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#### The Korematsu-era cases present a flawed institutional and racist stance on indefinite detention---it was not based on military necessity, only racial discrimination

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.

#### The decisions are among the worst court decisions in history by every criteria---the social and human impact 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.

#### Racism makes war and violence inevitable---it presents enemies as biologically inferior to justify their extermination

Eduardo Mendieta 2, PhD and Associate professor of Stonybrook School of Philosophy, April 25th, 2002, "'To make live and to let die' - Foucault on Racism,'" Meeting of the Foucault Circle, APA Central Division Meeting, Chicago, April 25th, 2002, www.stonybrook.edu/commcms/philosophy/people/faculty\_pages/docs/foucault.pdf

This is where racism intervenes, not from without, exogenously, but from within, constitutively. For the emergence of biopower as the form of a new form of political rationality, entails the inscription within the very logic of the modern state the logic of racism. For racism grants, and here I am quoting: “the conditions for the acceptability of putting to death in a society of normalization. Where there is a society of normalization, where is a power that is, in all of its surface and in first instance, and first line, a bio-power, racism is indispensable as a condition to be able to put to death someone, in order to be able to put to death others. The homicidal [meurtrière] function of the state, to the degree that the state functions on the modality of bio-power, can only be assured by racism “(Foucault 1997, 227). To use the formulations from his 1982 lecture “The Political Technology of Individuals” – which incidentally, echo his 1979 Tanner Lectures – the power of the state after the 18th century, a power which is enacted through the police, and is enacted over the population, is a power over living beings, and as such it is a biopolitics. And, to quote more directly, “since the population is nothing more than what the state takes care of for its own sake, of course, the state is entitled to slaughter it, if necessary. So the reverse of biopolitcs is thanatopolitics.” (Foucault 2000, 416). Racism, is the thanatopolitical technology, one same political rationality; the management of life, the life of a population, the tending to the continuum of life of a people.¶ And with the inscription of racism within the state of biopower, the long history of war that Foucault has been telling in these dazzling lectures has made a new turn: the war of peoples, a war against invaders, imperials colonizers, which turned into a war of races, to then turn into a war of classes has now turned into the war of a race, a biological unit, against its polluters and threats. Racism is the means by which bourgeois political power, biopower, rekindles the fires of war within civil society. Racism normalizes and medicalizes war. Racism makes war the permanent condition of society, while at the same time masking its weapons of death and torture. As I wrote somewhere else, racism banalizes genocide by making quotidian the lynching of suspect threats to the health of the social body. Racism makes the killing of the other, of others, an everyday occurrence by internalizing and normalizing the war of society against its enemies. To protect society entails we be ready to kill its threats, its foes, and if we understand society as a unity of life, as a continuum of the living, then these threats and foes are biological in nature.

#### 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.

#### 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.

#### We should officially repudiate the interment cases to prevent future deployment of violent racial myths

Peter Irons 13, Civil Rights Attorney, and professor emeritus of political science, "UNFINISHED BUSINESS: THE CASE FOR SUPREME COURT REPUDIATION OF THE JAPANESE AMERICAN INTERNMENT CASES," 2013, http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf-http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf

CONCLUSION¶ Over the past seven decades, many distinguished scholars and judges have implored the Court to repudiate the internment decisions. It seems appropriate to note the first and perhaps most distinguished of these voices: just months after the Korematsu decision in December 1944, Eugene V. Rostow, the justly esteemed professor and dean at Yale Law School, published an article in the Yale Law Journal entitled “The Japanese American Cases – A Disaster.” [24] In his article, which eviscerated the Court’s opinions in these cases as based on unsupported racial stereotypes (and without the benefit of the evidence of governmental misconduct discussed above), Professor Rostow wrote that those opinions, “[b]y their acceptance of ethnic differences as a criterion for discrimination . . . are a breach, potentially a major breach, in the principle of equality. Unless repudiated, they may encourage devastating and unforeseen social and political conflicts.” He continued: “In the political process of American life, these decisions were a negative and reactionary act. The Court avoided the risks of overruling the Government on an issue of war policy. But it weakened society’s control over military authority—one of those polarizing forces on which the organization of our society depends. And it solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society.” (emphasis added) Id. at 492.¶ “[T]hat the Supreme Court has upheld imprisonment on such a basis constitutes an expansion of military discretion beyond the limit of tolerance in democratic society. It ignores the rights of citizenship, and the safeguards of trial practice which have been the historical attributes of liberty. . . . What are we to think of our own part in a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court?” Id. at 533.¶ Professor Rostow urged in 1945 that “the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal of these war-time cases. In the history of the Supreme Court there have been important occasions when the Court itself corrected a decision occasioned by the excitement of a tense and patriotic moment. After the Civil War, Ex parte Vallandigham was followed by Ex parte Milligan. The Gobitis case has recently been overruled by West Virginia v. Barnette. Similar public expiation in the case of the interment of Japanese Americans from the West Coast would be good for the Court, and for the country.” Id. Failing to heed Professor Rostow’s words in 1945 and in the years since then, the Court should now feel an obligation to provide the “expiation” for which he prophetically called.

#### Our treatment of the Japanese during World War II was the culmination of mythic tropes surrounding savage warfare and the noble settler. This pervasive ideology conceives of war as a necessary cycle of cleansing and regeneration, so unless we eradicate it from our culture and legal system the ongoing racial genocide will accelerate to complete extermination.

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 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.

#### Its existence on the books allows for the justification of racially discriminatory war policy

Ilya Somin 13, Professor of Law at George Mason University School of Law; earned his B.A., Summa Cum Laude, at Amherst College, M.A. in Political Science from Harvard University, and J.D. from Yale Law School, March 13th, 2013, "Repudiating the Japanese Internment Decisions," www.volokh.com/2013/03/13/repudiating-the-japanese-internment-decisions/

I. The Case for Repudiation.¶ As Irons notes, the overwhelming majority of legal scholars and jurists now recognize that the Japanese internment cases were outrageous injustices. They are among the most reviled decisions in Supreme Court history. In 1988, Congress and President Ronald Reagan formally denounced the internment, apologized to the surviving victims, and enacted a law compensating them for their losses (albeit, inadequately, given that each was paid only $20,000 in compensation for some three years of imprisonment, and the loss of large amounts of income and property). The Supreme Court itself has made negative references to these cases in more recent decisions, but has never formally overruled any of them. While lawyers today would be ill-advised to rely on these cases in their arguments, they are technically still on the books, and could potentially be used as precedents in the future – especially if changes in public or elite opinion make racially discriminatory war policies more popular than they are now.

