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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).)

## \*\*\* 2AC

### AT: Topical Version

#### Passivity

Antonio, 95 – Professor of Sociology at the University of Kansas (Robert J., “Nietzsche's Antisociology: Subjectified Culture and the End of History,” The American Journal of Sociology, 101.1, p. 14-15, 1995)

The "problem of the actor," Nietzsche said, "troubled me for the longest time."' He considered "roles" as "external," "surface," or "foreground" phenomena and viewed close personal identification with them as symptomatic of estrangement. While modern theorists saw differentiated roles and professions as a matrix of autonomy and reflexivity, Nietzsche held that persons (especially male professionals) in specialized occupations overidentify with their positions and engage in gross fabrications to obtain advancement. They look hesitantly to the opinion of others, asking themselves, "How ought I feel about this?" They are so thoroughly absorbed in simulating effective role players that they have trouble being anything but actors—"The role has actually become the character." This highly subjectified social self or simulator suffers devastating inauthenticity. The powerful authority given the social greatly amplifies Socratic culture's already self-indulgent "inwardness." Integrity, decisiveness, spontaneity, and pleasure are undone by paralyzing overconcern about possible causes, meanings, and consequences of acts and unending internal dialogue about what others might think, expect, say, or do (Nietzsche 1983, pp. 83-86; 1986, pp. 39-40; 1974, pp. 302-4, 316-17). Nervous rotation of socially appropriate "masks" reduces persons to hypostatized "shadows," "abstracts," or simulacra. One adopts "many roles," playing them "badly and superficially" in the fashion of a stiff "puppet play." Nietzsche asked, "Are you genuine? Or only an actor? A representative or that which is represented? . . . [Or] no more than an imitation of an actor?" Simulation is so pervasive that it is hard to tell the copy from the genuine article; social selves "prefer the copies to the originals" (Nietzsche 1983, pp. 84-86; 1986, p. 136; 1974, pp. 232-33, 259; 1969b, pp. 268, 300, 302; 1968a, pp. 26-27). Their inwardness and aleatory scripts foreclose genuine attachment to others. This type of actor cannot plan for the long term or participate in enduring net-works of interdependence; such a person is neither willing nor able to be a "stone" in the societal "edifice" (Nietzsche 1974, pp. 302-4; 1986a, pp. 93-94). Superficiality rules in the arid subjectivized landscape. Neitzsche (1974, p. 259) stated, "One thinks with a watch in one's hand, even as one eats one's midday meal while reading the latest news of the stock market; one lives as if one always 'might miss out on something.' `Rather do anything than nothing': this principle, too, is merely a string to throttle all culture. . . . Living in a constant chase after gain compels people to expend their spirit to the point of exhaustio0n in continual pretense and overreaching and anticipating others." Pervasive leveling, improvising, and faking foster an inflated sense of ability and an oblivious attitude about the fortuitous circumstances that contribute to role attainment (e.g., class or ethnicity). The most mediocre people believe they can fill any position, even cultural leadership. Nietzsche respected the self-mastery of genuine ascetic priests, like Socrates, and praised their ability to redirect ressentiment creatively and to render the "sick" harmless. But he deeply feared the new simulated versions. Lacking the "born physician's" capacities, these impostors amplify the worst inclinations of the herd; they are "violent, envious, exploitative, scheming, fawning, cringing, arrogant, all according to circumstances." Social selves are fodder for the "great man of the masses." Nietzsche held that "the less one knows how to command, the more urgently one covets someone who commands, who commands severely—a god, prince, class, physician, father confessor, dogma, or party conscience." The deadly combination of desperate conforming and overreaching and untrammeled ressentiment paves the way for a new type of tyrant (Nietzsche 1986, pp. 137, 168; 1974, pp. 117-18, 213, 288-89, 303-4).

### 2ac Decisionmaking

#### The debate space can never be stable – the negative’s obsession with predictability and limits is disempowering –

De Cock 1—Christian De Cock, Professor of Organizational behaviour, change management, creative problem solving [2001, “Of Philip K. Dick, reflexivity and shifting realities Organizing (writing) in our post-industrial society” in the book “Science Fiction and Organization”]

