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#### Our advocacy is that the ongoing legal legacy of the Internment Cases justifying indefinite detention should be repudiated and ended.

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

Erwin **Chemerinsky 11**, Dean and Distinguished Professor of Law, 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.

**Korematsu was litigated in the context of Jim Crow laws---the aff disrupts racial compartmentalization by recognizing the connections between different policies and how racism affects multiple minority groups**

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

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

**This was the culmination of racism against Asian Americans in the United States---the aff helps expose the history of racism and slavery the state has been founded upon**

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

**Korematsu mirrors the Dred Scott decision in its flawed and racist judicial reasoning---both decisions found racial discrimination constitutionally legitimate**

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¶

**Its ongoing legal legacy must be ended because the Court established a flawed precedent, just like it did in Dred Scott**

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

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's reading 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.¶ Suppose one were to make some assumptions about the Dred Scott and Korematsu decisions that numerous contemporaries of those decisions made. Suppose, with respect to Dred Scott, one believed that slavery was a creation of positive law, so that if states chose to permit it, they created "property rights" in slaveholders. Suppose further that it was understood that slave status was a matter for states to decide, and other states and the federal government needed to respect those decisions. Both those assumptions were in place at the time of the Dred Scott decision n42 and were part of the reason why Congress and a series of antebellum presidents attempted to maintain a precise equilibrium between slave states and free states as new public lands states entered the Union. In this setting, the idea that Congress could outlaw slavery in all of the territory acquired by the United States between 1803 and 1853 - an area that more than doubled the size of the nation - was threatening to states with sizable slave populations. For example, in 1846, when President James K. Polk requested a congressional appropriation for funds to purchase lands from Mexico as part of a settlement to the Mexican War, David Wilmot, a Congressman from Pennsylvania, sought to attach a proviso to the appropriation that slavery would not be permitted in any of the territory acquired. n43¶ Thus, contemporaries of the Dred Scott decision might well have thought that granting power to Congress to abolish slavery in federal territories would result in much of the newly acquired territory being "free," and thus, over time, the balance between slave states and free states in Congress being disrupted. n44 Many residents of slave states believed that it was a small step from that situation to an antislavery majority in Congress seeking to abolish slavery in the states. n45 When the 1860 presidential platform of the Republican Party **defied Dred Scott's conclusion** that slavery [\*205] could not constitutionally be banned in federal territories, and Lincoln and a Republican congressional majority prevailed in the 1860 election, the Southern states who seceded from the Union stated that they were doing so because they believed that Congress would eventually seek to **force them to abolish slavery**. n46¶ In addition, antebellum constitutional jurisprudence had a strong tradition of protection for "vested" rights of property. Once one assumed that humans could legitimately be "owned" by other humans, the idea that Congress or a state legislature could take away the property rights of slaveholders seemed no different, conceptually, than other legislative appropriations of property that were inconsistent with the vested rights principle. It was one thing for citizens of a state to decide, collectively, that they did not want to hold slaves as property. It was another for slaveholders to have their ownership rights in slaves dissolved merely because they had become residents of a federal territory. n47¶ Finally, by the time Dred Scott was heard by the Court, Congress had demonstrated that it was no longer capable of containing the sectional tension that had resulted from the interaction of slavery with westward expansion. In the place of the Compromise of 1850's retention of the calibrated balance between slave and free states in the Union, Congress had substituted, in the Kansas-Nebraska Act of 1854, the idea that "popular sovereignty" would govern the treatment of slavery in federal territories aspiring to become states. n48 The results were the appearance of competing pro-and anti-slavery legislatures and constitutions in Kansas, subsequent violence in that state, and the prospect that the entire mass of western federal territory might be subjected to similar treatment. In this atmosphere a definitive constitutional treatment of the status of slavery in federal territories may have seemed a welcome solution to many contemporaries of the Dred Scott case. n49 Justice James Wayne advanced this argument in a memorandum to the Taney Court urging the Justices to take the occasion of Dred Scott to rule on the constitutionality of slavery in the federal territories. n50¶ [\*206] If one emphasizes those antebellum assumptions about slavery and its political and constitutional status, the Court's intervention in Dred Scott becomes more explicable and more consistent with American constitutional jurisprudence at the time. One should recall that the Constitution interpreted in Dred Scott had all its "proslavery" provisions intact and that no major political candidate, including Lincoln, was advocating for the abolition of slavery in states where it had become established. n51 With this in mind, it is possible to see Dred Scott as a case not about the constitutional legitimacy of slavery itself, but about the constitutional legitimacy of extending slavery into federal territories. Were persons such as Dr. John Emerson, the owner of Dred Scott, and his wife to be at risk of losing their property every time they took up residence in a federal territory? If slavery was to prove economically viable in the territory acquired by the United States after the Mexican War, could Congress prevent it from taking root there? Faced with those possibly dire uncertainties, the Court in Dred Scott sought to settle the matter. n52¶ The decision in Dred Scott thus can be deemed pernicious only if one concludes that a number of the decision's contemporary observers were radically wrong about the legitimacy of humans owning other humans as property, so that all the antebellum common law decisions, statutes, and constitutional provisions treating slavery as legitimate were entitled to no legal weight. That is what successive generations of Americans after Dred Scott have concluded. But that fact only shows that Dred Scott was on the wrong side of history. It does not provide support for the other criteria associated with notorious Supreme Court decisions.¶ To be sure, one could criticize the Court's aggressively interventionist stance in Dred Scott, and some of Taney's arguments in the opinion, as analytically flawed. n53 But many Supreme Court opinions have been criticized for undue activism or for inept reasoning. Dred Scott's notoriety rests on something different: it upheld the constitutional legitimacy of slavery and suggested that African-Americans were an inferior class of beings. Once one restores a sufficient amount of historical context to show that both of those attitudes were part of the discourse of antebellum constitutional jurisprudence, the notoriety of Dred Scott initially seems to rest on its being on the wrong side of history.¶ A similar analysis is possible for Korematsu. For many years Chief Justice Earl Warren, who had been one of the architects of the internment [\*207] policy during his years as Attorney General and Governor of California, and Justices Black and Douglas, who had joined the majority in Korematsu, were unrepentant in their defense of the decision despite its apparent **inconsistency with their willingness to protect the civil rights of minorities** as members of the Warren Court. n54 In their defense of Korematsu, those Justices suggested that their critics needed to recall the decision's context. The United States Navy had been attacked by Japan at Pearl Harbor, and for two years after that attack, the Japanese navy appeared to be in control of the Pacific. Japanese submarines had been observed off the West Coast. Unlike German and Italian residents of America, Japanese residents were thought to be disinclined to assimilate into the general population, living in closely-knit communities and retaining Japanese as their first language. n55 Many first-generation Japanese citizens had close relatives in Japan, and some traveled back and forth between Japan and the United States. n56¶ Warren, Black, and Douglas maintained that in this setting it was difficult for civilian authorities on the West Coast, most of whom did not speak Japanese, to determine the loyalty of the resident Japanese population. Warren recalled that numerous Japanese were engaged in the commercial fishing industry, resulting in fishing boats operated by Japanese regularly venturing into Pacific waters. n57 Warren was engaged with civil defense issues as Attorney General and Governor, and he and his staff worried that fishing boats manned by Japanese residents of America could be employed to flash signals to Japanese submarines, or possibly portions of the Japanese fleet, stationed off of the coast. n58 It seemed at the time, Warren recalled, that [\*208] potential sabotage or espionage could be forestalled by moving the resident Japanese population away from where they might have access to Japanese forces in the Pacific. n59¶ In defending their role in implementing and sustaining the internment of Japanese residents of the West Coast, none of the Justices openly suggested that German or Italian residents were perceived of as less of a security threat than those of Japanese extraction, despite the fact that there were German submarines stationed off the Atlantic Coast. But both those populations had been in America far longer than Japanese residents, who had only come to the United States in substantial numbers in the early twentieth century and who were mainly located on the West Coast. n60 Americans had far greater linguistic familiarity with German and Italian than with Japanese. At the time the United States entered World War II, few Americans had encountered Japanese students in public schools or colleges. There were reasons for contemporaries of the Korematsu decision to believe the stereotype of "unassimilable" Japanese communities in America.¶ Further, there was considerable revulsion against Japan in the United States for the bombing of Pearl Harbor. President Franklin D. Roosevelt referred to the event as a "date which will live in infamy." n61 Numerous Americans regarded it as outside the unwritten rules of wartime engagement since the United States was not a belligerent at the time the naval base at Pearl Harbor was attacked. Among the negative stereotypes applied to the nation of Japan after Pearl Harbor were tendencies to dissemble and to exhibit a ruthless disregard for human life. Sabotage operations among "unassimilable" Japanese communities on the West Coast were consistent with those stereotypes.¶ As for the Court's toothless standard of review in Korematsu, it was actually more searching, at least rhetorically, than the standard the Court had employed in Hirabayashi v. United States, decided a year earlier. Although technically the Hirabayashi case only involved a curfew order, not evacuation, a unanimous Court concluded that its standard of review of the order should be whether there was a rational basis for concluding that the curfew was necessary to protect against espionage and sabotage which might accompany an invasion. Even though there had been no evidence of sabotage, and even though officials had not advanced any reasons for why [\*209] Japanese residents should be singled out among those groups of residents that had "ethnic affiliations with an invading enemy," n62 the Court concluded that it could not say that the officials were mistaken in thinking that requiring Japanese-Americans to remain in their homes from 8:00 p.m. to 6:00 a.m. was necessary to the war effort. n63¶ Thus Black's opinion in Korematsu at least recognized that the supine form of review adopted in Hirabayashi gave officials license to selectively restrict the activities of racial minorities without having to say why. Of course then after asserting that nothing but the gravest national emergency could justify classifications disadvantaging racial minorities, Black blithely accepted the same supposed justifications for interning Japanese residents on the West Coast that the Hirabayashi opinion had accepted in sustaining the curfew order. But given the fact that the United States and Japan were still at war in 1944, when Korematsu was handed down, and that American naval supremacy in the Pacific was far from assured at the time, how likely was the Supreme Court of the United States to engage in a searching investigation of a civil defense strategy designed to protect the West Coast from a Japanese invasion?¶ Black argued in Korematsu that "to cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue." n64 Korematsu, Black claimed, "was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese empire." n65 There was no way at the time for civilian or military authorities to gauge the threat of a Japanese invasion of the West Coast and little way of predicting the response of Japanese residents in America to that prospect. One could argue that Korematsu is one of those decisions that looks far worse in retrospect than it did at the time because some contingencies that were part of the basis of the decision - an invasion, Japanese-directed sabotage or espionage on the West Coast - did not actually occur. In light of that nonoccurrence, and the heightened sensitivity of late twentieth century and twenty-first century Americans toward racial classifications, Korematsu has ended up on the wrong side of history.¶ The question raised by the above analyses of Dred Scott and Korematsu boils down to this: should one conclude that the ranking of previous [\*210] decisions by the Court is essentially determined by whether a decision is perceived as being on the right or wrong side of history?¶ That conclusion seems oversimplified. Most decisions of the Court have a limited doctrinal shelf life. None of the Marshall Court's decisions interpreting the scope of the Commerce Clause n66 or the reach of the Contracts Clause n67 would be considered authoritative today. Nor would the efforts by late nineteenth century and early twentieth century Courts to "prick out the boundary," in police power and due process cases, between permissible and impermissible exercises of the police powers of the states be considered authoritative today. n68 Nor would the early and mid-twentieth century Court's treatment of obscenity, n69 commercial speech, n70 or subversive advocacy n71 be considered authoritative today. Does doctrinal obsolescence in a decision of the Court render it notorious? The answer would seem to be, on the whole, no.¶ A recent treatment of the majority opinion in Lochner v. New York can serve as an illustration. That opinion was a candidate for notoriety for several years in the middle and late twentieth century, primarily on the ground that it employed the discredited judicial doctrine of "liberty of contract" to invalidate maximum hours legislation initiated as a health measure. But the majority opinion in Lochner v. New York has been "rehabilitated" on the ground that in an era in which Justices were expected to engage in pricking the boundary between the police power and private rights in due process cases, it rested on the widely held assumption that legislative efforts to fix hours in the baking industry were unwarranted, paternalistic interferences with the freedom of employees to contract for their services. Furthermore, judicial efforts to attach substantive meaning to [\*211] terms such as liberty in the Due Process Clause were then regarded as consistent with the judiciary's role as a guardian of private rights under the Constitution. n72¶ In short, the Lochner majority's being on the wrong side of history for later commentators was not in itself a reason for treating the opinion as notorious if it was on the right side of history for contemporaries. Lochner was handed down by a divided Court, with Justice John Marshall Harlan's dissenting opinion also engaging in "boundary pricking," but concluding that the statute establishing maximum hours of work in the baking industry could be justified as reasonable exercise of the power to the states to protect the health of their citizens. n73 Only Holmes's dissenting opinion suggested that "liberty of contract" was an unwarranted judicial gloss, and no commentator would endorse that position for another four years. n74 It was not until 1937 that a majority of the Court would back away from the doctrine. n75¶ In contrast, the Korematsu decision was criticized, as early as six months after it was decided, as "hasty, unnecessary and mistaken," "in no way required or justified by the circumstances of the war," and "calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind." n76 As for Dred Scott, we have seen that criticism of that decision was immediate and widespread, and the election of 1860 suggested that its holding as to the status of slavery in the federal territories would not be enforced by either the Lincoln Administration or Congress.¶ Thus **perceptions about the wrongheadedness of a result can affect evaluations of the reasoning accompanying that result** and of the institutional stance adopted by the Court in the decision, **but, taken alone, neither the doctrinal obsolescence of an opinion nor the subsequent estrangement of commentators from an outcome are enough to ensure notoriety**. It seems to [\*212] be implicitly acknowledged that the popularity of outcomes reached by the Court in its decisions will change over time, and that the shelf life of the Court's constitutional doctrines will be comparatively short. What seems necessary for notoriety is a combination of foundational wrongheadedness and transparently defective reasoning, both of which are identified by contemporaries of the decision. On that ground both **Dred Scott and Korematsu** qualify. Taney's interpretation of the Territory Clause and his conclusion about the "degraded" status of African-Americans at the founding were attacked by Justice Benjamin Curtis in his Dred Scott dissent n77 and numerous commentators in the press at the time. n78 Black's rationale for upholding the evacuation order in Korematsu and the general treatment of Japanese-Americans by the United States government was savaged shortly after the decision was handed down by Yale law professor Eugene Rostow.

