# 1AC – Round 3

### 1AC – Internment

#### CONTENTION 1: INTERNMENT

#### The Internment Cases have not been analyzed by modern courts yet

Craig Green 11, Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School, 2011, "Ending the Korematsu Era: An Early View from the War on Terror Cases," Northwestern University School of Law, Vol. 105, No. 3,www.law.northwestern.edu/lawreview/v105/n3/983/LR105n3Green.pdf

Korematsu’s Doctrinal History.— Despite Korematsu’s notoriety, some of its history is known only by experts. 30 My first project is to show that the Justices who decided Korematsu perceived that case differently than many modern observers do. In the 1940s, although race was important for some members of the Court, claims of military necessity overwhelmed the majority’s hesitation, and even the dissenting Justices were less committed to modern equal protection than is commonly recognized. 31 This specific contextual evidence about Korematsu is an important starting point for reinterpreting the Korematsu era as a whole. ¶ After the devastation of Pearl Harbor in December 1941, fears spread about other attacks that might be supported by spies and saboteurs within the United States. 32 President Roosevelt responded in February 1942 by authorizing the creation of military areas “from which any or all persons may be excluded” and in which “the right of any person to enter, remain in, or leave shall be subject to whatever restrictions [designated officials] may impose.” 33 To implement this order, Lieutenant General DeWitt split the entire Pacific Coast into military areas. 34 Congress then criminalized violations of any military-area regulations with a maximum punishment of $5000 and one year in prison. 35 ¶ Beginning on March 27, 1942, DeWitt ordered a “curfew” for alien Germans and Italians, and for all persons of Japanese ancestry throughout much of Arizona, California, Washington, and Oregon. 36 This was no ordinary curfew to keep people off the streets. DeWitt’s order was closer to house arrest, for it required regulated persons to be home from 8:00 p.m. to 6:00 a.m. and to be in their workplace, within five miles of home, or traveling between work and home at all other times. 37¶ Not six months after Pearl Harbor, DeWitt began ordering persons of Japanese ancestry to “evacuate” military zones, though that word was a euphemism as well. 38 Every family of Japanese ancestry had to report to Civil Control Stations or Assembly Centers, and appearance at such facilities was typically followed by indefinite confinement at Relocation Centers in Ida- ho, Utah, Arkansas, Wyoming, Arizona, Colorado, and remote parts of California. 39 For the large population of Japanese-Americans on the Pacific Coast, DeWitt’s orders must have seemed more like racially targeted imprisonment than evacuation.¶ The Supreme Court issued two decisions evaluating these governmental policies. In 1943, Hirabayashi upheld a defendant’s conviction for violating DeWitt’s curfew, and Korematsu in 1944 upheld a defendant’s conviction for violating DeWitt’s reporting requirement. 40 Both cases involved exactly the same claims of military necessity and exactly the same legal authorities. 41 Indeed, the government’s brief in Korematsu explicitly incorporated by reference much of the factual evidence that had been presented the year before in Hirabayashi. 42¶ The President’s core claim in both cases was that a racially homogenous wartime enemy was supported by a set of aliens and citizens in the United States who could not be individually identified. 43 To meet such dire asserted threats, the military claimed it was necessary to subject a racially determined mass of potential suspect s to curfews, reporting, and evacuation. The Court upheld such executive decisions, which Congress had approved ex ante, by a unanimous vote in Hirabayashi and by a six-vote majority in Korematsu. 44¶ To modern observers, Hirabayashi and Korematsu seem astonishingly misguided. Both involved explicit racial discrimination, and the government had no credible argument that such discrimination was needed to secure the homeland. 45 Twenty-first-century doctrine and legal culture typically require very strong justifications to support racial classifications. 46 Because the policies in Hirabayashi and Korematsu lacked such support, their racial discrimination would be unconstitutional today, and some modern analysts have not looked much further into the Court’s analysis.

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

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

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

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

G. Edward White 11, Distinguished Professor of Law and University Professor, University of Virginia School of Law, December 2011, "Symposium: Supreme Mistakes: Determining Notoriety in Supreme Court Decisions," Pepperdine Law Review, 39 Pepp. L. Rev. 197, lexis nexis

