## 1AC

### 1AC – Advocacy Statement

#### The ongoing legal legacy of the Internment Cases should be repudiated and ended.

### 1AC – Internment Bad

#### CONTENTION 1: INTERNMENT

#### The Internment Case precedents are a flawed and racist institutional stance on indefinite detention

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

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

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

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

#### This was not an aberration---it was one instance consistent with an entire history of racism against Asian Americans---we must right the wrong

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

#### We have a moral obligation to advocate for effective remedies to injustices like Korematsu---the aff is the necessary starting point to prevent future violence in the name of executive authority

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.

### 1AC – Advocacy Good

#### CONTENTION 2: OUR ADVOCACY IS GOOD

#### 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.

#### Student debate about internment is critical to actual political development---influences the durable shifts in checks and balances

Dominguez and Thoren 10 Casey BK, Department of Political Science and IR at the University of San Diego and Kim, University of San Diego, Paper prepared for the Annual Meeting of the Western Political Science Association, San Francisco, California, April 1-3, 2010, “The Evolution of Presidential Authority in War Powers”, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1580395

Students of American institutions should naturally be interested in the relationships between the president and Congress. However, the evolution of war powers falls into a category of inquiry that is important not just to studies of the presidency or to students of history, but also to the field of American Political Development. Among Orren and Skowronek’s recommendations for future work in American Political Development, they argue that “shifts in governing authority,” including and especially shifts in the system of checks and balances, “are important in historical inquiry, because they are a constant object of political conflict and they set the conditions for subsequent politics, especially when shifts are durable” (Orren and Skowronek 2004, 139). How an essential constitutional power, that of deploying military force, changed hands from one institution to another over time, would certainly seem to qualify as a durable shift in governing authority. Cooper and Brady (1981) also recommend that researchers study change over time in Congress’ relations to the other branches of government.

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

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

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

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

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

**Reforms are the best approach---the alternative is a mobilization of politics around maintaining identity rather than articulating a future of social justice for society**

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**Political mobilisation** around suffering **engenders solidarities** between those who are suffering and those who afford recognition of (and then action around) that suffering. Those who suffergenerally claim their common humanity with others in asking forpeople to look beyond the speciﬁc circumstances of their suffer-ing, and in doing so, the request is to address those speciﬁc circumstances on the basis of a humanity not bound to the circumstances. **The mistake of some forms of identity politics, then, is to associate identity with suffering**. While a recognition of historical (and contemporary) suffering is an important aspect of the political process of seeking redress for the conditions of suffering, it does not constitute identity singularly. ¶ “Wounded attachments”, we would argue, do not representthe general condition of politicised identities, but rather, are prob-lematic constructions of identities which fail to recognise (oraccept) the processes of change associated with movements. The accumulation of different sorts of challenges around similar issues generally leads to the gradual amelioration of the condi-tions which generated the identity (and the associated move-ment) in the ﬁrst instance. If the emphasis in the movement is on identity then successful reform (**even partial reform**) **reduces the injury and thus diminishes the power of the identity claim based upon that injury**. This is because reform is necessarily uneven in terms of the impact it has. This then poses a problem for those within the movement who would **wish the reforms to go further** and who see in the reforms a weakening of the identity that they believe is a necessary prerequisite for political action. **As they can no longer mobilise the injured identity – and the associated suffering – as common to all** (and thus requiring address becauseof its generalised effect), **there is often, then, a perceived need to privilege that suffering as particular and to institute a politics of guilt with regard to addressing it – truly the politics of ressentiment**. ¶ The problems arise by insisting on the necessity of political action being constituted through pre-existing identities and soli-darities (for example, those of being a woman). If, instead, it was recognised that equality for women is not separable from (or achievable separated from) wider issues of justice and equality within society then **reforms could be seen as steps towards equality.** A movement concerned with issues of social justice (of whichgender justice is an integral aspect) **would allow for provisional reforms to prevailing conditions of injustice without calling into question the basis for the movement** – **for there would always be more to be achieved .** 8 Each achievement would itself necessitate further revision of what equality would look like. And it would also necessitate revision of the particular aims that constitute the “identity” afforded by participating in that movement. In this way, identity becomes more appropriately understood as being, in part at least, about **participating in a series of dialogues about what is desired for the future in terms of understandings of social justice**. ¶ **Focusing on the future, on how we would like things to be tomorrow**, based on an understanding of where we are today**, would allow for partial reforms to be seen as gains and not threats**. **It is only if one believes that political action can only occur in the context of identiﬁcation of past injustices as opposed to future justice that one has a problem with (partial) reforms** in the present. **Political identity which exists only through an enunciation of its injury and does not seek to dissolve itself as an identity can lead to the ossiﬁcation of injured relations**. **The “wounded attachment” occurs when the politicised identity can see no future without the injury also constituting an aspect of that future**. Developing on the work of Brown, we would argue that not only does a “reformed” identity politics need to be based upon desire for the future, but that that desire should actually be a desire for the dissolution (in the future) of the identity claim. The complete success of the femi-nist movement, for instance, would mean that feminists no longerexisted, as the conditions that caused people to become feministhad been addressed. Similarly, with the dalit movement, its success would be measured by the dissolution of the identity of “dalit” as asalient political category. There would be no loss here, only a gain.¶ As we have argued, following Mohanty ([1993] 2000) andNelson (1993), it is participation in the processing of one’s ownand other’s experiences into knowledge about the world, in thecontext of communities that negotiate epistemological premises, which confers a notion of politicised identity. Since it is an under-standing of “tomorrow” (what that would be, and how it is to beachieved) that establishes one as, for example, a feminist, such an identity claim does not exclude others from participation**, and it does not solicit the reiﬁcation of identity around the fact of historical or contemporary suffering**. By removing these obstacles to progress, the “tomorrow” that is the goal, is more readily achievable. **Identity politics**, then, “**needs a tomorrow**” in this sense: that the raison d’être of any politicised identity is the bringing about of a tomorrow in which the social injustices of the present have been overcome. **But identity politics also needs that tomorrow – today – in the sense that politicised identities need to inscribe that tomorrow into their self-deﬁnition in the present, in order to avoid consolidating activity around the maintenance of the identity rather than the overcoming of the conditions that generated it.** **That the tomorrow to be inscribed – today – in the self-deﬁnition of one’s political identity, is one in which that identity will no longer be required, is not a situation to be regretted, since it is rather the promise of success for any movement for justice.**