'As Marx might have said more generally, 'all that is built or all that is "natural" melts into image' in the contemporary global economies of signs and space' (Lash and Urry, 1994, p. 326). The opinion seems to be broadly shared among both academics and practitioners that traditional conceptions of effective organizing and decision-making are no longer viable because we live in a time of irredeemable turbulence and ambiguity (Gergen, 1995). The emerging digital or 'new' economy seems to be a technologically driven vision of new forms of organizing, relying heavily on notions of flexibility as a response this turbulence. Corporate dinosaurs must be replaced with smart networks that add value. Words such as 'cyberspace' 3 and 'cyborganization' drip easily from tongues (e.g. Parker and Cooper, 1998) and 'the organization' becomes more difficult to conceptualize as it 'dissipates into cyberspace' and 'permeates its own boundaries' (Hardy and Clegg 1997: S6). Organizations are losing important elements of permanence as two central features of the modern organization, namely the assumption of self-contained units and its structural solidity, are undermined (March, 1995). Even the concept of place becomes increasingly phantasmagoric as locales get thoroughly penetrated by social influences quite distant from them (Giddens, 1990). In this new organizational world 'reality' seems to have become only a contract, the fabrication of a consensus that can be modified or can break down at any time (Kallinikos, 1997) and the witnessing point - the natural datum or physical reference point - seems to be in danger of being scrapped (Brown, 1997). This notion that reality is dissolving from the inside cannot but be related with feelings of disorientation and anxiety. Casey (1995, pp. 70-1), for example, provides a vivid description of the position of 'the self' within these new organizational realities. This is a world where everyone has lost a sense of everyday competence and is dependent upon experts, where people become dependent on corporate bureaucracy and mass culture to know what to do. The solidity (or absence of it) of reality has of course been debated at great length in the fields of philosophy and social theory, but it remains an interesting fact that organizational scholars have become preoccupied with this issue in recent years. Hassard and Holliday (1998), for example, talk about the theoretical imperative to explore the linkages between fact/fiction and illusion/reality. It is as if some fundamental metaphysical questions have finally descended into the metaphorical organizational street. Over the past decade or so, many academics who label themselves critical management theorists and/or postmodernists (for once, let's not name any names) have taken issue with traditional modes of organizing (and ways of theorizing about this organizing) by highlighting many irrationalities and hidden power issues. These academics have taken on board the idea that language has a role in the constitution of reality and their work is marked by a questioning of the nature of reality, of our conception of knowledge, cognition, perception and observation (e.g. Chia, 1996a; Cooper and Law, 1995; Czarniawska, 1997). Notwithstanding the importance of their contributions, these authors face the problem that in order to condemn a mode of organizing or theorizing they need to occupy an elevated position, a sort of God's eye view of the world; a position which they persuasively challenge when they deconstruct the claims of orthodox/modern organizational analyses (Parker, 2000; Weiskopf and Willmott, 1997). Chia, for example, writes about the radically untidy, ill-adjusted character of the fields of actual experience - 'It is only by … giving ourselves over to the powers of "chaos", ambiguity, and confusion that new and deeper insights and understanding can be attained' (Chia, 1996b, p. 423) - using arguments which could not be more tidy, analytical and precise. This of course raises the issue of reflexivity: if reality can never be stabilized and the research/theorizing process 'is always necessarily precarious, incomplete and fragmented' (Chia, 1996a, p. 54), then Chia's writing clearly sits rather uncomfortably with his ontological and epistemological beliefs. In this he is, of course, not alone (see, e.g., Gephart et al.., 1996; Cooper and Law, 1995). This schizophrenia is evidence of rather peculiar discursive rules where certain ontological and epistemological statements are allowed and even encouraged, but the reciprocate communicational practices are disallowed. Even the people who are most adventurous in their ideas or statements (such as Chia) are still caught within rather confined communicational practices. To use Vickers' (1995) terminology: there is a disjunction between the ways in which organization theorists are ready to see and value the organizational world (their appreciative setting) and the ways in which they are ready to respond to it (their instrumental system). When we write about reflexivity, paradox and postmodernism in organizational analysis, it is expected that we do this unambiguously. 4 And yet, the notion that 'if not consistency, then chaos' is not admitted even by all logicians, and is rejected by many at the frontiers of natural science research - 'a contradiction causes only some hell to break loose' (McCloskey, 1994, p. 166).

### 2ac anthropocentrism

#### Humanism is inescapable – and giving up on it dooms the planet to extinction

**Davies 97** [Tony, Professor of English at Birmignham. Humanism. 130]

So there will not after all be, nor indeed could there be, any tidy definitions. The several humanisms – the civic humanism of the quattrocento Italian city-states, the Protestant humanism of sixteenth century northern Europe, the rationalistic humanism that attended at the revolutions of enlightened modernity, and the romantic and positivistic humanisms through which the European bourgeoisies established their hegemony over it, the revolutionary humanism that shook the world and the liberal humanism that sought to tame it, the humanism of the Nazis and the humanism of their victims and opponents, the antihumanist humanism of Heidegger and the humanist antihumanism of Foucault and Althusser – are not reducible to one, or even to a single line or pattern. Each has its distinctive historical curve, its particular discursive poetics, its own problematic scansion of the human. Each seeks, as all discourses must, to impose its own answer to the question of ‘which is to be master’. Meanwhile, the problem of humanism remains, for the present, an inescapable horizon within which all attempts to think about the ways in which human being have, do, might live together in and on the world are contained. Not that the actual humanisms described here necessarily provide a model, or even a useful history, least of all for those very numerous people, and peoples, for whom they have been alien and oppressive. Some, at least, offer a grim warning. Certainly it should no longer be possible to formulate phrases like ‘the destiny of man’ or ‘the triumph of human reason’ without an instant consciousness of the folly and brutality they drag behind them. All humanisms, until now, have been imperial. They speak of the human in the accents and the interests of a class, a sex, a ‘race’. Their embrace suffocates those whom it does not ignore. The first humanists scripted the tyranny of Borgias, Medicis and Tudors. Later humanisms dreamed of freedom and celebrated Frederick II, Bonaparte, Bismarck, Stalin. The liberators of colonial America, like the Greek and Roman thinkers they emulated, owned slaves. At various times, not excluding the present, the circuit of the human has excluded women, those who do not speak Greek or Latin or English, those whose complexions are not pink, children, Jews. It is almost impossible to think of a crime that has not been committed in the name of humanity. At the same time, though it is clear that the master narrative of transcendental Man has outlasted its usefulness, it would be unwise simply to abandon the ground occupied by the historical humanisms. For one thing, some variety of humanism remains, on many occasions, the only available alternative to bigotry and persecution. The freedom to speak and write, to organize and campaign in defence of individual or collective interests, to protest and disobey: all these, and the prospect of a world in which they will be secured, can only be articulated in humanist terms. It is true that the Baconian ‘Knowledge of Causes, and Secrett Motions of Things’, harnessed to an overweening rationality and an unbridled technological will to power, has enlarged the bounds of human empire to the point of endangering the survival of the violated planet on which we live. But how, if not by mobilizing collective resources of human understanding and responsibility of ‘enlightened self-interest’ even, can that danger be turned aside?

