# MN ST Round 3

# 1NC – Gonzaga

### 0

#### Court affs must specify the grounds of the ruling. Evaluate this through competing interpretations.

#### Best for education—the rationale is the most important part—they moot a huge percentage of the literature

SUTTON 1—Circuit Judge, United States Court of Appeals for the Sixth Circuit [Sutton, Jeffrey S. Michigan Law Review April 2010]

The opinion-writing process provides another constraint. Unlike the democratically elected branches of the federal government, federal appellate judges must explain their decisions in writing. The processnot only improves the decision-making process, but it also disciplines judges to ensure that their votes amount to more than intuition and impulse. No doubt, as Posner rightly points out, this still leaves considerable room for rationalization and "fig-leafing" (p. 350)--giving decisions the veneer, if not the substance, of legal reasoning. Iagree with Posner that the courts should be more candid about the key explanations for their decisions. All too often opinions amount to a blurring array of citations, which obscure rather than highlight the critical choices made by the court.Most issues in most cases usually turn on one point, whether a pragmatic or a legalistic one. Posneris right to suggest that judges should feature and develop these points rather than bury them in a haystack of citations. One reason Posner's opinions are so influential is that they do just that. Others should follow his example.

#### Key to ground—all court arguments about the rulings—not abstract deicisons—not specifying structurally biases the literature for the aff.

#### Takes out solvency—vote neg on presumpti-no ground to model

### 1

#### Presidential authority only comes from congress or the constitution

NAME: Laura A. Cisneros 12\* BIO: \* Associate Professor, Golden Gate University School of Law. Copyright (c) 2012 West Virginia Law Review West Virginia Law Review Winter, 2012 West Virginia Law Review 115 W. Va. L. Rev. 577 LENGTH: 33396 words ARTICLE: YOUNGSTOWN SHEET TO BOUMEDIENE: A STORY OF JUDICIAL ETHOS AND THE (UN)FASTIDIOUS USE OF LANGUAGE. Lexis

At this point, it is helpful to take a step back and examine some text that occurs earlier in the Medellin opinion. Roberts prefaced his recitation of Jackson's tripartite framework by reaffirming Justice Black's now-classic formula for discerning the legal sources of presidential power: "The President's authority to act, as with the exercise of any governmental power, "must stem [\*622] either from an act of Congress or from the Constitution itself.'" n200 Here, Roberts is structuring his opinion so as to maximize its rhetorical thrust and display its legal pedigree. Not only does he quote Justice Black's "first principle" of presidential authority from Youngstown, he also cites to Dames & Moore as additional legal support. With a simple string citation, Roberts places Dames & Moore, a decision battered by commentary critical of its expansive allowance of presidential power, n201 on equal footing with Youngstown, a decision viewed as one of the bulwarks against executive excesses. This is quite a balancing act, but one with a distinct purpose. By treating Dames & Moore as equal to and consistent with Youngstown, Roberts lays the groundwork for accepting Dames & Moore's use of the congressional acquiescence doctrine as a graft upon both Black's majority opinion and Jackson's concurrence in the earlier case.

#### War powers authority for detention is explicitly limited to enemy combatants

**Glazier**, Associate Professor at Loyola Law School in Los Angeles, California, **2006**. (David, Boston University International Law Journal, Spring, 2006, 24 B.U. Int'l L.J. 55, FULL AND FAIR BY WHAT MEASURE?: IDENTIFYING THE INTERNATIONAL LAW REGULATING MILITARY COMMISSION PROCEDURE, l/n)

President Bush's decision to consider the terrorist attacks of September 11, 2001, as an act of war has significant legal ramifications. Endorsed by Congress in the Authorization for the Use of Military Force ("AUMF"), [n1](http://www.lexisnexis.com.ezp1.lib.umn.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371143683321&returnToKey=20_T17601046724&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.13051.626107591917#n1) this paradigm shift away from treating terrorism as a crime to treating terrorism as an armed conflict allows the United States to exercise "fundamental incidents of waging war." [n2](http://www.lexisnexis.com.ezp1.lib.umn.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371143683321&returnToKey=20_T17601046724&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.13051.626107591917#n2) Among these fundamental war powers are the authorities to detain enemy personnel for the duration of hostilities, to subject law of war violators to trials in military tribunals, and to exercise subject matter jurisdiction over the full scope of the law of war, rather than over only those offenses defined in U.S. criminal statutes. [n3](http://www.lexisnexis.com.ezp1.lib.umn.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371143683321&returnToKey=20_T17601046724&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.13051.626107591917#n3)

#### Violation: the aff limits indefinite detention outside of war powers authority –Korematsu is distinct from indefinite detention

The Committee on Federal Courts 4 (The Committee on Federal Courts studies, recommends and reports on proposed changes in the rules, procedures and practices of the federal courts, The Record of The Association of The Bar of the City of New York¶ 2004¶ 59 The Record 41¶ LENGTH: 60818 words¶ THE INDEFINITE DETENTION OF "ENEMY COMBATANTS": BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE CONTEXT OF THE WAR ON TERROR \* Lexis.

a. The differing nature of wars: "total war" precedents should not govern the war on terror at home¶ As already noted, there is no specific case support for unilateral executive detentions in the United States. The cases supporting an expansive construction of the President's war power generally, such as The Prize Cases, Korematsu and Quirin, were decided in the very different "total war" circumstances of the Civil War and World War II, which should not control the balance between due process and the war power in the quite different setting of the domestic war on terror. Further, the President's actions sustained in these cases were supported by congressional authorization, while indefinite detentions are not (see p. 130, below).

#### Vote neg

#### limits

Alfred de Zayas, PhD, Philosophy and former Secretary of the Human Rights Committee, and Visiting Professor, Law, University of British Columbia, "Human Rights and Indefinite Detention," INTERNATIONAL REVIEW OF THE RED CROSS v. 87 n. 857, 3--05, p. 16.

The phenomenon of indefinite detention affects many categories of persons, including persons held as security risks, “terrorists,” “enemy combatants,” and common criminals held in pre-trial detention without bail, but also asylum-seekers, undocumented migrants, persons awaiting deportation, and persons under psychiatric detention. For the purposes of this article we shall examine the legality of indefinite detention against a number of criteria — not only the temporal element, i.e. the sheer length of the detention or the timelapse before being brought before a judge, but also other elements such as the uncertainty about the actual termination of said detention, the illegality in the manner of effecting arrest (i.e. with or without a judicial warrant of arrest), the justification for the deprivation of liberty given to the detainee, the possibility of having access to counsel and to one’s family (i.e. illegality of incommunicado detention), the possibility of testing the legality of the detention before a competent tribunal, and the conditions of detention (i.e. with respect to the inherent dignity of the human person, and without being subjected to irregular interrogation methods).

#### Precision—they render “war powers” meaningless on the war powers topic- precision key to predictable division of ground

#### Extra topicality is a voter-- proves the resolution is insufficient and makes it a no cost option

### 2

#### A. The AFF has not specified a test case.

#### B. That’s a voter --- knowing what case they rule on is key to precedent and facts-specific ground.

### 3

#### The AFF posits a world in which individuals have no responsibility – this fails to understand the way that the individual shapes war and everyday violence

**Kappeler 95**(Susanne, Associate Professor at Al-Akhawayn University, The Will to Violence: The politics of personal behavior, Pg.10-11)

Yet **our insight that** indeed **we are not responsible for the decisions of a** Serbian **general or a** Croatian **president tends to mislead us into thinking that** therefore **we have no responsibility** at all, not even **for forming our own judgme**nt, and thus into underrating the responsibility we do have within our own sphere of action. In particular, it seems to absolve us from having to try to s**ee any relation between our own actions and those events**, or to recognize the connections between those political decisions and our own personal decisions. It not only shows that we participate in what Beck calls ‘organized irresponsibility’, upholding the apparent lack of connection between bureaucratically, institutionally, nationally, and also individually organized separate competences. It also proves the phenomenal and unquestioned al**liance of our personal thinking with the thinking of** the major **power mongers**. For **we**tend to **think that we cannot ‘do’ anything,** say**, about a war,** because we deem ourselves to be in the wrong situation **because we are not where the major decisions are made.**Which is why **many of those not yet entirely disillusioned with politics** tend to **engage in** a form of mental deputy politics, in the style of ‘what would I do if I were the general, the prime minister, the president, the foreign minister or the minister of defense?’ Since **we** seem to **regard their mega spheres of action as the only worthwhile and truly effective ones, and since our political analyses** tend to **dwell there first of all**, any **question of what I would do if I were indeed myself tends to peter out in the comparative insignificance of having what is perceived as ‘virtually no possibilities’**: what I could do seems petty and futile. For my own action I obviously desire the range of action of a general, a prime minister, or a General Secretary of the UN – finding expression in ever more prevalent formulations like ‘I want to stop this war’, ‘I want military intervention’, ‘I want to stop this backlash’, or ‘I want a moral revolution. ‘We are this war’, however, even if we do not command the troops or participate in co-called peace talks, namely as Drakulic says, in our non-comprehension’: our willed refusal to feel responsible for our own thinking and for working out our own understanding, preferring innocently to drift along the ideological current of prefabricated arguments or less than innocently taking advantage of the advantages these offer. And we ‘are’ the war in our ‘unconscious cruelty towards you’, our tolerance of the ‘fact that you have a yellow form for refugees and I don’t’- our readiness, in other words, to build identities, one for ourselves and one for refugees, one of our own and one for the ‘others.’ **We share in the responsibility for this war and its violence in the way we let them grow inside us, that** is, in the way **we shape ‘**our feelings, **our relationships, our values’ according to the structures and the values of war and violence.**

#### Their view of Identity Politics destroy personal responsibility and reproduce systems of violence and oppression.

Kappeler 95 (Susanne, Associate Professor At the School of Humanities and Social Sciences, Al Akhawayn University. “The Will To Violence: The Politics of Personal Behavior”, p. 12-13)

The rise of cultural identity politics in particular has contributed to the view that violence is exclusively a matter of social Dower relations. What feminist analysis has identified as the dialectic between social power structures and the actions of individuals in specific situations is in danger of becoming conflated in the simple transfer of social power structures to the identity of individuals. Far from supporting members of oppressed groups in the consciousness of their right to equality, identity politics tends to inscribe power and inequality, or victim status, respectively in the identity of persons. The analysis of the behavior of individuals thus tends to lose in importance in favor of an (exclusive) analysis of social relations and the identification of our place in the social power hierarchy.

#### we are the violence. Individuals are the impetus for exploitation and racism, and only this theory explains the truth behind violence

**Kappeler 95** (Susanne, Associate Professor at Al-Akhawayn University, The Will to Violence: The politics of personal behavior, Pg.9)

**war does not suddenly break out in a peaceful society**; sexual violence is not the disturbance of otherwise equal gender relations. Racist attacks do not shoot like lightning out of a non-racist sky, and the sexual exploitation of children is no solitary problem in a world otherwise just to children. **The violence of our** most commonsense **everyday thinking, and especially our personal will to violence, constitute the conceptual preparation, the ideological armament and the intellectual mobilization which make the ;outbreak’ of war, of sexual violence, of racist attacks, of murder and destruction possible at all.**  ‘We are the war’, writes SlavenkaDrakulic at the end of her existential analysis at the end of her existential analysis of the question, ‘what is war?’: I do not know what war is, I want to tell [my friend], but I see it everywhere. It is in the blood-soaked street in Sarajevo, after 20 people have been killed while they queued for bread. But it is also in your non-comprehension, in my unconscious cruelty towards you, in the fact that you have a yellow form [for refugees] and I don’t, in the way in which it grows inside ourselves and changes our feelings, relationships, values – in short: us. We are the war…and I am afraid that we cannot hold anyone else responsible. We make this war possible, we permit it to happen. ‘**We are the war’- and we also ‘are’ the** sexual violence, the racist violence, the **exploitation and the will to violence in all its manifestations in a society in co-called ‘peacetime’, for we make them possible and we permit them to happen.**

#### The Alternative is to reject the affirmatives representations and reconcieve of violence as an issue of personal choice made by individuals.