# 2AC

## Internment

### AT: Traditional Policy Analysis

#### The aff’s approach is a method for dispute resolution---normative policy prescriptions are educationally valuable and don’t deny agency

Richard Ellis et al 9, Ph.D. University of California, Berkeley, degree completed December 1989, M.A. University of California, Berkeley, Political Science, 1984, B.A. University of California, Santa Cruz, Politics, 1982, Debating the Presidency: Conflicting Perspectives on the American Executive, p. google books

In 1969 the political scientist Aaron Wildavsky published a hefty reader on the American presidency. He prefaced it with the observation that “the presidency is the most important political institution in American life” and then noted the paradox that an institution of such overwhelming importance had been studied so little. “The eminence of the institution,” Wildavsky wrote, “is matched only by the extraordinary neglect shown to it by political scientists. Compared to the hordes of researchers who regularly descend on Congress, local communities, and the most remote foreign principalities, there is an extraordinary dearth of students of the presidency, although scholars ritually swear that the presidency is where the action is before they go somewhere else to do their research.”1 Political scientists have come a long way since 1969. The presidency remains as central to national life as it was then, and perhaps even more so. The state of scholarly research on the presidency today is unrecognizable compared with what it was forty years ago. A rich array of new studies has reshaped our understanding of presidential history, presidential character, the executive office, and the presidency’s relationship with the public, interest groups, parties, Congress, and the executive branch. Neglect is no longer a problem in the study of the presidency. In addition, those who teach about the presidency no longer lack for good textbooks on the subject. A number of terrific books explain how the office has developed and how it works. Although students gain a great deal from reading these texts, even the best of them can inadvertently **promote a passive learning experience.** Textbooks convey what political scientists know, but the balance and impartiality that mark a good text can **obscure the contentious nature** of the scholarly enterprise. Sharp disagreements **are often smoothed over** in the writing. The primary purpose of Debating the Presidency **is to allow students to** participate **directly in the ongoing real-world controversies swirling around the presidency and to judge for themselves which side is right.** It is premised philosophically on our view of students as active learners to be engaged rather than as passive receptacles to be filled. The book is designed to promote a classroom experience in which students debate and discuss issues rather than simply listen to lectures. Some issues, of course, lend themselves more readily to this kind of classroom debate. In our judgment, questions of a normative nature —**asking** not just what is, **but what ought to be**—are likely to foster the most interesting and engaging classroom discussions. So in selecting topics for debate, we generally eschewed narrow but important empirical questions of political science—such as whether the president receives greater support from Congress on foreign policy than on domestic issues—for broader questions that include empirical as well as normative components—such as **whether the president has usurped the war power** that rightfully belongs to Congress. We aim not only to teach students to think like political scientists, **but also to encourage them to think like democratic citizens**. Each of the thirteen issues selected for debate in this book’s second edition poses questions on which thoughtful people differ. These include whether the president should be elected directly by the people, whether the media are too hard on presidents, and whether the president has too much power in the selection of judges. Scholars are trained to see both sides of an argument, but we invited our contributors to choose one side and defend it vigorously. Rather than provide balanced scholarly essays impartially presenting the strengths and weaknesses of each position, Debating the Presidency leaves the balancing and weighing of arguments and evidence to the reader. The essays contained in the first edition of this book were written near the end of President George W. Bush’s fifth year in office; this second edition was assembled during and after Barack Obama’s first loo days as president. The new edition includes four new debate resolutions that should spark spirited classroom discussion about the legitimacy of signing statements, the war on terror, the role of the vice presidency, and the Twenty-second Amendment. Nine debate resolutions have been retained from the first edition and, wherever appropriate, the essays have been revised to reflect recent scholarship or events. For this edition we welcome David Karol, Tom Cronin, John Yoo, Lou Fisher, Peter Shane, Nelson Lund, Doug Kriner, and Joel Goldstein, as well as Fred Greenstein, who joins the debate with Stephen Skowronek over the importance of individual attributes in accounting for presidential success. In deciding which debate resolutions to retain from the first edition and which ones to add, we were greatly assisted by advice we received from many professors who adopted the first edition of this book. Particularly helpful were the reviewers commissioned by CQ Press: Craig Goodman of Texas Tech University, Delbert J. Ringquist of Central Michigan University, Brooks D. Simpson of Arizona State University, and Ronald W. Vardy of the University of Houston. We are also deeply grateful to chief acquisitions editor Charisse Kiino for her continuing encouragement and guidance in developing this volume. Among the others who helped make the project a success were editorial assistants Jason McMann and Christina Mueller, copy editor Mary Marik, and the book’s production editor, Gwenda Larsen. Our deepest thanks go to the contributors, not just for their essays, but also for their excellent scholarship on the presidency.

