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Gil Gott

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THE DEVIL WE KNOW: RACIAL SUBORDINATION AND  
NATIONAL SECURITY LAW

GIL GOTT\*

SINCE September 11, Muslims, Arabs and South Asians in the United States have had to contend with disparate and abusive treatment, both within civil society and at the hands of state actors including security, law enforcement and prison officials.<sup>1</sup> It would seem a horrible exaggeration to say that post-September 11 has been a period of “open season” on these groups. To be sure, high-ranking officials have denounced hate crimes and hate speech, and law enforcement has arrested and tried perpetrators of these crimes. Private individuals and groups have shown solidarity with these communities. But, the countless reported incidents of abuse suffered by Muslims, Arabs and South Asians at the hands of state and private actors imbue such other tokens of executive and societal “tolerance” and concern with an air of hypocrisy. In such an environment it behooves us to consider how liberal democratic systems might evolve legal and other forms of group-based remedies and safeguards to counter the socially and politically pernicious effects of what may well be a new and enduring form of religiously-inflected, unbounded, all-or-nothing warfare.

This article asks the “subordination question” with regard to contemporary national security law and policy.<sup>2</sup> It will consider how our scholarship and institutions construct national security law and policy in ways that afford either greater or lesser degrees of analytical and normative primacy to the problems of racialized group-based social harms that commonly surround exercises of national security-related powers. The anti-subordinationist methodology deployed here foregrounds such problems and allows us more accurately to assess the real costs of “states of emergency” by moving beyond standard law-versus-security framings. By focusing on “enemy group” demonization we are also better able to grasp the identity-inflected basis of the constructed security horizon itself, in effect analytically opening up to contestation the statist “black box” of emergency construction. Finally, the normative pre-commitments of an anti-subordinationist perspective allow us to judge the merits and the desirability of national secur-

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\* Assistant Professor, DePaul University, International Studies.

1. For a discussion on the abuse of Muslims, Arabs and South Asians in the United States, see *infra* Part III.

2. I borrow the formulation from feminist methodology that posited “the woman question.” For discussion of the woman question in the legal context, see Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV L. REV. 829, 837 (1990) (explaining “‘woman question,’ which is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective”).

ity law and policy from a perspective that resists resolving the law-security binarism into unrestrained political decisionism.<sup>3</sup>

Given an abundance of historical and contemporary evidence that national security rationales and measures are socially contingent in both conception and effect (reflecting at the bottom, societal pathologies such as racial and ethnic animus), it would seem likely that mainstream legal scholars would treat the resulting group-based harms as central to the post-September 11 national security law and policy debates. Indeed, the research I present in this article shows that it is not the case that liberal legal sensibilities wholly fail to apprehend the problems of group demonization in security crises. Legal liberalism, in fact, evinces due concern for state abuse of emergency powers and acknowledges the “distributional” inequalities inherent in such abusive practices, that is, the disproportionate burdening of “out-groups” in state security crises. The legal literature, however, typically orients itself around the narrow problem of how best to balance the conflicting demands of law—usually conceived of as minimized individual civil liberties protections and/or institutional balancing—and state security. I will show that legal liberalism has not effectively confronted the devil we know all too well—the subordination of racialized enemy groups, in this case, Arabs, Muslims or South Asians.

I look at two categories of post-September 11 liberal and progressive legal responses, accommodationist approaches<sup>4</sup> and more oppositional, albeit formalistic, civil liberties-based critiques. The first group of approaches seeks generally to accommodate law and justice to national security-related “necessity” and is animated in part by valorization and even identification with the state and its putative security needs. Alternatively, the formalistic civil liberties approaches would generally apply the Constitution in more or less the same way regardless of the state’s perceived security dilemma. This “business as usual” approach distrusts hypertrophied governmental powers and uses civil liberties framings to critique

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3. Decisionism here connotes the exercise of raw political and state power, relatively unconstrained by law or ethics.

4. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1058 (2003) (defining models of accommodation that “countenance a certain degree of accommodation for the pressures exerted on the state in times of emergency, while, at the same time, maintaining normal legal principles and rules as much as possible”); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 *STAN. L. REV.* 605, 606 (2003) (defining accommodation view as view that “the Constitution should be relaxed or suspended during an emergency”). Accommodation also describes a political dynamic. For example, in the aftermath of September 11, academics were faced with the hard choice of either “accommodating” the more aggressive national security policies of the Bush administration or being dismissed as irrelevant to the serious business of defending the nation. Observers of the Washington scene have identified such a dynamic. See, e.g., Georgie Anne Geyer, *Trading with a Currency of Fear*, (Oct. 22, 2004), at <http://opednews.orb6.com/stories/ucgg/20041022/tradingwithacurrencyoffear.php> (discussing fear tactics used by Bush and Kerry in 2004 presidential campaigns).

security regimes, such as the one arising from the war on terrorism.<sup>5</sup> While I consider the work of civil liberties advocates to be courageous and crucial for the broader project of creating a more just national security culture, I will consider how both accommodationist and formalistic civil liberties approaches similarly may occlude key subordinationist dimensions of the war on terrorism.

Anti-subordinationist principles require taking more complete account of how enemy groups are racialized, and how they come to be constructed as outsiders and the kinds of harms that may befall them as such. Group-based status harms include those that have been inscribed in law and effectuated through state action, and those that arise within civil society, through social structures, institutions, culture and habitus. Familiarity with the processes of racialization is a necessary precondition for appreciating and remedying such injuries. Applying anti-subordinationist thinking to national security law and policy does not require arguing that *only* race-based effects matter, but does require affording significant analytical and normative weight to the problems of such status harms. Racial injuries require racial remedies.

Foregrounding anti-subordinationist principles in national security law and policy analysis departs significantly from traditional approaches in the field. Nonetheless, arguments based in history, political theory and pragmatism suggest that such a fundamental departure is warranted. Historically, emergency-induced “states of exception”<sup>6</sup> that have suspended legal protections against governmental abuses have tended to be identity-based in conception and implementation.<sup>7</sup> Viewed from the perspective of critical political theory, the constellation of current “security threats” rests on the epochal co-production of identity-based and market-driven

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5. See Gross, *supra* note 4, at 1044-45 (referring to these as “business as usual” approaches).

6. “The exception” refers throughout this paper to the problem liberal legal systems face when state actors declare emergencies that require suspension of the normal rules of law. Weimar legal theorist Carl Schmitt famously used the problem of the exception to critique liberal legal systems. See generally Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and The “Norm-Exception” Dichotomy*, 21 CARDOZO L. REV. 1825 (2000) (discussing Schmitt’s theory of emergency powers). More recently, postmodern legal and political theorists have come to understand the exception as symbolic of the state’s permanent and absolute dominion over “bare life,” an aspect of law’s basic structure that places in doubt the possibility of liberal and democratic impulses operating through “the rule of law.” See Gil Gott, *Identity and Crisis: The Critical Race Project and Postmodern Political Theory*, 78 DENV. U. L. REV. 817, 834-45 (2001) (discussing postmodern political theory and exception).

7. The Japanese internment is the obvious example. For a discussion analyzing accommodationist approaches that incorporate security-inflected logic in truncating the regulative role law plays in national security, see *infra* Part I; see also John Hayakawa Tōrōk, *Ideological Deportation: The Case of Kwong Hai Chew* (2004) (describing effect of ideological exclusion in immigration law on Chinese in America).

global political antagonisms, referred to somewhat obliquely as civilization clashes or perhaps more forthrightly as American imperialism.

Pragmatically, it makes no sense to fight terrorism by alienating millions of Muslim, Arab and South Asian residents in the United States and hundreds of millions more abroad through abusive treatment and double standards operative in identity-based repression at home and in selective, preemptive U.S. militarism abroad. Such double standards undermine the democratic legitimacy of the United States both in its internal affairs and in its assertions of global leadership. Indeed, there seems to be no shortage of perspectives from which liberal legal institutions would be enjoined from embracing a philosophy of political decisionism *precisely* at the interface of law and security, an anomic frontier along which are likely to arise identity-based regimes of exception and evolving race-based forms of subordination.

Part I analyzes accommodationist approaches that variously incorporate security-inflected logic in truncating the regulative role law plays in national security contexts. I will seek to understand the accommodationist thrust of these interventions in light of the authors' operative assumptions regarding the proper array of interests and exigencies to be balanced. I will argue that the interests of demonized "enemy groups" facing race-based status harm—Muslims, Arabs and South Asians in the United States—are ineffectively engaged through accommodationist frameworks. The decisionist impulse of these analyses, that is, the tendency to acquiesce in the outcomes of non-substantively constrained statist and/or majoritarian political process, results from an incomplete grasp of the racialization processes. In short, more race consciousness is needed in national security law and policy in order to cement substantive commitments and procedural safeguards against historical and ongoing race-based subordination through the racialization of "security threats."

Part II examines approaches that rely on formalistic understandings of civil liberties in critiquing the government's post-September 11 policies. These approaches also inadequately center subordinationist effects in their criticisms of the war on terrorism. In lieu of anti-subordinationist commitments, these approaches complicate the formal distinction between aliens or immigrants and citizens. While such critiques of alienage-based distinctions and other *de jure* nativisms increasingly define the parameters of civil liberties and social justice advocacy in immigration law, much of the critical force of such approaches remains cabined. First, they remain cabined within a particular argumentative frame determined by the limits of the "national imaginary" and, second, within an aspect of white normativity that analogizes between the experiences of European immigrants and immigrants of color.

Part III argues that September 11 represents a watershed in the racialization of Muslims, Arabs and South Asians as people of color in the United States. I brief the nature and magnitude of harms accruing to

Muslims, Arabs and South Asians both through the government's policies in the war on terrorism and through societal dynamics. The evidence indicates that we are seeing not only legal but also social and political closures (and resistances) that typify racial formation processes in the United States. Those processes have both constructed and subordinated racialized minorities over many generations. Moreover, the current dynamic reflects an extension and acceleration of trends negatively impacting Muslims, Arabs and South Asians that were already in train well before September 11, 2001.

Parts I through III make the case that legal liberalism has responded ineffectively to the demonization and racialized subordination of Arabs, Muslims and South Asians in the United States. In Part IV, I will contextualize this failing by examining the international political system and the ways it structures current conceptualizations of state violence and state decisions on the exception in the war on terrorism. Status harms to Muslims, Arabs and South Asians are cases of a racialization of security that continues apace, made even more likely under post-modern international structures that operate at ever greater removes from the rationalist assumptions of the modern international system. Part V concludes by placing the current securitization of race in a historical and normative context that compels prioritization of the subordinationist devil we know in the war on terrorism, quite apart from the devils the state and state actors claim to know.

#### I. REASONABLE ACCOMMODATION: LEGAL LIBERALISM AND THE WAR ON TERRORISM

September 11 has led to the most significant scholarly and public scrutiny of U.S. national security law and policy since the Vietnam era. The specter of large-scale violent attacks by so-called Islamist terrorists has prompted renewed debate about whether and how constitutional protections should apply in times of national emergencies, and what role the judiciary should play in overseeing the government's exercise of security powers.<sup>8</sup> Some view September 11 as having ended what we might call the Cold War national security law equilibrium, that is, executive-legislative power sharing, tempered by the real possibility of judicial intervention either in the service of substantive protections of individual liberties or as referee and interpreter of power-sharing arrangements between the political branches. The model of a unilateralist "emergency executive," empow-

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8. Various legal memoranda generated from within the Bush administration apparently viewed the "changed world" after September 11 as legitimating a new more unilateralist and "extra-legal" view of international and domestic security law questions. By contrast, the Oklahoma City bombing by white supremacists, for example, though catastrophic in its own right did not lead to an outpouring of scholarship in the field. The threat from specifically Muslim-identified terrorists attacking the United States has been the cause of the current spate of reform proposals.

ered to take swift and decisive action without having to be concerned with winning *ex ante* congressional authorization or *ex post* judicial approval, has returned as the symbolic counterpoise to the terrorist threat. The disciplinary center of gravity, however, is found in what I refer to as accommodationist approaches that seek, short of creating an "imperial presidency," to adjust liberal democratic norms and practices to fit the reconfigured national security environment.

Generally, accommodationist approaches provide important and sophisticated elaborations of positions that were staked out by Justice Jackson in his opinions in the Japanese internment cases and later in *Youngstown Sheet & Tube v. Sawyer* (the "Steel Seizure Case").<sup>9</sup> The political and jurisprudential impulses retrieved from these now canonical twentieth century national security law opinions range from a posture of judicial deference or quietism, reliance on an institutional process-based balancing calculus, and a concern with the longer-term health and legitimacy of liberal rule of law systems and their judiciaries. In addition, today's accommodationists often follow Justice Jackson's dissent in *Korematsu v. United States*,<sup>10</sup> recognizing the potential for, if not the inevitability of, racialized group subordination occurring under the guise of national security necessity.

In this section, I assess two types of accommodationist approaches, asking whether and how effectively these approaches intervene to remedy race-based injuries accruing to "discrete and insular" minorities in the wake of the state's and society's reaction to the perceived threat from Islamist terrorists. The first approach I examine is premised on a model of *social learning* that generally cuts against concerns of civil libertarians regarding the repressive effects of the war on terrorism. The social learning model assures us that contemporary America's current state of social learning regarding the importance of civil liberties militates against the types of power abuses that occurred in the past in the name of national security. The social learning model generally counsels deference on the part of advocates, lawyers and judges toward the members of the political branch responsible for exercising the state's security function. Moreover, despite the social learning model's recognition that group demonization is a likely consequence of such exercises of the security function, the approach provides no remedy for the resulting racialized subordination. For demonized "enemy" groups the question arises: exactly what have "we" learned from the past and how does that social learning protect "us" from racialized harms in the future?

Second, I examine process-based approaches that see bilateral (executive and congressional) political review as the democratic floor below

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9. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (discussing three categories for executive actions).