**Kappeler 95**(Susanne, Associate Professor at Al-Akhawayn University, The Will to Violence: The politics of personal behavior, Pg.5-6)

**A politics aiming at a change in people’s behavior would require** political work that is very much more cumbersome and very much less promising of success than is the use of state power and social control. It would require political consciousness-raising- politicizing the way we think- which cannot be imposed on others by force or compulsory educational measures. It would require **a view of people which takes seriously and reckons with their will, both their will to violence or their will to change.** To take seriously the will of othershoweverwould mean recognizing one’s own, and putting people’s will, including our own, at the centre of political reflection**.** A **political analysis of violence needs to recognize** this will, **the personal decision in favor of violence**- not just to describe acts of violence, or the conditions which enable them to take place, but **also to capture the moment of decision which is the real impetus for violent action**. For **without this decision there will be no violent act,** not even in circumstances which potentially permit it. **It is the decision to violate, not just the act itself, which make a person a perpetrator of violence-just as it is the decision not to do so which makes people not act violently and not abuse their power in a situation which would nevertheless permit it. This moment of decision**, therefore, **is** also **the locus of potential resistance to violence. To understand the structures of thinking and the criteria by which such decisions are reached, but above all to regard this decision as an act of choice, seems** to me **a necessary precondition for any political struggle against violence**and for a non-violent society. My focus then, is on the decision to violate- not just in circumstances where violence is conspicuous by its damage, but in every situation where the choice to violate presents itself. This means a change from the accustomed perspective on violence to the context where decisions for actions are being made, as it were “before” their consequence become apparent, and which we may not recognize as contexts of violence. Our political analysis of sexual or racist violence have necessarily concentrated on situations where the power disequilibrium between perpetrator and victim is extreme, where, in particular, it is supported by social power structures such as male and/or white supremacy, so that not only is the violence unlikely to receive sanctions, but on the contrary, the perpetrator will find support rather than the victim. Violence, however, is a possibility wherever there is freedom of action, however limited. Such violence may ‘look different’, not least because the possibilities or resistance may also be greater in situations where there is relative freedom of action also on the part of the other agent, that is, the violator’s envisaged victim.

### 4

#### The 1AC endorses a process of racial redemption by wiping their hands clean of the blood and benefit of the Korematsu decision. This is part of a broader processes of establishing whiteness as innocent in the face of the crimes of the past. Extending the politics of Korematsu enables the reappearance of white supremacy.

Sumi Cho - Professor of Law at DePaul University College of Law.- 1998- Boston College Law School Boston College Law Review December, - Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption – lexis

Webster's defines "redemption" as an act that releases one from blame or debt. n242 In the term's religious sense, one is freed from the consequences of sin through repentance for an offense or injury. For western Judeo-Christian cultures, redemption is a sacred remedy for those who have sinned. With proper acknowledgment and atonement for one's transgressions, anyone can return to proper society with a "clean slate" and a "second chance." n243  [\*120]  It is possible that Earl Warren sought a religious sort of redemption for the injuries he inflicted upon Japanese Californians during the war. Significant evidence suggests that his actions weighed heavily on his conscience and may support speculation that his stellar civil rights record on the bench was tied to the "sins" of his past. n244 While a religious-like redemption may have motivated the Chief Justice, I will deploy a more legalistic notion of redemption in an attempt to capture the meaning of Warren's civil rights jurisprudence -- its significance as racial redemption. My theory of racial redemption, presented here in an early stage of development, offers a general framework within which to place a series of legal precedents and through which to understand legal history. Beyond its application to Earl Warren and the Warren Court, racial redemption theory is available for a wide range of purposes, including: analyzing contemporary post-civil rights politics in an era of race-coding; understanding the phenomenon of pitting one subordinated group against another in a process I refer to as "racial brokering;" explaining the increasing use of people of color as spokespersons or "racial mascots" for racially regressive policies and reconciling the increasing equality discourse with the decreasing yield in material resources to redress inequality. In a legal property sense, redemption refers to the freeing of property from mortgage by paying the debt for which the property stood as security. n245 Whiteness, as Professor Cheryl Harris has shown,  [\*121]  has constituted a form of property recognized in law. n246 In Plessy v. Ferguson, for example, the Court acknowledged that if Plessy were white, he would have an action for damages against the railway company for his wrongful exclusion from the "white car": If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man. n247 In the Plessy era, the property value of whiteness was maintained under a legal system and social order based on the logic of white supremacy. n248 But in a post-civil rights era in which open forms of white supremacy have been legally prohibited and socially discredited, the property value of whiteness, to the extent it is understood to retain a supremacist content, has been "mortgaged" and diminished. n249  [\*122]  Logically, however, whites have a vested interest in retaining advantageous racial hierarchies, structures and cultures -- the property value of whiteness -- and may be expected to defend political and material advantages over peoples of color. n250 Inherent in this property interest, though, lies a tension between the knowledge of white supremacy's moral decrepitude and the desire to enjoy the fruits of that tainted tree. A racial redemption of sorts is needed to restore the property interest in whiteness to its full pre-Jim Crow value under post-Jim Crow norms and to reconcile the fundamental tension at the heart of the current U.S. racial socio-economy. Racial redemption is the process by which whiteness can be restored to its full material value by removing the encumbrances that the legacy of racism has placed upon it. Such a process reconciles the knowledge/desire tension by denouncing supremacy while permitting its continued operation. Specifically, there are three identifiable features that characterize the process of racial redemption: 1) the repudiation of old forms of white supremacy; 2) the burial of historical memories of racial subordination; and 3) the transformation of white supremacy into more sustainable forms. The repudiation of America's supremacist past may take various forms, such as the declaration of racial apologies or racial equality "covenants." A number of historical events merged in the mid-twentieth century to force the repudiation of white supremacist regimes, only two of which I will address. First, the discovery of the Nazi death camps was an epiphanal moment for the United States and began the final demise of the pseudo-scientific, biologically-based philosophy of white supremacy. n251 The Holocaust held a mirror to white Americans' violent [\*123] exclusion and disfranchisement of people of color, particularly Black Americans in the South. In addition, the 1944 publication, An American Dilemma, removed the intellectual cover enjoyed by scientific racism. n252 In his thousand page work, Gunnar Myrdal argued that America's race problem was attributable not to the biological inferiority of the minority group, but to the irrational prejudices of members of the majority group. n253 The Holocaust, the public spectacle of the Nuremberg trials and the influence of An American Dilemma made it impossible to sustain old forms of white supremacy as a public rationale for the racial caste system in postwar America. n254 The burial feature of racial redemption makes use of censorship, historical amnesia, selective recall, euphemizing and revisionist historicizing in achieving its ends. This process obscures individual, institutional and cultural complicities with the old forms of white supremacy that would otherwise have left "blood on the hands" of those who participated in the repudiated regime, and even damaged the moral currency of those who passively benefited from it. In one sense, burial provides closure after a grieving period, granting permission to "move on" from the legacy of America's racist past. Such burials may manifest themselves as outright denials, glaring omissions, silences, absences and counter-factual or decontextualized assertions. Burial obscures the full extent to which white privilege has been consolidated and leveraged into material gain. n255 The third, and most important, feature of racial redemption involves the simultaneous transformation and reassertion of white supremacy.  [\*124]  The process of racial redemption retires an outmoded form of white supremacy while introducing a new, more resilient form. What has been billed as revolutionary racial change in the repudiation phase reveals itself as a "mere change in the form of investment" in white supremacy. n256 Burial of racial historical context makes it analytically difficult for the public to evaluate comparatively the evolving form of subordination. Pre-Brown, white supremacy manifested itself in the system of segregation supported by an ideology of biological determinism. Post-Brown, white supremacy continued in the new form of formal legal equality abutted by the ideology of colorblind fundamentalism. Through the stages of repudiation, burial and transformation, the racial redemption process effects, and depends upon, a retrieval of innocent whiteness. This retrieval decouples whiteness from the stigma of white supremacy by imagining a kinder, gentler whiteness -- one that would never be seen cloaked in white sheets and hoods, one that has not benefited from centuries of a racial caste system, one that has not been constructed through belief in inherent biological differences between people of color and whites and one that has not been tolerant of outright violence and malign neglect. For Warren individually, the Supreme Court as an institution and the nation as a whole, the decoupling of whiteness from white supremacy occurred through Brown and its companion cases that invalidated the principle of separate-but-equal and the practice of segregation. n257 The jurisprudence that began with Brown has had the effect of restoring white innocence and relegitimating the state and its institutions through the embrace of colorblind ideology. n258 The following sections analyze Warren's post-internment actions and the Warren Court's racial jurisprudence through the lens of racial redemption. I suggest the centrality of Brown et al. as a moment in  [\*125]  individual and institutional redemption processes, both of which involve the retrieval of racial innocence in the postwar era.

Criticism solves the aff.

Sumi Cho -Professor of Law at DePaul University College of Law.- 1998- Boston College Law School Boston College Law Review December, - Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption – lexis

In seeking to explain the unique role of race in American society and politics, Omi and Winant develop a theory of racial formation, defined generally as "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed." n419 This definition reflects the basic understanding of race and racial formation as products of social, cultural and political processes. Racial formation theory, however, goes far beyond this basic insight. Omi and Winant further break down racial formation into its smaller component parts, referred to as racial projects. These racial projects are social and political manifestations that one may, at the risk of great oversimplification, liken to movements or campaigns. n420 Racial projects "do the ideological work" of linking two levels of social theory that often remain unintegrated: the structural (material and institutional) and the representational (cultural and discursive) components of a society's racial formation. As Omi and Winant explain: "A racial project is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines." n422 Stated in slightly different terms: "Racial projects connect what race means in a particular discursive practice and the ways in which both [\*156] social structures and everyday experiences are racially organized, based upon that meaning." n423 Both subjects and structures are accounted for in the theory, for the racial project reconciles the role of individual agency with the constraints of social structure (thereby transcending this perennial social theory dilemma). Finally, racial projects may be either regressive or progressive, liberal or conservative; they may involve society's micro-level interactions or macro-level actions, involving, for example, state institutions and electoral politics. n424 Racial redemption can be thought of generally as a racial project, containing both a structural-material and a representational-cultural component. As described above, the meaning of whiteness is at stake in the project of racial redemption, and the outcome will have significant material consequences. More specifically, the value of whiteness is maintained through its reputational rehabilitation, shown above to occur through the operation of various component projects, from repudiation of white supremacy and burial of historical complicities in white supremacy to transformation toward a redeemed and innocent whiteness. n425 The property value of whiteness and the social structure of racial privilege depend on this rehabilitation.