## Advocacy Good

### AT: 3 Tier Method

#### We use situated impartial knowledge. It’s not a view from nowhere OR privileged insight to reality based on your own experience—it’s the claim to look at claims on face for their merits, irrespective of the power relations we diagnose

Lisa J. Disch 93, Professor of Political Theory – University of Minnesota, “More Truth Than Fact: Storytelling as Critical Understanding in the Writings of Hannah Arendt,” Political Theory 21:4, November

What Hannah Arendt called “my old fashioned storytelling”7 is at once the most elusive and the most provocative aspect of her political philosophy. The apologies she sometimes made for it are well known, but few scholars have attempted to discern from these “scattered remarks” as statement of epistemology or method.8 Though Arendt alluded to its importance throughout her writings in comments like the one that prefaces this essay, this offhandedness left an important question about storytelling unanswered: how can thought that is “bound” to experience as its only “guidepost” possibly be critical? I discern an answer to this question in Arendt’s conception of storytelling, which implicitly redefines conventional understandings of objectivity and impartiality. Arendt failed to explain what she herself termed a “rather unusual approach”9 to political theory because she considered methodological discussions to be self-indulgent and irrelevant to real political problems.10 This reticence did her a disservice because by failing to explain how storytelling creates a vantage point that is both critical and experiential she left herself open to charges of subjectivism.11 As Richard Bernstein has argued, however, what makes Hannah Arendt distinctive is that she is neither a subjectivist nor a foundationalist but, rather, attempts to move “beyond objectivism and relativism.”12 I argue that Arendt’s apologies for her storytelling were disingenuous; she regarded it not as an anachronistic or nostalgic way of thinking but as an innovative approach to critical understanding. Arendt’s storytelling proposes an alternative to the model of impartiality defined as detached reasoning. In Arendt’s terms, impartiality involves telling oneself the story of an event or situation form the plurality of perspectives that constitute it as a public phenomenon. This critical vantage point, not from outside but from within a plurality of contesting standpoints, is what I term “situated impartiality.” Situated impartial knowledge is neither objective disinterested nor explicitly identified with a single particularistic interest. Consequently, its validity does not turn on what Donna Haraway calls the “god trick,” the claim to an omnipotent, disembodied vision that is capable of “seeing everything from nowhere.”13 But neither does it turn on a claim to insight premised on the experience of subjugation, which purportedly gives oppressed peoples a privileged understanding of structures of domination and exonerates them of using power to oppress. The two versions of standpoint claims – the privileged claim to disembodied vision and the embodied claim to “antiprivilege” from oppression – are equally suspect because they are simply antithetical. Both define knowledge positionally, in terms of proximity to power; they differ only in that they assign the privilege of “objective” understanding to opposite poles of the knowledge/power axis. Haraway argues that standpoint claims are insufficient as critical theory because they ignore the complex of social relations that mediate the connection between knowledge and power. She counters that any claim to knowledge, whether advanced by the oppressed or their oppressors, is partial. No one can justifiably lay claim to abstract truth, Haraway argues, but only to “embodied objectivity,” which she argues “means quite simply situated knowledges.”14 There is a connection between Arendt’s defense of storytelling and Haraway’s project, in that both define theory as a critical enterprise whose purpose is not to defend abstract principles or objective facts but to tell provocative stories that invite contestation form rival perspectives.15

## Aesthetics

### AT: Aesthetics Link

#### Their radical impulse to critique traditional political reform results in authoritarian violence to sculpt the perfect population---\*\*\*especially links in the context of their competition based on changing the form of speech

Zamponi 12—professor of sociology, UC Santa Barbra (SIMONETTA FALASCA-ZAMPONI, The politics of aesthetics: Mussolini and fascist Italy, http://www.opendemocracy.net/simonetta-falasca-zamponi/politics-of-aesthetics-mussolini-and-fascist-italy)

