# 1AC

#### Advocacy statement: the ongoing legal legacy of the internment cases should be ended.

#### The internment cases---including Korematsu---are flawed and racist institutional stances on indefinite detention---Korematsu ruled the internment of Japanese Americans during World War II constitutional

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

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

#### The precedents make future internment likely---it massively expands executive authority and offers unlimited deference

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

B. THE INTERNMENT CASES¶ The greatest move towards containing the threat of sabotage occurred on February 19, 1942, when President Roosevelt signed Executive Order 9066, which authorized the Secretary of War, or the military commander whom he might designate, "to prescribe military areas in such places and of such extent as he ... may determine, from which any or all persons may be excluded.44 Congress gave force to the Order by passing Public Law 503, which made it a misdemeanor to violate the orders of a military commander in a designated military area.45 Immediately, General DeWitt issued a number of proclamations setting up military zones, curfews, and travel regulations.46 These proclamations were followed up with civilian exclusion orders, which removed persons of Japanese ancestry from various areas along the West Coast, gathered them in assembly areas and • 47 transported to relocation camps. In all, the government removed 112,000 persons of Japanese ancestry from their homes.48¶ The Internment Cases both occurred under violations of the military proclamations. Gordon Hirabayashi, in an act of civil defiance, turned himself into the FBI with the specific purpose of challenging the constitutionality of the civilian exclusion and curfew orders.49 Conversely, Fred Korematsu violated the exclusion order in trying to pose as a non- Japanese.50 In both cases, the petitioners challenged the military orders (Hirabayashi addressed the curfew order, Korematsu addressed the exclusion order) for violating their rights to equal protection under the law.¶ Condemning any legal classifications based on race, it appeared that the Supreme Court would lean in the petitioners' favor.51 Despite its rigid scrutiny of the racial classifications involving the curfew and exclusion orders, however, the Court upheld both orders to prevent acts of espionage and sabotage by the potentially disloyal members of the Japanese American population.2 The Supreme Court's ruling that such blatant racial classifications were constitutional in light of the government's national security interests indicates that the Internment Cases provide the current government with broad authority to curb the terrorist threat.¶ C. ARE THE INTERNMENT CASES GOOD LAW TODAY?¶ Before determining Internment Cases' present legal effect, one must realize that the Court used a more amorphous form of equal protection analysis to uphold the exclusion orders. Although both cases were decided before the Court "reverse incorporated" the 14th Amendment's Equal Protection Clause into the 5th Amendment (thus making it applicable to federal government actions), it conducted the analysis anyway.5 The fact that the Internment Cases relied on an embryonic form of scrutiny affects the way in which courts today can interpret their precedential scope. For example, a modern court may have trouble narrowly interpreting the two cases as precedents permitting the government to intern American citizens on the basis of race. Although matter-of-factly that was what occurred, as a legal matter, it is questionable whether the Internment would survive the modern form of strict scrutiny, which requires the government to achieve its ends with the least restrictive means, no matter how compelling those ends might be.54 As such, a court may have a better chance at analogizing to more general themes within the Internment Cases, or to particular statements of law, which remain unchanged to this day.¶ In 1938, the Supreme Court had established the notion of differing levels of judicial scrutiny to be utilized when examining government actions that violated the Bill of Rights in the now-famous footnote in United States v. Carolene Products Co. ("Carolene Products").55 The Court held that any government action facially classifying individuals on the basis of race, under this equal protection analysis, would require a "more searching inquiry," since "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.56 Justice Harlan Stone, who authored the footnote, did not offer it as a settled theorem of judicial review, but as a starting point for debate among attorneys, academics, and judges that would eventually yield a well thought-out comprehensive doctrine.57 Equal protection and free speech challenges arose, however, before his proposal had time to percolate within the legal community.58 As a result, the Internment Cases' Court had little precedent or scholarly analysis with which to guide their understanding of ''a more searching inquiry."¶ Although the Internment Cases do not cite to the footnote in their analysis, they both recognized that classifications based on ancestry are "by their nature odious to a free people,"59 and therefore "immediately suspect'60 and subject to "the most rigid scrutiny.,61 Though Hirabayashi did not specifically use the terms "most rigid scrutiny," it implied such heightened inquiry, noting that because of the "odious[ness]" of "legislative classification or discrimination based on race alone," "for that reason" such legislation has often constituted a denial of equal protection.62 Furthermore, Chief Justice Stone authored the Hirabayashi opinion, which would lead to the assumption that he would abide by the reasoning he set forth in the Carolene Products footnote.63 Both decisions, however, added one caveat to the Carolene Products footnote, stating that the Bill of Rights does not represent an impenetrable guarantee of individual liberty and may be supplanted when the government proffers a legally sufficient justification.64¶ The greatest distinction between the Internment Cases' scrutiny and the modern notion of heightened scrutiny is the former's underdeveloped sense of what burden the government must meet in order to offer a sufficiently legal justification. Modern equal protection analysis states that the government can classify on the basis of race only if it is necessary to achieve a compelling interest.65¶ The Internment Cases' Court failed to address the "necessity" aspect of heightened scrutiny. The Courts' analyses granted the government with far more "wiggle room" than any modern court would dare provide. The term "necessary" entails a close-fit between the government's means to achieving its compelling end; it cannot be substantially over or under- inclusive.66 For example, even if preventing terrorism represents a worthwhile pursuit, the government cannot exclude Arabs from large buildings as such a policy would be both substantially over-inclusive (because all Arabs are not terrorists) and under-inclusive (because all terrorists are not Arabs). Hirabayashi literally did not address the potential burdens and overbreadth of the military imposed curfew for Japanese Americans.67 On the other hand, Korematsu did briefly ponder the higher burden of being excluded from one's home versus being subject to a curfew.68 Despite mentioning these hardships, the Court seems to have merged the "means-ends fit" analysis with the "compelling interest" portion of heightened scrutiny as it completely dismisses the burdens as a necessary wartime hardship and part of maintaining national security.69 It did not independently address whether the hardships incurred by the Japanese Americans were so "overreaching" or "burdensome" that there had to exist a less restrictive alternative to bolster national security. If anything, the Korematsu majority's terse mention of the hardships appears almost perfunctory as shown in Justice Owen Robert's dissent.7° The Court's language in the Internment Cases also indicates a somewhat ambiguous definition of what exactly constitutes a "compelling government interest." Admittedly, judicial scrutiny represents a value judgment based on the totality of the circumstances, such that determining the level of deference owed to the government in scrutinizing its actions becomes a daunting task for the Court. Justice Stone, however, deployed his "newly forged" invention of heightened scrutiny before the legal community could explore its intricacies. As such, heightened scrutiny appeared before scholars characterized it as "strict in theory and fatal in fact.",71¶ Korematsu states that while "a pressing public necessity" may sometimes justify classification, "racial antagonism never can.72 Taken as they are, the words "pressing public necessity" imply absolutely anything the government finds to be gnawing at its heel. The only limitation the Court places on a "pressing public necessity" is the absence of any openly racist justifications. Within the context of the Court's analysis, one can find some rigidity to the "pressing public necessity" requirement as it explained the special circumstances of war and the dangers of an unascertainable number of enemy saboteurs among the Japanese American population.73 Then again, any justification can appear "necessary" with competent lawyering. The Court offered little on the basis of comparison to give teeth to the standard of review, basing most of its analysis on the equally ambiguous Hirabayashi case.74¶ Justice Stone's language in Hirabayashi seems to imply that the court's conception of "rigid scrutiny" is not necessarily rigid when compared to modern formulations of judicial scrutiny for facially racial classifications. The Court stated that it was "enough" that circumstances within the knowledge of the military afforded a "rational basis for the decision which they made.75 Modern "rational basis review" is extremely deferential to the government interest - so much so that any conceivable constitutional purpose, even if it is not the government's actual purpose, will justify upholding the law.76¶ Contextually, however, Justice Stone probably meant for this rational basis formulation to possess less government deference than the rubberstamp interpretation it holds today. Within the decision, he prefaced his application of the standard by generally condemning government racial classifications.77 **It would not make sense logically to condemn a practice and then excuse it without any compelling justification.** Furthermore, it is clear that the standard by which Justice Stone conducted his equal protection analysis followed his Carolene Products footnote, as it fell in stride with a series of post-Carolene dissents in which he appealed for greater minority protection.78¶ Although Stone offered precedents to further explicate the components of heightened scrutiny for racial classifications in Hirabayashi, the cases do little to elaborate on his original query posed in Carolene Products. Setting up the standard for heightened scrutiny, he listed Yick Wo v. Hopkins ("Yick Wo"), 79 Yu Cong Eng v. Trinidad ("Yu Cong Eng"), 80 and Hill v. Texas ("Hill") 81 as examples of racial classifications failing to meet the standard.82 However, he conceded that these precedents would be controlling, "were it not for the fact that the danger of espionage and sabotage, in time of war ... calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."83 Stone's language, "were it not for," seems to distinguish the use of heightened scrutiny altogether in the face of military necessity, and the decision itself fails to debate the validity of the government's justification or the means with which to achieve it.¶ Even the cases themselves shed little light on the intricacies of heightened scrutiny.84 Although the Court generally deplored the discriminatory results and application of the laws considered in those cases, its lengthy discussions on the merits of the government's purposes were unnecessary since, in all three cases, they were clearly discriminatory.85 Therefore, in Hirabayashi, Stone did not compare the government purpose of military necessity to any cases involving government purposes that were outright irrational. Consequently, the majority simply "shot from the hip" in making its value judgment.¶ Despite the circumstances under which they were decided, the Internment Cases have not been overruled and represent good law today. Some may argue that even without the formality of a Supreme Court ruling, lower courts have overturned the convictions of Gordon Hirabayashi and Fred Korematsu, placing the original decisions in jeopardy.86 In fact, a recent article in the Georgetown Immigration Law Journal commented that Korematsu is dead law in light of the 2001 Supreme Court decision, Zadvydas v. Davis.87 These criticisms, however, fail to actually phase out the Internment Cases' core legal analysis.¶ Lower courts overturned Hirabayashi and Korematsu's convictions on the basis of a factual error, but they did not overrule the legal analysis relied upon in the original Internment Cases. Hirabayashi and Korematsu challenged their convictions in the mid-1980s after the Commission on Wartime Relocation and Internment of Civilians ("CWRIC") unearthed a drove of information suggesting that the government knowingly suppressed and altered evidence during the original trial.88 Their cause of action, however, limited them to only challenging the factual errors leading to their convictions and not the law itself. Hirabayashi and Korematsu each petitioned the court under a writ of coram nobis, which allows petitioners to challenge a federal criminal conviction obtained by constitutional or fundamental error that renders a proceeding irregular and invalid.89 Although Korematsu argued that under current constitutional standards his conviction would not survive strict scrutiny, the Court dismissed his argument, noting that "the writ of coram nobis [is] used to correct errors of fact," and "[is] not used to correct legal errors and this court has no power, nor does it attempt, to correct any such errors."90 The court hearing Hirabayashi's coram nobis petition simply ignored the issue entirely.9' Although the Georgetown article interprets Zadvydas' reasoning to overrule the Internment Cases, the actual holding of the case is limited to modifying a post-removal-period detention statute, and, even if applied broadly, does not rule out the possibility of infinitely detaining "specially dangerous individuals."92 Zadvydas concerned a statute which allows the government to detain a deportable alien if it has not been able to secure the alien's removal during a 90-day statutory "removal period.93 The Court held that the statute implies a limit on the post-removal detention period, which the article interprets as an all-out ban on indefinite detentions of immigrants or citizens without due process.94 Factually, **the Zadvydas statute applies to a procedurally narrower class of people than the Internment Orders** (aliens adjudged to be deported versus aliens suspected of espionage) and appears to serve a less "urgent" purpose in "ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community.,95 Therefore, it may be argued that the two cases are not factually analogous. Even if they are, Zadvydas' holding itself does not preclude the possibility of indefinitely detaining particularly dangerous individuals without due process.96 The Court set aside this particular exception to the general rule, stating that such detainment is constitutionally suspect.97 The Zadvydas statute did not target dangerous individuals, such as terrorists; therefore, it did not fit within the exception because it broadly applied to even the most innocuous tourist visa violators.98 In Hirabayashi and Korematsu, the Court upheld the orders because the government, despite falsifying the evidence, convinced the Court that Japanese Americans and immigrants presented an acute danger to national security. Lastly, Zadvydas did not contain any references to either Internment Case, so it is probably safe to assume that the Court did not intend to overrule them in the process.¶ The greatest evidence, however, that the Internment Cases are still live precedents is that current cases still cite to them. Ninth Circuit decision Johnson v. State of California 99 cited to Hirabayashi on February 25, 2003, and American Federation of Government Employees (AFL-CIO) v. United States referred to Korematsu on March 29, 2002.0° Both cases used Hirabayashi and Korematsu as authority for strictly scrutinizing government racial classifications. Additionally, the United States Supreme Court cited the Internment Cases as authority on the relationship between strict scrutiny and race.'0' In fact, many cases have referred to the Internment Cases for this purpose, as they represent the Supreme Court's first formulation of heightened scrutiny. The scope of the Internment Cases' precedent, however, extends beyond simply establishing strict scrutiny for racial classifications, and includes the Supreme Court's commentary on the circumstances in which such "odious'1T2 measures are justifiable. The recalcitrant position that this justification occupies in Supreme Court case history poses the greatest threat to present-day civil liberties.¶ With respect to the current cases challenging the executive orders invoked in the wake of the September l1th attacks, Korematsu and Hirabayashi may offer virtually unlimited deference **to the government in its efforts to maintain national security in times of war.** Hirabayashi (upon which Korematsu based its analysis) characterized the war power of the federal government as the "power to wage war successfully" that "extends to every matter so related to war as substantially to affect its conduct, and embraces every phase of the national defense[.]"'103 By approving the wholesale detainment of an entire ethnic group in order to prevent potential sabotage, the Court provided the government a very wide berth in determining the neccesary actions in waging a successful war. Such a precedent ostensibly allows the government to use a "declaration of war" as a proxy for any action it sees fit. "War" then releases the government from any obligations to equal protection and other Constitutional rights. Thus, Padilla's characterization of the current terrorist scenario as one in which the President's war powers are invoked'04 renders Hirabayashi and Korematsu applicable.¶ The government has already crept toward the direction predicted by the Internment Cases. Prior to Hamdi and Padilla, Congress passed a joint resolution empowering the President to take all "necessary and appropriate" measures to prevent any future acts of terrorism against the United States.105 Hamdi itself implicitly acknowledged the Internment Cases' precedent in its explanation of the President's war power, by referencing the Supreme Court's tendency to defer to the political branches when "called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs."' Coincidentally, both Hamdi and Hirabayashi cite to Ex parte Quirin ("Quirin"), a case involving the due process rights of German saboteurs caught on American soil, to derive the broad authority given to the President during times of war.'07 Although Hamdi paid lip service to the idea that executive wartime authority is not unlimited,108 it also stated, "the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally."'109¶ Even if the President's war power is invoked, one might argue that in 1971 the legislature statutorily curtailed the President's discretionary power to detain citizens by first requiring an "Act of Congress."10 Although argued in the government's brief in the Korematsu coram nobis case as a pre-existing legislative barrier to future mass-internments, the statute does little to limit the Internment Cases' authority.' The legislature did, in fact, approve the executive order under which Korematsu was convicted.' 2 The government may have characterized this approval as an isolated incident that was repealed in 1976,13 but Hamdi and Padilla subsequently refuted any notion that occurences of congressional approval are few and far between. Both cases exempted President Bush's detainment executive order stating that the prior joint resolution granting the President "necessary and appropriate" authority constituted an "Act of Congress."' 14 Although in theory the 1971 statute makes it more difficult for the President to detain citizens by requiring congressional approval, the joint resolution that quickly followed the terrorist attacks demonstrates that Congress is not reluctant to give its authorization.¶ **The** broad presidential war authority precedent **established in the Internment Cases appears to act as an all-purpose compelling government interest, which may** allow the government to openly target ethnic and religious groups **associated with terrorism**. The current executive orders tiptoe around equal protection issues given that they do not specifically call for the detention of Arabs or Muslims. Even if the government detains a disproportionate number of people who are members of these groups, the government's actions are unchallengeable on these grounds without proof of a discriminatory purpose. Now, with Hirabayashi and Korematsu as accessible precedents, the government may openly profile suspect groups by entirely quashing the equal protection issue. Even if the government bases its correlations off of unreliable research tainted with racial prejudice, as long as the Court is unaware of these transgressions, the government can argue in the vein of Hirabayashi that such classifications are logically related to preserving national security. Though neither Hamdi nor Padilla involved an equal protection issue, their deference to government war authority foreshadows a Hirabayashi extension of that authority to facially racial classifications.¶ One factor hindering the use of the Internment Cases is that they were decided in a very different time and under a dated legal standard. The fact that the Internment Cases emerged under a less-developed form of strict scrutiny makes it less tenable that something as extreme as a full-scale exclusion and internment of an ethnic group will occur again. Moreover, it is always possible that the Hirabayashi and Korematsu Courts' ambiguity in defining a compelling interest may even limit the clout "national security" carries as an end-all government purpose.¶ Even with these historical and contextual roadblocks, cases decided after the Internment Cases effectively touched up their anachronistic blemishes. Adarand Constructors, Inc. v. Pena referred to Korematsu and Hirabayashi in delineating its standard of heightened scrutiny, confirming that the two previous cases did, in fact, employ some version of strict scrutiny at the time.1"5 Furthermore, Adarand explicitly rejected the long- held notion that "strict scrutiny is strict in theory, and fatal in fact," which although more of an academic characterization, highlights the surmountability of heightened scrutiny. Still, it is almost impossible for the government to intern an entire ethnic group because it is not narrowly tailored to, nor the least restrictive alternative for, the government's interest in protecting national security. This construction of strict scrutiny, however, does not rule out inconveniences slightly less than Internment and leaves open the possibility of, for example, mandatory baggage searches for all Arab-American airplane passengers. Furthermore, **there is always the possibility of a Court resorting to Korematsu's "balancing out" of the narrow tailoring requirement for "hardships are part of war, and war is an aggregation of hardships."**'17 Moreover, even if the Internment Cases' outdated methodology of judicial review precludes them from being applied in a modern equal protection analysis, it still does not affect the broad authority given the President to "wage war successfully." Indeed, no precedent explicitly bars uses of the Internment Cases**, and** in the crises- minded state of our present times, these relics of the past are factually analogous and legally applicable.