10. 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (arguing that decision will lead to subordination of racial groups under guise of national security).

which exercises of national security power should not be allowed to slide. That floor is, at a minimum, quite “sticky,” given the aversion such approaches have toward substantive commitments that could ameliorate the subordinationist effects of institutional politics and majoritarian democracy that such models rely upon. While certain of these approaches seem generally more open to contemplating race-based justice concerns and even incorporate some basic substantive protections, their narrower focus on problems of judicial legitimation prevents them from dealing effectively with the problems of racial subordination. Even if the courts avoid endorsing government abuses, thus preserving judicial legitimacy, subordinated groups may rightfully ask: through what means and to what end will that legitimacy have been retained?

#### A. *Social Learning*

In order to gain a sense at the outset of how subordinationist concerns remain peripheral to the mainstream of accommodationist thinking, it is instructive to consider briefly the work of scholars whose seeming embrace of the unilateralist executive places them somewhat outside legal liberalism’s disciplinary mainstream. In their response to critics of the government’s post-September 11 exercises of emergency powers, University of Chicago Professors Eric A. Posner and Adrian Vermeule identify what they see as civil libertarian critics’ two main forms of argument—one based on the idea of a ratchet mechanism whereby civil liberties lose out to national security interests over time, and one based on the problem of fear-induced panic that causes government actors to overreact to perceived threats. Posner and Vermeule counter the latter “panic thesis” in a way that is striking for both its honesty and indifference regarding the destructive and distorting role racial animus can play in emergency-based exercise of state power. They write:

Fear generated by immediate threats, then, causes instinctive responses that are not rational in the cognitive sense, not always desirable, and not a good basis for public policy, but it is not this kind of fear that leads to restrictions of civil liberties during wartime. *The internment of Japanese Americans during World War II may have been due to racial animus or to a mistaken assessment of the risks; it was not the direct result of panic; indeed, there was a delay of weeks before the policy was seriously considered.*<sup>11</sup>

What is more remarkable to me than the authors’ ostensible point regarding the relative insignificance of panic in policy formation during emergencies is their rather matter-of-fact attribution of problematic civil

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11. Posner & Vermeule, *supra* note 4, at 633 (emphasis added).



liberties restrictions to racial animus.<sup>12</sup> Posner and Vermeule do not explore further the impact of their observation concerning the determinative role played by racial animus and, thus, do not assess their own thinking on judicial deference in light of what they concede may be government actors' irrational decision-basis. This move, in effect if not in intent, normalizes by not assessing as "irrational" white fears of racialized Others in policy makers' decision-bases. Nevertheless, the authors' decision to not focus their analysis on racial animus as an irrational decision-basis, though such animus would seem pertinent to the panic-thesis that their article works at length to refute, can be explained by the fact that Posner and Vermeule obviously intended their article as a response to the types of arguments contemporary critics have mounted against enhanced state power in emergency contexts. Posner and Vermeule would have had to look beyond the "usual suspects" for critics who methodologically centered racial or ethnic animus in assessing the legal and social consequences of the government's war on terrorism.

This is not to say that the disciplinary mainstream is unaware that demonized and racialized Others suffer the brunt of power abuses in state security crises. Even those models that acknowledge the problem of group-based subordination fail to provide commensurate racial remedies. For example, progressive constitutional scholar Mark Tushnet's social learning thesis affords significant rhetorical weight to the problem that state security measures typically target constructed enemy "Others."<sup>13</sup> Tushnet offers a qualification of what he calls the Whig narrative regarding social learning, which posits that social learning over time has led to greater respect for civil liberties in emergencies, along lines that will sound familiar to anti-subordinationists:

The social learning process couples learning about exaggerated reactions to perceived threats with a persistent creation of an Other—today, the non-citizen—who is outside the scope of our concern. . . . The Whig version of social learning does identify a

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12. Presumably, based on what they wrote in the above quote, the authors would also agree that the existence of racial animus could be a significant factor in mistaken risk assessment.

13. See Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. REV. 273 (2003) (discussing idea that every security crisis results in destruction of civil liberties, but United States has been unable to prevent itself from repeating their mistakes). Another article appearing around the time of Tushnet's, co-authored by Jack Goldsmith and Cass Sunstein, applies a similar analysis. See Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002) (discussing reasons why President Bush was criticized for enabling military commissions to try terrorists, but President Roosevelt was praised for creating a military commission to try Nazi saboteurs). While a similar thesis animates Goldsmith's and Sunstein's analysis, they do not necessarily advocate the same extra-constitutional validity model as Tushnet. Posner and Vermeule focus much of their critique on the ratchet thesis which they find at the base of both Tushnet's and Goldsmith's and Sunstein's arguments, a point I do not analyze in this article.

real process in which government policy in response to emergencies has a decreasingly small range, but a more pessimistic view would direct our attention to the fact that the policy continues to focus on the Other.<sup>14</sup>

Tushnet identifies this distorting effect of “focus on the Other” as “the central issue in thinking about civil liberties in wartime.”<sup>15</sup> Moreover, Tushnet understands that abuses of security powers, as a matter of historical fact, are often based on clear knowledge either that the threat was exaggerated or nonexistent, or that the chosen (abusive) policy response would be ineffective at curbing any real threat. He reminds us in this context of General John L. DeWitt, whose evidentiary basis for imprisoning some 120,000 innocent civilians was nothing more than a racist worldview regarding Japanese Americans.

In this light, Tushnet’s “defense” of *Korematsu* is intentionally ironic and nuanced: “*Korematsu* was part of a process of social learning that both diminishes contemporary threats to civil liberties in our present situation and reproduces a framework of constitutionalism that ensures that such threats will be a permanent part of the constitutional landscape.”<sup>16</sup> Tushnet’s intervention seeks to combine the Whig narrative regarding social learning with a concern that courts might in fact unwittingly normalize executive assertions of unchecked emergency powers by, as the *Korematsu* Court did, subjecting abusive policies to pseudo-constitutional review. Because judges are likely, in Tushnet’s view, to succumb to the security hysterias of the day, any constitutional review to which they subject the government’s wartime policies will most likely amount to a mere rubber-stamping of those policies, creating bad precedent, if not encouragement, for future exercises of such executive power.<sup>17</sup>

Tushnet identifies three arrangements for negotiating the resulting tensions between state emergency powers and constitutional protections. In his final analysis, Tushnet declares his support for a form of judicial deference that places most exercises of emergency powers beyond real judicial review. Tushnet’s preference reflects an assessment that the most pressing constitutional issue in emergency contexts is the problem of judicial legitimation of governmental overreach.<sup>18</sup> For Tushnet, the possibil-

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14. Tushnet, *supra* note 13, at 298.

15. *Id.* at 298.

16. *Id.* at 274; see also, Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179, 193 (1998) (proposing using internment cases as part of critical genealogy of foreign affairs law).

17. See Tushnet, *supra* note 13, at 282-83 (discussing author’s belief that any wartime policy will be approved by courts). This recalls Justice Jackson’s famous reference to the *Korematsu* decision as a “loaded weapon.” See *Korematsu v. United States*, 323 U.S. 214, 246 (Jackson, J., dissenting) (“The principle [endorsed by the majority] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”).

18. Tushnet’s options include: (1) using the original constitution as the “sole guide”; (2) add to the constitution a process for declaring and administering an

ity of extra-constitutional validity for problematic governmental policies is “consistent with the persistence of the constitutional regime.”<sup>19</sup> However one may feel about creating a new category of extra-constitutional validity, an idea that other writers endorse as a way of insuring against the constitutionalization of anti-democratic (Schmittean) states of exception, Tushnet does not extend his insight regarding the problem of the security state’s focus on the other into his assessment of the approaches he contemplates for squaring state emergency powers with the values of constitutional democracy.<sup>20</sup>

Indeed, Tushnet fails to characterize as categorical civil liberties violations some of the most salient abuses of the war on terror. He mentions those policies that have targeted thousands and tens of thousands of Muslims and Arabs in the United States—Kafkaesque indefinite detentions, selective deportation for minor immigration infractions and intimidating interrogation by law enforcement officials—and grants that “in some instances, the actions taken might be true violations of civil liberties.”<sup>21</sup> Tushnet concludes, nonetheless, that a meaningful distinction must be maintained between harm to citizens and harm to non-citizens. Because he does not elaborate, it is unclear exactly why or how those lines are or should be drawn, or when the distinction between citizens and non-citizens might become constitutionally problematic. But, one senses the familiar deployment of civil liberties formalism, rendering the status harms that accrue to racialized groups across the citizen/non-citizen divide irrelevant.

Tushnet’s social learning hypothesis posits a public awareness that the government has exaggerated the existence of threats in the past and has dealt ineffectively with real threats that existed. The public is thus less inclined to trust governmental claims regarding threats, and governmental actors who know of this social learning will limit the scope of their responses to such perceived threats.<sup>22</sup> Tushnet, however, also asserts a qualified defense of policymakers who he sees as facing *ex ante* decision contexts wherein exaggerations and overreactions are “entirely rational

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emergency regime, i.e., “constraining emergency powers by constitutionalizing them”; and (3) treating emergency powers as extra-constitutional but somehow valid, that is, having courts not endorse such exercises so that the *exceptional* nature of emergency-based policies is clear. See Tushnet, *supra* note 13, at 299-300 (discussing three options).

19. *Id.* at 306.

20. See Gross, *supra* note 5, at 1826-27. The Schmittean exception refers to Carl Schmitt’s famous aphorism that he is sovereign who decides the exception, meaning to suspend the normal operation of the rule of law. See *id.*

21. Tushnet, *supra* note 13, at 297.

22. See *id.* at 283-84. Tushnet is also aware, however, that repressive policies evolve over time. See *id.* So, new policies might appear consistent with the social learning thesis, but the more things seem to change, the more repression may in fact stay the same. Thus, critics of governmental policies face the prospect of constantly fighting the last war, whereas the present war should be seen as involving new forms of overreach and repression.

and ought not be criticized in retrospect.”<sup>23</sup> He admonishes those who would constrain policy-makers in such contexts, warning that “we should be careful not to constrain them because of our hindsight wisdom—unless we are confident that the constraints we put in place really do respond only to tendencies to *exaggerate* uncertain threats or to develop *ineffective* policy responses to real ones.”<sup>24</sup> Tushnet, however, fails to consider how racism informs the “rational” exaggerations and overreactions of policy makers that he views as beyond critique.

In the end, Tushnet’s social learning-based model promises little, if any, protection or remedy for demonized Others. Tushnet counsels too much caution for civil society actors who would otherwise presumably embody and operationalize social learning in their deployment of “hindsight wisdom” to challenge repressive security policies. Absent the use of such wisdom, however, it is hard to imagine how civil rights can be championed in the face of *ex ante* state monopoly over relevant information.<sup>25</sup> Moreover, Tushnet’s reliance on the Whig version of social learning allows him to remove the judiciary from an active, let alone robust, role in overseeing security state actors. What we are left with is a historically unsupported faith that state actors will themselves have sufficiently internalized social learning to prevent abuses of the Other. In other words, Tushnet’s offer to demonized groups amounts to little more than a form of political decisionism cloaked in the hope that social learning (among state actors) can stanch the negative synergy of hysteria and racism.

Deploying the notion of social learning from a critical race perspective, we might be able to take a more complete account of the subordinationist problem in state security power exercises and provide effective racial remedies. As opposed to a white-normative deployment of social learning, a critical race perspective would reject a Whig narrative that presents the internment as something that has been transcended, as a symbol of a redeemed/enlightened national identity. The concept of social learning, in this sense, would have to be refined substantially to focus on the more critical problem of “racial learning.” What exactly has *white* America learned from the internment? To what extent have the state’s culturally and demographically white security institutions and policy-makers actually internalized critical race perspectives on group subordination, racial injury and racial remedy? Indeed, to what extent has the legal academy and the judiciary internalized these perspectives?

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23. *Id.* at 287.

24. *Id.* at 287-88.

25. The most egregious abuses of legal process in the internment cases revolved precisely around attempts to shield policymakers from judicial scrutiny of their decision-bases. See Gott, *supra* note 16, at 225-45 (discussing government lawyers’ attempts to get courts to take “judicial notice” of racist characterizations of Japanese Americans).

### B. *Process-Based Approaches*

In their article, Samuel Issacharoff and Richard H. Pildes present the case from “positive law” for a version of the political-process-based approach to the courts’ role in wartime.<sup>26</sup> The authors argue that U.S. courts have tended to reject the two extremes that characterize public discourse on civil liberties and national security during crises—neither subjecting national security policies to substantive review as would be consistent with the individual rights-based thinking of civil libertarians, nor having simply deferred to the President as executive unilateralists would desire. “Instead,” Issacharoff and Pildes argue, “the courts have developed a process-based, institutionally-oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts.”<sup>27</sup>

Outside national security law contexts there is, of course, a long history of pitting process-based approaches against the demands of substantive racial justice.<sup>28</sup> Process-based approaches respond to the so-called counter-majoritarian dilemma that valorizes decisions of the political branches as more democratically legitimate than decisions of courts.<sup>29</sup> Barbara Flagg, however, shows that faith in process-based principles of judicial review, which putatively avoid application of “non-neutral” substantive norms, is a “transparently white” proposition.<sup>30</sup> The last half-century’s “enduring principle” of neutral process-based approaches to constitutional review for racial minorities has benefitted whites and disadvantaged

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26. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1, 5 (2004) (discussing move to process-based, institutionally-oriented framework). Though I focus on Issacharoff and Pildes here, Oren Gross also offers a more fully articulated process-based approach, premised on a populist-democratic conception of political process. Gross’s “extra-legal measures” model provides for governmental actors in emergencies going “outside the constitutional order,” but being subjected, *ex post*, to a political process in which “the people decide” whether the extra-legal actions are acceptable. See Gross, *supra* note 4, at 1023. Gross’s approach, like other process-based approaches, offers little by way of substantive or results-oriented protections for subordinated “enemy groups.” *Id.* at 1134.