#### Rejection of anthropocentrism undermines pragmatic attempts at environmental protection.

Andrew **Light**, July **2002**. Associate professor of philosophy and environmental policy, and director of the Center for Global Ethics at George Mason University. “Contemporary Environmental Ethics From Metaethics to Public Philosophy,” Metaphilosophy 33.4, Ebsco.

With this variety of views in the field, how should environmental ethics proceed? One answer would be that it will simply proceed, whether it should or not, as a new set of debates between the more traditional non anthropocentric views and the biocentric, anthropocentric, or other alternative views briefly mentioned at the end of the previous section. Many anthropocentric environmental ethicists seem determined to do just that (see Norton 1995 and Callicott 1996). There is, however, an alternative: in addition to continuing the tradition of most environmental ethics as philosophical sparring among philosophers, we could turn our attention to the question of how the work of environmental ethicists could be made more useful in taking on the environmental problems to which environmental ethics is addressed as those problems are undertaken in policy terms. The problems with contemporary environmental ethics are arguably more practical than philosophical, or at least their resolution in more practical terms is more important than their resolution in philosophical terms at the present time. For even though there are several dissenters from the dominant traditions in environmental ethics, the more important consideration is the fact that the world of natural-resource management (in which environmental ethicists should hope to have some influence, in the same way that medical ethicists have worked for influence over the medical professions) takes a predominantly anthropocentric approach to assessing natural value, as do most other humans (more on this point in the next section). Environmental ethics appears more concerned with overcoming human interests than redirecting them toward environmental concerns. As a consequence, a nonanthropocentric form of ethics has limited appeal to such an audience, even if it were true that this literature provides the best reasons for why nature has value (de-Shalit 2000).9 And **not to appeal to such an audience arguably means that we are not having an effect either on the formation of better environmental polices or on the project of engendering public support for them**. As such, I would argue, environmental ethics is not living up to its promise as a field of philosophy attempting to help resolve environmental problems. It is instead evolving mostly as a field of intramural philosophical debate. To demonstrate better how the dominant framework of environmental ethics is hindering our ability to help address environmental problems, let us examine a more specific case where the narrow rejection of anthropocentrism has hindered a more effective philosophical contribution to debates in environmental policy.

#### Their ethics can’t overcome traditional social barriers to how/why we treat others. it would be better to advocate for the institutionalization of expanding our traditional theories of ethics to apply to animals.

Paola **CAVALIERI** Editor Etica & Animalia **‘8** in *Animal Subjects* p. 112-114

The situation is analogous if we turn to Derrida's thinking. Derrida attacks the metaphysics of subjectivity and, following Heidegger, criticizes all Western metaphysical tradition2 -lmt this merely to offer, again following Heidegger, a "philosophy of die originaIy" that makes sense of the universe in an even deeper and more comprehensive way:3 Since it is to this global view that Derrida's ethical stances are connected, they tend to stand or fall together with it. 1i instead of sticking to the idiosyncratic substantive notion of subject that can be charged with an inherent will to master and sacrifiee[ one gives prominence to the formal notion of agent, construed as a rational intentional being that logically identifies in rilere mtentionality the relevant similarity between itself and its recipients, the ethical centrality of deconstruction loses much of its force. And if one does not think that hierarchical dichotomies are the central problem in ethics, the replacement of the binary opposition between hurnans and nonhunians with "multiple and heterogeneous" hierarchical borders does not turn out to be a main theoretical achievement, Even more to the point, for those who do not share Derrida's un-scientific stance, there is no reason to opt for an ethics that discounts the rational application of general criteria with respect to "the ordeal of the undecidable "-fl