#### The precedent creates a loaded gun mentality adopted by president after president---it just takes one reckless one to exploit the decision

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

B. “Tools Belong to the Man Who Can Use Them” 295¶ Another lesson from sixty years of wartime case law concerns the role of judicial precedent itself in guiding presidential action. Two viewpoints merit notice, each having roots in opinions by Justice Jackson. On one hand, consider his explanation in Korematsu for why courts must not approve illegal executive action:¶ A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . . show[s] that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. 296¶ This “loaded weapon” rhetoric is an orthodox element in analyzing Korematsu as a racist morality play. The passage is cited to show that Supreme Court precedents really matter and that racist errors retain their menacing power for generations. 297 Students are reminded that Korematsu was never directly overruled, thereby inviting the vivid nightmare that the Court’s ruling lies even now as a loaded weapon just waiting for some reckless President to grab and fire. 298

#### Plan

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

### 1ac – solvency

#### 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.

#### We must interrogate the Internment decisions to correct the precedents set for abuses of Presidential War powers---now is key

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

IV. EPILOGUE : WHAT THE KOREMATSU ERA MEANS NOW¶ Iconic war powers precedents offer special interpretive challenges because such cases arise only infrequently from clustered factual circumstances that differ greatly from any other group of cases. The result is an uncommon risk that each generation of lawyers may forget or misread the wisdoms and follies of the past. This is what happened before 9/11. Lawyers, judges, scholars, and commentators had not adequately appreciated the Court’s unfortunate history surrounding World War II. As old issues resurfaced concerning detention and military commissions, executive lawyer and federal courts of appeals used Korematsu -era precedents (though not Korematsu itself) as “positive” precedents instead of “negative” ones. This was a mistake, as the modern Court has repeatedly held. This Article seeks to bolster safeguards against presidential abuse and, at long last, to limit the Korematsu era’s influence. But like everything else, such scholarship operates in a world of contingent circumstances where pens and ideas are only sometimes mightier than swords and the politics of war. 316¶ If my thesis is correct that the modern GWOT cases have undermined the Korematsu era’s institutional assumptions, the episodic nature of war powers cases creates pressure to solidify that interpretation quickly. Elections have delivered a President with an arguably different view of presidential power. 317 And several new Justices now occupy the high bench— with the especially notable departures of Justice Stevens, who personally witnessed the Korematsu era as a young man, 318 and Justice Souter, whose Hamdi concurrence showed exceptional insight in analyzing past examples of war powers. Our current cluster of wartime decisions might soon draw to a close, and if that happens, issues of executive detention and military commissions may once again drift out of focus.¶ All too soon, it may be hard to remember the political pressures heaped on the Court in 2004, when it said “no” for the first time to a popular, self- declared wartime President. As memories fade, the modern Court’s remarkable steps in rejecting Korematsu-era deference might be similarly forgotten or misconstrued. Rasul might become a case “just” about federal habeas statutes, Hamdi “just” a set of divided opinions about enemy combatants, Hamdan “just” an interpretation of the UCMJ, and Boumediene “just” a constitutional decision about Guantánamo Bay. For anyone who wishes to celebrate the Korematsu era’s end, the time to determine the recent war powers cases’ meaning is now. Otherwise, the Court’s subtle language and narrow holdings may allow future executive lawyers to deflect recent precedents and revive Korematsu-era principles that the 9/11 era has firmly and quietly laid to rest.

#### 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.

#### Correcting the past is a prerequisite to fixing the future---otherwise future racist policies are inevitable

Wendell L. Griffen 99, Judge for the Arkansas Court of Appeals, "RACE, LAW, AND CULTURE: A CALL TO NEW THINKING, LEADERSHIP, AND ACTION," University of Arkansas at Little Rock Law Review, 21 U. Ark. Little Rock L. Rev. 901, 1999, Lexis Nexis

We have yet to admit the racism that resulted in Chinese exclusion laws in the West and acknowledge the fact that similar treatment was not applied to immigrants from Europe. Somehow our obsession with power and notion of manifest destiny made us oblivious to the blatant racism practiced against the Mexican people of Texas, New Mexico, Colorado, and Arizona during the last century that resulted in the loss of millions of acres of land that had been owned for generations. We forcibly removed American citizens of Japanese ancestry from their homes, communities, work, and businesses during World War II and interned them like prisoners of war solely because of their ancestry. The United States Supreme Court sanctioned that blatant act of institutional racism in Korematsu v. United States, n3 just as it had sanctioned the institutional racism of slavery in Dred Scott v. Sanford, n4 and racial segregation in Plessy v. Ferguson. n5 Had the same reasoning been applied to American citizens of Italian and German ancestry, Joe DiMaggio and Dwight D. Eisenhower would have been interned. There was never a serious discussion about a threat to national security posed by having a person of German ancestry commanding Allied forces against the Third Reich, let alone being elected president within a decade of that war.¶ Unless and until we admit that racism produced these and countless other stubborn, stupid, and sick results we will not create a different society in the 21st Century. American law, history, economics, religion, social life, and culture have been so permeated by racism and racist thought for such a long time that nothing short of new thinking about that racism and its effects on our national life bodes real chance for producing racial equity in the new century.¶ Until American thinking about racism and racial justice is defined from the perspective of the historical victims of racism and racial injustice rather than from the perspective of the historical beneficiaries, we are doomed to [\*905] continue the sorry legacy of racism. We must shift our thinking about racism and racial justice from focusing on the benefits and comforts that have been enjoyed and may be reduced by racism's historical white beneficiaries to focusing on the costs, burdens, and consequences that have been suffered and will be endured by racism's historical non-white victims. We should admit that the new thinking is not likely to come from the same mindset that has produced so much of what we deem legitimate about American law and culture.¶ The prevailing thought in American law and culture regarding racism and racial injustice follows the ages-old presumption of white superiority over non-white people and what one social ethicist termed a belief in "the rightness of whiteness." n6 Thus, the very mindset that produced the theft of Native American land, enslavement of Africans, discrimination against people of Asian ancestry, and belittling of the Hispanic culture (including the Spanish language) has driven and continues to dominate American thinking about religion, government, law, economics, education, and societal life in general.

#### The plan is necessary to ensure other race based policies are repudiated

Frank H. Wu 2, Professor of Law, Howard University, September 2002, "Profiling in the Wake of September 11," Justice Magazine, http://www.americanbar.org/publications/criminal\_justice\_magazine\_home/crimjust\_cjmag\_17\_2\_japanese.html

The condemnation of the internment may lead to the condoning of milder measures in the classical fallacy of false alternatives. Anything short of an internment is compared to the internment, as if to say it could be worse and so there is no cause for complaint. To be fair, racial profiling can be carried out in a much milder form than internment camps. To be precise, the current secret detentions are best likened to the apprehension of hundreds of Japanese Americans, German Americans, and Italian Americans and the curfews and other measures that preceded the internment itself.¶ In that context, the conclusion that the internment was wrong is not enough. The reasons it was wrong must be articulated again. As lawyers well know, the rationale may be as important as the result by itself in comprehending the meaning of legal authority. What is constitutional is not necessarily advisable. Technically, for all the contempt directed at the Supreme Court’s internment cases, it is worth noting that the decisions have never been repudiated and actually have been followed consistently. Indeed, Chief Justice William H. Rehnquist penned a book a few years ago intimating that if a similar matter were to come before the Court again he would not expect it do otherwise. (William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime (Knopf 1998).)

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#### Appeals for institutional restrain are a crucial supplement to political resistance to executive power.