27. Issacharoff & Pildes, *supra* note 26, at 5.

28. See generally Barbara Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935 (1994) (surveying history of process-based approaches from critical race perspective).

29. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (providing one of most well known versions of argument for “neutral” process-based constitutional review in order to counter the counter-majoritarian difficulty).

30. See Flagg, *supra* note 28, at 975 (explaining that “transparently white” theory effects judicial review because “it has contributed to a climate of discourse in which processual analyses displace substantive constitutional interpretation”). By “transparently white,” Flagg refers to the tendency for embedded white preferences to appear as neutral—whiteness being transparent or invisible as a racial identity to most whites. See *id.* 968-73.

people of color. Flagg's critique reveals the types of substantive bias inherent in process-based approaches.

The pluralist interest impaired by process-oriented constitutional law is the interest in antistatist modes of analysis. These days, all who enter the constitutional arena must speak the processual language of institutional concerns. However, because the process perspective systematically exerts pressure in the direction of the colorblindness interpretation of equality, the arena is not equally hospitable to all points of view. Those for whom matters other than institutional legitimacy take priority must nevertheless confront the substantive "tilt" associated with the process perspective.<sup>31</sup>

Adopting a process-based approach to the national security law context renders a similar "substantive tilt" insofar as concerns for institutional legitimation displace anti-subordinationist principles that would prioritize remediation of group-based harms imposed on Muslims, Arabs, South Asians and other demonized minorities.

Issacharoff and Pildes developed their argument for the process-based approach by looking at Civil War era opinions in *Ex parte Milligan*,<sup>32</sup> the case that famously overturned President Lincoln's suspension of habeas corpus by ruling in favor of a detained individual's right to trial in a civilian court. Two positions emerge from their reading of *Milligan*. The majority opinion in the case represents an absolutist rights-oriented view for Issacharoff and Pildes that "transformed the case into a challenge to the power of the entire national government, even when acting in concert, to invoke emergency powers (such as suspension of habeas corpus) and re-calibrate the rights of individuals during wartime."<sup>33</sup> A concurring opinion signed by the remaining four judges contains what Issacharoff and Pildes see as the better, pragmatic approach that will become the dominant view.<sup>34</sup> Under the concurring opinion's approach, "[t]he con-

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31. *Id.* at 977 (footnote omitted).

32. 71 U.S. 2 (1866).

33. Issacharoff & Pildes, *supra* note 26, at 12.

34. Issacharoff and Pildes claim that the *Milligan* rights-oriented majority position was subsequently discredited by public reaction to the case. Their reading of this reaction skews in favor of their conclusions regarding the superiority of what they see as the more pragmatic process-based approach. They claim that public hostility toward *Milligan* was strictly a result of the decisive role the Court may have been reserving for itself in subsequently adjudicating Reconstruction laws that infringed on individual liberties. Had the Court adopted the concurrence's process-based approach, Issacharoff and Pildes argue, the public would not have reacted in outrage: "None of this [outrage] had been necessary, because had the Court taken the pragmatic, institutional-process approach of the concurrence, the decision would have been widely accepted." *Id.* at 14. Given the partisan basis of the public's outrage, generally, Southerners loved *Milligan*, Northerners did not, it seems unlikely that the choice of a theory of national security constitutionalism would have stemmed the critical tide. The Civil War-era Court is, in fact, an example of

stitutional inquiry . . . started and finished with what authority Congress had given to President Lincoln.”<sup>35</sup>

Issacharoff and Pildes read the history of national security law, up through the present war on terrorism, as the triumphant trajectory of political process-oriented judicial review of security-related exercises of state power. They then turn to normative concerns, looking at the slipperiness of process-based review and the willingness of courts to engage in dubious interpretive gymnastics in order to find congressional authorization for executive actions.<sup>36</sup> The authors also examine problems within the political process itself, such as the possibility that Congress might simply abdicate to the executive on matters of national security. The most notorious and daunting political problems of any process-based approach, the protection in the political process of discrete and insular minorities mentioned in *Carolene Products*' famous Footnote Four, do not push Issacharoff and Pildes to qualify their faith in process-based institutional balancing.<sup>37</sup>

For example, the authors seek to attenuate civil liberties concerns by arguing that the executive branch may itself “internalize civil libertarian values.” They base this argument in a comparison of the civil liberties records from World War I and World War II.<sup>38</sup> They conclude that protection of dissident speech was dramatically improved in World War II in large part because executive branch officials, like Attorney General Francis Biddle, resisted the repressive impulses of the President.<sup>39</sup> Issacharoff and Pildes, however, do not discuss the Japanese internment during World War II as part of this comparison. Foregrounding the internment would undercut their hypothesis, illustrating the problems of relying on process-based approaches in contexts involving a political environment biased against a demonized and subordinated minority. Within the executive branch, individual members of the Justice Department, including Biddle,

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an institution trapped by what we today might place broadly into the category of identity politics. The partisan reactions to *Milligan*, and the divisions within the Court over which model to apply, suggest that the choice between individual rights-based absolutism and the institutional-process approach is much more politically fraught than Issacharoff and Pildes would suggest. It is precisely in this political dimension that the process-based model requires further elaboration and substantive foundation.

35. *Id.* at 13.

36. *See id.* at 36-40 (noting, for example, that Congress tends to rubber stamp executive decisions and process-based review “turn[s] judicial review, which piggybacks onto the congressional role, also into a meaningless rubber stamp”).

37. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

38. *See, e.g.*, Issacharoff & Pildes, *supra* note 26, at 40-41 (using World War II examples of judicial resistance of executive actions to theorize that civil liberties can be protected).

39. *See id.* (“[T]he Attorney General, Francis Biddle, himself stepped in the civil liberties tradition, managed to resist most of President Roosevelt’s insistent demands to ‘indict the seditionists.’”).

had indeed opposed the internment.<sup>40</sup> These would-be purveyors of the executive branch's "internalized civil libertarian values," however, were easily swept aside by the racist impulse that took hold of the political process.<sup>41</sup>

Issacharoff and Pildes present the Japanese internment as the by now familiar token of transcended/benighted past and a redeemed/enlightened present. They write: "[F]ar from legitimating repressive wartime policies, [*Korematsu's*] only doctrinal role has been as a symbol of what ought to be avoided in political practice and constitutional law."<sup>42</sup> The case of *Ex parte Mitsuye Endo*,<sup>43</sup> published the same day as *Korematsu* and providing the empty gesture of invalidating the then terminating internment of loyal Japanese American citizens, enjoys a certain position of privilege in such revisionist treatments of the internment. *Endo* is seen as a corrective to the rest of the internment jurisprudence.<sup>44</sup> Issacharoff and Pildes conclude that "the idea that *Korematsu* and its inherent racialism represent the full story about the judicial encounter with the World War II internment of the Japanese is a creation of the narrative American constitutional law has come to tell about this episode. That conventional account ignores [*Endo*]."<sup>45</sup>

Despite this relatively rosy assessment of the Court's role in the internment cases, Issacharoff and Pildes are willing to make no "historical/descriptive" case for a stronger judicial role in providing substantive constitutional oversight for political branch exercises of security powers. They conclude that "American courts have viewed the costs of putting judgment of these [substantive] questions into the hands of courts to out-

40. See Gott, *supra* note 16, at 224-35 (mentioning J. Edgar Hoover, John McCloy, Oscar Cox, Ben Cohen and Joseph Rauh as some originally opposed to internment).

41. See *id.* (articulating how severe racism and racialization helped cause shift in policy towards favoring internment).

42. *Id.* at 23 (citing Sternberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting)).

43. 323 U.S. 283 (1944).

44. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1939 (2003) (placing *Endo* decision on par with *Korematsu* as "part of constitutional law").

45. Issacharoff & Pildes, *supra* note 26, at 21. Issacharoff and Pildes refer in their work to Gudridge's revisionist essay on *Endo* that somewhat cryptically sees the case as depicting "a legal space within which the unconstitutional and the extraconstitutional are inexpressible." Gudridge, *supra* note 44, at 1967. Gudridge concludes that *Korematsu* must be viewed in light of his reading of *Endo* in order to comprehend the proper and minimalist way that constitutional law can operate in the face of "felt necessity." *Endo/Korematsu* signal for Gudridge a "doubled legal consciousness," a hopeful oscillation between "originating commitment," on the one hand, and necessity, on the other. Gudridge sees this way of appreciating *Endo* as necessary to keeping alive in exigent contexts "readable signs of the continuing impact of constitutional sensibility, of at least the elementary patterns of constitutional law." *Id.* at 1968. Gudridge does not endorse the institutionally-oriented process-based reading of *Endo* defended by Issacharoff and Pildes, but instead asserts that *Endo* "sounds in constitutional law." *Id.* at 1954.



weigh the benefits of leaving these freighted questions in the joint hands of the legislature and executive."<sup>46</sup> The remaining structure of national security constitutionalism renders these exception decisions substantively unrestrained by providing only the guarantee of "bilateral review of claimed states of emergency."<sup>47</sup>

A different historical/descriptive case, however, can certainly be made even if one does not think that the Court performed admirably in the internment cases. That is, the Court's approach in the internment cases may not be as substantively hollowed-out as Issacharoff and Pildes indicate. Several of the Justices' opinions were, in fact, quite explicit in discussing the racist roots of the curfew, exclusion and detention orders. None of the opinions expressly sets aside as substantively irrelevant the acknowledged problems of the internment's racial injustices. It is true that by choosing to support political branch and military abuses the cases did not afford decisive weight to the substantive issues of racial injustice. But, it is a stretch to read the various opinions and conclude that Justices did not undertake substantive review of the internment. The Court's substantive baseline was indeed "infernally,"<sup>48</sup> but seeing the internment cases as precedents for substantively unrestrained political decisionism really requires expunging the glaring racial dimensions of the Court's deliberations. It is more descriptively accurate to say that the Court simply constructed the particular norms it applied (due process, equal protection) in a way that allowed it to valorize the political branch narrative regarding the necessity of internment, regardless of how this burdened Japanese Americans.

At bottom, such readings of the internment cases acquiesce in the political branches' absolute right to decide the exception, even on racist grounds. Such readings necessarily avoid engaging fully the racialized nature of the internment. Contrast these readings, however, with that offered by Jerry Kang who tempers any praise one might be tempted to extend to the *Endo* Court with the terse observation that *Endo* functioned mainly to absolve the political branches of any "sins" related to the internment.<sup>49</sup> Kang's reading of *Endo* is integral to his critical understanding of the wartime Court as a "full participant in the internment machinery." The machinery metaphor Kang chooses is poignant, suggesting something systemic and heartless, perhaps also simultaneously "democratic" (as in autocratic "machine politics") in a uniquely American sense. It conjures an

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46. Issacharoff & Pildes, *supra* note 26, at 25.

47. *Id.*

48. See Gudridge, *supra* note 44, at 1934 (setting forth term "informal baseline").

49. See Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 963 (2004) ("[T]he two political branches of the federal government were absolved of any sins, and an obscure, long-since dissolved agency ended up holding the bag.").

image that should trouble those using the internment to support process-based decisionism.

Kang's socio-legal synthesis of the internment cases differs substantially from revisionist readings such as that offered by Isaacharoff and Pildes. Kang argues that the Court used judicial tactics and timing to allow the internment to proceed, while avoiding constitutionally sanctioning the indefinite detention of loyal citizens. Moreover, *Endo* itself was an "epic whitewash," providing rhetorical cover for the racist impulse at the heart of the internment.<sup>50</sup> "Notwithstanding the harsh and public reality of biased, negative racial meanings influencing the decision-making process of the political branches, the [*Endo*] Court explained that it could not possibly assume that this was so."<sup>51</sup>

Kang shows that rationalizations based on "minimalist virtues," principles that support judicial restraint, are inapplicable to the internment jurisprudence.<sup>52</sup> Minimalist virtues share, with process-based theories, the presumed advantages of furthering democratic accountability and avoiding either legitimization of unconstitutional practices or "unrealistic," politically inexpedient, judicial assertions of principle. Neither democratic accountability nor political expediency explains to Kang the Justices' failure to use judicial review decisively in negating the internment orders.

Kang shows that the Justices were not concerned with democratic accountability,<sup>53</sup> much less the protection of discrete and insular minorities in the democratic process.<sup>54</sup> The judicial approach to the internment cases "in no way promoted democratic decision making and accountability, especially if we understand democracy as more than simplistic maximization of majority preferences."<sup>55</sup> The Court also did not "dodge" the cases in a way that would be consistent with the political expediency prong of the minimalist virtues. The Court segmented, and then upheld the constitutionality of, various aspects of the internment. Indeed, Kang points out that the Court did not seek to avoid legitimating the internment for the simple reason that the Court may not have doubted the internment's constitutionality.<sup>56</sup>

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50. *See id.* at 961 ("But in *Endo*, this otherwise reasonable interpretive practice produced an epic whitewash.")

51. *Id.*

52. *See id.* at 965-75 (discussing "minimalist virtues"). "Minimalist virtues" is a result of Kang's conflation of Alexander Bickel's notion of "passive virtues" and Cass Sunstein's theory of "judicial minimalism." *See id.* at 965 (describing conflation of theories). Such theories of judicial restraint are akin to process-based approaches in prioritizing responses to the counter-majoritarian dilemma.

53. Kang points out that, "[a]t various points in the wartime cases, the Court was invited to strike down aspects of the internment on grounds that the military's actions had not been authorized by the President of Congress." *Id.* at 967-68.

54. Kang emphasizes that "the sort of democracy that was realistically in play [at the time of the internment] was tyranny of the majority." *Id.* at 969.

55. *Id.* at 970.

56. *See id.* at 971 ("Further, the Court did not avoid the merits entirely by employing some device such as standing, ripeness, mootness, or political question.

