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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 Courts have the duty and power to correct this mistake---repudiation would be effective

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

This essay presents the case for the Supreme Court to follow President Lincoln’s example by formally repudiating its decisions in the Japanese American internment cases, issuing a public statement acknowledging that these decisions were based upon numerous and knowing acts of governmental misconduct before the Court, and were thus wrongly decided. These acts of misconduct, documented and discussed herein, were committed by several high-ranking military and civilian officials (including the Solicitor General of the United States) before and during the pendency of the internment cases before the Supreme Court. Consequently, the Court was forced to rely in making its decisions on records and arguments that were fabricated and fraudulent. Sadly, the Court’s unquestioning acceptance of these tainted records, and its upholding of the criminal convictions of Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu, has left a stain on the Court’s integrity that requires the long overdue correction of public repudiation and apology, as both the legislative and executive branches of the federal government— to their credit—have now done.¶ Although this essay is directed to a general, and hopefully wide readership, it is primarily aimed at an audience of nine: the current justices of the Supreme Court, who have the inherent power to erase this stain on its record and to restore the Court’s integrity. Admittedly, a public repudiation of the Japanese American internment cases would be unprecedented, considering that the cases are technically moot, since the Solicitor General of the United States at the time, Charles Fried, did not ask the Court to review the decisions of the federal judges who vacated the convictions, pursuant to writs of error coram nobis [5] that were filed in all three cases in 1983 and decided in opinions issued in 1984, 1986, and 1987. The government’s decision to forego appeals to the Supreme Court left the victorious coram nobis petitioners in a classic Catch-22 situation: hoping to persuade the Supreme Court to finally and unequivocally reverse and repudiate the decisions in their cases, they were unable—as prevailing parties in the lower courts—to bring appeals to the Court.¶ The evidence of the government’s misconduct in these cases is clear and compelling, and rests on the government’s own records. It reveals that high government officials, including the Solicitor General, knowingly presented the Supreme Court with false and fabricated records, both in briefs and oral arguments, that misled the Court and resulted in decisions that deprived the petitioners in these cases of their rights to fair hearings of their challenges to military orders that were based, not on legitimate fears that they—and all Japanese Americans—posed a danger of espionage and sabotage on the West Coast, but rather reflected the racism of the general who promulgated the orders. As a result of the government’s misconduct in these cases, the integrity of the Supreme Court was compromised. With a full record of the government’s misconduct in these cases now before it, the Supreme Court has both the inherent power and duty to correct its tainted records through a public repudiation of the wartime decisions.

#### 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

### 2AC Perm Stuff

#### The perm’s effective---no cooption as “their cause” can become “our cause”

Bhambra 10—U Warwick—AND—Victoria Margree—School of Humanities, U Brighton (Identity Politics and the Need for a ‘Tomorrow’, http://www.academia.edu/471824/Identity\_Politics\_and\_the\_Need\_for\_a\_Tomorrow\_)