II. Examples of Notorious Mistakes: A First Look¶ ¶ In the long history of Supreme Court jurisprudence, a small number of cases have been consistently identified as notorious mistakes by commentators. Those cases need to be distinguished from a much larger group of cases that were severely criticized at the time they were decided but over the years have secured a degree of acceptance. Martin v. Hunter's Lessee, n4 McCulloch v. Maryland, n5 Brown v. Board of Education, n6 and Miranda v. Arizona n7 are in the larger group of cases. The smaller group seems to include only a few cases, which appear to be distinguished by the fact that successive generations of commentators have continued to regard them as notorious. What gives those cases their notoriety? Perhaps a comparison of two cases regularly placed on the list of notorious mistakes will aid us in that inquiry.¶ [\*199] Dred Scott v. Sandford n8 and Korematsu v. United States n9 are likely to appear on nearly everyone's list of notorious mistakes. n10 Some sense of why can be gleaned from a characterization of Dred Scott by David Currie in 1985, and of Korematsu in a 1982 Congressional report on that case. Currie described Dred Scott as "bad policy and bad judicial politics ... [and] also bad law." n11 The Congressional report stated that Korematsu had been "overruled in the court of history." n12 Taken together, those characterizations of Dred Scott and Korematsu suggest that four characteristics have been attributed to notorious decisions: misguided outcomes, a flawed institutional stance on the part of the Court, deficient analytical reasoning, and being "on the wrong side" of history with respect to their cultural resonance.¶ The Dred Scott decision concluded that African-American slaves and their descendants were not "citizens of the United States" and hence ineligible to sue in the federal courts. n13 The decision further concluded that Congress could not outlaw slavery in federal territories because to do so would constitute an interference with the Fifth Amendment property rights of slaveholders. n14 The Korematsu decision allowed the federal government to evacuate American citizens of Japanese origin from the West Coast, where they were detained in internment centers during the course of World War II, even though the sole basis of their evacuation and detention was their national origin, and even though Americans of German or Italian extraction were not comparably treated**.** n15 Thus, Dred Scott committed the Court to the propositions that the Constitution protected the "rights" of humans to own other humans as property, and that African-Americans descended from slaves were a "degraded race" not worthy of United States citizenship, whereas Korematsu committed the Court to the proposition that American citizens of a particular ethnic origin could be summarily incarcerated by the government simply because of their ethnicity. Those [\*200] propositions, as policy statements, seem blatantly at odds with the foundational principles of American civilization that all persons are created equal and may not be arbitrarily deprived of their liberty by the state.¶ The outcomes reached in Dred Scott and Korematsu appear to suggest that the Court found the policies of slavery and discrimination on the basis of ethnicity to be constitutionally legitimate. The decisions could also be seen as reflecting an inappropriate institutional stance by the Court with respect to its role of determining the constitutionality of the actions of other branches of government.¶ In Dred Scott the Court was asked to decide whether an African-American slave who had been taken by his owner into a federal territory where slavery was not permitted, and then "voluntarily" returned to a slave state, could sue for his freedom in federal court. n16 A majority of the Court found that African-American slaves were ineligible to sue in federal court. n17 That finding made any inquiry into the constitutional status of slavery in the federal territories irrelevant to the decision, but Chief Justice Roger Taney's opinion, which was characterized as the "opinion of the court," went on to conclude that the Due Process Clause of the Fifth Amendment, which according to Taney protected the property rights of slave owners, prevented Congress from abolishing slavery in the territories. n18¶ The interaction of slavery and westward expansion has been recognized as one of the most deeply contested political issues of the antebellum period. The power of Congress to decide the status of slavery in federal territories had been acknowledged by supporters and opponents of slavery ever 1789, when Congress divided land acquired from Virginia, North Carolina, Pennsylvania, New York, and Connecticut into "northwest" and "southwest" portions, with the Ohio River serving as a boundary, and outlawed slavery in the northwest section while remaining silent on it in the southwest section. n19¶ As slavery became a polarizing national issue in the early nineteenth century, it was generally conceded that although the federal government had no power to abolish slavery in states, it appeared to retain that power in federal territories. n20 All of the political compromises related to the westward expansion of slavery that were fashioned by Congress between 1820 and 1850 proceeded on that assumption. Moreover, as the United States acquired a vast amount of new territory between 1803 and 1853, the attitude [\*201] of Congress toward slavery in portions of that territory was thought to foreshadow the attitude of residents of those portions when states formed from them sought to enter the Union. The process by which Congress gave permission to new states to enter the Union was heavily influenced by expectations about whether the states would be free or slave, and those expectations were influenced by Congress's treatment of slavery in the portions of territory from which prospective states were carved out. n21¶ By reaching out to decide the constitutional status of slavery in the federal territories in Dred Scott, the Taney Court treated the delicate balancing of free and slave territories, and free and slave states, as if it had been based on an erroneous assumption. Suddenly, Congress had no power to outlaw slavery in any federal territory. n22 That conclusion represented a dramatic intervention by the Court in an extremely sensitive political issue that Congress had sought to keep in equipoise. Moreover, the intervention was not necessary to the decision in Dred Scott.¶ Taney's conclusion that Congress had no power to outlaw slavery in the federal territories rested on two propositions. First, he announced that Congress's constitutional power to make rules and regulations for federal territories n23 extended only to territory within the United States in 1789. n24 Second, he maintained that the Due Process Clause of the Fifth Amendment protected property in slaves. n25 Both propositions were novel. Taney'sreading of the Territories Clause of the Constitution would have prevented Congress from exercising any of its enumerated powers outside the original thirteen states, n26 and Taney's interpretation of the Due Process Clause could not easily be squared with federal or state bans on the international or interstate slave trade, both of which were in place at the time of Dred Scott. n27¶ In short, Dred Scott can be seen as reaching a pernicious result, representing a categorical judicial resolution of an issue long regarded as deeply contested in the political branches of government, and resting on some dubious legal arguments. In addition, it was described as a mistake by [\*202] contemporaries, n28 the Republican Party adopted a platform in the 1860 election pledging to continue to outlaw slavery in federal territories in defiance of the decision, n29 and it was explicitly overruled by the Thirteenth and Fourteenth Amendments to the Constitution. n30¶ One could construct a similar analysis of the Korematsu decision. It gave constitutional legitimacy to the incarceration of large numbers of American residents of Japanese descent simply on the basis of their ethnicity. The internment program made no effort to distinguish aliens from citizens or Japanese loyal to the United States from those loyal to Japan. n31 Internments were of indefinite duration. They were often accompanied by the confiscation of property owned by Japanese residents. Detainees could not challenge their detentions through writs of habeas corpus. And even though Justice Hugo Black's opinion for the Court asserted that Japanese residents of the West Coast were "not [interned] because of [their] race" but "because we are at war with the Japanese Empire," n32 the United States was also at war with Germany and Italy at the time, and few residents of German or Italian descent were interned during the course of that war.¶ Whereas the Court's posture with respect to other branches of government in Dred Scott might be described as awkwardly interventionist, its institutional posture in Korematsu might be described as awkwardly supine. The Court in Korematsu merely posited that military authorities had determined that allowing Japanese to remain on the West Coast posed threats of espionage and sabotage because Japan might invade the West Coast, and that relocating all Japanese to internment centers was necessary because there was no easy way to distinguish "loyal" from "disloyal" members of the Japanese population. n33 Although the Korematsu majority maintained that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and courts "must subject them to the most rigid scrutiny," n34 it arguably did not subject the restrictions on Japanese residents of the West Coast to any scrutiny at all. It simply noted that exclusion of "the whole group [of Japanese]" n35 from the West Coast was justified because of military authorities' concerns about espionage and sabotage by the Japanese on the West Coast, and their inability to "bring about an immediate segregation of the disloyal from the loyal." n36 The [\*203] Korematsu majority made no effort to determine whether military authorities had attempted to ascertain the loyalty of particular Japanese, or whether they had attempted to detain Germans or Italians anywhere in the United States. Instead, it concluded that the military authorities who ordered Japanese residents on the West Coast to leave their homes and report to "Assembly Centers," the first stage in their internment, were **justified in doing so because they "considered that the need for action was great, and time was short."** n37¶ The legal arguments mounted by Black for the Korematsu majority were no more statured than those employed by Taney in Dred Scott. Although Black rhetorically endorsed strict scrutiny for acts restricting the civil rights of racial minorities, he failed to subject the internment policy to searching review while denying that the internment policy was racially motivated. Justice Robert Jackson pointed out in dissent that the standard of review implemented by Black's opinion - whether the military reasonably believed that one of its policies was justified by a grave, imminent danger to public safety - could not realistically be applied by courts. n38 Moreover, the Korematsu Court had not heard any evidence on what the military believed or whether they could distinguish loyal from disloyal Japanese. It would subsequently be revealed that most of the basis for the internment order rested on stereotyped assumptions about the "unassimilated" status of Japanese communities in America rather than on military necessity, and government officials concealed this evidence from the Court. n39¶ Part of the reason that Korematsu would be "overruled in the court of history" resulted from the Court's subsequent implementation of the strict scrutiny standard for racial classifications proposed by Black in a series of cases reviewing classifications of African-Americans on the basis of their race. n40 Once the Court began to put some teeth into its review of policies affecting the civil rights of racial minorities, its rhetorical posture in Korematsu appeared disingenuous. In addition, the factors that led to the internment policy being formulated and upheld (uninformed stereotyping of a racial minority by military and civilian officials and reflexive deference on the part of the Court to the decisions of military officials in times of war) suggested that unless the Court actually followed through on its promise to subject racial discrimination to exacting scrutiny, the Korematsu precedent [\*204] might become, as Jackson put it, "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." n41¶ III. Characteristics of "Mistaken" Decisions: A Further Analysis¶ ¶ Dred Scott and Korematsu thus share pernicious outcomes, a questionable institutional stance on the part of the Court, flawed legal reasoning, and, over time, a location on the wrong side of history. At first glance those criteria might appear to be useful baselines for identifying notorious Supreme Court decisions, but a closer look at the criteria suggests that three of them seem heavily dependent on the fourth.

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

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

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

#### Racism must be rejected in every instance

Albert Memmi 2k, Professor Emeritus of Sociology @ U of Paris, Naiteire, Racism, Translated by Steve Martinot, p. 163-165

The struggle against racism will be long, difficult, without intermission, without remission, probably never achieved. Yet, for this very reason, it is a struggle to be undertaken without surcease and without concessions. One cannot be indulgent toward racism; one must not even let the monster in the house, especially not in a mask. To give it merely a foothold means to augment the bestial part in us and in other people, which is to diminish what is human. To accept the racist universe to the slightest degree is to endorse fear, injustice, and violence. It is to accept the persistence of the dark history in which we still largely live. it is to agree that the outsider will always be a possible victim (and which man is not himself an outsider relative to someone else?. Racism illustrates, in sum, the inevitable negativity of the condition of the dominated that is, it illuminates in a certain sense the entire human condition. The anti-racist struggle, difficult though it is, and always in question, is nevertheless one of the prologues to the ultimate passage from animosity to humanity. In that sense, we cannot fail to rise to the racist challenge. However, it remains true that one’s moral conduit only emerges from a choice: one has to want it. It is a choice among other choices, and always debatable in its foundations and its consequences. Let us say, broadly speaking, that the choice to conduct oneself morally is the condition for the establishment of a human order, for which racism is the very negation. This is almost a redundancy. One cannot found a moral order, let alone a legislative order, on racism, because racism signifies the exclusion of the other, and his or her subjection to violence and domination. From an ethical point of view, if one can deploy a little religious language, racism is ‘the truly capital sin. It is not an accident that almost all of humanity’s spiritual traditions counsels respect for the weak, for orphans, widows, or strangers. It is not just a question of theoretical morality and disinterested commandments. Such unanimity in the safeguarding of the other suggests the real utility of such sentiments. All things considered, we have an interest in banishing injustice, because injustice engenders violence and death. Of course, this is debatable. There are those who think that if one is strong enough, the assault on and oppression of others is permissible. Bur no one is ever sure of remaining the strongest. One day, perhaps, the roles will be reversed. All unjust society contains within itself the seeds of its own death. It is probably smarter to treat others with respect so that they treat you with respect. “Recall.” says the Bible, “that you were once a stranger in Egypt,” which means both that you ought to respect the stranger because you were a stranger yourself and that you risk becoming one again someday. It is an ethical and a practical appeal—indeed, it is a contract, however implicit it might be. In short, the refusal of racism is the condition for all theoretical and practical morality because, in the end, the ethical choice commands the political choice, a just society must be a society accepted by all. If this contractual principle is not accepted, then only conflict, violence, and destruction will be our lot. If it is accepted, we can hope someday to live in peace. True, it is a wager, but the stakes are irresistible.

#### The Internment Case precedents make future internment likely

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

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

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

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

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

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

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

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

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

Craig Green 11, Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School, 2011, "Ending the Korematsu Era: An Early View from the War on Terror Cases," Northwestern University School of Law, Vol. 105, No. 3,www.law.northwestern.edu/lawreview/v105/n3/983/LR105n3Green.pdf

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

### Plan

#### The United States federal judiciary should restrict the use of the Internment Cases as a basis for war authorization of Presidential detention without charge during conflict because of overreliance on military necessity.