Ethical theories of the kind just described have obvious difficulties in overcoming ingrained perspectives such as the view that nonhuman animals are inferior beings with respect to human animals-indeed, they cannot even make room for the notion of "nonhuman animals." On the other hand it can plausibly he claimed that they also have difficulties in producing a universally acceptable, though minimal, ethical doctrine that might protect the least among us. Luckily, we already have such a doctrine- contemporary human rights theory--which is the most refined product of that analytic style in ethics that has actually, and for quite some time, given up any metaphysical commitment. The doctrine's simple reliance on the idea that the basic -Interests-to life, freedom and well- being---of individuals, whatever their group menibership and whatever their cognitive level, have a direct normative force imposing an equal prima face dut of non-interference; its independence from any preconceived and **undemonstrable philosophical world view;** and, finally, its focus, through the notion, not of ontologically loaded "natural rights" but of moral rights carrying legal overtones, on the beings who suffer the injury, are the result of a long work in rational, argumentative ethics. And, not incidentally, it is just the logic of this doctrine that entails now the rejection of speciesism together with racism and sexism, and which, thanks to the abandonment of the traditional intellectual bias, points to the inclusion of many nonhuman animals into the privileged moral category till now confined to hum-an beings" if seen in this light, French **anti-humanism's** inability to produce any radical result on the animal question is only one among the short comings of an unsatisfactory approach to ethics."

#### 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.

### 2AC Give Back the Land

#### Internal critique of settler society and executive authority more likely to be successful than their utopian external critique

Aziz **RANA** Law @ Cornell **’11** *The Two Faces of American Freedom* p. 14-19

In emphasizing how settlerism set the ideological and structural parameters for collective life, my point is decidedly not to demean or reject the past. Our accounts of liberty may well have emerged precisely in the context of slavery and native expropriation. These contexts were the living embodiment of freedom's antithesis: bondage and servitude. However, any **one-sided rejection** of settlerism, due to its brand of Anglo supremacy and social subordination, would necessarily ignore how such circumstances gave birth to a liberating vision of collective possibility\_27 For most of the American experience, this vision articulated and justified a historically new political creature- an independent and imperial settler state. Yet, at decisive historical moments, it also led some Americans to imagine a republicanism that was both inclusive and disconnected from territorial conquest. In essence, these reformers saw the ideal of democracy as a guiding social practice, which was bound neither philosophically nor politically to existing forms of bondage. They imagined an alternative identity for the country, one that would revise dramatically the uses of external power and thus create a new, universal, and nonimperial American polity. In a sense, they suggested the real exceptionalism of the American project: the effort to strip republican ideals of their oppressive roots and to make free citizenship broadly accessible to all. The Book in Outline Each chapter of the book explores the conceptual relationship between the settler experience and notions of liberty during a given historical period. In Chapter 1 I detail the legal and political basis for Anglo colonization of North America and the ways in which settler ideology combined a rich understanding of collective freedom with the project of empire. I then reconceive the central causes and consequences of the American Revolution by reinterpreting the Revolution as a settler revolt over the future of imperial colonization. By the 1760s, London's imperium had grown exponentially, extending from Indian Bengal to French Canada and transforming almost overnight into a global and culturally diverse effort in colonial administration. For Anglo settlers, the emerging imperial order was a threat to both their vision of republican freedom and their position of social supremacy vis-a-vis marginalized groups. Through revolt, colonists reaffirmed the inherent link between internal liberty and external subordination and established an independent settler empire along the lines of the old imperial status quo. The ultimate result was a political community motivated by the promise of republican self-rule and imprisoned within a deeply limited vision of social inclusion. Chapter 2 describes how, for small farmers and townspeople, the experience of revolutionary upheaval promoted a radicalizing of collective ambitions- what I refer to as the populist form of republican liberty. For such groups, achieving meaningful independence required energizing government power and linking it to a self-assertive popular will. However, this vision confronted a basic postcolonial predicament, one not unfamiliar to the independent African and Asian polities that emerged in the twentieth century. Anglo settlers found themselves embedded in a world of competing European states, in which the goal of achieving substantive independence from Europe ran squarely against the implementation of populist politics. As a result, small farmers and townspeople came to see government authority, as employed by commercial and political elites, as a threat to what remained of popular autonomy. This sense was reinforced by the fact that federal power became increasingly associated with territorial expansion and the congressional assertion of the old imperial prerogative. Retreating from their original revolutionary vision, farmers and artisans sought instead to police state activity and protect their own social status by imposing this prerogative on marginalized groups. As a consequence, the new United States developed a rigid politics of duality, which separated free citizens from an increasingly complicated structure of control over (among others) slaves, emancipated blacks, semisovereign Indian tribes, and Mexican citizens. In Chapter 3 I describe the reemergence and flourishing of the robust populist account of republican freedom, which accompanied a general reevaluation of social goals and institutional arrangements generated by the Civil War, industrialization, and the closing of the frontier. In this context, a sweeping protest movement, organized through the Farmers Alliance, the Knights of Labor, and the People's Party, sought to adapt economic and political self-rule to new collective realities. At their most expansive, radical agrarian and labor activists suggested a more universal and nonimperial mode of popular politics, which engaged in a thoroughgoing critique of external American power and its corrosive effects on internal liberty. They sketched, although often incompletely, a vision of freedom without empire. In the end, the defeat of the Populist revolt meant that when later reformers sought to challenge internal and external modes of authority, they faced institutions and practices that had grown more deeply embedded with each passing year. In Chapter 4 I chart the rise of the alternative vision of constitutional and political life that took root in the wake of the Populist movement. This new consensus, which culminated in the constitutional order established by the New Deal, ultimately involved abandoning the notion of freedom as self-rule. It dismantled settler institutions and ideals and created a new statecraft along the lines of the United States' European rivals, transforming the American presidency, perhaps ironically, into an apt successor to the English crown. In the process, New Dealers emphasized security-from both want and foreign threat-as the main collective goal, instead of economic independence or participatory citizenship. This commitment to security involved developing a strong and flexible executive, able to respond aggressively to social crises at home and abroad. It also meant reconfiguring the old imperial prerogative, centralized now in the presidency, as a routine and general mode of state authority rather than a specialized method for policing the boundary between insiders and outsiders. In international affairs, while the country refrained from pursuing a traditional colonial empire, the United States nonetheless increasingly sought global dominance and justified such policies as necessary for domestic and foreign safety. This projection of power helped to reinforce the new constitutionalism, in which the executive served as an authoritative representative body and spoke broadly on behalf of "we the people." By way of a conclusion, I pursue more directly the current implications of this historical reconstruction, focusing on post-New Deal reform projects and modes of mass mobilization. I look especially at the implications of popular efforts at greater political and economic inclusion, such as for blacks and women. These efforts have taken two basic trajectories. On the one hand, they have served to strengthen prevailing institutions by incorporating elites from previously marginalized groups into arenas of corporate and governmental privilege. Yet, on the other hand, they have at times also made explicit the ties between internal dependence and external power and, in the process, reasserted the goal of a universal and nonimperial republican politics. In fact, the civil rights movement can be read as our most recent collective attempt to revive dormant accounts of freedom as self-rule and to connect such accounts to a full-throated critique of American interventionism. Today the goal of inclusion continues to have this dual potential-to sustain governing hierarchies and to challenge them fundamentally. Despite this ambiguity, it remains the best available avenue for reviving a robust vision of republican freedom and for joining this vision to the ideal of an open political community. In particular, the question of immigration-the appropriate economic and political status of immigrants within our borders-provides a central method for engaging structurally with the meaning of internal and external authority. Social Criticism and the Uses of History Before turning to the project in earnest, a short note about the methodology of the book is warranted. Although the subsequent chapters follow a basic chronology and offer novel interpretations of past events, this effort is not a work of traditional historical scholarship. Rather, I see this project as a form of social criticism, in which history is presented in the service of today's problems as well as tomorrow's latent possibilities. My focus on the historical past is ultimately instrumental; it seeks to illuminate how the American experience itself holds the normative tools for grappling with the current moment and for imagining emancipatory alternatives. In many ways, the book is an experiment in what Michael Walzer has called "connected criticism." By this, Walzer means that there are two ways to engage in normative argument. On the one hand, a person can stand outside a particular social community, as if he or she were a "dispassionate stranger," and assess local arrangements on the basis of principles derived from universal justice. On the other hand, a critic can approach his or her views as part of an internal argument within the practices of a given society and seek to reshape collective life by reference to shared traditions, histories, and values.28 My decision to engage in the second brand of social criticism is a conscious one, motivated by an appraisal of our present conditions. Today, it is difficult for many of us to imagine real social alternatives, ones that challenge prevailing hierarchies and justifications for internal and external power////