For Benjamin, the paradox was that what he called ‘the age of mechanical reproduction’, rather than fulfilling its “natural” mission of freeing people from the chains of an enchanted vision of the world - one that made people feel miniscule and in awe of authority - ended up instead becoming an instrument of domination. Liberation was countered by submission. Freed from the dogma of the Church and other institutions, thanks to the availability of information and new technologies, the so-called masses were nevertheless prey to re-enchantment, especially through new charismatic styles of politics that fed off myths and rituals: the case of Mussolini’s Italy (and, of course, Nazi Germany too). This idea of “anaesthetized aesthetics,” to use an expression by Susan Buck-Morss, perfectly captures Mussolini’s approach to politics and his role in the government of the polity. How was his politics anaesthetic? In my research of Mussolini’s writings and speeches, the trope of the politician as artist emerged as one of the strongest and most frequent, and not as a mere formula or superficial reference but as a core feature of Mussolini’s own understanding of politics. In Mussolini’s view, for politics not to be a dirty word that reflected the failing political class’s capacity for endless debates and conservative behaviour, it had to play a role much more active and daring; politics was supposed to change a society’s whole way of living and thinking. The issue was not one of mere shifts in government: the old game of political compromises and formulas. With fascism, the goal was to revolutionize the meaning of politics itself in order to construct a new Italy on the ruins of the old one. Here is where the idea of the politician as artist comes in. The artist politician destroys in order to create. “Moulding,” “sculpting,” and “shaping” were terms that became familiar in Mussolini’s discourse when he referred to the masses and their transformation into ideal fascist models. Politics was an art for Mussolini, and he liked to think of himself as a sculptor who alone could render hard material into malleable constructions, pliable artifacts. Is there anything more radical in terms of disregard for people, or more opposed to the rules of democratic participation, than this approach that considers people as things? - an approach that in my opinion overlaps with and defines totalitarianism. The second element of fascism’s aesthetic politics was the expressive means employed by Mussolini, as a result of his underpinning idea of a disciplined, organized harmonious "aesthetic" form that is supposed to define the whole of Italian society under fascism - to actualize his role as artist politician. This is certainly the more familiar, visually evident, and even at times caricatured aspect of fascism’s aesthetic politics. It encompasses the plethora of rituals and symbols, which attracted the attention of many, including Hitler as well as Stalin, especially during the early years of the regime. In part the natural outcome of a movement that wanted to distinguish itself from traditional politics, in part a reflection of the youthful character of its members, and in part an expression of cultural trends of the time, fascism emerged as a semiotically rich phenomenon. Uniforms of adherents, although not colourful, were distinctive; ritualistic ceremonies and gestures identified the special nature of the group; myths framed the cultural horizon of its followers, and so on and so forth. Such semiotic excess did not merely emerge at the origins of the movement, but continued to be augmented over time with new or newly redefined symbolic means. Their importance within the regime increased, at times exponentially, such as in the case of the Roman salute or the goose step, and of course of the myth of Mussolini, which was at the centre of this highly orchestrated ritualistic apparatus. Though shifting in style and focus over the years, Mussolini’s centrality in the fascist constellation remained unchallenged, unsurpassed, and ever growing indeed, gaining traction also thanks to the ability of the media to diffuse Mussolini’s image via the printed press, cinema, and the radio. From lion tamer to rural worker, motorcyclist, father, commander, Mussolini’s figure affirmed fascism’s value and helped build fascism as a longstanding regime. Two decades – not an insignificant stretch of time. A new Italian man This leads me to the last element of my discussion: the effectiveness of Mussolini’s aesthetic approach to politics. The question is tricky because there is no exact way to know the answer. What motivates me to raise this issue is however not so much the desire to find definite answers but the need to emphasize once again that Mussolini’s deep subscription to an aestheticized understanding of politics led him to play down, or not necessarily focus on, the outcome of his approach. Mussolini believed that the goal of remaking the Italians would naturally be attained. It was not an issue of if or how. Changes in the Italians’ gestures, rituals, ways of speaking, writing, etc. would necessarily bring about the change Mussolini was pursuing: a new Italian man would be born out of this artistic endeavour. Mussolini had undeniable faith in this project and was not very rational about it, I would underline, which again demonstrates the radical nature of his subscription to an aesthetic understanding of politics. More strategic objectives often took a back seat in his agenda, something that in different ways we find typical of the other totalitarian experiments in Nazi Germany and Stalin’s Russia. Aesthetic goals were absolute and independent of any ethical issues.

#### Purely aesthetic politics lay the groundwork for fascism by relying on propoganda---focus on consequences and institutions is key to prevent style devoid of content that celebrates violence

Zamponi 12—professor of sociology, UC Santa Barbra (SIMONETTA FALASCA-ZAMPONI, The politics of aesthetics: Mussolini and fascist Italy, http://www.opendemocracy.net/simonetta-falasca-zamponi/politics-of-aesthetics-mussolini-and-fascist-italy)