David **COLE** Law @ Georgetown **’12** “The Politics of the Rule of Law: The Role of Civil Society in the Surprising Resilience of Human Rights in the Decade after 9/11” http://www.law.uchicago.edu/files/files/Cole%201.12.12.pdf p. 51-53

As I have shown above, while political forces played a significant role in checking President Bush, what was significant was the particular substantive content of that politics; it was not just any political pressure, but pressure to maintain fidelity to the rule of law. Politics standing alone is as likely to fuel as to deter executive abuse; consider the lynch mob, the Nazi Party in Germany, or xenophobia more generally. What we need if we are to check abuses of executive power is a politics that champions the rule of law. Unlike the politics Posner and Vermeule imagine, this type of politics cannot be segregated neatly from the law. On the contrary, it will often coalesce around a distinctly legal challenge, objecting to departures from distinctly legal norms, heard in a court case, as we saw with Guantanamo. Congress’s actions make clear that had Guantanamo been left to the political process, there would have been few if any advances. The litigation generated and concentrated political pressure on claims for a restoration of the values of legality, and, as discussed above, that pressure then played a critical role in the litigation’s outcome, which in turn affected the political pressure for reform. There is, to be sure, something paradoxical about this assessment. The rule of law, the separation of powers, and human rights are designed to discipline and constrain politics, out of a concern that pure majoritarian politics, focused on the short term, is likely to discount the long-term values of these principles. Yet without a critical mass of political support for these legal principles, they are unlikely to be effective checks on abuse, for many of the reasons Posner andVermeule identify. The answer, however, is not to abandon the rule of law for politics, but to develop and nurture a political culture that values the rule of law itself. Civil society organizations devoted to such values, such as Human Rights Watch, the Center for Constitutional Rights, and the American Civil Liberties Union, play a central role in facilitating, informing, and generating that politics. Indeed, they have no alternative. Unlike governmental institutions, civil society groups have no formal authority to impose the limits of law themselves. Their recourse to the law’s limits is necessarily indirect: they can file lawsuits seeking judicial enforcement, lobby Congress for statutory reform or other legislative responses, or seek to influence the executive branch. But they necessarily and simultaneously pursue these goals through political avenues

– by appealing to the public for support, educating the public, exposing abuses, and engaging in public advocacy around rule-of-law values. Unlike ordinary politics, which tends to focus on the preferences of the moment, the politics of the rule of law is committed to a set of long-term principles. Civil society organizations are uniquely situated to bring these long-term interests to bear on the public debate. Much like a constitution itself, civil society groups are institutionally designed to emphasize and reinforce our long-term interests. When the ordinary political process is consumed by the heat of a crisis, organizations like the ACLU, Human Rights First, and the Center for Constitutional Rights, designed to protect the rule of law, are therefore especially important. While Congress and the courts were at best compromised and at worst complicit in the abuses of the post-9/11 period, civil society performed admirably. The Center for Constitutional Rights brought the first lawsuit seeking habeas review at Guantanamo, and went on to coordinate a nationwide network of volunteer attorneys who represented Guantanamo habeas petitioners. The ACLU filed important lawsuits challenging secrecy and government excesses, and succeeded in disclosing many details about the government’s illegal interrogation program. Both the ACLU and CCR filed lawsuits and engaged in public advocacy on behalf of torture and rendition victims, and challenging warrantless wiretapping. Human Rights Watch and Human Rights First wrote important reports on detention, torture, and Guantanamo, and Human Rights First organized former military generals and admirals to speak out in defense of humanitarian law and human rights. These efforts are but a small subset of the broader activities of civil society, at home and abroad, that helped to bring to public attention the Bush administration’s most questionable initiatives, and to portray the initiatives as contrary to the rule of law. At their best, civil society organizations help forge a politics of the rule of law, in which there is a symbiotic relationship between politics and law: the appeal to law informs a particular politics, and that politics reinforces the law’s appeal, in a mutually reinforcing relation. Posner and Vermeule understand the importance of politics as a checking force in the modern world, but fail to see the critical qualification that the politics must be organized around a commitment to fundamental principles of liberty, equality, due process, and the separation of powers – in short, the rule of law. Margulies and Metcalf recognize that politics as much as law determines the reality of rights protections, but fail to identify the unique role that civil society organizations play in that process. It is not that the “rule of politics” has replaced the “rule of law,” but that, properly understood, a politics of law is a critical supplement to the rule of law. We cannot survive as a constitutional democracy true to our principles without both. And our survival turns, not only on a vibrant constitution, but on a vibrant civil society dedicated to reinforcing and defending constitutional values.

### AT: Focus Tradeoff

#### Our historical interrogation of the internment case isn’t exclusive to certain bodies---their links make no sense; only the alt tries to compartmentalize overlapping struggles which links more

Leti Volpp 10, Professor of Law at Cal-Berkeley School of Law, "The Excesses of Culture: On Asian American Citizenship and Identity\*", scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1162&context=aalj

I would suggest that we see this kind of collective memory exemplified in Fred Korematsu's brief challenging the imprisonment of hundreds of prisoners on Guantanamo in the Supreme Court's deliberations of Rasul v. Bush, which addressed whether or not the prisoners had the 76 right to challenge their confinement through statutory habeas.¶ The brief began:¶ More than sixty years ago, as a young man, Fred Korematsu challenged the constitutionality of President Franklin Roosevelt's 1942 Executive Order that authorized the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. In Korematsu v. United States, this Court upheld his conviction, explaining that because the United States was at war, the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong.¶ More than half a century later, Fred Korematsu was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for his courage and persistence in opposing injustice. In accepting this award, Mr. Korematsu reminded the nation that "We should be vigilant to make sure this will never happen again." He has committed himself to ensuring that Americans do not forget the lessons of their own history. ¶ Because Mr. Korematsu has a distinctive, indeed unique, perspective on the issues presented by this case, he submits this brief to 77 assist the Court in its deliberation.¶ The historical experience of subordination of a community can create a lens, a way to see, which I would argue lends itself to an ethical argument: that it behooves us, as Asian Americans, to be particularly sensitive to the communities today subjected to the unjust treatment that has characterized treatment of our own community. I think this is precisely what Fred Korematsu did.¶ This is a very particular argument about politics. This does not say that our political activity should focus on Asian American bodies. This says that we should think about what we know from our past experience-and what we have learned from this experience-to think critically about who is being treated in this way now, and that the bodies that this is happening to now, whether Asian American or not, should be a focus of our concern. If we think about this on the terrain of culture, I think it is unarguable that the people today subject to the most violent expulsion from membership are Muslims. Post-September 11-and the wars in Afghanistan and Iraq-the West has been ever more defined as progressive, democratic, civilized and feminist, in stark contrast to Islam and to Muslims.

AT: W

While it may be true that almost every institutional enounter with blackess is negative, we shouldn’t base revolutionary critique on the idea that all institutions must be irreperably anti-black, or that they can’t be reformed and used positively. To do so opens us up to counterarguments like: the republican party has absorbed plenty of black people. If its just, “you’re always mean to black people” and not “you’ve designed a system which structurally disadvantages most of us”, they can respond with “look at all my black friends!”

One may advocate for institutional action without endorsing the institution. If you ask a thief to return your property or say they should, your recognition of the theif’s agency doesn’t do much to actively promote the thief as an agent. Don’t throw the baby out with the bathwater. The aff does committ attention and perhaps a grain of legitimacy to the courts, but on the whole that’s not so bad—if korematsu should be overturned vote aff, their argument justifies rejecting brown v board.