### 1AC – Solvency

#### CONTENTION 2: SOLVENCY

#### The federal judiciary should repudiate the Internment Cases officially---prevents devastating social and political conflicts

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

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

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

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

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

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

Craig Green 11, Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School, 2011, "Ending the Korematsu Era: An Early View from the War on Terror Cases," Northwestern University School of Law, Vol. 105, No. 3,www.law.northwestern.edu/lawreview/v105/n3/983/LR105n3Green.pdf

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

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

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

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

#### Only courts can signal that future internment will be avoided

David A. Harris 11, Professor of Law, University of Pittsburgh School of Law, Winter 2011, "On the Contemporary Meaning of Korematsu: 'Liberty Lies in the Hearts of Men and Women,'" Missouri Law Review, Volume 76, Number 1, law.missouri.edu/lawreview/files/2012/11/Harris.pdf

Despite these criticisms, **Americans cannot depend on these cases to tell them what a court would do if faced with another attack and a plan for internment**. None of the Guantanamo cases relied upon, or even expressed any relation to, the law of equal protection; doctrinally, they rested on the President’s executive and wartime powers. And perhaps more important than what these cases struck down is what they did allow. The best example is Hamdi, in which Justice O’Connor famously refused to grant the executive virtually unlimited constitutional power in wartime. 148 Hamdi actually allows the executive to hold American citizens indefinitely, without charges or trial, as enemy combatants. 149 While some minimal degree of process is due, 150 the bottom line is that the Court conceded this power to the President with very little in the way of checks or balances. Similarly, in Hamdan , the Court ruled that only Common Article Three of the Geneva Conventions, the most basic set of protections available, applied to enemy combatants at Guantanamo. 151 Hamdan also found that it would be procedurally adequate for military commissions, if modified, to try these prisoners. 152 ¶ If there is a relationship between the enemy combatants cases and what the Court might do if faced with a Korematsu decision again, it is that the Court in these cases largely – even if not entirely – deferred to the power of the executive. One can see the enemy combatant cases as a counterweight to Korematsu only by blinding oneself to the fact that the enemy combatant cases allowed indefinite detention of American citizens in the name of national security, with only minimal due process available. Thus, rather than signaling that the Court would stand in the way of another internment, a plausible reading of **these cases indicates that the Court has, at the very least,** left the door open for it**.**

### 1AC – Impact Framing

#### CONTENTION 3: IMPACT FRAMING

#### Overreliance on utility principles to justify executive detention power turns the lesser evil into the greater by obliterating restraints on the conduct of war – balancing legal checks and balances with security is necessary to create optimal outcomes for both

Richard Ashby Wilson 5, the Gladstein Distinguished Chair of Human Rights and Director of the Human Rights Institute at the University of Connecticut, Human Rights in the War on Terror, p. 19-21

Michael Ignatieff’s ‘lesser evil’ ethics and overreliance on a consequentialist ethics place him much closer to the anti-rights philosophical tradition of utilitarianism than the liberal tradition of human rights. Philosophically and politically, utilitarian consequentialism is about as far from an ethics of human rights as one can travel, and this is borne out in the DOJ memo’s dramatic bolstering of executive power and the sweeping away of the rights of prisoners of war. Jonathan Raban might have a point in suggesting that Ignatieff has become the ‘in-house philosopher’ of the ‘terror warriors’ (2005: 22). Lesser evil reasoning makes a virtue out of lowering accepted standards and surrendering safeguards on individual liberties. In the hands of government officials, it enables unrestrained presidential authority and a disregard for long-standing restraints on the conduct of war. Anyone remotely familiar with the history of twentieth-century Latin America will also be accustomed to ‘lesser evil’ excuses for human rights abuses, given their pervasiveness in the National Security Doctrine of numerous military dictatorships. Ignatieff is aware that a lesser evil ethics can take us down a slippery slope: ‘If a war on terror may require lesser evils, what will keep them from slowly becoming the greater evil? The only answer is democracy itself . . . The system of checks and balances and the division of powers assume the possibility of venality or incapacity in one institution or the other’ (2004: 10-11). This argument now seems rather credulous. Evidence gathered from Abu Ghraib, Guantanamo Bay and U.S. prisons in Afghanistan suggests that torture, the keeping of ‘ghost detainees’ and other violations of the Geneva Conventions were endemic within the system of military custody. By the time government officials weakly diverted blame to by denouncing a few low-ranking ‘bad apples’ in the 272nd Military Police Company, the damage had already been done, to the prisoners and to America’s standing in Iraq and the world. Even if the connection between a lesser evil ethics and a disregard for prisoners’ human rights is coincidental rather than intrinsic, lesser evil advocates have been wildly overconfident about the probity of government and the ability of democratic institutions to monitor closely the boundary between coercion and torture. The evidence points to the contrary view; that the executive branch, at the very least, fostered a legal setting in which prisoner abuse could flourish and excluded any congressional oversight. The monitoring procedures that were in place did not prevent such abuse from becoming widespread and symptomatic. The ‘lesser evil’ moral calculus that simplifies difficult decision making in an ‘age of terrorism’ is a little more complicated for others, and the DOJ memo should have at least demonstrated an awareness that the standard necessity defence case has been challenged comprehensively in jurisprudence and moral philosophy. In the 1970s, the late philosopher Bernard Williams carried out a critique of utilitarianism’s philosophy of the law so devastating that he concluded ‘the simple-mindedness of utilitarianism disqualifies it totally…the day cannot be far off in which we hear no more of it’ (1973: 150). Alas, this was the only part of Williams’ critique that was wide of the mark, since utilitarianism will probably always appeal to those longing for greater executive power. Williams examines a scenario analogous to the necessity defence cases found in the DOJ memo. He considers the case of a man, Jim, who is dropped into a South American village where he is the guest of honor. There, a soldier, Pedro, presents him with the dilemma of intentionally killing one man and saving another nineteen souls, whom Pedro was about to execute. Williams finds the utilitarian answer, that obviously Jim should kill one man to save nineteen, inadequate on a number of grounds. Generally stated, Williams’ position is that utilitarianism ignores individual integrity in its quest for the general good and it neglects the point that each of us are morally responsible for what we do, not what others do. Jim is responsible for his own actions and his not killing one man is not causal to Pedro’s subsequent killing of twenty. To advise Jim to torture or kill the one to save the many is to treat Jim as an impersonal and empty channel for effects in the world, or in Williams’ words, as a janitor of a system of values whose role is not to think or feel, but just to mop up the moral mess. The utilitarian perspective portrays an anxiety about the long-term psychological effects on the agent, say, a person’s feelings or remorse for an act of murder, as self-indulgent. It ignores the life projects to which Jim is committed, and his obligations to friends and family to act in a certain way It treats these commitments as irrational and of no consequence in its moral calculus of the greater good. In this critique, utilitarianism, of the kind that has characterized the legal counsel to President Bush in the ‘war on terror’, ignores individual moral agency and strips human life of what makes it worthwhile. Seeing persons as ends in themselves and not as means to other ends corresponds with a Kantian defence of human rights and liberal democracy more generally. In the struggle against Islamist terrorists, we are well advised to temper our desire for good consequences (which can seldom be predicted in advance) with an equal concern with intentions and integrity of motives. Consequences matter and integrity and good intentions are not in themselves sufficient. Yet developing an approach that is not overreliant on consequentialism and which foregrounds human agency, motivations and intentions could provide enduring grounds for defending human rights in the present climate. It could better equip us with the fundamental ethical principles to go about recombining human rights and security, and work through more carefully which suspensions of ordinary domestic laws and international rule of law are defensible, and which are not.

#### Specificity reduces the probability of their predictions because of the conjunctive fallacy and reduces the ability to cope with the highest magnitude impacts

Eliezer Yudkowsky 6, 8/31. Singularity Institute for Artificial Intelligence Palo Alto, CA. “Cognitive biases potentially affecting judgment of global risks, Forthcoming in Global Catastrophic Risks, eds. Nick Bostrom and Milan Cirkovic, singinst.org/upload/cognitive- biases.pdf

