# 1

#### T—Indefinite Detention

#### A) Overruling Korematsu isn’t topical—the Court only ratified the initial evacuation order—but the DETENTION was struck down the same day in the Endo case:

Samuel Issacharoff & Richard Pildes, 2005 (professor in procedural jurisprudence @ Columbia University Law School & co-director of the Program on Law and Security @ NYU School of Law, *The Constitution in Wartime*, ed. by Mark Tushnet, p.174-175)

Conventionally, the Court fares no better than the other institutions of the national government. Korematsu is excoriated as one of the two or three worst moments in American constitutional history. The decision is thought to offer numerous lessons about the inability of courts during wartime to provide any check on political excesses, particularly those jointly endorsed by the executive and the legislature. But the idea that Korematsu and its inherent racialism represent the full story about the judicial encounter with the internment of the Japanese is partly a creation of the narrative that American constitutional law has come to tell about this episode. This conventional account ignores the companion case to Korematsu, Ex Parte Endo, decided the same day as Korematsu itself. As Professor Gudridge describes it in a recent revisionist analysis, Korematsu can only be properly understood in the context of Endo. For while the Court in Korematsu found constitutional the initial evacuation order that required the Japanese to leave the West Coast, in Endo it unanimously held, at the very same time, that the detention of the Japanese was illegal.

#### B) Violation: there is a distinction between the evacuation Korematsu deals with and the ongoing detention the topic refers to:

Samuel Issacharoff & Richard Pildes, 2005 (professor in procedural jurisprudence @ Columbia University Law School & co-director of the Program on Law and Security @ NYU School of Law, *The Constitution in Wartime*, ed. by Mark Tushnet, p.175)

The Court saw a fundamental distinction between the policies of acts perceived as those of exigency, such as the detention order in *Korematsu* or the imposition of curfew restrictions on Japanese upheld in *Hirabayashi v. United States*, and ongoing detention, which was the subject of Endo. Evacuation and restrictions on mobility reflected military judgments (faulty or pernicious as they may have been) of what was necessary for security. Detention, however, reflected political and policy judgments, not military ones. Despite the emphasis that *Korematsu* has received at the expense of Endo, the fact is that even during this bleak episode, the Court continued to resist executive branch actions that rested, at most, on political and policy, rather than military judgments.

**C) Standards:**

**1) Precision: topic draws a distinction between indefinite detention and evacuation orders.**

**2) Limits: allows them to deal with anytime there’s an evacuation order.**

**D) Voting Issue: Fairness & Education**

# 2

#### Effort to sanction Iran has slowed down in the Congress now:

Gulf News, 2/18/2014 (“Further Iran sanctions would undermine efforts by int''l community, Rouhani – report,” <http://www.kuna.net.kw/ArticleDetails.aspx?id=2361950&Language=en>, Accessed 2/20/2014, rwg)

WASHINGTON, Feb 18 (KUNA) -- A bipartisan report published by analysts with an independent non-profit group in the US said further sanctions on Iran will only undermine the diplomatic effort currently underway to curb the Islamic Republic's nuclear program.¶ "It is difficult to argue that a new sanctions bill is intended to support the negotiations when all the countries doing the negotiating oppose it," concluded the report by the Iran Project, a group that serves to bolster the US-Iran dialogue and educate members of Congress.¶ The document examined the pros and cons of the bill introduced in December by Senators Mark Kirk and Robert Menendez, a Republican and a Democrat, respectively. The bill seeks to increase sanctions as a way of pushing Iran to cooperate further with the international community.¶ But any such action "would feed an unwelcome narrative" to the other countries involved in the nuclear talks, and "the net result would be less pressure on Iran," said the report.¶ "It is very difficult to imagine that the sanctions bill would do anything but undermine Rouhani, as he attempts to steer Iran on a different path," it continued. "This is an assessment shared not only by Iran experts, and Iranian expats who have opposed the regime, but also by Israeli military intelligence, which has concluded that Rouhani may represent a fundamental shift in Iranian politics." The report also added that it would be "difficult to escape the conclusion that a new sanctions bill would increase the probability of war, even if it does not guarantee such an outcome." For now, the sanctions bill has slowed down in Congress as it undergoes another review, and more than 100 members of the House of Representatives - including some Republicans - signed a letter last week backing President Barack Obama's negotiation process with Iran.