We suggest that alternative models of identity and community are required from those put forward by essentialist theories, andthat these are offered by the work of two theorists, SatyaMohanty and Lynn Hankinson Nelson. Mohanty’s ([1993] 2000)post-positivist, realist theorisation of identity suggests a way through the impasses of essentialism, while avoiding the excessesof the postmodernism that Bramen, among others, derides as aproposed alternative to identity politics. For Mohanty ([1993]2000), identities must be understood as theoretical constructions that enable subjects to read the world in particular ways; as such, substantial claims about identity are, in fact, implicit explana-tions of the social world and its constitutive relations of power. Experience – that from which identity is usually thought to derive– is not something that simply occurs, or announces its meaningand signiﬁcance in a self-evident fashion: rather, experience is always a work of interpretation that is collectively produced (Scott 1991). Mohanty’s work resonates with that of Nelson (1993), whosimilarly insists upon the communal nature of meaning ork nowledge-making. Rejecting both foundationalist views of knowledge and the postmodern alternative which announces the“death of the subject” and the impossibility of epistemology,Nelson argues instead that, it is not individuals who are theagents of epistemology, but communities. Since it is not possiblefor an individual to know something that another individualcould not also (possibly) know, it must be that the ability to makesense of the world proceeds from shared conceptual frameworksand practices. Thus, it is the community that is the generator andrepository of knowledge. Bringing Mohanty’s work on identity astheoretical construction together with Nelson’s work on episte-mological communities therefore suggests that, “identity” is one of the knowledges that is produced and enabled for and by individu-als in the context of the communities within which they exist. The post-positivist reformulation of “experience” is necessary here as it privileges understandings that emerge through the processing of experience in the context of negotiated premises about the world, over experience itself producing self-evident knowledge (self-evident, however, only to the one who has “had” the experience). This distinction is crucial for, if it is not the expe-rience of, for example, sexual discrimination that “makes” one afeminist, but rather, the paradigm through which one attempts tounderstand acts of sexual discrimination, then it is not necessary to have actually had the experience oneself in order to make theidentiﬁcation “feminist”. If being a “feminist” is not a given factof a particular social (and/or biological) location – that is, beingdesignated “female” – but is, in Mohanty’s terms, an “achieve-ment” – that is, something worked towards through a process of analysis and interpretation – then two implications follow. First,that not all women are feminists. Second, that feminism is some-thing that is “achievable” by men. 3 While it is accepted that experiences are not merely theoretical or conceptual constructs which can be transferred from one person to another with transparency, we think that there is some-thing politically self-defeating about insisting that one can only understand an experience (or then comment upon it) if one has actually had the experience oneself. As Rege (1998) argues, to privilege knowledge claims on the basis of direct experience, orthen on claims of authenticity, can lead to a narrow identity poli-tics that limits the emancipatory potential of the movements or organisations making such claims. Further, if it is not possible to understand an experience one has not had, then what point is there in listening to each other? Following Said, such a view seems to authorise privileged groups to ignore the discourses of disadvantaged ones, or, we would add, to place exclusive responsibility for addressing injustice with the oppressed themselves. Indeed, as Rege suggests, reluctance to speak about the experi-ence of others has led to an assumption on the part of some whitefeminists that “confronting racism is the sole responsibility of black feminists”, just as today “issues of caste become the soleresponsibility of the dalit women’s organisations” (Rege 1998).Her argument for a dalit feminist standpoint, then, is not made in terms solely of the experiences of dalit women, but rather a call for others to “educate themselves about the histories, the preferred social relations and utopias and the struggles of the marginalised” (Rege 1998). This, she argues, allows “their cause” to become “our cause”, not as a form of appropriation of “their” struggle, but through the transformation of subjectivities that enables a recognition that “their” struggle is also “our” struggle. Following Rege, we suggest that social processes can facilitate the understanding of experiences, thus making those experi-ences the possible object of analysis and action for all, while recognising that they are not equally available or powerful forall subjects. 4 Understandings of identity as given and essential, then, we suggest, need to give way to understandings which accept them as socially constructed and contingent on the work of particular,overlapping, epistemological communities that agree that this orthat is a viable and recognised identity. Such an understanding avoids what Bramen identiﬁes as the postmodern excesses of “post-racial” theory, where in this “world without borders (“rac-ism is real, but race is not”) one can be anything one wants to be: a black kid in Harlem can be Croatian-American, if that is whathe chooses, and a white kid from Iowa can be Korean-American”(2002: 6). Unconstrained choice is not possible to the extent that,as Nelson (1993) argues, the concept of the epistemological com-munity requires any individual knowledge claim to sustain itself in relation to standards of evaluation that already exist and thatare social. Any claim to identity, then, would have to be recog-nised by particular communities as valid in order to be success-ful. This further shifts the discussion beyond the limitations of essentialist accounts of identity by recognising that the commu-nities that confer identity are constituted through their shared epistemological frameworks and not necessarily by shared characteristics of their members conceived of as irreducible. 5 Hence, the epistemological community that enables us to identify our-selves as feminists is one that is built up out of a broadly agreed upon paradigm for interpreting the world and the relations between the sexes: it is not one that is premised upon possessing the physical attribute of being a woman or upon sharing the same experiences. Since at least the 1970s, a key aspect of black and/orpostcolonial feminism has been to identify the problems associated with such assumptions (see, for discussion, Rege 1998, 2000). We believe that it is the identiﬁcation of injustice which calls forth action and thus allows for the construction of healthy solidarities. 6 While it is accepted that there may be important differences between those who recognise the injustice of disadvantage while being, in some respects, its beneﬁciary (for example, men, white people, brahmins), and those who recognise the injustice from the position of being at its effect (women, ethnic minorities,dalits), we would privilege the importance of a shared political commitment to equality as the basis for negotiating such differences. Our argument here is that thinking through identity claims from the basis of understanding them as epistemological communities militates against exclusionary politics (and its asso-ciated problems) since the emphasis comes to be on participation in a shared epistemological and political project as opposed to notions of ﬁxed characteristics – the focus is on the activities indi- viduals participate in rather than the characteristics they aredeemed to possess. Identity is thus deﬁned further as a function of activity located in particular social locations (understood asthe complex of objective forces that inﬂuence the conditions in which one lives) rather than of nature or origin (Mohanty 1995:109-10). As such, the communities that enable identity should not be conceived of as “imagined” since they are produced by very real actions, practices and projects.