**The precedent makes future internment likely---it massively expands executive authority and offers unlimited deference**

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

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

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

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

**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.

**Korematsu survives silently as a precedent for future violence---only public debate can prevent history from repeating itself**

Dean Masaru **Hashimoto 96**, Assistant Professor of Law at Boston College, “ARTICLE: THE LEGACY OF KOREMATSU V. UNITED STATES: A DANGEROUS NARRATIVE RETOLD”, Fall 1996, 4 UCLA Asian Pac. AM. Law Journal 72, Lexis

During times of war, citizens must bear tremendous costs and burdens; indeed, sometimes they even surrender their lives. So was the nation's treatment of Japanese Americans so intolerable in view of wartime exigency? Part I examines the constitutional analysis considering this question in Korematsu v. United States. n35 Declaring that "hardships are part of war," n36 the Court upheld a military order that excluded persons of Japanese ancestry from designated coastal areas. The Court began, however, by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." n37 But it ultimately relied on the precedent set by United States v. Hirabayashi, n38 which upheld a similar curfew. **The Court's analysis turned on whether the military order was within the war powers of the President** and Congress.¶ [\*77] However, the Court's opinion in Korematsu has been aptly called "a muddled hodge-podge of conflicting and **barely articulate doctrine**." n39 Its mixed messages later were misinterpreted by the Court itself. The popular wisdom is that Korematsu has been, in fact, overruled as evidenced by the criticism it has received. n40 **Nevertheless, the Court continues to cite and rely on Korematsu in modern cases**. Most recently, in Adarand Constructors, Inc. v. Pena, n41 for example, the Court explicitly claimed that it relied on Korematsu in overruling more recent precedent that had applied intermediate scrutiny to federal affirmative action programs. The Court offered two conflicting interpretations of Korematsu and described its result as "inexplicable." n42 In its first interpretation, the Court concluded that although it had set forth the "most rigid scrutiny" standard in Korematsu, it "then inexplicably relied on 'the principles we announced in the Hirabayashi case,'" n43 which held that the "Fifth Amendment 'restrains only such discriminatory legislation by Congress as amounts to a denial of due process.'" n44 In this interpretation, the Court indicated that it had not applied a strict scrutiny test in Korematsu. Later, in the same opinion, however, the Court offered yet a different interpretation of Korematsu. The Court noted that Korematsu has been repeatedly cited for the proposition that racial classifications made by the federal government must be subject to strict scrutiny n45 and concluded that Korematsu teaches that "even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification." n46 The Court's second interpretation of Korematsu assumes that it had applied strict scrutiny. Part I explores these two contradictory views.¶ Part I also considers the role of Korematsu as legal precedent. n47 Since the 1980s, various individuals, groups, and courts have pronounced Korematsu insignificant. [\*78] Yet, despite declarations that Korematsu is of little precedential significance in the modern day**, the Court has not explicitly overruled it**. Instead, the Court gives Korematsu meaning in several different ways. Part I describes and criticizes the logic of those who claim that Korematsu is no longer influential as precedent. Part I also shows how Korematsu has been perpetuated as precedent. The Court has abandoned its reliance on traditional stare decisis in interpreting Korematsu. Instead, it has relied on interpretive methods that either exaggerate the amount of judicial scrutiny imposed or perpetuate the legal principles of Korematsu without citation to the case. The Court also uses Korematsu based on its historical meaning. The Court's modern interpretation of Korematsu places more emphasis on the persuasive quality of the case as precedent instead of confronting its logic**. This rhetorical orientation allows the legal principle contained in Korematsu to survive and flourish silently**.¶ The modern Court's difficulty in understanding Korematsu and its distortion as precedent had its genesis in the Korematsu Court's failure to provide a logical explanation for reaching its result and choosing instead to rely on persuasive rhetoric. To describe and explain the opinion's lack of an integrated analysis, I take a narrative-based approach to interpreting Korematsu. n48 This technique is sensitive to the intertwined roles of rhetoric and logic as well as to social influences involved in the creation of narratives and their subsequent transformations. Part II traces the origins of the narratives incorporated into the Court's written opinion and considers other available narratives ignored by the Court, particularly those of the parties most intimately involved: Korematsu and DeWitt. Part II also describes how the Court integrated and attributed meanings to the narratives contained within Korematsu. The section next offers and analyzes a two-tiered decisionmaking model for how narratives [\*79] may have been selected for integration into the Court's opinion. Then, I develop the idea that the Court's emphasis on choosing narratives and assigning them meaning based on persuasive appeal, rather than on their logical relevance resulted in the disjointed quality of the written opinion. This practice led to the failure to establish what I term the "interpretive-narrative link" -- a meaningful connection between the narrative and the Court's rule of law. The failure to establish this link caused the disharmony among messages within the opinion about the standard of review imposed.¶ Part III explains why the Court should privilege adjudication based on the narrative-interpretive link. This is not a call for less rhetoric; it would be naive to deprecate its importance. Instead, this is a plea for more explicit logical connections. The Court has excessively favored persuasive appeal over logical analysis in its use of Korematsu as precedent. The Court should confront Korematsu when it is logically relevant to a case. The Justices ought to provide explanation about how Korematsu is interpreted, despite rhetorical cost. Emphasis on the importance of the interpretive-narrative link in doctrinal interpretation would mean explicitly acknowledging Korematsu's legal presence through the traditional method of stare decisis as well as through historical interpretation. I call, however, for an abandonment of interpretive methods that rely on exaggeration based on the rhetoric contained within Korematsu and also for discarding those that permit reliance sub silentio**. Only through continuing public conversations about the modern-day meaning of Korematsu can its potentially dangerous principles and rhetoric be limited effectively**.

#### As scholars discussing Korematsu, we must adopt a multifaceted approach to oppression---shifting to political identities embracing intersectionality of diverse struggles is necessary to avoid repeating past mistakes

Margaret Chon 10, Seattle University law professor, 8 Seattle J. Soc. Just. 643, “ACCESS TO JUSTICE: Remembering and Repairing: The Error Before Us, In Our Presence”, Lexis

In its inaugural year, the center has already committed to research initiatives, such as Lutie A. Lytle Black Women Faculty Writing Workshop, held every summer at different law schools. The center’s range of participation in advocacy, education, and research illustrates concretely what Center Director, Professor Robert Chang, has theorized in his scholarship: that social justice activists need to move from identity politics to political identities. 41 According to Professor Chang, political identities are based more on explicit political commitments rather than narrowly defined views of who is inside and who is outside the circle of friends or amici.42 These broad-based efforts also keep sight of the interplay between individual versus structural sources of equality as well as the mutual construction of racism with other forms of “isms,” such as class-based oppression, gender-based oppression, and other inequalities based on religion, sexual orientation, immigration status, and so on—what is sometimes called intersectionality,43 or simultaneity.44 Without a deep understanding that each of these axes of injustice are part and parcel of an overall system and structure of power, in which some groups are systematically favored and others disfavored, any efforts at social change will only end up repeating the hierarchies but in slightly disguised ways. ¶ In addressing inequality, we also need to be wary of unwarranted utopianism or premature racial redemption,45 for example, in the form of post-racialism. Critical theorists have often pointed out the conflation of the “is” and the “ought” in colorblindness.46 While we all strive toward a society where race and other distinctions do not systematically result in inequality, we are still in the “is” stage—race and other social categories do still matter.47 It is tempting to posit that before we circle the board to “Go,” we no longer have to go through “Race Place.”48 But it’s not so simple, unfortunately. In the post-9/11 context, and as many Asian American law professors have noted, however, racialized religious discrimination has run rampant both within and outside the United States. While the majority of Muslims worldwide live in Asia,49 in the United States this kind of discrimination has been manifested primarily against people of Middle Eastern descent or people who look “Middle Eastern.” Unmistakable historical parallels can be drawn to the prejudice and discrimination experienced by Japanese Americans during World War II.50 ¶ As advocates, educators, and scholars, we have a lot of work to do to make these and other links visible, to re-frame dominant narratives so as to better address the heterogeneous nature of our identity politics as well as our political identities, and to interrupt the circulation and re-circulation of toxic cultural memes. This is a social justice full employment act. Perseverance is a key trait throughout these various social justice efforts. Some successes are still incipient.51 Mrs. Kathryn Korematsu has said: ¶ I would like to tell [students] to . . . get an education primarily. Learn as much as you can about . . . your past, the past history of Japanese Americans in the United States, especially the internment. . . . To always guard, be on guard, to protect their rights, to stand up for their rights. [Becomes emotional] Sorry. That one person can make a difference, even if it takes forty years.52 ¶ As one of my mentors, Judge A. Leon Higginbotham, would tell his clerks, “At some points in history some people just have to keep the flame burning, and that’s as much [as] you can do.”53

#### Epistemological communities like debate are a good place to make normative claims about how we want the world to be, even if we can’t directly identify with those experiences

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

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

## 2AC

### Case

#### The aff challenge to indefinite detention creates an ideal intersectional space to build coalitions against racial violence---PARTICULAR projects are key

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Because of the various problems with coalition building, several scholars do not endorse it. For example, Delgado advocates laboring within your own group for the social justice goals you support. "For some projects, justice turns out to be a solitary though heroic quest, and the road to justice is one that must be traveled alone, or with our deepest, most trusted companions."' 4 Haunani-Kay Trask states that real organizing of native Hawaiians takes place outside of coalitions.205 She supports Malcolm X's claims that whites need to tackle racism within their own communities, rather than in coalition." "Work in conjunction with us-each working among our own kind."207 Despite the frictions and problems between various traditional and nontraditional groups, coalition building can be a useful tool of critical race praxis in the current period. African Americans have been used to being the dominant minority in the United States, able to keep their concerns at the center of the civil rights movement. Latinos are now surpassing Blacks numerically,208 and are the majority in California already.2 They will be 25% of the U.S. population by 2050.210 Blacks will have to learn to work in coalition with Latinos to ensure that Black concerns are not lost in a new dispensation of "favored minority." While the Latinos are becoming the majority minority, they are not as politically organized as the Blacks yet, with many being recent immigrants or noncitizens, who may not speak English.21 ' Thus in some instances, Latinos will need to learn from African Americans, and with them, to achieve various goals. Coalition is good for Asians because although they score higher on standardized tests and have a higher income level than the other minority groups, history has already shown that they remain regarded as perpetual foreigners,1 2 once subject to internment. 3 Native Americans constitute only two million people," 4 and can benefit from linking with the larger groups, some of whom may resent those tribes, who now profit from gambling casino wealth." 5 Arabs and Muslims need to join in coalition with the other groups because they are too small and too recent as immigrants in comparison to the other groups to go it alone. As the current personification of evil of the moment, they need to draw upon the resources of other groups for support. Coalition building does not happen in a vacuum. It must coalesce around particular projects where there is commonality of interest. For instance, Frank Valdes has noted that Latinos and Asians share a common interest in legal issues that involve "immigration, family, citizenship, nationhood, language, expression, culture, and global economic restructuring."216 Racial profiling is a potential issue for cooperation as it affects all the major minority groups. I will use it for illustrative purposes in the remainder of this section, even though it is only one of various issues that could be the basis for coalition building. Asian scholars have noted how both the recent mistreatment of Chinese American scientist Dr. Wen Ho Lee 2 17 and the interning of 120,000 Japanese and Japanese Americans in World War II could both be regarded as cases of racial profiling.218 Kevin Johnson has called for Asians and Latinos to form political coalitions to challenge arbitrary INS conduct . 21 He also wants Blacks and Latinos to form coalitions to work on issues of racial profiling, as well.22° In the war against terrorism, racial profiling is particularly affecting Blacks, Latinos and South Asians who look Arab, creating an ideal intersectional issue for coalition building.22 ' Coalescing around profiling in these times will not be easy. In his timely book, Justice at War: Civil Liberties and Civil Rights in a Time of Crisis, Richard Delgado, a founder of CRT, queries, "Will the establishment insist on Americanism and toeing the line in the war on terrorism, and demand that minorities demonstrate loyalty, in return for a symbolic concession or two?.. .Will it choose one minority group for favored treatment, in hope of keeping the others in line."2'22 There are several foreseeable scenarios in this regard. For example, the Bush administration could reconfigure rather than terminate various federal affirmative action programs after an expected hostile Supreme Court decision in the upcoming Michigan cases,223 to attempt to ensure Black support for the war efforts. The administration's rejection of the pro-affirmative action position of the University of Michigan may have attracted some Asian support.224 The perpetuation of the forty year old blockade against Cuba despite U.S. business opposition ensures Cuban American loyalty,225 and the rumored appointment of a Hispanic for the next U.S. Supreme Court vacancy may attract other Latinos.22 ' Delgado wonders whether people of color will "be able to work together toward mutual goals--or [will] the current factionalism and distrust continue into the future, with various minority groups competing for crumbs while majoritarian rule continue[s] unabated? 22