This article is the first in an occasional series on ‘The Political Aesthetics of Power and Protest,’ the subject of a one-day workshop held at the University of Warwick this September. Democracy, since it does not function through command or coercion, requires instead a constant renewal of sets of symbols - symbols which appeal to people and instil in them a sense of belonging and identification. Increasing disenchantment and disillusion with the state, with political institutions, their practices and performance, makes it more important to explore the place of this aestheticisation of political language, the aesthetics of protest as well as of power. Power has forever been entwined with a symbolic apparatus in charge of representing it. From Louis the XIV in France to Queen Victoria in England, images and rituals have served to strengthen people’s connections to governing institutions; symbols and rites make power more tangible and appealing. In the eighteenth century there also emerged a whole philosophical movement that argued that beauty could articulate political morality. Beauty was supposed to motivate people’s actions with the indirect result of guiding them towards the common good. As aesthetics slowly became entangled with politics, competing interpretations of how this relationship should unfold came to the fore. Eventually beauty was conceived instrumentally, reduced to style, and devoid of content. Fascism was one of the first movements to take advantage of aesthetics’ original radical political impulse while also simplifying its moral reach. Mussolini’s approach to politics is an extreme example of the degrading process aesthetics underwent at the turn of the twentieth century, a most perniciously successful implementation of the aestheticization of politics. As several scholars have argued, the concept of autonomous, disinterested art emerged as the result of a complex historical process originating in the eighteenth century in Britain. At the time, moralists of the calibre of Addison, Shaftesbury, Hutcheson, Hume, and Alison set out to address the impact of egoism and instrumentality on ethical questions. Lord Shaftesbury, in particular, developed a notion of disinterestedness, at first linked to moral issues. Later disinterestedness became the core concept of modern aesthetic theory and the key methodological principle in the newly emerging discipline of aesthetics. Shaftesbury was opposed to the idea of considering ethics in terms of an action’s consequences, i.e., whether or not the action had positive effects on the common good. He argued that disinterestedness served to overcome what he considered the false choice between egoism and altruism; disinterestedness implied that moral life was not concerned with action but instead was fundamentally concerned with harmony and contemplation. Within this framework, virtuous “man” was like an art lover, and virtue was not about making the right decisions in order to reach worthy ends; rather, it stood for “no other than the love of order and beauty.” At first preoccupied with moral issues, over time Shaftesbury turned his ethical concerns into an aesthetically informed theory that emphasized the importance of beauty and contemplation when defining a virtuous person. Thus, whereas he had originally discussed disinterest in opposition to interest in practical actions, Shaftesbury later employed disinterest to refer to the “virtuous man” as a spectator keen on contemplating the beauty of both manners and morals. Disinterestedness was contrary to action and also dismissive of the desire to possess or use a thing; it emphasized the perceiving act when contemplating an object rather than the object being contemplated. Disinterestedness was connected with aesthetics rather than ethics, and emphasis was increasingly placed on the recipients’ experience and their capacity to contemplate an object. As long as one remained a spectator, one’s experience of an object would supposedly be disinterested because it was based solely on perception. The perceptual experience of beauty was then emphasized rather than the qualities that made a thing beautiful. This new perspective on experience marked the birth of aesthetics as a distinctive realm. Good taste Eventually, “good taste” was adopted as an evaluative tool and linked to the pleasure of the imagination and lack of desire for possessions. In Germany, judgment of taste became central to Kant’s influential redefinition of aesthetic essence and came to be identified by Kant with the human ability to share experiences in comparison to animals. For Kant, disinterestedness in aesthetic judgment signified that taste, though subjective because based on feelings rather than concepts, was not arbitrary or private. It involved, at least in principle, the existence of what he called a sensus communis, or common sense, intended not in the ordinary meaning of simple but rather in the sense of shared. Aesthetic judgment for Kant required consensual understanding within a collectivity. Thus, on the one hand, disinterestedness implied that the crucial factor in our experience of a beautiful object was not the object itself but the feelings of enjoyment it aroused in us. On the other hand, through reference to sensus communis, disinterestedness also implied that those feelings, being in principle communicable and inter-subjective, were not based on personal or sensual gratification and did not implicate a utilitarian dimension. Kant’s famous definition of art as “purposiveness without purpose” helped solidify the identification of the aesthetic realm with non-instrumental ends. For Kant, this did not mean that art should be disconnected from social life. In contrast, art provided an ideal space within which to envision a public forum away from concrete political or governmental action and where enlightened citizens could freely discuss political issues. Art was a self-proclaimed non-political space in which politics, however, worked as a motivational engine. In this sense, although seemingly founded on separation, modern aesthetics originated in relation to politics, domesticating the masses, with all their desires and impulses and winning them to democratic politics. Mussolini’s concept of power How is all this discussion of aesthetics connected to Mussolini and to the centrality of aesthetics in Mussolini’s conception and exercise of power? What do I mean by “conception of” power? In my view, Mussolini’s subscription to aesthetics ensured that symbols, art and rituals were all seen as contributing to a transformative, moulding power. They deeply informed how Mussolini conceived and exercised power. Mussolini subscribed to the notion of aesthetics promoted by the art for art’s sake movement, that is, the notion of art as autonomous and self-referential and detached from worldly matters. At the same time, and somewhat paradoxically, Mussolini had a great intuition about the crucial role of affect in politics, an intuition that, combined with his approach to aesthetics, gave way to the strange and lethal alchemy that we know of as fascism. Walter Benjamin was the first to associate fascism with an aesthetic approach to politics – an approach that he saw as representative of modern antinomies. The evocative and disturbing image Benjamin conjured to make his argument was the comparison of bombed-out sites in Ethiopia to blooming flowers – a comparison drawn by the leader of the Futurist avant-garde movement, Filippo Tommaso Marinetti, from the height of the flying plane dropping those bombs during Italy’s colonial war. For Benjamin, such an image implied an aestheticized view of violence and war, of destruction and pain, an artistic transfiguration that overcame bodily material reality. Benjamin argued that the deadening of sense perception reflected in the image of blooming flowers instead of mangled Ethiopian bodies paradoxically ensued from a heightened sensitivity to which modern life’s fast pace subjected its dwellers. For example, the shock experienced in combat is transformed and sublated via the remote perspective from high in the sky and out of the mechanical invention of the time, the airplane.