#### B) Debates on the authority to use force take up enormous time & political energy:

Steve Vladeck, 3/14/2013 (staff writer, “Hard National Security Choices,” <http://www.lawfareblog.com/2013/03/drones-domestic-detention-and-the-costs-of-libertarian-hijacking/>, Accessed 8/19/2013, rwg)

But the cost to the government is also relevant. As last week demonstrates, government officials end up having to expend a remarkable amount of energy to either defend or reject the government’s authority to undertake conduct it would seldom (or never) attempt, and to then endure and be forced to respond to criticisms because it had the temerity to suggest that there might be exceptional circumstances where such uses of force might be permissible.¶ Ultimately, there are difficult and important conversations to have about current and future U.S. policy when it comes to, inter alia, targeted killings and detention. But if last week’s filibuster and accompanying public relations storm are any indication, the most visible libertarians in Congress don’t appear to be interested in having them. That’s certainly their prerogative. But in that case, we might all be better off if they let these conversations take place, rather than hijacking them and turning them into debates in which there is virtually no one on the other side–not because there’s nothing to their points, but because there’s so much more in what’s not being said.

#### C) **Obama ability to fight hard is key to fending off members of Congress wanting to impose sanctions:**

Dawn.com, 2/19/2014 (“Iran 'greatly concerned' by US sanctions talk, says Zarif,” <http://www.dawn.com/news/1087918/iran-greatly-concerned-by-us-sanctions-talk-says-zarif>, Accessed 2/20/2014, rwg)

VIENNA: Talk of new US sanctions in recent months has created “a great deal of concern” in Iran on whether Washington is serious about a nuclear deal, Iran's foreign minister said Tuesday.¶ “Unfortunately what we have seen in the last two months has not encouraged us to believe that everything is in order,” said Mohammad Javad Zarif, speaking from Vienna on the first day of nuclear talks.¶ “I can understand the politics... in the United States... but from the general perspective of the Iranian populace what has happened in the last two months has been less than encouraging,” he said.¶ Certain statements “have created a great deal of concern in Iran on whether the US is serious about wanting to reach an agreement”.¶ He added: “But nevertheless, these statements aside, it is really possible to make an agreement because of a single overriding fact, and that is that we have no other option.¶ “If we want to resolve this issue the only way is through negotiations,” he said, speaking from Vienna in a webcast discussion organised by Denver University's Center for Middle East Studies.¶ US President Barack Obama has had to fight hard to stop sceptical members of Congress, including some from his own party, from passing additional sanctions on the Islamic republic.

#### **D) New sanctions legislation risks a global nuclear war:**

Press TV, 11/13/2013 (“Global nuclear conflict between US, Russia, China likely if Iran talks fail,” http://www.presstv.ir/detail/2013/11/13/334544/global-nuclear-war-likely-if-iran-talks-fail/, Accessed 1/22/2014, rwg)

A global conflict between the US, Russia, and China is likely in the coming months should the world powers fail to reach a nuclear deal with Iran, an American analyst says. “If the talks fail, if the agreements being pursued are not successfully carried forward and implemented, then there would be enormous international pressure to drive towards a conflict with Iran before [US President Barack] Obama leaves office and that’s a very great danger that no one can underestimate the importance of,” senior editor at the Executive Intelligence Review Jeff Steinberg told Press TV on Wednesday. “The United States could find itself on one side and Russia and China on the other and those are the kinds of conditions that can lead to miscalculation and general roar,” Steinberg said. “So the danger in this situation is that if these talks don’t go forward, we could be facing a global conflict in the coming months and years and that’s got to be avoided at all costs when you’ve got countries like the United States, Russia, and China with” their arsenals of “nuclear weapons,” he warned. The warning came one day after the White House told Congress not to impose new sanctions against Tehran because failure in talks with Iran could lead to war. White House press secretary Jay Carney called on Congress to allow more time for diplomacy as US lawmakers are considering tougher sanctions. "This is a decision to support diplomacy and a possible peaceful resolution to this issue," Carney said. "The American people do not want a march to war." Meanwhile, US Secretary of State John Kerry is set to meet with the Senate Banking Committee on Wednesday to hold off on more sanctions on the Iranian economy. State Department spokeswoman Jen Psaki said Kerry "will be clear that putting new sanctions in place would be a mistake." "While we are still determining if there is a diplomatic path forward, what we are asking for right now is a pause, a temporary pause in sanctions. We are not taking away sanctions. We are not rolling them back," Psaki added. The analyst also noted that Israel and Saudi Arabia are “the usual suspects,” which are “working hand in hand to try to prevent” an interim nuclear agreement with Iran.

# 3

#### A. Their advocacy does not challenge the preconception that human problems are those worth solving – modern philosophical discussions are necessarily human-centered.