#### They presume the purity of their experience in place of facts---we must examine multiple perspectives like the aff

Conway 97—philosophy, Penn State (Daniel, Nietzsche and the political, 135-6)

This preference is clearly political in nature, and Haraway makes no pretense of aspiring to epistemic purity or foundational innocence. For Haraway, any epistemic privilege necessarily implies a political (i.e., situated) preference. Her postmodern orientation elides the boundaries traditionally drawn between politics and epistemology, and thus renders otiose the ideal of epistemic purity. All perspectives are partial, all standpoints situated—including those of feminist theorists. It is absolutely crucial to Haraway's postmodern feminist project that we acknowledge her claims about situated knowledge as themselves situated within the political agenda she sets for postmodern feminism; feminist theorists must therefore accept and accommodate the self-referential implications of their own epistemic claims. ¶ The political agenda of postmodern feminism thus assigns to (some) subjugated standpoints a political preference or priority. Haraway, for example, believes that some subjugated standpoints may be more immediately revealing, especially since they have been discounted and excluded for so long. They may prove especially useful in coming to understand the political and psychological mechanisms whereby the patriarchy discounts the radically situated knowledges of others while claiming for its own (situated) knowledge an illicit epistemic privilege: ¶ The standpoints of the subjugated ... are savvy to modes of denial through repression, forgetting, and disappearing acts— ways of being nowhere while claiming to sec comprehensively. The subjugated have a decent chance to be on to the god-trick and all its dazzling—and, therefore, blinding—illuminations.34 ¶ But these subjugated standpoints do not afford feminist theorists an epistemically privileged view of the world, independent of the political agendas they have established. Reprising elements of Nietzsche's psychological profile of the "slave" type, Haraway warns against the ¶ serious danger of romanticizing and/or appropriating the vision of the less powerful while claiming to see from their positions. To see from below is neither easily learned nor unproblematic, even if "we" "naturally" inhabit the great underground terrain of subjugated knowledges. The positionings of the subjugated are not exempt from critical re-examination, decoding, deconstruction, and interpretation; that is, from both semiological and hermeneutic modes of critical enquiry. The standpoints of the subjugated are not "innocent" positions.35 ¶ A subjugated standpoint may shed new light on the ways of an oppressor, but it in no way renders superfluous or redundantthe standpoint of the oppressor. Because neither standpoint fully comprises the other, the aggregation of the two would move both parties (or a third party) closer to a more objective understanding of the world. If some feminists have political reasons for disavowing this project of aggregation, or for adopting it selectively, then they must pursue their political agenda at the expense of the greater objectivity that they might otherwise have gained.

#### Standpoint epistemology too sweeping – dominant standpoint can emancipate and oppressed standpoint can entrench suffering

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http://www.uel.br/grupo-estudo/processoscivilizadores/portugues/sitesanais/anais10/Artigos\_PDF/Francois\_Depelteau.pdf

Critical theory is not only an anti-positivistic attack against neutral, ‘pure’ knowledge. It also proposes some critical knowledge to transform the world. In opposition to ‘traditional science’ which is associated with the interests of elites, states, and other dominant groups and institutions, critical knowledge is made up and diffused for the oppressed, exploited, dominated, and alienated people, such as capitalist workers, women in patriarchical society, gays and lesbians in an heterosexual society, and so on. Social scientists are invited to support dominated groups, to work with and for them, or even through them, as activists and not only ‘philosophers.’ In this sense, critical theory (should) leads to ‘political emancipation’ (Habermas, Knowledge and Human Interests). As Marx wrote in the famous These XI on Feuerbach: ‘The philosophers have only interpreted the world, in various ways; the point is to change it.’ However, critical thinkers cannot simply describe the world as it is seen by the oppressed. As Horheimer says: If critical theory consisted essentially in formulations of the feelings and ideas of one class at any given moment, it would not be structurally different from the special branches of science. It would be engaged in describing the psychological contents typical of certain social groups; it would be social psychology. (1972: 214) If it aspires to change the world and improve the life conditions of the oppressed, the goal of critical theory is not to describe the consciousness of the oppressed; ‘the point is to change it’: If, however, the theoretician and his specific object are seen as forming a dynamic unity with the oppressed class, so that his presentation of societal contradictions is not merely an expression of the concrete historical situation but also a force within it to stimulate change, then his real function emerges. (Horkheimer 1972: 215) Critical theory can fulfill this function only by being convincing; and since it aspires to be much more than another ideology, it can be convincing - as a liberating force - only if it can provide better (‘objective’) explanations about societal contradictions, social structures, ideologies, group conflicts, and power relations. In other words, the critical thinker can form a ‘dynamic unity’ with the oppressed people only if critical theory transforms the ‘false’ consciousness of the oppressed into a critical and real consciousness coming from a better (more objective, scientific) understanding of reality. The idea is not to please the oppressed people, or to support their worldviews. One major implication of this is that the critical thinker has to, or might have to, contradict the explanations provided by dominant groups, but also by the oppressed that he/she wants to help: The unity of the social forces which promise liberation is at the same time their distinction (in Hegel’s sense); it exists only as a conflict which continually threatens the subjects caught up in it. This truth becomes clearly evident in the person of the theoretician; he/she exercises an aggressive critique not only against the conscious defenders of the status quo but also against distracting, conformist, or utopian tendencies within his/her own household. (Horkheimer 1972: 215-216)

#### The real test of our politics should be the ability to advocate for change on behalf of people who aren’t like us and whose experience we don’t share---our framework creates policy deliberation on broader issues of concern to people who might be unlike ourselves