### 2AC – Perm Solves

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

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

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

### AT: Whiteness Impact

#### Anti-blackness isn’t a monolithic root cause---they shut off productive debate over solutions – means the alt fails

Tommie Shelby 7, Professor of African and African American Studies and of Philosophy at Harvard, 2007, We Who Are Dark: The Philosophical Foundations of Black Solidarity

Others might challenge the distinction between ideological and structural causes of black disadvantage, on the grounds that we are rarely, if ever, able to so neatly separate these factors, an epistemic situation that is only made worse by the fact that these causes interact in complex ways with behavioral factors. These distinctions, while perhaps straightforward in the abstract, are difficult to employ in practice. For example, it would be difficult, if not impossible, for the members of a poor black community to determine with any accuracy whether their impoverished condition is due primarily to institutional racism, the impact of past racial injustice, the increasing technological basis of the economy, shrinking state budgets, the vicissitudes of world trade, the ascendancy of conservative ideology, poorly funded schools, lack of personal initiative, a violent drug trade that deters business investment, some combination of these factors, or some other explanation altogether. Moreover, it is notoriously difficult to determine when the formulation of putatively race-neutral policies has been motivated by racism or when such policies are unfairly applied by racially biased public officials.¶ There are very real empirical difficulties in determining the specific causal significance of the factors that create and perpetuate black disadvantage; nonetheless, it is clear that these factors exist and that justice will demand different practical remedies according to each factor's relative impact on blacks' life chances. We must acknowledge that our social world is complicated and not immediately transparent to common sense, and thus that systematic empirical inquiry, historical studies, and rigorous social analysis are required to reveal its systemic structure and sociocultural dynamics. There is, moreover, no mechanical or infallible procedure for determining which analyses are the soundest ones. In addition, given the inevitable bias that attends social inquiry, legislators and those they represent cannot simply defer to social-scientific experts. We must instead rely on open public debate—among politicians, scholars, policy makers, intellectuals, and ordinary citizens—with the aim of garnering rationally motivated and informed consensus. And even if our practical decision procedures rest on critical deliberative discourse and thus live up to our highest democratic ideals, some trial and error through actual practice is unavoidable.¶ These difficulties and complications notwithstanding, a general recognition of the distinctions among the ideological and structural causes of black disadvantage could help blacks refocus their political energies and self-help strategies. Attention to these distinctions might help expose the superficiality of theories that seek to reduce all the social obstacles that blacks face to contemporary forms of racism or white supremacy. A more penetrating, subtle, and empirically grounded analysis is needed to comprehend the causes of racial inequality and black disadvantage. Indeed, these distinctions highlight the necessity to probe deeper to find the causes of contemporary forms of racism, as some racial conflict may be a symptom of broader problems or recent social developments (such as immigration policy or reduced federal funding for higher education).

### AT: Body Link

#### The desire to fix identity in the body reproduces the worst forms of violence—by definition, all difference becomes a threat to be exterminated when identity becomes inevitable and material

Paul Gilroy 2k, Professor at London School of Economics, Against Race: Imagining Political Culture Beyond the Color Line, 102-106