The conjunction fallacy similarly applies to futurological forecasts. Two independent sets of professional analysts at the Second International Congress on Forecasting were asked to rate, respectively, the probability of "A complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983" or "A Russian invasion of Poland, and a complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983". The second set of analysts responded with significantly higher probabilities. (Tversky and Kahneman 1983.) In Johnson et. al. (1993), MBA students at Wharton were scheduled to travel to Bangkok as part of their degree program. Several groups of students were asked how much they were willing to pay for terrorism insurance. One group of subjects was asked how much they were willing to pay for terrorism insurance covering the flight from Thailand to the US. A second group of subjects was asked how much they were willing to pay for terrorism insurance covering the round-trip flight. A third group was asked how much they were willing to pay for terrorism insurance that covered the complete trip to Thailand. These three groups responded with average willingness to pay of $17.19, $13.90, and $7.44 respectively. **According to probability theory,** adding additional detail **onto a story** mustrender the story less probable. It is less probable that Linda is a feminist bank teller than that she is a bank teller, since all feminist bank tellers are necessarily bank tellers. Yet **human psychology seems to follow the rule that** adding an additional detail can make the story more plausible**.** People might pay more for international diplomacy intended to prevent nanotechnological warfare by China, than for an engineering project to defend against nanotechnological attack from any source. The second threat scenario is less vivid and alarming, but the defense is more useful because it is more vague. More valuable still would be strategies which make humanity harder to extinguish without being specific to nanotechnologic threats - such as colonizing space, or see Yudkowsky (this volume) on AI. Security expert Bruce Schneier observed (both before and after the 2005 hurricane in New Orleans) that the U.S. government was guarding specific domestic targets against "movie-plot scenarios" of terrorism, at the cost of taking away resources from emergency-response capabilities that could respond to any disaster. (Schneier 2005.) **Overly detailed reassurances can also create** false perceptions of safety: "X is not an existential risk and you don't need to worry about it, because A, B, C, D, and E"; where the failure of any one of propositions A, B, C, D, or E potentially extinguishes the human species. "We don't need to worry about nanotechnologic war, because a UN commission will initially develop the technology and prevent its proliferation until such time as an active shield is developed, capable of defending against all accidental and malicious outbreaks that contemporary nanotechnology is capable of producing, and this condition will persist indefinitely." Vivid, specific scenarios **can inflate our probability estimates of security, as well as misdirecting defensive investments into needlessly narrow or implausibly detailed risk scenarios**. More generally, **people tend to** overestimate conjunctive probabilities **and** underestimate disjunctive probabilities. (Tversky and Kahneman 1974.) That is, people tend to overestimate the probability that, e.g., seven events of 90% probability will all occur. Conversely, people tend to underestimate the probability that at least one of seven events of 10% probability will occur. Someone judging whether to, e.g., incorporate a new startup, must evaluate the probability that many individual events will all go right (there will be sufficient funding, competent employees, customers will want the product) while also considering the likelihood that at least one critical failure will occur (the bank refuses a loan, the biggest project fails, the lead scientist dies). This may help explain why only 44% of entrepreneurial ventures survive after 4 years. (Knaup 2005.) Dawes (1988, p. 133) observes: 'In their summations lawyers avoid arguing from disjunctions ("either this or that or the other could have occurred, all of which would lead to the same conclusion") in favor of conjunctions. Rationally, of course, disjunctions are much more probable than are conjunctions.' **The scenario of** humanity going extinctin the next century **is a** disjunctive event**.** It could happen as a result of any of the existential risks discussed in this book - or some other cause which none of us foresaw. Yet for a futurist, disjunctions make for an awkward and unpoetic-sounding prophecy.

#### Deciding on the basis of the 1% risk calculation erodes priority-setting & triggers paralysis when action is needed.

David Meskill 9, professor at Colorado School of Mines and PhD from Harvard, “The "One Percent Doctrine" and Environmental Faith,” Dec 9, <http://davidmeskill.blogspot.com/2009/12/one-percent-doctrine-and-environmental.html>

Tom Friedman's piece today in the Times on the environment (http://www.nytimes.com/2009/12/09/opinion/09friedman.html?\_r=1) is one of the flimsiest pieces by a major columnist that I can remember ever reading. He applies Cheney's "one percent doctrine" (which is similar to the environmentalists' "precautionary principle") to the risk of environmental armageddon. But this doctrine is both intellectually incoherent and practically irrelevant. It is intellectually incoherent because it cannot be applied consistently in a world with many potential disaster scenarios. In addition to the global-warming risk, there's also the asteroid-hitting-the-earth risk, the terrorists-with-nuclear-weapons risk (Cheney's original scenario), the super-duper-pandemic risk, etc. Since each of these risks, on the "one percent doctrine," would deserve all of our attention, we cannot address all of them simultaneously. That is, even within the one-percent mentality, we'd have to begin prioritizing, making choices and trade-offs. But why then should we only make these trade-offs between responses to disaster scenarios? Why not also choose between them and other, much more cotidien, things we value? Why treat the unlikely but cataclysmic event as somehow fundamentally different, something that cannot be integrated into all the other calculations we make? And in fact, this is how we behave all the time. We get into our cars in order to buy a cup of coffee, even though there's some chance we will be killed on the way to the coffee shop. We are constantly risking death, if slightly, in order to pursue the things we value. Any creature that adopted the "precautionary principle" would sit at home - no, not even there, since there is some chance the building might collapse. That creature would neither be able to act, nor not act, since it would nowhere discover perfect safety. Friedman's approach reminds me somehow of Pascal's wager - quasi-religious faith masquerading as rational deliberation (as Hans Albert has pointed out, Pascal's wager itself doesn't add up: there may be a God, in fact, but it may turn out that He dislikes, and even damns, people who believe in him because they've calculated it's in their best interest to do so). As my friend James points out, it's striking how descriptions of the environmental risk always describe the situation as if it were five to midnight. It must be near midnight, since otherwise there would be no need to act. But it can never be five \*past\* midnight, since then acting would be pointless and we might as well party like it was 2099. Many religious movements - for example the early Jesus movement - have exhibited precisely this combination of traits: the looming apocalypse, with the time (just barely) to take action.

#### Traditional risk calculus locks in unlimited executive control---democratic controls are the best check on decision-making that sacrifices the whole world for power

Dr. Mary O’Brien 2k, Ph.D, environmental scientist and activist, 2000, (“Making Better Environmental Decisions,” Pg-xvii-xviii

This book is based on the understanding that it is not acceptable for people to tell you that the harms to which they will subject you and the world are safe or insignificant. You deserve to know good alternative to those harms, and you deserve to help decide which alternative will be chosen. Underlying this book, however, is a less explicitly stated personal belief, namely that we humans will never dredge up enough will to alter our habitual, destructive ways of behaving toward each other and the world unless we simultaneously employ information and emotion and a sense of relationship to others—other species, other cultures, and other generations. Using this information while divorced from emotion and using information while insulated from connection to a wide net of others are how destruction of the Earth is being accomplished. Risk assessment of narrow options is a classic example of using certain bits of information in such a way as to exclude feeling and to artificially sever connections of parts to the whole. Risk assessment rips you (and others) out of connection to the rest of the world and reduces you (if you are even considered at all in the risk assessment) to a number. You are then consigned to damage or death or “risk,” depending on how your number is shuffled around in models, assumptions, and formulas enduring “risk management.” Assessment of the pros and cons of a range of reasonable alternatives allows the connection to remain. The cultural emotions connected to a given alternative, for instance, can be a pro or a con, and may be both, depending on which sector of the community you inhabit. An advantage or a disadvantage of a given alternative can be social, religious, economic, scientific, or political. Risk assessment is one of the major methods by which parts (corporations such as Monsanto or Hyundai, “private land owners,” industrial nations) can act on their wants at the expense of wholes (eg, whole communities and countries, or the seventh generation from now) without appearing to be doing so. Risk assessment lets them appear simply “scientific” or “rational” as they numerically estimate whether or how many deaths or what birth defects will be caused, and ignore other regions of human experience that also matter to people. Always, some groups of humans will be trying to exercise their power at the expense of the whole. Decisions arrived at from risk assessment can be homicidal, biocidal, and suicidal, but they are made every day. Risk assessment is a premier process by which illegitimate exercise of power is justified. The stakes of installing alternatives to risk assessment, therefore, are the whole Earth (just as are the stakes of fashioning democratic control over corporations, or of requiring changes in behavior of those who have wreaked irreparable damage). Installing alternatives assessment is one step in the struggle to use information, feeling, and a sense of relationship to others to stop social-environmental madness.