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

Earlier this year, Sen. Mark Kirk, R-Ill., returned to Washington after a long, arduous recovery from the stroke he suffered in early 2012. In an interview with Natasha Korecki of the Chicago Sun-Times, Kirk said he:¶ [Plans] to take a closer look at funding of the Illinois Medicaid program for those with have no income who suffer a stroke, he said. In general, a person on Medicaid in Illinois would be allowed 11 rehab visits, he said.¶ “Had I been limited to that, I would have had no chance to recover like I did,” Kirk said. “So unlike before suffering the stroke, I’m much more focused on Medicaid and what my fellow citizens face.”¶ Kirk has the same federal health-care coverage available to other federal employees. He has incurred major out-of-pocket expenses, which have affected his savings and retirement, sources familiar with Kirk’s situation said.¶ Harold Pollack commended Kirk for those “wise words, sadly earned,” writing: “Such a profound physical ordeal – and one’s accompanying sense of profound privilege in securing more help than so many other people routinely receive — this changes a person.”¶ Steve Benen was also impressed with Kirk’s hard-won change of heart, but noted:¶ I do wish, however, that we might see similarly changed perspectives without the need for direct personal relevance. Many policymakers are skeptical about federal disaster relief until it’s their community that sees devastation. They have no interest in gay rights until they learn someone close to them is gay. And they’re unsure of the value of Medicaid until they see its worth up close.¶ Which brings us to this week, and the news that conservative Republican Sen. Rob Portman of Ohio now supports marriage equality for same-sex couples. The Cleveland Plain-Dealer’s headline for Sabrina Eaton’s report tells the story, “Sen. Rob Portman comes out in favor of gay marriage after son comes out as gay“:¶ Republican U.S. Sen. Rob Portman on Thursday announced he has reversed his longtime opposition to same-sex marriage after reconsidering the issue because his 21-year-old son, Will, is gay.¶ Portman said his son, a junior at Yale University, told him and his wife, Jane, that he’s gay and “it was not a choice, it was who he is and that he had been that way since he could remember.”¶ “It allowed me to think of this issue from a new perspective, and that’s of a Dad who loves his son a lot and wants him to have the same opportunities that his brother and sister would have — to have a relationship like Jane and I have had for over 26 years,” Portman told reporters in an interview at his office.¶ The conversation the Portmans had with their son two years ago led to him to evolve on the issue after he consulted clergy members, friends — including former Vice President Dick Cheney, whose daughter is gay — and the Bible.¶ This is a big deal. Portman is the first Republican senator to endorse marriage equality. And he wasn’t previously someone who seemed on the fence — he was adamantly, religiously opposed before.¶ So the first thing I want to say is congratulations, kudos, and thank you to Portman. I heartily second the commendations and praise he’s receiving from groups like the Human Rights Campaign, Freedom to Marry Ohio, and PFLAG.¶ For Portman, as for Kirk, an unbidden circumstance expanded his perspective of the world. That new, larger appreciation in turn expanded his understanding of what justice requires — of what justice requires for people who aren’t necessarily just like him.¶ This is one way we all learn — one way we all become bigger, better people. It is, for almost all of us, a necessary first step toward a more expansive empathy and a more inclusive understanding of justice. Even if it is only a first step, it is an unavoidable one, and we should celebrate the epiphany that challenging circumstance has allowed these senators.¶ What Steve Benen said about Kirk is still true for Portman. It is good to see his perspective change due to “direct personal relevance,” but it would be better if he could learn to expand his perspective even without it. That’s the next necessary step, the next epiphany awaiting these senators.¶ Kirk’s long recovery provided his “Aha!” moment when it comes to other people who are also recovering from a stroke. And Portman’s coming to grips with his son’s identity provided him with an “Aha!” moment when it comes to other LGBT people and their families. But it’s not yet clear that either senator has yet taken the next logical step — the next “Aha!” moment. The next step is the big one. It’s the realization that because I didn’t understand others’ situation or others’ perspective until I myself faced the same thing, I should then strive to listen and to learn and to see the world through others’ eyes so that I can better understand the world without having to experience every situation, every injustice, every ordeal personally.¶ This next step is necessary for justice, which can only come “When those who are not injured feel as indignant as those who are.”¶ That next step may seem obvious, but epiphanies always seem obvious in retrospect.¶ Until that next step occurs, though, the slightly expanded empathy of people like Kirk and Portman seems self-serving, like the “cowardice and hypocrisy” of the privileged, as Morf Morford describes it. They still seem to cling to a cramped, self-centered understanding of justice — one that can only grow when their own, personal interests require it to do so. It still lacks the ability to be “indignant” except when one is personally among the “injured.”¶ “Moral and political positions aren’t supposed to be something you only take when they’ll benefit you,” Mark Evanier wrote. Empathy becomes suspect when it coincides so closely with personal benefit. It begins to look like what Mark Schmitt calls “Miss America compassion“:¶ Their compassion seems so narrowly and literally focused on the specific misfortune that their family encountered. Having a child who suffers from mental illness would indeed make one particularly passionate about funding for mental health, sure. But shouldn’t it also lead to a deeper understanding that there are a lot of families, in all kinds of situations beyond their control, who need help from government? Shouldn’t having a son whose illness leads to suicide open your eyes to something more than a belief that we need more money for suicide help-lines? Shouldn’t it call into question the entire winners-win/losers-lose ideology of the current Republican Party?¶ If we take the first step without ever taking the next step — changing our perspective only when “direct personal relevance” demands it and not otherwise — we can fall into what Matthew Yglesias describes as “The Politics of Narcissism“:¶ Remember when Sarah Palin was running for vice president on a platform of tax cuts and reduced spending? But there was one form of domestic social spending she liked to champion? Spending on disabled children? Because she had a disabled child personally? Yet somehow her personal experience with disability didn’t lead her to any conclusions about the millions of mothers simply struggling to raise children in conditions of general poorness. Rob Portman doesn’t have a son with a pre-existing medical condition who’s locked out of the health insurance market. Rob Portman doesn’t have a son engaged in peasant agriculture whose livelihood is likely to be wiped out by climate change. Rob Portman doesn’t have a son who’ll be malnourished if SNAP benefits are cut. So Rob Portman doesn’t care.¶ … But if Portman can turn around on one issue once he realizes how it touches his family personally, shouldn’t he take some time to think about how he might feel about other issues that don’t happen to touch him personally? Obviously the answers to complicated public policy questions don’t just directly fall out of the emotion of compassion. But what Portman is telling us here is that on this one issue, his previous position was driven by a lack of compassion and empathy. Once he looked at the issue through his son’s eyes, he realized he was wrong. Shouldn’t that lead to some broader soul-searching? Is it just a coincidence that his son is gay, and also gay rights is the one issue on which a lack of empathy was leading him astray? That, it seems to me, would be a pretty remarkable coincidence. The great challenge for a senator isn’t to go to Washington and represent the problems of his own family. It’s to try to obtain the intellectual and moral perspective necessary to represent the problems of the people who don’t have direct access to the corridors of power.¶ Senators basically never have poor kids. That’s something members of Congress should think about.¶ Will Femia notes that this widely shared observation prompted an insightful — and darkly funny — meme about “hypothetical Republican empathy.”¶ “If empathy only extends to your flesh and blood, we gotta start shoving people into those families,” Rachel Maddow said.¶ “Now all we need is 59 more gay Republican kids,” Dave Lartigue wrote.¶ “Perhaps if we could get the Republican caucus to adopt gay, black Hispanic illegal-immigrant children, who will grow up to be denied insurance due to pre-existing conditions, we’d make some more social progress,” mistermix wrote.¶ “Eventually one of these Republican congressmen is going to find out his daughter is a woman, and then we’re all set,” Anil Dash tweeted.¶ And Andy Borowitz chimed in with “Portman Inspires Other Republicans to Stop Speaking to Their Children.”¶ Endless variations of that joke circulated this week because that joke offers limitless possibilities — as limitless as the stunted “hypothetical empathy” of “Miss America compassion” is limited.¶ That joke and Yglesias’ argument are correct. An empathy that never moves beyond that first step and that first epiphany is morally indistinct from selfishness. To take that first step without the next one is only to move from “me first” to “me and mine first.” (David Badash and Jonathan Chait also have insightful posts making this argument.)¶ But no one can take that next big step until they take the first one. So I’m less interested in criticizing Portman or Kirk or anyone else in their position than I am in figuring out how we can urge and encourage them to take that next big step. How can we facilitate the next epiphany?¶ That’s the bigger issue, the more important challenge. Ari Kohen tackles this challenge in a bookish post building on Richard Rorty’s thoughts. Kohen is interested most of all in how “to accomplish this progress of sentiments, thisl expanding of our sense of solidarity”:¶ The best way to convince the powerful that their way of thinking about others needs to evolve is to show them the ways in which individuals they consider to be “Other” are, in fact, much more closely akin to them than they ever realized. It is, in short, to create a greater solidarity between the powerful and the weak based on personal identification.¶ Rob Portman’s change of heart is a good example of the way in which we ultimately achieve a progress of sentiments that leads to the equal treatment of more and more people. Viewed in this way, it’s really not something people on the Left ought to be criticizing; it’s something we should be working to encourage for those without the sort of immediate personal connection that Portman fortunately had.¶ (Note that we are, yet again, confronted with the idea of ethics as a trajectory.)¶ The vital question, then, is how? How can we encourage “a progress of sentiments” along a trajectory “that leads to the equal treatment of more and more people”?¶ Part of the answer, I think, is to remember how we ourselves were encouraged along — how we ourselves each came to take that next step, how we ourselves came to have that second epiphany.¶ That’s the approach that Grace at Are Women Human? takes in a firm-but-generous post titled “Changes of heart and our better selves.” Grace highlights Portman’s case as an example of “the tensions between celebrating progress and recognizing that there’s still work to be done.” She draws on her own story and history for humility and perspective, and as a guide to helping others see and take the next steps in their journey:¶ How easy it is to say Portman … should have done better and forget that I wasn’t so different, not so long ago.¶ The honest truth: it was getting to know and love queer people that, more than anything else, led me away from the bigotry I’d been taught as faith. … It’s important for me not to forget this, or that it took the thought that my not-yet-born child might be transgender for me to realize that I needed to educate myself about gender identity. It would be dangerous to indulge the fiction that I’ve always held the moral “high ground.” …¶ That history — her own and that of others who have come to a more inclusive, expansive understanding of justice — informs the advice, and the warning, that follows:¶ Portman isn’t an exception in having, and indulging, the luxury of ignoring the consequences of politics that don’t affect him personally.¶ This is a feature, not a bug, of our culture and political system. Power is concentrated in the hands of people who routinely make policy on matters they have little experience or real stakes in. You don’t need any conscious malice in this setup to produce policy that has devastating effects on the communities these issues touch most directly (though there’s plenty of malice, too). All you need is a system run by people who can afford not to care that much about policies that mostly impact other people’s lives.¶ Which, I suppose, is why civil rights activism often depends on cultivating these very moments of identification with the “other,” on spontaneous and planned appeals to emotion and basic decency. Systemic lack of incentive to care has to be confronted with stories that get politicians or the public to care.¶ Emmitt Till’s open casket. Rosa Parks’ carefully planned protest of bus segregation – as a more “respectable” face of black resistance than Claudette Colvin. Hydeia Broadbent and Ryan White as the faces of children with HIV. DREAMers taking over public spaces, stories about families torn apart by racist, classist, unjust immigration policies.¶ … Rob Portman is not an exception. He’s the rule. I don’t say this to suggest that we cut him slack for finally arriving at a basic (and still incomplete) recognition of the humanity of queer people. Nor am I arguing that we shouldn’t critique the circumstances around his change of heart.¶ What I hope is that we don’t forget ourselves in these calls to do better. That we don’t fall into the deceptive confidence that because we know or do better, we’ve arrived…or forget how many of us had to change and grow to get to where we are now. We’re all capable of fooling ourselves into thinking our standpoints are clearly “rational” or “moral” when it comes to issues that don’t affect us.

#### Being able to talk about your personal issues is the privilege—who is here to speak about their experience in indefinition detention? Their kritik mirrors acts of distancing that say we should only focus on what’s in our purview---indefinite detention has maintained its legitimacy precisely because we view it as out there and not affecting us---we must bring the voices of those who can’t speak for themselves here

Park 10

[2010, James Park, “EFFECTUATING PRINCIPLES OF JUSTICE IN ENDING INDEFINITE DETENTION: HISTORICAL REPETITION AND THE CASE OF THE UYGHURS”, 31 Whittier L. Rev. 785]

George Orwell once wrote in The Road to Wigan Pier regarding empire and the complicity of a nation that enjoys its fruits: For in the last resort, the only important question is, Do you want the British Empire to hold together or do you want it to disintegrate?... For, apart from any other consideration, the high standard of life we enjoy in England depends upon our keeping a tight hold on the Empire, particularly the tropical portions of it such as India and Africa. Under the capitalist system, in order that England may live in comparative comfort, a hundred million Indians must live on the verge of starvation. 128 How the old British Empire relates to the detention of Haitians and Uyghurs at Guantanamo Bay involves the very question of conscious awareness and the difficulties in piercing the veil of physical and metaphysical detachment. 129 Descriptions of events transcribed through the filter of media form a buffer to action due to its intangible nature-there is an unreality to the medium of television where elements of reality that play across the screen can take on the discursive properties of the imaginary. 130 As a result, there can be quiet and passive acquiescence when terms, such as, "exceptional," "unprecedented," and "the normal rules do not apply" are heard and used to form the exigencies and justifications for "intensive interrogation methods" and indefinite detention without charge. 131 Spatial separation and isolation also create impediments to rectifying injustice. In the case of the Haitian refugees, service organizations had to go through the judiciary and spend years in litigation to gain access to the refugees at Guantanamo Bay. 13 In the case of Guantanamo Bay detainees caught up in the "War on Terror," there were explicated policies against denying access. 133 For instance, "[a] confidential 2003 manual for operating the Guantanamo detention center shows that military officials had a policy of denying detainees access to independent monitors" from the Red Cross. 134 In other words, those who had done no wrong were denied access and, as a result, justice. The indefinite detention of the Haitians and Uyghurs and the years they have spent and are spending in extra-territorial detention can, similarly, be examined through the prism of "punishment" as there have been alterations to the order and methodology of punishment and incarceration over time. 135 Punishment has changed from something that was acutely visible to something that has become cloaked and secreted away. 136 At one time, the public spectacle of punishment took center stage as a gory spectacle of physical pain. 137 These dramatic displays of "justice" provided all concerned with a specific role: The criminal to be punished acted as the star, the innocent public witnesses supplied the captivated audience, and the government authority directed this macabre melodrama. 138 These displays were therefore meant to educate both the individual criminals living (or in some cases dying), as well as the watching public as to the concepts of justice and punishment. 139 These theatrics later gave way to a less sensational mode of education which focused less on physical torment in pursuit of justice and sought to internalize a sense of a moral code in all individuals. 140 Thus, what was once a passive group of mere voyeurs has been disbanded to become a cluster of individual productions-each person now internalizes and imagines the process of punishment through the censored lens of courtroom dramas and the scripted cinema of the prison yard in popular culture, rather than bear witness to the realities of society's retribution. This more sanitary, internal approach to punishment is particularly pronounced when examined in the context of the "War on Terror." In this instance, the institutions of punishment are not only removed from the public eye, but from the very soil of our nation.

**//MARKED**

141 In point of fact, Guantanamo Bay is based in a country where United States citizens cannot visit without obtaining a license through the United States government due to a long-existing trade embargo which has only recently been revisited. 142 Guantanamo Bay has been argued to be territory that is outside the bounds of United States' sovereignty, thereby, prohibiting detainees from invoking habeas corpus to challenge their detention. 143 Proponents of this argument used the United States Supreme Court decision in Johnson v. Eisentrager, decided in 1950, which held that those detained in territories beyond the borders of United States sovereignty are unable to invoke the writ of habeas corpus. 144 Thus, Guantanamo Bay was argued to be the sovereign territory of the nation of Cuba as a convenient fiction despite the years of isolation between the two nations. 145 This argument was shattered when the United States Supreme Court held that habeas corpus for "War on Terror" detainees was due in Boumediene v. Bush, decided in 2008. 146 Even further tucked away from the public eye are the secret prisons-socalled "black sites"-instituted by the Bush Administration, operating extra-judicially and containing the faceless "ghost detainee," subject to "intensive interrogation methods."' 147 As the form of punishment and detention shifts further afield, it takes on a profound dimension of separation. George Orwell, in the excerpt above, was alluding to the natural tendency to accept the conditions with which people are presented. The automatic supposition that what may be taking placing is unjust and perhaps beyond the constitutional limits can be seemingly driven from conscious awareness by the public's separation from events and the lack of information. As a consequence, justice has proceeded at a slow, aggravated plod in rectifying wrong where, oftentimes, individuals are simply "released" quietly after years of imprisonment without the subject of their innocence ever being addressed.

