. governments

PRESS TV 12 – 30 – 12 [US increasingly losing influence in Latin America: Javier Farje, <http://www.presstv.ir/detail/2012/12/30/280880/us-grows-paranoid-over-iran-latam-ties/>]

The United States has lost influence in Latin America as Iran grows its relations with countries in the region, an editor tells Press TV.¶ This comes as US President Barack Obama has enacted the “Countering Iran in Western Hemisphere Act”, requiring the US State Department to develop a strategy within 180 days aimed at countering Iran’s growing relations with Latin American countries. ¶ Press TV has conducted an interview with Javier Farje, editor with the Latin America Bureau, from London, to further discuss the issue. Farje is joined by Gloria Estela La Riva, a Latin America expert from San Francisco, and Isaac Bigio, a Latin American expert from London. The following is a rough transcription of the interview. ¶ Press TV: Let’s look at the situation. Congressional Bill HR3783 says that Washington must provide for a “comprehensive strategy to counter Iran’s growing hostile presence and activity in the Western hemisphere and for other purposes”. What do you think exactly this means? ¶ Farje: Well, it’s quite strange this position because it seems to remind everybody of a Cold War rhetoric. ¶ This seems to be the misconception in the US that Iran is exercising a huge influence in Latin America which we know is not the case. It’s just a country which wants to open its diplomatic relations with other continents, in this case Latin America. ¶ What the Americans don’t seem to realize is that things have changed and you mentioned this in the beginning of your report. Things have changed in Latin America. We have more left-wing governments in Latin America and Latin America has decided to take a more independent approach to whom they have a relationship with or not. That seems to be a misleading attitude in the US. ¶ In that respect, I agree with Geoff Thale. Geoff Thale is the program director of the Washington office for Latin America, an independent think-tank based in the US which talks about the relations between the US and Latin America. ¶ What happens is that Latin America feels uneasy about sanctions. They are very uncomfortable about accepting the harsh sanctions applied on Iran. ¶ That doesn’t mean that Venezuela or Nicaragua or Cuba are going to create some kind of pro-Iranian, anti-American alliance that is going to put both Latin America and Iran together to fight the US. It’s not going to happen because nothing in terms of the relations between say Venezuela and Iran or Brazil and Iran seem to suggest that this alliance is going to happen. ¶ This seems to be a misconception that this is a huge influence in Latin America but also this reflects the fact that the US has lost influence in Latin America. It no longer dictates the way Latin America establishes relationships with other countries in the world. They seem to be misunderstanding this relationship.¶ What they don’t seem to realize is that this is a big strategic mistake because this is very counterproductive. People are going to feel in Latin America that the US wants once again that they want to influence the way Latin America establishes relationships with other countries in the world. ¶ Press TV: Let’s look at this situation and the makeup of Latin America. As you had said earlier, it’s definitely a different makeup. It’s not the same South America as before.

#### Some reforms are inevitable

CSM 12 – 28 – 12 Immigration reform likely to be at the top of Congress’ agenda in 2013, [www.rawstory.com/rs/2012/12/28/immigration-reform-likely-to-be-at-the-top-of-congress-agenda-in-2013](http://www.rawstory.com/rs/2012/12/28/immigration-reform-likely-to-be-at-the-top-of-congress-agenda-in-2013)

Yet with Election 2012 highlighting the electoral consequences of America's changing demographics, the next year appears to be ripe for compromise. How reforms might take shape could be a major point of contention between the parties, but lawmakers on both sides suddenly see an opportunity for what could be their most expansive achievement of 2013.

"It has to be in 2013," says Rep. Raúl Labrador (R) of Idaho, an immigration lawyer who thundered into Congress in the tea party wave of 2010. "If we wait until 2014, it's going to be election time. And you know how efficient we are here during election time."

#### Menendez appointment solves US-Latin relations

OPPENHEIMER 12 – 19 - 12 Miami Herald syndicated columnist and a member of The Miami Herald team that won the 1987 Pulitzer Prize [Andres Oppenheimer: U.S. may pay more attention to Latin America in Obama’s second term, http://www.miamiherald.com/2012/12/19/3149669/andres-oppenheimer-us-may-pay.html]

If President Barack Obama appoints Sen. John Kerry as secretary of state to replace Hillary Clinton when he starts his second term next month, as some administration officials anticipate, you may see a somewhat greater U.S. focus on Latin American affairs.