#### Their insistence on negativity and a particular starting point is problematic—only our inclusive approach can create movements and tangible change

Brand-Jacobsen, 2005[Kai Frithjof Brand-Jacobsen is founder and Director of the Peace Action, Training and Research Institute of Romania (PATRIR) and Co-Director of TRANSCEND, and is on the Executive Board of the TRANSCEND Peace University (TPU) where he is Course Director for the courses Peacebuilding and Empowerment and War to Peace Transitions. He has worked in Afghanistan, India, Pakistan, Nepal, Russia, South Eastern Europe, North America, Colombia, Somalia, Cambodia, Aceh-Indonesia and the Middle East at the invitation of governments, inter-governmental organisations, UN agencies, and local organisations and communities. He has written and published widely, and is author of The Struggle Continues: The Political Economy of Globalisation and People's Struggles for Peace (Pluto, forthcoming), co-author, together with Johan Galtung and Carl Jacobsen, of Searching for Peace: The Road to TRANSCEND (Pluto, 2000 & 2002) and Editor of the TRANSCEND book series published together with Pluto Press, Constructive Peace Studies: Peace by Peaceful Means. He is a member of the Executive Board of the Journal of Peace and Development and the Executive Board of the Centre for Peace and Conflict Resolution. In 1999 he was founder and Director of the Coalition for Global Solidarity and Social Development, and in 2000, together with Johan Galtung, he was founder of the Nordic Institute for Peace Research (NIFF). Since 1996 he has provided more than 250 training programmes in peacebuilding, development, and constructive conflict transformation to more than 4000 participants in 30 countries. <http://www.globalsolidarity.org/articles/peace_means_kai.html>]