#### Ending the precedent is vital to prevent history from repeating itself

Stephen I. Vladeck 9, associate professor at American University Washington College of Law, 2009, "The Long War, The Federal Courts, and the Necessity/Legality Paradox," 43 U. Rich. L. Rev. ahttps://webspace.utexas.edu/rmc2289/LT/Vladeck.Short.pdf

B. The Limits of Jackson’s Dissent—and of Wittes’s Argument¶ As much as Jackson’s dissent has been celebrated for its attack on the substance of Black’s majority decision, its argument against judicial involvement has been roundly criticized. In what became the authoritative critique of Korematsu, Eugene Rostow denounced Jackson’s opinion as “a fascinating and fantastic essay in nihilism.” 135 Even Professor Hutchinson, among Jackson’s more sympathetic commentators, noted two obvious flaws: “some emergencies may not be resolved quickly or clearly, and judicial abstention may popularly and even formally be understood as tacit approval.”¶ 136¶ These concerns are even more poignant as applied to Wittes’s work. Almost twice as much time has passed since Congress enacted the AUMF as that which elapsed between Pearl Harbor and V-E Day. Moreover, the war on terrorism has the potential to drag on for generations, which would turn temporary exercises of military necessity into permanent policy, a prospect Jackson himself railed against in a 1948 concurrence.¶ 137¶ But I also think the risk runs even deeper , for even if one takes Jackson’s logic at face value, it holds not just that the underlying military conduct is unreviewable, but that the assertion of military necessity (as justifying the decision not to review the underlying conduct) is itself unreviewable. Just like recent debates over whether procedurally valid suspensions of habeas corpus are substantively reviewable by the courts, 138 the underlying idea is that once the government makes a threshold procedural showing, there is nothing for the courts to do.¶ Even if one believes that suspensions are unreviewable, there is a critical difference between the Suspension Clause and the issue here: At least with regard to the former, there is a colorable claim that the Constitution itself ousts the courts from reviewing whether there is a “case[s] of Rebellion or Invasion where the public Safety requires” suspension. 139 In contrast, Jackson’s argument sounds purely in pragmatism—that the reason not to review whether military necessity exists is because such review will lead either to the courts affirming an unlawful policy, or to the potential that the political branches will simply ignore a judicial decision invalidating such a policy. Like Jackson before him, Wittes seems to believe that the threat to liberty posed by judicial deference in that situation pales in comparison to the threat posed by judicial review.¶ The problem is that such a belief is based on a series of assumptions that Wittes does not attempt to prove. First, he assumes that the Executive Branch would ignore a judicial decision invalidating action that might be justified by military necessity. While Jackson may arguably have had credible reason to fear such conduct (given his experience with both the Gold Clause Cases 140 and the “switch in time”), 141 a lot has changed in the past six-and-a-half decades, to the point where I, at least, cannot imagine a contemporary President possessing the political capital to expressly refuse to enforce a Supreme Court decision. But perhaps I’m naïve.¶ 142¶ Second, Wittes assumes that a judicial decision invalidating action that might be justified by military necessity will therefore preclude the relevant government official from taking such action. Of course , it will not; it will merely require that official to make the “moral” choice—between doing what is legal and doing what he or she believes is “right.” Just as legality does not follow from necessity, so too does illegality not compel the conclusion that the particular conduct is unnecessary. I don’t mean to devolve into metaphysics; I mean only to point out that this is a relevant consideration that Wittes’s critique overlooks. There may in fact be something to gain from requiring government officials to break the law in such extreme circumstances.¶ Finally, at a more basic level, there is history, to which we—unlike Justice Jackson—are privy. The government affirmatively misled the Court in Korematsu, just as it apparently did in Hirabayashi, claiming military necessity where none truly existed. 143 Given this history—and any number of additional episodes—we cannot afford to have faith that the government would only choose to invoke Jackson’s “military necessity” exception to judicial review in cases of urgent need, especially when the invocation itself is unreviewable. In the end, I think Wittes (like Jackson before him) is right to focus our attention on the potential dilemma that courts face in these cases. But their solution would be significantly worse than the disease.¶ CONCLUSION¶ Dissenting in Olmstead v. United States, 144 the Supreme Court’s famous 1928 decision sustaining against Fourth and Fifth Amendment challenges a criminal conviction based upon evidence obtained through a warrantless wiretap, Justice Brandeis rejected the argument that the wire tap could be justified as an exercise of law enforcement powers justified by necessity. In his words,¶ Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well- meaning but without understanding.¶ 145¶ As the story usually goes, Brandeis’s view of the constitutionality of such warrantless wiretapping—or lack thereof—was subsequently vindicated, with the Warren Court overruling Olmstead in Berger v. New York 146 and Katz v. United States . 147 Such conventional wisdom, though, may well have been another casualty of September 11, given the Bush Administration’s own admission that it engaged in a systematic program of warrantless wiretapping, 148 a program that, even if constitutional, seems difficult to reconcile with the exclusivity provisions of the Foreign Intelligence Surveillance Act (FISA) 149 —at least prior to the 2008 amendments thereto.¶ 150¶ Putting the substance of Brandeis’s dissent aside (at least for the moment), the above-quoted passage may be the perfect epigraph to describe the Bush Administration’s conduct of the war on terrorism, policies that have been pursued by “men [and women] of zeal, well-meaning but without understanding.” Jane Mayer certainly thought so—her important recent book, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Values, 151 places Brandeis’s sentiment right on the back cover, just above President Bush’s assertion in his 2003 State of the Union address that “[o]ne by one, the terrorists are learning the meaning of American justice.” 152¶ Mayer’s book is significant here in another respect, as well, for it is the most thorough account yet available of the government’s mistreatment of detainees—and the role that senior governmental official s played in promulgating policies directly leading to that mistreatment. As Mayer’ s account makes clear, even with the jousting over definitional semantics, there can no longer be any question that the U.S. government has tortured detainees in its custody during the war on terrorism. 153 And as I suggested above, I suspect that it is the specter of courts reviewing torture claims that prompts the judicial review paradox of which Wittes is so concerned.¶ One could argue, as Alice Ristroph (among others) has, that torture is a singularly bad example of a situation where courts should defer on whether torture is “necessary” in favor of those with “expertise.” After all, as Ristroph notes, the real “experts” all seem to agree that torture is counterproductive. 15¶ But even if torture actually worked, and even if one accepted that the completely fantastical ticking-bomb hypothetic al could actually happen someday, 155 there would still be government officials claiming the need to use such extreme authority when it was not strictly necessary. That is Brandeis’ s point: even the most well-intentioned of officers will cloak in the guise of “necessity” actions that are neither necessary nor appropriate, which is exactly why judicial review is so essential.¶ 156¶ The great irony in all of this is Jackson. Profoundly affected by his experience as lead American prosecutor at the Nuremberg war crimes tribunal, where he witnessed first-hand the chaos and calamity that could ensue when courts stopped serving as a check on the tyranny of the majority, 157 he became more circumspect later in his career about whether the courts should ever defer to executive claims of need, even while still worrying about whet her they would. As he concluded his celebrated concurrence in Youngstown.¶ With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up. 158

#### This was the culmination of racism against Asian Americans in the United States

Natsu Taylor Saito 1, professor at Georgia State University College of Law, 2001, "Symbolism Under Siege: Japanese American Redress and the 'Racing' of Arab Americans as 'Terrorists,'" Asian Law Journal, 8 Asian L. J. 1, 2001, hein online