We will explore below ultranationalist and fascist movements of the twentieth century deployed elaborate technological resources in order to generate spectacles of identity capable of unifying and coordinating inevitable, untidy diversity into an ideal and unnatural human uniformity. Their synthetic versions of fundamental identity looked most seductive where all difference had been banished or erased from the collective. Difference within was repressed in order to maximize the difference between these groups and others. Identity was celebrated extravagantly in military styles: uniforms were combined with synchronized body movement, drill, pageantry, and visible hierarchy to create and feed the comforting belief in sameness as absolute, metaphysical invariance. Men and women could then appear as interchangeable and disposable cogs in the encamped nation's military machine or as indistinguishable cells in the larger organic entity that encompassed and dissolved their individuality. Their actions may even be imagined to express the inner spirit, fate, and historicality of the national community. The citizen was manifested as a soldier, and violence- potential as well as actual-was dedicated to the furtherance of national interests. That vital community was constituted in the dynamic interaction between marchers moving together in austere time and the crowds that watched and savored the spectacle they created. In disseminating these valuable political effects, identity was mediated by cultural and communicative technologies like film, lighting, and amplified sound. These twentieth-century attributes were only partly concealed by the invocation of ancient ritual and myth. The biblical stories of nation-building that demonstrate divine favor and the moral sanctions it supplies to worldly political purposes have been invoked by many different nationalist groups. The Afrikaners of South Africa provide one especially interesting and unwholesome example of how Rousseau's "peculiar rites and ceremonies" need not always serve a benign purpose. Their ethnically minded ideologues systematically invented an Afrikaner identity during the period that saw the rise of fascist movements elsewhere. They provided their political community with its own version of Christianity and a repertory of myths that were the basis for the elaborate political drama that summoned their historic nation into racialized being: The most dramatic event in the upsurge of Afrikaner nationalism was the symbolic ox-wagon trek of 1938, which celebrated the victory of the Great Trek. Eight wagons named after voortrekker heroes such as Piet Retief, Hendrik Potgeiter and Andres Pretorius traversed South Africa by different routes ... before they converged on a prominent hill overlooking Pretoria. There, on 16th December 1938, the centenary of the battle of Blood River, which marked the defeat of the Zulu kingdom, more than 100,000 Afrikaners-perhaps one tenth of the total Afrikaner people-attended the ceremonial laying of the foundation stone of the Voortrekker Monument. Men grew beards, women wore voortrekker dress, for the occasion ... (they) knelt in silent prayer ... The ceremony concluded with the singing of Die Stem van Suid Afrika; God Save the King had been excluded.5 Today's ubiquitous conflicts between warring constituencies that claim incompatible and exclusive identities suggest that these large-scale theatrical techniques for producing and stabilizing identity and soliciting national, "racial," or ethnic identification have been widely taken up. The reduction of identity to the uncomplicated, militarized, fraternal versions of pure sameness pioneered by fascism and Nazism in the 1930s is now routine, particularly where the forces of nationalism, "tribalism," and ethnic division are at work. Identity is thus revealed as a critical element in the distinctive vocabulary used to voice the geopolitical dilemmas of the late modern age. Where the power of absolute identity is summoned up, it is often to account for situations in which the actions of individuals and groups are being reduced to little more than the functioning of some overarching presocial mechanism. In the past, this machinery was often understood as a historical or economic process that defined the special, manifest destiny of the group in question. **These days, it is more likely to be represented as a prepolitical, sociobiological, or biocultural feature, something mysterious and genetic that sanctions especially harsh varieties of deterministic thinking.** In this light, identity ceases to be an ongoing process of self-making and social interaction. It becomes instead a thing to be possessed and displayed. **It is a silent sign that closes down the possibility of communication across the gulf between one heavily defended island of particularity and its equally well fortified neighbors**, between one national encampment and others. **When identity refers to an indelible mark or code somehow writ- ten into the bodies of its carriers, otherness can only be a threat**. Identity is latent destiny. Seen or unseen, **on the surface of the body or buried deep in its cells, identity forever sets one group apart** from others who lack the particular, chosen traits that become the basis of typology and comparative evaluation. No longer a site for the affirmation of subjectivity and autonomy, identity mutates. Its motion reveals a deep desire for mechanical solidarity, seriality, and hypersimilarity. The scope for individual agency dwindles and then disappears. **People become bearers of the differences that the rhetoric of absolute identity invents and then invites them to celebrate.** Rather than communicating and making choices, individuals are seen as obedient, silent passengers moving across a flattened moral landscape toward the fixed destinies to which their essential identities, their genes, and the closed cultures they create have consigned them once and for all. And yet, **the desire to fix identity in the body is inevitably frustrated by the body's refusal to disclose the required signs of absolute incompatibility people imagine to be located there.**

Numerous cross-cultural examples might be used to illustrate this point. Reports from the genocide in Rwanda repeatedly revealed that identity cards issued by the political authorities were a vital source of the information necessary to classify people into the supposedly natural "tribal" types that brought them either death or deliverance. There, as in several other well-documented instances of mass slaughter, the bodies in question did not freely disclose the secrets of identity: Many Tutsis have been killed either because their ID cards marked them out as a Tutsi or because they did not have their card with them at the time and were therefore unable to prove they were not a Tutsi ... To escape the relentless discrimination they suffered, over the years many Tutsis bribed local government officials to get their ID card changed to Hutu. Unfortunately, this has not protected them ... The Tutsi give-aways were: one, being tall and two having a straight nose. Such criteria even led hysterical militias to kill a number of Hutus whose crime was "being too tall for a Hutu." Where there was doubt about the person's physical characteristics or because of the complaints that too many Tutsis had changed their card, the Interahamwe called upon villagers to verify the "tutsiship" of the quarry in question.6 Similar events were still being reported four years later when the genocidal assault against the Tutsis had been rearticulated into the civil war in Congo--a conflict that had already drawn in several other states and that appeared to provide the key to stability in the region. Under the presidency of Laurent Kabila, people whose physical characteristics made them suspect were still being openly murdered. 7 It is important to remember, however, that the linguistic markers of residual colonial conflict between anglophone and francophone spheres of influence were also implicated in sustaining the killing. These fragments from a history of unspeakable barbarity underline how the notion of fixed identity **operates easily on both sides of the chasm** that usually divides scholarly writing from the disorderly world of political conflicts. Recently, identity has also come to constitute something of a bridge between the often discrepant approaches to understanding self and sociality found on the different sides of that widening gulf. As a theme in contemporary scholarship, identity has offered academic thinking an important route back toward the struggles and uncertainties of everyday life, where the idea of identity has become especially resonant. **It has also provided the distinctive signatures of an inward, implosive turn that brings the difficult tasks of politics to an end by making them appear irrelevant in the face of deeper, more fundamental powers that regulate human conduct irrespective of governmental superficialities**. If identity and difference are fundamental, then they are not amenable to being re-tooled by crude political methods that cannot possibly get to the heart of primal ontologies, destinies, and fates. "When the stakes are this high, nothing can be done to offset the catastrophic consequences that result from tolerating difference and mistaken attempts at practicing democracy. Difference corrupts and compromises identity. Encounters with it are just as unwelcome and potentially destructive as they were for Houston Stewart Chamberlain. They place that most precious commodity, rooted identity, in grave jeopardy. "When national and ethnic identities are represented and projected as pure, exposure to difference threatens them with dilution and compromises their prized purities with the ever-present possibility of contamination. Crossing as mixture and movement must be guarded against. **New hatreds and violence arise** not, as they did in the past, from supposedly reliable anthropological knowledge of the identity and difference of the Other but from the novel problem of not being able to locate the Other's difference in the common-sense lexicon of alterity. Different people are certainly hated and feared, but the timely antipathy against them is **nothing compared with the hatreds turned toward the greater menace of the half-different and the partially familiar**. To have mixed is to have been party to a great betrayal. Any unsettling traces of hybridity must be excised from the tidy, bleached-out zones of impossibly pure culture. The safety of sameness can then be recovered by either of the two options that have regularly appeared at the meltdown point of this dismal logic: **separation and slaughter.**