Singer ’89, Professor of Bioethics at Princeton University and Laureate Professor at the Centre for Applied Philosophy and Public Ethics at the University of Melbourne [All Animals Are Equal, TOM REGAN & PETER SINGER (eds.), Animal Rights and Human Obligations, New Jersey, 1989, pp. 148-162]

Experimenting on animals, and eating their flesh, are perhaps the two major forms of speciesism in our society. By comparison, the third and last form of speciesism is so minor as to be insignificant, but it is perhaps of some special interest to those for whom this article was written. I am referring to speciesism in contemporary philosophy. Philosophy ought to question the basic assumptions of the age. Thinking through, critically and carefully, what most people take for granted is, I believe, the chief task of philosophy, and it is this task that makes philosophy a worthwhile activity. Regrettably, philosophy does not always live up to its historic role. Philosophers are human beings, and they are subject to all the preconceptions of the society to which they belong. Sometimes they succeed in breaking free of the prevailing ideology: more often they become its most sophisticated defenders. So, in this case, philosophy as practiced in the universities today does not challenge anyone's preconceptions about our relations with other species. By their writings, those philosophers who tackle problems that touch upon the issue reveal that they make the same unquestioned assumptions as most other humans, and what they say tends to confirm the reader in his or her comfortable speciesist habits.

#### B. We must deny the urge to align ourselves with their human-centric politics – it is an all or nothing question.

Dell’Aversano ‘10 [Carmen, “the love whose name cannot be spoken: queering the human-animal bond” journal for critical animal studies, volume III issue 1 and 2, 2010]

A real ―oxymoronic community of difference‖, embracing not only all possible variants of ―gender trouble‖ but also the queering of the human-animal barrier, would not need to teach anybody anything, because it would have made violence unthinkable, since the human oppression of non-human animals is not a peripheral case of no political relevance but, as Zimbardo‘s own analysis of ―dehumanization‖ shows, the archetype, model and training ground of all forms of oppression and injustice.xxvi In this respect animal queer, more than any form of queer, radically threatens the very foundations of human society as we know it, since taking it seriously, not simply as another interesting category for academic analysis but as an ethical and political imperative, implies doing everything we can to dismantle the linguistic, conceptual and performative apparatus which makes all kinds of violence and oppression possible. In animal queer the dichotomy between liberation theory and civil right politics, which has been discussed at length in queer literature,xxvii has no substance: crossing the line dividing our species from the other ones means eradicating the very categories of thought needed to conceive of inequality and injustice. If the definition of queer politics is radical opposition to the established social order as such, and the measure of success of queer political action is the extent to which it smashes the system, then animal rights activism is the queerest possible form of political action, because it is structurally incompatible with continuing to live the way the system expects us to. The reason why animal queer is structurally and intrinsically subversive, and why it is perceived as radically threatening, and is, accordingly, ruthlessly marginalized, by all forms of cultural and political discourse, is that it replaces sameness with otherness as the criterion of emotional, social and political inclusion: whoever supports animals, Journal for Critical Animal Studies, Volume VIII, Issue 1/2, 2010 (ISSN1948-352X) 101 fights for animals, loves an animal loves, supports and fights not for the self but for the other (―the wholly other that they call animal […]Yes, the wholly other, more other than any other, that they call an animal‖, as Derrida 1999 380 would put it), and knows in advance that no middle ground will ever be found, no assimilation will ever be possible, that in one, one hundred or one million years animals will be just as puzzling, as foreign, as alien to all that we can be and understand as they are now. If true love is felt not for the self but for the Other, and if ―[a]imer l‘autre, c‘est préserver son étrangeté, reconnaître qu‘il existe à côté de moi, loin de moi, non avec moi‖xxviii (Bruckner & Finkielkraut 1977 256), then love in its animal queer form is indeed the purest, most coherent and most radical form of love, and as such it has the potential not to reform society or to facilitate social ―progress‖ but to replace it with the unthinkable, with something radically contradicting all assumptions, expectations and definitions, to create the possibility of a happiness we can‘t even imagine, because to fathom it we would already have to be different from what we are, to have moved beyond ourselves.

#### C. Vote neg to reject the 1ac —maintaining the human-non-human binary dooms them to endless cycles of subordination and violence- this is also the site of protest that we should focus on

Best ’07, Associate Professor, Departments of Humanities and Philosophy University of Texas, El Paso [Steven, Charles Patterson, The Eternal Treblinka: Our Treatment of Animals and the Holocaust New York: Lantern Books, 2002, 280 pp]