Thus far, it has the makings of a feel-good story: a terrible thing happened, but the nation recognized its wrong and stepped forward to provide some redress. The story confirms what so many want to believe, that despite occasional aberrations this is a nation committed to democracy and the equality of peoples. Most people I encounter are open to this story. Like many Japanese Americans, I am invited to tell it at high schools and churches, even military bases. However, if we really care about achieving democracy and equality, we need to look beyond this level of the narrative.¶ Im. FUNDAMENTAL FLAWS IN THE NARRATIVE¶ There are at least two major flaws with the internment narrative. First, it accepts the notion that the internment was an aberration rather than a logical extension of the treatment of Asians in America. Second, it implies that the wrong has actually been righted.¶ A. The Internment Was Not an Aberration in the Context of Asian American History¶ Implicit in the terms of the apology, which attributed the problem to wartime hysteria and racial prejudice, is the notion that the internment was an aberration, an instance in which our nation temporarily strayed from its basic commitment to due process and equal protection.¶ But the internment was not an aberration. One need only look at the social, political, economic, and legal history of Asian Americans in the United States, from the enforcement of the 1790 Naturalization Act's limitation of citizenship to "free white persons,"3 to the exploitation of Chinese labor in the mines and building of the railroads,39 to lynchings and Jim Crow laws,40 to Chinese exclusion in the 1880s and the exclusion of the Japanese in the early 1900S,41 to the alien land laws,42 and to the National Origins Act of 1924,43 to see that the military orders to exclude and then imprison "all persons of Japanese ancestry, both alien and non-alien"4 were really a logical extension of all that had come before.¶ Between the time of the Chinese Exclusion Act of 188245 and the National Origins Act of 1924,"' immigration laws were modified to prevent nearly all Asian migration to the United States. The 1790 Naturalization Act limited citizenship to "free white persons" and Asians were held in a series of cases to be non-white.7 Thus, as Asians were incorporated into the U.S. racial hierarchy, "foreignness" became part of their racialized identity.' Some forms of discrimination, such as segregation and lynchings, were blatantly race-based, but much of it was structured, legally and socially, on the presumption that Asian Americans were not or could not become citizens. State and local laws were enacted which levied special taxes on Asian Americans; others prevented those aliens "ineligible to citizenship" from obtaining employment, possessing various kinds of licenses, or owning land.49¶ Legalized discrimination was compounded by the perpetual "enemy" status afforded Asians in popular American culture. Starting with depictions of the "yellow peril" hordes waiting to take over the country in the 1880s, Asians were routinely portrayed as sneaky, inscrutable, fanatical, unassimilable and, on top of that, fungible." They were foreign, disloyal and therefore an enemy, just as portrayed in the rhetoric of the internment. In this context, the anti-Japanese sentiment and actions taken in the 1940s were unusual only in scope, not in nature.¶ Thus, as we look briefly at the history of Asians in America, we see the internment emerging as a somewhat extreme, but not aberrant, manifestation of a well-entrenched pattern of discrimination rooted in a racialized identification of Asian Americans as perpetually "foreign.'¶ B. Flaw #2: The Real Wrong Has Not Been Righted¶ The second major problem with the standard internment narrative is that it implies that the wrong has been recognized and corrected, or at least that it could not happen again. One of the stated purposes of the Civil Liberties Act was to "discourage the occurrence of similar injustices and violations of civil liberties in the future."52 To understand whether the wrong has been corrected, we must first see if it has been correctly identified. The way the story is usually told, the wrong is one of racial prejudice playing out against a group of people in ways we now recognize to have been excessive.¶ The history of racial discrimination against Asian Americans certainly did not end with the internment. The Chinese, who were "our friends" in World War II,53 rapidly became the enemy as China "went communist." The wars in Korea and Vietnam reinforced this image, despite the fact that Asians were allies as often as they were enemies.54 The refusal to distinguish among individuals and ethnic groups has persisted from General DeWitt's famous pronouncement that "a Jap's a Jap"s through the beating death of Vincent Chin, a fifth generation Chinese American killed by unemployed auto workers in Detroit who were angry at the Japanese automobile industry,56 to the stories of hate crimes against "gooks" and "chinks" still recorded every month.57¶ It was this history that made Asian Americans so suspicious of the allegations against and treatment of Wen Ho Lee, a nuclear physicist accused but never actually charged with espionage.58 According to Neil Gotanda, "The federal government, after years of investigation, has been unable to produce any evidence of espionage. The spy charges have been maintained, not by evidence, but by constant allegations linking Wen Ho Lee to China.59 He continues:¶ The assignment to Wen Ho Lee of a presumption of disloyalty is a well- established marker of foreignness. And foreignness is a crucial dimension of the American racialization of persons of Asian ancestry. It is at the heart of the racial profile of Chinese and other Asian Americans.61 But while racism is inextricable from the story of the internment, the primary "wrong" that should be addressed by reparations is more complex. In what is still probably the best analysis of the Supreme Court's decisions in the internment cases, Yale Law School professor Eugene Rostow, in 1945, summarized the wrong as follows:¶ The Japanese exclusion program thus rests on five propositions of the utmost potential menace: (1) protective custody, extending over three or four years, is a permitted form of imprisonment in the United States; (2) political opinions, not criminal acts, may contain enough clear and present danger to justify such imprisonment; (3) men, women and children of a given ethnic group, both Americans and resident aliens can be presumed to possess the kind of dangerous ideas which require their imprisonment; (4) in time of war or emergency the military, perhaps without even the concurrence of the legislature, can decide what political opinions require imprisonment, and which ethnic groups are infected with them; and (5) the decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other safeguards of 61 the Bill of Rights.¶ Rostow's summary describes a wrong much larger than the "relocation" of 120,000 people on the basis of their race or national origin for three or four years. It goes beyond the denial of Japanese Americans' civil rights and liberties to a dismantling of protections that are supposed to extend to everyone within this system.¶ Have these problems been corrected? The 1943 and 1944 Supreme Court opinions in the Korematsu and Hirabayashi cases have never been overturned. The coram nobis cases decided in the 1980s vacated the convictions but, as Fred Yen says, "Unfortunately, proclamations of Korematsu's permanent discrediting are premature. The Supreme Court has never overruled the case. It stands as valid precedent, an authoritative interpretation of our Constitution and the 'supreme Law of the Land.'"2 Could it happen again? Would it? Given the publicity and the reparations, it is unlikely that it will happen again to Japanese Americans, but that does not mean it could not happen to other groups. The following section explores parallels I have observed between the Asian American experience described above and the contemporary social, political, and legal treatment of Arab Americans and Muslims in the United States.¶ IV. HISTORY REPEATS AS WE WATCH: THE TREATMENT OF ARAB AMERICANS TODAY¶ A. The "Racing" of Arab Americans as "Terrorists" One way to examine whether the wrong done to Japanese Americans during World War II has been righted is to look at how the media and our political and judicial systems are responding to discrimination against Arab Americans and Muslims3 in the United States today. The possibility **that** Arab Americans could be interned just as Japanese Americans were lies just below the surface of popular consciousness, occasionally emerging as it did in the movie The Seige.6 We have no more legal protections against such a scenario than we did in 1942. However, we need not postulate the wholesale internment of Arab Americans to see how many of the issues faced today by Arab Americans parallel those Asian Americans have encountered.5¶ Just as Asian Americans have been "raced" as foreign, and from there as presumptively disloyal6 Arab Americans and Muslims have been "raced" as "terrorists": foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world and adhere to Islam, these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both. As Ibrahim Hooper of the Council on American-Islamic Relations notes, "The common stereotypes are that we're all Arabs, we're all violent and we're all conducting a holy war."67

#### The aff is a holistic challenge to racism that recognizes the connections between different policies and how racism affects multiple minority groups

Devon W. Carbado 5, is a professor of law at the University of California, Los Angeles. 2005, "Racial Naturalization," American Quarterly, 57.3 (2005), p. 633-658, project muse

Conclusion¶ My argument has been that American identity and American citizenship do not necessarily go hand in hand, that racial naturalization constitutes both, and that racial naturalization ought to be understood as a process or experience through which people enter the imagined American community as cognizable racial subjects. Explicit in this claim is a conception of racism itself as a technology of naturalization. Indeed, it is precisely through racism that our American racial identities come into being. Put differently, **racism plays a significant role in socially situating and defining us as Americans.** Our sense of ourselves as Americans, of others as Americans, and of the nation itself, is inextricably linked to racism.¶ I do not mean to suggest that we are overdetermined by racism—that, as a result of racism, we have no agency. My point is simply that racism helps to determine who we are as Americans and how we fit into the social fabric of American life. Racism, in other words, is always already a part of America's social script, a script within which there are specific racial roles or identities for all of us. None of us exists outside of or is unshaped by the American culture racism helps to create and sustain.¶ To some extent, my conception of racial naturalization is linked to a claim Toni Morrison advances in "On the Backs of Blacks." Morrison's point of departure is a critique of Elia Kazan's critically acclaimed America, America. She writes: [End Page 651]¶ Fresh from Ellis Island, Stavros gets a job shining shoes at Grand Central Terminal. It is the last scene of Elia Kazan's film America, America, the story of a young Greek's fierce determination to immigrate to America. Quickly, but as casually as an afterthought, a young black man, also a shoe shiner, enters and tries to solicit a customer. He is run off the screen—"Get out of here! We're doing business here!"–and silently disappears.¶ This interloper into Stavros's workplace is crucial in the mix of signs that make up the movie's happy-ending immigrant story: a job, a straw hat, an infectious smile—and a scorned black. It is the act of racial contempt that transforms this charming Greek into an entitled white. Without it, Stavros's future as an American is not at all assured.60¶ Morrison powerfully reveals the nature of Stavros's racialized journey into American identity. Indeed, the scene depicts Stavros's social rebirthing as an American—which is to say, his racial naturalization. Through the deployment of a recognizable American social practice—antiblack racism—Stavros is born again. He becomes a (white) American out of the racial body of northern racism.¶ Significantly, this transition in Stavros's identity does not require the acquisition of formal citizenship status. Stavros becomes a white American by social practice, not by law.61 While formal naturalization and citizenship might never be available to Stavros, he can (and does) become racially naturalized by simply shoring up his whiteness, and positioning himself against black subalternity.¶ Morrison's analysis might lead one to conclude that the episode she describes figures Stavros's, but not the shoe shiner's, Americanization. My own view, however, is that the encounter naturalizes the shoe shiner as well. More than merely reflect the shoe shiner's black American identity, the encounter actually produces it. When it is kept in mind that Kazan's America, America takes place in the early 1900s, a period during which African American racial subordination was utterly and completely normative, it becomes clear that Stavros's displacement of the shoe shiner rehearses an American script that is both inclusive and familiar. The shoe shiner's part in this script is to experience racial subordination. Stavros's is to practice it. Both are included in the drama, and both are Americanized by it.¶ In this sense, Kazan's representation of the black shoe shiner reflects more than a problem of racial exclusion. It reveals what I have been calling an inclusive exclusion. Stavros's "Get out of here" includes the black shoe shiner into a recognizable American social position—that of the American Negro. This social position is in turn subordinated to Stavros's newly acquired status as a white American. In other words, Stavros's attainment of white American identity depends upon an exclusion of the black shoe shiner ("Get out of here"), and that exclusion is precisely what renders the shoe shiner intelligible as an [End Page 652] American. Indeed, it is through Stavros's exclusion that the shoe shiner reexperiences his American belonging.¶ What I am suggesting, in short, is that the scene around which Morrison frames her argument naturalizes Stavros and the black shoe shiner. The event assimilates both, drawing them into an American reality that both precedes and is enacted by the racial roles they perform. Morrison is only half right, then, when she asserts that "becoming [white] American is based on . . . an exclusion of me." The concept of racial naturalization disarticulates racism from exclusion. It conceives of racism as a social process that includes everyone, naturalizing us into different but recognizable American racial positions, both as citizens and noncitizens. None of us is excluded from this process. None of us is outside of it. None of us is left behind.¶ Conceiving of racial naturalization in this way has at least two benefits. First, **it provides another theoretical vehicle to make the point that racism is endemic to American society, that, historically, racism has been formative of, and not simply oppositional to, American democracy**.62 Second, the concept helps to disrupt our tendency to engage in racial compartmentalism. By racial compartmentalism I mean the application of particular racial paradigms (such as immigration) to understand the racial experiences of particular racial groups (such as Latinas/os). **As a result of racial compartmentalism, blacks disappear in the context of discussions about immigration law and policy, and Asian Americans disappear in the context of discussions about racial profiling.**63 Racial compartmentalism makes it possible to study Korematsu v. United States and never engage, or even reference, the fact that the constitutionality of Japanese American internment was litigated in the context of Jim Crow.64 And because of racial compartmentalism, it is acceptable to study the racial failures of Reconstruction and never engage, or even acknowledge, the fact that these failures occur in the context of Chinese exclusion.65 If, like Nikhil Pal Singh, we understand the color line as "an internal border"66 —or, to pluralize his conception, a series of borders—**it becomes more difficult for us to ignore or elide the multiracial social dynamics of inclusion and exclusion**.67¶ Conceptualizing the color line as an internal border (or a series of borders) provides a way of highlighting the fact that racial identification is a form of documentation. How we cross the borders of the color line and where socially we end up are functions of the racial identification we carry. Perhaps not surprisingly, then, historically, racial identification (like other forms of identification) has raised evidentiary questions about falsification, standards of proof, and methods of authentication—in short, questions about the "real" and the "copy." [End Page 653]¶ **To the extent that we understand race as a form of identification, it becomes apparent that problems of migration (social movement across marked boundaries), documentation ("papers"/identifications), and national membership (noncitizen, citizen, American identity) do not end at the physical borders of America.** These problems are a part of the broader social landscape of America. Consider this point with respect to Latinas/os. The racial identification of this group as both "illegal" and "alien" is a problem within, and not simply a problem at the physical borders of, the nation-state.68 Thus we have the phenomenon of factory surveys, or raids of workplaces with significant representation of Latina/o employees by U.S. immigration officials. These raids, within the nation's interior, suggest that the color line operates both as a fixed checkpoint (at the physical borders of the United States) and as a roving patrol (within the interior).69¶ Problematizing the color line in terms of documentation has implications for black experiences as well. Specifically, this framing brings into sharp relief the ways in which documentation has served as an important technology for policing physical and social boundary-crossings by blacks. Dred Scott is a useful starting place for elaborating this point.