### Case

#### 1. Law is indeterminate – the Affs reform is coopted by the biased nature of the legal system, turns case and means their precedent has no effect

Robert W. **Gordon**, professor of law at Stanford, Summer 19**87**, “UNFREEZING LEGAL REALITY: CRITICAL APPROACHES TO LAW”, Florida State University Law Review, lexis, umn-rks

Now a central tenet of CLS work has been that the ordinary discourses of law -- debates over legislation, legal arguments, administrative and court decisions, lawyers' discussions with clients, legal commentary and scholarship, etc. -- all contribute to cementing this feeling, at once despairing and complacent, that things must be the way they are and that major changes could only make them worse. Legal discourse accomplishes this in many ways. First by endlessly repeating the claim that law and the other policy sciences have perfected a set of rational techniques and institutions that have come about as close as we are ever likely to get to solving the problem of domination in civil society. Put another way, legal discourse paints an idealized fantasy of order according to which legal rules and procedures have so structured relations among people that such relations may primarily be understood as instituted by their consent, their free and rational choices. Such coercion as apparently remains may be explained as the result of necessity -- either natural necessities (such as scarcity or the limited human capacity for altruism) or social necessities. For example, in a number of the prevailing discourses, the ordinary hierarchies of workplace domination and subordination are explained: (1) by reference to the contractual agreement of the parties and to their relative preferences for responsibility versus leisure, or risk taking versus security; (2) by the natural distribution of differential talents and skills (Larry Bird earns more as a basketball player because he is better); and (3) by the demands of efficiency in production, which are said to require extensive hierarchy for the purposes of supervision and monitoring, centralization of investment decisions, and so forth. There are always some residues of clearly unhappy [\*199] conditions -- undeserved deprivation, exploitation, suffering -- that cannot be explained in any of these ways. The discourses of law are perhaps most resourceful in dealing with these residues, treating them as, on the whole, readily reformable within the prevailing political options for adjusting the structures of ordinary practices -- one need merely fine tune the scheme of regulation, or deregulation, to correct them. But the prevailing discourse has its cynical and worldly side, and its tragic moments, to offset the general mood of complacency. In this mood it resignedly acknowledges that beyond the necessary minimum and the reformable residues of coercion and misery there is an irreducible, intractable remainder -- due to inherent limits on our capacity for achieving social knowledge, or for changing society through deliberate intervention, or for taking collective action against evil without suffering the greater evil of despotic power. These discourses of legal and technical rationality, of rights, consent, necessity, efficiency, and tragic limitation, are of course discourses of power -- not only for the obvious reasons that law's commands are backed by force and its operations can inflict enormous pain, but because to have access to these discourses, to be able to use them or pay others to use them on your behalf, is a large part of what it means to possess power. Further, they are discourses that -- although often partially constructed, or extracted as concessions, through the pressure of relatively less powerful groups struggling from below -- in habitual practice tend to express the interests and the perspectives of the powerful people who use them. The discourses have some of the power they do because some of their claims sound very plausible, though many do not. The claim, for example, that workers in health-destroying factories voluntarily "choose," in any practical sense of the term, the risks of the workplace in return for a wage premium, is probably not believed by anyone save those few expensively trained out of the capacity to recognize what is going on around them. In addition, both the plausible and implausible claims are backed up in the cases of law and of economics and the policy sciences by a quite formidable-seeming technocratic apparatus of rational justification -- suggesting that the miscellany of social practices we happen to have been born into in this historical moment is much more than a contingent miscellany. It has an order, even if sometimes an invisible one; it makes sense. The array of legal norms, institutions, procedures, and doctrines in force, can be rationally derived from the principles of regard for individual autonomy, utilitarian [\*200] efficiency or wealth creation, the functional needs of social order or economic prosperity, or the moral consensus and historical traditions of the community. There are several general points CLS people have wanted to assert against these discourses of power. First, the discourses have helped to structure our ordinary perceptions of reality so as to systematically exclude or repress alternative visions of social life, both as it is and as it might be. One of the aims of CLS methods is to try to dredge up and give content to these suppressed alternative visions. Second, the discourses fail even on their own terms to sustain the case for their relentlessly apologetic conclusions. Carefully understood, they could all just as well be invoked to support a politics of social transformation instead. n3 Generally speaking, the CLS claims under this heading are that the rationalizing criteria appealed to (of autonomy, functional utility, efficiency, history, etc.) are far too indeterminate to justify any conclusions about the inevitability or desirability of particular current practices; such claims, when unpacked, again and again turn out to rest on some illegitimate rhetorical move or dubious intermediate premise or empirical assumption. Further, the categories, abstractions, conventional rhetorics, reasoning modes and empirical statements of our ordinary discourses in any case so often misdescribe social experience as not to present any defensible pictures of the practices that they attempt to justify. Not to say of course that there could be such a thing as a single correct way of truthfully rendering social life as people live it, or that CLS writers could claim to have discovered it. But the commonplace legal discourses often produce such seriously distorted representations of social life that their categories regularly filter out complexity, variety, irrationality, unpredictability, disorder, cruelty, coercion, violence, suffering, solidarity and self-sacrifice. n4

#### 2. That causes authoritarianism and guarantees further oppression, turning case

Lynne **Henderson**, Professor of Law at the Indiana University School of Law at Bloomington, 19**91**

[“Authoritarianism and the Rule of Law,” Indiana Law Journal (66 Ind. L.J. 379), Spring, Available Online to Subscribing Institutions via Lexis-Nexis]

The lack of scholarly acknowledgment, until very recently, of Cover's suggestion that law has too often been a mechanism for state violence and human oppression indicates the difficulty legal scholars have in acknowledging that law can be oppressive as a matter of course, rather than as an occasional exception. n146 Perhaps no other scholar has been more concerned with the violent and punitive nature of law than Cover. His journey began with his study of judicial enforcement of the fugitive slave laws in Justice Accused n147 and ended in an assertion that law was not an instrument of the state. He wrote that he was an "anarchist . . . with anarchy understood to mean the absence of rulers, not the absence of law." n148 By this statement, Cover may have meant to reiterate Paine's statement that it is the Rule of Law that is king, but it seems to have rested more on Cover's belief that law is a site of struggle over meaning. n149 For Cover, law was not state power or even an instrument of government, but rather is any social understanding of normative authority: n150 "[T]here is a radical dichotomy between the social organization of law as power and the organization of [\*404] law as meaning." n151 Further, "in the domain of legal meaning, it is force and violence that are problematic." n152 Law was the normative and interpretive commitment of a community; it was meaning accompanied by such strong commitment that it could lead to active resistance to other interpretations. While pure legal meaning was, for Cover, divorced from power and coercion, judicial violence had to be tested against community commitments. n153 Because, for Cover, "[a] legal world is built only to the extent that there are commitments that place bodies on the line," n154 violence might be the only way to assure the dominance of one legal interpretation over another. One need not accept that law is whatever someone is prepared to put her body on the line for to gain an appreciation of Cover's exposure of the punitive and oppressive aspects of the American constitutional system or the authoritarian nature of the judiciary and the state.

Cover argued that the state sought to control law, its means of social control, in part through its "imperfect monopoly over the domain of violence." n155 He asserted that judges invoke and implement state violence by insisting on obedience to their orders and sacrificing "legal meaning to the interest in public order." n156 Judges, according to Cover, most typically applied a "statist" approach to law, denying the efficacy of alternative community interpretations. n157 But legal meanings developed by committed communities were law as much as the meanings developed by the courts. He noted, "the jurisgenerative principle by which legal meaning proliferates . . . never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. . . Courts, at least the courts of the state, are characteristically 'jurispathic,'" n158 literally killing off alternative legal meanings. n159

Cover also described a kind of "process authoritarianism" by describing the jurisdictional reasons given by judges to "place the violence of administration beyond the reach of 'law.'" n160 He argued that judges promoted substantive authoritarianism through procedure, both by asserting their own power to punish and by deferring to state violence. Judges, by using "jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege," reinforced authoritarianism. n161 In his examination of [\*405] Supreme Court cases, Cover argued that the Court had adopted what was in fact a substantively authoritarian stance towards its equity jurisdiction in injunction cases, "equity [being] 'strong' when the court is aligned with state violence and 'weak' when the court is a counterweight to that violence." n162 Private resistance -- resistance to state law by citizens -- was subordinated to a "regime of obedience -- of state superiority" and "public order." n163 Thus the Supreme Court's approval of the punitive use of state violence by a court in Walker v. City of Birmingham, n164 which held that citizens had the duty to obey even unconstitutional lower court injunctions, was, for Cover, pure authoritarianism.

The rule of [Walker] subordinates the creation of legal meaning to the interest in public order. It is the rule of the judge, the insider, looking out. It speaks to the judge as agent of state violence and employer of that violence against the "private" disorder of movements, communities, unions, parties, "people," "mobs." . . . Even when wrong, the judge is to act and is entitled to be obeyed. The signal Walker sends the judge is to be aggressive in confronting private resistance, because his authority will be vindicated . . . n165

Thus, the Justices were both morally irresponsible and implicated in state violence and statist law. n166 When asked to enjoin the state from engaging in violence, as in, for example, the Los Angeles police chokehold case, n167 the Court used "jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege." n168 Using the reasons of federalism, separation of powers, deference to "majoritarian branches" and, in the case of lower court judges, obedience to hierarchy, Cover argued that the Court's jurisdictional principles "align the interpretive acts of judges with the acts and interests of those who control the means of violence." n169

In Violence and the Word, n170 Cover opposed the interpretivist turn in legal scholarship, pointing out that "[l]egal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life." n171 Legal interpretation, unlike literary interpretation, was political and was "either played out on the field of pain and death or it is something less (or more) than law." n172 Legal interpretation, [\*406] as judges engaged in it, was "(1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way." n173 For example, the ideology of punishment justified to the judge and to others the violence of the criminal law. n174 Drawing on Milgram's study of obedience to authority, n175 Cover argued that institutional roles facilitated the imposition of violence. n176 Although Cover did not make the argument, his description of judges bears some resemblance to that of role authoritarians. Consistent with Milgram's observations, Cover argued that when judges interpret the law they shelter themselves from the violent implications of their role as interpreters and they set into motion violence within institutional roles, giving persons permission to inflict pain that insulates them from inhibition. n177 Judges thus identify with and are active in perpetuating state violence; that violence in turn limits the possibility of finding common meaning and "law." n178

#### 3. Courts fail-Obama over rides and all attempts to hold perpetrators accountable has failed.

Weber 11

(Elisabeth, “Literary Justice?: Poems from Guantanamo Bay Prison Camp”, Comparative Literature Studies, Vol. 48, No. 3, 2011, pp. 417-434, Project Muse, ASH)

There is a different shame that also survives. Any legal actions to hold those responsible for the U.S. torture policies have been thwarted. Former president George W. Bush can boast with impunity in his memoir that his authorization of torture (a crime that according to the UN Convention Against Torture of 1975, article 2, cannot be justified by any “exceptional circumstances whatsoever,” including a state of war or a threat of war) was the right “decision.” Contrary to President Obama’s pledge in January 2009, Guantánamo remains open and is actually expanding its operations: the suspension of military commissions ordered by Obama shortly after taking office has recently been “rescinded.”54 “A victim,” Felman writes following Thomas Szasz and Jean-François Lyotard, “is by definition not only one who is oppressed but also one who has no language of his own, one who, quite precisely, is robbed of a language with which to articulate his or her victimization.”55 The confiscation of thousands of verses of poetry by U.S. authorities makes this abundantly clear. What is “available” to the prisoners in Guantánamo “as language” in the few poems released in translation is, to quote Felman again, “only the oppressor’s language. But in the oppressor’s language, the abused will sound crazy, even to himself, if he describes himself as abused.”56 Al-Dossari’s poem addresses its hypothetical readers, the “judges” and “people of conscience,” the “principled men and the fair-minded” in a way that resonates with a question articulated by Felman in the context of her discussion of the trials of domestic violence: “How can we recognize, how can we expiate a violence that is inscribed in culture as invisible, and that cannot be rendered visible in court?”57

#### 4. Courts fail-by allowing perpetrators of injustice to operate with impunity they serve as a remonumentalization of the violence.

Weber 11

(Elisabeth, “Literary Justice?: Poems from Guantanamo Bay Prison Camp”, Comparative Literature Studies, Vol. 48, No. 3, 2011, pp. 417-434, Project Muse, ASH)

The theses of a pattern and of judging history as such are further complicated by the very long list of catastrophes abetted by Western civilization that have not been addressed by any “exercise of legal justice” or even its promise, an unjustly abbreviated version of which would include the genocidal pursuit against Native Americans through their children’s forced displacement to boarding ‘schools’ in the United States and Canada, where they were criminally neglected, molested, exploited, and often left to die, a systematic “rape of the soul,” that continued well into the 1980s; the nuclear bombing of Hiroshima and Nagasaki that would have been tried as a war crime had the United States not won World War II; the overthrow of the thriving Iranian democracy by the British secret service and the CIA in 1953 resulting in a twenty-six-year-long ferocious dictatorship by the U.S.-supported Mohammad-Reza Shah Pahlavi; the ongoing, and possibly continuously amplifying, traumatic consequences of the expulsion of Palestinians from their homes and lands that made the foundation of the state of Israel possible; and the atrocities committed by military juntas trained and supported by the United States all over South America against their own populations.13 Many more instances of blatant impunity in the wake of massive state inflicted trauma could be cited. In none of these cases has the response of Western civilization been a promise of legal (or of any other) justice. According to John Dower’s recent wide-ranging analysis, the United States was dominated by “cultures of war” throughout the twentieth century, and, as Scott Martelle’s review puts it, “regardless of self-perceptions of righteousness, nations with a culture of war will, indeed, wage war.”14 The assertion that we have “inherited” a pattern of promised justice from this history not only abets a remonumentalization of Western civilization but also risks inadvertently repeating the trauma, reinflicting it in the refusal to acknowledge acts of terror committed by Western states. Thus, the assertion of a pattern threatens to undermine the analyses conducted in its shadow.