Peace by Peaceful Means

Dear Friends, The discussions which have taken place over e-mail over the past few days have been extremely interesting. I have just returned from Oslo where the 100th anniversary of the Nobel Peace Prize was being celebrated. The obvious contrast between the rather elite 'suit' dominated celebrations in Oslo and the realities of what is occurring in the world today was stark. Questions of strategy, tactics and visions for how we work to bring about change, to transform all forms of violent conflict -- direct, structural, and cultural -- and to empower, mobilise, and involve people in a mass, broad-based movement for peace and to build the alternatives we are looking for, are **vital**. In Norway alone, to take one example, perhaps 80% of people think what is happening now in and over Afghanistan is wrong, either completely or at least in part, and yet all they hear from the media, academics and politicians is constant support and acclaim for the 'justness' of this war (or indeed, any war in which it is 'we' against 'them'). Small groups of people and 'NGOs', in Norway as in every single country, are trying to bring forward alternatives, to raise their voices, and to protest/oppose what they think is wrong. While these organisations are in every case much smaller than our governments and militaries going to war, they often represent the social majority. A major challenge they face, however, is how to reach out to people, how to involve people, and how to develop alternatives which make sense to people tired of war and violence (whether of the kind we are seeing in Afghanistan, or of a global economic system killing 100,000 a day). **Negative** **slogans** and **opposition** to what is wrong **is** **not** **enough** however. It is not enough, but it is necessary. 'Basta!', 'Enough!' was perhaps the most 'revolutionary' cry of the last decade, and still is in many parts of the world. The simple, courageous act, of standing up when we see that something is wrong, and stating that it is wrong, not cooperating with it, can be a powerful and evocative symbol. When we are having our conferences, discussions and meetings in whichever city, town or village of the world we may be found, we should always remember that the vast majority of people in our own city, town or village, as well as the entire rest of the world, have no idea that we are there, meeting. The vision, hope and ideas which bring people to these conferences are, in the vast majority of cases, kept marginalised, on the periphery. Yet that is also part of our own responsibility, technique and methods. Basta! became a cry to inspire millions, because those who said it lived it, refusing to cooperate any longer with what they know to be wrong. While Basta! may be the most revolutionary cry or word today, transforming all forms of direct, structural, and cultural violence is the greatest challenge. The two are **inclusive** and **complementary**, not exclusive. We need to state clearly our opposition to violence, war, injustice and exploitation (the 'peace movement' has often been willing to do the first two, not always as willing on the last two), and we need also to build a constructive, positive programme. It is not only a question of what we are against, but what we are for. When we criticize what we think is wrong, people will also want to know what we think could be done instead. In these cases, our **answers** **must** **seem** **real** and **viable** to people. The 'anti-globalisation' movement is therefore also a social justice movement; 'non-governmental organisations' should also be people's organisations or people's movements; and one of our challenges today will be to build upon the growing 'anti-war' movement, transforming it also into a peace movement. A step further, as many social and peace activists have recognised, will be to link the peace and social justice movements. Slogans and messages are important, as are practice and vision. It will not be possible today to unite broad numbers of people around issues which they feel are too abstract and divorced from them. The 'abolish the debt' campaign/movement was successful because people were able to see the clear linkages between debt and the effective colonisation and enslavement of countries and people across the south, as well as the incredible suffering and destruction it brought. The Jubilee 2000 'campaign' however, unlike the Jubilee South movement which continues today, did not reach its objective of having the debt cancelled. Instead, while many people around the world believe the problem has been solved, the debt-system and the burden it places upon countries has become even more extreme. Going from 'campaigns' to movements will also be important, though even here it is not a question of 'either/or' but 'both/and' with individual campaigns extremely useful and effective at times for involving people, raising awareness and mobilising around specific issues, strengthening further the broader movements of which they may be a part. Today, a movement for demos kratos is necessary, and vital for any movement or work towards peace. To speak about the United States or any government in the world today as a 'democracy' is a ridiculous farce. They are highly elite dominated systems built upon massive structures and cultures of violence, and willing to use overwhelming (Powel Doctrine) violence when necessary to enforce their needs and/or interests. At best they may be demagogia's, where elites maintain power by promising the people what they will do for them (we call this 'elections'), but they are not system's or societies built upon people's power, demos kratos. Decisions to go to war are made by tiny numbers of people. Our economic and political policies are constructed for us, often to the detriment of the social majorities who are told to 'leave well enough alone' and trust in the experts. This is sometimes as true of politicians as it is of non-governmental organisations who themselves frequently prefer the conference halls and well-funded projects to actually working democratically with people as part of the people themselves. An alternative today, what Johan Galtung has called for, with 10,000 dialogues, meetings, discussions at every level, focussing not only on what is wrong, but also on what we want therapy, ideas, alternatives. In one form or another many of these dialogues are taking place. In a way they are therapy for the massive amounts of violence we are all being exposed to today, in our cultures, in our world, on our television sets or in the speeches of our 'democratically elected' rulers (the question, for those who do not support their policies, should not be 'who put them in power' -- though this is also important -- but why haven't we removed them from power yet\_). They are also empowering, if we take the step beyond saying what is wrong to what could be done\_, what should be done\_, and then go further to discussing what I/we can do about it. Mobilising people for peace today is not simply about a slogan (though coming up with clearly expressed messages in a few words will of course help us to link people together and raise awareness). What is necessary, beyond any single issue or top-level strategy for how to change the world, is the process. The way is the goal. Perhaps the greatest achievement of the social justice/anti-globalisation movement is that it has mobilised, involved, and empowered millions of people around the world in discussing, thinking about, and acting upon the realities around them. On the streets of Seattle, Praha, Okinawa, Melbourne, Gotheburg, Washington, Quebec, Genoa, Ottawa, people, many of whom refuse to vote, have been discussing foreign policy, domestic politics, people to people movements, and all the issues which politicians and well-established NGOs are not able and often not willing to discuss with people. We have our 'manifestos', our policies and plans which we wish to put forward in the name of people, often addressing them to 'politicians' and 'elites' believing, in a fundamentally undemocratic way, that they will be the ones to bring about and implement change for us. This is not to say that that is not an important level which we also need to work at. The broader vision here is both/and, not either or, in terms of strategy as well often of vision. We also need, however, to be willing to take part in the much slower, more timely, and more empowering process, of tens of thousands of dialogues together with people, communities, and organisations at every level. Solidarity today is being built upon and carried further into alliances not just supporting people in their struggles for social justice, peace and freedom, but carrying forward those struggles ourselves in our own communities, our own towns, cities and villages. If we wish to change the injustices taking place in the world today we must of course work on a global level, but we must also work, just as importantly, within our communities. Again, both/and rather than either or. We should also be wary when we say 'we must begin here', or 'this must be done first!', even when the message is very positive and constructive. 'We must begin with the individual!'. 'We must begin by changing society!'. 'We must begin with a culture of peace!'. 'We must begin by ending the debt!'. All of these, and the many others put forward, are extremely important issues. They are also all linked together. Again, both/and. Exclusive and elitist visions will only serve to further fragment our efforts, creating division and separation where what is needed is dialogue, solidarity, cooperation and alliances between movements/organisations which often take diverse strategies and approaches to addressing deeply interlinking injustices and structures and cultures of violence. Conscientisation (raising awareness, often political awareness -- but also social, cultural, economic), organisation (we can do more together than we can apart, and it is necessary to organise -- though in many different ways -- to be able to bring about changes, both against what we think is wrong and for what we think is right), mobilisation (bringing in more and more people, involving people in dialogues, discussion, action, and work for change/transformation), and empowerment (I/we can, rather than 'I/we can't'; also important recognising the power we have to bring about change, rather than simply accepting existing, often extremely violent, power structures and believing that change can/should/must be implemented by those 'in power', whether slave owners, men, politicians, or fuhrers) are all necessary.