While a welcome advance over the anthropocentric conceit that only humans shape human actions, the environmental determinism approach typically fails to emphasize the crucial role that animals play in human history, as well as how the human exploitation of animals is a key cause of hierarchy, social conflict, and environmental breakdown. A core thesis of what I call “animal standpoint theory” is that animals have been key driving and shaping forces of human thought, psychology, moral and social life, and history overall. More specifically, animal standpoint theory argues that the oppression of human over human has deep roots in the oppression of human over animal. In this context, Charles Patterson’s recent book, The Eternal Treblinka: Our Treatment of Animals and the Holocaust, articulates the animal standpoint in a powerful form with revolutionary implications. The main argument of Eternal Treblinka is that the human domination of animals, such as it emerged some ten thousand years ago with the rise of agricultural society, was the first hierarchical domination and laid the groundwork for patriarchy, slavery, warfare, genocide, and other systems of violence and power. A key implication of Patterson’s theory is that human liberation is implausible if disconnected from animal liberation, and thus humanism -- a speciesist philosophy that constructs a hierarchal relationship privileging superior humans over inferior animals and reduces animals to resources for human use -- collapses under the weight of its logical contradictions. Patterson lays out his complex holistic argument in three parts. In Part I, he demonstrates that animal exploitation and speciesism have direct and profound connections to slavery, colonialism, racism, and anti-Semitism. In Part II, he shows how these connections exist not only in the realm of ideology – as conceptual systems of justifying and underpinning domination and hierarchy – but also in systems of technology, such that the tools and techniques humans devised for the rationalized mass confinement and slaughter of animals were mobilized against human groups for the same ends. Finally, in the fascinating interviews and narratives of Part III, Patterson describes how personal experience with German Nazism prompted Jewish to take antithetical paths: whereas most retreated to an insular identity and dogmatic emphasis on the singularity of Nazi evil and its tragic experience, others recognized the profound similarities between how Nazis treated their human captives and how humanity as a whole treats other animals, an epiphany that led them to adopt vegetarianism, to become advocates for the animals, and develop a far broader and more inclusive ethic informed by universal compassion for all suffering and oppressed beings. The Origins of Hierarchy "As long as men massacre animals, they will kill each other" –Pythagoras It is little understood that the first form of oppression, domination, and hierarchy involves human domination over animals. Patterson’s thesis stands in bold contrast to the Marxist theory that the domination over nature is fundamental to the domination over other humans. It differs as well from the social ecology position of Murray Bookchin that domination over humans brings about alienation from the natural world, provokes hierarchical mindsets and institutions, and is the root of the long-standing western goal to “dominate” nature. In the case of Marxists, anarchists, and so many others, theorists typically don’t even mention human domination of animals, let alone assign it causal primacy or significance. In Patterson’s model, however, the human subjugation of animals is the first form of hierarchy and it paves the way for all other systems of domination such as include patriarchy, racism, colonialism, anti-Semitism, and the Holocaust. As he puts it, “the exploitation of animals was the model and inspiration for the atrocities people committed against each other, slavery and the Holocaust being but two of the more dramatic examples.” Hierarchy emerged with the rise of agricultural society some ten thousand years ago. In the shift from nomadic hunting and gathering bands to settled agricultural practices, humans began to establish their dominance over animals through “domestication.” In animal domestication (often a euphemism disguising coercion and cruelty), humans began to exploit animals for purposes such as obtaining food, milk, clothing, plowing, and transportation. As they gained increasing control over the lives and labor power of animals, humans bred them for desired traits and controlled them in various ways, such as castrating males to make them more docile. To conquer, enslave, and claim animals as their own property, humans developed numerous technologies, such as pens, cages, collars, ropes, chains, and branding irons. The domination of animals paved the way for the domination of humans. The sexual subjugation of women, Patterson suggests, was modeled after the domestication of animals, such that men began to control women’s reproductive capacity, to enforce repressive sexual norms, and to rape them as they forced breeding in their animals. Not coincidentally, Patterson argues, slavery emerged in the same region of the Middle East that spawned agriculture, and, in fact, developed as an extension of animal domestication practices. In areas like Sumer, slaves were managed like livestock, and males were castrated and forced to work along with females. In the fifteenth century, when Europeans began the colonization of Africa and Spain introduced the first international slave markets, the metaphors, models, and technologies used to exploit animal slaves were applied with equal cruelty and force to human slaves. Stealing Africans from their native environment and homeland, breaking up families who scream in anguish, wrapping chains around slaves’ bodies, shipping them in cramped quarters across continents for weeks or months with no regard for their needs or suffering, branding their skin with a hot iron to mark them as property, auctioning them as servants, breeding them for service and labor, exploiting them for profit, beating them in rages of hatred and anger, and killing them in vast numbers – all these horrors and countless others inflicted on black slaves were developed and perfected centuries earlier through animal exploitation. As the domestication of animals developed in agricultural society, humans lost the intimate connections they once had with animals. By the time of Aristotle, certainly, and with the bigoted assistance of medieval theologians such as St. Augustine and Thomas Aquinas, western humanity had developed an explicitly hierarchical worldview – that came to be known as the “Great Chain of Being” – used to position humans as the end to which all other beings were mere means. Patterson underscores the crucial point that the domination of human over human and its exercise through slavery, warfare, and genocide typically begins with the denigration of victims. But the means and methods of dehumanization are derivative, for speciesism provided the conceptual paradigm that encouraged, sustained, and justified western brutality toward other peoples. “Throughout the history of our ascent to dominance as the master species,” Patterson writes, “our victimization of animals has served as the model and foundation for our victimization of each other. The study of human history reveals the pattern: first, humans exploit and slaughter animals; then, they treat other people like animals and do the same to them.” Whether the conquerors are European imperialists, American colonialists, or German Nazis, western aggressors engaged in wordplay before swordplay, vilifying their victims – Africans, Native Americans, Filipinos, Japanese, Vietnamese, Iraqis, and other unfortunates – with opprobrious terms such as “rats,” “pigs,” “swine,” “monkeys,” “beasts,” and “filthy animals.” Once perceived as brute beasts or sub-humans occupying a lower evolutionary rung than white westerners, subjugated peoples were treated accordingly; once characterized as animals, they could be hunted down like animals. The first exiles from the moral community, animals provided a convenient discard bin for oppressors to dispose the oppressed. The connections are clear: “For a civilization built on the exploitation and slaughter of animals, the `lower’ and more degraded the human victims are, the easier it is to kill them.” Thus, colonialism, as Patterson describes, was a “natural extension of human supremacy over the animal kingdom.” For just as humans had subdued animals with their superior intelligence and technologies, so many Europeans believed that the white race had proven its superiority by bringing the “lower races” under its command. There are important parallels between speciesism and sexism and racism in the elevation of white male rationality to the touchstone of moral worth. The arguments European colonialists used to legitimate exploiting Africans – that they were less than human and inferior to white Europeans in ability to reason – are the very same justifications humans use to trap, hunt, confine, and kill animals. Once western norms of rationality were defined as the essence of humanity and social normality, by first using non-human animals as the measure of alterity, it was a short step to begin viewing odd, different, exotic, and eccentric peoples and types as non- or sub-human. Thus, the same criterion created to exclude animals from humans was also used to ostracize blacks, women, and numerous other groups from “humanity.” The oppression of blacks, women, and animals alike was grounded in an argument that biological inferiority predestined them for servitude. In the major strain of western thought, alleged rational beings (i.e., elite, white, western males) pronounce that the Other (i.e., women, people of color, animals) is deficient in rationality in ways crucial to their nature and status, and therefore are deemed and treated as inferior, subhuman, or nonhuman. Whereas the racist mindset creates a hierarchy of superior/inferior on the basis of skin color, and the sexist mentality splits men and women into greater and lower classes of beings, the speciesist outlook demeans and objectifies animals by dichotomizing the biological continuum into the antipodes of humans and animals. As racism stems from a hateful white supremacism, and sexism is the product of a bigoted male supremacism, so speciesism stems from and informs a violent human supremacism -- namely, the arrogant belief that humans have a natural or God-given right to use animals for any purpose they devise or, more generously, within the moral boundaries of welfarism and stewardship, which however was Judaic moral baggage official Chistianithy left behind.