#### We have a moral obligation to advocate for effective remedies to injustices like Korematsu---the aff is not the ONLY starting point, but is ONE effective starting point to challenge executive abuses of power

Natsu Taylor Saito 10, Professor of Law, Georgia State University College of Law, “ARTICLE: INTERNMENTS, THEN AND NOW: CONSTITUTIONAL ACCOUNTABILITY IN POST-9/11 AMERICA”, Spring, 2 Duke Forum for L. & Soc. Change 71, Lexis

The dangers illustrated by the internment of Japanese Americans during World War II appear to be alive and well in post-9/11 America. If we wish to transform that reality, we cannot limit ourselves to resisting each new iteration of this pattern in a piecemeal fashion. Appealing to Congress, the executive, or even the courts to curb particular "excesses" or to enforce specific constitutional guarantees in a more effective manner still leaves Justice Jackson's "loaded weapon" available to those who would utilize it in the future. This brings us to what I believe may be the most dangerous legacy of the Japanese American internment--the failure of all branches of government to acknowledge what actually happened, to take effective remedial measures, or to hold to account those responsible for acknowledged injustices.¶ As Jerry Kang has documented, the Supreme Court did a remarkable job in the internment cases of "[letting] the military do what it will, keep[ing] its own hands clean, and forg[ing] plausible deniability for others." n182 Although the cases were self-evidently about the constitutionality of the detentions, the Court limited its holding in the Yasui and Hirabayashi cases to the legality of the [\*98] curfew, n183 and in Korematsu it bypassed the question of internment, approving the exclusion order as an extension of the curfew upheld in Hirabayashi. n184 "This segmentation technique allowed the Court to obscure its own agency and thereby minimize responsibility for its choice." n185¶ In ex parte Endo, n186 decided at the same time as Korematsu, the issue of internment could no longer be avoided, for the only question was whether the government could continue to detain a U.S. citizen whom it conceded was "loyal." The Court, which waited to issue its decision until President Franklin Roosevelt had been safely re-elected, n187 found Mitsuye Endo's continued detention unlawful, but managed to absolve both Congress and the president by claiming that the War Relocation Authority ("WRA") had not been authorized to detain Endo. n188 In turn, the lower federal court decisions vacating the convictions of Gordon Hirabayashi and Fred Korematsu held that the Supreme Court would have ruled differently in the 1940s, had the justices been aware that they were being misled by the government's lawyers. n189¶ More than forty years after the fact, the Civil Liberties Act attributed the internment to a combination of wartime hysteria, racial prejudice, and a failure of political leadership. This legislation also provided an apology and $ 20,000 in compensation to each surviving internee. n190 Despite the historic significance of this Act, and the enormous importance of the redress process to individual survivors and to the Japanese American community as a whole, n191 the fact that the legislative debate and the apology it produced were couched in terms of the wholesale loyalty of Japanese Americans is problematic. n192 Chris Iijima observed that, "[w]hile there was general agreement, at least rhetorically, on the injustice of the internment . . . [t]hose who, at the time of internment, saw it for the injustice and outrage that it was and chose to dissent continue to be silenced and unheralded even during the process of acknowledging their prescience." n193 As I [\*99] have argued elsewhere, the larger message that Congress seemingly intended to convey was that Japanese Americans should be rewarded for cooperating in our own incarceration, not that a wrong which should have been more widely resisted had occurred. n194¶ This Article began with Eugene Rostow's question: "What are we to think of our own part in a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court?" n195 Answering this question requires us to look not only at whether the institutions of government fulfilled their responsibilities under the Constitution, but whether the individual actors involved have been held accountable.¶ In the case of the Japanese American internment, it seems quite clear that those most responsible were well-rewarded. Lieutenant General John L. DeWitt, who falsely claimed that evacuation of Japanese Americans from the West Coast was necessary despite the fact that the War Department had determined that there was "no threat of imminent attack," and whose Final Report stated plainly that time was not an issue in assessing the loyalty of Japanese Americans, n196 was subsequently appointed Commandant of the Army and Navy Staff College and, after his retirement, promoted to full general by a special act of Congress. n197 Karl Bendetsen, the primary architect of the internment and author of DeWitt's Final Report, was appointed Assistant Secretary of the Army in 1950 and Undersecretary in 1952, before leaving government to become a corporate executive. n198¶ Attorney General Francis Biddle, who was well aware of the problems with DeWitt's report, went on to represent the United States at the Nuremberg Tribunal and later became a member of the Permanent Court of Arbitration at the Hague. n199 Because DeWitt's arguments contradicted the government's position that evacuation was necessary as there was insufficient time to conduct loyalty hearings, Assistant Secretary of War John J. McCloy ensured that the version of the Final Report made available to the Supreme Court was revised to eliminate the problematic language. n200 He went on to become the founding president of the International Bank for Reconstruction and Development ("The [\*100] World Bank") and, later, a senior advisor to President Reagan. n201 The Justice Department's liaison to the WRA, Tom C. Clark, was first appointed Attorney General and eventually became a justice on the Supreme Court. n202¶ Part of the government's legal strategy was to avoid disputes about the accuracy of the military's assessments by having the courts take judicial notice of "facts" that were based upon unfounded presumptions about race and culture. n203 In turn, many of these "facts" had been generated by the media, most notably the press controlled by William Randolph Hearst, n204 and groups such as the Native Sons of the Golden West, an organization dedicated to preserving California "as it has always been and as God himself intended it shall always be--the White Man's Paradise." n205 In 1942, Earl Warren, then-Attorney General of California and a member of the Native Sons, coached the California Joint Immigration Committee--formerly known as the Asiatic Exclusion League--on how "to persuade the federal government that all ethnic Japanese should be excluded from the West Coast." n206 According to the CWRIC, "In DeWitt's Final Report, much of Warren's presentation to the [congressional committee preparing legislation to criminalize non-compliance with the military orders] was repeated virtually verbatim, without attribution. Warren's arguments, presented after the signing of the Executive Order, became the central justifications presented by DeWitt for the evacuation." n207 Subsequently Warren was elected Governor of California in November 1942, twice reelected, and appointed Chief Justice of the Supreme Court in 1953. n208¶ Even government attorneys who opposed the internment acquiesced in its implementation and participated in its defense. Edward Ennis, Director of the Alien Enemy Unit of the Justice Department, and Assistant Attorney General James R. Rowe Jr. both recognized the factual inaccuracies and constitutional problems inherent to the government's arguments of "military necessity." Nonetheless, as Rowe later stated, he managed to "convince Ennis that it was not important enough to make him quit his job." n209¶ [\*101] With this sort of record, why would any public official, military leader, or government employee be deterred from engaging in comparable behavior? It remains unclear whether any officials will be held responsible for the detentions, abuse, and torture associated with the War on Terror that has been waged by the United States since 2001, but the signs are not propitious.¶ The American-Arab Anti-Discrimination Committee called for the removal of Civil Rights Commissioner Kirsanow following his defense of internment in 2002. n210 He was not removed, although apparently he did apologize, insisting that his remarks had been taken out of context. n211 In January 2006, while Congress was in recess, President Bush appointed Kirsanow to the National Labor Relations Board. n212 Congressman Coble expressed his "regret" that "many Japanese and Arab Americans found my choice of words offensive," but ignored calls for his resignation as chair of the subcommittee on terrorism. n213¶ CIA Director "Leon Panetta announced at his confirmation hearing that CIA agents that engaged in torture, including waterboarding, in the early phases of the war against terrorism, would not be criminally prosecuted." n214 In fact, attorneys in the Obama administration have continued to rely "on the state secret doctrine and thus seem prepared to confer de facto immunity on the CIA for constitutional wrongs as gross as those entailed in extraordinary rendition." n215 According to Attorney General Eric Holder, "It would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department." n216¶ It appears unlikely that those who sanctioned the illegal or unconstitutional programs will be prosecuted. As Jordon Paust observed in 2007, the administration of George W. Bush had "furthered a general policy of impunity by refusing to prosecute any person of any nationality under the War Crimes Act or alternative legislation, the torture statute, genocide legislation, and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad." n217 Shortly after Jay Bybee issued his torture memorandum in August 2002, President Bush appointed him to the Ninth Circuit Court of Appeals, and he was confirmed in March 2003. n218 John Yoo, who [\*102] drafted the torture memos, has returned to his law professorship at Boalt Hall. n219 The Obama Justice Department has rejected recommendations of ethics investigators concerning violations of professional standards by Bybee and Yoo. n220 Although President Obama's January 22 Executive Order "prohibits reliance on any Department of Justice or other legal advice concerning interrogation that was issued between September 11, 2001 and January 20, 2009," n221 when questioned about possible prosecutions for torture, he has only emphasized the importance of looking forward, not backward. n222 As things stand, then, there is no reasonable prospect of legal remedies for any of the wrongs associated with the so-called War on Terror.¶ I believe we, as lawyers and legal scholars, have responsibilities distinct from those of documentary historians or moral theorists. It is a central tenet of the rule of law that legal rights without remedies are meaningless. n223 If the legal system has permitted or facilitated legal wrongs, we have an obligation to ensure that effective remedies are implemented. In other words, it is necessary to address the question of accountability for injustice and, where there are consistent patterns replicating injustices, we must acknowledge that the remedies thus far employed have been inadequate. Otherwise, we are engaging not in legal analysis but alchemy.¶ The injustices of the Japanese American internment were belatedly acknowledged and partial redress provided to some of its victims, but even these measures were couched in terms which exonerated the institutional and individual actors responsible for the wrongs at issue. This left the door open for the dangers posed by the internment to be replicated in the current War on Terror, and our failure to hold those accountable for contemporaneous wrongs will ensure that they, too, will be repeated in the future.

#### Academic, institutions-based debate regarding detention can reverse excessive presidential authority---college students are important

Kelly Michael Young 13, Associate Professor of Communication and Director of Forensics at Wayne State University, "Why Should We Debate About Restriction of Presidential War Powers", 9/4, public.cedadebate.org/node/13

Beyond its obviously timeliness, we believed debating about presidential war powers was important because of the stakes involved in the controversy. Since the Korean War, scholars and pundits have grown increasingly alarmed by the growing scope and techniques of presidential war making. In 1973, in the wake of Vietnam, Congress passed the joint War Powers Resolution (WPR) to increase Congress’s role in foreign policy and war making by requiring executive consultation with Congress prior to the use of military force, reporting within 48 hours after the start of hostiles, and requiring the close of military operations after 60 days unless Congress has authorized the use of force. Although the WPR was a significant legislative feat, 30 years since its passage, presidents have frequently ignores the WPR requirements and the changing nature of conflict does not fit neatly into these regulations. After the terrorist attacks on 9-11, many experts worry that executive war powers have expanded far beyond healthy limits. Consequently, there is a fear that continued expansion of these powers will undermine the constitutional system of checks and balances that maintain the democratic foundation of this country and risk constant and unlimited military actions, particularly in what Stephen Griffin refers to as a “long war” period like the War on Terror (http://www.hup.harvard.edu/catalog.php?isbn=9780674058286). In comparison, pro-presidential powers advocates contend that new restrictions undermine flexibility and timely decision-making necessary to effectively counter contemporary national security risks. Thus, a debate about presidential wars powers is important to investigate a number of issues that have serious consequences on the status of democratic checks and national security of the United States.¶ Lastly, debating presidential war powers is important because we the people have an important role in affecting the use of presidential war powers. As many legal scholars contend, regardless of the status of legal structures to check the presidency, an important political restrain on presidential war powers is the presence of a well-informed and educated public. As Justice Potter Stewart explains, “the only effective restraint upon executive policy and power…may lie in an enlightened citizenry – in an informed and critical public opinion which alone can protect the values of a democratic government” (http://www.law.cornell.edu/supct/html/historics/USSC\_CR\_0403\_0713\_ZC3.html). As a result, this is not simply an academic debate about institutions and powers that that do not affect us. As the numerous recent foreign policy scandals make clear, anyone who uses a cell-phone or the internet is potential affected by unchecked presidential war powers. Even if we agree that these powers are justified, it is important that today’s college students understand and appreciate the scope and consequences of presidential war powers, as these students’ opinions will stand as an important potential check on the presidency.

#### Exec power has increased because of perceived public indifference and lack of comprehension about security issues

Aziz Rana 12, Assistant Professor of Law, Cornell University Law School; A.B., Harvard College; J.D., Yale Law School; PhD., Harvard University, Connecticut Law Review July, 2012, 44 Conn. L. Rev. 1417, “COMMENTARY: NATIONAL SECURITY: LEAD ARTICLE: Who Decides on Security?” lexis nexis

Despite over six decades of reform initiatives, the overwhelming drift of security arrangements in the United States has been toward greater-not less-executive centralization and discretion. This Article explores why efforts to curb presidential prerogative have failed so consistently. It argues that while constitutional scholars have overwhelmingly focused their attention on procedural solutions, the underlying reason for the growth of emergency powers is ultimately political rather than purely legal. In particular, scholars have ignored how the basic meaning of "security" has itself shifted dramatically since World War II and the beginning of the Cold War in line with changing ideas about popular competence. Paying special attention to the decisive role of actors such as Supreme Court Justice Felix Frankfurter and Pendleton Herring, co-author of 1947's National Security Act, this Article details how emerging judgments about the limits of popular knowledge and mass deliberation fundamentally altered the basic structure of security practices. Countering the pervasive wisdom at the founding and throughout the nineteenth century, this contemporary shift has recast war and external threat as matters too complex and specialized for ordinary Americans to comprehend. Today, the dominant conceptual approach to security presumes that insulated decision-makers in the executive branch (armed with the military's professional expertise) are best equipped to make sense of complicated and often conflicting information about safety and self- defense. The result is that the other branches-let alone the public writ large-face a profound legitimacy deficit whenever they call for transparency or seek to challenge coercive security programs. Not surprisingly, the tendency of legalistic reform efforts has been to place greater decision-making power in the other branches and then to watch those branches delegate such power back to the executive.