#### Perm – vote affirmative to queer the negative.

#### Any attempt to establish a mutually exclusive identity politics reifies opressive dichotomous thinking which exterminates queer and trans subjectivity.

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Dichotomous thinking infuses numerous research methodologies, limiting what is allowed to exist. These ways of thinking and being negate queer existences because those who identify as queer live beyond the binaries of sex, gender and sexuality. Thus, queer methodologies are vital for exposing hegemonic linear ways of being and thinking that analyze, categorize and psychiatrize those outside of such polarized identities. My goal is not to delimit what a queer methodology is, but rather to add to the discussion regarding ontology and epistemology and how this may shift our gaze in a queer research inquiry. I argue queer methodologies provide space for the multiplicity of strangeness to exist as their disruption of normalcy and Otherness (Kumashiro 1999) is explicitly political. Queer methodologies deconstruct truth claims, question dualistic ontology and queer straight lines.

 Though my approach is from a queer theory and poststructural perspective, I note Namaste (2003) critiques these theories for their lack of contextuality and demands researchers to be reflexive. But if I discuss my own identity within this paper, will I be reproducing my own oppression in taking up reverse discourses, which reconstitute dominant discourses about the Other from a subjugated position? If I declare myself genderless and sexless, and thus immune to these categorizations, I ignore how sexism, transphobia, heterosexism and misogyny have forever changed my life and my body. If I locate myself solely within theoretical frameworks of poststructural feminism and queer and gender theory, will this simply reflect only my thinking and not my physical being? As methods are to methodology, so is my body connected to my subjectivity.

 Would it suffice to say I am genderqueer? Likely not. What is not read in this declaration is my race, class, age, ability (or are they read as dominant in each of these categories?), nor is my sex or sexuality intact. I have experienced life as a female bodied, white, middle class, queer femme from English-speaking Canada. These identities written upon me shape how I experience and understand the world: “we embody the discourses that exist in our culture, our very being is constituted by them, they are a part of us, and thus we cannot simply throw them off” (Sullivan 2003: 41). What is not so clear is how I transgress heterosexual gender norms and that I have also experienced the physical consequences of patriarchy, heterosexism and homonormativity through incest, surviving a late diagnosis of cervical dysplasia and domestic violence. There are few spaces I exist in where I can definitively mark which category I fit. Binary systems within sex, gender and sexuality are problematic for me not only personally, but also politically and ideologically. Although I have been an activist for more of my life than not, critical race, queer and gender theories have given me language and ideas to examine the ways in which I am in the world in my inconsistent, ever shifting and multiple ways.

Queering

In this paper, I use the term “queer” in a multitude of ways. As a noun, I use it to reference people who identify as queer – typically people who challenge and/or exist beyond dualistic and constructed categories such as transgender, bisexual, two-spirit, transsexual, transvestite, intersex and questioning people (Manning, forthcoming). To use queer as an identity can run counter to the work queer does to circumvent and undermine identity politics. Here, however, I use it to highlight how it has been taken up as a liminal identity in ways that problematize orientation. By this I mean that sex, gender and sexuality are relational and queer positions itself against normative spaces made visible by dominant discourses.

 Additionally, I use queer as a verb. To queer something is to question normalcy by problematize its apparent neutrality and objectivity. Britzman (1998: 82) locates what queer theory can do as a practice: “Queer theory is not an affirmation, but an implication. Its bothersome and unapologetic imperatives are explicitly transgressive, perverse, and political”. Queer resists definition, uniformity and cohesion. It examines how normal is made specifically with regards to sexuality.

 Heteronormativity took root in queer theory as it made explicit how heterosexuality positions itself as neutral, normative and dominant. Similarly, the “new homonormativity” is a set of “politics that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them” (Duggan 2003: 50). Duggan explains how these neo-liberal views get taken up by gay men and lesbians as a way to normalize their existences. I argue drawing these lines of normalcy is done at the expense of queer, trans and intersex people and reconstitutes us as invisible and deviant. In response, I take up queer in multiple ways to expand on its relationality, disruptions to normativity and intrinsic deviance.