### Farber

#### The thesis that the USFG is inherently and irredeemably racist is both historically flawed and politically debilitating. It creates a witch hunt mentality, fragmenting movements’ members and goals, preventing any progress from being made on concrete racial inequalities. Their attempt to pinpoint every instance of racist motive is both conspiracy theory like in its performance and mirrors the politics of the far-right

Daniel A. FARBER, Associate Dean and Henry J. Fletcher Professor of Law, University of Minnesota, 98 [January 1, 1998, “Is American Law Inherently Racist,” Debate between Richard Delgado and Daniel A. Farber, Berkeley Law Scholarship Repository, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1211&context=facpubs&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fstart%3D10%26q%3Drelated%3ARVxu2BBQFe0vOM%3Ascholar.google.com%2F%26hl%3Den%26as\_sdt%3D0%2C11#search=%22related%3ARVxu2BBQFe0vOM%3Ascholar.google.com%2F%22]

PROFESSOR FARBER: As I was getting ready to leave for the airport, my wife gave me a final piece of advice about this debate. She said, "Don't be too reasonable." Nevertheless, I would like to begin by stressing some common ground that I think may get lost because the debate format naturally encourages us to take adversarial positions. In reality, Professor Delgado and I share a great deal in our views of law and American society. Both of us see the issue of racial inequality as being central and requiring the most serious possible attention. Both of us reject the conservative dogma of color blindness, and both of us, as I think will be shown tonight, believe that one imperative need is for dialogue and discussion of this topic if we are to make any progress. So we do have something in common. But we also have a fundamental disagreement, I think, a disagreement that is illustrated by the fact that we are on the opposite sides of this debate about the inherent racism of American law. As Professor Delgado said in his introductory remarks, critical race theory's view is essentially that racism is embedded in the DNA of American law. And that in effect, racism is not merely a widespread blemish on American law, but is instead, a radical infection that goes right to the heart of the legal system.

I disagree with that for reasons that I will hopefully make clear. I think that this thesis rests on a one-sided view of the legal system. I think that it is based on a misunderstanding of some of the fundamental principles of the system. I think in the end, despite what I know are Professor Delgado's good intentions, that the inherent racism position (and critical race theory, in general) risks being more destructive than constructive in terms of advancing our national conversation on race. I noticed that Professor Delgado postponed the issue of inherent racism, or the inherency of racism, until his next ten minutes. I may also put off, to some extent, my discussion of that point as well, though I will refer to it briefly.

Let me begin with the vision of the American legal system that Professor Delgado presented in his first twenty minutes. I do not intend to deny the reality of the dark side of American law in American legal history, and that dark side has indeed been very bad at times. Nevertheless, I think one might equally point to some more positive aspects of American legal society, and that we get only a skewed and incomplete picture if we focus only on one side of the picture: if we ignore the Thirteenth, 5 Fourteenth, 6 and Fifteenth 7 Amendments; if we ignore Brown v. Board of Education"8 and the work of the Warren Court; if we ignore the Civil Rights Acts of 1964,' 9 1965,20 and 1990;2" and if we ignore or minimize the commitment to affirmative action that many American institutions, especially educational institutions, have had for the past two decades. I do not think you have to be a triumphalist to think that these are important developments-you only have to be a realist.

Similarly, as serious as the problem of racial inequality remains in our society, it is also unrealistic to ignore the considerable amount of progress that has been made. Consider the emergence of the black middle class in the last generation or generation and a half, and the integration of important American institutions such as big-city police forces, which are important in the day-to-day lives of many minority people. The military has sometimes been described as the most successfully integrated institution in American society. We all know, as well, that the number of minority lawyers has risen substantially. In state and federal legislatures, there was no such thing as a black caucus in Congress thirty or forty years ago, because there would not have been enough black people present to call a caucus. And do not forget the considerable evidence of sharp changes in white attitudes over that period in a more favorable and tolerant direction.

It is true that there is much in our history that we can only look back on with a feeling of shame, but there is also much to be proud of that we should not forget. I also think that the accusation that the American legal system is inherently racist lacks perspective in the sense that it seems to imply that there is something specifically American about this problem. If you look around the world, societies virtually everywhere are struggling with the problems of ethnic and cultural pluralism, and are trying to find ways to incorporate diverse groups into their governing structures. I think if you look around the world, including even countries like France which Professor Delgado referred to, it is far from clear that we are doing worse than the others. In some ways, I think we are doing considerably better than most.

You can always paint a picture of despair by only focusing on the things that go wrong, and much of the critical race theory literature that I have read along those lines reminds me a great deal of the work that is being done by people at the opposite end of the political spectrum. If you read Robert Bork's latest book "Slouching Toward Gomorrah,"22 it reads exactly like Derrick Bell, 3 only in reverse. While Bell sees an inherent flaw of racism that we can never overcome and that will haunt us forever, Bork sees an inherent flaw of egalitarianism that we can never overcome and that has corrupted all aspects of our society. Both of them can point to some evidence. If you only look at the evidence on one side of the thesis it begins to look persuasive; but when you look at the evidence as a whole, I think you see a much more complex picture.

I think the inherency part of the thesis is perhaps the most significant, so I want to say a few words about that now, although I will probably need to come back to that after Professor Delgado's next segment.

It seems to me the most powerful criticisms of our society or our legal system are that it does not live up to its own ideals. For example, how could Thomas Jefferson, the author of the Declaration of Independence, also have been an owner of slaves? That puts the question in stark terms. How can a legal system that prides itself on equality still allow some of the outcomes that Professor Delgado has detailed? I think those are powerful criticisms. But what I find most disturbing about much of critical race theory is the argument that it is not the performance that is the problem-it is the ideals. That it is not that Jefferson did not live up to the Declaration of Independence, it is that the ideals of the Enlightenment, the ideals of the Declaration of Independence themselves are inherently and "genetically" flawed, that are themselves inherently racist. That, as Professor Delgado has said before, "normal legal discourse" is itself racist-or, as Alex Johnson has said, that ordinary, supposedly neutral standards of merit are secretly color coded for Whites only, or are presented in a white voice.24

One of the primary tasks that we took on ourselves in the book was to try to both document the academic support for that position and then to try to explain why we considered it to be so fatally flawed. It obviously resonates with a lot of postmodernist and postcritical legal studies scholarship. There is a sort of trendiness to talking about the social construction of reality. But when you put aside all the philosophical jargon, it seems to be there just really is not much to support the thesis, and I will return to that later.

Finally, and I think perhaps this is the most significant practical problem, the inherent racism approach is not a step toward bringing us to seriously confront the problems that our society has. In fact, I think it is taking us down a false path. The dynamics of the concept of inherent racism has several unfortunate effects. First of all, among even its adherents, it leads to a kind of "witch hunt" mentality, in which people are constantly searching for more and more subtle forms of racism among themselves, among their opponents in the legal system generally, and so forth. As a result, people invest their time combing the Internal Revenue Code for deductions that might seem more favorable to one group than another group, rather than looking at what is the stark and overwhelming problem-not how people's income is taxed but who is earning how much and why. So we become more and more obsessed with looking for more and more subtle flaws.