#### Avoiding the original case silences dissent---an investigation against government racism by external individuals like us is key to prevent the same wrongs from happening again

Natsu Taylor Saito 1, professor at Georgia State University College of Law, 2001, "Symbolism Under Siege: Japanese American Redress and the 'Racing' of Arab Americans as 'Terrorists,'" Asian Law Journal, 8 Asian L. J. 1, 2001, hein online

V. CONCLUSION: CONTESTING THE SYMBOLISM OF REDRESS¶ After a thoughtful study of the legislative intent underlying the Civil Liberties Act of 1988, University of Hawai'i law professor Chris Iijima cautions us that the ultimate effect of Japanese American redress may not be to repair the harm caused by the internment. Instead, he warns that it may become "a return to original humiliation" if we allow it to reinforce the "ideology of acquiescence"' 52 rather than resistance to injustice. Reparations for the Japanese American internment accomplished much that was important to the individuals involved, to the community, and to a broadening of "official history." And yet, as we have seen in the discussion above, it has not thus far created institutional change that will prevent such abuses from happening again. The redress received was clearly symbolic. No governmental proclamation fifty years after the fact or token payment of money can compensate for the families torn apart, property confiscated, communities scattered, psyches scarred, lives lost. But just what does it symbolize? This is what we are in the process of contesting and as we contest it we become, in Man Matsuda's words, the "authors" of the internment."'¶ Iijima makes a convincing case that it was Congress' intent in passing the Civil Liberties Act to reward the "superpatriotism" of the Japanese Americans, illustrated by their co-operation with the internment and the extraordinary accomplishments of the all-nisei combat units. He quotes as typical the statement of Congressman Yates who noted the difficulties of the internment and concluded that:¶ [T]his should have been enough to kill the spirit of a less responsible group of people. But the reply from the Japanese parents was to [send] their children out from behind the wire fences... to fight the Nazis and the armed forces of their ancient homeland.'54¶ From this perspective, redress was "deserved" because Japanese Americans were both heroic and stoic, because they went along with the program and proved their loyalty. In other words, we have been rewarded for accommodating the wrong. If this is not what Congress was doing, why haven't those who recognized the wrong at the time, who spoke the truth and stood up for it at great personal cost, been honored? The resisters, and there were many,'55 still have not been properly recognized. Iijima notes, There is a particular irony about the debate on the redress bill. While there was general agreement, at least rhetorically, on the injustice of the internment,... [t]hose who, at the time of internment, saw it for the injustice and outrage that it was and chose to dissent continue to be silenced and unheralded even during the process of acknowledging their prescience."'¶ This interpretation of Japanese American reparations - the rewarding of acquiescence rather than the righting of wrongs - seems to accurately capture not only Congress' intent in passing the Civil Liberties Act, but also the reason why the mainstream narrative is so readily accepted. Rather than alarming people about the dangers lurking in our political and judicial structures, it comforts them with the notion that oppressed minorities can accommodate injustice.¶ If this is the symbolism that ultimately attaches to Japanese American redress, it will serve to divide Japanese Americans (and by extension other Asian Americans) from other communities of color, reinforcing the "model minority" myth that says to African Americans and Latinos, "look, they made it against all odds and were even polite in the process; why can't you?" It will also mask the on-going abuses of power perpetrated by the government against racially identified groups in the name of "national security."If we allow virtually the same wrong to be committed with impunity against Arab Americans today, we will have lost the Japanese American reparations battle altogether. A check and a letter fifty years after the fact mean nothing if they are not symbolic of changes in the system which created the wrong in the first place.¶ We began with the commonly held belief that redress for the internment of Japanese Americans has almost been completed. We see, instead, that much remains to be done. First, we must take it upon ourselves to learn what is really happening, even if it appears to be happening to "someone else." We must name the wrongs we see by their proper and truthful names; we must insist on meaningful redress. Those of us who grew up hearing about the internment remember stories of the white neighbor families who stood by, many sympathetic, even sad, watching silently as our families were herded onto trucks by soldiers with bayonets. We must not become those silent observers.

#### Simulated national security law debates preserve agency and enhance decision-making---avoids cooption

Laura K. Donohue 13, Associate Professor of Law, Georgetown Law, 4/11, “National Security Law Pedagogy and the Role of Simulations”, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.164 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education and integrates the experience through a multi-day simulation. In 2009, I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations. The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.165 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material. The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos. The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.166 A. Course Design The central idea in structuring the NSL Sim 2.0 course was to bridge the gap between theory and practice by conveying doctrinal material and creating an alternative reality in which students would be forced to act upon legal concerns.167 The exercise itself is a form of problem-based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (directed and focused on certain areas of the law and legal education) and flexible (responsive to student input and decisionmaking). Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.168 Additionally, while authenticity matters, it is worth noting that at some level the fact that the incident does not take place in a real-world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes – without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting. NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux. A key aspect of the course design is that it retains both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. A certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise. In order to capture problems related to adaptation and evolution, addressing goal [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.169 It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage of helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.170 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0. The twin goals of adaptation and evolution require that students be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, four attorneys from practice, a media expert, six to eight former simulation students, and a number of technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of shifting national security law authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional responsibility. The attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law. Throughout the simulation, the Control Team is constantly reacting to student choices. When unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media). A total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple alterations of the situation, relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers. The simulation itself is problem-based, giving players agency in driving the evolution of the experience – thus addressing goal [2(c)]. This requires a realtime response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to emphasize different areas of the law and the students’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed. The written and oral components of the simulation conform to the fourth pedagogical goal – the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication, such as legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. These oral components are paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas for NSLs. In addition, students are required to prepare a paper outlining their legal authorities prior to the simulation – and to deliver a 90 second oral briefing after the session. To replicate the high-stakes political environment at issue in goals (1) and (5), students are divided into political and legal roles and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state offices, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of many different considerations that decisionmakers take into account in the national security domain. Scenarios are selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further alterations to the simulation provide for the broader political context – for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component helps to emphasize the broader political context within which national security law is practiced. Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous interjections from both the Control Team and the participants in the simulation itself. As aforementioned, professors on the Control Team, and practicing attorneys who have previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, determining the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals. Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection – for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient. The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and the issues that arose in the course of the simulation, develop frameworks for analyzing uncertainty, tension with colleagues, mistakes, and successes in the future. B. Substantive Areas: Interstices and Threats As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on specific authorities that may be brought to bear in the course of a crisis. The decision of which areas to explore is made well in advance of the course. It is particularly helpful here to think about national security authorities on a continuum, as a way to impress upon students that there are shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might address the intersection of pandemic disease and biological weapons. A third could examine cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal portion of the course and the simulation follows from this decision. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out which authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided according to the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course. The simulation itself is based on five to six storylines reflecting the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student responses. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life. For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to stress the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (for example, by someone who has traveled from overseas), but then for the storyline to move into the second realm (awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of introducing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise – with the storyline designed to raise these questions. A third storyline might simply be well developed noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, about containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might become the focus. The sixth storyline could be further noise in the system – loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like. The five to six storylines, prepared by the Control Team in consultation with experts, become the basis for the preparation of scenario “injects:” i.e., newspaper articles, VNN broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression. C. How It Works As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often occur at inconvenient times and may well involve limited sleep and competing demands.171 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play. Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material – both general and SCI – has been provided to the relevant student teams. The Control Team has access to the complete site. For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings between the players), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis. The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication. As the storylines unfold, the Control Team takes on a variety of roles, such as that of the President, Vice President, President’s chief of staff, governor of a state, public health officials, and foreign dignitaries. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities. At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges and formal observers then offer reflections on the simulation and determine which teams performed most effectively. Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness of their – and other students’ – performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then formally ends.172 Learning, however, continues beyond the temporal confines of the semester. Students who perform well and who would like to continue to participate in the simulations are invited back as members of the control team, giving them a chance to deepen their understanding of national security law. Following graduation, a few students who go in to the field are then invited to continue their affiliation as National Security Law fellows, becoming increasingly involved in the evolution of the exercise itself. This system of vertical integration helps to build a mentoring environment for the students while they are enrolled in law school and to create opportunities for learning and mentorship post-graduation. It helps to keep the exercise current and reflective of emerging national security concerns. And it builds a strong community of individuals with common interests. CONCLUSION The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same. The one-size fits all approach currently dominating the conversation in legal education, however, appears ill-suited to address the concerns raised in the current conversation. Instead of looking at law across the board, greater insight can be gleaned by looking at the specific demands of the different fields themselves. This does not mean that the goals identified will be exclusive to, for instance, national security law, but it does suggest there will be greater nuance in the discussion of the adequacy of the current pedagogical approach. With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified – (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, to ensure that they will be most effective when they enter the field. The problem with the current structures in legal education is that they fall short, in important ways, from helping students to meet these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises. These are important classroom devices. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more holistic approach to national security law which will allow for the maximum conveyance of required skills. Total immersion simulations, which have not yet been addressed in the secondary literature for civilian education in national security law, may provide an important way forward. Such simulations also cure shortcomings in other areas of experiential education, such as clinics and moot court. It is in an effort to address these concerns that I developed the simulation model above. NSL Sim 2.0 certainly is not the only solution, but it does provide a starting point for moving forward. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within a course. It makes use of technology and physical space to engage students in a multi-day exercise, in which they are given agency and responsibility for their decision making, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.

#### Public deliberation about detention policy promotes agency and decision-making---reciprocity and public debate facilitates mutual respect that lays the groundwork for cooperation on other issues

Dr. Amy Gutmann 4, President and Christopher H. Browne Distinguished Professor of Political Science in the School of Arts and Sciences and Professor of Communication in the Annenberg School for Communication University of Pennsylvania, AND Dennis Thompson, Alfred North Whitehead Professor of Political Philosophy in the Faculty of Arts and Sciences and in the John F. Kennedy School of Government, Emeritus Political Theory, "Why Deliberative Democracy?" press.princeton.edu/chapters/s7869.html