# 1AR

### AT: Mills

#### Mills votes aff---engagement key to decrease white supremacy

Stephen C. Ferguson 4, RACIAL CONTRACT THEORY: A CRITICAL INTRODUCTION, Submitted to the Department of Philosophy and the Faculty of the Graduate School of the University of Kansas in partial fulfillment of the requirements for the degree of Doctor of Philosophy

Racial contract theory: A critical introduction, by Ferguson, Stephen C., Ii, Ph.D., UNIVERSITY OF KANSAS, 2004, 210 pages; 3153181

The outcome of The Racial Contract is quite simply what I have termed, Racial Contract Theory (RCT). There are five main components to RCT. First, to subject contractarianism to an ideological critique and expose the racist presuppositions of contract theorists from Thomas Hobbes through John Rawls. Second, to identify the origins of white supremacy as a political system in a Racial Contract between whites against non-whites. The third component, therefore, is an argument to show that being white - under the white supremacist polity - entails being endowed with white privilege, that is, material and psychological benefits. The fourth component of Mills' project is to demonstrate that race is a social construction created for the purpose of political rule over non-whites. And, lastly, Mills argues that the only historically feasible solution to the problem of white supremacy is liberal democratic capitalism.

### Gilroy

#### Finishing Gilroy

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### Coalitions DA

#### Broad-based coalitions are key---any alternative gets coopted by the right

Leroy Clark 95, Professor of Law, Catholic University Law School, “A Critique of Professor Derrick A. Bell's Thesis of the Permanence of Racism and His Strategy of Confrontation”, 73 Denv. U.L. Rev. 23

Lessons from the Movement: Broad Based Coalitions The civil rights movement, however, may provide some insights. The genius of that movement was its openness to involvement by as broad a spectrum of the black and white public as wished to make a contribution. Its message of mutually beneficial racial harmony changed public attitudes and the way institutions functioned. The labor movement of the 1920s and 1930s also had this character. The New Deal, which realized many labor union goals, eventually was accepted by a broad base of the public, so much so that Franklin Roosevelt was re-elected more times than any president who was not constitutionally limited to two terms. The task is more formidable today because issues are more complex and multifaceted than the straight forward propositions that blacks were entitled to equal treatment under the law, or that unions should have had a right to organize. But broad, mass-based organizing and public acceptance are the main elements needed today, and they must be revived before any significant reform is possible. This perspective renders Professor Bell's implicit endorsement of "Black Power"--the "Nobody will save us but ourselves" philosophy--particularly dysfunctional, given the current character of problems facing blacks and American society as a whole. Believing that blacks alone must free themselves is a sure route to Professor Bell's despair. n131 Solving the massive economic dislocation described above requires enlisting allegiance and support from a broad spectrum of the public. Too much emphasis on the interests of one's own group disrupts the ability to draw the American people into a sense of its true collective interests. We, as blacks, have, for many understandable reasons, contributed to the over-emphasis on black nationalism in the recent past. The Civil Rights Movement, for example, had to throw off condescending, paternalistic white leadership. However, excessive trumpeting of "Black Power," without supporting resources or strategy, destroyed some organizations, like the Student NonViolent Coordinating Committee. n132 Many whites found better things to do with their time and money when they were repeatedly told that they were not needed and that all of them were, irretrievably, the enemy. We must reverse that theme, because the right wing has profited--particularly in electoral politics--from playing out a kind of group counter-attack of "we the hard-working, family-oriented, (white) Americans" against all those irresponsible, taxeating "others." n133 Economic anxiety reinforces racial hoarding of opportunities and benefits; black progress is keyed to progress in society as a whole toward economic security.