#### 5. SQUO SOLVES-THE KOREMATSU DECISION HAS EFFECTIVELY BEEN OVERTURNED

Ronald J. Sievert, Adjunct Professor at University of Texas School of Law, Winter, 2000.

Houston Law Review, p 1448.

In that famous, or infamous, case, the Supreme Court originally upheld the removal of Japanese citizens from the West Coast and the attendant violation of their civil rights [158](http://www.lexis.com/research/retrieve?_m=046b73db92dc3f3bf3e46620da84d6e4&newStartCite=1&crnCh=0&crnCt=ALLCASES&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAB&_md5=fe1682bca6705b914da4cfa00318c11f&focBudTerms=korematsu%20w/#n158) in reliance upon the United States Army's Dewitt report, citing sabotage, espionage, and illegal radio transmissions allegedly conducted by these citizens. [159](http://www.lexis.com/research/retrieve?_m=046b73db92dc3f3bf3e46620da84d6e4&newStartCite=1&crnCh=0&crnCt=ALLCASES&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAB&_md5=fe1682bca6705b914da4cfa00318c11f&focBudTerms=korematsu%20w/#n159) Forty years later, a United States District Court found, and the Justice Department confirmed, that the Dewitt report submitted to the Supreme Court was highly selective and contained material omissions which could have affected the Supreme Court's decision. [160](http://www.lexis.com/research/retrieve?_m=046b73db92dc3f3bf3e46620da84d6e4&newStartCite=1&crnCh=0&crnCt=ALLCASES&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAB&_md5=fe1682bca6705b914da4cfa00318c11f&focBudTerms=korematsu%20w/#n160) Korematsu's conviction was reversed [161](http://www.lexis.com/research/retrieve?_m=046b73db92dc3f3bf3e46620da84d6e4&newStartCite=1&crnCh=0&crnCt=ALLCASES&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAB&_md5=fe1682bca6705b914da4cfa00318c11f&focBudTerms=korematsu%20w/#n161) and the court agreed with the findings of an independent commission that Korematsu now ""lies overruled in the court of history.'" [162](http://www.lexis.com/research/retrieve?_m=046b73db92dc3f3bf3e46620da84d6e4&newStartCite=1&crnCh=0&crnCt=ALLCASES&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzz-zSkAB&_md5=fe1682bca6705b914da4cfa00318c11f&focBudTerms=korematsu%20w/#n162)

#### 6. No Solvency – the law is inherently indeterminate. Judges enforce law as they please because they have absolute discretion. Enforcement will be coopted.

**Fellas**, associate at Hughes, Hubbard, & Reed, **1993** John, Boston Law Review, 73 B.U.L. Rev. 715

Some critical legal scholars have argued that the rejection of the distinction between law and politics has subversive implications for our legal order, namely that it renders law indeterminate. 30 The indeterminacy thesis is usually expressed as one about judicial decision making. The idea is that the materials of the law do not compel a judge to decide a case one particular way. No method of legal analysis is capable of generating a unique, correct solution to a particular legal question. 31 [\*723] There is a clear connection between the rejection of the distinction between law and politics and the indeterminacy thesis. From the standpoint of the critics, legal reasoning is incapable of excluding politics from the province of law. It is not possible to say what the law requires in a particular case without reference to the considerations relevant to what it ought to be. However, politics is inherently controversial, such that people can legitimately disagree about what the law ought to be in a particular case. Thus, if it is not possible to say what the law actually is without reference to the considerations that bear on what it ought to be, it follows that the question of what the law requires is itself controversial. This entails that people can also legitimately disagree about what the law requires. If people can legitimately disagree about what the law requires, it follows that law is indeterminate. There is no single, right answer to questions of law. It is important to emphasize that the indeterminacy thesis, like the repudiation of the distinction between law and politics, is a claim about the nature of legal doctrine, not about the good faith of the judiciary. In asserting that law is indeterminate, the critics do not claim that judges ignore clear law and decide cases according to their own preferences. Rather, they claim that what the law requires is ambiguous. They assert not that judges take the law into their own hands, but that the law is so fluid that it slips through them. They insist that even if a judge were to approach his task in good faith, his decision could not be made by reference to the law because the law does not dictate the outcome of particular cases.

#### 7. Turn- Backlash—Victories in the court are short-lived- conservative reconstruction ensures backlash.

Robin **West**, Professor of Law, Georgetown University Law Center, FALL, **1993** (88 Nw. U.L. Rev. 241, Northwestern Law review)

Although the adjudicated Constitution obviously has from time to time been used to effectuate progressive gains and to solidify progressive victories, those moments have been rare, anomalous, and often fleeting: the victory has been, as often as not, soured by near instantaneous conservative reconstruction. [18](http://www.lexis.com/research/retrieve?_m=262a4e1992c6fc168c7695baba3d2dbc&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=349ae0e9e7b9fcc8b4c51a02fa9b4384#n18#n18) For the most part, the clauses of the adjudicated Constitution have operated in concert to conserve present distributions of social, economic, and private power against legislative and democratic attempts at redistributing those resources or renegotiating the terms of struggle. If for no other than that reason, progressives would be well advised to break their romance with the United States Constitution. If it is true, as I have suggested, that the adjudicated Constitution is doctrinally and substantively more of a bar to than a vehicle for progressive legislation, then Thayer's rule looks attractive indeed.

#### 8. Court solvency takes years.

**Powers and Rothman**, Research Associate for the Center for Social and Political Change at Smith College and Professor of Gov and Director of the Center for Social and Political Change at Smith College, **2k2**

[Stephen and Stanley, *The Least Dangerous? Consequences of Judicial Activism*, p179]

A recurrent problem with the judiciary’s extension of fundamental rights to the institutions we have studied is that when courts intervene, they do not merely point out a constitutional or statutory violation that must be corrected. They typically dictate a detailed set of remedies to address the issue. This type of intervention has generated a notoriously rigid approach to institutional reform. The judiciary was not designed to legislate or to execute the laws, only to interpret their meaning. It lacks the accountability required of a policy-making body. Judges are only accountable to the public under the most rare and extreme circumstances. Yet in the wake of elaborate court orders, prisons, mental hospitals, schools, police departments, and corporations must all continue to balance individual rights against group or societal interests. Unfortunately, judges do not have the expertise, the time, or the inclination to make the kind of long-term incremental adjustments that may be critical to institutional stability and progress. That is why court-ordered remedies rarely work as planned and have so many unanticipated consequences. Moreover, as we have seen, modification or reversal of court rulings adversely impacting social and political institutions generally takes years.

#### 9. Courts fail—no enforcement—our evidence assumes an increase in court power, this subsumes all of the affs offense.

**Pacelle**, poli sci prof and legal studies coordinator at the univ of Missouri at St. Louis, **2k2**

[Richard, *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?*, p81]

Even if the Supreme Court was to carve out some sphere of power for itself, there would be significant limitations. Any Court decision has to be enforced, but enforcement power is the province of the president and the executive branch. Thus, the Court is at their mercy. If the president does not like the decision, he does not have to enforce it. Indeed, history books report that Andrew Jackson, upset at the Worcester v. Georgia (1832) decision, growled that “John Marshall made his decision, now let him enforce it.” There was concern that Dwight Eisenhower would not back the Brown decision when the Southern states resisted. Ultimately, though quite reluctantly, Eisenhower sent troops to Little Rock to support the decision. What if the Court’s decision requires active policy intervention and the allocation of resources to help carry out the directives? If the courts determine that prisons are overcrowded or schools are substandard, will the legislature, which has the taxing and spending power, be willing to raise and spend money to correct the problem? It took a decade before serious legislative support for the Brown decision was provided. Title VI of the Civil Rights Act of 1964 empowered the government to cut off federal funds to school districts that did not comply with the desegregation directive (Halpern 1995, 30—59). The bottom line is the adage “the Court lacks the sword and the purse”—it lacks the ability to enforce its decisions and the power over the resources to do so. This places a limitation on the justices. If they stray too far from the acceptable boundaries set by Congress or the president, they risk a negative response from the branches with the real power. If the Court can safely be ignored by the other branches and the public, the cost is its institutional legitimacy.

#### 10. Court can’t deliver its message to lower courts

**Baum**, political science professor @ OSU, **2004** p. 2 (Lawrence, *The Supreme Court*)

Communication. Judges and administrators can carry out Supreme Courrt decisions well only if they know what the Court wants them to do. The communication process begins with the Court’s opinions. Ideally, an opinion would state the Court’s legal rules with sufficient precision and specificity that an official who reads the opinion would know how to apply those rules to any other case or situation. Frequently, however, opinions fall far short of that ideal: there is considerable ambiguity in the Court’s messages.

#### 11. State Legislatures circumvent Court rulings

**Baum**, political science professor @ OSU, **2004** p. 2 (Lawrence, *The Supreme Court*)

More frequently than Congress, state legislatures have adopted statutes at seem clearly to violate the Court’s decisions. In the decade after Brown v. Board of Education, southern states passed a large number of statutes to prevent school desegregation. Some states have enacted laws to restore public school religious observances that the Court invalidated. Most noncomplying statutes are overturned quickly by the federal courts. one example was a 1999 Louisiana law that required schools to allow “stuents and teachers desiring to do so to observe a brief time in prayer or meditation” each day. These and similar statutes win enactment because they allow legislators to gain personal satisfaction and political credit expressing opposition to the Court’s rulings.

#### 12. ACTIVIST RULINGS OUTSIDE OF STRICT CONSTITUTIONAL INTERPRETATIONS RISK EITHER MAJORITY OR MINORITY TYRANNY

Robert **Bork**, legal scholar and former U.S. Supreme Court nominee, MODERN CONSTITUTIONAL THEORY: A READER, ed. J.H. Garvey et al., 19**99**, p. 114.

Some see the model as containing an inherent, perhaps an insoluble dilemma. Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court’s power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and place beyond the reach of majorities by the Constitution. But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court’s power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority of the minority.

# 2nc

## test

### Test Case Spec: 2NC Kickout

#### Observations unnecessary to the facts of the case is dicta and has no precedential value.

Paul G. **Ulrich**, P.C., Sidley Austin LLP, August **2012**, Federal Appellate Practice Guide 9th Circuit, p. Westlaw Next

See Export Group v. Reef Indus., 54 F.3d 1466, 1471 and n.4 (9th Cir. 1995) (holding panel was not bound by dicta in prior panel decision but noting difficulty in distinguishing dicta from alternative ground for decision; where a court has two alternative bases for a decision, neither basis may be characterized as dicta); United States v. Towne, 997 F.2d 537, 545 (9th Cir. 1993) (observations in prior opinions unnecessary to the decisions reached cannot be deemed precedential); Grunwald v. San Bernadino City Unified Sch. Dist., 994 F.2d 1370, 1375 n.4 (9th Cir.), cert. denied, 510 U.S. 964, 114 S. Ct. 439, 126 L. Ed. 2d 373 (1993) (noting that dicta in a 20-year-old Ninth Circuit case had never been followed and that its precedential value had been dissipated by an intervening Supreme Court decision). The Supreme Court also has held dicta and statements in concurring opinions in its decisions do not constitute binding precedent. Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41, 47 (1997). See also Arthur D. Hellman, Breaking the Banc: The Common-Law Process in the Large Appellate Court, 23 Ariz. St. L.J. 915, 926 (1991) (failure to follow dictum in an earlier decision does not create a conflict).