WHAT DELIBERATIVE DEMOCRACY MEANS¶ To go to war is the most consequential decision a nation can make. Yet most nations, even most democracies, have ceded much of the power to make that decision to their chief executives--to their presidents and prime ministers. Legislators are rarely asked or permitted to issue declarations of war. The decision to go to war, it would seem, is unfriendly territory for pursuing the kind of reasoned argument that characterizes political deliberation.¶ Yet when President George W. Bush announced that the United States would soon take military action against Saddam Hussein, he and his advisors recognized the need to justify the decision not only to the American people but also to the world community. Beginning in October 2002, the administration found itself engaged in argument with the U.S. Congress and, later, with the United Nations. During the months of preparation for the war, Bush and his colleagues, in many different forums and at many different times, sought to make the case for a preventive war against Iraq.1 Saddam Hussein, they said, was a threat to the United States because he had or could soon have weapons of mass destruction, and had supported terrorists who might have struck again against the United States. Further, he had tyrannized his own people and destabilized the Middle East.¶ In Congress and in the United Nations, critics responded, concurring with the judgment that Hussein was a terrible tyrant but challenging the administration on all its arguments in favor of going to war before exhausting the nonmilitary actions that might have controlled the threat. As the debate proceeded, it became clear that almost no one disagreed with the view that the world would be better off if Saddam Hussein no longer ruled in Iraq, but many doubted that he posed an imminent threat, and many questioned whether he actually supported the terrorists who had attacked or were likely to attack the United States.¶ This debate did not represent the kind of discussion that deliberative democrats hope for, and the deliberation was cut short once U.S. troops began their invasion in March 2003. Defenders and critics of the war seriously questioned one another's motives and deeply suspected that the reasons offered were really rationalizations for partisan politics. The administration, for its part, declined to wait until nonmilitary options had been exhausted, when a greater moral consensus might have been reached. But the remarkable fact is that even under the circumstances of war, and in the face of an alleged imminent threat, the government persisted in attempting to justify its decision, and opponents persevered in responding with reasoned critiques of a preventive war.¶ The critics are probably right that no amount of deliberation would have prevented the war, and the supporters are probably right that some critics would never have defended going to war even if other nonmilitary sanctions had ultimately failed. Yet the deliberation that did occur laid the foundation for a more sustained and more informative debate after the U.S. military victory than would otherwise have taken place**. Because the administration had given reasons** (such as the threat of the weapons of mass destruction) for taking action, **critics had more basis to continue to dispute the original decision, and to challenge the administration's judgment. The imperfect deliberation that preceded the war** prepared the ground for the less imperfect deliberation that followed.¶ Thus even in a less than friendly environment, deliberative democracy makes an appearance, and with some effect. Both the advocates and the foes of the war acted as if they recognized an obligation to justify their views to their fellow citizens. (**That their motives were political or partisan is less important than that their actions were responsive to this obligation.**) This problematic episode can help us discern the defining characteristics of deliberative democracy if we attend to both the presence and the absence of those characteristics in the debate about the war.¶ What Is Deliberative Democracy?¶ Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another. In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return. But not all issues, all the time, require deliberation. Deliberative democracy makes room for many other forms of decision-making (including bargaining among groups, and secret operations ordered by executives), as long as the use of these forms themselves is justified at some point in a deliberative process. Its first and most important characteristic, then, is its reason-giving requirement.¶ The reasons that deliberative democracy asks citizens and their representatives to give should appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject. The reasons are neither merely procedural ("because the majority favors the war") nor purely substantive ("because the war promotes the national interest or world peace"). They are reasons that should be accepted by free and equal persons seeking fair terms of cooperation.¶ The moral basis for this reason-giving process is common to many conceptions of democracy**. Persons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as** autonomous agents **who take part in the governance of their own society, directly or through their representatives.** In deliberative democracy an important way these agents take part is by presenting and responding to reasons, or by demanding that their representatives do so, with the aim of justifying the laws under which they must live together. The reasons are meant both to produce a justifiable decision and to express the value of mutual respect. It is not enough that citizens assert their power through interest-group bargaining, or by voting in elections. No one seriously suggested that the decision to go to war should be determined by logrolling, or that it should be subject to a referendum. Assertions of power and expressions of will, though obviously a key part of democratic politics, still need to be justified by reason. When a primary reason offered by the government for going to war turns out to be false, or worse still deceptive, then not only is the government's justification for the war called into question, so also is its respect for citizens.¶ A second characteristic of deliberative democracy is that the reasons given in this process should be accessible to all the citizens to whom they are addressed. To justify imposing their will on you, your fellow citizens must give reasons that are comprehensible to you. If you seek to impose your will on them, you owe them no less. This form of reciprocity means that the reasons must be public in two senses. First, the deliberation itself must take place in public**, not merely in the privacy of one's mind.** In this respect deliberative democracy stands in contrast to Rousseau's conception of democracy, in which individuals reflect on their own on what is right for the society as a whole, and then come to the assembly and vote in accordance with the general will.2¶ The other sense in which the reasons must be public concerns their content. A deliberative justification does not even get started if those to whom it is addressed cannot understand its essential content. It would not be acceptable, for example, to appeal only to the authority of revelation, whether divine or secular in nature. Most of the arguments for going to war against Iraq appealed to evidence and beliefs that almost anyone could assess. Although President Bush implied that he thought God was on his side, he did not rest his argument on any special instructions from his heavenly ally (who may or may not have joined the coalition of the willing).¶ **Admittedly, some of the evidence on both sides of the debate was technical** (for example, the reports of the U.N. inspectors). But this is a common occurrence in modern government. Citizens often have to rely on experts. This does not mean that the reasons**, or the bases of the reasons,** are inaccessible. Citizens are justified in relying on experts if they describe the basis for their conclusions in ways that citizens can understand; and if the citizens have some independent basis for believing the experts to be trustworthy (such as a past record of reliable judgments, or a **decision-making structure that contains checks and balances by experts who have reason to exercise critical scrutiny over one another**).¶ To be sure, the Bush administration relied to some extent on secret intelligence to defend its decision. Citizens were not able at the time to assess the validity of this intelligence, and therefore its role in the administration's justification for the decision. In principle, using this kind of evidence does not necessarily violate the requirement of accessibility if good reasons can be given for the secrecy, and if opportunities for challenging the evidence later are provided. As it turned out in this case, the reasons were indeed challenged later, and found to be wanting. Deliberative democracy would of course have been better served if the reasons could have been challenged earlier.¶ **The third characteristic of deliberative democracy is that its process** aims at producing a decision that is binding **for some period of time**. **In this respect the deliberative process is not like a talk show or an academic seminar. The participants do not argue for argument's sake; they do not argue even for truth's own sake** (although the truthfulness of their arguments is a deliberative virtue because it is a necessary aim in justifying their decision). They intend their discussion to influence a decision the government will make, or a process that will affect how future decisions are made. At some point, the deliberation temporarily ceases, and the leaders make a decision. The president orders troops into battle, the legislature passes the law, or citizens vote for their representatives. Deliberation about the decision to go to war in Iraq went on for a long period of time, longer than most preparations for war. Some believed that it should have gone on longer (to give the U.N. inspectors time to complete their task). But at some point the president had to decide whether to proceed or not. Once he decided, deliberation about the question of whether to go to war ceased.¶ Yet deliberation about a seemingly similar but significantly different question continued: was the original decision justified? Those who challenged the justification for the war of course did not think they could undo the original decision. They were trying to cast doubt on the competence or judgment of the current administration. They were also trying to influence future decisions--to press for involving the United Nations and other nations in the reconstruction effort, or simply to weaken Bush's prospects for reelection.¶ This continuation of debate illustrates the fourth characteristic of deliberative democracy--its process is dynamic. Although deliberation aims at a justifiable decision, it does not presuppose that the decision at hand will in fact be justified, let alone that a justification today will suffice for the indefinite future. **It keeps open the** possibility of a continuing dialogue**, one in which citizens can criticize previous decisions and move ahead on the basis of that criticism**. Although a decision must stand for some period of time, it is provisional in the sense that it must be open to challenge at some point in the future. This characteristic of deliberative democracy is neglected even by most of its proponents. (We discuss it further below in examining the concept of provisionality.)¶ Deliberative democrats care as much about what happens after a decision is made as about what happens before. Keeping the decision-making process open in this way--recognizing that its results are provisional--is important for two reasons. First, **in politics as in much of practical life, decision-making processes and the human understanding upon which they depend are imperfect.** We therefore cannot be sure that the decisions we make today will be correct tomorrow, and even the decisions that appear most sound at the time may appear less justifiable in light of later evidence. Even in the case of those that are irreversible, like the decision to attack Iraq, reappraisals can lead to different choices later than were planned initially. Second, **in politics most decisions are not consensual. Those citizens and representatives who disagreed with the original decision are more likely to accept it if they believe they have a chance to reverse or modify it in the future. And they are more likely to be able to do so if they have a chance to keep making arguments**.¶ One important implication of this dynamic feature of deliberative democracy is that the continuing debate it requires should observe what we call the principle of the economy of moral disagreement**. In giving reasons for their decisions, citizens and their representatives should try to find justifications that** minimize their differences with their opponents. Deliberative democrats do not expect deliberation always or even usually to yield agreement. How citizens deal with the disagreement that is endemic in political life should therefore be a central question in any democracy. Practicing the economy of moral disagreement promotes the value of mutual respect (which is at the core of deliberative democracy). By economizing on their disagreements, citizens and their representatives can continue to work together to find common ground, if not on the policies that produced the disagreement, then on related policies about which they stand a greater chance of finding agreement. Cooperation on the reconstruction of Iraq does not require that the parties at home and abroad agree about the correctness of the original decision to go to war. Questioning the patriotism of critics of the war, or opposing the defense expenditures that are necessary to support the troops, does not promote an economy of moral disagreement.¶ Combining these four characteristics, we can define deliberative democracy as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.3 This definition obviously leaves open a number of questions. We can further refine its meaning and defend its claims by considering to what extent deliberative democracy is democratic; what purposes it serves; why it is better than the alternatives; what kinds of deliberative democracy are justifiable; and how its critics can be answered.

#### Public deliberation facilitates an informed citizenry based on mutual respect and leads to better policies---shutting down switch-side debate is arrogant and ethically bankrupt

Dr. Amy Gutmann 4, President and Christopher H. Browne Distinguished Professor of Political Science in the School of Arts and Sciences and Professor of Communication in the Annenberg School for Communication University of Pennsylvania, AND Dennis Thompson, Alfred North Whitehead Professor of Political Philosophy in the Faculty of Arts and Sciences and in the John F. Kennedy School of Government, Emeritus Political Theory, "Why Deliberative Democracy?" press.princeton.edu/chapters/s7869.html

What Purposes Does Deliberative Democracy Serve?¶ The general aim of deliberative democracy is to provide the most justifiable conception for dealing with moral disagreement in politics. In pursuing this aim, deliberative democracy serves four related purposes. The first is to promote the legitimacy of collective decisions. This aim is a response to one of the sources of moral disagreement--scarcity of resources. Citizens would not have to argue about how best to distribute health care or who should receive organ transplants if these goods and services were unlimited. In the face of scarcity, deliberation can help those who do not get what they want, or even what they need, to come to accept the legitimacy of a collective decision.¶ The hard choices that public officials have to make should be more acceptable, even to those who receive less than they deserve, if everyone's claims have been considered on the merits, rather than on the basis of the party's bargaining power. Even with regard to decisions with which many disagree, most of us take one attitude toward those that are adopted after careful consideration of the relevant conflicting moral claims, and quite a different attitude toward those that are adopted merely by virtue of the relative strength of competing political interests.¶ The second purpose of deliberation is to encourage public-spirited perspectives on public issues. This aim responds to another source of moral disagreement--limited generosity. Few people are inclined to be wholly altruistic when they are arguing about contentious issues of public policy, such as defense spending or health-care priorities. **Deliberation in well-constituted forums responds to this limited generosity by encouraging participants to take a broader perspective on questions of common interest.**¶ To be sure, politicians are not automatically transformed from representatives of special interests into trustees of the public interest as a result of talking to one another. The background conditions in which the deliberation takes place are critical. **Deliberation is more likely to succeed to the extent that the deliberators are well informed, have relatively equal resources, and take seriously their opponents' views**. But even when the background conditions are unfavorable (as they often are), citizens are more likely to take a broader view of issues in a process in which moral reasons are traded than in a process in which political power is the only currency.¶ The third purpose of deliberation is to promote mutually respectful processes of decision-making. It responds to an often neglected source of moral disagreement--incompatible moral values. Even fully altruistic individuals trying to decide on the morally best standards for governing a society of abundance would not be able to reconcile some moral conflicts beyond a reasonable doubt. They would still confront, for example, the problem of abortion, which pits the value of life against the value of liberty. Even issues of national security can pose questions about which people can reasonably disagree--under what conditions is a nation justified in starting a war, on its own, against another nation?¶ Deliberation cannot make incompatible values compatible, but it can help participants recognize the moral merit in their opponents' claims when those claims have merit. It can also help deliberators distinguish those disagreements that arise from genuinely incompatible values from those that can be more resolvable than they first appear. And it can support other practices of mutual respect, such as the economy of moral disagreement described earlier.¶ Inevitably, citizens and officials make some mistakes when they take collective actions. The fourth purpose of deliberation is to help correct these mistakes. This aim is a response to the fourth source of disagreement, incomplete understanding. A well-constituted deliberative forum provides an opportunity for advancing both individual and collective understanding. Through the give-and-take of argument, participants can learn from each other, come to recognize their individual and collective misapprehensions, and develop new views and policies that can more successfully withstand critical scrutiny. When citizens bargain and negotiate, they may learn how better to get what they want. But when they deliberate, they can expand their knowledge, including both their self-understanding and their collective understanding of what will best serve their fellow citizens.¶ It is all too easy to assume that we already know what constitutes the best resolution of a moral conflict, and do not need to deliberate with our fellow citizens. To presume that we know what the right resolution is before we hear from others who will also be affected by our decisions is not only arrogant but also unjustified in light of the complexity of the issues and interests that are so often at stake. **If we refuse to give deliberation a chance, not only do we forsake the possibility of arriving at a genuine moral compromise but we also give up the most defensible ground we could have for maintaining an uncompromising position: that we have fairly tested our views against those of others.**¶ Tugging on the coattails of Thomas Jefferson, a little boy (in a New Yorker cartoon) once asked: "If you take those truths to be self-evident, then why do you keep on harping on them so much?" The answer from a deliberative perspective is that such claims deserve their status as self-evident truths for the purposes of collective action only if they can withstand challenge in a public forum. Jefferson himself argued for open deliberative forums, indeed even periodic constitutional conventions, in which citizens could contest conventional wisdom.11 An implication of taking the problem of incomplete understanding seriously is that the results of the deliberative process should be regarded as provisional. Some results are rightly regarded as more settled than others. We do not have to reargue the question of slavery every generation. But the justification for regarding such results as settled is that they have met the deliberative challenge in the past, and there is no reason to believe that they could not do so today.¶ Why Is Deliberative Democracy Better Than Aggregative Democracy?¶ **To appreciate the value of deliberative democracy, we need to consider the alternatives**. Obviously, there are many conceptions of democracy, and many moral theories that support these conceptions. To begin, we should distinguish first- and second-order theories.12 First-order theories seek to resolve moral disagreement by demonstrating that alternative theories and principles should be rejected. The aim of each is to be the lone theory capable of resolving moral disagreement. The most familiar theories of justice--utilitarianism, libertarianism, liberal egalitarianism, communitarianism--are first-order theories in this sense. Each theory claims to resolve moral conflict, but does so in ways that require rejecting the principles of its rivals. In contrast, deliberative democracy is best understood as a second-order theory. Second-order theories are about other theories in the sense that they provide ways of dealing with the claims of conflicting first-order theories. They make room for continuing moral conflict that first-order theories purport to eliminate. They can be held consistently without rejecting a wide range of moral principles expressed by first-order theories. Deliberative democracy's leading rivals among second-order theories are what are known as aggregative conceptions of democracy.13¶ The deliberative conception, as we have indicated, considers the reasons that citizens and their representatives give for their expressed preferences. It asks for justifications. The aggregative conception, by contrast, takes the preferences as given (though some versions would correct preferences based on misinformation). It requires no justification for the preferences themselves, but seeks only to combine them in various ways that are efficient and fair. Some preferences may be discounted or even rejected, but only because they do not produce an optimal result, not because they are not justified by reasons.

# 2AC

#### Omission is not exclusion: NO discursive act can include everything; this doesn't mean we reject or marginalize these concerns

Rorty ‘2 (Professor of Comparative Literature @ Stanford, `02 (Richard, Peace Review, vol. 14, no. 2, p. 152-153)

I have no quarrel with Cornell's and Spivak's claim that "what is missing in a literary text or historical narrative leaves its mark through the traces of its expulsion." For that seems simply to say that any text will presuppose the existence of people, things, and institutions that it hardly mentions. So the readers of a literary text will always be able to ask themselves questions such as: "Who prepared the sumptuous dinner the lovers enjoyed?" "How did they get the money to afford that meal?" The reader of a historical narrative will always be able to wonder about where the money to finance the war came from and about who got to decide whether the war would take place. "Expulsion," however, seems too pejorative a term for the fact that no text can answer all possible questions about its own background and its own presuppositions. Consider Captain Birch, the agent of the East Indian Company charged with persuading the Rani of Sirmur not to commit suicide. Spivak is not exactly "expelling" Captain Birch from her narrative by zeroing in on the Rani, even though she does not try to find out much about Birch's early days as a subaltern, nor about the feelings of pride or shame or exasperation he may have experienced in the course of his conversations with the Rani. In the case of Birch, Spivak does not try to "gently blow precarious ashes into their ghostly shape," nor does she speculate about the possible sublimity of his career. Nor should she. S.ivak has her own fish to and her own witness to bear just as Kipling had his when he spun tales of the humiliations to which newly arrived subalterns were subjected in the regimental messes of the Raj. So do all authors of literary texts and historical narratives, and such texts and narratives should not always be read as disingenuous exercises in repression. They should be read as one version of a story that could have been told, and should be told, in many other ways.