. In a way, the highly analytical forms of theorizing evident in political philosophy only reinforce the seeming gulf between governing institutions and utopian ideals. As one seminal example, in A Theory of justice John Rawls hopes to shed light on the problems of contemporary life by presenting a perfectly realized condition of justice. He does so by engaging in a complex thought experiment, in which he imagines what political decisions people would make when placed in the "original position." 29 The problem with this abstract form of utopianism is that it unwittingly underscores our dominant sense of collective uncertainty. Such ruminations about ideal conditions are severely disconnected from the everyday facts of diminished popular authority and political alienation. Although this form of utopian thinking embodies one avenue for social creativity, it never attaches the promise of improvement to a vision of **practical agency**. Moreover, it fails to suggest the cultural tools within the American experience that make these accounts of justice not just universal aspirations but rather constitutive elements of our local and contested debates over social possibility. In excavating the ideological visions that shaped specifically American struggles, I hope to articulate a robust account of human freedom embedded in our past. In a sense, I would like to underscore how seemingly radical arguments about economic control, political participation, and imperial legacy- arguments that we ordinarily do not associate with American identity-have been at the heart of internal projects of change and social renewal. In its own way, this project is therefore an attempt to construct an alternative image of the nation's founding and experience, one that can replace the traditional accounts of exceptionalism and constitutional perfection. In the process, it asserts that one of the central pitfalls of the current public discourse is precisely the preservationist impulse, which tends to flatten our rich and varied traditions of political argument. Thus a primary task for the social critic is to show how apparently marginal views of freedom and social membership are themselves foundational aspects of our identity. This means making us appreciate as our own practices and ideas that at present appear distant and culturally foreign. In the end, simply reproducing the political actions of our predecessors will not be enough to make society less authoritarian. Even in those historical periods when Americans sought to universalize republican freedom and dislodge the commitment to economic and political independence from the reality of colonial rule, settler thinking nonetheless compromised such efforts in collective hope. But what these previous moments do provide are the basic contours for making sense of our current problems and the possible shape that democratic control might take. They present a means for critiquing the institutions and concepts that have dominated contemporary thinking. In our era of American primacy abroad and democratic unease at home, the past suggests how individuals might again assert popular power and how such power could be made compatible with a fuller and more inclusive moral identity.