 Although the violation of compulsory sex/gender relations is one of the topics most

frequently addressed within queer theory, this body of knowledge rarely considers the

implications of an enforced sex/gender system for people who have defied it, who live

outside it, or who have been killed because of it. (Namaste 2003: 9)

 Transgenderists, feminists, and some queer theorists (Fausto-Sterling 1997; Stryker 2006;

Wilchins 2004), push queer theory beyond simply examining the discursive production of sexuality. Where queer theory primarily disrupts the seemingly stable categories of homosexual and heterosexual, gender and transgender theories take this disruption further by problematizing how sex and gender are socially constructed and required. Gender and transgender theories also tease out neo-liberal agendas embedded in the hegemonic lesbian, gay, bisexual and transgender (LGBT) movement. These theories offer ways to not only make visible and centre intersex, transsexual, transgender, two-spirit, pansexual and queer people within discourses where we have often been objects, but critique the “natural” construction of sex much touted by science.

Disturbing Ontology Modernist ontology permeates multiple research methodologies. “An ontology is a theory about what the world is like – what the world consists of, and why” (italics added, Strega 2005: 201). Modernist ontology inscribes binary constructs in a way that maintains sexual and gender dominance. When researchers fail to question the dualistic nature inherent in certain methodologies, these social, physical and political hierarchies are perpetuated. Methodologies located in positivist paradigms are marked by dichotomous ways of being and thinking, yet some interpretative and emancipatory methodologies are also influenced by this ontology. Conversely, 3 ontologies that embrace complexity, multiplicity and inconsistency are more likely to be useful in producing queer methodologies. Queer methodologies need a “continuous questioning and deconstruction of all knowledge,” particularly knowledges claiming objectivity and truth (Hammers & Brown 2004: 88).

 During the ‘Age of Reason,’ modernist practice produced and classified knowledge (Hall & Gieben 1992: 8). “Deeply embedded in these [modernist] constructs are systems of classification and representation, which lend themselves easily to binary oppositions, dualisms, and hierarchical orderings of the world” (Tuhiwai Smith 1999: 55). **These binary constructs are not limited to sex and sexuality, but also significantly frame constructions of race, ability, etc**. Somerville (2000) describes how race and sexuality were classified and enmeshed to construct deviant, knowable and subordinate objects. Wittig (1980: 210) points out, “this necessity of the different/other is an ontological one for the whole conglomerate of sciences and disciplines” she calls the “straight mind”.

 Positivist scientists view these classifications as objective, neutral and true suggesting they are removed from all social, cultural and political influences. Numerous theorists (Fausto-Sterling 1997 & 2000; Foucault 1990; Hammers & Brown 2004; Tuhiwai Smith 1999) critique science for its claims of objectivity, which produce “patriarchal knowledge and work against knowledge of the realities of gender relations” (Ramazanoglu & Holland 2002: 49). Adrienne Rich (1987, cited in Hammers & Brown 2004: 85) argues, “objectivity is a term given to men’s subjectivity”. To work against objectivity and to position subjectivity in research is necessary in queer methodologies. Although I do not want to position subjectivity as the opposing binary mate to objectivity (as this would be contradictory to my claims of rejecting binaries), I propose to problematize subjectivity by exposing the complexity and contradictions within one’s own subjectivity.

 In interpretative and emancipatory research paradigms, a researcher can reproduce dominant modernist representations **by restricting their own complexity to a binary identification as an insider or outsider**. Several feminist theorists complicate the insider/outsider quandary by blurring or queering the line between these dichotomies. Fine (1998: 135) ‘works the hyphen’ between Self and Other and suggests “researchers probe how we are in relation with the contexts we study and with our informants, understanding that we are all multiple in those relations”. Tang (2006: 14) explores occupying insider and outsider roles by “oscillating” between each role, “signifying both being hesitant or embracing of the roles participants might have allocated for me…[having] the agency to switch in between roles if necessary or to remain straddling in ambiguity”. Lal (1996: 196) questions the politics of self in proposing, “with each threshold of an insider boundary that one crosses, there would seem to be another border zone available for one’s definition as outsider”. In these ways, subjectivity can and should become murky, unstable and contradictory by resisting a clear and contained identification within the insider/outsider polarity.

 Hammers & Brown (2004: 87) point out, “ ‘situating’ of oneself…would not only re-organize the researcher(subject) - researched(object) relationship to be one that is non-hierarchical, equitable, and respectful, but make as central direct, material experience and reality”. Although identifying one’s subjectivity does not entirely level the power dynamics within research, I agree it is necessary to resist claims of objectivity while helping to identify power relations at work within a research project. Subjectivity also allows for multiplicity and complexity to be within the research – something that objectivity would clearly reject. Subjectivity and reflexivity within research is well grounded in feminist and emancipatory research approaches. What I hope to promote is a kind of subjectivity that complicates, questions and deconstructs power relations, discourses and working assumptions within queer methodologies.