#### A framework of accessibility means we never take action to actually resolve accessibility issues---claims of who is more oppressed crowd-out substantive discussions

Minow 96—Professor of Law, Harvard Law School (Martha, Oregon Law Review, Fall)

Personal testimony about oppression displaces analysis of social structures that produce and maintain it. n91 Identity politics tends to locate the problem in the identity group rather than the social relations that produce identity groupings. n92 Cornel West observes: "we confine discussions about race in America to the 'problems' black people pose for whites rather than consider what this way of viewing black people reveals about us as a nation." n93 Serious discussion of race in America, he argues, "must begin not with the problems of black people but with the flaws of American society - flaws rooted in historic inequalities and longstanding cultural stereotypes." n94 Identity politics is likely to reinforce white people's conception of blacks as "them" rather than pressing home everyone's mutual dependence and relationships. n95 Identity politics also tends to not only produce defensiveness among white men, but also to make it easier for white men to abandon and even blame people of color and women of all sorts for their circumstances. Blame should not be placed on identity politics for the indifference or selfishness of those who wish it would go away, but nor should those who pursue identity politics be excused of its effects. Adjudicating who is right and who is wrong in the conflicts between identity politics advocates and those who charge identity politics with threatening unity occupies too much time and attention compared with the stakes really at issue. After all, if [\*669] the alternative is a notational unity, then the fight simply focuses on which kind of identity ought to trump others. Those caught up in this debate too often fail to focus on, much less remedy, the savage brutalities affecting the most vulnerable members of society - and therefore the entire quality of the society. Thus, amid rancorous debates over multicultural curricula, actual school performance by children most at risk of failure remains largely neglected. n96 Intense university debates over identity-based issues in faculty promotions mobilize students while eviscerated public budgets for higher education do not. n97 Devastated urban neighborhoods; massively widening gaps between a small group of wealthy people and the rest of the society; evaporating public sector support for art, libraries, and human services; the disruption of families caused at least in part by economic hardship; and the substitution of market values for all other vocabularies of moral and political reasoning occur before our eyes. n98 Racial patterns of inequality persist or grow larger in some respects than in the past. n99

#### Debate that teaches debaters how to speak in the language of experts is productive ---that solves cession of science and politics to ideological elites who dominate the argumentative frame

Robert Hoppe 99, Professor of Policy and knowledge in the Faculty of Management and Governance at Twente University, the Netherlands. "Argumentative Turn" Science and Public Policy, volume 26, number 3, June 1999, pages 201–210 works.bepress.com

ACCORDING TO LASSWELL (1971), policy science is about the production and application of knowledge of and in policy. Policy-makers who desire to tackle problems on the political agenda successfully, should be able to mobilise the best available knowledge. This requires high-quality knowledge in policy. Policy-makers and, in a democracy, citizens, also need to know how policy processes really evolve. This demands precise knowledge of policy.

There is an obvious link between the two: the more and better the knowledge of policy, the easier it is to mobilise knowledge in policy. Lasswell expresses this interdependence by defining the policy scientist's operational task as eliciting the maximum rational judgement of all those involved in policy-making.

For the applied policy scientist or policy analyst this implies the development of two skills. First, for the sake of mobilising the best available knowledge in policy, he/she should be able to mediate between different scientific disciplines. Second, to optimise the interdependence between science in and of policy, she/he should be able to mediate between science and politics. Hence Dunn's (1994, page 84) formal definition of policy analysis as an applied social science discipline that uses multiple research methods in a context of argumentation, public debate [and political struggle] to create, evaluate critically, and communicate policy-relevant knowledge.

Historically, the differentiation and successful institutionalisation of policy science can be interpreted as the spread of the functions of knowledge organisation, storage, dissemination and application in the knowledge system (Dunn and Holzner, 1988; van de Graaf and Hoppe, 1989, page 29). Moreover, this scientification of hitherto 'unscientised' functions, by including science of policy explicitly, aimed to gear them to the political system. In that sense, Lerner and Lasswell's (1951) call for policy sciences anticipated, and probably helped bring about, the scientification of politics.

Peter Weingart (1999) sees the development of the science-policy nexus as a dialectical process of the scientification of politics/policy and the politicisation of science. Numerous studies of political controversies indeed show that science advisors behave like any other self-interested actor (Nelkin, 1995). Yet science somehow managed to maintain its functional cognitive authority in politics. This may be because of its changing shape, which has been characterised as the emergence of a post-parliamentary and post-national network democracy (Andersen and Burns, 1996, pages 227-251).

National political developments are put in the background by ideas about uncontrollable, but apparently inevitable, international developments; in Europe, national state authority and power in public policy-making is leaking away to a new political and administrative elite, situated in the institutional ensemble of the European Union. National representation is in the hands of political parties which no longer control ideological debate. The authority and policy-making power of national governments is also leaking away towards increasingly powerful policy-issue networks, dominated by functional representation by interest groups and practical experts.

In this situation, public debate has become even more fragile than it was. It has become diluted by the predominance of purely pragmatic, managerial and administrative argument, and under-articulated as a result of an explosion of new political schemata that crowd out the more conventional ideologies. The new schemata do feed on the ideologies; but in larger part they consist of a random and unarticulated 'mish-mash' of attitudes and images derived from ethnic, local-cultural, professional, religious, social movement and personal political experiences.

The market-place of political ideas and arguments is thriving; but on the other hand, politicians and citizens are at a loss to judge its nature and quality.

Neither political parties, nor public officials, interest groups, nor social movements and citizen groups, nor even the public media show any inclination, let alone competency, in ordering this inchoate field. In such conditions, scientific debate provides a much needed minimal amount of order and articulation of concepts, arguments and ideas. Although frequently more in rhetoric than substance, reference to scientific 'validation' does provide politicians, public officials and citizens alike with some sort of compass in an ideological universe in disarray.

For policy analysis to have any political impact under such conditions, it should be able somehow to continue 'speaking truth' to political elites who are ideologically uprooted, but cling to power; to the elites of administrators, managers, professionals and experts who vie for power in the jungle of organisations populating the functional policy domains of post-parliamentary democracy; and to a broader audience of an ideologically disoriented and politically disenchanted citizenry.

#### Personal experience focus shuts down deliberation

Subotnik 98 Professor of Law, Touro College, Jacob D. Fuchsberg Law Center. 7 Cornell J. L. & Pub. Pol'y 681, Lexis

Having traced a major strand in the development of CRT, we turn now to the strands' effect on the relationships of CRATs with each other and with outsiders. As the foregoing material suggests, the central CRT message is not simply that minorities are being treated unfairly, or even that individuals out there are in pain - assertions for which there are data to serve as grist for the academic mill - but that the minority scholar **himself or herself** hurts **and hurts badly**.¶ An important problem that concerns the very definition of the scholarly enterprise now comes into focus. **What can an academic** trained to [\*694] question and to doubt n72 **possibly say to Patricia Williams when effectively she announces, "I hurt bad"?** n73 **"No, you don't hurt"? "You shouldn't hurt"?** "Other people hurt too"? Or, most dangerously - and perhaps most tellingly - "What do you expect when you keep shooting yourself in the foot?" If the majority were perceived as having the well- being of minority groups in mind, these responses might be acceptable, even welcomed. And they might lead to real conversation. But, **writes Williams, the failure by those "cushioned within the invisible privileges of race and power**... to incorporate a sense of precarious connection as a part of our **lives is... ultimately obliterating**." n74¶ "Precarious." "Obliterating." **These words will clearly invite responses only from fools and sociopaths; they will, by effectively precluding objection, disconcert and disunite others**. **"I hurt," in academic discourse, has three broad though interrelated effects**. First, it demands priority from the reader's conscience. It is for this reason that law review editors, waiving usual standards, have privileged a long trail of undisciplined - even silly n75 **-** destructive and, above all, self-destructive articles**.** n76 **Second, by emphasizing the emotional bond between those who hurt in a similar way, "I hurt" discourages fellow sufferers from** abstracting themselves **from their pain in order** to gain perspective **on their condition**. n77¶ [\*696] **Last, as we have seen,** it precludes the possibility of open and structured conversation with others. n78 [\*697] **It is because of this** conversation-stopping effect of what they insensitively call "first-person agony stories" **that Farber and Sherry deplore their use.** "The norms of academic civility hamper readers from challenging the accuracy of the researcher's account; it would be rather difficult, for example, to criticize a law review article by questioning the author's emotional stability or veracity." n79 Perhaps, a better practice would be to put the scholar's experience on the table, along with other relevant material, but to subject that experience to the same level of scrutiny.¶ If through the foregoing rhetorical strategies CRATs succeeded in limiting academic debate, why do they not have greater influence on public policy? Discouraging white legal scholars from entering the national conversation about race, n80 I suggest, has generated a kind of cynicismin white audiences which, in turn, has had precisely the reverse effect of that ostensibly desired by CRATs. **It drives the American public to the right and ensures that anything CRT offers is reflexively rejected.**¶ In the absence of scholarly work by white males in the area of race, of course, it is difficult to be sure what reasons they would give for not having rallied behind CRT. Two things, however, are certain. First, the kinds of issues raised by Williams are too important in their implications [\*698] for American life to be confined to communities of color. If the lives of minorities are heavily constrained, if not fully defined, by the thoughts and actions of the majority elements in society, it would seem to be of great importance that white thinkers and doers participate in open discourse to bring about change. Second, given the lack of engagement of CRT by the community of legal scholars as a whole, the discourse that should be taking place at the highest scholarly levels has, by default, been displaced to faculty offices and, more generally, the streets and the airwaves.

#### Personal focus replicates and magnifies the exclusion of technical debates---non-falsifiable claims wreck dialogue and potential for productive conversation

Levasseur 1—Assistant Professor of Communication Studies at West Chester University in West Chester, Pennsylvania. (David, Egocentric Argument and the Public Sphere: Citizen Deliberations on Public Policy and Policymakers, Rhetoric & Public Affairs 4.3 (2001) 407-43, Muse)

While the personal narratives from participants in the study certainly seemed to spark enthusiasm, such engagement came at a significant cost. As with other forms of egocentric argument, narratives that focus on the self are largely unable to steer the conversation towards more transcendent communal outcomes. A group discussion in Ohio reveals this characteristic of personal narratives. In this particular discussion, participants actively debated the issue of whether government should support labor unions: M1: I don't think the unions are going to be wiped out, first of all. And I'm not a proponent of unions. I'm basically anti-union, okay? . . . However, by the same token, unions have got to work the same way in being fair to companies, and I've seen situations where unions, because of some of the things they did, were a disgrace. Perry Power Plant--I know people who were told to go hide--I have nothing to do--go hide. That's WRONG! Okay, I've seen situations where a person, because he's in the union and he has this job classification, then he can't do anything else and he's sitting there for six and a half of his eight hours because he's only needed to do these two things, but he's got to be there because nobody else can do it because the unions state that you've got to have a person to do this and a person to do this and so on. M2: Well, that's his trade though. What do you do? M1: I'm an accountant but I do a lot of other things other than just accounting things. M2: Well, what if somebody came in and tried to take your job--take your livelihood? Something you've trained for, you're second, third generation of this particular . . . M1: Yeah, but I can't be allowed to sit around for six and a half hours out of the eight hours when I could be doing something else but I can't do it because . . . M2: No, that's not my point. [End Page 414] M1: Well, that's my point! If I could do something productive to help the company to help me to help the workers the other six and a half hours, but I'm not allowed to do that because that's not my job classification. Then I'm qualified, I can do it, but I'm not allowed. . . . M2: What about prevailing wage with unions? M1: What do you mean? M2: Well, usually non-union companies are--they gauge their pay scale to union companies with prevailing wage. So if one day, if the prevailing wage with union companies--if it falls and it's gone, then what do you think will happen to the rest of the wages? When the union prevailing wage is wiped out? In this discussion, participants actively debated the issue of whether government should support labor unions; however, they reached no mutual conclusions on the value of labor unions. Divergent opinions were shared, but no attempt at consensus building regarding the role of unions in the economy occurred. Consensus was difficult because when one focuses on self-experience, it is difficult to transcend those experiences. While the conversation raised a number of points on behalf of unions, the anti-union storyteller continued to return to his story. Habermas argues that the public sphere should constitute a discursive space where individuals "transcend the provinciality of their spatiotemporal contexts"--a space where citizens engage in "context transcending validity claims." 39 When citizens ground public policy discussions in personal narratives, they generally fail to transcend the limitations of their personal lives and move to a broader social outlook. It is also interesting to note that in this exchange about unions the personal narrative goes unchallenged. Rhetorical theorists have long recognized that narratives are susceptible to the charge of ungeneralizable evidence. For instance, Richard Whatley observed that one must take care in constructing arguments from examples, because examples are perceived as "exceptions to a general rule" and "will not prove the probability of the conclusion." 40 While such a perception may prove fatal in debates between experts in the technical sphere, they do not seem to have much impact in the deliberative practices of ordinary citizens. In the foregoing exchange, one participant recounted his personal experiences with union workers at the Perry Power Plant. He told the story of union workers who spent endless hours in idleness or in hiding. While one could certainly challenge the generalizability of such a story, the other group members did not offer such challenges. Instead, a pro-union participant shifted the ground of the debate to the alternative issue of "prevailing wage," where the discussion died. Perhaps such personal narratives are difficult to challenge because they establish expertise. Recent scholarly outcry suggests that experts have usurped the public [End Page 415] sphere. 41 Such lamentations are grounded in the fear that technical expertise undermines citizen deliberation by devaluing citizens' views. While this incursion by technical expertise did find its way into the group discussions (citizens citing outside "expert" sources), personally grounded expertise, such as the credibility established in the following exchange from a group in California, appeared far more often: M1: I think they should really look into the military spending. That is just amazing. I was in the military, and it's just a waste. People just rot in the military. It's just amazing how much unnecessary money is used in the military, and how many people that shouldn't have jobs are in the military. M2: That's the Republican job program. M3: I think you can say that about any government organization. In this exchange, a participant recounted his personal experience in the military. With the simple statement, "I was in the military," he established expertise in this realm of public affairs. Just as technical expertise quells discussion, personal expertise has similar effects. In this case, the assertion that "people rot in the military" went unchallenged, and the discussion of military spending quickly came to an end. Such personal credibility may also be less assailable than technical expertise because of its deeply personal nature. Arguments grounded in technical expertise can be challenged for their failure to satisfy certain argumentation standards within a specialized argument field. For instance, a social scientist's findings could be challenged based on a flaw in experimental design. Such a challenge takes issue with the findings; it does not fundamentally take issue with the individual. On the other hand, a challenge to one's lived experience is easily perceived as a challenge to one's life or to one's character. Such challenges can only suggest that one is disingenuous in his or her storytelling or that one's lived experience falls outside the norm. Such challenges seem out of place in a culture grounded in a liberal political tradition that suggests that one should not judge others. 42

#### The real test of our politics should be the ability to advocate for change on behalf of people who aren’t like us and whose experience we don’t share---the 1AC forfeited an opportunity to engage in policy deliberation on broader issues of concern to people who might be unlike ourselves---that’s a reason to prefer our framework for debate

Fred Clark 3-21, ethicist, journalist, former managing editor of Prism Magazine, 3/21/13, “For Sen. Portman, Sen. Kirk and the rest of us: The next big step is the important one,” <http://www.patheos.com/blogs/slacktivist/2013/03/21/for-sen-portman-sen-kirk-and-the-rest-of-us-the-next-big-step-is-the-important-one/>

Earlier this year, Sen. Mark Kirk, R-Ill., returned to Washington after a long, arduous recovery from the stroke he suffered in early 2012. In an interview with Natasha Korecki of the Chicago Sun-Times, Kirk said he:

[Plans] to take a closer look at funding of the Illinois Medicaid program for those with have no income who suffer a stroke, he said. In general, a person on Medicaid in Illinois would be allowed 11 rehab visits, he said.