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

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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.

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### AT: Ideology (Morson)

#### Their move is not benign – the rhetoric of limits creates a necessarily exclusionary and authoritarian politics

Kulynych 97—Jessica, Assistant Professor of Political Science at Winthrop University [1997, “Performing Politics,” *Polity*, Winter, v. XXX, n.2, p. 315-330]

II. Disciplining Habermas Political scientists have traditionally understood political participation as an activity that assures individual influence over the political system, protection of private interests, system legitimacy, and perhaps even selfdevelopment. Habermas and Foucault describe the impact of the conditions of postmodernity on the possibility for efficacious political action in remarkably similar ways. Habermas describes a world where the possibilities for efficacious political action are quite limited. The escalating interdependence of state and economy, the expansive increase in bureaucratization, the increasingly technical nature of political decisionmaking, and the subsequent colonization of a formerly sacred private sphere by a ubiquitous administrative state render traditional modes of political participation unable to provide influence, privacy, legitimacy, and self-development.' As the state is forced to take an ever larger role in directing a complex global, capitalist, welfare state economy, the scope of administration inevitably grows. In order to fulfill its function as the manager of the economy, the administrative state must also manage the details of our lives formerly considered private. Yet, as the state's role in our "private" lives continues to grow, the public has become less and less interested in government, focusing instead on personal and social mores, leisure, and consumption. Ironically, we have become less interested in politics at precisely the same moment when our lives are becoming increasingly "politicized" and administered. This siege of private life and the complicity of this ideology of "civil privatism" in the functioning of the modern administrative state makes a mockery of the idea that there exist private interests that can be protected from state intervention.4 Correlatively, the technical and instrumental rationality of modem policymaking significantly lessens the possibility for public influence on state policy.5 The difficulty of participation in Habermas's world is exacerbated by the added complexity of a political system structured by hierarchical gender and racial norms. Nancy Fraser uses Habermas's analysis of the contemporary situation to demonstrate how the infusion of these hierarchical gender and racial norms into the functioning of the state and economy ensures that political channels of communication between citizens and the state are unequally structured and therefore cannot function as mechanisms for the equal protection of interests.' Accordingly, theorists are much less optimistic about the possibilities for citizens to acquire or develop feelings of autonomy and efficacy from the attempt to communicate interests to a system that is essentially impervious to citizen interests, eschews discussion of long-term goals, and requires exclusively technical and instrumental debate. Similarly, Foucault's complex genealogical descriptions of disciplinary power networks challenge the traditional assumption that political power is located primarily in the formal apparatus of the state. The traditional understanding of political participation tells us nothing about what types of political action are appropriate in a world where power is typically and predominantly disciplinary, productive, and normalizing. As long as we define the purpose of participation only in terms of influence, privacy, legitimacy, and self-development, we will be unable to see how political action can be effective in the contemporary world. While separately both Habermas and Foucault challenge the traditional understanding of participation, their combined insights further and irrevocably extend that challenge. Theoretical focus on the distinctions between Habermas and Foucault has all too often obscured important parallels between these two theorists. Specifically, the HabermasFoucault debate has underemphasized the extent to which Habermas also describes a disciplinary society. In his descriptions of bureaucracy, technocracy, and system colonization, Habermas is also describing a world where power is productive and dispersed and where political action is constrained and normalized. Habermas, like Foucault, describes a type of power that cannot be adequately characterized in terms of the intentions of those who possess it. Colonization is not the result of conscious intention, but is rather the unintended consequence of a multitude of small adjustments. The gender and racial subtexts infusing the system are not the results of conscious intention, but rather of implicit gender and racial norms and expectations infecting the economy and the state. Bureaucratic power is not a power that is possessed by any individual or agency, but exists in the exercise of decisionmaking. As Iris Young points out, we must "analyze the exercise of power [in contemporary societies] as the effect of often liberal and humane practices of education, bureaucratic administration, production and distribution of consumer goods, medicine and so on."' The very practices that Habermas chronicles are exemplary of a power that has no definitive subject. As Young explains, "the conscious actions of many individuals daily contribute to maintaining and reproducing oppression, but those people are simply doing their jobs or living their lives, and do not understand themselves as agents of oppression."" Colonization and bureaucratization also fit the pattern of a power that is not primarily repressive but productive. Disciplinary technologies are, as Sawicki describes, not ... repressive mechanisms ... [that] operate primarily through violence ... or seizure ... but rather [they operate] by producing new objects and subjects of knowledge, by inciting and channeling desires, generating and focusing individual and group energies, and establishing bodily norms and techniques for observing, monitoring and controlling bodily movements, processes, and capacities. The very practices of administration, distribution, and decisionmaking on which Habermas focuses his attention can and must be analyzed as productive disciplinary practices. Although these practices can clearly be repressive, their most insidious effects are productive. Rather than simply holding people back, bureaucratization breaks up, categorizes, and systemizes projects and people. It creates new categories of knowledge and expertise. Bureaucratization and colonization also create new subjects as the objects of bureaucratic expertise. The