## Ground

### 2nc

#### Decisions without grounds have no legal weight – not an effective memory

Post, UC-Berkeley law professor, 2001
(Robert, “ARTICLE: The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court”, May, 85 Minn. L. Rev. 1267, lexis)

So, for example, the editors of the American Law Review argued in 1886 that "the practice of writing dissenting opinions" ought not to be prohibited by legislation, because   it has always been recognized that **judicial decisions which merely announce conclusions of law, without either referring to authority for such conclusions or offering reasons in support of them, carry little weight**. If mere legislation is the office of the courts, they would carry the weight which an act of legislation carries. Experience, we take it, shows that **judicial decisions which are neither founded on authority nor on sound reasoning are never allowed to remain unquestioned** by the profession. **Cases are known where such decisions**, always unsatisfactory to the profession, **have been constantly assailed and finally overthrown** after the lapse of many years. **It is the office of the judge who writes a judicial decision to give the reasons upon which the court proceeds.** The proper administration of justice is not satisfied with anything else. **If these are omitted, the judgment becomes a mere arbitrary exercise of power. If it is the office of the judicial courts to furnish the reasons which the court gives for its decision, it cannot be affirmed with any show of logic that it is not equally their office to furnish the reasons which a portion of the court may give for the opposing view.**   Dissenting Opinions, 20 Am. L. Rev. 428, 429 (1886).

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### ID Authority: Limits 2NC

#### Asylum seekers- that alone has tons of affs

Alfred de Zayas, PhD, Philosophy and former Secretary of the Human Rights Committee, and Visiting Professor, Law, University of British Columbia, "Human Rights and Indefinite Detention," INTERNATIONAL REVIEW OF THE RED CROSS v. 87 n. 857, 3--05, p. 21.

As for other persons detained during an international armed conflict, there is a growing consensus that they would enjoy protection under the Fourth Geneva Convention of 1949. As the International Criminal Tribunal for the former Yugoslavia held in Prosecutor v. Delalic et al, Celebici Camp case, “There is no gap between the Third and Fourth Geneva Conventions and (…) if an individual is not entitled to protection of the Third Convention (…) he or she necessarily falls within the ambit of Convention IV.”23 The above norms apply to the various categories of persons deprived of their liberty. A special case is presented by the growing number of asylumseekers who are subjected to indeﬁnite detention. In this connection it is important to mention the revised guidelines of the United Nations High Commissioner for Refugees on applicable criteria and standards relating to the detention of asylum-seekers. While this is “soft law”, States ought to take a careful look at these provisions, including Guideline 7: “Given the very negative effects of detention on the psychological well-being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories: Unaccompanied elderly persons. Torture or trauma victims. Persons with a mental or physical disability…” The increasing use of detention as a restriction of the freedom of movement of asylum-seekers on the grounds of their illegal entry remains a matter of major concern to UNHCR.

#### Drug war, murders, rapes, child abuse become T

The Committee on Federal Courts 4 (The Committee on Federal Courts studies, recommends and reports on proposed changes in the rules, procedures and practices of the federal courts, The Record of The Association of The Bar of the City of New York¶ 2004¶ 59 The Record 41¶ LENGTH: 60818 words¶ THE INDEFINITE DETENTION OF "ENEMY COMBATANTS": BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE CONTEXT OF THE WAR ON TERROR \* Lexis.

 [\*110] The Bush administration, arguing for a broadening of the USA PATRIOT Act, has urged that law enforcement agencies be afforded "the same tools to fight terror that they [already] have to fight other crime," n70 but the dynamic will work in the other direction as well. The two rationales for the detentions of suspected terrorists--to facilitate their interrogation and to incapacitate them (preventive detention)--are not limited to terrorism. Compelling arguments for extracting information from detainees surely could be made in the context of investigations of international drug dealing, serial murders or rapes, or even child abuse. Nor can the rationale of preventive detention logically be limited to terrorism. Undoubtedly, any United States Attorney's office could point to many persons of interest believed to a moral certainty by prosecutors to have committed or to be planning to commit serious crimes, but who have not been arrested because the evidence gathered to date is not deemed sufficient to satisfy "probable cause" or to secure a conviction. If such deficiencies of proof do not preclude the detention of suspected terrorists--if "some evidence" is enough to detain them indefinitely--pressures may build to use preventive detention in other contexts to lock up other persons suspected of other serious criminal activity, based on "some" evidence falling well short of proof of their guilt. n71¶ n70 Remarks of President Bush, Sept. 10, 2003, at FBI Academy, Quantico, Virginia (White House website).¶ n71 Salerno (pp. 16-17, above), opens the door to preventive detentions in the context of pretrial detentions, but still subject to both a prior probable-cause finding and the speedy trial guarantee of the Sixth Amendment.

#### NDAA doesn’t apply to citizens, LPRs, or anyone captured in the US- also doesn’t affect the AUMF

NAME: Colby P. Horowitz 13 BIO: \* J.D. Candidate, 2014, Fordham University School of Law. Captain, U.S. Army, participating in the Funded Legal Education Program. April, 2013 Fordham Law Review 81 Fordham L. Rev. 2853 LENGTH: 27336 words SYMPOSIUM: THE GOALS OF ANTITRUST: NOTE: CREATING A MORE MEANINGFUL DETENTION STATUTE: LESSONS LEARNED FROM HEDGES V. OBAMA. Lexis

President Obama commented that, despite new language in the NDAA that is not included in the AUMF, section 1021 "breaks no new ground and is unnecessary." n97 The President's interpretation is supported by a subsection of section 1021 titled "Construction," which states that "nothing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF]." n98 Another subsection, titled "Authorities," further limits section 1021 by declaring that "nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." n99

### T Impact: Education--A2 "Must Learn About ' X '"

#### Topicality structurally mandates difference within debate -- this avoids the perpetuation of extremism and intolerance through enclaves of radical similarity.

Sunstein 2k—Cass Sunstein, Distinguished Professor of Jurisprudence and Professor of Political Science at University of Chicago [October 2000, “Deliberative Trouble? Why Groups Go to Extremes,” *Yale Law Journal*, 110 Yale L.J. 71, Lexis]

The central problem is that widespread error and social fragmentation are likely to result when like-minded people, insulated from others, move in extreme directions simply because of limited argument pools and parochial influences. As an extreme example, consider a system of one-party domination, which stifles dissent in part because it refuses to establish space for the emergence of divergent positions; in this way, it intensifies polarization within the party while also disabling external criticism. In terms of institutional design, the most natural response is to ensure that members of deliberating groups, whether small or large, will not isolate themselves from competing views - a point with implications for multimember courts, open primaries, freedom of association, and the architecture of the Internet. Here, then, is a plea for ensuring that deliberation occurs within a large and heterogeneous public sphere, and for guarding against a situation in which like-minded people wall themselves off from alternative perspectives.

#### The presence of only one view-point encourages enclaves spurring social fragmentation and intolerance.

Sunstein 2k—Cass Sunstein, Distinguished Professor of Jurisprudence and Professor of Political Science at University of Chicago [October 2000, “Deliberative Trouble? Why Groups Go to Extremes,” *Yale Law Journal*, 110 Yale L.J. 71, Lexis]

One of my largest purposes is to cast light on enclave deliberation as simultaneously a potential danger to social stability, a source of social fragmentation, and a safeguard against social injustice and unreasonableness. n14 Group polarization helps explain an old point, with [\*76] clear constitutional resonances, to the effect that social homogeneity can be quite damaging to good deliberation. n15When people are hearing echoes of their own voices, the consequence may be far more than support and reinforcement. An understanding of group polarization thus illuminates social practices designed to reduce the risks of deliberation limited to like-minded people. Consider the ban on single-party domination of independent regulatory agencies, the requirement of legislative bicameralism, and debates, within the United States and internationally, about the value of proportional or group representation. Group polarization is naturally taken as a reason for skepticism about enclave deliberation and for seeking to ensure deliberation among a wide group of diverse people.

### T: A2 “Reasonability” 2NC

#### Reasonability bad:

#### it’s arbitrary, subjective and can’t be universalized

Evan **Resnick**, “Defining Engagement,” JOURNAL OF INTERNATIONAL AFFAIRS v. 54 n. 2, Spring 20**01**, ASP.

In matters of national security, establishing a clear definition of terms is a precondition for effective policymaking. Decisionmakers who invoke critical terms in an erratic, ad hoc fashion risk alienating their constituencies. They also risk exacerbating misperceptions and hostility among those the policies target. Scholars who commit the same error undercut their ability to conduct valuable empirical research. Hence, if scholars and policymakers fail rigorously to define "engagement," they undermine the ability to build an effective foreign policy.

# 1nr

### Extn

#### The affirmative’s call for the supreme court to take action to remedy the harms cements social alienation—outsourcing responsibility for ethical decision-making takes out and turns the case.

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[“The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life,” George Washington Law Review (52 Geo. Wash. L. Rev. 263), January, Available Online to Subscribing Institutions via Lexis-Nexis]

Although I believe Blum's approach is much the best of the three, it shares a basic error with the other two: the failure to recognize that the Supreme Court is fundamentally a figment of the cultural imagination and that its true role is to be found not in the direct practical consequences of the outcomes of its decisions – with the politics of these outcomes being mystified by ideology – but rather in the ideology itself as a set of cultural images that are intended to give a false political legitimacy to the social order. Let me develop this ideal and then return to Blum's analysis in order to reinterpret it in accordance with the view of the Court that I am proposing.

Contemporary American society is a network of hierarchies within which people feel profoundly isolated from one another. Although we long to overcome the isolation and mutual distrust that characterizes hierarchical life, we are also afraid to make the attempt because from the vantage point of our distance from one another, the fragility of our common desire seems no match for the alienation that contains it. The risk of a humiliating and even violent rejection by others always seems very great. Faced with this conflict, our history takes on the quality of a double-movement. Because of our fear, the hierarchies tend to reproduce themselves generation after generation in the form of class domination, racial and sexual oppression, and in many other ways that need not be reduced to these conventional categories, such as the teacher-student relationship. Yet, because of our desire to overcome the inhumanity and powerlessness inherent in these hierarchical conditions, we are continually forming into groups that challenge the way things are, in movements like the labor movement, or the civil-rights movement, or the women's movement, or in very disorganized ways as was the case for the 60s counter-culture.

Sometimes direct force is used to suppress these challenges to the hierarchy-system, but it is much more effective for those who wish to maintain the status quo to get people to consent to it. To do this the conflict that is generated within the hierarchies must be continually mediated by people whose job it is to produce illusions about the justness of the existing order.

One might describe such people as producers of false social meaning. [\*265] In place of the painful absence of connectedness that is at the heart of people's actual experience of the hierarchical world, they convey false pictures of social life that attempt to provide people with a substitute and fantasy-based feeling of connection with others. This, it seems to me, is where the Supreme Court comes in. The objective of the Supreme Court is to pacify conflict through the mediation of a false social-meaning system, a set of ideas and images about the world which serve today as the secular equivalent of religious ideology in previous historical periods. Either a conflict is assimilated into an existing prevailing world-view, or the existing world-view accommodates itself somewhat to absorb the conflict. n3 But in either case the objective is to maintain a relatively coherent, though false, sense of social-meaning and connection.

The false social-meaning system to which I refer is the entire universe of American political theory. From the time that we are born into the hierarchy-network and the isolation that it forces upon us, each of us is conditioned to believe that in spite of the lack of connection that we experience in our concrete and immediate daily lives, we are actually joined together in a great democratic group.As a defensive response to the corrosion of the mutually empowering reciprocity that would serve as a basis for a true democracy, each of us comes to believe in the reality of a kind of wish-world in which things are the way they are because "we" have decreed them to be so through a collective act of freedom and equality. This false idea that the existing hierarchy-system is a consequence of genuine democratic choice is what I call "the political illusion" because it inverts the true nature of the world. Instead of seeing the world clearly as a complex of social and economic hierarchies generating a false political ideology that serve as an imaginary substitute for genuine social connection, we are led to believe that it is "our" political institutions that actually create the social and economic hierarchies in the first place. For example, we are led to think that the democratically-elected legislature creates the corporation, when, in reality, the alienation produced by the corporate hierarchy is simply legitimized by the legislative franchise granting corporations the "right to exist."