# 4

#### Text: The Executive branch of the United States should require that should repudiate and end the ongoing legacy of the Korematsu Era war powers authority cases.

#### CP solves the aff

Posner 5/2/13(a professor at the University of Chicago Law School, is a co-author of The Executive Unbound: After the Madisonian Republic and Climate Change Justice, “President Obama Can Shut Guantanamo Whenever He Wants” May 2, 2013, <http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/05/president_obama_can_shut_guantanamo_whenever_he_wants_to.html>, KB)

The NDAA does not, however, ban the president from releasing detainees. Section 1028 authorizes him to release them to foreign countries that will accept them—the problem is that most countries won’t, and others, like Yemen, where about 90 of the 166 detainees are from, can’t guarantee that they will maintain control over detainees, as required by the law.¶ There is another section of the NDAA, however, which has been overlooked. In section 1021(a), Congress “affirms” the authority of the U.S. armed forces under the AUMF to detain members of al-Qaida and affiliated groups “pending disposition under the law of war.” Section 1021(c)(1) further provides that “disposition under the law of war” includes “Detention under the law of war without trial until the end of the hostilities authorized by” the AUMF. Thus, when hostilities end, the detainees may be released.¶ The president has the power to end the hostilities with al-Qaida—simply by declaring their end. This is not a controversial sort of power. Numerous presidents have ended hostilities without any legislative action from Congress—this happened with the Vietnam War, the Korean War, World War II, and World War I. The Supreme Court has confirmed that the president has this authority.