It’s not that Kerry is an expert in the region or that he would be any more interested in Latin American affairs than Clinton. He’s not — just as Clinton wasn’t.

The difference would be that Kerry’s current job as chairman of the powerful U.S. Senate Relations Committee would most likely be taken by Cuban-American Sen. Bob Menendez, D-N.J. That changing of the guard and the promotion of Rep. Eliot Engel, D-N.Y., from ranking minority member of the House Subcommittee on the Western Hemisphere to ranking member of the full House Foreign Affairs Committee would leave two Latin America hands in key congressional positions to influence U.S. foreign policy.

Judging from what I’m told by well-placed congressional sources of both parties, there would not be a great difference between Kerry and Clinton as secretary of state.

Both are political heavyweights: Kerry was the 2004 Democratic presidential candidate and became chairman of the Senate Foreign Relations Committee in 2009. Clinton is a former first lady who had made her own mark as New York senator before becoming secretary of state.

When it comes to Latin American issues, Kerry made his biggest — some would say only — mark in the late 1980s, when he played a key role in the congressional investigation into the Iran-contra scandal in Central America. Since then, his main focus has been Afghanistan, Iran and other world hotspots.

When I interviewed Kerry during his 2004 presidential campaign, he conceded that he didn’t personally know any of the major Latin American leaders. On the other hand, his world view was much more in tune with Latin American leaders than that of then-President George W. Bush.

Congressional sources tell me that if Menendez replaces Kerry at the helm of the Senate Foreign Relations Committee he would push for a hemisphere-wide anti-narcotics strategy that would replace the current fragmented U.S. plans to fight drug cartels in Mexico, Colombia and Central America. The Menendez proposal would also place more emphasis on reducing U.S. drug demand.

Menendez is also a strong proponent of greater U.S. economic assistance to Latin America///

— a tough assignment in budget-cutting season, granted — and of investigating Iran’s activities in Venezuela, Bolivia and other Iranian allies in the region.

A supporter of U.S. sanctions on Cuba, he also has signed, along with Kerry and Republican Sens. Richard Lugar and Marco Rubio, a letter denouncing the 34-country Organization of American States for sliding into “paralysis” and failing to meet its responsibility to defend democracy in the region.

While Menendez does not get along too well with the White House, where many see him as too Cuba-focused, his appointment as head of the Foreign Relations Committee would put pressure on the administration to spend more time and energy on Latin American issues, Menendez supporters say.

Engel, in turn, told me that in his potential new job, “I will try everything I can to strengthen and enhance U.S. ties with Latin America,” and that “with Bob Menendez and myself leading the Democrats in both committees, I would look forward to both of us working to strengthen relations with Latin America.’’

My opinion: The likely promotion of Menendez and Engel to top congressional jobs, as well as the growing political weight of Latinos in the United States following the crucial Hispanic support for Obama in the Nov. 6 elections, may push the president to pay more attention to Latin America over the next four years.

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### T—Prohibit

#### Counter interpretation – restrict means to limit through conditions.

**Cambridge Dictionary 9** (Cambridge Dictionary of American English, *Restrict – Definition*, http://dictionary.cambridge.org/define.asp?key=restrict\*1+0&dict=A)

Restrict

Verb [T]

To limit (an intended action) esp. by setting the conditions under which it is allowed to happen

The state legislature voted to restrict development in the area.

Efforts are under way to further restrict cigarette advertising.

#### Their ev—restrict, not restrictions. We also meet this card

Supreme Court of Delaware 83 (THE MAYOR AND COUNCIL OF NEW CASTLE, a municipal corporation of the State of Delaware, Plaintiff Below, Appellant, v. ROLLINS OUTDOOR ADVERTISING, INC., Defendant Below, Appellee, No. 155, 1983, 475 A.2d 355; 1984 Del. LEXIS 324, November 21, 1983, Submitted, April 2, 1984, Decided)