At the heart of this political illusion is the Constitution, a document endowed with the supreme symbolic power to "constitute" us as a joined-together group of so-called "citizens." It magically transforms the alienated social relations of real life into an imaginary set of social relations based upon mutually agreed upon rights and obligations. [\*266] It is the fundamental totemic source of the false "we" that serves as the principal justification for the status quo, and all of the conflicts generated by the status quo are assimilated to this false "we" through the parcelling out of an ever-changing matrix of "constitutional rights." Through the process of constitutional interpretation, the people who get appointed to the Supreme Court perpetually refashion the contours of the false social-meaning system so as to maintain the hegemony of the imaginary group against all of the real group-challenges that perpetually threaten -- by virtue of the very energy of the genuine social connection that animates them -- to expose the constitutional illusion.

#### Positive rights will not be enforced—indeterminacy guarantees failure.

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[“The Error of Positive Rights,” UCLA Law Review (48 UCLA L. Rev. 857), April, Available Online to Subscribing Institutions via Lexis-Nexis]

Because of the economics of rights enforcement and the strategic concerns of the judiciary, judges are likely to do very little to promote the ends commanded by those rights. One reason is that such positive rights, by their nature, are highly indeterminate. Hershkoff acknowledges that positive welfare rights are an ""example of indeterminacy,' requiring a court to choose from among contested values without any selection criteria, in the face of imperfect information and normative uncertainty." n250 While all language is somewhat ambiguous, positive rights would suffer from particular indeterminacy. The reason for this indeterminacy is that such rights are consequentialist, requiring the judiciary to create a program that achieves a given result. n251 This characteristic provides another basis for distinguishing positive and negative rights - the former call for a specific result, while the latter simply regulate particular actions or conduct. n252

Advocates observe that positive rights tend to be vague and indeterminate. Their "lack of conceptual clarity" represents a "serious obstacle" to their implementation. n253 They describe a positive right to "nutritious food" as "hopelessly vague and indeterminate." n254 While quite vague, these terms could be defined and given greater determinacy over time. n255

Much of the discussion of the indeterminacy regarding positive rights relates to defining the substance of the right itself, namely, what is a minimally [\*902] sufficient income, and ignores the more serious indeterminacy about positive rights relating to their consequential nature. Even if we could define precisely what the poor were entitled to, there remains the question of what program would effect that entitlement. Current policymakers might be unable to define the actions that would ensure a minimally sufficient living standard for all Americans. In the context of welfare policy, a "prime difficulty is that of assuring that the actual effects of a measure in fact conform to its intended objectives." n256

### Overview

#### Turn- Supreme Court Actions sucks radical polices into the hegemonic status quo. This leads to a diffusing of the movements as they lose the rallying point of a clearly defined enemy. The slow steady diffusion of movements through court adoption of liberal racial stance just makes the problem worse

Sumi Cho -Professor of Law at DePaul University College of Law.- 1998- Boston College Law School Boston College Law Review December, - Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption – lexis

When Omi and Winant characterize the state in the context of the United States as a racial state, they mean that the state is "inherently racial" -- i.e., racial in its structures. n431 They argue that the state does not merely intervene in racial conflicts, rather "the state is itself increasingly the pre-eminent site of racial conflict." n432 Moreover, "through policies which are explicitly or implicitly racial, state institutions organize and enforce the racial politics of everyday life." n433 The theory of the racial state is not vulgarly deterministic; rather, it understands the state as a field of struggle, operating in the present conjuncture according to hegemonic principles. n434 In other words, the outcomes of racial conflicts, as mediated by the state, will produce order "secured by a complex system of compromises, legitimating ideologies (i.e., the 'rule of law'), by adherence to established political rules and bureaucratic regularities, etc." n435 Further, the racial state is thoroughly embedded in social relations, meaning that state actors and agencies are linked in complicated and myriad ways to racialized constituencies. n436 The social relations within which states operate include cultural and technical norms that, in the United States, are structurally driven by difference. n437 The theory of the racial state as the site of racial struggle, embedded in social relations and producing hegemonic order, further strengthens the argument made here. Racial redemption and the meaning of whiteness are highly conflicted, involving racial projects launched from various points on the political spectrum. From the perspective of the theory of the racial state, it makes sense that redemption would proceed, in part, at the level of the Supreme Court's race jurisprudence. The Court has slowly absorbed radical race-political [\*159] challenges to the existing social order through the standard rule-of-law mechanisms of neutral principles and procedures. n438 More subtly, as shown above, the Court has transformed the image of whiteness through its discourse of innocent white victimization. n439 This move has been more significant to the hegemonic functioning of the Court than its usual deployment of legal liberalism because of the uniquely racial nature of social divisions and social conflict in the United States, as well as the racial nature of the state as a whole

. n440 By reclaiming white innocence, the Court has undermined a crucial component of progressive race politics and thrown askew the moral compass of progressive challengers to the racial status quo. A redeemed white innocence renders claims of injustice incomprehensible because it imposes a system of "shared" racial meanings wherein there are no "wrongdoers" and no unjust beneficiaries of racial privilege -- merely sets of competing interest groups that must not be "unnecessarily trammeled" n441 under Pareto principles of efficiency. n442 However, it should be noted that the Court's iteration of innocent whiteness may prove to be such an effective endgame maneuver that it ultimately pushes us beyond the equilibriating reinstatement of a racial hegemony. It may help create a new set of disequilibria that will lead to reformulated challenges to the state and the current racial order.

#### Turn- The Perm is co-opted by the state. The repressive state diffuses the radical kernels of law that their perm good evidence assumes

Sumi Cho -Professor of Law at DePaul University College of Law.- 1998- Boston College Law School Boston College Law Review December, - Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption – lexis

Omi and Winant refer to the trajectory of racial politics as the cyclical disruption and restoration of the racial order. n443 The racial order in the U.S. is "equilibrated by the state -- encoded in law, organized through policy-making, and enforced by a repressive apparatus." n444 Because racial identities and meanings are fluid and shifting, the racial order imposed by the state is inherently temporary and thus subject to ongoing disruption and restoration. Racially based social movements that arise in the form of political projects defy and define the racial state by creating ruptures that lead to the restoration of a new equilibrium. n446 In turn, the racial state "co-opts" racial movements by absorbing the least threatening demands through the creation of new rules, policies, programs and agencies.

#### The plan sets up an illicit form of trading. Just like the church which allowed its subjects to buy their way out of purgatory, contemporary racial politics enable a transaction where the sins of the past are forgotten by the generous gestures of the present. This anesthetizes whiteness as an institution and enables it to reappear in worse forms.

Sumi Cho - Professor of Law at DePaul University College of Law.- 1998- Boston College Law School Boston College Law Review December, - Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption – lexis

Constitutional scholar Mark Tushnet challenges us to transcend the triumphalism surrounding the popular understanding of Brown v. Board of Education and the Warren Court. "The task ought to be," Tushnet suggests, "to explain how Brown validated rather than disturbed the status quo, how the Court's rights jurisprudence of the 1960s and early 1970s was a stabilizing rather than a destablizing force." n312 This is addressed by understanding the Warren Court through the framework of racial redemption. 1. Repudiation: Brown as Racial Covenant The United States has been able to move from the past into the present because of the Court. In 1933, the Court refused to do so and lost stature. The Warren Court did not make the same mistake. n313 The same general dynamic of repudiation evident in Warren's racial apology appears in the Court's move to end judicial complicity with supremacist Jim Crow segregation. As Professor Derrick Bell points out, the post-Reconstruction Court ignored the clear intentions of the Thirteenth, Fourteenth and Fifteenth Amendments and condoned every transgression on the bodies of Black people, including murder. n314 Deploying legal doctrines such as "no private constitutional rights," n315 [\*136] "separation of powers," n316 "civil versus social rights," n317 "equal application" n318 and "states' rights'-oriented federalism," n319 the Court refused to protect the civil rights, and indeed lives, of people of color. This regressive reputation was familiar to members of the Warren Court. In his memoirs Warren displayed such an understanding of the Court's racial history. When the Democrats in the Tilden-Hayes affair traded the presidency to the Republicans for the muting of the newly acquired rights of the black people who had so recently been [\*137] enfranchised, challenge the Supreme Court then, in keeping with the national mood, in one case after another, beginning with Slaughter House cases and the Civil Rights cases, limited the rights of blacks until finally the case of Plessy v. Ferguson held that the states could by statute separate blacks from whites in public transportation providing the accommodations were equal. n320 Against the background of this disreputable past, the Warren Court attempted to restore the institution's legitimacy and stature on racial matters amidst rapidly shifting postwar racial norms. Brown I n321 definitively rejects the racial inferiorization of African Americans through segregation. "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community," Warren wrote for the Brown I Court. n322 In conference with his Supreme Court brethren, Warren straightforwardly asserted that the basis for segregation and the principle of separate-but-equal "could be justified only by belief in the inferiority of the Negro." n323 In his memoirs, he made clear his view of Brown's role in repudiating racism, stating that "Brown lashed at three centuries of slavery and its remnants based on the white supremacy theory . . . ." n324 The Brown I decision reflects the Court's conscious shift from white supremacist biological determinism to a Myrdalian prejudice model as the dominant racial ideology. n325 As discussed above, Myrdal's An American Dilemma n326 undermined the widespread belief among whites that racial inequality was based on the genetic inferiority of African Americans. n327 According to Myrdal, it was the irrational prejudice of white individuals that led to racial discrimination. Since the restrictive covenant cases of the 1940s, the NAACP had subjected the [\*138] Court to a "steady diet of Myrdal" in its amicus briefs. n328 In Brown's controversial footnote 11, the Court ultimately embraced the analysis of the hefty text as "modern authority" for the deleterious effects of segregation. n329 Thirteen years later, after judicially recognizing and combating the racist creation of a "feeling of inferiority," the Court directly confronted the power of "white supremacy." n330 Massive Southern resistance to the Brown edict of desegregation had prepared the Warren Court to take on Southern honor and culture where racial matters were concerned. n331 In Loving v. Virginia, n332 the Chief Justice authored an opinion striking the Virginia anti-miscegenation law as being violative of the Fourteenth Amendment. In that opinion, Warren made clear his declaration of racial egalitarianism: There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. n333 By lashing out at white supremacy -- tentatively in Brown in 1954, and explicitly in Loving in 1967 -- the Warren Court announced a jurisprudence in which the norms and values of racial egalitarianism would be righteously proclaimed and the judicial complicity of the past rejected. Combined with the civil rights legislation passed during the Johnson administration, the Warren Court's racial jurisprudence essentially constituted a "Second Reconstruction." The Warren Court hoped to distinguish itself from previous Courts that had assisted and defined Black disfranchisement in the aftermath of the First Reconstruction. Indeed, this repudiatory posture that distanced the Court from biologically based white supremacy is prominent in the popular understanding of the Court's significance. [\*139] 2. Burial: Revisioning Postwar America Nowhere in the decision did the words "segregation" or "desegregation" appear. n334 While the full significance of Brown's capacity to "disappear" America's racial sins would be realized through the Burger and Rehnquist Courts, particularly in their affirmative action jurisprudence, n335 even Brown I's engagement of the most extreme forms of American apartheid demonstrates the burial function of racial redemption through the techniques of silence, euphemism and contradiction.