Furthermore, at least in the hands of some of the practitioners or adherents to this position, it leads to a breakdown in debate, even both among people who are essentially on the liberal side of the spectrum and in disputes with their opponents. For example, consider the attacks on liberals like Randy Kennedy, a black professor on the Harvard Law School faculty. We see how people, who are in some sense fundamentally allies, who all support affirmative action and think racial problems are very important, find it impossible to hold a discussion because of this search for motives, hidden agendas, and biases. We see the same thing within critical legal studies in which two figures in the movement, Mark Tushnet and Gary Peller, bludgeoned each other in the pages of the Georgetown Law Journal25 about their motivations and potential racism, etc. I do not think that is the way we can move forward.

This thesis also has been destructive of dialogue with outsiders///

, with the rest of American society, with people who are not already believers in critical race theory or the inherent racism of American society and law. For example, at my own law school, a young member of our faculty, Jim Chen, wrote an article about racial intermarriage 6 that was considered to be inappropriate by some other minority group members. An entire issue27 of the Iowa Law Review was published, dedicated not only to criticizing his views, which I think was entirely appropriate, but to speculations about the kinds of twisted motives that could lead a member of a minority group to take a position other than the approved critical race theory position. That is not the way for us to move forward. We also see this in the attacks, of which we heard a distant echo from Professor Delgado earlier, on Daniel Moynihan, who has been a staunch liberal, strongly concerned about minorities during his entire career, and yet has been anathemized for making what were considered to be politically incorrect statements. I do not think this is going to lead us forward.

And finally, what I fear the most is the response that seemed to be implied by one of the audience questions earlier. If it is true that American society is inherently racist, doesn't that mean that it is essentially hopeless? Now this conclusion does not logically follow from that premise, any more than it logically follows that if certain character traits have a genetic basis then it is hopeless to do anything about them. But nevertheless, we all recognize that when we are talking about individuals and biology, these genetic theories tend to discourage the idea of reform, and tend to reinforce, as a matter of social reality, the view that any bad behavior that we see is just inherent. I think we can expect to see the same kind of thing when we are dealing with the sociological equivalent involving the claim that there is this inherent genetic flaw in American society. You can see this most clearly in Derrick Bell's writings, which are redolent of despair and which, in that respect, curiously resemble Robert Bork's writings, who is similarly convinced that the genetic flaws of American society will prevent it from ever achieving his vision of justice.

It is true that we cannot afford to forget our history. It is true that much of that history is unfortunate, if not worse. But it is also true that if we remain totally obsessed with the flaws of the past, fixated on their inevitability, we are unlikely to be able to move past them and move forward. And in particular, it seems to me that if we approach today's problems primarily as an issue in finger-pointing, in blaming somebody or another, or in finding the culprit, then we are not likely to be able to unite our society in a quest toward attacking those serious problems.

### Hudson—Binary Not True

#### Anti-blackness is not an ontological antagonism---conflict is inevitable in politics, but does not have to be demarcated around whiteness and blackness---the alt’s ontological fatalism recreates colonial violence

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Thus the self-same/other distinction is necessary for the possibility of identity itself. There always has to exist an outside, which is also inside, to the extent it is designated as the impossibility from which the possibility of the existence of the subject derives its rule (Badiou 2009, 220). But although the excluded place which isn’t excluded insofar as it is necessary for the very possibility of inclusion and identity may be universal (may be considered “ontological”), its content (what fills it) – as well as the mode of this filling and its reproduction – are contingent. In other words, the meaning of the signifier of exclusion is not determined once and for all: the place of the place of exclusion, of death is itself over-determined, i.e. the very framework for deciding the other and the same, exclusion and inclusion, is nowhere engraved in ontological stone but is political and never terminally settled. Put differently, the “curvature of intersubjective space” (Critchley 2007, 61) and thus, the specific modes of the “othering” of “otherness” are nowhere decided in advance (as a certain ontological fatalism might have it) (see Wilderson 2008). The social does not have to be divided into white and black, and the meaning of these signifiers is never necessary – because they are signifiers. To be sure, colonialism institutes an ontological division, in that whites exist in a way barred to blacks – who are not. But this ontological relation is really on the side of the ontic – that is, of all contingently constructed identities, rather than the ontology of the social which refers to the ultimate unfixity, the indeterminacy or lack of the social. In this sense, then, the white man doesn’t exist, the black man doesn’t exist (Fanon 1968, 165); and neither does the colonial symbolic itself, including its most intimate structuring relations – division is constitutive of the social, not the colonial division. “Whiteness” may well be very deeply sediment in modernity itself, but respect for the “ontological difference” (see Heidegger 1962, 26; Watts 2011, 279) shows up its ontological status as ontic. It may be so deeply sedimented that it becomes difficult even to identify the very possibility of the separation of whiteness from the very possibility of order, but from this it does not follow that the “void” of “black being” functions as the ultimate substance, the transcendental signified on which all possible forms of sociality are said to rest. What gets lost here, then, is the specificity of colonialism, of its constitutive axis, its “ontological” differential. A crucial feature of the colonial symbolic is that the real is not screened off by the imaginary in the way it is under capitalism. At the place of the colonised, the symbolic and the imaginary give way because non-identity (the real of the social) is immediately inscribed in the “lived experience” (vécu) of the colonised subject. The colonised is “traversing the fantasy” (Zizek 2006a, 40–60) all the time; the void of the verb “to be” is the very content of his interpellation. The colonised is, in other words, the subject of anxiety for whom the symbolic and the imaginary never work, who is left stranded by his very interpellation.4 “Fixed” into “non-fixity,” he is eternally suspended between “element” and “moment”5 – he is where the colonial symbolic falters in the production of meaning and is thus the point of entry of the real into the texture itself of colonialism. Be this as it may, whiteness and blackness are (sustained by) determinate and contingent practices of signification; the “structuring relation” of colonialism thus itself comprises a knot of significations which, no matter how tight, can always be undone. Anti-colonial – i.e., anti-“white” – modes of struggle are not (just) “psychic” 6 but involve the “reactivation” (or “de-sedimentation”)7 of colonial objectivity itself. No matter how sedimented (or global), colonial objectivity is not ontologically immune to antagonism. Differentiality, as Zizek insists (see Zizek 2012, chapter 11, 771 n48), immanently entails antagonism in that differentiality both makes possible the existence of any identity whatsoever and at the same time – because it is the presence of one object in another – undermines any identity ever being (fully) itself. Each element in a differential relation is the condition of possibility and the condition of impossibility of each other. It is this dimension of antagonism that the Master Signifier covers over transforming its outside (Other) into an element of itself, reducing it to a condition of its possibility.8 All symbolisation produces an ineradicable excess over itself, something it can’t totalise or make sense of, where its production of meaning falters. This is its internal limit point, its real:9 an errant “object” that has no place of its own, isn’t recognised in the categories of the system but is produced by it – its “part of no part” or “object small a.”10 Correlative to this object “a” is the subject “stricto sensu” – i.e., as the empty subject of the signifier without an identity that pins it down.11 That is the subject of antagonism in confrontation with the real of the social, as distinct from “subject” position based on a determinate identity.