# 2AC

## Internment Advantage

#### 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.

## Solvency

#### Obama would comply with the court

Stephen I. Vladeck 9, Professor of Law and Associate Dean for Scholarship at American University Washington College of Law, senior editor of the peer-reviewed Journal of National Security Law and Policy, Supreme Court Fellow at the Constitution Project, and fellow at the Center on National Security at Fordham University School of Law, JD from Yale Law School, 3-1-2009, “The Long War, the Federal Courts, and the Necessity / Legality Paradox,” http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=facsch\_bkrev

Moreover, 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[ ] of Rebellion or Invasion [where] the public Safety may require” suspension––and even then, only for the duration of the suspension.179 In contrast, Jackson’s argument sounds purely in pragmatism—courts should not review whether military necessity exists 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.180 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.181 While Jackson may arguably have had credible reason to fear such conduct (given his experience with both the Gold Clause Cases182 and the “switch in time”),183 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 squarely refuse to comply with a Supreme Court decision. But perhaps I am naïve.184

## Court Stripping

#### Judicial review increases the legitimacy of gov flex---prevents more intrusive crackdowns

Benjamin Wittes 8, is a Senior Fellow in Governance Studies at the Brookings Institution, where he is the Research Director in Public Law, 2008, “The Necessity and Impossibility of Judicial Review,” https://webspace.utexas.edu/rmc2289/National%20Security%20and%20the%20Courts/Law%20and%20the%20Long%20War%20%20Chapter%204.pdf

WE COME, then, to the question of what judicial review ought to look like in the war on terror if one accepts that it should exist more robustly than the administration prefers but should not be of an unbridled or general nature, as human rights advocates wish to see. The answer is conceptually simple, though devilishly complicated in operation: Judicial review should be designed for the relatively narrow purpose of holding the executive to clearly articulated legislative rules, not to the often vague standards of international legal instruments that have not been implemented through American law. Judges should have an expanded role in the powers of presidential preemption in the antiterrorism arena, for the judiciary is essential to legitimizing the use of those powers. Without them, the powers themselves come under a barrage of criticism which they cannot easily withstand. And eventually the effort to shield them from judicial review fails, and the review that results from the effort is more intrusive, more suspicious, and less accommodating of the executive's legitimate need for operational flexibility. Judges, in other words, should be a part of the larger rules the legislature will need to write to govern the global fight against terrorism. Their role within these legal regimes will vary-from virtually no involvement in cases of covert actions and overseas surveillance to extensive involvement in cases of long-term detentions. The key is that the place of judges within those systems is not itself a matter for the judges to decide. The judiciary must not serve as the designer of the rules.

#### Legitimacy is tanked already

Rosen 12 Jeffrey – Legal Affairs Editor at New Republic, “The Supreme Court Has a Legitimacy Crisis, But Not For the Reason You Think “, 2012, http://www.tnr.com/article/politics/103987/the-supreme-court-has-legitimacy-crisis-not-the-reason-you-think

Last week, a New York Times/CBS poll found that only 44 percent of Americans approve of the Supreme Court’s job performance and 75 percent say the justices are sometimes influenced by their political views. But although the results of the poll were striking, commentators may have been too quick to suggest a direct link between the two findings. In the Times article on the poll, for example, Adam Liptak and Allison Kopicki suggested that the drop in the Court's 66 percent approval ratings in the late 1980s “could reflect a sense that the court is more political, after the ideologically divided 5-to-4 decisions in Bush v. Gore and Citizens United.” At the beginning of his tenure, Chief Justice John Roberts said that he subscribed to a similar theory. “I do think the rule of law is threatened by a steady term after term after term focus on 5-4 decisions,” Roberts told me. But a new study by Nathaniel Persily of Columbia Law School and Stephen Ansolabehere of Harvard suggests that the relationship between the Court’s declining approval ratings and increased perceptions of the Court’s partisanship may be more complicated than the New York Times and the Chief Justice suggest. According to the study, Americans already judge the Court according to political criteria: They generally support the Court when they think they would have ruled the same way as the justices in particular cases, or when they perceive the Court overall to be ruling in ways that correlate with their partisan views. If this finding is correct, the most straightforward way for the Court to maintain its high approval ratings is to hand down decisions that majorities of the public agree with. And, like its predecessors, the Roberts Court has, in fact, managed to mirror the views of national majorities more often than not. In a 2009 survey, Persily and Ansolabehere found that the public strongly supported many of the Supreme Court’s recent high-profile decisions, including conservative rulings recognizing gun rights and upholding bans on partial birth abortions, as well as liberal rulings upholding the regulation of global warming and striking down a Texas law banning sex between gay men. But if the public agrees with most of the Court's decisions, why is it more unpopular than ever? Part of the answer has to do with the fact that there are a handful of high profile decisions on which the Court is out of step with public opinion, including the Kelo decision allowing a local government to seize a house under eminent domain and the Boumediene case extending habeas corpus to accused enemy combatants abroad, and recent First Amendment decisions protecting unpopular speakers, such as funeral protesters, manufacturers of violent video games, and corporations (in the Citizens United case.) All of these decisions were unpopular with strong majorities of the public. But Persily and Ansolabehere also found that even decisions that closely divide the public can lead to a decrease in the Court’s approval rating over time, by increasing the perception among half the public that the Court is out of step with its partisan preferences. Bush v. Gore is perhaps the clearest example. In the short term, the Court’s overall approval ratings didn’t suffer: Republicans liked the decision, while Democrats didn’t, and the two effects canceled each other out. But Persily and his colleagues found that ten years later, Bush v. Gore continues to define the Court for many citizens, destroying confidence in the Court among Democrats while reinvigorating it among Republicans. Since an important component of the Court’s overall approval rating is whether Americans perceive themselves to be in partisan agreement with the Court as an institution, Bush v. Gore has led to a statistically significant decline in approval among Democrats as a whole.

#### Legitimacy resilient – single decisions don’t matter

Grosskopf 98 Anke and Jeffrey Mondak, Professor of Political Science – University of Pittsburgh and Florida State University, “Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court”, Political Research Quarterly, 51(3), September

Opinion about the Supreme Court may influence opinion about the Court’s decisions, but is the opposite true? Viewed from the perspective of the Court’s justices, it would be preferable if public reaction to rulings did not shape subsequent levels of support for the Court. If opinion about the Court were fully determined by early political socialization and deeply rooted attachments to democratic values, then justices would be free to intervene in controversial policy questions without risk that doing so would expend political capital. Consistent with this perspective, a long tradition of scholarship argues that the Supreme Court is esteemed partly because it commands a bedrock of public support or a reservoir of goodwill, which helps it to remain legitimate despite occasional critical reaction to unpopular rulings (Murphy and Tanenhaus 1958; Easton 1965, 1975; Caldeira 1986; Caldiera and Gibson 1992). The sources of this diffuse support are usually seen as rather stable and immune from short-term influences, implying that evaluations of specific decisions are of little or no broad importance. For instance, Caldeira and Gibson (1992) find that basic democratic values, not reactions to decisions, act as the strongest determinants of institutional support.

#### One ruling doesn’t matter---empirically proven

Linton 93 Paul Benjamin, Associate General Council – Americans United for Life, “Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court”, Saint Louis University Public Law Review, 13 St. Louis U. Pub. L. Rev. 15, Lexis

The Court describes this first circumstance as "hypothetical." [272](http://www.lexis.com/research/retrieve?_m=b188535af59d84ac1888be5243cf47ea&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=e07bd46ad93e5159e2488a98aa18b635" \l "n272" \t "_self) The distinct impression left by this passage is that decisions of the Supreme Court overruling earlier decisions on matters of constitutional interpretation are rare and thus should not be too readily emulated, lest the "legitimacy" of the Court be called into question. But this impression is wrong. On more than 200 occasions, the Court has overturned previous decisions, and in nearly three-fourths of those cases, the Court overruled because the earlier decision had wrongly interpreted the Constitution. [273](http://www.lexis.com/research/retrieve?_m=b188535af59d84ac1888be5243cf47ea&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=e07bd46ad93e5159e2488a98aa18b635" \l "n273" \t "_self) What does this remarkable track re  [\*75]  cord of "judicial correction" mean? At the very least, that the "legitimacy" of the Court is not affected by its acknowledgement of prior error, even when that error involved an intepretation of the Constitution. Indeed, as in Brown and West Coa Hotel, the Court has often enhanced its credibility by overruling decisions that were wrong when originally decided. One more overruling decision, if otherwise appropriate, could not reasonably be expected to damage that credibility.

#### No spillover---doesn’t undermine legitimacy

Healy 1 Thomas, Associate – Sidley Austin Brown & Wood, Washington D.C. and J.D. – Columbia University Law School, West Virginia Law Review, Fall, Lexis

In Part III, I acknowledge that even if stare decisis is not dictated by the founding generation's assumptions or by the system of checks and balances, it might nonetheless be essential to the legitimacy of the courts. By following the doctrine consistently for the better part of two centuries, the courts may have created an expectation that they will continue to do so. And to the extent that their legitimacy now rides on this expectation, they may no longer be free to abandon the doctrine. Even if this is true, however, it does not necessarily follow that non-precedential decisions threaten the courts' legitimacy. Stare decisis is not an end in itself, but a means to promote certain values, such as certainty, equality, efficiency, and judicial integrity. Although a complete abandonment of stare decisis might undermine these values, the discrete practice of issuing nonprecedential opinions does not. Because a court must still follow past decisions even when it issues a nonprecedential opinion, problems arise only when the nonprecedential opinion differs in a meaningful way from the precedents upon which it is based (or when it is based on no precedents at all, as in cases of first impression).