social welfare client and the consumer citizen are the creation of bureaucratic power, not merely its target. The extension of lifeworld gender norms into the system creates the possibility for sexual harassment, job segregation, parental leave, and consensual corporate decisionmaking. Created as a part of these subjectivities are new gestures and norms of bodily behavior, such as the embarrassed shuffling of food stamps at the grocery checkout and the demeaning sexual reference at the office copier. Bodily movements are monitored and regularized by means of political opinion polls, welfare lists, sexual harassment protocols, flex-time work schedules, and so forth. Modern disciplinary power, as described by Foucault and implied by Habermas, does not merely prevent us from developing, but creates us differently as the effect of its functioning. These disciplinary techniques not only control us, but also enable us to be more efficient and more productive, and often more powerful. Focusing on the disciplinary elements of the Habermasian critique opens the door for exploring the postmodern character of Habermasian politics. Because Habermas does describe a disciplinary world, his prescription for contemporary democracy (discursive politics) ought to be sensitive to, and appropriate for, a disciplinary world. Foucault's sensitivity to the workings of disciplinary power is central to the articulation of a plausible, postmodern version of discursive politics. In the following discussion I will argue for a performative redefinition of participation that will reinvigorate the micro-politics demanded by Foucault, as well as provide a more nuanced version of the discursive politics demanded by Habermas. III. Habermas and Discursive Participation Habermas regards a public sphere of rational debate as the only possible foundation for democratic politics in the contemporary world. For Habermas, like Schumpeter, democracy is a method. Democracies are systems that achieve the formation of public opinion and public will through a correct process of public communication, and then "translate" that communicative power into administrative power via the procedurally regulated public spheres of parliaments and the judiciary. The extent to which this translation occurs is the measure of a healthy constitutional democracy. Thus, the "political public sphere" is the "fundamental concept of a theory of democracy." In this discursive definition of democracy, political participation takes on a new character. Participation equals discursive participation; it is communication governed by rational, communicatively achieved argument and negotiation. Habermas distinguishes two types of discursive participation: problem-solving or decision-oriented deliberation, which takes place primarily in formal democratic institutions such as parliaments and is regulated or governed by democratic procedures; and informal opinion-formation, which is opinion-formation "uncoupled from decisions ... [and] effected in an open and inclusive network of overlapping, subcultural publics having fluid temporal, social and substantive boundaries."" In many ways this two-tiered description of discursive participation is a radically different understanding of political participation, and one better suited to the sort of societies we currently inhabit. Habermas moves the focus of participation away from policymaking and toward redefining legitimate democratic processes that serve as the necessary background for subsequent policymaking. While only a limited number of specially trained individuals can reasonably engage in decisionmaking participation, the entire populous can and must participate in the informal deliberation that takes place outside of, or uncoupled from, formal decisionmaking structures. This informal participation is primarily about generating "public discourses that uncover topics of relevance to all of society, interpret values, contribute to the resolution of problems, generate good reasons, and debunk bad ones."" Informal participation has two main functions. First, it acts as a "warning system with sensors that, though unspecialized, are sensitive throughout society."" This system communicates problems "that must be processed by the political system."" Habermas labels this the "signal" function. Second, informal participation must not only indicate when problems need to be addressed, it must also provide an "effective problematization" of those issues; As Habermas argues, from the perspective of democratic theory, the public sphere must, in addition, amplify the pressure of problems, that is, not only detect and identify problems but also convincingly and influentially thematize them, furnish them with possible solutions, and dramatize them in such a way that they are taken up and dealt with by parliamentary complexes." Informal participation is crucial because it is the source of both legitimacy and innovation in formal decisionmaking. As long as decisionmaking is open to the influence of informal opinion-formation, then state policies are legitimate because they are grounded in free and equal communication that meets the democratic requirement of equal participation. Informal participation originating in the public sphere is also the resource for innovative descriptions and presentations of interests, preferences, and issues. If they ignore informal participation, state decisionmakers have no connection to the center of democracy: the political public sphere. Habermas's description of discursive participation is also novel and effective due to its broad construal of the participatory act. Participation is defined very broadly because the concept of the public sphere remains quite abstract. The public sphere is a "linguistically constituted public space." 16 It is neither an institution nor an organization. Rather, it is a "network for communicating information and points of view [which are] ... filtered and synthesized in such a way that they coalesce into bundles of topically specified public opinions." ''' Public spheres are defined not by a physical presence but rather by a "communication structure." According to Habermas, "the more they detach themselves from the public's physical presence and extend to the virtual presence of scattered readers, listeners, or viewers linked by public media, the clearer becomes the abstraction that enters when the spatial structure of simple interactions is expanded into a public sphere." 'I In other words, actually being present in a "concrete locale" is unnecessary for the existence of a public sphere, and hence unnecessary for active participation. Participation is not limited to large, organized discussions in formal settings; it also includes "simple and episodic encounters" in which actors "reciprocally [attribute] communicative freedom to each other."19 This abstraction makes participation easier and extremely inclusive. As Habermas describes, "every encounter in which actors do not just observe each other but take a second-person attitude, reciprocally attributing communicative freedom to each other, unfolds in a linguistically constituted public space." 