### K

#### The invocation of social death as ontologically inevitable inscribes a pessimism towards politics which makes agency impossible and oversimplifies the history of resistance

Brown 9 Vincent, Prof. of History and African and African-American Studies @ Harvard Univ., December, "Social Death and Political Life in the Study of Slavery," American Historical Review, p. 1231-1249

Specters of the Atlantic is a compellingly sophisticated study of the relation be- tween the epistemologies underwriting both modern slavery and modern capitalism, but the book’s discussion of the politics of anti-slavery is fundamentally incomplete. While Baucom brilliantly traces the development of “melancholy realism” as an op- positional discourse that ran counter to the logic of slavery and finance capital, he has very little to say about the enslaved themselves. Social death, so well suited to the tragic perspective, stands in for the experience of enslavement. While this heightens the reader’s sense of the way Atlantic slavery haunts the present, Baucom largely fails to acknowledge that the enslaved performed melancholy acts of accounting not unlike those that he shows to be a fundamental component of abolitionist and human rights discourses, or that those acts could be a basic element of slaves’ oppositional activities. In many ways, the effectiveness of his text depends upon the silence of slaves—it is easier to describe the continuity of structures of power when one down- plays countervailing forces such as the political activity of the weak. So Baucom’s deep insights into the structural features of Atlantic slave trading and its afterlife come with a cost. Without engagement with the politics of the enslaved, slavery’s history serves as an effective charge leveled against modernity and capitalism, but not as an uneven and evolving process of human interaction, and certainly not as a locus of conflict in which the enslaved sometimes won small but important victories.11¶ Specters of the Atlantic is self-consciously a work of theory (despite Baucom’s prodigious archival research), and social death may be largely unproblematic as a matter of theory, or even law. In these arenas, as David Brion Davis has argued, “the slave has no legitimate, independent being, no place in the cosmos except as an instrument of her or his master’s will.”12 But the concept often becomes a general description of actual social life in slavery. Vincent Carretta, for example, in his au- thoritative biography of the abolitionist writer and former slave Olaudah Equiano, agrees with Patterson that because enslaved Africans and their descendants were “stripped of their personal identities and history, [they] were forced to suffer what has been aptly called ‘social death.’ ” The self-fashioning enabled by writing and print “allowed Equiano to resurrect himself publicly” from the condition that had been imposed by his enslavement.13 The living conditions of slavery in eighteenth-century Jamaica, one slave society with which Equiano had experience, are described in rich detail in Trevor Burnard’s unflinching examination of the career of Thomas Thistle- wood, an English migrant who became an overseer and landholder in Jamaica, and who kept a diary there from 1750 to 1786. Through Thistlewood’s descriptions of his life among slaves, Burnard glimpses a “world of uncertainty,” where the enslaved were always vulnerable to repeated depredations that actually led to “significant slave dehumanization as masters sought, with considerable success, to obliterate slaves’ personal histories.” Burnard consequently concurs with Patterson: “slavery completely stripped slaves of their cultural heritage, brutalized them, and rendered ordinary life and normal relationships extremely difficult.”14 This was slavery, after all, and much more than a transfer of migrants from Africa to America.15 Yet one wonders, after reading Burnard’s indispensable account, how slaves in Jamaica or- ganized some of British America’s greatest political events during Thistlewood’s time and after, including the Coromantee Wars of the 1760s, the 1776 Hanover conspiracy, and the Baptist War of 1831–1832. Surely they must have found some way to turn the “disorganization, instability, and chaos” of slavery into collective forms of belonging and striving, making connections when confronted with alien- ation and finding dignity in the face of dishonor. Rather than pathologizing slaves by allowing the condition of social death to stand for the experience of life in slavery, then, it might be more helpful to focus on what the enslaved actually made of their¶ situation.¶ Among the most insightful texts to explore the experiential meaning of Afro- Atlantic slavery (for both the slaves and their descendants) are two recent books by Saidiya Hartman and Stephanie Smallwood. Rather than eschewing the concept of social death, as might be expected from writing that begins by considering the per- spective of the enslaved, these two authors use the idea in penetrating ways. Hart- man’s Lose Your Mother: A Journey along the Atlantic Slave Route and Smallwood’s Saltwater Slavery: A Middle Passage from Africa to American Diaspora extend social death beyond a general description of slavery as a condition and imagine it as an experience of self. Here both the promise and the problem with the concept are most fully apparent.16¶ Both authors seek a deeper understanding of the experience of enslavement and its consequences for the past, present, and future of black life than we generally find in histories of slavery. In Hartman’s account especially, slavery is not only an object of study, but also the focus of a personal memoir. She travels along a slave route in Ghana, from its coastal forts to the backcountry hinterlands, symbolically reversing the first stage of the trek now commonly called the Middle Passage. In searching prose, she meditates on the history of slavery in Africa to explore the precarious nature of belonging to the social category “African American.” Rendering her re- markable facility with social theory in elegant and affective terms, Hartman asks the question that nags all identities, but especially those forged by the descendants of slaves: What identifications, imagined affinities, mythical narratives, and acts of re- membering and forgetting hold the category together? Confronting her own alienation from any story that would yield a knowable genealogy or a comfortable identity, Hartman wrestles with what it means to be a stranger in one’s putative motherland, to be denied country, kin, and identity, and to forget one’s past—to be an orphan.17 Ultimately, as the title suggests, Lose Your Mother is an injunction to accept dis- possession as the basis of black self-definition.¶ Such a judgment is warranted, in Hartman’s account, by the implications of social death both for the experience of enslavement and for slavery’s afterlife in the present. As Patterson delineated in sociological terms the death of social personhood and the reincorporation of individuals into slavery, Hartman sets out on a personal quest to “retrace the process by which lives were destroyed and slaves born.”18 When she contends with what it meant to be a slave, she frequently invokes Patterson’s idiom: “Seized from home, sold in the market, and severed from kin, the slave was for all intents and purposes dead, no less so than had he been killed in combat. No less so than had she never belonged to the world.” By making men, women, and children into commodities, enslavement destroyed lineages, tethering people to own- ers rather than families, and in this way it “annulled lives, transforming men and women into dead matter, and then resuscitated them for servitude.” Admittedly, the enslaved “lived and breathed, but they were dead in the social world of men.”19 As it turns out, this kind of alienation is also part of what it presently means to be African American. “The transience of the slave’s existence,” for example, still leaves its traces in how black people imagine and speak of home:¶ We never tire of dreaming of a place that we can call home, a place better than here, wherever here might be . . . We stay there, but we don’t live there . . . Staying is living in a country without exercising any claims on its resources. It is the perilous condition of existing in a world in which you have no investments. It is having never resided in a place that you can say is yours. It is being “of the house” but not having a stake in it. Staying implies transient quarters, a makeshift domicile, a temporary shelter, but no attachment or affiliation. This sense of not belonging and of being an extraneous element is at the heart of slavery.20¶ “We may have forgotten our country,” Hartman writes, “but we haven’t forgotten our dispossession.”21¶ Like Baucom, Hartman sees the history of slavery as a constituent part of a tragic present. Atlantic slavery continues to be manifested in black people’s skewed life chances, poor education and health, and high rates of incarceration, poverty, and premature death. Disregarding the commonplace temporalities of professional historians, whose literary conventions are generally predicated on a formal distinction between past, present, and future, Hartman addresses slavery as a problem that spans all three. The afterlife of slavery inhabits the nature of belonging, which in turn guides the “freedom dreams” that shape prospects for change. “If slavery persists as an issue in the political life of black America,” she writes, “it is not because of an antiquated obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago.”22¶ A professor of English and comparative literature, Hartman is in many respects in a better position than most historians to understand events such as the funeral aboard the Hudibras. This is because for all of her evident erudition, her scholarship is harnessed not so much to a performance of mastery over the facts of what hap- pened, which might substitute precision for understanding, as to an act of mourning, even yearning. She writes with a depth of introspection and personal anguish that is transgressive of professional boundaries but absolutely appropriate to the task. Reading Hartman, one wonders how a historian could ever write dispassionately about slavery without feeling complicit and ashamed. For dispassionate accounting—exemplified by the ledgers of slave traders—has been a great weapon of the powerful, an episteme that made the grossest violations of personhood acceptable, even necessary. This is the kind of bookkeeping that bore fruit upon the Zong. “It made it easier for a trader to countenance yet another dead black body or for a captain to dump a shipload of captives into the sea in order to collect the insurance, since it wasn’t possible to kill cargo or to murder a thing already denied life. Death was simply part of the workings of the trade.” The archive of slavery, then, is “a mortuary.” Not content to total up the body count, Hartman offers elegy, echoing in her own way the lamentations of the women aboard the Hudibras. Like them, she is concerned with the dead and what they mean to the living. “I was desperate to reclaim the dead,” she writes, “to reckon with the lives undone and obliterated in the making of human commodities.”23¶ It is this mournful quality of Lose Your Mother that elevates it above so many histories of slavery, but the same sense of lament seems to require that Hartman overlook small but significant political victories like the one described by Butter- worth. Even as Hartman seems to agree with Paul Gilroy on the “value of seeing the consciousness of the slave as involving an extended act of mourning,” she remains so focused on her own commemorations that her text makes little space for a consideration of how the enslaved struggled with alienation and the fragility of belonging, or of the mourning rites they used to confront their condition.24 All of the ques- tions she raises about the meaning of slavery in the present—both highly personal and insistently political—might as well be asked about the meaning of slavery to slaves themselves, that is, if one begins by closely examining their social and political lives rather than assuming their lack of social being. Here Hartman is undone by her reliance on Orlando Patterson’s totalizing definition of slavery. She asserts that “no solace can be found in the death of the slave, no higher ground can be located, no perspective can be found from which death serves a greater good or becomes any- thing other than what it is.”25 If she is correct, the events on the Hudibras were of negligible importance. And indeed, Hartman’s understandable emphasis on the personal damage wrought by slavery encourages her to disavow two generations of social history that have demonstrated slaves’ remarkable capacity to forge fragile com- munities, preserve cultural inheritance, and resist the predations of slaveholders. This in turn precludes her from describing the ways that violence, dislocation, and death actually generate culture, politics, and consequential action by the enslaved.26¶ This limitation is particularly evident in a stunning chapter that Hartman calls “The Dead Book.” Here she creatively reimagines the events that occurred on the voyage of the slave ship Recovery, bound, like the Hudibras, from the Bight of Biafra to Grenada, when Captain John Kimber hung an enslaved girl naked from the mizzen stay and beat her, ultimately to her death, for being “sulky”: she was sick and could not dance when so ordered. As Hartman notes, the event would have been unre- markable had not Captain Kimber been tried for murder on the testimony of the ship’s surgeon, a brief transcript of the trial been published, and the woman’s death been offered up as allegory by the abolitionist William Wilberforce and the graphic satirist Isaac Cruikshank. Hartman re-creates the murder and the surge of words it inspired, representing the perspectives of the captain, the surgeon, and the aboli tionist, for each of whom the girl was a cipher “outfitted in a different guise,” and then she puts herself in the position of the victim, substituting her own voice for the unknowable thoughts of the girl. Imagining the experience as her own and wistfully representing her demise as a suicide—a final act of agency—Hartman hopes, by this bold device, to save the girl from oblivion. Or perhaps her hope is to prove the impossibility of ever doing so, because by failing, she concedes that the girl cannot be put to rest. It is a compelling move, but there is something missing. Hartman discerns a convincing subject position for all of the participants in the events sur- rounding the death of the girl, except for the other slaves who watched the woman die and carried the memory with them to the Americas, presumably to tell others, plausibly even survivors of the Hudibras, who must have drawn from such stories a basic perspective on the history of the Atlantic world. For the enslaved spectators, Hartman imagines only a fatalistic detachment: “The women were assembled a few feet away, but it might well have been a thousand. They held back from the girl, steering clear of her bad luck, pestilence, and recklessness. Some said she had lost her mind. What could they do, anyway? The women danced and sang as she lay dying.”¶ Hartman ends her odyssey among the Gwolu, descendants of peoples who fled the slave raids and who, as communities of refugees, shared her sense of dispos- session. “Newcomers were welcome. It didn’t matter that they weren’t kin because genealogy didn’t matter”; rather, “building community did.” Lose Your Mother con- cludes with a moving description of a particular one of their songs, a lament for those who were lost, which resonated deeply with her sense of slavery’s meaning in the present. And yet Hartman has more difficulty hearing similar cries intoned in the past by slaves who managed to find themselves.27¶ Saltwater Slavery has much in common with Lose Your Mother. Smallwood’s study of the slave trade from the Gold Coast to the British Americas in the late seventeenth and early eighteenth centuries likewise redeems the experience of the people traded like so many bolts of cloth, “who were represented merely as ciphers in the political arithmetic,” and therefore “feature in the documentary record not as subjects of a social history but as objects or quantities.”28 Each text offers a penetrating analysis of the market logic that turned people into goods. Both books work with the concept of social death. However, Smallwood examines the problem of social death for the enslaved even more closely than Hartman does.29¶ Like Hartman, Smallwood sees social death as a by-product of commodification. “If in the regime of the market Africans’ most socially relevant feature was their exchangeability,” she argues, “for Africans as immigrants the most socially relevant feature was their isolation, their desperate need to restore some measure of social life to counterbalance the alienation engendered by their social death.” But Small- wood’s approach is different in a subtle way. Whereas for Hartman, as for others, social death is an accomplished state of being, Smallwood veers between a notion of social death as an actual condition produced by violent dislocation and social death as a compelling threat. On the one hand, she argues, captivity on the Atlantic littoral was a social death. Exchangeable persons “inhabited a new category of mar- ginalization, one not of extreme alienation within the community, but rather of ab- solute exclusion from any community.” She seems to accept the idea of enslaved commodities as finished products for whom there could be no socially relevant relationships: “the slave cargo constituted the antithesis of community.” Yet elsewhere she contends that captives were only “menaced” with social death. “At every point along the passage from African to New World markets,” she writes, “we find a stark contest between slave traders and slaves, between the traders’ will to commodify people and the captives’ will to remain fully recognizable as human subjects.”30 Here, I think, Smallwood captures the truth of the idea: social death was a receding ho- rizon—the farther slaveholders moved toward the goal of complete mastery, the more they found that struggles with their human property would continue, even into the most elemental realms: birth, hunger, health, fellowship, sex, death, and time.¶ If social death did not define the slaves’ condition, it did frame their vision of apocalypse. In a harrowing chapter on the meaning of death (that is, physical death) during the Atlantic passage, Smallwood is clear that the captives could have no frame of reference for the experience aboard the slave ships, but she also shows how des- perate they were to make one. If they could not reassemble some meaningful way to map their social worlds, “slaves could foresee only further descent into an endless purgatory.” The women aboard the Hudibras were not in fact the living dead; they were the mothers of gasping new societies. Their view of the danger that confronted them made their mourning rites vitally important, putting these at the center of the women’s emerging lives as slaves—and as a result at the heart of the struggles that would define them. As Smallwood argues, this was first and foremost a battle over their presence in time, to define their place among ancestors, kin, friends, and future progeny. “The connection Africans needed was a narrative continuity between past and present—an epistemological means of connecting the dots between there and here, then and now, to craft a coherent story out of incoherent experience.” That is precisely what the women on the Hudibras fought to accomplish.31