In short, revisionist readings of the internment, which emphasize the Court's "principled" democratic process-based or minimalist approach, cannot redeem the internment as a model of national security law. The internment cases should be canonized, but not as monuments to principled judicial behavior in national security contexts in which political branch demonization and repression of racialized "enemy groups" has been a recurring problem.<sup>57</sup> What can redeem the internment disaster for legal liberalism is an appreciation of how either process-based approaches or judicial minimalist values must be subjected to an effects-oriented substantive baseline that provides the fullest possible protection from, and promise of remedy for, group-based harms that accrue to racially subordinated groups.<sup>58</sup> Kang invokes, for example, the deep principles of equal protection that do not allow for the trading of "outsiders" rights for the sake of benefits (including systemic legitimation) that accrue primarily to insiders.<sup>59</sup> Whether the Court in the internment cases followed a judicial minimalist or process-based script, it effectuated a transparently white jurisprudence. This is a legacy that cannot be transcended through revision, but which should instead sustain a non-negotiable anti-subordinationism at the core of U.S. national security law.

### C. *Sub-Constitutionalism: A Process-Based Hybrid*

Bruce Ackerman proposes the creation of an "emergency constitution" as a way to manage the problem of security threats that do little to threaten the state's existence but which readily turn the government into the bane of civil liberties.<sup>60</sup> Ackerman believes that our biggest problem is not that government will be unable to withstand terrorist attacks, "but that it will be too strong in the long run."<sup>61</sup> Ackerman sees the present threat from terrorism as creating a powerful "distinctive interest" that compels the state to reassure its citizens that sovereignty is protected. Ackerman sets out to accommodate the legal system to this emerging state imperative, which he calls the "reassurance function."<sup>62</sup>

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Instead, it segmented off easier aspects of the case and incrementally affirmed their constitutionality.").

57. See Gott, *supra* note 16, at 269 (arguing for more fully racialized understanding of internment cases as important foreign affairs law precedent that would lead to prioritization of anti-subordinationist commitments in field).

58. Sunstein would include an injustice exception to his minimalist principle. See Kang, *supra* note 49, at 969.

59. See *id.* at 972 (explaining that systems which avoid legitimation "smacks almost entirely of political expediency and almost nothing of principle").

60. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1040 (2004) (explaining constitutional challenge presented by terrorism and states' attempts to protect their citizens).

61. *Id.*

62. See *id.* ("Government will not disintegrate in the face of a terrorist threat, but politicians will have a powerful incentive to abuse the reassurance function.").

Ackerman, even more forcefully than other accommodationists, acknowledges the “distributional” problems his emergency constitution must face as a result of prevailing demonologies that will identify and unjustly target for abuse certain discriminated segments of the population.<sup>63</sup> The primary bulwark that Ackerman’s emergency constitution erects against this kind of discrimination and abuse is a “supermajoritarian escalator”—a requirement that the state’s emergency powers be temporally limited pending approval by larger legislative majorities.<sup>64</sup> This procedural centerpiece, in a model otherwise mostly devoid of judicially enforceable substantive anti-subordinationist protections, would presumably give significant “national minorities” a degree of voice and political recourse against abuse.<sup>65</sup>

Nonetheless, Ackerman seems resigned that minority demonization may be an insurmountable problem in emergency contexts, even for his supermajoritarian process.<sup>66</sup> He discusses two types of exemplary limit cases—the Japanese internment and Palestinian intifada—as situations in which both liberal judiciaries and supermajoritarian procedural safeguards might fail to insure fidelity to the principles of liberal democracy.<sup>67</sup> Ackerman believes that *Korematsu* and the internment illustrate the strengths and weaknesses of relying on judicial review to limit governmental abuse. Even an avowed libertarian like Justice Black succumbed to pressures in creating a paradigmatic case of the “permissive moment” in common law approaches to policing the law/security boundary.<sup>68</sup> “Decades of revisionist activity” were required for the common law method to redeem its mistake in *Korematsu*, and yet, *Korematsu* is still valid legal precedent.<sup>69</sup>

Ackerman doubts that the Court will have sufficiently internalized post-internment moral and legal revisionism to resist a future program to intern Arab-Americans in the war on terrorism.<sup>70</sup> Thus, sharing a concern with Tushnet and other accommodationists, Ackerman foresees that reliance on the courts is likely to create the “normalization of emergency con-

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63. *See id.* at 1048-49 (discussing drawbacks of Ackerman’s proposed emergency constitution).

64. *See id.* at 1047-49 (explaining theory of supermajoritarian escalator principle).

65. *See id.* at 1048-49 (explaining benefits of supermajoritarian escalator principle). Ackerman’s model does include some basic substantive protections. *See infra* text accompanying notes 78-82.

66. *See* Ackerman, *supra* note 60, at 1049 (explaining supermajoritarian escalator as playing “greater or smaller role in checking the abuses that such [antidemonized minority] discrimination invites”).

67. *See id.* at 1042-45 (providing examples of breakdown of constitution protections when terrorism is involved).

68. *See id.* at 1042-43 (finding *Korematsu* provides revealing examples of “both the strengths and limits of a judge-centered approach”).

69. *See id.* (describing *Korematsu* as “very, very bad law”).

70. *See id.* at 1043 (questioning what court’s response would be “if Arab-Americans are herded into concentration camps”).

ditions.”<sup>71</sup> His emergency constitution is designed to avoid the impossible choice between a “lawless police state” (his characterization of the extra-legal approach suggested by Tushnet and Oren Gross) and “legally normalized oppression,” which he believes results from common law’s reliance on judges in national security contexts.<sup>72</sup>

Ackerman turns to the example of the Palestinian struggle to illustrate the limits of his own emergency constitution.<sup>73</sup> He surmises that the “repressive forces that may be unleashed by a Palestinian intifada that continues at its present intensity for years and years” will not be checked, even by his proposed emergency regime.<sup>74</sup> The Palestinian intifada thus marks the limit condition within which Ackerman’s model can work. The recognition at the heart of Ackerman’s understanding of *Korematsu* and the Palestinian intifada is that the law-security distinction collapses into unprincipled decisionism, both for judges and Ackerman’s temporally delimited supermajoritarian system, paradigmatically, at the intersection of race and subordination.

Ackerman’s appreciation of identity-contingent limits on liberal democracy’s capacity to sustain a working law-security distinction compels him to conceive of remedies for the resulting group-based injuries.<sup>75</sup> Yet, like other accommodationists, Ackerman falls short of integrating the problem of group demonization and identity-based construction of security threats into his accommodation of the reassurance function as a source of state overreaching in times of crises. In other words, Ackerman neither assesses the reassurance function, nor tailors his response to it in light of his own anti-subordinationist analysis of liberal democracy’s limited ability to sustain a meaningful law-security distinction. Ackerman’s emergency constitution responds instead to a rather abstracted understanding of the state’s reassurance function, foregoing critical engagement with the central subordinationist moment of extreme security-inflected exercises of state power.

Ackerman targets what he identifies as “bad” emergency-related legal structures. These are structures that “channel temporary needs for reassurance into permanent restrictions on liberty.”<sup>76</sup> Ackerman’s model periodically and incrementally escalates to a maximum of eighty percent the legislative majority needed to reauthorize emergency powers.<sup>77</sup> Failing

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71. *See id.* (explaining “normalization of emergency conditions as the creation of legal precedents that authorize oppressive measures without any end”).

72. *See id.* at 1044-45 (discussing advantage of Ackerman’s model over other approaches).

73. *See id.* at 1045 (discussing Palestinian Intifada).

74. *See id.* at 1045 (conceding drawback of proposed emergency constitution).

75. *See infra* text accompanying notes 76-82.

76. *See Ackerman, supra* note 60, at 1045 (explaining “constitutional structures can perform a crucial channeling function”).

77. *See id.* at 1047 (explaining framework of supermajoritarian escalator model).

such periodic reauthorization, the state's emergency powers—in particular its power of constitutionally unregulated detention—would lapse. Ackerman includes several basic substantive commitments in his model.<sup>78</sup> For instance, states may not derogate, even in times of emergency, a few primary political rights and individual liberties that coincide with core international human rights protections, such as a ban on torture.<sup>79</sup> Certainly, given the “discrete and insular” quality of societal minority groups demonized by majorities and states, a more carefully tailored program of “anti-demonization” protections is necessary.

Ackerman's model sets itself apart from other accommodationist models in one aspect. Ackerman eloquently articulates his understanding of the “crushing costs” that befall victims of unjust detentions.<sup>80</sup> In addition, he sees the “callousness” with which governmental actors respond to “the hundreds or thousands of innocent men and women caught up in antiterrorist dragnets.”<sup>81</sup> His model, in contrast to some other accommodationist models, would provide mandatory monetary compensation for victims of national security power abuse. Ackerman extrapolates this remedy from the Constitution's principle of just compensation and argues for after-the-fact payment for “takings” of liberty.<sup>82</sup> It is interesting to contemplate extending Ackerman's thinking on just compensation to losses of political or social capital. Applying a critical understanding of race-based subordination to the model of human capital that Ackerman adopts would allow for less literal or formalistic definition of the class of victims who warrant protection and remedy.

## II. PROGRESSIVE LEGALISM, RACE AND FORMALISM

David Cole's important book *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*<sup>83</sup> (“*Enemy Aliens*”) offers a valuable critique of the war on terrorism by blending libertarian commitments with an awareness of the political and social dimensions of “enemy” construction behind the government's security-based restrictions.<sup>84</sup> Cole has been one of the most outspoken critics of the war on terrorism and is often characterized as a civil libertarian. Yet, his previous work on race and class in the criminal justice system places Cole in a unique relationship to civil

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78. *See id.* at 1047 (explaining that “state of emergency then should expire unless it gains majority approval”).

79. *See id.* at 1058-59 (discussing necessary limitations of emergency powers).

80. *See id.* at 1062-63 (discussing issue of compensation of erroneously detained individuals).

81. *Id.* at 1062.

82. *See id.* at 1063 (summarizing Ackerman's argument for providing monetary compensation to detainees).

83. DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

84. *See generally id.* (discussing thesis of Cole's book).

liberties advocacy as someone committed to race-based critique.<sup>85</sup> More strictly formalistic civil liberties advocacy, of the sort perhaps epitomized by the American Civil Liberties Union, takes little to no account of the underlying political and social context in choosing and defending clients and causes. Debates over hate speech or pornography restriction have revealed deep fault lines between, on the one hand, more formalistic libertarian and, on the other, critical race and feminist projects.<sup>86</sup> Cole's work embodies a progressive form of civil liberties advocacy, sharing certain forms of analysis with formalist approaches to civil liberties protection, while also seeking to take account of structural (social, economic and political) determinants of "unequal justice."

Were one to read but a single book on the legal problems arising from the war on terror, it should probably be Cole's *Enemy Aliens*. The book presents, in four parts, the argument against using national security powers to force a constitutional accommodation to what the state perceives or declares as necessary.<sup>87</sup> First, Cole lays out the legal and policy changes brought by September 11 and how these changes primarily eroded the rights and liberties of non-citizens.<sup>88</sup> Second, he uses both historical and contemporary evidence to show how security-related state overreaching, which begins as repression affecting only non-citizens, usually turns into across-the-board retrenchment affecting citizens and non-citizens alike.<sup>89</sup> Third, Cole rebuts the consequentialist argument (that liberty restrictions make us more secure) by showing the ways that the double standards relied upon to strip "enemy" groups of their rights cause a legitimacy crisis.<sup>90</sup> This crisis makes it harder to police the terrorist threats both at home and abroad.<sup>91</sup> Fourth, he presents the moral and constitutional argument that our nation's liberal democratic commitments require us to extend basic rights to non-citizens, even in times of threats to national security.<sup>92</sup>

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85. See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 5 (1999) (arguing that administration of criminal law is "predicated on the exploitation of inequality").

86. See, e.g., MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 1 (Robert W. Gordon & Margaret Jane Rudin eds., 1993) (discussing debate between civil rights community and civil liberties communities over First Amendment right to engage in hate speech).

87. See COLE, *supra* note 83, at 7 (explaining that "central argument of this book is that trading foreign nationals' liberties for citizens' security should be resisted").

88. *Id.* at 17-82 (noting that, while most expressed willingness to sacrifice liberties post-September 11, only seven percent of American citizens felt practical effect on rights).

89. See *id.* at 85-179.

90. See *id.* at 183-208.

91. See *id.*

92. See *id.* at 210-27.

Consider how Cole presents the problem of what he calls “spillover effects”; the process by which citizens’ rights are negatively impacted by restrictions originally targeted at non-citizens.<sup>93</sup> In a sense, Cole’s argument is a learned elaboration on the famous speech by Reverend Martin Niemöller, which preaches the principle of solidarity with oppressed groups from a perspective of enlightened self-interest.<sup>94</sup> This line of argument is an appeal to members of majorities, who may not be immediately or significantly affected by selective state exercises of security power, to beware lest their complacency in the face of others’ civil liberties disasters lead them to ruin.

It is difficult to judge whether reliance on such an argument is, in the final analysis, proper to advocate for the interests of subordinated groups. Nevertheless, one can see why these arguments make attractive additions to the rhetorical arsenal of civil liberties defenders. In Reverend Niemöller’s case, the poem had the virtue of tracking his experiences in Nazi Germany and thus did not sacrifice verisimilitude for moral force. The problem with arguments for self-interest, however, is that they do not provide the basis for critique or resistance where the state actually burdens outsider groups through exceptional exercises of security power. Self-interest arguments fail to elucidate the specifically racialized quality of such subordination, missing the tight articulation between security regimes and racial formation.

Cole looks at Japanese internment to show how anti-alien bias rationalizes political repression, and that such repression eventually extends from non-citizens to citizens.<sup>95</sup> Cole concludes that the “internment marked the extension to U.S. citizens of practices long imposed on foreign nationals, as the citizen/non-citizen divide was bridged by racial ani-

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93. *See id.* at 75.