No impact (to SOP violations)

Constitutional Commentary 96 (Winter, p. 343-345)

A second, perhaps more interesting, difficulty with the prophylactic approach is that it may rely on a too judicialocentric view of the workings of government that exaggerates the Court's role in the separation-of-powers struggle. Professor Redish's argument rests on the notion that it is vitally important that the Court get its separation-of-powers jurisprudence right. The argument runs something like this: Separation of powers is a bulwark of liberty - without it, the individual protections of the Bill of Rights are nothing but paper. The Court defines separation-of-powers law. If it messes up, then so much for liberty. The Court is bound to mess up if it adopts anything other than a prophylactic approach to separation of powers. It is therefore urgent that the Court adopt this approach. Fortunately, the Framers' design is probably stronger than this argument presupposes. Separation-of-powers gives each branch tools which enable ambition to counteract ambition. The Court gets to decide cases. It justifies its decisions with opinions which the other branches and the citizenry generally follow as authoritative. Thus, although the Court does not have guns or money, it has words. These words are the Court's tools in the separation-of-powers struggle. Any time the Court writes an opinion on separation of powers, it self-consciously uses its particular power to shove the boundaries of branch power - sometimes to profound effect, as a simple hypothetical illustrates. Suppose Chief Justice Marshall had ended Marbury v. Madison with the following paragraph: Then again, Congress has just as much right to interpret the Constitution as I do - perhaps even more, because Congress is the branch closest to the people, and it is the people's Constitution. I was just kidding about that judicial review stuff. History would be very different, partially because such a result in Marbury would have grossly undermined the Court's future ability to compete in the separation-of-powers struggle successfully. On a more general level, Supreme Court opinions on any topic can affect the balance of branch power. For instance, the Supreme Court can undermine its authority by producing poorly reasoned opinions - or, much worse from a realpolitik point of view, unpopular opinions. The power, however, of any given decision to damage a Court staffed by relatively sane Justices is probably limited. This is an institution that has survived Dred Scott and Plessy v. Ferguson. Of course, the other branches also shove at the boundaries of branch power - FDR's Court-packing plan being one notable example of this practice. Sometimes the law of unintended consequences grabs hold. Perhaps the Court-packing plan concentrated the Justices' minds on finding ways to hold New Deal legislation constitutional, but it also blew up in FDR's face politically. At least for the last two hundred years, however, no branch has managed to expand its power to the point of delivering an obvious knock-out blow to another branch. Seen from this broader perspective, cases such as Morrison, Bowsher v. Synar, and Mistretta v. United States surely alter the balance of branch power at a given historical moment, but do not change the fundamental and brute fact that the Constitution puts three institutional heavyweights into a ring where they are free to bash each other. Judicialocentrism tends to obscure this obvious point because it causes people to dwell on the hard cases that reach the Supreme Court. The power of separation of powers, however, largely resides in its ability to keep the easy cases from ever occurring. For instance, Congress, although it tries to weaken the President from time to time, has not tried to reduce the President to a ceremonial figurehead a la the Queen of England. Similarly, Congress does not make a habit of trying cases that have been heard by the courts. This list could be continued indefinitely. The Supreme Court has had two hundred years to muck about with separation-of-powers doctrine. Over that time, scores of Justices - each with his or her own somewhat idiosyncratic view of the law - have sat on the bench. Scholars have denounced separation-of-powers jurisprudence as a mess. But the Republic endures, at least more or less. These historical facts tend to indicate that the Court need not rush to change its approach to separation of powers to prevent a slide into tyranny.

## 2AC Kritik

### F/W

#### D. No link---it’s just a link of omission

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.

### Perm

#### Perm do both---broadest expression of the emancipatory struggle against oppression

Angharad E. Beckett, ‘6 (Lecturer in Sociology and Social Policy at the School of Applied Social Sciences at Durham University, “Citizenship and Vulnerability Disability and Issues of Social and Political Engagement”, PALGRAVE MACMILLAN, p. 114)

In particular, Priestley draws attention to what he considers to be the legitimate concerns of many disability groups with special interests such as ethnicity, gender or sexuality, that their special interests may be perceived to be ‘optional extras’ to the common experience of disability. Priestley’s point is taken further by Vernon (1999) who argues that so-called ‘simultaneous oppression’ or ‘double jeopardy’ has often been alleged to be the unique experience of a minority of disabled people. In fact, according to Vernon, the experience of simultaneous oppression is key to understanding disability itself, since the majority of disabled people are not a homogeneous mass of white, heterosexual, middle- class, young men! For Vernon, it is essential that the disability movement avoids making the assumption that other forms of oppression, for example, sexism, have already been ‘taken care of’ by other movements. She points to the growing literature that shows that disabled people experience racism (Begum, 1992, 1994, Sharma and Love, 1991 and Stuart, 1992, 1993, 1994); sexism (Fine and Asch, 1988, Morris, 1989, 1991, 1996, Lloyd, 1992); heterosexism (Corbett, 1994, Hearn, 1988); ageism (Zarb and Oliver, 1993, MacFarlane, 1994); and class inequality issues (Priestley, 1995). She then highlights the manner in which different forms of oppression can interact, for example, for many disabled people, their socio-economic or class position can have profound effects upon their options as a disabled person with regard to lifestyle. To make matters even worse, Vernon (1999: 395) claims that the possession of more than one ‘stigmatized’ identity can result in lack of acceptance even within oppressed groups: ‘Being black and disabled can sometimes mean that you are neither fully accepted in the black community nor in the disabled community’. This is a potential problem for all groups experiencing simultaneous oppression and is, seemingly, yet to be considered adequately by the disability movement. Indeed, Fawcett (2000), drawing upon the work of Nancy Fraser (1995a), states that focusing on disability as ‘difference’ can in itself be used in a normative way to ‘gloss-over’ pervasive differences between disabled people – for example between academically able physically disabled people and individuals with learning disabilities.

#### Their focus on the body as a site for politics limits the emancipatory potential for disability studies---it only demonizes that which it seeks to avoid, inevitably recreating exclusion

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The most troubling aspect of Thomson's use of identity politics is her definition of disability as visible physical difference. Extraordinary Bodies locates "the disabled people of the later twentieth-century" at the end of a historical trajectory that begins with "the wondrous monsters of antiquity" and moves to "the fascinating freaks of the nineteenth-century" (58). Undoubtedly, many of the people who appeared in nineteenth-century freak shows might today be described as disabled. But other nineteenth-century constructions that have little to do with visual bodily difference—such as the hysteric or the invalid—are also important to consider in a history of disability. Thomson, however, tends to equate disability with visible difference. She writes that "the disabled body is a spectacle . . . in a complex relation between seer and seen" (136). In literature, she claims, disability "functions only as a visual difference"; and throughout history, female "deviance" is "always attributed to some visible characteristic" (10-11; 28; emphasis added)

I do not mean to suggest that Thomson would deny that many people with invisible impairments are disabled; on the contrary, like each of the critics I discuss in this essay, Thomson is committed to combating oppression of people with all forms of disability. In fact, early in the first chapter of her book, she provides a definition of disability that includes a number of non-visible impairments (13). Yet Thomson does not explain in Extraordinary Bodies how her definition of disability as a visual spectacle might be reconciled with her recognition of arthritis as a disability, or with the ADA's inclusion of conditions such as carpal tunnel syndrome, Chronic Fatigue Syndrome, hypertension, and chronic back pain under the category of disability. [24] Thomson's unintentional elision of invisible disability has potentially serious political repercussions; people with unseen disabilities are often objects of suspicion and disbelief. [25]

Thomson's narrow definition of disability does not result from a wish to exclude, but rather from the use of an identity politics model. Critics of identity politics point out that the construction of identity is an inevitably exclusionary process; one defines who one is in part by saying what one is not, thus producing what Butler has called a "constitutive outside" (xi). In Extraordinary Bodies, this constitutive outside might be understood as disease. Thomson's construction of a positive disabled identity is facilitated by her emphatic disassociation of disability from disease. She seeks "to recast [disability] from a form of pathology to a form of ethnicity" (6). The title of her conclusion—"From Pathology to Identity"—repeats the call for such a transition in understanding disability.

### Korematsu Racist

#### 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

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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.