#### Wilderson is overly reductive---he has no way to explain historical resistance to anti-blackness because his theory pigeon holes all oppression into the non-falsifiable register of psychoanalysis

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As we shall see below, blacks in the US cannot and do not have ontology, or so Wilderson argues, denying with the same breath the workability of analogy as a method, because analogy can only be a ruse. Thus, what he calls ‘the ruse of analogy’ grants those who fall for it, for example, ‘Black film theorists’ or Black academics, an opportunity to reflect on (black) cinema only after some form of structural alteration. (38) Analogy does seem tricky if one follows Wilderson’s line of thought, that is, the Holocaust/Jews and slavery/Africans. Jews entered and came out of Auschwitz as Jews whereas Africans emerged from the slave ships as Blacks.2 Two types of holocaust: the first ‘Human’, the second ‘Human and metaphysical’, something which leads to Wilderson saying that ‘the Jews have the Dead ... among them; the Dead have the Black among them’. (38) It bears reiterating that for Wilderson, blacks are socially and ontologically dead in the sense that the black body has been violently turned into flesh, ‘ripped apart literally and imaginatively’, that it is a body vulnerably open, ‘an object made available (fungible) for any subject’ and ‘not in the world’ or civil society the way white bodies are. (38)¶ Furthermore, Wilderson argues that differences between black and white ethical dilemmas separate them dialectically into incompatible zones. As illustration Wilderson reflects on black women suffering in US prisons in the 1970s and then juxtaposes the suffering with white women’s concurrent public preoccupations in civil society. For example, the violence and neglect underwent by Safya Bukhari‐ Alston3 in solitary confinement at the Virginia Correctional Center for Women is linked to the similar plight of another black woman, Dorothy, in Haile Gerima’s Bush Mama (1977) before Wilderson questions what both situations mean in relation to images of ‘[w]hite women burning bras in Harvard Square ... marching in ... Manhattan campaigning for equal rights’. (135) Wilderson’s answer is that the images of female black pain and white activism are irreconcilable precisely because they cannot be read against one another without such an exercise appearing intellectually sloppy. However, he does not develop this point, preferring instead to examine suffering through ‘a libidinal economy’ (131) leading, predictably, to the conclusion that white radicalism, white political cinema and white supremacy are one and the same thing. Most unfortunate though inevitable is the reason Wilderson gives to justify this: a so‐called ‘anti‐Blackness’ that, ¶ [wilderson quote begins]¶ as opposed to white apathy, is necessary to White political radicalism and to White political cinema because it sutures affective, emotional, and even ethical solidarity between the ideological polar extremes of Whiteness. This necessary anti‐Blackness erects a structural prohibition that one sees in White political discourse and in White political cinema. (131) [wilderson quote ends]¶ undamentally, the first three chapters of Red, White and Black are concerned with what it takes to think blackness and agency together ethically, or to permit ourselves intellectual mindful reflections upon the homicidal ontology of chattel slavery. Wilderson posits ways through which ‘the dead’ (blacks) reflect on how the living can be put ‘out of the picture’. (143) There seems to be no let off or way out for blacks (‘The Slave’) in Wilderson’s logic, an energetic and rigorous, if unforgiving and sustained, treadmill of damning analysis to which ‘Indians’ (‘The “Savage”’/‘The Red’) will also be subjected, first through ‘“Savage” film’ analysis.¶ <cont>¶ And yet Wilderson’s highlighting is problematic because it overlooks the ‘Diaspora’ or ‘African Diaspora’, a key component in Yearwood’s thesis that, crucially, neither navel‐gazes (that is, at the US or black America) nor pretends to properly engage with black film. Furthermore, Wilderson separates the different waves of black film theory and approaches them, only, in terms of how a most recent one might challenge its precedent. Again, his approach is problematic because it does not mention or emphasise the inter‐connectivity of/in black film theory. As a case in point, Wilderson does not link Tommy Lott’s mobilisation of Third Cinema for black film theory to Yearwood’s idea of African Diaspora. (64) Additionally, of course, Wilderson seems unaware that Third Cinema itself has been fundamentally questioned since Lott’s 1990s’ theory of black film was formulated. Yet another consequence of ignoring the African Diaspora is that it exposes Wilderson’s corpus of films as unable to carry the weight of the transnational argument he attempts to advance. Here, beyond the US‐centricity or ‘social and political specificity of [his] filmography’, (95) I am talking about Wilderson’s choice of films. For example, Antwone Fisher (dir. Denzel Washington, 2002) is attacked unfairly for failing to acknowledge ‘a grid of captivity across spatial dimensions of the Black “body”, the Black “home”, and the Black “community”’ (111) while films like Alan and Albert Hughes’s Menace II Society (1993), overlooked, do acknowledge the same grid and, additionally, problematise Street Terrorism Enforcement and Prevention Act(STEP) policing. The above examples expose the fact of Wilderson’s dubious and questionable conclusions on black film.¶ Red, White and Black is particularly undermined by Wilderson’s propensity for exaggeration and blinkeredness. In chapter nine, ‘“Savage” Negrophobia’, he writes ¶ [wilderson quote begins]¶ The philosophical anxiety of Skins is all too aware that through the Middle Passage, African culture became Black ‘style’ ... Blackness can be placed and displaced with limitless frequency and across untold territories, by whoever so chooses. Most important, there is nothing real Black people can do to either check or direct this process ... Anyone can say ‘nigger’ because anyone can be a ‘nigger’. (235)7¶ [wilderson quote ends] ¶ Similarly, in chapter ten, ‘A Crisis in the Commons’, Wilderson addresses the issue of ‘Black time’. Black is irredeemable, he argues, because, at no time in history had it been deemed, or deemed through the right historical moment and place. In other words, the black moment and place are not right because they are ‘the ship hold of the Middle Passage’: ‘the most coherent temporality ever deemed as Black time’ but also ‘the “moment” of no time at all on the map of no place at all’. (279)¶ Not only does Pinho’s more mature analysis expose this point as preposterous (see below), I also wonder what Wilderson makes of the countless historians’ and sociologists’ works on slave ships, shipboard insurrections and/during the Middle Passage,8 or of groundbreaking jazz‐studies books on cross‐cultural dialogue like The Other Side of Nowhere (2004). Nowhere has another side, but once Wilderson theorises blacks as socially and ontologically dead while dismissing jazz as ‘belonging nowhere and to no one, simply there for the taking’, (225) there seems to be no way back. It is therefore hardly surprising that Wilderson ducks the need to provide a solution or alternative to both his sustained bashing of blacks and anti‐ Blackness.9 Last but not least, Red, White and Black ends like a badly plugged announcement of a bad Hollywood film’s badly planned sequel: ‘How does one deconstruct life? Who would benefit from such an undertaking? The coffle approaches with its answers in tow.’ (340)

#### Reforms are possible and desirable---tangible change outweighs the risk of cooption and is still a better strategy than the alt

Michael Omi 13, and Howard Winant, Resistance is futile?: a response to Feagin and Elias, Ethnic and Racial Studies Volume 36, Issue 6, p. 961-973, 2013 Special Issue: Symposium - Rethinking Racial Formation Theory

In Feagin and Elias's account, white racist rule in the USA appears unalterable and permanent. There is little sense that the ‘white racial frame’ evoked by systemic racism theory changes in significant ways over historical time. They dismiss important rearrangements and reforms as merely ‘a distraction from more ingrained structural oppressions and deep lying inequalities that continue to define US society’ (Feagin and Elias 2012, p. 21). Feagin and Elias use a concept they call ‘surface flexibility’ to argue that white elites frame racial realities in ways that suggest change, but are merely engineered to reinforce the underlying structure of racial oppression. Feagin and Elias say the phrase ‘racial democracy’ is an oxymoron – a word defined in the dictionary as a figure of speech that combines contradictory terms. If they mean the USA is a contradictory and incomplete democracy in respect to race and racism issues, we agree. If they mean that people of colour have no democratic rights or political power in the USA, we disagree. The USA is a racially despotic country in many ways, but in our view it is also in many respects a racial democracy, capable of being influenced towards more or less inclusive and redistributive economic policies, social policies, or for that matter, imperial policies. What is distinctive about our own epoch in the USA (post-Second World War to the present) with respect to race and racism? Over the past decades there has been a steady drumbeat of efforts to contain and neutralize civil rights, to restrict racial democracy, and to maintain or even increase racial inequality. Racial disparities in different institutional sites – employment, health, education – persist and in many cases have increased. Indeed, the post-2008 period has seen a dramatic increase in racial inequality. The subprime home mortgage crisis, for example, was a major racial event. Black and brown people were disproportionately affected by predatory lending practices; many lost their homes as a result; race-based wealth disparities widened tremendously. It would be easy to conclude, as Feagin and Elias do, that white racial dominance has been continuous and unchanging throughout US history. But such a perspective misses the dramatic twists and turns in racial politics that have occurred since the Second World War and the civil rights era. Feagin and Elias claim that we overly inflate the significance of the changes wrought by the civil rights movement, and that we ‘overlook the serious reversals of racial justice and persistence of huge racial inequalities’ (Feagin and Elias 2012, p. 21) that followed in its wake. We do not. In Racial Formation we wrote about ‘racial reaction’ in a chapter of that name, and elsewhere in the book as well. Feagin and Elias devote little attention to our arguments there; perhaps because they are in substantial agreement with us. While we argue that the right wing was able to ‘rearticulate’ race and racism issues to roll back some of the gains of the civil rights movement, we also believe that there are limits to what the right could achieve in the post-civil rights political landscape. So we agree that the present prospects for racial justice are demoralizing at best. But we do not think that is the whole story. US racial conditions have changed over the post-Second World War period, in ways that Feagin and Elias tend to downplay or neglect. Some of the major reforms of the 1960s have proved irreversible; they have set powerful democratic forces in motion. These racial (trans)formations were the results of unprecedented political mobilizations, led by the black movement, but not confined to blacks alone. Consider the desegregation of the armed forces, as well as key civil rights movement victories of the 1960s: the Voting Rights Act, the Immigration and Naturalization Act (Hart- Celler), as well as important court decisions like Loving v. Virginia that declared anti-miscegenation laws unconstitutional. While we have the greatest respect for the late Derrick Bell, we do not believe that his ‘interest convergence hypothesis’ effectively explains all these developments. How does Lyndon Johnson's famous (and possibly apocryphal) lament upon signing the Civil Rights Act on 2 July 1964 – ‘We have lost the South for a generation’ – count as ‘convergence’? The US racial regime has been transformed in significant ways. As Antonio Gramsci argues, hegemony proceeds through the incorporation of opposition (Gramsci 1971, p. 182). The civil rights reforms can be seen as a classic example of this process; here the US racial regime – under movement pressure – was exercising its hegemony. But Gramsci insists that such reforms – which he calls ‘passive revolutions’ – cannot be merely symbolic if they are to be effective:

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oppositions must win real gains in the process. Once again, we are in the realm of politics, not absolute rule. So yes, we think there were important if partial victories that shifted the racial state and transformed the significance of race in everyday life. And yes, we think that further victories can take place both on the broad terrain of the state and on the more immediate level of social interaction: in daily interaction, in the human psyche and across civil society. Indeed we have argued that in many ways the most important accomplishment of the anti-racist movement of the 1960s in the USA was the politicization of the social. In the USA and indeed around the globe, race-based movements demanded not only the inclusion of racially defined ‘others’ and the democratization of structurally racist societies, but also the recognition and validation by both the state and civil society of racially-defined experience and identity. These demands broadened and deepened democracy itself. They facilitated not only the democratic gains made in the USA by the black movement and its allies, but also the political advances towards equality, social justice and inclusion accomplished by other ‘new social movements’: second-wave feminism, gay liberation, and the environmentalist and anti-war movements among others. By no means do we think that the post-war movement upsurge was an unmitigated success. Far from it: all the new social movements were subject to the same ‘rearticulation’ (Laclau and Mouffe 2001, p. xii) that produced the racial ideology of ‘colourblindness’ and its variants; indeed all these movements confronted their mirror images in the mobilizations that arose from the political right to counter them. Yet even their incorporation and containment, even their confrontations with the various ‘backlash’ phenomena of the past few decades, even the need to develop the highly contradictory ideology of ‘colourblindness’, reveal the transformative character of the ‘politicization of the social’. While it is not possible here to explore so extensive a subject, it is worth noting that it was the long-delayed eruption of racial subjectivity and self-awareness into the mainstream political arena that set off this transformation, shaping both the democratic and anti-democratic social movements that are evident in US politics today.