 In Brown I, Warren faced the task of reconciling Plessy's "separate-but-equal" precedent with the Court's declaration that segregation had no place in education. In Plessy, the Court had dismissed the plaintiff's complaint as fictive and based on the "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority." n336 According to the Plessy Court, if there was any sense of inferiority flowing from segregation, it was "solely because the colored race [chose] to put that construction upon it." n337 Rather than directly challenge the Fuller Court's disingenuousness, Warren evaded it "in such an economical and uncontentious way that the basic dishonesty of Plessy was . . . dismissed as simply no longer fashionable thinking." n338 Writing for the Court, Warren declared that "whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [in Brown that segregation produces inferiority] is amply supported by modern authority." n339 By refusing to censure the Plessy Court, however, the Warren Court obscured judicial complicity in maintaining the material interest in whiteness. Moreover, by failing to expose Plessy's supremacist logic, Brown I invited Southern resistance, for critics could argue that the decision "had been based not on solid reasoning or legal precedent but on psychological evidence." n340 In exchange for a unanimous verdict, the [\*140] Court preserved the integrity of the South's racial honor. n341 In so doing, the Court left concealed the racist ideology and structures behind the South's segregationist policies. Pro-segregation advocates appearing before the Brown I Court emphasized their pious motives and irreproachable racial history. n342 Arguing for the state of Texas, Attorney General Ben Shepperd proclaimed that "there is no discrimination on the part of the State of Texas in administering its public school system, only separation of the races." n343 He continued that "Texas loves its Negro people and Texas will solve their problems its own way." n344 On behalf of South Carolina, the venerated John W. Davis lectured the Court on the non-racist nature of segregation: You say that [segregation is the product of] racism. Well, it is not racism. Recognize that for sixty centuries and more humanity has been discussing questions of race and race tension, not racism . . . . Let me say this for the State of South Carolina . . . It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it is a thousand pities that by this controversy there should be urged the return to an experiment which gives not more promise of success today than when it was written into their Constitution during what I call the tragic era. n345 The Court responded to these advocates' insistence on the absence of racism, with a "howling silence," thereby leaving intact the segregationists' implicit claim of white innocence. n346 As Professor Thomas Ross points out, the impact of this glaring omission had significant repercussions on the viability of an effective remedy: "Had the Court in Brown I spoken of the racism that motivated the segregation laws, the delay in Brown II would have been more difficult to justify." n347 [\*141] The Court's burial of segregation's impact and nature continued in Brown II. n348 Defenders of segregation made oral arguments so aggressively that observers believed Warren might issue a contempt citation. n349 In Warren's view, the pro-segregationists' unwillingness to comply with the Court's Brown I decree amounted to "heresy." n350 Yet, the Chief Justice, writing for the Court in Brown II, described the presentations as "informative and helpful" in considering the "complexities" of transitioning to a public education system free of racial discrimination. n351 Further, Warren rewarded the heretic and supremacist stance of the respondents by euphemizing segregationists' resistance to Brown as receptiveness: "The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as amici curiae, and in other states as well." n352 Consistent with its "restraint" regarding Plessy and the segregationist defiance in the Brown I record, the Brown II Court, finding no "racial malice," announced that the timetable for implementation of Brown I's desegregation edict would be that of "all deliberate speed." n353 Brown II's oxymoronic standard would predictably encourage Southern resistance and permit segregated schooling to continue. n354 The [\*142] burial of the past (and ongoing) operation of racial subordination rationalized the "all deliberate speed" guideline and transformed the already-compromised promise of equality in Brown I into the clear betrayal of Brown II. n355 Perhaps the Court's generosity toward Southern segregationists stemmed from the restoration of racial honor that seems to have occurred rather instantaneously. In Bolling v. Sharpe, decided the same day as Brown I, the Chief Justice, writing for the Court, asserted that "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." n356 Warren's declaration of racial classifications as "contrary to our traditions" seems incongruous when Brown had just overturned Jim Crow's racial classifications that had survived over 50 years of the Supreme Court's "scrutiny." What's more, Warren cites to Hirabayashi and Korematsu as precedent for Bolling's special duty to [\*143] scrutinize racial classifications, implying counter-factually that those cases had actually involved some kind of meaningful scrutiny. n357 The internment cases are similarly deployed in Loving v. Virginia, another unanimous Warren opinion. n358 Again, Warren buries the significance of the internment precedents n359 as he uses them to script the reconstruction of the Court's racial reputation: Over the years, this Court has repudiated "(d)istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." Hirabyashi v. United States (citation omitted). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny" Korematsu v. United States (citation omitted) . . . . n360 Applying relatively heightened judicial review of racial classifications, though, does distinguish the Warren Court from its openly complicit predecessors. The development of strict scrutiny analysis was used by the postwar judiciary to attack segregation-era forms of de jure racial discrimination. But by invoking a separate, seemingly more rigorous process for race cases, the Warren and postwar Courts restored the judiciary's "clean slate" on racial matters in a manner that both repudiated and buried the sins of the past. 3. Transformation: Restoring Whiteness through Post-Civil Rights Doctrines of Supremacy My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man . . . . To compare [his] racial debt . . . with that of those who plied the slave trade, and who maintained a formal caste system for many years thereafter, is to confuse a mountain with a molehill. n361 [\*144] This section explores the ways in which the earlier jurisprudence of the Brown era leads to the later transformation of white supremacy that occurs during the Burger and Rehnquist Courts. The most important linkage involves the restoration of innocent whiteness, n362 which underwrites such neoconservative judicial standbys as the permuted strict scrutiny standard of review as a judicial device for protecting majority interests, n363 the rejection of societal or systemic discrimination as a basis for affirmative action, n364 and the rhetoric of colorblindness. I will sketch briefly the historical understanding of post-Brown racial jurisprudence that is underwritten by the theory of racial redemption I am developing in this Article. The Warren Court rejected and sought to bury the dominant racial paradigm of biological determinism and its related practice of de jure segregation, and, in doing so, inaugurated the process of institutional racial redemption. The Court was frustrated in this endeavor, however, by concerted efforts of Southern segregationists to evade compliance with Brown. n365 The initial refusal of the South, and later the North, to transition to a kinder, gentler form of racial subordination under Brown's new principles meant that the hegemonic "preservation-through-transformation" n366 project of the civil rights era would be delayed. The Southern Manifesto, n367 the Parker doctrine, n368 "pupil [\*145] placement" programs, n369 "freedom-of-choice" plans n370 and other tactics n371 demonstrated the ingenuity of those intent on preserving white supremacy's old forms and habits. Accordingly, it was the Burger and Rehnquist Courts that completed the redemptive process initiated in the Warren era, in part by limiting the reach of Brown and its progeny to de jure and apartheid-like forms of discrimination. n372 Discriminating actors and institutions eventually shifted away from these repudiated overt social and legislative forms of racial subjugation, initiating the post-Brown transformation of white supremacy. Despite fears that it would "turn back the clock" on Warren Court gains, the Burger Court, n373 perhaps still vaguely haunted by judicial complicity with white supremacy, tread carefully around established precedent. In fact, early Burger Court decisions in Swann, n374 Keyes n375 [\*146] and Griggs n376 expanded civil rights gains. These decisions gave civil rights advocates hope that not only would racial progress continue, but also that legal remediation would take on a deeper understanding of discrimination -- one that transcended the Myrdalian prejudice model. n377 For a brief period from 1969-73, the Court favored a more systemic understanding of racial oppression that acknowledged the impact of societal discrimination and the state's obligation to remedy. n378 This shift reflected the political tenor of the times, as the tactics of the civil rights movement changed from non-violent protest and integration to "Black Power" and Black nationalism. n379 Once these movements reached their zenith in the early 1970s, the Court abandoned its flirtation with the "institutionalized racism" model of racial inequality and reverted back to Myrdal in Milliken v. Bradley in 1974, n380 [\*147] Washington v. Davis in 1976, n381 and Arlington Heights v. Metropolitan Housing in 1977. n382 Through these cases, the Court ushered in a jurisprudence that imposed on plaintiffs strict requirements for proving causation and intent. n383 The Burger Court would begin, and the Rehnquist Court would continue, to apply principles that restricted racial remedies as they redeemed whiteness. n384 By the time William Rehnquist was installed as Chief Justice of the Supreme Court in 1986, the Reagan administration had redefined the most compelling civil rights violations as those resulting from affirmative action policies that discriminated against innocent white victims. n385 Consistent with this redefinition, the Court narrowed the acceptable range of race-conscious remedial efforts, shrewdly seizing upon earlier Warren-era discourse. This narrowing, effected through use of three mechanisms, began with Wygant n386 and continued through Adarand n387 (and its Fifth Circuit cousin Hopwood). n388 These three mechanisms were the doctrine of strict scrutiny, the distinction between "identifiable" versus societal discrimination and an a priori principle of colorblindness. In using these three facially-neutral mechanisms that privileged [\*148] white interests at the expense of people of color, courts relied on the figure of innocent whiteness as the ultima ratio of racial constitutionalism, while they discursively constituted that innocence through a process of reiteration. The result has been the unique post-civil rights era form of redeemed whiteness. Whereas strict scrutiny was initially used by the Warren Court as a means to ferret out invidious intent, the Burger and Rehnquist Courts deploy strict scrutiny in favor of whites by expanding racially-suspect classes to include racial classifications generally. n389 This move was closely connected to the redemption of whiteness. Once whites could be cast as innocent victims of affirmative action policies, n390 increased judicial protection of white people's interests through heightened judicial review could be pursued audaciously. n391 The identifiable versus societal discrimination doctrine, n392 which asserts that institutionalized racism (practiced primarily against people [\*149] of color) is not legally remediable, does not per se deny the existence of racism. n393 It merely holds injuries of the deeply-rooted systemic sort to be "too amorphous" n394 to be countenanced legally. n395 Without an actual wrongdoer (individually, whites are innocent), the recognition of societal discrimination is without legal consequence, displaced analytically by the "faced" figures of innocent white individuals. Like the vagaries of the marketplace, societal discrimination is beyond constitutional logic and legal sanction. It is just another cost of doing business in America. Instead, only non-structural, "identifiable" injuries (especially those of whites in affirmative action cases) are deemed "intrusive" enough to warrant legal redress and judicial favor. n396 Here the repudiatory and burial stages combine with the figure of white innocence to effect the crucial transformational binarism of societal versus identifiable discrimination. While the Warren Court embraced the concept of colorblindness as a repudiatory principle with which to battle color-conscious segregationist legal regimes, n397 subsequent courts have used Brown's strategic [\*150] colorblind stance to transform repudiated/buried white privilege into a viable post-civil rights regime. n398 The Rehnquist Court hypothesized that the Fourteenth Amendment created colorblind "personal rights," as opposed to race-conscious group rights. n399 Because affirmative action policies were race-based remedies that relied on group-based racial classifications, the Rehnquist Court concluded that they violated the Fourteenth Amendment's edict of colorblind, individualized equal protection established through Brown. Moreover, the Court's colorblind interpretation of white supremacy's victims and beneficiaries transformed the Fourteenth Amendment's understanding of equality from an "anticaste principle" to an "antidifferentiation principle." n400 Once affirmative action was shown to burden whites, the colorblind Court used strict scrutiny to protect them from the invidious intent of affirmative action -- to reverse the effects of white privilege by treating its victims "differentially." n401 [\*151] In these ways, the now sacred altar of colorblindness has become an important discursive site in the transformation and extension of white supremacy in the post-Brown era, even as it represents an ideological gravemarker to the earlier forms of white supremacy and judicial complicity. n402 As Professor John Morrison has observed, white insistence on non-race consciousness amounts to white denial of racial guilt. n403 If Euro-Americans do not acknowledge race, then they cannot be guilty of racial subordination. n404 Similarly, Professor Gary Peller has argued that colorblindness was the ideological flipside of "a more diffuse and widespread cultural avoidance that seemed to include measures of guilt, desires for atonement, and needs for absolution." n405 [\*152] The historicity of colorblindness as a response to the group-based biological determinism of the segregation era actually places it in close epistemological proximity to scientific racisms that view people of color as inherently inferior. In Hegelian terms, the "sublation" of Brown colorblindness that occurs through the dialectic it forms with biologistic racism, which destroys/preserves (Aufhebung) aspects of both, conditions the meaning and politics of neoconservative colorblindness. n406 In short, the ideology of colorblindness remains forever bound up with biologically deterministic forms of white supremacy. The increasing dominance of colorblind morality in racial juris-prudence today suggests that we have circled back to Brown through a dehistoricized 1950s' understanding of racial inequality as individual "prejudice." This superficial and incomplete understanding of racial subordination, pried from its original context, is sufficiently locked-in to prevent dialogue about a more systemic approach to oppression. Instead, colorblindness draws on a strategic pre-civil rights discourse of resistance to provide the Court with a mantra, cited and recited in the judicial attack on racial remedies. n407 Accordingly, the Brown-era's repudiatory proclamations of racial equality and burial of historic and ongoing racial injuries have become crucial to the effective transformation of white supremacy during the post-Warren Court era. In its late-redemption stage, the Court is able to reintegrate whiteness into its moral canon. This reintegration can be traced through references to white innocents in affirmative action cases. n408 Beginning [\*153] with Bakke in 1976, we see Justice Powell lamenting the dangers of affirmative action policies which amount to "forcing innocent persons . . . to bear the burdens of redressing grievances not of their making." n409 In Fullilove, Chief Justice Burger, writing for the Court, upheld the federal affirmative action plan in large part because innocent whites were not impermissibly burdened. n410 Wygant epitomizes the Court's obsession with white innocence. Professor Ross points out that the Wygant Court characterizes whites as "innocent" no less than five times in two paragraphs. n411 Such a rhetoric of innocence continued in Justice Stevens' concurrence in City of Richmond v. Croson which warned that "the disadvantaged class of white contractors presumably includes . . . [\*154] some who have never discriminated against anyone on the basis of race." n412 From Bakke, the first major affirmative action case decided in 1978, through Croson in 1989, the Supreme Court consistently hypothesized and ultimately asserted the innocence of whiteness, thereby privileging perceived infringements against innocent whites over racial injuries to people of color and distorting the historical record of power relations between dominant whites and people of color. However, by the time Adarand was decided in 1995, the Court no longer had to make such express assertions. n413 The Adarand Court conspicuously avoids any mention of "innocence" in its majority and concurring opinions. Instead, Justice O'Connor, writing for the majority, emphasizes a new triad of constitutional principles to be applied to racial remediation -- "skepticism," "consistency" and "congruence." n414 Noticeably, none of the principles in this triad has as its immediate historical referent the pre-Brown or Brown-era problematic of whiteness as encumbered by white supremacy. n415 White innocence is now naturalized; it is the Court's default assumption, signaling that whiteness has been restored to its fullest value through the successful completion of the racial project of redemption begun in Brown.