20 Thus, the concerns that political scientists have had about unequal resource distribution and its effect on one's capability to act are mitigated in Habermas's broad definition of discursive participation. Even though limited resources may prevent active interventions in decisionmaking and policymaking processes, for Habermas the "communicative structures of the public sphere relieve the public of the burden of decision-making."" In a similar vein, Habermas does not limit participation to a specific set of activities, but defines it procedurally or contextually. Participation is not limited to traditional activities such as voting, campaigning, or letter-writing, but is instead designated by the discursive quality of the activity. In other words, it is not the intent to influence policy that defines participation, but rather the communication structure in which the activity takes place. That communication structure must be equitable and inclusive, social problems must be openly and rationally deliberated, and they must be thematized by people potentially affected. However, Habermas's discursive formulation is inadequate primarily because it does not explicitly and rigorously attend to the disciplinary effects of contemporary societies explained so creatively by Foucault. Habermas has been routinely criticized for ignoring the productive nature of contemporary power. His juxtaposition of system and lifeworld in The Theory of Communicative Action relies on a separation of good power from bad (communicative power v. steering media), and posits an ideal speech situation freed from the distortions of power." More importantly, Habermas's theorization of discursive participation is exceedingly abstract and does not adequately attend to the ways in which power informs discourse. A number of theorists have effectively argued that women and men do not stand in equal relationship to language. For example, Linda Zerilli argues that discursive space is a "fraternal community of unique and symbolic dimensions."23 Women utilize language in this discursive world "whose `common' and symbolic language ... enables one user to understand what another is saying; just as it compels each speaker to constrain [themselves] within the limits of an existing political vocabulary."24 In this case the content of speech is systematically limited in direct violation of the required conditions for the ideal speech situation. The foundations of communication are not the ideal equal relationships that Habermas imagines, but are instead an exclusive, learned, and gendered, symbolic heritage. As Carole Pateman points out, women enter into public discussion on a very tenuous plane. The symbolic heritage that defines the meaning of key communicative concepts such as consent systematically excludes women from the category of individuals capable of consenting. 11 The mere existence of a debate over whether "no means no" with regard to consensual sexual relations and rape is a manifestation of this heritage. Women can hardly be seen as equal participants when they do not have the same opportunity to express their intent. Certainly, one might suggest that the above cases are really just failures of speech, and, therefore, not a critique of ideal speech as it is formulated by Habermas. Indeed Seyla Benhabib reformulates Habermas's speech act perspective to make it sensitive to the above critique. She argues that feminists concerned with the discourse model of democracy have often confused the historically biased practices of deliberative assemblies with the normative ideal of rational deliberation." She suggests that feminists concerned with inequities and imbalances in communication can actually benefit from the Habermasian requirement that all positions and issues be made " `public' in the sense of making [them] accessible to debate, reflection, action and moral-political transformation."" The "radical proceduralism of the discourse model makes it ideally suited to identify inequities in communication because it precludes our accepting unexamined and unjustified positions." Even such a sophisticated and sensitive approach to ideal speech as Benhabib's cannot cleanse communicative action of its exclusivity. It is not only that acquiring language is a process of mastering a symbolic heritage that is systematically gendered, but the entire attempt to set conditions for "ideal speech" is inevitably exclusive. The model of an ideal speech situation establishes a norm of rational interaction that is defined by the very types of interaction it excludes. The norm of rational debate favors critical argument and reasoned debate over other forms of communication.29 Defining ideal speech inevitably entails defining unacceptable speech. What has been defined as unacceptable in Habermas's formulation is any speech that is not intended to convey an idea. Speech evocative of identity, culture, or emotion has no necessary place in the ideal speech situation, and hence persons whose speech is richly colored with rhetoric, gesture, humor, spirit, or affectation could be defined as deviant or immature communicators. Therefore, a definition of citizenship based on participation in an ideal form of interaction can easily become a tool for the exclusion of deviant communicators from the category of citizens. This sort of normalization creates citizens as subjects of rational debate. Correlatively, as Fraser explains, because the communicative action approach is procedural it is particularly unsuited to address issues of speech content." Therefore, by definition, it misses the relationship between procedure and content that is at the core of feminist and deconstructive critiques of language. A procedural approach can require that we accommodate all utterances and that we not marginalize speaking subjects. It cannot require that we take seriously or be convinced by the statements of such interlocutors. In other words, a procedural approach does not address the cultural context that makes some statements convincing and others not. I would suggest that Habermas recognizes this problem, but has yet to explicitly theorize it. As I noted above, Habermas requires that informal discursive participation not only identify problems but also "convincingly and influentially thematize them." A thematization is legitimate, Habermas argues, only when it stems from a communicative process that "develops out of communication taking place among those who are potentially affected."" Thus, the extent to which a position is convincing seems to rely primarily on whether the affected parties have had a say in its articulation (a procedural requirement). What Habermas does not explicitly recognize is that whether a problem is convincingly thematized is not just a matter of utilizing correct procedure.