### Coalitions – hooks

#### Uniting different coalitions is necessary to overcome white supremacy---the alt recreates white “divide and conquer”

bell hooks 3, social critic extraordinaire, “Beyond Black Only: Bonding Beyond Race”, http://prince.org/msg/105/50299?pr

African Americans have been at the forefront of the struggle to end racism and white supremacy in the United States since individual free black immigrants and the larger body of enslaved blacks first landed here. Even though much of that struggle has been directly concerned with the plight of black people, all gains received from civil rights work have had tremendous positive impact on the social status of all non-white groups in this country. Bonding between enslaved Africans, free Africans, and Native Americans is well documented. Freedom fighters from all groups (and certainly there were many traitors in all three groups who were co-opted by rewards given by the white power structure) understood the importance of solidarity-of struggling against the common enemy, white supremacy. The enemy was not white people. It was white supremacy. ¶ Organic freedom fighters, both Native and African Americans, had no difficulty building coalitions with those white folks who wanted to work for the freedom of everyone. Those early models of coalition building in the interest of dismantling white supremacy are often forgotten. Much has happened to obscure that history. The construction of reservations (many of which were and are located in areas where there are not large populations of black people) isolated communities of Native Americans from black liberation struggle. And as time passed both groups began to view one another through Eurocentric stereotypes, internalizing white racist assumptions about the other. Those early coalitions were not maintained. Indeed the bonds between African Americans struggling to resist racist domination, and all other people of color in this society who suffer from the same system, continue to be fragile, even as we all remain untied by ties, however frayed and weakened, forged in shared anti-racist struggle. ¶ Collectively, within the United States people of color strengthen our capacity to resist white supremacy when we build coalitions. Since white supremacy emerged here within the context of colonization, the conquering and conquest of Native Americans, early on it was obvious that Native and African Americans could best preserve their cultures by resisting from a standpoint of political solidarity. The concrete practice of solidarity between the two groups has been eroded by the divide-and-conquer tactics of racist white power and by the complicity of both groups. Native American artist and activist of the Cherokee people Jimmie Durham, in his collection of essays A Certain Lack of Coherence, talks about the 1960’s as a time when folks tried to regenerate that spirit of coalition: “In the 1960’s and ‘70’s American Indian, African American and Puerto Rican activists said, as loudly as they could, “This country is founded on the genocide of one people and the enslavement of another.” This statement, hardly arguable, was not much taken up by white activists.” As time passed, it was rarely taken up by anyone. Instead the fear that one’s specific group might receive more attention has led to greater nationalism, the showing of concern for one’s racial or ethnic plight without linking that concern to the plight of other non-white groups and their struggles for liberation. ¶ Bonds of solidarity between people of color are continuously ruptured by our complicity with white racism. Similarly, white immigrants to the United States, both past and present, establish their right to citizenship within white supremacist society by asserting it in daily life through acts of discrimination and assault that register their contempt for and disregard of black people and darker-skinned immigrants mimic this racist behavior in their interactions with black folks. In her editorial “On the Backs of Blacks” published in a recent special issue of TIME magazine Toni Morrison discusses the way white supremacy is reinscribed again and again as immigrants seek assimilation: ¶ All immigrants fight for jobs and space, and who is there to fight but those who have both? As in the fishing ground struggle between Texas and Vietnamese shrimpers, they displace what and whom they can…In race talk the move into mainstream America always means buying into the notion of American blacks as the real aliens. Whatever the ethnicity or nationality of the immigrant, his nemesis is understood to be African American…So addictive is this ploy that the fact of blackness has been abandoned for the theory of blackness. It doesn’t matter anymore what shade the newcomer’s skin is. A hostile posture toward resident blacks must be struck at the Americanizing door. ¶ Often people of color, both those who are citizens and those who are recent immigrants, hold black people responsible for the hostility they encounter from whites. It is as though they see blacks as acting in a manner that makes things harder for everybody else. This type of scapegoating is the mark of the colonized sensibility which always blames those victimized rather than targeting structures of domination. ¶ Just as many white Americans deny both the prevalence of racism in the United States and the role they play in perpetuating and maintaining white supremacy, non-white, non-black groups, Native, Asian, Hispanic Americans, all deny their investment in anti-black sentiment even as they consistently seek to distance themselves from blackness so that they will not be seen as residing at the bottom of this society’s totem pole, in the category reserved for the most despised group. Such jockeying for white approval and reward obscures the way allegiance to the existing social structure undermines the social welfare of all people of color. White supremacist power is always weakened when people of color bond across differences of culture, ethnicity, and race. It is always strengthened when we act as though there is no continuity and overlap in the patterns of exploitation and oppression that affect all of our lives. ¶ To ensure that political bonding to challenge and change white supremacy will not be cultivated among diverse groups of people of color, white ruling groups pit us against one another in a no-win game of “who will get the prize for model minority today.” They compare and contrast, affix labels like “model minority,” define boundaries, and we fall into line. Those rewards coupled with internalized racist assumptions lead non-black people of color to deny the way racism victimizes them as they actively work to disassociate themselves from black people. This will to disassociate is a gesture of racism. ¶ Even though progressive people of color consistently critique these standpoints, we have yet to build a contemporary mass movement to challenge white supremacy that would draw us together. Without an organized collective struggle that consistently reminds us of our common concerns, people of color forget. Sadly forgetting common concerns sets the stage for competing concerns. Working within the system of white supremacy, non-black people of color often feel as though they must compete with black folks to receive white attention. Some are even angry at what they wrongly perceive as a greater concern on the part of white of the dominant culture for the pain of black people. Rather than seeing the attention black people receive as linked to the gravity of our situation and the intensity of our resistance, they want to make it a sign of white generosity and concern. Such thinking is absurd. If white folks were genuinely concerned about black pain, they would challenge racism, not turn the spotlight on our collective pain in ways that further suggest that we are inferior. Andrew Hacker makes it clear in Two Nations that the vast majority of white Americans believe that “members of the black race represent an inferior strain of the human species.” He adds: “In this view Africans-and Americans who trace their origins to that continent-are seen as languishing at a lower evolutionary level than members of other races.” Non-black people of color often do not approach white attention to black issues by critically interrogating how those issues are presented and whose interests the representations ultimately serve. Rather than engaging in a competition that sees blacks as winning more goodies from the white system than other groups, non-black people of color who identify with black resistance struggle recognize the danger of such thinking and repudiate it. They are politically astute enough to challenge a rhetoric of resistance that is based on competition rather than a capacity on the part of non-black groups to identify with whatever progress blacks make as being a positive sign for everyone. Until non-black people of color define their citizenship via commitment to a democratic vision of racial justice rather than investing in the dehumanization and oppression of black people, they will always act as mediators, keeping black people in check for the ruling white majority. Until racist anti-black sentiments are let go by other people of color, especially immigrants, and complain that these groups are receiving too much attention, they undermine freedom struggle. When this happens people of color war all acting in complicity with existing exploitative and oppressive structures. ¶ As more people of color raise our consciousness and refuse to be pitted against one another, the forces of neo-colonial white supremacist domination must work harder to divide and conquer. The most recent effort to undermine progressive bonding between people of color is the institutionalization of “multiculturalism”. Positively, multiculturalism is presented as a corrective to a Eurocentric vision of model citizenship wherein white middle-class ideals are presented as the norm. Yet this positive intervention is undermined by visions of multiculturalism that suggest everyone should live with and identify with their own self contained group. If white supremacist capitalist patriarchy is unchanged then multiculturalism within that context can only become a breeding ground for narrow nationalism, fundamentalism, identity politics, and cultural, racial, and ethnic separatism. Each separate group will then feel that it must protect its own interests by keeping outsiders at bay, for the group will always appear vulnerable, its power and identity sustained by exclusivity. When people of color think this way, white supremacy remains intact. For even though demographics in the United States would suggest that in the future the nation will be more populated by people of color, and whites will no longer be the majority group, numerical presence will in no way alter white supremacy if there is no collective organizing, no efforts to build coalitions that cross boundaries. Already, the white Christian Right is targeting large populations of people of color to ensure that the fundamentalist values they want this nation to uphold and represent will determine the attitudes and values of these groups. The role Eurocentric Christianity has played in teaching non-white folks Western metaphysical dualism, the ideology that under girds binary notion of superior/inferior, good/bad, white/black, cannot be ignored. While progressive organizations are having difficulty reaching wider audiences, the white-dominated Christian Right organizes outreach programs that acknowledge diversity and have considerable influence. Just as the white-dominated Christian church in the U.S. once relied on biblical references to justify racist domination and discrimination, it now deploys a rhetoric of multiculturalism to invite non-white people to believe that racism can be overcome through a shared fundamentalist encounter. Every contemporary fundamentalist white male-dominated religious cult in the U.S. has a diverse congregation. People of color have flocked to these organizations because they have felt them to be places where racism does not exist, where they are not judged on the basis of skin color. While the white-dominated mass media focus critical attention on black religious fundamentalist groups like the Nation of Islam, and in particular Louis Farrakhan, little critique is made of white Christian fundamentalist outreach to black people and other people of color. Black Islamic fundamentalism shares with the white Christian Right support for coercive hierarchy, fascism, and a belief that some groups are inferior and others superior, along with a host of other similarities. Irrespective of the standpoint, religious fundamentalism brainwashes individuals not to think critically or see radical politicization as a means of transforming their lives. When people of color immerse themselves in religious fundamentalism, no meaningful challenge and critique of white supremacy can surface. Participation in a radical multiculturalism in any form is discouraged by religious fundamentalism. ¶ Progressive multiculturalism that encourages and promotes coalition building between people of color threatens to disrupt white supremacist organization of us all into competing camps. However, this vision of multiculturalism is continually undermined by greed, one group wanting rewards for itself even at the expense of other groups. It is this perversion of solidarity the authors of Night Vision address when they assert: “While there are different nationalities, races and genders in the U.S., the supposedly different cultures in multiculturalism don’t like to admit what they have in common, the glue of it all-parasitism. Right now, there’s both anger among the oppressed and a milling around, edging up to the next step but uncertain what it is fully about, what is means. The key is the common need to break with parasitism.” A based identity politics of solidarity that embraces both a broad based identity politics which acknowledges specific cultural and ethnic legacies, histories, etc. as it simultaneously promotes a recognition of overlapping cultural traditions and values as well as an inclusive understanding of what is gained when people of color unite to resist white supremacy is the only way to ensure that multicultural democracy will become a reality.