94. *See id.* (invoking Niemöller speech in section titled “First They Came for the Aliens”). There are various versions of Niemöller’s speech in circulation. The one quoted below is taken from historian Harold Marcuse’s web page dedicated to reconstructing the “original” version of the speech. *See* Harold Marcuse, *Martin Niemöller’s Famous Quotation: “First they came for the Communists . . .”,* at <http://www.history.ucsb.edu/faculty/marcuse/niem.htm#versions> (last modified Sept. 17, 2004).

First they came for  
the socialists, and I did not speak out  
because I was not a socialist.  
Then they came for the trade unionists,  
and I did not speak out  
because I was not a trade unionist.  
Then they came for the Jews,  
and I did not speak out  
because I was not a Jew.  
Then they came for me,  
and there was no one left to speak for me.

*Id.*

95. *See* COLE, *supra* note 83, at 85.



mus.”<sup>96</sup> He shows that the non-citizen/citizen bridging device of racial animus is analogous to the bridging device of “politics” used during the anti-communist backlash of the McCarthy era, when “radical citizens were targeted in much the way that radical foreign nationals had been targeted earlier.”<sup>97</sup>

Cole’s decision to cast anti-Japanese or anti-Asian racial animus in the role of a bridging device is necessitated by his focus on alienage (and the spillover effect into the category of citizen) as the operative category of analysis. Of course, another way of viewing the relationship is to see racism as the factor-making that made alienage all but irrelevant in the case of Japanese-Americans who were interned *en masse*. A more focused critical race analysis of the internment would be helpful, for example, if Cole were trying to make a cautionary argument about a “racial spillover effect” that could impact other racial minorities.<sup>98</sup> Instead, the analysis must effectively de-emphasize the racial contingency of the internment and emphasize the general problem of anti-immigrant sentiment in the United States.<sup>99</sup> Cole chose not to locate the roots of the internment in the century of intense and violent anti-Asian history, an especially prominent feature of the social formation of the western region states from which the internees were expelled. Instead, Cole argues that the roots of the internment go back to the period before the first wave of Asian immigrants arrived in the United States, to the post-American revolutionary period and the passage of the first in a series of anti-alien security laws, the Alien and Sedition Acts.<sup>100</sup>

Cole uses this long history of anti-alien security law to support his point about the easy bridgability of the non-citizen/citizen divide:

The Enemy Alien Act (in force at the time of the interment) is by definition predicated on a sharp distinction between citizens and foreign nationals; its very justification is the enemy alien’s foreign nationality. Given the centrality of “alien-ness” to the concept, one might think that this power would pose little threat to the liberties of U.S. citizens. In World War II, however, the military extended the Act’s philosophy to Japanese-Americans through the prism of race.<sup>101</sup>

It is certainly true that the military, especially the lawyers defending the internment, used racial stereotypes and racist propaganda to advocate

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96. *Id.* at 86.

97. *Id.* at 86-87.

98. See, e.g., Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 851 (2003) (arguing that government’s post-September 11 actions have aroused nativist passion, which has negatively impacted non-Arab groups of immigrants such as Latinos).

99. See COLE, *supra* note 83, at 90.

100. See *id.* at 90.

101. *Id.* at 95.

the internment of Japanese Americans.<sup>102</sup> The lesson Cole draws from the internment about the easy slide from repression of non-citizens to repression of citizens overstates any role the formal citizen/non-citizen distinction played in the unfolding of events. Chief Justice Rehnquist has opined that the internment cases were soundly decided insofar as the government repression only targeted non-citizens.<sup>103</sup> The Chief Justice's line-drawing is, in reality, in the spirit of after-the-fact apologia. Moreover, it is part of his attempt to push United States national security law toward a more unilateral executive model, or at least toward a model of limited judicial review.<sup>104</sup> As Cole points out, at the time, the Court "made little reference to the fact that citizens' rights were at issue."<sup>105</sup>

In fact, the decisive line-drawing at the time of the internment was racial, as evidenced by the fact that none of the other non-racially demonized groups of enemy aliens (in particular Germans and Italians) faced the kind of group-based treatment that the Japanese faced.<sup>106</sup> Cole's desire to turn the internment into an objective lesson for citizens who may not be worried about the government's repressive policies in the war on terrorism brings him to the problematic theoretical interface of immigration and race. He concludes that a "close interrelationship between anti-Asian racism and anti-immigrant sentiment made the transition from enemy alien to enemy race disturbingly smooth."<sup>107</sup> Articulating the racial dimension of the interment as bound up in the general interrelationship between alienage and race elides the lesson of scholarship that has shown how Asians as a group have been specifically "raced" through an othering process that uniquely ties racial difference to permanent "foreign-ness."<sup>108</sup> This foreign-ness is not exhausted by, or subsumable to, the legal category of alienage with which Cole works. It is instead an aspect of racial forma-

102. See Gott, *supra* note 16, at 225-45 (describing legal and political climate of Japanese internment during World War II).

103. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 209-11 (1998) (explaining that distinctions between Japanese and other aliens were legally sufficient to support varied treatment of these alien groups during World War II).

104. See *Rasul v. Bush*, 124 S. Ct. 2686, 2707 (2004) ("From this point forward, federal courts will entertain petitions from these prisoners [foreign nationals in Guantanamo], and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war.").

105. COLE, *supra* note 83, at 97-98.

106. See *id.* at 95 (acknowledging that "[i]t is no accident that the enemy alien concept was extended only to Japanese-Americans. German-Americans and Italian-Americans were spared such treatment, although citizens of these backgrounds often had their loyalty challenged in less categorical ways. The justification for targeting only the Japanese was avowedly racist and had deep roots.").

107. *Id.* at 97.

108. See, e.g., Keith Aoki, "Foreign-ness" and Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1 (1996) (describing global "Orientalism" and its impact on Asian-Americans living in United States).

tion; a distinct category of analysis that relates only orthogonally to the legal category of alienage.

The lesson Cole draws from what I refer to below as “the internment this time”<sup>109</sup> parallels the one he draws from the historical cases. Cole emphasizes that the government’s targeting of innocent foreign national Arabs and Muslims on the basis of “ethnic stereotyping” has extended “anti-alien measures to U.S. citizens through the prisms of race and political association.”<sup>110</sup> In sum, the argument Cole presents is designed to convince non-Arabs and non-Muslims (“citizens”) that they should reject the government’s racist double standards in the war on terrorism. This argument uses a formal, de-racialized and alienage-based understanding of the discrimination involved in the government’s policies to depict the danger of a spillover effect that might eventually impact citizens.

Karen Engle has written a thoughtful article discussing how historical constructions of “good aliens” and “bad aliens,” long operative in the semantics of immigration law, have affected the war on terrorism.<sup>111</sup> Engle’s article, like Cole’s book, relies on alienage and signifying practices affecting immigrants generally to mount an argument about the manipulated legitimization of the war on terrorism.<sup>112</sup> Engle identifies three parameters by which bad aliens have been signified in the past: national origin, race/ethnicity and political identity. These categories are deployed by the state as part of a legitimating dynamic through which both citizens and aliens are constructed and disciplined to support the war on terrorism.<sup>113</sup>

Engle rejects the position forwarded by Leti Volpp and others who have supported a race-based critique of the war on terrorism and its effects on Muslims, Arabs and South Asians. Engle writes:

I maintain that individuals thought to occupy the category of Muslim or Arab are not automatically placed into the bad category . . . . Thus, the war on terrorism is not simply a war on Muslims, and it is not a holy war. To the contrary, it largely attains legitimacy by presuming and relying on the existence of a category of good Muslims, both within the United States and abroad. The United States of the twenty-first century maintains an identity as a multicultural, (neo)liberal and tolerant state.<sup>114</sup>

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109. For a further discussion of this reference, see *infra* Section III and accompanying footnotes regarding racialization of national security.

110. COLE, *supra* note 83, at 104.

111. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terrorism*, 75 U. COLO. L. REV. 59, 61 (2004) (describing how “good alien”/“bad alien” distinction serves as “organizing structure” in war on terrorism).

112. See *id.* at 109 (arguing that patriotism of “Good Muslims” legitimizes war on terrorism).

113. See *id.* (explaining how “Muslims are disciplined into ‘choosing’ the good, thereby creating a population that supports the United States in its war against terrorism at home and abroad”).

114. *Id.* at 62 (footnotes omitted).

Engle's focus on the semiotics of war-on-terrorism legitimation centers the problem of explaining Islamophilic and Arab-friendly pronouncements made by many of those waging the war on terrorism. This centering, however, also leads to a certain leveling of the historical record regarding the nation's anti-immigrant discriminations. Engle posits a generalized process through which bad aliens are constructed, thus creating analytical equivalencies between race-based and other forms of anti-immigrant discrimination, othering or demonization.<sup>115</sup> Racial distinctions that more or less create closed categories based on biology, phenotype or culture are viewed together with more open-ended categorizations that allow for opting out by proving that a member of the otherwise suspect class can be trusted or assimilated.<sup>116</sup> Engle sees pervasive race-based profiling in the government's post-September 11 anti-terrorism campaign as only part of the story, maintaining that "today's profiling [of Arabs and Muslims] is both tolerated and even endorsed because it operates alongside an open offer to those identified with profiled groups to demonstrate that they are model members of their groups."<sup>117</sup>

Engle, like Cole but for reasons different from his, understands the war on terrorism from a similarly formal set of legal distinctions that analytically privileges categories of self and other resulting deductively from the territorialized logic of the nation-state. Citizens and immigrants/aliens are not categories that map linearly onto the discriminating logic of racial formation. Similarly to Cole, Engle posits the problem of anti-Muslim or anti-Arab animus as a function of the spillover effect from the bad alien category that now affects all Muslims and Arabs regardless of citizenship:

The perception of disloyal tendencies that define the bad alien categories has bled over into the identification of bad citizens. The fear that [Muslim/Arab] terrorists would naturalize in order to undermine the system is perhaps not as strongly felt or expressed as it was in the 1950s. In fact, little distinction seems to have been made between United States-born and naturalized citizens in the internal war on terrorism. Rather, regardless of birth, Muslims and Arabs form most of the suspect class.<sup>118</sup>

Engle's reliance on the formal categories of immigration law, aggregating aliens and citizens, respectively, as classes even while impressively teasing out the different ways good and bad aliens are constructed from within the same category, leads to a displacement of the racial dimensions of the war on terrorism. What might be better understood as an irreduci-

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115. *See id.* at 64 (discussing effect on immigration in creating bad aliens).

116. *See id.* at 87-88 ("Thus the war on terrorism oscillates between profiling justified by security concerns on one hand and insistence and reliance upon existence of Good Muslims on the other.").

117. *Id.* at 94.

118. *Id.* at 98.

ble “racing” of Arabs and Muslims, accompanied by rather transparent and bad-faith official recitation of a multicultural mantra, is submerged analytically in the same way that the acceptance of alienage and nationality categories in immigration law discussions generally may elide the racialized nature of the immigration law regime.<sup>119</sup>

To be clear, neither Cole nor Engle is unaware or denies that racism operates to the detriment of immigrants of color, or Arabs and Muslims (non-citizen or citizen).<sup>120</sup> But for both, race is folded into a critique that draws conceptual and rhetorical force from formal immigration and alienage law categorizations. It is clear that these approaches are not as anti-theoretical to group-based analyses (or remedies) as purely formalistic understandings of civil liberties that often, in categorical fashion, exclude underlying anti-subordinationist concerns involving group differentiation and group-based power imbalances. Yet, in seeking, as perhaps in Cole’s case, to appeal to the relatively non-impacted group of white citizens, and in Engle’s case, to explain the apparent contradiction between the racist “walk” and multicultural “talk” of the war on terrorism, formal categories of immigration law displace racial subordination as the critical center of gravity.

### III. THE INTERNMENT THIS TIME

Huey (reading from newspaper): Newsweek has confirmed through an exhaustive national poll that Black Americans are no longer America’s most hated group. The results do not come as a surprise to many experts, who have observed a dramatic change in Americans’ profiling and discrimination patterns since September 11th. The last ethnic groups to remove Black Americans from the top spot were the Japanese and the Japanese-Americans, who had a brief but memorable run at the top in the early 1940s.

Caesar: I’m so proud . . .<sup>121</sup>

How does the post-September 11 treatment of Arabs, Muslims and South Asians in the United States compare with the internment of the Japanese in World War II? Asking this question obviously places the present discus-

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119. See generally Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525 (2000) (explaining article’s thesis).

120. See Engle, *supra* note 111, at 97 (noting different treatment received by three United States citizens). White “American Taliban” John Walker Lindh was quickly indicted and allowed to plea bargain out after his capture in Afghanistan; Saudi-born Yasser Hamdi has been held incommunicado since his capture and; Puerto Rican descended Jose Padilla has also been held incommunicado since his apprehension in Chicago. She indicates that the identity-based distinctions among the three men as the basis for their differential treatment are “difficult to ignore.” See *id.* (discussing varied treatment of these three United States’ citizens).

121. Aaron McGruder, *The Boondocks*, Nov. 8, 2001.

sion in a particularly compelling comparative moral and historical perspective. Still, the question also suggests the broader problem of comparatively assessing the racialization of Muslims, Arabs and South Asians in the United States. Some may be quick to conclude that the historical internment of Japanese Americans and the internment this time are categorically distinct cases, notwithstanding the thousands of innocent Muslims, Arabs and South Asians who have been detained in the war on terrorism. Yet, close observers, such as Hamid Khan of the South Asian Network in Los Angeles, see the current trauma as evincing aspects of both an actual and a virtual internment.<sup>122</sup> Khan observes that, in addition to the actual detentions, Arabs, Muslims and South Asians are undergoing an internalized internment, resulting from a realistic fear of government repression and a sense of betrayal and besiegement as a despised minority group in U.S. society.<sup>123</sup> Moreover, Khan believes that the internment this time, like the Japanese internment, must be understood in the context of a longer history of racialized subordination of the affected groups.<sup>124</sup>

The analysis presented here is not intended to arrive at any “final” assessment on the status of Muslims, Arabs and South Asians in the United States. That the processes of racialization have affected these groups seems certain, but how to understand the groups’ racial positionality relative to the other groups of color in the United States remains an open question.<sup>125</sup> My goal in writing this section is modest. I want to suggest that group-based subordination of Muslims, Arabs and South Asians bears a strong enough family resemblance to other forms of race-based subordination to warrant “extraordinary consideration” in the national security law debate. Derrick Bell’s famous Space Trader parable depicted members of the white establishment as having at least to acknowledge that their desire to trade African-Americans to the extraterrestrial invaders might run afoul

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122. Hamid Khan, Remarks at LatCrit IX Conference Plenary Panel on Terrorism and Culture (May 1, 2004) (discussing Khan’s primary argument).