#### Aff kills flexibility

Vermeule 6 (Adrian Vermeule, Professor of Law, Harvard Law School, 2006,¶ “THE EMERGENCY CONSTITUTION IN THE POST-SEPTEMBER 11 WORLD ORDER: SELF-DEFEATING¶ PROPOSALS: ACKERMAN ON EMERGENCY POWERS,” Fordham Law Review, LN)

The reason for the failure of statutory frameworks is plain. When an emergency or war or

crisis arises, the executive needs flexibility; because statutory limitations determined in¶ advance can only reduce flexibility, and do so in a way that does not anticipate the particular¶ requirements of a new emergency, no one has any ex post interest in insisting that these limitations be respected.¶ Ackerman acknowledges the grim historical record but provides no valid reason for thinking that his framework statute - which is far¶ more ambitious than the other ones - might fare differently.

#### Executive flexibility key to prevent extinction

Yoo 2/1/12 (American attorney, law professor, and author. He served as a political appointee, the Deputy Assistant US Attorney General in the Office of Legal Counsel, Department of Justice (OLC), during the George W. Bush administration. “War Powers Belong to the President”¶ Posted Feb 1, 2012,¶ <http://www.abajournal.com/magazine/article/war_powers_belong_to_the_president>, KB)

A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security. In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation, which leads only to passivity and isolation and not smarter decisions, will come at the price of speed and secrecy.¶ The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can take the initiative and Congress can use its funding power to check them. Instead of demanding a legalistic process to begin war, the framers left war to politics. As we confront the new challenges of terrorism, rogue nations and WMD proliferation, now is not the time to introduce sweeping, untested changes in the way we make war.

# Case

#### Korematsu doesn’t lay around like a loaded gun—it won’t be used in future situations:

Eric Posner & Adrian Vermeule, 2005 (professors of law @ University of Chicago , *The Constitution in Wartime*, ed. by Mark Tushnet, p. 61-62)

PRECEDENT. The locus classicus for the argument from precedent is Justice Jackson’s dissent in Korematsu v. United States, with its famous claim that “once a judicial opinion rationalizes [an emergency] order to show that it conforms to the Constitution or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated…[a] principle [that] lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Jackson’s idea is obscure. Suppose that judicial precedents explicitly uphold government actions in a time of crisis on the ground that the emergency justifies the order, even if a similar order would be invalid in ordinary times. Why must the precedent both (1) spill over into ordinary law and (2) remain entrenched “for all time,” as Jackson puts it? As for the first condition, the precedent will itself have a built-in limitation to emergency circumstances. Presumably the idea is that precedents are extremely malleable, and the category of “emergency” is a fluid and unstable one. But it this is so it is so in both directions; later judges may either distend the precedent to accommodate government power or else contract the precedent to constrain it. Jackson’s exegetes need to supply an independent account to explain why the former possibility is more likely, and more harmful, than the latter, and they have not done so.

#### Korematsu does not allow for a slippery slope to executive domination:

Eric Posner & Adrian Vermeule, 2005 (professors of law @ University of Chicago , *The Constitution in Wartime*, ed. by Mark Tushnet, p. 62-63)

At bottom, Jackson’s view must rest on a simple empirical conjecture: the expansion of emergency powers, once begun, will inevitably culminate in total executive domination. But this seems hysterical; there is no evidence for it in the study of comparative politics. Many constitutions contain explicit provisions for emergency powers, either in text or in judicial doctrine. Sometimes executive domination has overtaken the relevant policies, sometimes it has not; other variables probably dominate, such as the nation’s state of development, or its susceptibility to economic shocks, or the design of legislative and judicial institutions. Jackson’s exegetes bear the burden of showing, systematically, that recognizing a legal category of emergency power automatically sends the constitution reeling to the bottom of the slippery slope. A casual citation to a few salient examples, typically the emergency provisions of the Weimar constitution, will not carry that burden.

#### No link and TURN--Korematsu has zero precedential value—it is not cited as the justification for any governmental action—its doctrinal role is as a symbol as to what to avoid:

Samuel Issacharoff & Richard Pildes, 2005 (professor in procedural jurisprudence @ Columbia University Law School & co-director of the Program on Law and Security @ NYU School of Law, *The Constitution in Wartime*, ed. by Mark Tushnet, p.176-177)

Throughout the Japanese internment and related cases, the Court self-consciously struggled to preserve a congressional oversight role for the executive, even as it upheld all the executive’s actions up until the *Endo* case. Before leaving the topic of the Japanese internment, we must note that Korematsu has also had no legal or jurisprudential effect. At least until now, the decision has never been cited to support any government action of which we aware. The only jurisprudential effect of Korematsu has in fact been to encourage more aggressive, not more passive, judicial review of executive and legislative actions during times when national security was implicated. *Korematsu* has constituted “an infernal baseline” in American constitutional law: far from legitimating repressive wartime policies, its only doctrinal role has been as a symbol of what ought to be avoided in political practice and constitutional law. But there is also the cautionary note struck by Justice Jackson in dissent. Jackson argued that it was unrealistic to expect courts to do anything other than rubber-stamp military decisions during times of war. To ask or expect more can be no more than a foolhardy, self-defeating illusion. The danger, according to Jackson, is that once courts are drawn into the process of substantive review of extraordinary power, their role as constitutional arbiters will be at the very least compromised, if not altogether undermined.