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### Consequences Key

#### You must eval consequeneces of proposals

Christopher A. Bracey 6, Associate Professor of Law, Associate Professor of African & African American Studies, Washington University in St. Louis, September, Southern California Law Review, 79 S. Cal. L. Rev. 1231, p. 1318

Second, reducing conversation on race matters to an ideological contest allows opponents to elide inquiry into whether the results of a particular preference policy are desirable. Policy positions masquerading as principled ideological stances create the impression that a racial policy is not simply a choice among available alternatives, but the embodiment of some higher moral principle. Thus, the "principle" becomes an end in itself, without reference to outcomes. Consider the prevailing view of colorblindness in constitutional discourse. Colorblindness has come to be understood as the embodiment of what is morally just, independent of its actual effect upon the lives of racial minorities. This explains Justice Thomas's belief in the "moral and constitutional equivalence" between Jim Crow laws and race preferences, and his tragic assertion that "Government cannot make us equal [but] can only recognize, respect, and protect us as equal before the law." [281](http://web.lexis-nexis.com/universe/document?_m=cd9713b340d60abd42c2b34c36d8ef95&_docnum=9&wchp=dGLbVzz-zSkVA&_md5=9645fa92f5740655bdc1c9ae7c82b328#n281) For Thomas, there is no meaningful difference between laws designed to entrench racial subordination and those designed to alleviate conditions of oppression. Critics may point out that colorblindness in practice has the effect of entrenching existing racial disparities in health, wealth, and society. But in framing the debate in purely ideological terms, opponents are able to avoid the contentious issue of outcomes and make viability determinations based exclusively on whether racially progressive measures exude fidelity to the ideological principle of colorblindness. Meaningful policy debate is replaced by ideological exchange, which further exacerbates hostilities and deepens the cycle of resentment.

### Deliberation Good—White Supremacy

#### White supremacy isn’t a monolithic root cause. Relying on public debate to identify and address proximate causes is best—it also proves there is a positive, white anti-racist role which answers white solidarity

Shelby 7—Tommie Shelby, Professor of African and African American Studies and of Philosophy at Harvard [2007, We Who Are Dark: The Philosophical Foundations of Black Solidarity]

Others might challenge the distinction between ideological and structural causes of black disadvantage, on the grounds that we are rarely, if ever, able to so neatly separate these factors, an epistemic situation that is only made worse by the fact that these causes interact in complex ways with behavioral factors. These distinctions, while perhaps straightforward in the abstract, are difficult to employ in practice. For example, it would be difficult, if not impossible, for the members of a poor black community to determine with any accuracy whether their impoverished condition is due primarily to institutional racism, the impact of past racial injustice, the increasing technological basis of the economy, shrinking state budgets, the vicissitudes of world trade, the ascendancy of conservative ideology, poorly funded schools, lack of personal initiative, a violent drug trade that deters business investment, some combination of these factors, or some other explanation altogether. Moreover, it is notoriously difficult to determine when the formulation of putatively race-neutral policies has been motivated by racism or when such policies are unfairly applied by racially biased public officials.

There are very real empirical difficulties in determining the specific causal significance of the factors that create and perpetuate black disadvantage; nonetheless, it is clear that these factors exist and that justice will demand different practical remedies according to each factor's relative impact on blacks' life chances. We must acknowledge that our social world is complicated and not immediately transparent to common sense, and thus that systematic empirical inquiry, historical studies, and rigorous social analysis are required to reveal its systemic structure and sociocultural dynamics. There is, moreover, no mechanical or infallible procedure for determining which analyses are the soundest ones. In addition, given the inevitable bias that attends social inquiry, legislators and those they represent cannot simply defer to social-scientific experts. We must instead rely on open public debate—among politicians, scholars, policy makers, intellectuals, and ordinary citizens—with the aim of garnering rationally motivated and informed consensus. And even if our practical decision procedures rest on critical deliberative discourse and thus live up to our highest democratic ideals, some trial and error through actual practice is unavoidable.