### War Powers Specific

#### 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.

### Form/Content

#### Lines between form and content are wrong---the better political stance is to analyze both the form and its specific content

Douglas Kellner 3, George F. Kneller Philosophy of Education Chair in the Graduate School of Education at UCLA, Baudrillard: A New McLuhan?, Illuminations, 2003, http://www.uta.edu/huma/illuminations/kell26.htm

Yet doubts remain as to whether the media are having quite the impact that Baudrillard ascribes to them and whether his theory provides adequate concepts to analyze the complex interactions between media, culture, and society today. In this section, I shall suggest that Baudrillard's media theory is vitiated by three subordinations which undermine its theoretical and political usefulness and which raise questions as well about the status of postmodern social theory. I shall suggest that the limitations in Baudrillard's theory can be related to his uncritical assumption of certain positions within McLuhan's media theory and that therefore earlier critiques of McLuhan can accurately and usefully be applied to Baudrillard. This critique will suggest that indeed Baudrillard is a "new McLuhan" who has repackaged McLuhan into new postmodern cultural capital. First, in what might be called a formalist subordination, Baudrillard, like McLuhan, privileges the form of media technology over what might be called the media apparatus, and thus subordinates content, meaning, and the use of media to its purely formal structure and effects. Baudrillard -- much more so than McLuhan who at least gives some media history and analysis of the media environment -- tends to abstract media form and effects from the media environment and thus erases political economy, media production, and media environment (i.e. society as large) from his theory. Against abstracting media form and effects from context, I would argue that the use and effects of media should be carefully examined and evaluated in terms of specific contexts. Distinctions between context and use, form and content, media and reality, all dissolve, however, in Baudrillard's one-dimensional theory where global theses and glib pronouncements replace careful analysis and critique. Baudrillard might retort that it is the media themselves which abstract from the concreteness of everyday, social, and political life and provide abstract simulacra of actual events which themselves become more real than "the real" which they supposedly represent. Yet even if this is so, media analysis should attempt to recontextualize media images and simulacra rather than merely focusing on the surface of media form. Furthermore, instead of operating with a model of (formal) media effects, I would argue that it is preferable to operate with a dialectical perspective which posits multiple roles and functions to television and other media. Another problem is that Baudrillard's formalism vitates the project of ideology critique, and against his claims that media content are irrelevant and unimportant, I would propose grasping the dialectic of form and content in media communication, seeing how media forms constitute content and how content is always formed or structured, while forms themselves can be ideological, as when the situation comedy form of conflict/resolution projects an ideological vision which shows all problems easily capable of being resolved within the existing society, or when action-adventure series formats of violent conflict as the essence of reality project a conservative view of human life as a battleground where only the fittest survive and prosper.[12] For a dialectical theory of the media, television would have multiple functions (and potential decodings) where sometimes the ideological effects may be predominant while at other times time functions a medium like television functions as mere noise or through the merely formal effects which Baudrillard puts at the center of his analysis. Consequently, there is no real theory or practice of cultural interpretation in Baudrillard's media (increasingly anti-)theory, which also emanates an anti-hermeneutical bias that denies the importance of content and is against interpretation.[13] This brings us to a second subordination in Baudrillard's theory in which a more dialectical position is subordinated to media essentialism and technological determinism. For -- according to Baudrillard -- it is the technology of, say, television that determines its effects (one-way transmission, semiurgy, implosion, extermination of meaning and the social) rather than any particular content or message (i.e. for both Baudrillard and McLuhan "the media is the message"), or its construction or use within specific social systems. For Baudrillard, media technology and semiurgy are the demiurges of media practices and effects, separated from their uses by specific economic and political interests, individuals and groups, and the social systems within which they function. Baudrillard thus abstracts media from social systems and essentializes media technology as dominant social forces. Yet against Baudrillard, one could argue that capital continues to be a primary determinant of media form and content in neo-capitalist societies just as state socialism helps determine the form, nature, and effects of technologies in certain state socialist societies.

#### Focusing on form over content risks producing a genocidalpolitics

Lawrence J. Biskowski 95 – PROFESSOR OF POLITICAL SCIENCE --- assistant professor of political science, University of Georgia, “Politics versus Aesthetics: Arendt's Critiques of Nietzsche and Heidegger,” The Review of Politics, Vol. 57, No. 1, Winter, 1995

Compelling explorations of the more tyrannical aspects of instrumental and subject-centered reason, moral systems based upon intrinsic purposes or teloi, grand narratives, and the like have led thinkers in the Nietzschean tradition to embrace aesthetics as a paradigm for thinking about the self and its various relationships to itself, to others, and to the world. Aesthetic ways of thinking appear to many contemporary theorists to be the best alternative—in some cases the sole alternative—to the instrumental or technological logics increasingly pervading virtually all other spheres of modern life, to the problematic assumptions and hidden violence of various "command" and neo-Kantian moral theories, and to the transcendental egoism of attempts to anchor identity in various perceptions of natural law, intrinsic purpose, or potential consensus. But this shift to aesthetics seems to require a radical departure from previous means of understanding human interaction and orienting ourselves in the world. Thus, to take an extreme, seemingly bizarre, but nevertheless illustrative example, Jean Baudrillard insists that "we live everywhere already in an '[a]esthetic' hallucination of reality."9 Everything, "even if it be the everyday and banal reality, falls by this token under the sign of art, and becomes [a]esthetic."10 The attractions of aesthetic thinking in a world still recovering from its metaphysical hangover—and still largely lacking in alternatives and curatives—are enormous. Indeed, as Lawrence Scaff puts it, aesthetics and aesthetic ways of thinking seem to have invaded everywhere, now threatening to subordinate independent orders, such as the ethical or political, to its own standards and forms. Aesthetic indifference to "substance" and an overriding concern with the perfection of "form" encourage a kind of action and judgment oriented toward impression, rhythm, tempo, gesture, symbolization— in a word, toward style." The criteria and logics of aesthetics expand to fill the roles formerly filled by the criteria and logics associated with now-discredited or putatively obsolete institutions, practices, traditions, moral systems, and religions. Concern with style follows from the accession of a public life based largely on image and increasingly devoid of any other sense of reality for many people. The leap to Baudrillard's insistence that we live in an "aesthetic hallucination of reality" is a surprisingly short one. Style, however, is not beauty. Even aesthetics—insofar as it was formerly concerned with supposedly objective, public, or at least widely shared standards of beauty—is undermined among contemporary intellectuals by the same radical historicism which, by undermining other logics, institutions, understandings, and so forth, provided the conditions for its expansion and elevation. Standards of beauty are no more objective and universal than standards of justice, virtue, and truth; their adoption is always an imposition underwritten by some manifestation of power. With all such public standards discredited, individuals are thrown back on themselves or, rather, on their will and, more typically, on their impulses, as their only grounds for practical choices. Coupled with an increasing recognition of how identity is formed and stabilized, this experience leads to a diminished sense of the unity and consistency of the self,12 which in turn leads to the enormous surge in interest among contemporary theorists in the politics of identity, the nature of the self, and the political and moral implications of a de-centered subjectivity. Thus in at least some significant respects, and for good or for ill, the aestheticism being proffered in somewhat different ways in both public and intellectual life is an aestheticism of self-fascination and self-absorption. The self, understood as a multiplicity, must be at the center of all authentic choices and values (which may, of course, be contradicted at any time), or the criteria for such choices at least should come from within. Moral or aesthetic or political criteria imposed upon the individual from the outside cannot be legitimate. Of paramount concern, therefore, are the forces of external coercion, including, especially, the surreptitious and intrusive socialization technologies by which the self and its various understandings and values have heretofore been shaped, and the means by which these technologies may be overcome so that one may finally be free to be what one authentically is, if indeed one believes this goal remains within the realm of the possible. This turn inward and toward the self, surely the product of liberating insights, is not without its dangers. To the extent that the aesthetic supersession of morality means that individuals are thrown back on themselves or their impulses as their only grounds for practical choices, they are left in a state of indeterminacy and unfreedom, ultimately unable to determine even their own identities except in one rather limited way. In the absence of legitimate moral criteria of any source or kind, they are in effect controlled by changing whims and arbitrary impulses; they confront other people and the world in much the same way that a sculptor confronts a block of marble, that is, as (at least) potential sources of aesthetic enjoyment, as potential sources of resistance to the realization of one's projects), and ultimately as something that exists solely or mainly as a medium for self-expression. As Hegel described an earlier version of this doctrine: [t]his type of subjectivism not merely substitutes a void for the whole of ethics, rights, duties, and laws...but in addition its form is a subjective void, i.e., it knows itself as this contentless void and in this knowledge knows itself as absolute.13 For Hegel, freedom under these conditions was emptied of all direction and purpose. Perhaps more startling yet are the other political (and moral) implications: Laws, rights, duties, and obligations, but also people, institutions, things, and the world itself can become our playthings, little more than media for our impulses and caprices lionized as self-expression.