#### Rights protections are resilient even in times of war:

Peter J. Spiro, 2005 (professor of international law @ UGA, *The Constitution in Wartime*, ed. by Mark Tushnet, p.198)

As September 11 looms a little smaller in the imagination, there is the possibility of a less alarmist perspective on its significance. In the immediate wake of the attacks, there was well-founded anxiety that the enormity of the episode and the war talk that followed would result in the significant curtailment of civil liberties, and particularly the rights of aliens. The historical precedents pointed in that direction, and some proposals, offered seriously, would indeed have constituted a serious setback to individual rights. But the more extreme fears have not been realized. Although elements of the government’s response to 9/11 have been rights-restrictive, the overall resiliency of rights protections has perhaps been more remarkable.

#### Judiciary ill-suited to determine matters of national security:

Samuel Issacharoff & Richard Pildes, 2005 (professor in procedural jurisprudence @ Columbia University Law School & co-director of the Program on Law and Security @ NYU School of Law, *The Constitution in Wartime*, ed. by Mark Tushnet, p.164)

A review of the positive law indicates that much of the debate over liberty versus security misses the most essential structure of this law. The cases speak to a modest and uncertain role for the courts in addressing issues of national security. In terms of actually defining first-order claims of rights, American courts show great reticence to engage the permissible scope of liberties in direct, first-order terms. Perhaps, as expressed by Chief Justice Rehnquist, “[j]udicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as ‘military necessity.’

#### Korematsu not key – its a discredited precedent with regards to race

**Harris 11** [David A. Harris (Law Prof @ U of Pittsburgh); “On the Contemporary Meaning of Korematsu: “Liberty Lies in the Hearts of Men and Women””; *Missouri Law Review*: Vol. 76, No. 1; WINTER 2011]

**Korematsu Is Dead**

**More than sixty-five years after the** Supreme Court’s **Korematsu decision and more than twenty-five years after the reversal** of the original conviction, **one might well ask what relevance the case has today. With the historical record corrected and the defendant vindicated, most commentators view Korematsu as a dead case**. They see it as a historical curiosity, a relic of an era in which the country collectively lost its head to the toxic combination of war hysteria, xenophobia, and racism.

For example, **the eminent constitutional scholar Laurence Tribe of Harvard Law School wrote that the dissenting opinion of Justice Jackson, not the majority opinion of Justice Black, has “carried the day in the court of history**.”38 **The Commission on Wartime Relocation and Internment of Civilians went even further, stating** in its report **that the** Supreme Court’s **Korematsu opinion “lies overruled” by history.**39 **A multitude of scholars has said that no court would rely on Korematsu today to sustain similar action by the government.**40

**More importantly,** some members of **the Supreme Court** have **weighed in** on the issue. For example, **Justice** Antonin **Scalia ranked Korematsu among the worst decisions that the Supreme Court ever made, comparing it to** the universally despised **Dred Scott** case, which helped plunge the nation into the Civil War.41 **With** the **other justices opining about the case either in decisions or during** their **confirmation hearings, eight of the current justices of the Supreme Court have said that courts could not rely on the core principle of Korematsu today.**42

**If all of this ignominy heaped on Korematsu does not convince one that the case has no life left in it, one must also consider the actions of Congress and the President.** **In** 19**88**, **Congress** enacted a bill that gave redress to Japanese Americans who suffered through the internment camps.43 This statute **officially apologized to the Japanese** – both those who held American citizenship at the time and those who did not – **for the suffering they endured** due to their removal from their homes and businesses and for their internment in camps. **In the words of the law, “[f]or these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.”**44 The statute also created a fund out of which previously interned individuals could receive a payment of $20,000.45 **When** President **Reagan signed the bill** on August 10, 1988, **he “admit[ted] a wrong” and “reaffirm[ed] our commitment as a nation to equal justice under the law.”46**

**With that kind of reputation – as bad as Dred Scott, as big a civil liberties mistake as the country has ever made, and as clear a consensus that the dissent and not the majority got it right – one could justifiably think of Korematsu as a dead case, upon which no court today would, or could, ever rely.**