These difficulties and complications notwithstanding, a general recognition of the distinctions among the ideological and structural causes of black disadvantage could help blacks refocus their political energies and self-help strategies. Attention to these distinctions might help expose the superficiality of theories that seek to reduce all the social obstacles that blacks face to contemporary forms of racism or white supremacy. A more penetrating, subtle, and empirically grounded analysis is needed to comprehend the causes of racial inequality and black disadvantage. Indeed, these distinctions highlight the necessity to probe deeper to find the causes of contemporary forms of racism, as some racial conflict may be a symptom of broader problems or recent social developments (such as immigration policy or reduced federal funding for higher education).

### Progress/Anti-black = wrong

#### Black progress is undeniable---afro-pessimism requires ignoring mass amounts of evidence to the contrary

Leroy Clark 95, Professor of Law, Catholic University Law School, “A Critique of Professor Derrick A. Bell's Thesis of the Permanence of Racism and His Strategy of Confrontation”, 73 Denv. U.L. Rev. 23

Professor Bell treats the post-1960s claims of progress as an illusion: discrimination simply became more covert, but equally efficient. n69 The facts, however, viewed with a holistic perspective, largely refute this claim. n70¶ The most thorough analysis of black-American status since Gunnar Myrdal's An American Dilemma in 1944, is A Common Destiny--Blacks and American Society. n71 The report covers the period from 1940 through 1986, and is more comprehensive than the studies Professor Bell relied on in recent law review articles.¶ A Common Destiny answers Professor Bell's central question in Faces:¶ Contemporary views of the status of black-white relations in America vary widely. Perspectives range from optimism that the main problems have been solved, to the view that black progress is largely an illusion, to assessments that the nation is retrogressing and moving toward increased racial disparities. To some observers, the present situation is only another episode in a long history of recurring cycles of apparent improvement that are followed by new forms of dominance in changed contexts: the level of black status changes, it is said, but the one constant is blacks' continuing subordinate social position. To other observers, the opposite is correct: long-run progress is the dominant trend. n72¶ A Common Destiny, however, concludes that the overwhelming majority of black-Americans made substantial progress since 1940:¶ Over the 50-year span covered by this study, the social status of American blacks has on average improved dramatically, both in absolute terms and relative to whites. The growth of the economy and public policies promoting racial equality led to an erosion of segrega- tion and discrimination, making it possible for a substantial fraction of blacks to enter the mainstream of American life. n73¶ Just five decades ago, most black Americans could not work, live, shop, eat, seek entertainment, travel where they chose. Even a quarter century ago--100 years after the Emancipation Proclamation of 1863--most blacks were effectively denied the right to vote. . . . Today the situation is very different. n74¶ The Committee acknowledged that "the great gulf that existed between black and white Americans in 1939 . . . has not closed," because one-third of blacks "still live in households with incomes below the poverty line." n75 Yet the study reported that 92% of blacks lived below the poverty line in 1939. n76 A 60% drop in poverty is an astounding improvement, by any measure, and is an even faster movement out of poverty than that of the white public that was also suffering from the ravages of the economic depression of the 1930s. n77 Some reduction of black poverty occurred when blacks secured higher paying jobs in defense industries during World War II. But the passage of the 1964 Civil Rights Act brought a significant reduction in racial employment discrimination. By 1984, blacks had $ 9 billion more per year in real income, adjusted for inflation, than they would have had if they had remained arrayed throughout the occupational spectrum as they were before the Act. n78 A new black economic elite developed through movement into higher paying employment in the private sector and away from employment in government, the clergy, and civil rights organizations; this new elite should sustain their progress and finance opportunities for their young. n79¶ The number of black elected officials increased from a few dozen in 1940 to 6,800 by 1988, and the number of black public administrators went from 1% in 1940 to 8% in 1980. n80 No white elected official has openly supported racial segregation since Governor Wallace in the early 1960s, a testament, in part, to the substantial increases in black voter registration and voting, due to the Voting Rights Acts of 1957, 1960, and 1965. n81¶ One could also show decreases in racial segregation in education, housing, and other aspects of American life, coupled with the virtual disappearance of racial exclusion in public accommodations--all due to enforcement of the new legislation. It is true, racial discrimination has not been totally eradicated. n82 But, Peter F. Drucker summarizes:¶ In the fifty years since the Second World War the economic position of African-Americans in America has improved faster than that of any other group in American social history--or in the social history of any country. Three-fifths of America's blacks rose into middle class incomes; before the Second World War the figure was one twentieth. n83¶ I doubt that Professor Bell believes that racial discrimination should have totally disappeared. But what, then, accounts for Professor Bell's statements that "the civil rights gains, so hard won, are being steadily eroded"; that it has been "more than a decade of civil rights setbacks in the White House, and in the courts"; n84 and that the civil rights movement is "a movement now brought to a virtual halt"? n85¶ Professor Bell was not looking at the total sweep of black progress since the 1960s, but was dismayed by the hostility towards--or lack of support for--civil rights displayed during the twelve years of the Reagan and Bush administrations. n86 Ex-president Jimmy Carter appointed a record number of black attorneys to the federal courts. n87 Reagan and Bush returned to the old style, appointing few minorities and women to the federal bench. Further, their appointees often proved unsympathetic to the arguments of civil rights organizations. n88 Reagan and Bush were the only presidents who opposed passage of the 1964 Civil Rights Act, and the only presidents who vetoed civil rights legislation in the 20th century. n89 They also used subtle, and sometimes not so subtle, "racial codes" to covertly organize whites to break the Democratic party's hold on the presidency, especially in the South. n90¶ Even given this executive branch hostility to civil rights, the Congress, the branch of government much more vulnerable to the electorate, consistently and successfully opposed or reversed actions that undermined civil rights. Congress amended and improved the Voting Rights Act in 1982. n91 Congress overrode the veto of one of the most popular presidents in modern times, Reagan, and passed the Civil Rights Restoration Act in 1986. n92 The enforcement machinery of the Fair Housing Act, prohibiting racial discrimination in the sale or rental of housing, was substantially improved by amendment in 1988. n93 A bill barring discrimination in employment and public accommodations for the disabled, a disproportionate number of which are blacks, passed in 1990. n94¶ The major "setbacks," to which Professor Bell refers, were several United States Supreme Court cases which limited the scope of statutes prohibiting discrimination in employment, or which created proof problems for plaintiffs. n95 Congress passed a bill in 1991 which reversed all of the adverse decisions by the Court. n96 This history of Congressional repudiation of executive and judicial hostility to civil rights and, indeed, the extension of civil rights to new areas, is not noted in either of Professor Bell's two books. n97¶ Why, if society is as irremediably racist as Professor Bell alleges, can Congress, which constantly sounds out the public, confidently pass this wide range of pro-civil rights legislation? The answer is that the overwhelming majority of white Americans underwent attitude changes in the last thirty years, generally relinquishing crude or unadulterated racial prejudice. A majority of whites no longer believe in the racial inferiority of blacks, and believe blacks should not be discriminated against in employment, schools, and access to public and private accommodations. n98 Professor Bell's books contain no mention of the extensive opinion poll data showing less racial prejudice. Indeed, his books, especially Confronting Authority, portray the white public as massively, and often incomprehensibly and stupidly, committed to racism.