“Had I been limited to that, I would have had no chance to recover like I did,” Kirk said. “So unlike before suffering the stroke, I’m much more focused on Medicaid and what my fellow citizens face.”

Kirk has the same federal health-care coverage available to other federal employees. He has incurred major out-of-pocket expenses, which have affected his savings and retirement, sources familiar with Kirk’s situation said.

Harold Pollack commended Kirk for those “wise words, sadly earned,” writing: “Such a profound physical ordeal – and one’s accompanying sense of profound privilege in securing more help than so many other people routinely receive — this changes a person.”

Steve Benen was also impressed with Kirk’s hard-won change of heart, but noted:

I do wish, however, that we might see similarly changed perspectives without the need for direct personal relevance. Many policymakers are skeptical about federal disaster relief until it’s their community that sees devastation. They have no interest in gay rights until they learn someone close to them is gay. And they’re unsure of the value of Medicaid until they see its worth up close.

Which brings us to this week, and the news that conservative Republican Sen. Rob Portman of Ohio now supports marriage equality for same-sex couples. The Cleveland Plain-Dealer’s headline for Sabrina Eaton’s report tells the story, “Sen. Rob Portman comes out in favor of gay marriage after son comes out as gay“:

Republican U.S. Sen. Rob Portman on Thursday announced he has reversed his longtime opposition to same-sex marriage after reconsidering the issue because his 21-year-old son, Will, is gay.

Portman said his son, a junior at Yale University, told him and his wife, Jane, that he’s gay and “it was not a choice, it was who he is and that he had been that way since he could remember.”

“It allowed me to think of this issue from a new perspective, and that’s of a Dad who loves his son a lot and wants him to have the same opportunities that his brother and sister would have — to have a relationship like Jane and I have had for over 26 years,” Portman told reporters in an interview at his office.

The conversation the Portmans had with their son two years ago led to him to evolve on the issue after he consulted clergy members, friends — including former Vice President Dick Cheney, whose daughter is gay — and the Bible.

This is a big deal. Portman is the first Republican senator to endorse marriage equality. And he wasn’t previously someone who seemed on the fence — he was adamantly, religiously opposed before.

So the first thing I want to say is congratulations, kudos, and thank you to Portman. I heartily second the commendations and praise he’s receiving from groups like the Human Rights Campaign, Freedom to Marry Ohio, and PFLAG.

For Portman, as for Kirk, an unbidden circumstance expanded his perspective of the world. That new, larger appreciation in turn expanded his understanding of what justice requires — of what justice requires for people who aren’t necessarily just like him.

This is one way we all learn — one way we all become bigger, better people. It is, for almost all of us, a necessary first step toward a more expansive empathy and a more inclusive understanding of justice. Even if it is only a first step, it is an unavoidable one, and we should celebrate the epiphany that challenging circumstance has allowed these senators.

What Steve Benen said about Kirk is still true for Portman. It is good to see his perspective change due to “direct personal relevance,” but it would be better if he could learn to expand his perspective even without it. That’s the next necessary step, the next epiphany awaiting these senators.

Kirk’s long recovery provided his “Aha!” moment when it comes to other people who are also recovering from a stroke. And Portman’s coming to grips with his son’s identity provided him with an “Aha!” moment when it comes to other LGBT people and their families. But it’s not yet clear that either senator has yet taken the next logical step — the next “Aha!” moment. The next step is the big one. It’s the realization that because I didn’t understand others’ situation or others’ perspective until I myself faced the same thing, I should then strive to listen and to learn and to see the world through others’ eyes so that I can better understand the world without having to experience every situation, every injustice, every ordeal personally.

This next step is necessary for justice, which can only come “When those who are not injured feel as indignant as those who are.”

That next step may seem obvious, but epiphanies always seem obvious in retrospect.

Until that next step occurs, though, the slightly expanded empathy of people like Kirk and Portman seems self-serving, like the “cowardice and hypocrisy” of the privileged, as Morf Morford describes it. They still seem to cling to a cramped, self-centered understanding of justice — one that can only grow when their own, personal interests require it to do so. It still lacks the ability to be “indignant” except when one is personally among the “injured.”

“Moral and political positions aren’t supposed to be something you only take when they’ll benefit you,” Mark Evanier wrote. Empathy becomes suspect when it coincides so closely with personal benefit. It begins to look like what Mark Schmitt calls “Miss America compassion“:

Their compassion seems so narrowly and literally focused on the specific misfortune that their family encountered. Having a child who suffers from mental illness would indeed make one particularly passionate about funding for mental health, sure. But shouldn’t it also lead to a deeper understanding that there are a lot of families, in all kinds of situations beyond their control, who need help from government? Shouldn’t having a son whose illness leads to suicide open your eyes to something more than a belief that we need more money for suicide help-lines? Shouldn’t it call into question the entire winners-win/losers-lose ideology of the current Republican Party?

If we take the first step without ever taking the next step — changing our perspective only when “direct personal relevance” demands it and not otherwise — we can fall into what Matthew Yglesias describes as “The Politics of Narcissism“:

Remember when Sarah Palin was running for vice president on a platform of tax cuts and reduced spending? But there was one form of domestic social spending she liked to champion? Spending on disabled children? Because she had a disabled child personally? Yet somehow her personal experience with disability didn’t lead her to any conclusions about the millions of mothers simply struggling to raise children in conditions of general poorness. Rob Portman doesn’t have a son with a pre-existing medical condition who’s locked out of the health insurance market. Rob Portman doesn’t have a son engaged in peasant agriculture whose livelihood is likely to be wiped out by climate change. Rob Portman doesn’t have a son who’ll be malnourished if SNAP benefits are cut. So Rob Portman doesn’t care.

… But if Portman can turn around on one issue once he realizes how it touches his family personally, shouldn’t he take some time to think about how he might feel about other issues that don’t happen to touch him personally? Obviously the answers to complicated public policy questions don’t just directly fall out of the emotion of compassion. But what Portman is telling us here is that on this one issue, his previous position was driven by a lack of compassion and empathy. Once he looked at the issue through his son’s eyes, he realized he was wrong. Shouldn’t that lead to some broader soul-searching? Is it just a coincidence that his son is gay, and also gay rights is the one issue on which a lack of empathy was leading him astray? That, it seems to me, would be a pretty remarkable coincidence. The great challenge for a senator isn’t to go to Washington and represent the problems of his own family. It’s to try to obtain the intellectual and moral perspective necessary to represent the problems of the people who don’t have direct access to the corridors of power.

Senators basically never have poor kids. That’s something members of Congress should think about.

Will Femia notes that this widely shared observation prompted an insightful — and darkly funny — meme about “hypothetical Republican empathy.”

“If empathy only extends to your flesh and blood, we gotta start shoving people into those families,” Rachel Maddow said.

“Now all we need is 59 more gay Republican kids,” Dave Lartigue wrote.

“Perhaps if we could get the Republican caucus to adopt gay, black Hispanic illegal-immigrant children, who will grow up to be denied insurance due to pre-existing conditions, we’d make some more social progress,” mistermix wrote.

“Eventually one of these Republican congressmen is going to find out his daughter is a woman, and then we’re all set,” Anil Dash tweeted.

And Andy Borowitz chimed in with “Portman Inspires Other Republicans to Stop Speaking to Their Children.”

Endless variations of that joke circulated this week because that joke offers limitless possibilities — as limitless as the stunted “hypothetical empathy” of “Miss America compassion” is limited.

That joke and Yglesias’ argument are correct. An empathy that never moves beyond that first step and that first epiphany is morally indistinct from selfishness. To take that first step without the next one is only to move from “me first” to “me and mine first.” (David Badash and Jonathan Chait also have insightful posts making this argument.)

But no one can take that next big step until they take the first one. So I’m less interested in criticizing Portman or Kirk or anyone else in their position than I am in figuring out how we can urge and encourage them to take that next big step. How can we facilitate the next epiphany?

That’s the bigger issue, the more important challenge. Ari Kohen tackles this challenge in a bookish post building on Richard Rorty’s thoughts. Kohen is interested most of all in how “to accomplish this progress of sentiments, this expanding of our sense of solidarity”:

The best way to convince the powerful that their way of thinking about others needs to evolve is to show them the ways in which individuals they consider to be “Other” are, in fact, much more closely akin to them than they ever realized. It is, in short, to create a greater solidarity between the powerful and the weak based on personal identification.

Rob Portman’s change of heart is a good example of the way in which we ultimately achieve a progress of sentiments that leads to the equal treatment of more and more people. Viewed in this way, it’s really not something people on the Left ought to be criticizing; it’s something we should be working to encourage for those without the sort of immediate personal connection that Portman fortunately had.

(Note that we are, yet again, confronted with the idea of ethics as a trajectory.)

The vital question, then, is how? How can we encourage “a progress of sentiments” along a trajectory “that leads to the equal treatment of more and more people”?

Part of the answer, I think, is to remember how we ourselves were encouraged along — how we ourselves each came to take that next step, how we ourselves came to have that second epiphany.

That’s the approach that Grace at Are Women Human? takes in a firm-but-generous post titled “Changes of heart and our better selves.” Grace highlights Portman’s case as an example of “the tensions between celebrating progress and recognizing that there’s still work to be done.” She draws on her own story and history for humility and perspective, and as a guide to helping others see and take the next steps in their journey:

How easy it is to say Portman … should have done better and forget that I wasn’t so different, not so long ago.

The honest truth: it was getting to know and love queer people that, more than anything else, led me away from the bigotry I’d been taught as faith. … It’s important for me not to forget this, or that it took the thought that my not-yet-born child might be transgender for me to realize that I needed to educate myself about gender identity. It would be dangerous to indulge the fiction that I’ve always held the moral “high ground.” …

That history — her own and that of others who have come to a more inclusive, expansive understanding of justice — informs the advice, and the warning, that follows:

Portman isn’t an exception in having, and indulging, the luxury of ignoring the consequences of politics that don’t affect him personally.

This is a feature, not a bug, of our culture and political system. Power is concentrated in the hands of people who routinely make policy on matters they have little experience or real stakes in. You don’t need any conscious malice in this setup to produce policy that has devastating effects on the communities these issues touch most directly (though there’s plenty of malice, too). All you need is a system run by people who can afford not to care that much about policies that mostly impact other people’s lives.

Which, I suppose, is why civil rights activism often depends on cultivating these very moments of identification with the “other,” on spontaneous and planned appeals to emotion and basic decency. Systemic lack of incentive to care has to be confronted with stories that get politicians or the public to care.

Emmitt Till’s open casket. Rosa Parks’ carefully planned protest of bus segregation – as a more “respectable” face of black resistance than Claudette Colvin. Hydeia Broadbent and Ryan White as the faces of children with HIV. DREAMers taking over public spaces, stories about families torn apart by racist, classist, unjust immigration policies.

… Rob Portman is not an exception. He’s the rule. I don’t say this to suggest that we cut him slack for finally arriving at a basic (and still incomplete) recognition of the humanity of queer people. Nor am I arguing that we shouldn’t critique the circumstances around his change of heart.

What I hope is that we don’t forget ourselves in these calls to do better. That we don’t fall into the deceptive confidence that because we know or do better, we’ve arrived…or forget how many of us had to change and grow to get to where we are now. We’re all capable of fooling ourselves into thinking our standpoints are clearly “rational” or “moral” when it comes to issues that don’t affect us.

# 1AR

#### Korematsu was never constitutionally overturned

Jennifer K. Elsea 13, Legislative Attorney, CRS, “Detention of U.S. Persons as Enemy Belligerents”, July 25, http://www.fas.org/sgp/crs/natsec/R42337.pdf

The Japanese internment program has since been widely discredited, 201 the convictions of some persons for violating the orders have been vacated, 202 and the victims have received compensation, 203 but the constitutionality of detention of citizens during war who are deemed dangerous has never expressly been ruled per se unconstitutional. 204 In the cases of citizens of other ethnic backgrounds who were interned or otherwise subject to restrictions under Executive Order 9066, courts played a role in determining whether the restrictions were justified, sometimes resulting in the removal of restrictions. 205 Because these persons were afforded a limited hearing to determine their dangerousness, a court later ruled that the Equal Protection Clause of the Constitution did not require that they receive compensation equal to that which Congress granted in 1988 to Japanese-American internees. 206