### AT: Reps 1st – Tuathail

#### Don't focus on representations

Tuathail 96 (Gearoid, Department of Georgraphy at Virginia Polytechnic Institute, Political Geography, 15(6-7), p. 664, science direct)

While theoretical debates at academic conferences are important to academics, the discourse and concerns of foreign-policy decision- makers are quite different, so different that they constitute a distinctive problem- solving, theory-averse, policy-making subculture. There is a danger that academics assume that the discourses they engage are more significant in the practice of foreign policy and the exercise of power than they really are. This is not, however, to minimize the obvious importance of academia as a general institutional structure among many that sustain certain epistemic communities in particular states. In general, I do not disagree with Dalby’s fourth point about politics and discourse except to note that his statement-‘Precisely because reality could be represented in particular ways political decisions could be taken, troops and material moved and war fought’-evades the important question of agency that I noted in my review essay. The assumption that it is representations that make action possible is inadequate by itself. Political, military and economic structures, institutions, discursive networks and leadership are all crucial in explaining social action and should be theorized together with representational practices. Both here and earlier, Dalby’s reasoning inclines towards a form of idealism. In response to Dalby’s fifth point (with its three subpoints), it is worth noting, first, that his book is about the CPD, not the Reagan administration. He analyzes certain CPD discourses, root the geographical reasoning practices of the Reagan administration nor its public-policy reasoning on national security. Dalby’s book is narrowly textual; the general contextuality of the Reagan administration is not dealt with. Second, let me simply note that I find that the distinction between critical theorists and post- structuralists is a little too rigidly and heroically drawn by Dalby and others. Third, Dalby’s interpretation of the reconceptualization of national security in Moscow as heavily influenced by dissident peace researchers in Europe is highly idealist, an interpretation that ignores the structural and ideological crises facing the Soviet elite at that time. Gorbachev’s reforms and his new security discourse were also strongly self- interested, an ultimately futile attempt to save the Communist Party and a discredited regime of power from disintegration. The issues raised by Simon Dalby in his comment are important ones for all those interested in the practice of critical geopolitics. While I agree with Dalby that questions of discourse are extremely important ones for political geographers to engage, there is a danger of fetishizing this concern with discourse so that we neglect the institutional and the sociological, the materialist and the cultural, the political and the geographical contexts within which particular discursive strategies become significant. Critical geopolitics, in other words, should not be a prisoner of the sweeping ahistorical cant that sometimes accompanies ‘poststructuralism nor convenient reading strategies like the identity politics narrative; it needs to always be open to the patterned mess that is human history.

### AT: Prior Questions – Owen

#### Prior questions fail and stymie politics

Owen 2 [David Owen, Reader of Political Theory at the Univ. of Southampton, Millennium Vol 31 No 3 2002 p. 655-7]

Commenting on the ‘philosophical turn’ in IR, Wæver remarks that ‘[a] frenzy for words like “epistemology” and “ontology” often signals this philosophical turn’, although he goes on to comment that these terms are often used loosely.4 However, loosely deployed or not, it is clear that debates concerning ontology and epistemology play a central role in the contemporary IR theory wars. In one respect, this is unsurprising since it is a characteristic feature of the social sciences that periods of disciplinary disorientation involve recourse to reflection on the philosophical commitments of different theoretical approaches, and there is no doubt that such reflection can play a valuable role in making explicit the commitments that characterise (and help individuate) diverse theoretical positions. Yet, such a philosophical turn is not without its dangers and I will briefly mention three before turning to consider a confusion that has, I will suggest, helped to promote the IR theory wars by motivating this philosophical turn. The first danger with the philosophical turn is that it has an inbuilt tendency to prioritise issues of ontology and epistemology over explanatory and/or interpretive power as if the latter two were merely a simple function of the former. But while the explanatory and/or interpretive power of a theoretical account is not wholly independent of its ontological and/or epistemological commitments (otherwise criticism of these features would not be a criticism that had any value), it is by no means clear that it is, in contrast, wholly dependent on these philosophical commitments. Thus, for example, one need not be sympathetic to rational choice theory to recognise that it can provide powerful accounts of certain kinds of problems, such as the tragedy of the commons in which dilemmas of collective action are foregrounded. It may, of course, be the case that the advocates of rational choice theory cannot give a good account of why this type of theory is powerful in accounting for this class of problems (i.e., how it is that the relevant actors come to exhibit features in these circumstances that approximate the assumptions of rational choice theory) and, if this is the case, it is a philosophical weakness—but this does not undermine the point that, for a certain class of problems, rational choice theory may provide the best account available to us. In other words, while the critical judgement of theoretical accounts in terms of their ontological and/or epistemological sophistication is one kind of critical judgement, it is not the only or even necessarily the most important kind. The second danger run by the philosophical turn is that because prioritisation of ontology and epistemology promotes theory-construction from philosophical first principles, it cultivates a theory-driven rather than problem-driven approach to IR. Paraphrasing Ian Shapiro, the point can be put like this: since it is the case that there is always a plurality of possible true descriptions of a given action, event or phenomenon, the challenge is to decide which is the most apt in terms of getting a perspicuous grip on the action, event or phenomenon in question given the purposes of the inquiry; yet, from this standpoint, ‘theory-driven work is part of a reductionist program’ in that it ‘dictates always opting for the description that calls for the explanation that flows from the preferred model or theory’.5 The justification offered for this strategy rests on the mistaken belief that it is necessary for social science because general explanations are required to characterise the classes of phenomena studied in similar terms. However, as Shapiro points out, this is to misunderstand the enterprise of science since ‘whether there are general explanations for classes of phenomena is a question for social-scientific inquiry, not to be prejudged before conducting that inquiry’.6 Moreover, this strategy easily slips into the promotion of the pursuit of generality over that of empirical validity. The third danger is that the preceding two combine to encourage the formation of a particular image of disciplinary debate in IR—what might be called (only slightly tongue in cheek) ‘the Highlander view’—namely, an image of warring theoretical approaches with each, despite occasional temporary tactical alliances, dedicated to the strategic achievement of sovereignty over the disciplinary field. It encourages this view because the turn to, and prioritisation of, ontology and epistemology stimulates the idea that there can only be one theoretical approach which gets things right, namely, the theoretical approach that gets its ontology and epistemology right. This image feeds back into IR exacerbating the first and second dangers, and so a potentially vicious circle arises.

### AT: Prior Questions – Cochrane

#### Prior questions will never be fully settled---must take action even under conditions of uncertainty

Molly Cochran 99, Assistant Professor of International Affairs at Georgia Institute for Technology, “Normative Theory in International Relations”, 1999, pg. 272

To conclude this chapter, while modernist and postmodernist debates continue, while we are still unsure as to what we can legitimately identify as a feminist ethical/political concern, while we still are unclear about the relationship between discourse and experience, it is particularly important for feminists that we proceed with analysis of both the material (institutional and structural) as well as the discursive. This holds not only for feminists, but for all theorists oriented towards the goal of extending further moral inclusion in the present social sciences climate of epistemological uncertainty. Important ethical/political concerns hang in the balance. We cannot afford to wait for the meta-theoretical questions to be conclusively answered. Those answers may be unavailable. Nor can we wait for a credible vision of an alternative institutional order to appear before an emancipatory agenda can be kicked into gear. Nor do we have before us a chicken and egg question of which comes first: sorting out the metatheoretical issues or working out which practices contribute to a credible institutional vision. The two questions can and should be pursued together, and can be via moral imagination. Imagination can help us think beyond discursive and material conditions which limit us, by pushing the boundaries of those limitations in thought and examining what yields. In this respect, I believe international ethics as pragmatic critique can be a useful ally to feminist and normative theorists generally.

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### Solvency

#### Pragmatic policy-focused approach is critical to productive change---K’s abstractions fail

William J. Novak 8, Associate Professor of History at the University of Chicago and Research Professor at the American Bar Foundation, “The Myth of the “Weak” American State”, June, http://www.history.ucsb.edu/projects/labor/speakers/documents/TheMythoftheWeakAmericanState.pdf

There is an alternative. In the early twentieth century, amid a first wave of nation- state and economic consolidation and assertiveness, American social science generated some fresh ways of looking at power in all its guises—social, economic, political, and legal. Overshadowed to some extent by exuberant bursts of American exceptionalism that greeted confrontations with totalitarianism and then terrorism, the pragmatic, critical, and realistic appraisal of American power is worth recovering. From Lester Frank Ward and John Dewey to Ernst Freund and John Commons to Morris Cohen and Robert Lee Hale, early American socioeconomic theorists developed a critique of a thin, private, and individualistic conception of American liberalism and interrogated the location, organization, and distribution of power in a modernizing United States. All understood the problem of power in America as complex and multifaceted, not simple or one-dimensional, especially as it concerned the relationship of state and civil society. Rather than spend endless time debating the proper definition of law or the correct empirical measure of the state, they concentrated instead on detailed investigations of power in action in the everyday practices and policies that constituted American public life. Rather than confine the examination of power to the abstract realm of political theory or the official political acts of elites, electorates, interest groups, or social movements, these analysts instead embraced a more capacious conception of governance as “an activity which is apt to appear whenever men are associated together.”35 More significantly, these political and legal realists never forgot, amid the rhetoric of law and the pious platitudes that routinely flow from American political life, the very real, concrete consequences of the deployment of legal and political power. They never forgot the brutal fact that Robert Cover would later state so provocatively at the start of his article “Violence and the Word” that legal and political interpretation take place “in a field of pain and death.” 36 The real consequences of American state power are all around us. In a democratic republic, where force should always be on the side of the governed, writing the history of that power has never been more urgent.