#### I’m going to finish the card I ended with in the 1NC – only through an examination of social relations can we solve – state actors don’t solve.

Sumi Cho - Professor of Law at DePaul University College of Law.- 1998- Boston College Law School Boston College Law Review December, - Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption – lexis

FINISH

Further, the racial state is thoroughly embedded in social relations, meaning that state actors and agencies are linked in complicated and myriad ways to racialized constituencies. n436 The social relations within which states operate include cultural and technical norms that, in the United States, are structurally driven by difference. n437 The theory of the racial state as the site of racial struggle, embedded in social relations and producing hegemonic order, further strengthens the argument made here. Racial redemption and the meaning of whiteness are highly conflicted, involving racial projects launched from various points on the political spectrum. From the perspective of the theory of the racial state, it makes sense that redemption would proceed, in part, at the level of the Supreme Court's race jurisprudence. The Court has slowly absorbed radical race-political [\*159] challenges to the existing social order through the standard rule-of-law mechanisms of neutral principles and procedures. n438 More subtly, as shown above, the Court has transformed the image of whiteness through its discourse of innocent white victimization. n439 This move has been more significant to the hegemonic functioning of the Court than its usual deployment of legal liberalism because of the uniquely racial nature of social divisions and social conflict in the United States, as well as the racial nature of the state as a whole. n440 By reclaiming white innocence, the Court has undermined a crucial component of progressive race politics and thrown askew the moral compass of progressive challengers to the racial status quo. A redeemed white innocence renders claims of injustice incomprehensible because it imposes a system of "shared" racial meanings wherein there are no "wrongdoers" and no unjust beneficiaries of racial privilege -- merely sets of competing interest groups that must not be "unnecessarily trammeled" n441 under Pareto principles of efficiency. n442 However, it should be noted that the Court's iteration of innocent whiteness may prove to be such an effective endgame maneuver that it ultimately pushes us beyond the equilibriating reinstatement of a racial hegemony. It may help create a new set of disequilibria that will lead to reformulated challenges to the state and the current racial order. The racial project of racial redemption, then, is effected not only at the level of the individual and society at-large, but also on the terrain of the racial state and its adjudicatory institutions. White innocence represents cultural-representational claims that are operationalized within the state legal structure, which exercises the pivotal function [\*160] of declaring the limits of race-conscious affirmative relief from white supremacy. C. The "Trajectory" of Racial Jurisprudence 1. Racial Projects and Unstable Equilibria Omi and Winant refer to the trajectory of racial politics as the cyclical disruption and restoration of the racial order. n443 The racial order in the U.S. is "equilibrated by the state -- encoded in law, organized through policy-making, and enforced by a repressive apparatus." n444 Because racial identities and meanings are fluid and shifting, the racial order imposed by the state is inherently temporary and thus subject to ongoing disruption and restoration. n445 Racially based social movements that arise in the form of political projects defy and define the racial state by creating ruptures that lead to the restoration of a new equilibrium. n446 In turn, the racial state "co-opts" racial movements by absorbing the least threatening demands through the creation of new rules, policies, programs and agencies. n447 From the period of the Hayes-Tilden Compromise of 1877 n448 to World War II, the U.S. racial state preserved a relatively undisturbed equilibrium. Omi and Winant describe the state as "despotic" insofar as the state exercised its primary objectives of repression and exclusion through its racial policies. n449 Accordingly, there was limited political space to contest the prevailing racial order prior to World War II. After the war, the Black freedom movement and other racially based movements began to "open up" the state. They made contestation of dominant racial ideologies possible through "normal politics" (electoral, legislative, litigation, institutional reform, etc.) and direct action [\*161] "movement" strategies. n450 This postwar period produced the possibility of oppositional racial politics and enhanced the instability of the racial order. Using the racial trajectory framework, we can trace the ebbs and flows of the Court's redemption jurisprudence, beginning with Brown, (which represents a racial crisis) the NAACP's civil rights litigation, the "cold war imperative" and the postwar, post-Nuremberg consciousness generally. From Brown in 1954 through roughly 1974, the Court as a racial state institution established a new equilibrium using liberal intellectual paradigms. Neoconservative challenges to the existing equilibrium arose from within liberal paradigms that had always embraced "limiting principles" in their equality projects. Between 1974 and 1978, the Burger Court created a "rupture" in the equilibriating racial jurisprudence of the previous period by unequivocally restricting racial remedies to situations where plaintiffs could make near-impossible showings of causation and discriminatory intent, as seen in Milliken I, Washington and Arlington Heights. n451 From 1978-89, a new jurisprudential equilibrium was established n452 that rested on neoconservative racial jurisprudence and a greatly truncated vision of state-provided racial justice. By 1989, the New Right's various racial projects created another rupture. These projects achieved racial regression by rearticulating equality as synonymous with a colorblind and noninterventionist state. The 1989 term yielded a number of controversial decisions that reflected the New Right program of rhetorically colorblind, yet racialized and judicially activist constitutional jurisprudence. n453 Congress, however, in perhaps its last reconstructive moment (of the Second Reconstruction), reversed many of these Title VII decisions in the Civil Rights Act of 1991. n454 The back-and-forth compromises between Congress and the [\*162] Court over the "declining significance" of racial discrimination reflect both the racialized and hegemonic nature of the state. In 1995 in Adarand, the Supreme Court announced what seems to be the new equilibrium position, recasting colorblindness in the heavily-coded terms of "consistency," "congruence" and "skepticism." n455 The Court's race jurisprudence reflects with amazing consistency the racial trajectory mapped by Omi and Winant. n456 In particular, racial redemption represented a specific racial project, persistently pursued, that was instrumental in achieving the neoconservative/New Right n457 goal of realizing a "colorblind," non-redistributive regime that would be enforced judicially. Redeeming whiteness thus had both a discursive and material aspect. The redemption project was pivotal to the creation of limiting principles that halted the legal and cultural racial progressivism of the 1960s-70s, and it triggered ruptures that brought about new, regressive equilibria within the racial state

### Case Can’t Solve

They can’t solve- once whiteness has been absolved, society will no longer take the blame for their racist past. This is the mindset leads to the logic of Milliken

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Despite fears that it would "turn back the clock" on Warren Court gains, the Burger Court, n373 perhaps still vaguely haunted by judicial complicity with white supremacy, tread carefully around established precedent. In fact, early Burger Court decisions in Swann, n374 Keyes n375 [\*146] and Griggs n376 expanded civil rights gains. These decisions gave civil rights advocates hope that not only would racial progress continue, but also that legal remediation would take on a deeper understanding of discrimination -- one that transcended the Myrdalian prejudice model. n377 For a brief period from 1969-73, the Court favored a more systemic understanding of racial oppression that acknowledged the impact of societal discrimination and the state's obligation to remedy. n378 This shift reflected the political tenor of the times, as the tactics of the civil rights movement changed from non-violent protest and integration to "Black Power" and Black nationalism. n379 Once these movements reached their zenith in the early 1970s, the Court abandoned its flirtation with the "institutionalized racism" model of racial inequality and reverted back to Myrdal in Milliken v. Bradley in 1974, n380 [\*147] Washington v. Davis in 1976, n381 and Arlington Heights v. Metropolitan Housing in 1977. n382 Through these cases, the Court ushered in a jurisprudence that imposed on plaintiffs strict requirements for proving causation and intent. n383 The Burger Court would begin, and the Rehnquist Court would continue, to apply principles that restricted racial remedies as they redeemed whiteness. n384 By the time William Rehnquist was installed as Chief Justice of the Supreme Court in 1986, the Reagan administration had redefined the most compelling civil rights violations as those resulting from affirmative action policies that discriminated against innocent white victims. n385 Consistent with this redefinition, the Court narrowed the acceptable range of race-conscious remedial efforts, shrewdly seizing upon earlier Warren-era discourse. This narrowing, effected through use of three mechanisms, began with Wygant n386 and continued through Adarand n387 (and its Fifth Circuit cousin Hopwood). n388 These three mechanisms were the doctrine of strict scrutiny, the distinction between "identifiable" versus societal discrimination and an a priori principle of colorblindness. In using these three facially-neutral mechanisms that privileged [\*148] white interests at the expense of people of color, courts relied on the figure of innocent whiteness as the ultima ratio of racial constitutionalism, while they discursively constituted that innocence through a process of reiteration. The result has been the unique post-civil rights era form of redeemed whiteness.

### Impact

Subtle racism is worse than overt racism- harder to mobilize resistance against

Cecil J. Hunt- Associate Professor, The John Marshall Law School- A.B., Harvard University, - 2006 - University of Michigan Law School Michigan Journal of Race & Law Spring, 2006 11 Mich. J. Race & L. 477 - ARTICLE: THE COLOR OF PERSPECTIVE: AFFIRMATIVE ACTION AND THE CONSTITUTIONAL RHETORIC OF WHITE INNOCENCE - lexis

So the question remains: has the lost cause of White supremacy in America really been lost or has it merely morphed into a modern form of psychological guerrilla warfare, waged by other more subtle and perhaps  [\*481]  even more effective means? n15 A particularly illuminating example of America's contemporary ambivalence over the accuracy or exaggeration of the reports of racism's demise can be seen in the intense and extreme polarization in the juridical, political, and public debate over the issue of affirmative action in higher education. This Article finds common cause with that side of the debate which holds, in short, that racism has not died either a quiet or ignominious death. It argues, instead, that racism has merely traded in its old and crude weapons of colonialism, slavery, Jim Crow segregation, and racial terrorism n16 in exchange for more subtle, and ultimately more effective, modern, sophisticated weaponry of metaphor, rhetoric, language, image, denial, and most importantly - perspective. n17 The central argument of this Article is that while the legions of racism may have been driven from the open and overt battlefield of explicit public policy and naked sanction of law, they continue to wage the same war of total racial domination on a covert basis. Under this new strategy, the forces of racism and White supremacy have redirected their fire from direct assaults on the public square to the more rugged, entrenched terrain of the hills, valleys, and horizons of the juridical, political, and literary imagination. n18 This new form of White supremacy is harder to see than its  [\*482]  predecessor, and is more difficult to directly engage, as well as being less amenable to the mobilization of mass public protest; it is precisely for these reasons that the need for its identification, confrontation, and resistance is more urgent than ever.