**I see value in claiming space for queer subjectivities so those objectified by science can tell our own stories and lay claim to knowledges previously made deviant and invisible**. However, my specific interest is to expose the techniques/technologies of making normal. I am particularly interested in queer methodologies that examine how those who study non-normative sexes, genders and sexualities discursively produce us. My unapologetic and purposeful mission is to poke holes in, deconstruct and destabilize the hegemonic understandings that have classified, ignored, persecuted and killed us. For me, my politics of resistance is deeply rooted in my subjectivity. My subjectivity positions my ontological perspective to incorporate queer, two-spirit, trans, intersex and non-normative sexed, gendered and sexual people within the world.

Because of its multiplicity, complications and contradictions, a queer ontology challenges modernist ideas of binary, stable categories. As ontology shapes what existences are made possible and visible, a queer methodology reveals and makes possible queer and trans lives, experiences and encounters. A queer methodology therefore has a distinct ontology and epistemology. Although queer remains elusive, contextual and unstable and should continue to resist solidification, a queer methodology is most incongruent with research paradigms rooted in a dichotomous way of thinking and being, epitomized in classical sciences such as biology, psychiatry and medicine.

### 2AC Scott

#### Using personal experience to establish the legitimacy of argument essentializes difference. This prevents an analysis of the ideological systems that shape the construction of experience

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When the evidence offered is the evidence of "experience," the claim for referentiality is further buttressed-what could be truer, after all, than a subject's own account of what he or she has lived through? It is precisely this kind of appeal to experience as uncontestable evidence and as an originary point of explanation-as a foundation on which analysis is based-that weakens the critical thrust of histories of difference. By remaining within the epistemological frame of orthodox history, these studies lose the possibility of examining those assumptions and practices that excluded considerations of difference in the first place. They take as self-evident the identities of those whose experience is being documented and thus naturalize their difference. They locate resistance outside its discursive construction and reify agency as an inherent attribute of individuals, thus decontextualizing it. When experience is taken as the origin of knowledge, the vision of the individual subject (the person who had the experience or the historian who recounts it) becomes the bedrock of evidence on which explanation is built. Questions about the constructed nature of experience, about how subjects are constituted as different in the first place, about how one's vision is structured-about language (or discourse) and history-are left aside. The evidence of experience then becomes evidence for the fact of difference, rather than a way of exploring how difference is established, how it operates, how and in what ways it constitutes subjects who see and act in the world.7

To put it another way, the evidence of experience, whether conceived through a metaphor of visibility or in any other way that takes meaning as transparent, reproduces rather than contests given ideological systems-those that assume that the facts of history speak for themselves and those that rest on notions of a natural or established opposition between, say, sexual practices and social conventions, or between homosexuality and heterosexuality. Histories that document the "hidden" world of homosexuality, for example, show the impact of silence and repression on the lives of those affected by it and bring to light the history of their suppression and exploitation. But the project of making experience visible precludes critical examination of the workings of the ideological system itself, its categories of representation (homosexual/heterosexual, man/woman, black/white as fixed immutable identities), its premises about what these categories mean and how they operate, and of its notions of subjects, origin, and cause. Homosexual practices are seen as the result of desire, conceived as a natural force operating outside or in opposition to social regulation. In these stories homosexuality is presented as a repressed desire (experience denied), made to seem invisible, abnormal, and silenced by a "society" that legislates heterosexuality as the only normal practice.8 Because this kind of (homosexual) desire cannot ultimately be repressed-because experience is there-it invents institutions to accommodate itself. These institutions are unacknowledged but not invisible; indeed, it is the possibility that they can be seen that threatens order and ultimately overcomes repression. Resistance and agency are presented as driven by uncontainable desire; emancipation is a teleological story in which desire ultimately overcomes social control and becomes visible. History is a chronology that makes experience visible, but in which categories appear as nonetheless ahistorical: desire, homosexuality, heterosexuality, femininity, masculinity, sex, and even sexual practices become so many fixed entities being played out over time, but not themselves historicized. Presenting the story in this way excludes, or at least under- states, the historically variable interrelationship between the meanings "homosexual" and "heterosexual," the constitutive force each has for the other, and the contested and changing nature of the terrain that they simultaneously occupy. "The importance-an importance-of the category 'homosexual,'" writes Eve Kosofsky Sedgwick,

comes not necessarily from its regulatory relation to a nascent or already-constituted minority of homosexual people or desires, but from its potential for giving whoever wields it a structuring definitional leverage over the whole range of male bonds that shape the social constitution.9