123. *See id.* (discussing treatment of Arabs, Muslims and South Asians in United States).

124. *See id.* (analogizing internal internment of Arabs, Muslims and South Asians to Japanese internment during World War II). Clearly, no “formula” strictly induced from the historical experiences of the groups of color in the United States is likely to prove an apt metric by which to assess either the harms currently being incurred by Muslims, Arabs and South Asians in the United States, or the nature of those groups’ racialized status. Yet, Sucheng Chan’s work on Asian Americans provides a useful template for understanding the racialization of outsider groups targeted with a combination of racial, xenophobic and ideological animus. *See generally* SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* (Thomas J. Archdeacon ed., 1991). *See infra* text accompanying notes 269-71.

125. *See* MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s* 162 n.3 (Michael W. Apple ed., 2nd ed. 1994) (tracing development of race theory) (citations omitted).

of equal protection principles.<sup>126</sup> Similarly, members of today's security law and policy intelligentsia should be constrained to square their anti-terrorism gambits with group-based justice considerations regarding the status of Muslims, Arabs and South Asians. Of course, the hope here is also that such considerations might render the trading away of these groups' interests less likely, a significant, if wishful, deviation from Bell's grim script.

A. *Racialization of Muslims, Arabs and South Asians Before September 11*

Scholarship prior to September 11 on the status of Muslims, Arabs and South Asians in the United States presented differing views on the fundamental question of whether these groups were "melting" into the mix of white ethnic groups, or whether a more permanent racialized outsider status was taking shape.<sup>127</sup> The argument for applying what Omi and Winant refer to as the European "immigrant analogy"<sup>128</sup> seemed warranted in light of the legal classification of Muslims, Arabs, and South Asians as white. As early as 1909, a federal judge declared that a Syrian/Arab applicant met the statutory requirement of whiteness for naturalization eligibility.<sup>129</sup> In 1914, the Fourth Circuit reached a similar conclusion.<sup>130</sup> Additionally, the census bureau classified Arabs and Muslims as white or Caucasian<sup>131</sup> and the federal government has generally refused to include Arab or Muslim groups among those discriminated minorities considered eligible for affirmative action in contracting.<sup>132</sup>

Nevertheless, the analogy between Muslims, Arabs and South Asians, on the one hand, and European immigrants, on the other, appears strained in light of evidence showing more ambiguous treatment afforded these groups under the law. In the context of naturalization, not all judges agreed that Muslims, Arabs and South Asians should be classified as white, and some judges refused them access to citizenship through natu-

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126. See DERRICK BELL, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158-94, 191 (1992) (discussing constitutional implications of parable).

127. See OMI & WINANT, *supra* note 125, at 18 (describing how immigrant groups were "transformed, if hardly melted").

128. See *id.* at 17 (noting similar treatment of European immigrants and racial minorities).

129. See *In re Najour*, 174 F. 735 (N.D. Ga. 1909) (concluding that Syrians belong to "what the world recognizes, as the white race").

130. See *In re Dow*, 226 F. 145, 148 (4th Cir. 1915) (holding that term "white persons" includes Syrians, Armenians and Parsees); see also *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944) (finding that "Arab passes muster as a white person").

131. See Helen Hatab Samhan, *Not Quite White*, in *ARABS IN AMERICA: BUILDING A NEW FUTURE* 209-26, 213 (Michael W. Suleiman ed., 1999) [hereinafter *ARABS IN AMERICA*] (noting census bureau's pre-World War II treatment of Arabs).

132. See *id.* at 218-21 (stating that federal guidelines place Arabs and other persons with Middle Eastern origins in same "white category" as European majority).

ralization.<sup>133</sup> More recently, in at least one case, the Small Business Administration (SBA) recognized the discrimination claim of a Palestinian American contractor and included his company in the group of minority contractors eligible for affirmative action in federal contracting.<sup>134</sup> In addition, in 1987, the Supreme Court held that ethnic groups, such as Arabs, could bring section 1981 civil actions for discrimination.<sup>135</sup> Last, San Francisco included Arabs in the city's affirmative action program.<sup>136</sup> Scholars familiar with such legal ambiguities and other mixed signals sent from U.S. society to Muslims, Arabs and South Asians adopted the term "invisible minority" to capture the groups' unique status.<sup>137</sup>

Ambiguity of racial status, resulting from some degree of mixed classification under the law, has been reinforced by the different waves of immigration from the Middle East. Prior to World War II, for example, Arab immigrants to the United States were mostly Christians from Syria and Lebanon. Thereafter, immigrants came from North Africa and elsewhere in the Arab World, and many were Muslim, a racialized religion.<sup>138</sup> Moreover, "external" politics have had a unique impact on the status of Arabs and Muslims in the United States. Fallout from the 1967 Arab-Israeli War was an early watershed. This led to ostracism of Arabs and Muslims in the United States but also provided the impetus toward those groups' forma-

133. See *In re Ahmed Hassan*, 48 F. Supp. 841, 845 (E.D. Mich. 1942) (holding that dark skinned Yemenite was ineligible for citizenship on grounds that he was "part of the Mohammedan [sic] world"); *Ex parte Dow*, 211 F. 486, 487-89 (E.D.S.C. 1914) (discussing grounds for finding that Syrians are not within class of "white persons" eligible for naturalization under statute); *Ex parte Shahid*, 205 F. 812, 816 (E.D.S.C. 1913) (holding that Syrian applicant did not meet racial definition of white under 1790 Naturalization Act).

134. See Samhan, *supra* note 131, at 219 (citing contractor's documentation of "specific economic disadvantages based on his national origin" as grounds for SBA's decision).

135. See *St. Francis v. Al-Khazraji*, 481 U.S. 604, 605 (1987) (concluding person of Arabian ancestry may be protected from racial discrimination under § 1981).

136. See Jason B. Johnson, *Panel OKs Expansion of Preferences*, S.F. CHRON., Sept. 16, 1998, at A17 (noting expansion of San Francisco's affirmative action program to include Arab owned contracting companies).

137. See, e.g., Nadine Naber, *Ambiguous Insiders: An Investigation of Arab American Invisibility*, 23 ETHNIC AND RACIAL ST. 37, 56 (2000) (attributing Arab American "invisibility" to difficulty of classifying Arab American community); see also Tayyab Mahmud, *Genealogy of a State-Engineered "Model Minority": Not Quite/Not White South Asian Americans*, 78 DENV. U.L. REV. 657, 669-83 (2001) (reviewing history of South Asians in United States and describing complexity of their "model minority" status). But see Louise Cainkar, *No Longer Invisible: Arab and Muslim Exclusion After September 11*, MIDDLE EAST REP., Fall 2002, available at [http://www.merip.org/mer/mer224/224\\_cainkar.html](http://www.merip.org/mer/mer224/224_cainkar.html) (noting that September 11, 2001 marked end of Arab invisibility).

138. See Suad Joseph, *Against the Grain of the Nation—the Arab*, in ARABS IN AMERICA, *supra* note 131, at 257-71, 259 (observing that most pre-1960s Arab immigrants were Christian); Michael W. Suleiman, *Introduction: The Arab Immigrant Experience*, in ARABS IN AMERICA, *supra* note 131, at 1-21, 9 (1999) (discussing shift in immigrant population).



tion of a sense of collective identity.<sup>139</sup> Michael Suleiman traces the rise of "Arab-American pride" to the consequences of post-1967 Middle East politics and U.S. foreign policy in the region. He notes that many Arabs in the United States felt humiliated by the quick defeat of Arab armies and resentful of the partiality that the U.S. government and its people showed toward Israel.<sup>140</sup> Arab-Americans responded by organizing to fight the negative stereotypes of Arabs that increasingly permeated U.S. media and to make U.S. foreign policy more balanced in the Middle East.<sup>141</sup>

Thus, 1967 saw the creation of the Association of Arab-American University Graduates (AAUG), the first Arab American organization with "political-scholarly goals."<sup>142</sup> This signaled the beginning of a new era of pan-Arab organizing in the United States.<sup>143</sup> Other groups followed, including the National Association of Arab American and the American-Arab Anti-Discrimination Committee.<sup>144</sup> Despite the creation of such advocacy organizations, negative images of Arabs and Muslims continued to dominate media representations,<sup>145</sup> and many U.S. political figures, including leaders of the otherwise relatively pluralistic Democratic Party, distanced themselves from Arab and Muslim constituencies. Presidential candidates McGovern, Carter, Reagan and Mondale also disassociated themselves from Arab groups who offered support.<sup>146</sup> Between forty and fifty-one

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139. See Cainkar, *supra* note 137 (stating that many Arab-Americans responded to hostility from majority society by embracing Islamic identity); Joseph, *supra* note 138, at 265 (characterizing 1967 Arab-Israeli war as major influence in organization within Arab-American community); Suleiman, *supra* note 138, at 10-15 (describing ongoing development of cohesive Arab-American community).

140. See Suleiman, *supra* note 138, at 10, 13 (noting Arab-Americans' disappointment in American media's one-sided support of Israel).

141. See *id.* at 13 (describing Arab-American community's pro-active response to discrimination).

142. See Joseph, *supra* note 138, at 265 (characterizing development of Arab-American University Graduates (AAUG) as part of initiative to combat discriminatory representations of Arabs).

143. See Suleiman, *supra* note 138, at 13 (noting establishment of political groups devoted to defend Arab and Arab-American causes); see also Therese Saliba, *Resisting Invisibility: Arab Americans in Academia and Activism*, in ARABS IN AMERICA, *supra* note 131, at 304-19, 306 (describing Pan-Arab nationalism as "a strategy of organizing diverse groups of Arabs against U.S. foreign policy in the Middle East and racist media images of Arabs").

144. See Joseph, *supra* note 138, at 265-66 (discussing groups dedicated to combating discrimination, including American-Arab Anti-Discrimination Committee (ADC), National Association of Arab American (NAAA) and Arab American Institute (AAI)).

145. For a discussion of the negative television images of Arabs from the mid-1970s through the mid-1980s, see generally Jack G. Shaheen, *THE TV ARAB* (1984).

146. See Joseph, *supra* note 138, at 266 (noting Democratic party's aversion to political affiliation with Arab-American organizations). There are numerous other examples of politicians returning donations from Arab or Muslim groups; see also Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 310-11 (2002) (stating that many political figures feared political consequences of accepting contributions from Arab and Muslim American groups). In

percent of the respondents in a survey in 1981 agreed that Arabs were barbaric, cruel (44%), treacherous, cunning (49%), warlike, bloodthirsty (50%), mostly anti-Christian (40%) and/or anti-Semitic (40%), and that Arabs mistreated women (51%).<sup>147</sup> Such studies, along with the openness of anti-Arab or anti-Muslim bigotry, led observers to conclude that these groups are among the few that are acceptable to hate openly.<sup>148</sup>

The 1980s brought new levels of repression and violence. The FBI, beginning with Nixon's Operation Boulder, had been spying on and intimidating Arab-Americans and their organizations since the 1967 Arab-Israeli War ended.<sup>149</sup> Notwithstanding the onset of the United States' first war on terrorism under Ronald Reagan and the new phase of Palestinian activism in the occupied territories, the 1980s marked a period of heightened apprehension among Arabs and Muslims in the United States. The FBI's 1980s counter-terrorism campaigns harkened back to the abuses of its COINTELPRO programs that went far beyond law enforcement and effected an anti-democratic sabotage of the civil rights movement. In 1987, the case of the so-called Los Angeles Eight revealed stunning abuses of the political rights of Palestinians and supporters of the Palestinian movement. The legal case involved the deportation of a group of seven Palestinians and one Kenyan, who had been among the targets of a three-year FBI "anti-terrorism" investigation. A report of the investigation's findings showed that the FBI infiltrated and spied on the lawful, non-violent political activities of these supporters of the Palestinian cause. No unlawful activities were ever reported, but the FBI agents recorded their concern over the political opinions of those upon whom they spied.<sup>150</sup> The report concluded that the Palestinian activists were "anti-United States," and "anti-Israel."<sup>151</sup> At the criminal trial, officials from INS and the FBI both testified that the political beliefs of the defendants led to their arrest, and FBI Director William Webster testified that these political beliefs would have been protected if the defendants were U.S. citizens.<sup>152</sup>

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some cases, politicians alleged anti-Semitism on the part of the donors as the reason for returning contributions. *See id.* (noting allegations that contributor made anti-Semitic remarks). For a critical analysis of the politicization of charges of anti-Semitism, see NORMAN FINKELSTEIN, *BEYOND CHUTZPAH: ON THE MISUSE OF ANTI-SEMITISM AND THE ABUSE OF HISTORY* (forthcoming).

147. *See* Shelly Slade, *The Image of the Arab in America: Analysis of a Poll on American Attitudes*, 35 MIDDLE EAST J. 143 (1981), *cited in* Lisa Suhair Majaj, *Arab-American Ethnicity: Locations, Coalitions and Cultural Negotiations*, in *ARABS IN AMERICA*, *supra* note 131, at 320-36, 321 (reporting results of survey).

148. *See* Majaj, *supra* note 147, at 321 (arguing that Arabs are still "safe to hate" (quoting Slade, *supra* note 147, at 147)).

149. *See* Cainkar, *supra* note 137 (arguing that media openly advocates "*de facto* criminalization" of both Muslim and Non-Muslim Arabs).