#### Their understanding of anti-blackness is a calcified ideology that’s lost the ability to be self-reflexive about racial progress in society---voting aff only re-enforces a self-fulfilling narrative

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Yet, despite being an antique, the old black American narrative of pervasive victimization persists, denying the overwhelming evidence of change since the time of my parents and grandparents, refusing to die as doggedly as the Ptolemaic vision before Copernicus or the notion of phlogiston in the 19th century, or the deductive reasoning of the medieval schoolmen. It has become ahistorical. For a time it served us well and powerfully, yes, reminding each generation of black Americans of the historic obligations and duties and dangers they inherited and faced, but the problem with any story or idea or interpretation is that it can soon fail to fit the facts and becomes an ideology, even kitsch.

This point is expressed eloquently by Susan Griffin in her 1982 essay "The Way of all Ideology," where she says, "When a theory is transformed into an ideology, it begins to destroy the self and self-knowledge.… No one can tell it anything new. It is annoyed by any detail which does not fit its worldview.… Begun as a way to restore one's sense of really, now it attempts to discipline real people, to remake natural beings after its own image."

In his superb book In My Father's House, philosopher Kwame Anthony Appiah writes, "There is nothing in the world that can do all we ask race to do for us." We can easily amend or revise this insight and apply it to the pre-21st-century black American narrative, which can do very little of the things we need for it to do today.

But this is an enduring human problem, isn't it? As phenomenologist Edmund Husserl revealed a hundred years ago, we almost always perceive and understand the new in terms of the old--on more precisely, we experience events through our ideas, and frequently those are ideas that bring us comfort, ideas received from our parents, teachers, the schools we attend, and the enveloping culture, rather than original ones of our own. While a story or model may disclose a particular meaning for an experience, it also forces into the background or conceals other possible meanings. Think of this in light of novelist Ralph Ellison's brilliant notion of "invisibility," where--in his classic Invisible Man--the characters encountered by his nameless protagonist all impose their ideologies (explanations and ideas) on the chaos of experience, on the mysterious, untamed life that forever chums beneath widely accepted interpretations and explanations of "history" and "culture," which in our social world, for Ellison, are the seen. I know, personally, there is value in this Ellisonian idea because in the historical fictions I've been privileged to publish, like "Martha's Dilemma" in my second collection, Soulcatcher and Other Stories, I discovered that the most intriguing, ambiguous, and revealing material for stories can often be found in the margins of the codified and often repeated narrative about slavery. In this case, I dramatized a delicious anecdote about what happened to Martha and her slaves right after the death of George.

What I am saying is that "official" stories and explanations and endlessly repeated interpretations of black American life over decades can short-circuit direct perception of the specific phenomenon before us. The idea of something--an intellectual construct--is often more appealing and perfect (in a Platonic sense) than the thing itself, which always remains mysterious and ambiguous and mess)', by which I mean that its sense is open-ended, never fixed, it is always wise, I believe, to see all our propositions (and stories) as provisional, partial, incomplete, and subject to revision on the basis of new evidence, which we can be sure is just around the corner.

Nevertheless, we have heavily and often uncritically invested for most of our lives in the pre-21st-century black American narrative. In fact, some of us depend upon it for our livelihood, so it is not easy to let go, or to revise this story. Last October, Nation of Islam minister Louis Farrakhan spoke for two and a half hours at the Atlanta Civic Center. He and his mentor, black separatist Elijah Muhammad, provided black Americans with what is probably the most extreme, Manichean, and mythological version of the black American narrative, one that was anti-integrationist. In this incomplete and misleading rendition of the black American story, the races are locked in eternal struggle. As a story, this narrative falls because it is conceived as melodrama, a form of storytelling in which the characters are flat, lack complexity,, are either all good or all bad, and the plot involves malicious villains and violent actions. Back in the 1930s when Elijah Muhammad shaped his myth of Yacub, which explained the origins of the white race as "devils," he sacrificed the credibility of both character and plot for the most simplistic kind of dramatic narrative. Farrakhan covered many subjects that day last October, but what I found most interesting is that he said successful black people like Oprah Winfrey, Senator Obama, Colin Powell, and Condoleeza Rice give black Americans a false impression of progress.

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In other words, their highly visible successes do not change the old narrative of group victimization. Minister Farrakhan seems unwilling to accept their success as evidence that the lives of black Americans have improved. He seems unwilling to accept the inevitability of change. He was quoted in the press as saying, "A life of ease sometimes makes you forget the struggle." And despite the battles for "affirmative action that created a new middle class, he added, "It's becoming a plantation again, but you can't fight that because you want to keep your little job."

I beg to differ with Farrakhan, with his misuse of language, his loose, imprecise diction, because we obviously do not live on plantations, And wasn't job opportunity, one of the explicit goals of" the black American narrative? Farrakhan's entire life has been an investment in a story that changed as he was chasing it. So we can understand his fierce, personal, and even tragic attachment to dusty, antebellum concepts when looking at the uncharted phenomena in the early 21st century that outstrip his concepts and language.

However, it is precisely because Farrakhan cannot progress beyond an oversimplified caricature of a story line for racial phenomena that the suddenly notorious Rev. Jeremiah Wright praises him, saying "His depth of analysis… when it comes to the racial ills of this nation is astounding and eye-opening," and, "He brings a perspective that is helpful and honest." Recently Wright called the Nation of Islam leader, "one of the most important voices in the 20th and 21st centur[ies]." I do not doubt that Wright and Farrakhan are men who have experienced the evil of racism and want to see the conditions of our people improve, or that both have records of community service. But it is the emotional attachment to a dated narrative, one leavened with the 1960s-era liberation theology of James Cone, that predictably leads Wright to proclaim that the U.S. government created the AIDS virus to destroy blacks (he invokes the old and proven, the ghastly Tuskegee syphilis experiment, in an effort to understand a new affliction devastating black people, and thus commits the logical fallacy, known as misuse of analogy); that Jesus was "a black man"; and that the brains of blacks and whites operate differently. The former pastor of Trinity United Church of Christ in Chicago has made these paranoid and irresponsible statements publicly again and again without offering the slightest shred of evidence for these claims. "A bunch of rants that aren't grounded in truth" was how Barack Obama described his former minister's incendiary oratory, which is clearly antithetical not only to the postracial spirit of the Illinois senator's own speeches but also to his very racially and geographically mixed background. For in the realm of ideological thinking, especially from the pulpit, feeling and faith trump fact, and passion (as well as beliefs based on scripture) replaces fidelity to the empirical and painstaking logical demonstration.

Furthermore, such obsolete stories can also lead to serious mistakes in scholarship. I'm thinking now of Henry Louis Gates Jr., who in 1988 directed the publication of Oxford University Press's 40-volume Schomburg Library of Nineteenth-Century Black Women Writers. In his foreword, Gates praised the lost works of these black women writers as being the literary ancestors of Zora Neale Hurston, Toni Morrison, and Alice Walker. Furthermore, he said it was the discovery of a particular lost black novel, called Four Girls at Cottage City, published in 1895 by Emma Dunham Kelley-Hawkins, that inspired him to direct this Schomburg series in the first place so, he said, "I can read them myself."

Okay, so far so good.

But in 2005, Holly Jackson, then a doctoral student of English at Brandeis University, was given the academically' pedestrian, grunt-work assignment of writing an entry about Kelley-Hawkins for the African American National Biography. At the time very little was known about Kelley-Hawkins. After checking birth records in the Massachusetts Vital Records, and other documents, Jackson realized that Kelley-Hawkins was not black--as five decades of scholars had assumed but white. Yet all the evidence to suggest her whiteness was clearly present in the books she wrote. Something that had always puzzled scholars, Jackson said, was "the apparent whiteness of her characters, who are repeatedly described with blue eyes and skin as white as 'pure' or 'driven' snow." Even more fantastic are the theories that literary scholars came up with to explain why Kelley-Hawkins, supposedly a black woman, made no references to race or blackness in her two novels written in the 1890s. Jackson says, "Scholars have explained this away by arguing that the abundance of white signifiers is actually politically radical, with some even going so far as to argue that this extremely white world depicts a kind of post-racial utopia," a modem world where, according to critic Carla L. Peterson, "racial difference no longer existed."

Obviously, all these explanations are hogwash. Fifty years of scholarship based on these mistakes--articles, dissertations, courses in African American women's writing that include the work of Kelley-Hawkins--turns out to be an illusion created by the blinding intentionality of those who wrote about this white author based on a tangled knot of beliefs and prejudices, their concept of her completely distorting the facts.

Once Gates learned of this research by Jackson and also investigations by Katherine Flynn, a genealogist, he immediately went into the mode of damage control. He told a reporter that the work of Kelley-Hawkins would at least be removed from future editions of the Schomburg series, and he downplayed the significance of these discoveries by Jackson and Flynn. But Jackson, being a true scholar, would not allow this intellectual scandal to be swept under the rug. Of this "enormous historical misconception," she said, "there is so much at stake here, because of all the writing that has been done based on a false assumption about race." She asks us to wonder, "How have her [Kelley-Hawkins's] overwhelmingly 'white' texts successfully passed as black for so long in the absence of any corroborating historical data? How does this discovery change our understanding of African American literary history?" Finally, she said, "We have stretched our understanding of how black women have written in America to incorporate texts that do not fit."

I've gone into great detail about the Kelley-Hawkins story because it is a cautionary tale for scholars and an example of how our theories, our explanatory models, and the stories we tell ourselves can blind us to the obvious, leading us to see in matters of race only what we want to see based on our desires and political agendas. When we confront phenomena of any kind, we are wise if we assume the position phenomenologist Herbert Spiegelberg called epistemological humility, which is a healthy skepticism about what we think we already know. When constructing our narratives, it would also help if we remember a famous and often-quoted statement by C. S. Lewis on the characteristics of the human mind: "Five senses; an incurably abstract intellect; a haphazardly selective memory; a set of preconceptions and assumptions so numerous that I can never examine more than a minority of them--never become conscious of them all. How much of total reality can such an apparatus let through?"

How much, indeed.

But if the old black American narrative has outlived its usefulness as a tool of interpretation, then what should we do? The answer, I think, is obvious. In the 21st century, we need new and better stories, new concepts, and new vocabularies and grammar based not on the past but on the dangerous, exciting, and unexplored present, with the understanding that each is, at best, a provisional reading of reality, a single phenomenological profile that one day is likely to be revised, if not completely overturned. These will be narratives that do not claim to be absolute truth, but instead more humbly present themselves as a very tentative thesis that must be tested every day in the depths of our own experience and by all the reliable evidence we have available, as limited as that might be. For as Bertrand Russell told us, what we know is always "vanishingly small." These will be narratives of individuals, not groups. And is this not exactly what Martin Luther King Jr. dreamed of when he hoped a day would come when men and women were judged not by the color of their skin, but instead by their individual deeds and actions, and the content of their character?

#### Anti-blackness is not an ontological antagonism---conflict is inevitable in politics, but does not have to be demarcated around whiteness and blackness---the alt’s ontological fatalism recreates colonial violence