### AT: Non-Legal Alts

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

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

As I have shown above, while political forces played a significant role in checking President Bush, what was significant was the particular substantive content of that politics; it was not just any political pressure, but pressure to maintain fidelity to the rule of law. Politics standing alone is as likely to fuel as to deter executive abuse; consider the lynch mob, the Nazi Party in Germany, or xenophobia more generally. What we need if we are to check abuses of executive power is a politics that champions the rule of law. Unlike the politics Posner and Vermeule imagine, this type of politics cannot be segregated neatly from the law. On the contrary, it will often coalesce around a distinctly legal challenge, objecting to departures from distinctly legal norms, heard in a court case, as we saw with Guantanamo. Congress’s actions make clear that had Guantanamo been left to the political process, there would have been few if any advances. The litigation generated and concentrated political pressure on claims for a restoration of the values of legality, and, as discussed above, that pressure then played a critical role in the litigation’s outcome, which in turn affected the political pressure for reform. There is, to be sure, something paradoxical about this assessment. The rule of law, the separation of powers, and human rights are designed to discipline and constrain politics, out of a concern that pure majoritarian politics, focused on the short term, is likely to discount the long-term values of these principles. Yet without a critical mass of political support for these legal principles, they are unlikely to be effective checks on abuse, for many of the reasons Posner andVermeule identify. The answer, however, is not to abandon the rule of law for politics, but to develop and nurture a political culture that values the rule of law itself. Civil society organizations devoted to such values, such as Human Rights Watch, the Center for Constitutional Rights, and the American Civil Liberties Union, play a central role in facilitating, informing, and generating that politics. Indeed, they have no alternative. Unlike governmental institutions, civil society groups have no formal authority to impose the limits of law themselves. Their recourse to the law’s limits is necessarily indirect: they can file lawsuits seeking judicial enforcement, lobby Congress for statutory reform or other legislative responses, or seek to influence the executive branch. But they necessarily and simultaneously pursue these goals through political avenues – by appealing to the public for support, educating the public, exposing abuses, and engaging in public advocacy around rule-of-law values. Unlike ordinary politics, which tends to focus on the preferences of the moment, the politics of the rule of law is committed to a set of long-term principles. Civil society organizations are uniquely situated to bring these long-term interests to bear on the public debate. Much like a constitution itself, civil society groups are institutionally designed to emphasize and reinforce our long-term interests. When the ordinary political process is consumed by the heat of a crisis, organizations like the ACLU, Human Rights First, and the Center for Constitutional Rights, designed to protect the rule of law, are therefore especially important. While Congress and the courts were at best compromised and at worst complicit in the abuses of the post-9/11 period, civil society performed admirably. The Center for Constitutional Rights brought the first lawsuit seeking habeas review at Guantanamo, and went on to coordinate a nationwide network of volunteer attorneys who represented Guantanamo habeas petitioners. The ACLU filed important lawsuits challenging secrecy and government excesses, and succeeded in disclosing many details about the government’s illegal interrogation program. Both the ACLU and CCR filed lawsuits and engaged in public advocacy on behalf of torture and rendition victims, and challenging warrantless wiretapping. Human Rights Watch and Human Rights First wrote important reports on detention, torture, and Guantanamo, and Human Rights First organized former military generals and admirals to speak out in defense of humanitarian law and human rights. These efforts are but a small subset of the broader activities of civil society, at home and abroad, that helped to bring to public attention the Bush administration’s most questionable initiatives, and to portray the initiatives as contrary to the rule of law. At their best, civil society organizations help forge a politics of the rule of law, in which there is a symbiotic relationship between politics and law: the appeal to law informs a particular politics, and that politics reinforces the law’s appeal, in a mutually reinforcing relation. Posner and Vermeule understand the importance of politics as a checking force in the modern world, but fail to see the critical qualification that the politics must be organized around a commitment to fundamental principles of liberty, equality, due process, and the separation of powers – in short, the rule of law. Margulies and Metcalf recognize that politics as much as law determines the reality of rights protections, but fail to identify the unique role that civil society organizations play in that process. It is not that the “rule of politics” has replaced the “rule of law,” but that, properly understood, a politics of law is a critical supplement to the rule of law. We cannot survive as a constitutional democracy true to our principles without both. And our survival turns, not only on a vibrant constitution, but on a vibrant civil society dedicated to reinforcing and defending constitutional values.