150. *See* DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF SECURITY*, 35-48, 40 (2002).

151. *See id.*

152. *See* Akram & Johnson, *supra* note 146, at 319 (relaying testimony of FBI Director William Webster).

Susan Akram and Kevin Johnson discuss how the Palestinian Liberation Organization (PLO) has been singled out for harsher treatment under waiver of exclusion provisions in U.S. immigration law.<sup>153</sup> This selective withholding of relief from exclusion for people involved with the PLO, paired with the government's selective enforcement of deportation proceedings, (the L.A. Eight case is one example), reveals a systemic closure against the legal membership of Arabs and Muslims who support the Palestinian cause. Even after Congress eliminated ideological grounds for exclusion from the law in 1990, the INS continued selectively to seek removal of the L.A. Eight, now on grounds that they had engaged in "terrorist activity."<sup>154</sup> This concept was defined broadly enough to encompass the range of peaceful and otherwise legitimate political activities in which the defendants, as supporters of the Palestinian cause, had engaged.<sup>155</sup>

Such governmental abuse of Arab-American political freedoms occurred at the same time that the Alien Border Control Committee, a secret government task force, was discussing plans for the mass incarceration of "alien undesirables," mainly from Arab countries. There were even plans for a special detention facility for such prisoners in rural Louisiana.<sup>156</sup> Moreover, the FBI abuses were mirrored by a string of violent attacks targeting Arab activists in the mid-1980s, including the 1985 murder of Arab-American Defense Committee Regional Director Alex Odeh in Los Angeles, the 1986 double murder of renowned Islamic scholars and spouses Lois Lamya and Ismail al-Faruqi in Philadelphia and the severe beating of Moustafa Dabbas, publisher of the only Arabic-English newspaper in Philadelphia in 1986.<sup>157</sup> The combination of governmental abuses and acts of political violence had a chilling effect on Arab and Muslim political activity at exactly the time that these groups were most in need of public representation.<sup>158</sup>

The first Gulf War in 1991 only added to the dehumanization of Arabs and Muslims, as reflected in the comments of General Norman Schwarzkopf when he referred to Iraqis in Kuwait as not being part of the "same human race we are."<sup>159</sup> Racial epithets were used to goad U.S.

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153. *See id.* at 318 (noting that congress barred waiver of exclusion for PLO representatives and officials).

154. *See id.* at 320.

155. *See id.* (noting that "terrorist activity" is broadly defined as "any act which the actor knows, or should reasonably know, 'affords material support to any individual, organization, or government in conducting a terrorist activity at any time'") (citations omitted).

156. *See* COLE & DEMPSEY, *supra* note 150, at 39.

157. *See* Nabeel Abraham, *Anti-Arab Racism and Violence in the United States, in THE DEVELOPMENT OF ARAB-AMERICAN IDENTITY* 155-214, 163, 167, 173 (Ernest McCarus ed., 1994).

158. *See* Cainkar, *supra* note 137 (discussing Arab-American community's perception that government action was intended to ensure that Arabs in United States remain "politically voiceless").

159. R.W. Apple, Jr., *Allies Destroy Iraqis' Main Force; Kuwait is Retaken After 7 Months*, N.Y. TIMES, Feb. 28, 1991, at A1 (quoting General Norman Schwarzkopf);

troops forward in Iraq, and racist depictions of Iraqis appeared in U.S. newspapers.<sup>160</sup> Mosques were bombed and Muslim schools, organizations and businesses were vandalized. Hate crimes again surged against Arabs, and the FBI engaged in intimidating interviews of Arabs in the United States.<sup>161</sup> Sudden, event-related surges in hate crimes and anti-Arab and anti-Muslim media representations became a recurring theme in the 1990s. This theme repeated itself after the 1993 World Trade Center bombing and the 1995 Oklahoma City bombings. Thus, U.S. Arab and Muslim communities' well-being became closely linked to events and forces beyond their control.<sup>162</sup>

Akram and Johnson chronicled the government's discriminatory treatment of Arabs and Muslims in the context of immigration and refugee/asylum law during the post-1967 period.<sup>163</sup> This history demonstrates the ways certain extreme forms of court-sanctioned state power, declared available in immigration's unique environment of "plenary" congressional and executive power, operate selectively to the detriment of Arabs and Muslims.<sup>164</sup> Race, foreign policy and outsider status come together in shaping what amounts to one of the clearest examples of a legal regime of exception within U.S. law. The evidence shows how political and ethnonational factors shaped the legal system's treatment of Arabs and Palestinians and their supporters.

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*see also* Joseph, *supra* note 138, at 267-68. Schwarzkopf's comments referred to Iraqis who he alleged were committing atrocities in Kuwait. Such allegations later proved to be part of a propaganda campaign orchestrated to gain public support for the war. *See* SUSAN L. CARRUTHERS, *THE MEDIA AT WAR* 41-43 (2000) (noting that Kuwait employed services of public relations firm to convey victimized image of Kuwait). *But see id.* (describing difficulty of verifying validity of accounts of atrocities committed by Iraqis).

160. *See* Joseph, *supra* note 138, at 268 (citing examples of racism against Arabs found in newspapers during Gulf War).

161. *See* American-Arab Anti-Discrimination Committee, *1991 Report on Anti-Arab Hate Crimes: ADC Special Report* 5 (1992); *see also* Sunday Morning: Prejudices Against Arab-Americans in San Diego (reporting argument that scope of interviews extend beyond security issues), CBS News Transcript of "Sunday Morning" (Jan. 27, 1991), *available at* LEXIS, News Library, CBS News Transcripts File.

162. Cainkar shows, for example, how the Palestinian community in Chicago lost the cohering force of many of its local organizations coincident to the first Gulf War. *See* Louise Cainkar, *Ethnic Safety Net Among Arab Immigrants in Chicago*, in *ARABS IN AMERICA*, *supra* note 131, at 192-206, 198 (relaying plight of Arab Americans in poverty in Chicago and lack of community organizations).

163. *See* Akram & Johnson, *supra* note 146, at 295-327 (summarizing pre-September 11 history of discrimination and demonization of Muslims and Arabs); Susan M. Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J. REFUGEE L. 7, 10 (2000) (describing how "neo-Orientalist" stereotypes damage refugee rights of Arabs and Muslims); Susan M. Akram, *Scheherazade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 61-70 (1999) [hereinafter *Scheherazade Meets Kafka*] (presenting evidence of selective enforcement against Muslims and Arabs of secret evidence, detention and removal procedures/penalties).

164. Akram & Johnson, *supra* note 146, at 329

Since 1996, the INS has been empowered to use secret evidence in deportation cases.<sup>165</sup> Akram and Johnson were unable to locate any cases where the secret evidence power in deportation cases had been asserted against anyone other than Arabs and Muslims.<sup>166</sup> The secret evidence cases targeted some particularly high profile political figures including a Palestinian member of a University of South Florida academic think-tank committed to addressing Middle East issues, and a democratically elected member of the deposed Algerian Parliament.<sup>167</sup> Repeatedly, the secret evidence cases have revealed the INS's tendency to exaggerate claims. Akram and Johnson state, "the government's claims in all of the cases evaporated. No case has included sufficient evidence of terrorism-related charges necessary to justify detention. Besides the individual loss of liberty, these cases have chilled Arab and Muslim speech."<sup>168</sup>

Prior to September 11, Natsu Saito reviewed the secret evidence cases involving detention, exclusion or deportation of Muslims or Arabs in the United States and, already at that time, identified elements of racialization in the disparate types of treatment Muslims and Arabs received in the post-1996 legal environment.<sup>169</sup> Saito compares the racialization of Arabs and Muslims to that of Asian Americans.

Just as Asian Americans have been "raced" as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have been "raced" as "terrorists": foreign, disloyal, and imminently threatening.<sup>170</sup>

Saito's critical race-based reading of the legal record before September 11 shares theoretical space with the work of social scientists who have studied Arabs and Muslims from a similar racialization perspective.

The types of bigotry, violence and governmental abuse experienced by Arabs and Muslims after 1967 led social science scholars to reach different conclusions about the nature of the animus facing these groups. Nabeel Abraham identifies three different bases for the racism and violence affecting Arabs in the United States: ideology, nativism and jingo-

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165. See generally Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (authorizing use of secret evidence in immigration proceedings); see also Akram and Johnson, *supra* note 146, at 322-23 (reviewing provisions contained in Antiterrorism and Effective Death Penalty Act that create new procedures for detention and removal of "alien terrorists").

166. See Akram & Johnson, *supra* note 146, at 322 (arguing that INS applies secret evidence rule exclusively to Muslims and Arabs). For a fully detailed account of the secret evidence cases, see Akram, *Scheherezade Meets Kafka*, *supra* note 163, at 70-108 (providing case-by-case analysis of secret evidence cases).

167. See Akram & Johnson, *supra* note 146, at 324-25 (describing secret evidence proceedings involving prominent Arab figures).

168. *Id.* at 326.

169. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"* 8 *ASIAN L.J.* 1, 11-26 (2001).

170. *Id.* at 12.

ism.<sup>171</sup> The first category, ideological or political racism, refers to the animus that attaches to Arab and Muslim support for the Palestinian cause. Abraham argues that zealous support for Israel in the United States has reinforced the perception that Arabs are terrorists, sowing fear and suspicion toward Arab Americans.<sup>172</sup> Xenophobia fuels a second form of racism, nativistic racism “based on perceived differences of race, culture, ethnicity, and religion.”<sup>173</sup> This form is “homegrown” in the sense that it does not rely on the Israel-Palestinian conflict for fuel.<sup>174</sup> It is more in keeping with the anti-foreignness racism affecting Asian Americans, a mix of anti-immigrant and racist animus. Finally, jingoistic racism “is a curious blend of knee-jerk patriotism and homegrown white racism toward non-European, non-Christian dark skinned peoples. It is a racism spawned by political ignorance, false patriotism, and hyper ethnocentrism.”<sup>175</sup> The latter is the type of racism that we observe when the United States government defines a culturally or racially identified other as the enemy and mobilizes the “nation” for war.

Over time, exclusionary actions had the effect of creating political and cultural identities that Louise Cainkar characterizes as “transnational.”<sup>176</sup> Cainkar does not imply that Muslims and Arabs were able to develop a uniquely post-national set of identities that could be seen as an aspect of a broader, mostly positive trend toward the transcendence of the national boundaries and identities. Rather, Cainkar asserts that Muslims and Arabs developed transnational political and cultural identities in response to “exclusion and denigration in American society.”<sup>177</sup> Cainkar’s work traces a transition over time in the dominant identity-axis of these groups, from pan-Arab to nationalist to Muslim. This shift represents a departure from the so-called ethnicity paradigm that analogizes the Arab experience to white European experiences, which suggests the deepening racialization of Muslims and Arabs. These changes not only reflect the ongoing discrimination and exclusion from American society, but also the ways in which the international context, particularly aspects of U.S. foreign policy, have created conditions of racial subordination for Arabs and Muslims throughout the latter third of the twentieth century.

The result has been the formation within U.S. society of a racialized and subordinated sub-group that has moved toward forming a non-assimilated cultural and political identity in response to state and societal othering processes. Therese Salibi concluded:

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171. See Abraham, *supra* note 157, at 180-99.

172. See *id.* at 187-88.

173. *Id.* at 188.

174. See *id.* at 192-93.

175. *Id.* at 193.

176. Cainkar, *supra* note 137.

177. *Id.*

The racial transformation of Arab identity within [the United States] has been influenced in large part by a second wave of [pan-Arab oriented] Arab-American immigration, by the formation of Arab-American political organizations beginning in the 1960s, and by a growing resistance among these groups to U.S. foreign policy in the Middle East. In the wake of the Persian Gulf War, Arab-Americans emerged as a semi-legitimate minority group.<sup>178</sup>

In ways that parallel the experiences of the “unmeltable” peoples of color in the United States, Muslims and Arabs do not have the same choices that are available to whites to opt in or out of ethnic identities. The boundary-marking differences that set these groups apart from whites evince an immutability that has been the hallmark of enduring forms of racialized group-based subordination.<sup>179</sup>

B. *State Action in the Racialization of Muslims, Arabs and South Asians After September 11*

Abundant evidence of post-September 11 racialization and abuse of Muslims, Arabs and South Asians exists. In the brief space of this article, I can only rehearse some of the most important points gleaned from the various data sets currently available, highlighting evidence that suggests a hardening of the diminished social and legal status of the affected groups. Generally, the record shows that the government quickly extended its pre-September 11 discrimination of Muslims, Arabs and South Asians through the most vulgar forms of racial profiling. Law enforcement officials immediately began apprehending racially profiled Muslim and Arabs. In early November 2001, the reported number of detainees had reached almost 700.<sup>180</sup> Subsequently, the Justice Department stopped reporting the detention numbers.<sup>181</sup> Though the Justice Department resisted shedding further light on its post-September 11 treatment of Arabs and Muslims, David Cole estimated that the number of detentions in the United States topped 5,000 by May 2003.<sup>182</sup> Given that these detentions resulted from racial profiling and programs like the selectively-targeted (anti-Arab and anti-Muslim) Absconder Apprehension Initiative and the National Security Entry-Exit Registration System (“NSEERS”), we may assume that nearly all of the detained persons have been Arabs, Muslims or South Asians living in the United States.<sup>183</sup>

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178. Saliba, *supra* note 143, at 310.

179. See Majaj, *supra* note 147, at 322-23 (noting that discrimination is primarily process of “maintaining boundaries between ‘us’ and ‘them’”).

180. See COLE, *supra* note 83, at 25.

181. See *id.*

182. See *id.*

183. See *id.*; see also Council on American-Islamic Relations, *The Status of Muslim Civil Rights in the United States 2004 4-5* (2004) [hereinafter CAIR 2004 Report].