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Thus the self-same/other distinction is necessary for the possibility of identity itself. There always has to exist an outside, which is also inside, to the extent it is designated as the impossibility from which the possibility of the existence of the subject derives its rule (Badiou 2009, 220). But although the excluded place which isn’t excluded insofar as it is necessary for the very possibility of inclusion and identity may be universal (may be considered “ontological”), its content (what fills it) – as well as the mode of this filling and its reproduction – are contingent. In other words, the meaning of the signifier of exclusion is not determined once and for all: the place of the place of exclusion, of death is itself over-determined, i.e. the very framework for deciding the other and the same, exclusion and inclusion, is nowhere engraved in ontological stone but is political and never terminally settled. Put differently, the “curvature of intersubjective space” (Critchley 2007, 61) and thus, the specific modes of the “othering” of “otherness” are nowhere decided in advance (as a certain ontological fatalism might have it) (see Wilderson 2008). The social does not have to be divided into white and black, and the meaning of these signifiers is never necessary – because they are signifiers. To be sure, colonialism institutes an ontological division, in that whites exist in a way barred to blacks – who are not. But this ontological relation is really on the side of the ontic – that is, of all contingently constructed identities, rather than the ontology of the social which refers to the ultimate unfixity, the indeterminacy or lack of the social. In this sense, then, the white man doesn’t exist, the black man doesn’t exist (Fanon 1968, 165); and neither does the colonial symbolic itself, including its most intimate structuring relations – division is constitutive of the social, not the colonial division. “Whiteness” may well be very deeply sediment in modernity itself, but respect for the “ontological difference” (see Heidegger 1962, 26; Watts 2011, 279) shows up its ontological status as ontic. It may be so deeply sedimented that it becomes difficult even to identify the very possibility of the separation of whiteness from the very possibility of order, but from this it does not follow that the “void” of “black being” functions as the ultimate substance, the transcendental signified on which all possible forms of sociality are said to rest. What gets lost here, then, is the specificity of colonialism, of its constitutive axis, its “ontological” differential. A crucial feature of the colonial symbolic is that the real is not screened off by the imaginary in the way it is under capitalism. At the place of the colonised, the symbolic and the imaginary give way because non-identity (the real of the social) is immediately inscribed in the “lived experience” (vécu) of the colonised subject. The colonised is “traversing the fantasy” (Zizek 2006a, 40–60) all the time; the void of the verb “to be” is the very content of his interpellation. The colonised is, in other words, the subject of anxiety for whom the symbolic and the imaginary never work, who is left stranded by his very interpellation.4 “Fixed” into “non-fixity,” he is eternally suspended between “element” and “moment”5 – he is where the colonial symbolic falters in the production of meaning and is thus the point of entry of the real into the texture itself of colonialism. Be this as it may, whiteness and blackness are (sustained by) determinate and contingent practices of signification; the “structuring relation” of colonialism thus itself comprises a knot of significations which, no matter how tight, can always be undone. Anti-colonial – i.e., anti-“white” – modes of struggle are not (just) “psychic” 6 but involve the “reactivation” (or “de-sedimentation”)7 of colonial objectivity itself. No matter how sedimented (or global), colonial objectivity is not ontologically immune to antagonism. Differentiality, as Zizek insists (see Zizek 2012, chapter 11, 771 n48), immanently entails antagonism in that differentiality both makes possible the existence of any identity whatsoever and at the same time – because it is the presence of one object in another – undermines any identity ever being (fully) itself. Each element in a differential relation is the condition of possibility and the condition of impossibility of each other. It is this dimension of antagonism that the Master Signifier covers over transforming its outside (Other) into an element of itself, reducing it to a condition of its possibility.8 All symbolisation produces an ineradicable excess over itself, something it can’t totalise or make sense of, where its production of meaning falters. This is its internal limit point, its real:9 an errant “object” that has no place of its own, isn’t recognised in the categories of the system but is produced by it – its “part of no part” or “object small a.”10 Correlative to this object “a” is the subject “stricto sensu” – i.e., as the empty subject of the signifier without an identity that pins it down.11 That is the subject of antagonism in confrontation with the real of the social, as distinct from “subject” position based on a determinate identity.

#### Policy focus key to combat racism---anti-blackness is not ontological

Jamelle Bouie 13, staff writer at The American Prospect, Making and Dismantling Racism, http://prospect.org/article/making-and-dismantling-racism

Over at The Atlantic, Ta-Nehisi Coates has been exploring the intersection of race and public policy, with a focus on white supremacy as a driving force in political decisions at all levels of government. This has led him to two conclusions: First, that anti-black racism as we understand it is a **creation of explicit policy choices—**the decision to exclude, marginalize, and stigmatize Africans and their descendants has as much to do with racial prejudice as does any intrinsic tribalism. And second, that it's possible to **dismantle this prejudice using public policy**. Here is Coates in his own words: Last night I had the luxury of sitting and talking with the brilliant historian Barbara Fields. One point she makes that very few Americans understand is that racism is a creation. You read Edmund Morgan’s work and actually see racism being inscribed in the law and the country changing as a result. If we accept that racism is a creation, then we must then accept that it can be destroyed. And if we accept that it can be destroyed, we must then accept that it can be destroyed by us and that it likely must be destroyed by methods kin to creation. Racism was created by policy. It will likely only be ultimately destroyed by policy. Over at his blog, Andrew Sullivan offers a reply: I don’t believe the law created racism any more than it can create lust or greed or envy or hatred. It can encourage or mitigate these profound aspects of human psychology – it can create racist structures as in the Jim Crow South or Greater Israel. But it can no more end these things that it can create them. A complementary strategy is finding ways for the targets of such hatred to become inured to them, to let the slurs sting less until they sting not at all. Not easy. But a more manageable goal than TNC’s utopianism. I can appreciate the point Sullivan is making, but I'm not sure it's relevant to Coates' argument. It is absolutely true that "Group loyalty is deep in our DNA," as Sullivan writes. And if you define racism as an overly aggressive form of group loyalty—basically just prejudice—then Sullivan is right to throw water on the idea that the law can "create racism any more than it can create lust or greed or envy or hatred." But Coates is making a more precise claim: That **there's nothing natural about the black/white divide that has defined American history**. White Europeans had contact with black Africans well before the trans-Atlantic slave trade **without the emergence of an anti-black racism**. It took particular choices made by particular people—in this case, plantation owners in colonial Virginia—to make black skin a stigma, to make the "one drop rule" a defining feature of American life for more than a hundred years. By enslaving African indentured servants and allowing their white counterparts a chance for upward mobility, colonial landowners began the process that would **make white supremacy the ideology of America**. The position of slavery generated a stigma that then justified continued enslavement—blacks are lowly, therefore we must keep them as slaves. Slavery (and later, Jim Crow) **wasn't built to reflect racism as much as it was built in tandem with it**. And later policy, in the late 19th and 20th centuries, further entrenched white supremacist attitudes. Block black people from owning homes, and they're forced to reside in crowded slums. Onlookers then use the reality of slums to deny homeownership to blacks, under the view that they're unfit for suburbs. In other words, create a prohibition preventing a marginalized group from engaging in socially sanctioned behavior—owning a home, getting married—and then blame them for the adverse consequences. Indeed, in arguing for gay marriage and responding to conservative critics, Sullivan has taken note of this exact dynamic. Here he is twelve years ago, in a column for The New Republic that builds on earlier ideas: Gay men--not because they're gay but because they are men in an all-male subculture--are almost certainly more sexually active with more partners than most straight men. (Straight men would be far more promiscuous, I think, if they could get away with it the way gay guys can.) Many gay men value this sexual freedom more than the stresses and strains of monogamous marriage (and I don't blame them). But this is not true of all gay men. Many actually yearn for social stability, for anchors for their relationships, for the family support and financial security that come with marriage. To deny this is surely to engage in the "soft bigotry of low expectations." They may be a minority at the moment. But with legal marriage, their numbers would surely grow. And they would function as emblems in gay culture of a sexual life linked to stability and love. [Emphasis added] What else is this but a variation on Coates' core argument, that society can create stigmas by using law to force particular kinds of behavior? Insofar as gay men were viewed as unusually promiscuous, it almost certainly had something to do with the fact that society refused to recognize their humanity and sanction their relationships. The absence of any institution to mediate love and desire encouraged behavior that led this same culture to say "these people are too degenerate to participate in this institution." If the prohibition against gay marriage helped create an anti-gay stigma, then lifting it—as we've seen over the last decade—has helped destroy it. There's no reason racism can't work the same way.

#### Their argument elevates anti-blackness to an all-pervasive force that explains all oppression – doesn’t explain Korematsu

Margaret L. Andersen 3, Professor of Sociology and Women's Studies and Vice Provost for Academic Affairs at the University of Delaware, 2003, “Whitewashing Race: A Critical Perspective on Whiteness,” in White Out: The Continuing Significance of Racism, ed Doane & Bonilla-Silva, p. 28

Conceptually, one of the major problems in the whiteness literature is the reification of whiteness as a concept, as an experience, and as an identity. This practice not only leads to conceptual obfuscation but also impedes the possibility for empirical analysis. In this literature, "whiteness" comes to mean just about everything associated with racial domination. As such, whiteness becomes a slippery and elusive concept. Whiteness is presented as any or all of the following: identity, self-understanding, social practices, group beliefs, ideology, and a system of domination. As one critic writes, "If historical actors are said to have behaved the way they did mainly because they were white, then there's little room left for more nuanced analysis of their motives and meanings" (Stowe 1996:77). And Alastair Bonnett points out that whiteness "emerges from this critique as an omnipresent and all-powerful historical force. Whiteness is seen to be responsible for the failure of socialism to develop in America, for racism, for the impoverishment of humanity. With the 'blame' comes a new kind of centering: Whiteness, and White people, are turned into the key agents of historical change, the shapers of contemporary America" (1996b:153).¶ Despite noting that there is differentiation among whites and warning against using whiteness as a monolithic category, most of the literature still proceeds to do so, revealing a reductionist tendency. Even claiming to show its multiple forms, most writers essentialize and reify whiteness as something that directs most of Western history (Gallagher 2000). Hence while trying to "deconstruct” whiteness and see the ubiquitousness of whiteness, the literature at the same time reasserts and reinstates it (Stowe 1996:77).¶ For example, Michael Eric Dyson suggests that whiteness is identity, ideology, and institution (Dyson, quoted in Chennault 1998:300). But if it is all these things, it becomes an analytically useless

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concept. Christine Clark and James O'Donnell write: "to reference it reifies it, to refrain from referencing it obscures the persistent, pervasive, and seemingly permanent reality of racism" (1999:2). Empirical investigation requires being able to identify and measure a concept— or at the very least to have a clear definition—but since whiteness has come to mean just about everything, it ends up meaning hardly anything.

#### Our historical interrogation of the internment case isn’t exclusive to certain bodies---their links make no sense; only the alt tries to compartmentalize overlapping struggles which links more

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I would suggest that we see this kind of collective memory exemplified in Fred Korematsu's brief challenging the imprisonment of hundreds of prisoners on Guantanamo in the Supreme Court's deliberations of Rasul v. Bush, which addressed whether or not the prisoners had the 76 right to challenge their confinement through statutory habeas.¶ The brief began:¶ More than sixty years ago, as a young man, Fred Korematsu challenged the constitutionality of President Franklin Roosevelt's 1942 Executive Order that authorized the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. In Korematsu v. United States, this Court upheld his conviction, explaining that because the United States was at war, the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong.¶ More than half a century later, Fred Korematsu was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for his courage and persistence in opposing injustice. In accepting this award, Mr. Korematsu reminded the nation that "We should be vigilant to make sure this will never happen again." He has committed himself to ensuring that Americans do not forget the lessons of their own history. ¶ Because Mr. Korematsu has a distinctive, indeed unique, perspective on the issues presented by this case, he submits this brief to 77 assist the Court in its deliberation.¶ The historical experience of subordination of a community can create a lens, a way to see, which I would argue lends itself to an ethical argument: that it behooves us, as Asian Americans, to be particularly sensitive to the communities today subjected to the unjust treatment that has characterized treatment of our own community. I think this is precisely what Fred Korematsu did.¶ This is a very particular argument about politics. This does not say that our political activity should focus on Asian American bodies. This says that we should think about what we know from our past experience-and what we have learned from this experience-to think critically about who is being treated in this way now, and that the bodies that this is happening to now, whether Asian American or not, should be a focus of our concern. If we think about this on the terrain of culture, I think it is unarguable that the people today subject to the most violent expulsion from membership are Muslims. Post-September 11-and the wars in Afghanistan and Iraq-the West has been ever more defined as progressive, democratic, civilized and feminist, in stark contrast to Islam and to Muslims.

#### No impact---just because we presented in the 1AC in one particular way does NOT mean we foreclose other discussions

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.

#### Alt fails and causes genocidal backlash

Emery 7 (Kathy, PhD, “The Limits of Violent Resistance,” For the Western Edition, August 27, 2007 http://www.educationanddemocracy.org/Emery/westernedition/Sept07WestEd.pdf)

The August 15th editorial for SF Bayview concluded that the only way to stop gentrification in the Bayview is to “go to war.” Through all our marching and complaining and testifying at City Hall, our “City Fathers” still aren’t listening. At this point, sadly, I don’t think for a minute that anything is going to change if we continue to go the Martin route. I think we need **to channel Malcolm and the Panthers**—and start making some moves instead of making some noise. I need some soldiers on my side, and as much as I am sure that there are people who are willing to protest, I need some people next to me who are willing to go to war. By any means necessary. To me, the really sad thing, is that the editorialist, Ebony Sparks, believes that there are only two “routes” or means of opposition to the dominant/white power structure—that pursued by Martin Luther King Jr’s Southern Christian Leadership Conference or that pursued by Malcolm X and West Coast Black Panther Parties. Sparks apparently lumps the very different strategies employed by SNCC (Student Nonviolent Coordinating Committee) and CORE (Congress of Racial Equality) into those employed by the SCLC and NAACP. She also assumes that “marching, and complaining and testifying” is what constitutes the full range of tactics employed by the SCLC. This could not be further from the truth. While I am completely sympathetic and share Sparks’ impatience with the lack of people power in the Bay Area, I think **she does not appreciate the severe limitations** and ramifications **of violent resistance to the powers-that-be**. In fact, any attempts to resist gentrification violently would be used as an excuse to make all the “undesirable” Bayview residents disappear that much more quickly. The state, especially **in the era of Homeland Security and the Patriot Act, can** out-gun**, out-**infiltrate**, and out-**manipulate

**//MARKED**

 **any individual or group of people. To “go to war” with City Hall is to** attack it at its strongest point, **a suicidal Pickett’s Charge,** if you will.