**Professor David Cole, one of the strongest and most outspoken defenders of civil liberties in the post-9/11 era**,47 **says that Korematsu “has not proved to be the ‘loaded weapon’ that Justice Jackson feared” and he doubts that it ever will, given that such a healthy majority of the Supreme Court’s justices have repudiated it.**48 **Professor Eric Muller, who has made the study of the Japanese internment the centerpiece of his scholarship,49 believes that** “Korematsu did leave a loaded weapon lying about, as Justice Jackson feared.”50 Even so, Muller agrees with Cole in substance, because “**the passage of six decades may have emptied much of the ammunition from its chambers.”51**

#### Korematsu is not an impactful starting point for problematizing race; it paints an ineffective and incomplete picture, and excludes multiple critical contingencies – THEIR 1AC AUTHOR

**Green 11** [Craig Green (Prof of Law@Temple University Law, JD Yale); “ENDING THE KOREMATSU ERA: AN EARLY VIEW FROM THE WAR ON TERROR CASES”; 2011; Northwestern University Law Review: Vol. 105, No. 3]

Korematsu’s Modern Relevance.—This Article’s **revisionism concerning Korematsu’s original meaning also explains the decision’s continued significance. Even as Korematsu’s salience to issues of racial equality has declined, the decision remains important as a war powers precedent. If Korematsu is to be studied by modern commentators—as** I think **it should be—the relevance of this iconic case should shift to reflect such doctrinal developments. Conventional interpreters sometimes cite Hirabayashi and Korematsu as** a matter of ordinarily authoritative (positive) **precedent to prove** either (i) that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality”61 or (ii) that **antiracist principles** of equality constrain the federal government and not just the states.62 Regardless of these arguments’ historical anachronism,63 **Brown and its progeny have** now **superseded the doctrinal importance of Hirabayashi and Korematsu on such topics**.64 There were decisions even before 1943 holding that equal protection prohibits racist denials of civil rights.65 But Brown and its successors made these early precedents doctrinally superfluous. Likewise, the question of whether equal protection should be “reverse incorporated” against the federal government was once highly provocative, but that issue was not ad-dressed in Korematsu; instead, it was resolved a full decade later in Bolling v. Sharpe, a companion to Brown.66 **Most often, Korematsu is studied as a** discredited (negative) **precedent that exemplifies how doctrine can be abused in the service of racial prejudice**. 67 **Yet even as an illustration of** **how racial issues should not be treated** under the Constitution, **Korematsu merits only secondary prominence. The Court’s opinions in Dred Scott v. Sandford, the Civil Rights Cases, and Plessy v. Ferguson all incorporate governmental racism more directly than Korematsu,68 and the most robust evidence of racial oppression lies predominantly outside federal courts in lynching, de facto segregation, voter intimidation, employment abuse, and suchlike**.69 Thus, **although the internment cases are a horrible instance of American racism, their segment of that narrative is incomplete and unrepresentative. Korematsu also sheds little light on current debates over racial profiling, affirmative action, disparate impact, and the treatment of nonracial groups like homosexuals.**70 **In sum, if Korematsu were studied today simply for its contribution to equal protection jurisprudence, its doctrinal importance would be mild indeed.**

# Solvency

#### Courts demobilize social protest:

James T. Patterson, 2001 Ford Foundation Professor of History, Brown University, **2001**

[“The Troubled Legacy of Brown v. Board,” http://wwics.si.edu/topics/pubs/ACF236.pdf]

It is the force of that kind of resistance over ten years that Gerald Rosenberg makes so much of in The Hollow Hope. Michael Klarman, another leading revisionist, made many of the same points in a very important article in the 1994 Journal of American History, in essence agreeing that the Supreme Court made its decision, little happened, and therefore courts are often limited agents of social change. Rosenberg looks at the areas of desegregation, women’s rights, and abortion rights, and shows how little the Court actually accomplished. If the Court hadn’t involved itself, Rosenberg adds, protest might have emerged more quickly as militant demonstrations, which in fact brought forth concrete gains.

#### (--) Courts cause backlash against social movements: turning the case:

Idit Kostiner, 2003, Jurisprudence and Social Policy Program, University of California, **2003**

[“Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change”, June, <http://www.blackwell-synergy.com/doi/full/10.1111/1540-5893.3702006>, rwg]

Following Scheingold's argument on the "myth of rights," several empirical studies were conducted to explore whether specific litigation campaigns had been successful in promoting social reform. Focusing primarily on the direct effects of legal tactics, many of these studies revealed a substantial gap between the promises of rights litigation and its minimal impact in reality. In his well-cited book The Hollow Hope (1991), Rosenberg concludes that major litigation campaigns for school desegregation, abortion rights, and environmental justice failed to produce significant social reform. According to Rosenberg, some of these campaigns even had negative effects on social movements, as they led to backlash reactions and the rise of reactionary social movements. Other studies of the impact of litigation campaigns conclude with similarly pessimistic accounts of the fate of legal tactics as a tool for social reform.