The term "restrict" is defined as: To restrain within bounds; to limit; [\*\*9] to confine. Id. at 1182. The Supreme Court of the United States has recognized that HN5the term "regulate" necessarily entails a possible prohibition of some kind. That Court has stated: "It is an oft-repeated truism that every regulation necessarily speaks as a prohibition." Goldblatt v. Hempstead, 369 U.S. 590, 592, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). The Supreme Court of Massachusetts in reviewing a statute containing language similar to that found in 22 Del.C. § 301 (which empowered municipalities to "regulate and restrict" outdoor advertising on public ways, in public places, and on private property within public view) held that the statute in question authorized a town to provide, through amortization, for the elimination ofa nonconforming off-site signs five years from the time the ordinance was enacted. The court held that the Massachusetts enabling act: Conferred on the Legislature plenary power to regulate and restrict outdoor advertising . . . . Although the word "prohibit" was omitted from [the enabling act], it was recognized that the unlimited and unqualified power to regulate and restrict can be, for practical purposes, the power to prohibit [\*\*10] "because under such power the thing may be so far restricted that there is nothing left of of it." (Citations omitted.) The court continued its discussions of the two terms by stating: The distinction between regulation and outright prohibition is often considered to be a narrow one: "that regulation may take the character of prohibition, in proper cases, is well established by the decisions of this court" . . . quoting from United States v. Hill, 248 U.S. 420, 425, 63 L. Ed. 337, 39 S. Ct. 143 (1919). John Donnelly and Sons, Inc. v. Outdoor Advertising Board, Mass. Supr., 369 Mass. 206, 339 N.E.2d 709 (1975). We hold that, through Article II, Section 25 of the Delaware Constitution and 22 Del.C. § 301, the General Assembly has authorized New Castle to terminate nonconforming off-site signs upon reasonable notice, that is, by what has come to be known as amortization. We hold that the power to "regulate and restrict" as such term applies to zoning matters includes the power, upon reasonable notice, to prohibit some of those uses already in existence.

### Rlx resilient

#### Coop on prolif/warming/etc. inev

Hakim 08 President of the Inter-American Dialogue (Peter, , “Latin America: the next U.S. President’s agenda”, <http://www.thedialogue.org/PublicationFiles/Peter%20Hakim%20-%20Great%20Decisions%202008.pdf>)

Most countries have made clear they want strong trade links and other economic ties with the U.S. Eleven of LatinAmerica’s 19 nations have signed bilateral free-trade pacts with Washing- ton, although two of them still await U.S. congressional approval. Even governments that reject free-trade ne- gotiations with the U.S.—Bolivia and Ecuador, for instance—have lobbied Washington hard for trade preferences to keep U.S. tariffs low. The most vit- riolic critic of U.S.-LatinAmerica trade deals, Venezuela, sends most of its oil to the U.S. duty-free. The U.S., however, is not merely a huge market and capital reserve for Latin America. For better or worse, the U.S. continues to play an important po- litical role throughout the region. No other country was prepared to assist Colombia’s battle for survival against illicit drug trafficking and guerrilla violence. Mexico is now turning to the U.S. to help contain its burgeoning wave of criminal violence. It was the U.S. that took the controversial step of pressing Rev. Jean-Bertrand Aristide to give up power in Haiti in 2004, and that subsequently prodded Brazil to lead a peacekeeping mission in the country. In 2006, Washington helped to stop the constitutionally suspect ouster of Nicaraguan President Enrique Bolaños Geyer. It also clumsily (and unsuccessfully) intervened to prevent the reelection of its old nemesis, Presi- dent Daniel Ortega. Even Brazil, which pursues the region’s most stubbornly independent and diverse foreign policy, has made plain how much it values good rela- tions with the U.S. Top foreign policy officials in Brazil’s left-leaning govern- ment publicly insist the U.S.-Brazilian relationship has never been stronger. Brazil knows that its international and regional ambitions require amiable ties with the U.S.—and that an adversarial relationship would be costly in multiple ways. Many in Latin America deeply resent and mistrust the U.S., and take pride in resisting Washington’s pres- sures and inducements. They are some- times delighted when Chávez or Cuba’s Fidel Castro vilifies Washington, even if they would never do so themselves. But most Latin American governments, whatever their feelings about the U.S. and its policies, resist the anti-American temptation. They know, often from ex- perience, that alienating Washington can carry a high price—and therefore usually try to maintain cordial relation- ships with the world’s superpower.