The detention of thousands of racially-identified residents of the United States, which includes both citizens and non-citizens of Arab, Muslim or South Asian descent, represents the iceberg's tip in terms of state abuses affecting these resident communities. For example, the NSEERS program reportedly required more than 82,000 men and boys from countries with Muslim majorities to present themselves to the INS for special registration.<sup>184</sup> Of those who complied, 13,000 remain eligible for deportation for minor violations of immigration regulations.<sup>185</sup> The NSEERS program failed miserably as a tool to find terrorists. As a matter of common sense, it seems unlikely that anyone secretly planning a terrorist attack, and someone vulnerable to deportation or detection through the special registration program, would willingly show up at INS offices. Indeed, none of the tens of thousands of people who registered, including those charged with immigration violations, were charged with terrorism-related offenses.<sup>186</sup>

Even after the NSEERS was formally dismantled, it negatively impacted Arab, Muslim and South Asian communities.<sup>187</sup> Louise Cainkar placed NSEERS within a broader context of society's failure to accommodate Islam as a minority religion in the United States and concluded that:

Instead of helping to weave Muslims into the fabric of the nation and garner their support in anti-terrorism efforts, recent government policies [such as NSEERS] have singled them out *as a group* that is dangerous and suspect, as potential subversives. By requiring Muslim community organizations to use their resources on self-defense—resources that have been substantially depleted by government closures of charitable institutions and community fears—programs focused on community building must be cut-back or sacrificed. (Not unlike the resource drain caused by the federal government's targeting of civil rights activists in the 1960's).<sup>188</sup>

The drain on community resources is especially significant in light of the heightened need for community development of "political capital" among

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184. See CAIR 2004 Report, *supra* note 183, at 4. Note that the National Security Entry-Exit Registration System ("NSEERS") also targeted North Koreans in the United States. See *id.* at 5.

185. See *id.*

186. See *id.*

187. See Edward Hegstrom, *Living with Fear, Mistrust*, HOUSTON CHRON., June 13, 2004 (describing lasting fear and mistrust created among Arabs, Muslims and South Asian in Houston by NSEERS, even after program's termination); Adam Saytanides, *Selective 'Registration': INS Asks Terrorists to Turn Themselves in*, IN THESE TIMES, Mar. 3, 2003, at 4-5 (describing "pall" that NSEERS created over Pakistani community in Chicago). For a film documenting the human and community impacts of NSEERS, see PATRIOT ACTS (Thirst Films 2004) (focusing on impact of NSEERS on South Asian families in Chicago).

188. Louise Cainkar, *Special Registration: A Fervor for Muslims*, 7 J. ISLAMIC L. & CULTURE 73, 99 (2002).



the affected groups.<sup>189</sup> A negative synergy, with potentially devastating consequences, results from media and popular cultural demonization of Muslims, Arabs and South Asians when combined with government programs such as NSEERS that force communities into resource-draining defensive postures.

The devastation upon families and communities by indefinite detentions has been deepened by the government's insistence that names and locations of detainees be kept secret and by other abusive treatment of detainees, including physical and psychological coercion.<sup>190</sup> In a series of reports, the Office of the Inspector General of the United States Justice Department (OIG) documented a staggering array of abuses suffered by post-September 11 detainees, whose alleged wrong-doing amounted to nothing more than minor immigration infractions. For example, the OIG found that the processing of detainees (including issuance of charging documents) occurred in some cases no sooner than thirty days from the date of incarceration, despite INS's stated goal of 72 hours.<sup>191</sup> The delay prevented detainees from effectively retaining legal counsel, requesting a bond hearing or learning of the reasons for their incarceration.<sup>192</sup>

Delays were also common in the FBI's required clearance procedures before the release of post-September 11 detainees. The Justice Department's unwritten, though clearly understood, "hold until cleared" policy, combined with the low priority clearance proceedings, resulted in the average clearance proceeding taking 80 days.<sup>193</sup> Continued detention of persons who were otherwise subject to removal or "voluntary departure" was achieved through the Justice Department's "no bond" policy, which resulted in ongoing detentions that arguably violated even the minimal standards of immigration law.<sup>194</sup>

The OIG reported on conditions of confinement at the two facilities that received the majority of the post-September 11 detainees, Metropolitan Detention Center in Brooklyn, New York (MDC) and Passaic County Jail in Paterson, New Jersey (PCJ). In its original report, the OIG focused on a range of abuses at the two detention facilities. MDC, the more re-

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189. *See id.* at 99.

190. *See* American-Arab Anti-Discrimination Committee, *Report on Hate Crimes & Discrimination Against Arab Americans: The Post-September 11 Backlash* 32-36 (2002) [hereinafter *ADC 2002 Report*] (chronicling cases of abuse against Arabs).

191. U.S. Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 27-35 (Apr. 2003) [hereinafter *OIG Report*], available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (detailing changing requirements for charging documents and presenting statistics on how frequently INS took longer than specified time).

192. *See id.* (explaining delay in charging documents).

193. *See id.* at 37-66 (describing "hold until cleared" policy, its implementation and effects).

194. *See id.* at 72-87 (describing "no bond" policy, its implementation and effects).

strictive of the two facilities, classified post-September 11 detainees as Witness Security inmates, a classification which prevented families, friends and lawyers from obtaining crucial information regarding the location of their loved ones and clients.<sup>195</sup> The detainees could not use the telephone to secure effective legal representation because they were limited to just one weekly phone call and in some cases, not asked whether they wished to place their weekly call.<sup>196</sup> The detainees typically had not been able to retain counsel prior to their detention, and limited telephone access made it difficult to secure legal representation after being detained.<sup>197</sup>

Physical and verbal abuse of detainees, particularly at MDC, became the subject of a separate OIG report.<sup>198</sup> MDC created a special wing for the post-September 11 detainees that had the most restrictive detention permissible under the Federal Bureau of Prisons policy, including twenty-three hour a day lock-downs and constant cell illumination.<sup>199</sup> The OIG Report on the MDC investigated the detainees' allegations of physical abuse, including slamming them into walls, bending and twisting their arms, hands, wrists and fingers and inflicting pain by using restraints.<sup>200</sup> The OIG also reported allegations of racist and anti-Muslim verbal abuse.<sup>201</sup> The OIG investigation concluded that the allegations of physical and verbal abuse were credible and supported by videotape and other evidence, and, therefore, recommended administrative punishment of a number of the MDC staff members involved in the many instances of abuse.<sup>202</sup>

Government agents subjected other Muslims and Arabs to intimidation through so-called voluntary interviews. In 2001-2002 some 8,000 young men, almost all Arab and/or Muslim, were selected by the Justice Department for interviews.<sup>203</sup> The interviews were not compulsory, but upon receiving letters or being visited by law enforcement agents, many of

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195. *See id.* at 111-18 (relaying MDC classification of detainees at "witness security" which prevented contact by detainees with others and allegations of abuse).

196. *See id.* at 130-41 (describing draconian restrictions on inmates contact with attorneys through phone calls).

197. *See id.* (recounting case studies that indicated difficulty in obtaining legal representation with MDC restrictions).

198. U.S. Department of Justice, Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (Dec. 2003) [hereinafter OIG Report on MDC], available at <http://www.usdoj.gov/oig/special/0312/final.pdf>.

199. *See id.* at 3 (indicating conditions of incarceration of detainees at MDC).

200. *See id.* at 6 (reporting allegations of abuse by staff).

201. *See id.* at 28-29 (reporting allegations of verbal abuse including numerous death threats and warnings of reprisals for World Trade Center attacks).

202. *See id.* at 47 (concluding abuses took place and recommending administrative action against employees who committed abuses).

203. *See ADC 2002 Report, supra* note 190, at 36 (finding initially 5000, and then additional 3000, Arab non-citizens were selected to be investigated between November 2001 and early 2002); COLE, *supra* note 83, at 49.

the targeted individuals nonetheless felt compelled to cooperate. Over ninety percent of those contacted agreed to be interviewed.<sup>204</sup> Twenty of the interviewees were arrested on minor immigration charges.<sup>205</sup> The agents asked the men, among other things, about their own or their families' or friends' political beliefs.<sup>206</sup>

It is doubtful that the interviews accomplished anything other than the further alienation of the affected individuals and their communities from law enforcement. The American-Arab Anti-Discrimination Committee did not share Attorney General Ashcroft's positive assessment of the interview program, doubting the effectiveness and fairness of such ethnic dragnet techniques of investigation.<sup>207</sup> Nonetheless, the government conducted more voluntary interviews targeting Arab and Muslim communities in the summer of 2004.<sup>208</sup> Again, law enforcement officials asked interview subjects about their political views regarding, for example, the United States invasion of Iraq.<sup>209</sup> Members of the Arab and Muslim communities feared that the interviews signaled suspicion and targeting by the FBI that might have catastrophic consequences for innocent interviewees.<sup>210</sup> Mohammad Qazi, national coordinator for the America Muslim Alliance, described the chilling effect of the interviews, stating that those who feel targeted by the campaign "don't want to talk to reporters, they don't want to contribute money to any Muslim organization, they don't want to get involved politically in elections, they don't want to give their name or address out. People don't want to be visible anymore."<sup>211</sup>

The PATRIOT Act, which has been criticized in numerous articles and books for broadly eroding civil liberties, also enhanced the government's already hypertrophied power to attack Islamic charitable organizations that the government alleges support terrorist organizations.<sup>212</sup> In

204. See *ADC 2002 Report*, *supra* note 190, at 36 (finding ninety percent of those investigated voluntarily submitted to interviews).

205. See *id.* (indicating small number of interviews resulted in arrests for minor immigration violations).

206. See *id.* (dictating questions including inquires into political ideology).

207. See *id.* (concluding investigations were "ineffective" and "squandered time and efforts" and potentially increased distrust of government by Arabs).

208. See Mary Beth Sheridan, *Interviews of Muslims to Broaden*, WASH. POST, July 17, 2004, at A1 (reporting new interviews were being undertaken, but only those identified by intelligence or investigative information).

209. See *id.* (dictating questions which again include inquires into political ideology).

210. See *id.* (indicating how non-citizen Arabs were fearful of deportation similar to that which followed earlier investigations).

211. See Lisa Emmerich, *Muslims Recoil at Revived Scrutiny: Local Agencies Say FBI Interviews Can Intimidate*, ORLANDO SENTINEL, July 19, 2004, at B1 (reporting comments of Muslim activist concerning retreat by Muslims from political and social activism out of fear of investigations).

212. See COLE, *supra* note 83, at 75-79 (discussing how existing provision of International Emergency Economic Powers Act were augmented by PATRIOT act and used to shut down Islamic charities).

2001-2002, the government froze the assets of the three largest Islamic charities in the United States, Global Relief Fund, Holy Land Foundation and Benevolence International.<sup>213</sup> The evidentiary basis for these moves is unclear because the PATRIOT Act allows the Treasury Department to freeze an organization's assets if an entity is under investigation for violating the International Emergency Economic Powers Act (IEEPA).<sup>214</sup> The PATRIOT Act allows the government, in defending its actions in court, to rely on secret evidence.<sup>215</sup> The three charities fought the freezing of their assets in court, but lost.<sup>216</sup> The Supreme Court refused to grant certiorari in the Holy Land Foundation case, effectively rubber-stamping a process which affords Islamic charities almost no chance to discover, let alone rebut, evidence that they support terrorism.<sup>217</sup>

The anti-Islamic charity cases affect Muslims both politically and culturally and the causes they support. Consider, for example, the closing of Holy Land Foundation, which the government claimed was a security threat because of its alleged association with Hamas. Holy Land Foundation is a group that says it sponsors both humanitarian and violent action in support of the Palestinian cause. The case against Holy Land Foundation, to the extent anyone can understand it in the face of the government's reliance on secret evidence, seems premised more on the

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213. In one high-profile case, Enaam Arnaout, the Director of Benevolence International Foundation, was arrested on so-called material support charges. A great deal of news coverage uncritically reported the government's allegations against Arnaout. Subsequently, the terrorism charges against Arnaout were dropped and he pled guilty to the non-terrorist offense of diverting funds for use in buying supplies for Bosnian and Chechen fighters in the 1990s. None of the groups Arnaout supported with the diverted funds were deemed terrorist by the U.S. government. See Council on American-Islamic Relations, *The Status of Muslim Civil Rights in the United States 2003* 4 (2003).

214. The International Emergency Economic Powers Act (IEEPA) is designed to allow the President to apply economic coercion against countries as part of the Executive's foreign affairs powers. Under both Presidents Clinton and G.W. Bush, the IEEPA was used to target special designated terrorist organizations, which included many organizations involved in the Palestinian movement. See COLE, *supra* note 83, at 76-77.

215. USA PATRIOT Act, §106, amending 50 U.S.C. §1702(a)(1)(b) and adding 50 U.S.C.A. §1702(c); see also Cole, *supra* note 83, at 78.

216. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 85 (D.D.C. 2002) (denying motion for dismissal and summary judgment by plaintiff and granting defendants' motion *In Limine* and motion to strike); *Global Relief Found. v. O'Neill* 207 F. Supp. 2d 779, 809 (N.D. Ill. 2002) (denying motion for preliminary injunction by plaintiff); *Benevolence Int'l Found. Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 941 (N.D. Ill. 2002) (staying case pending outcome of parallel criminal case).

217. See Elizabeth Amon, *Faith, Hope, Charity and Terror Charges: Accused Charity Says It Was Denied a Real Hearing*, NAT'L L. J., Mar. 12, 2004, available at <http://www.law.com/jsp/article.jsp?id=1078368976257> (discussing denial of certiorari and government reliance on secret and unsubstantiated evidence).

organization's proximity to the Palestinian cause than anything else.<sup>218</sup> The evidence that has been unclassified concerns "contacts" between Holy Land foundation and Hamas leaders at a conference in 1993, before Hamas had been designated as a terrorist organization.<sup>219</sup> The government also alleges Holy Land Foundation paid for a Hamas leader to fly to the United States in 1990-1991, something the U.S. government itself did in 1997.<sup>220</sup> Finally, Holy Land is accused of giving charitable contributions to a Hamas-controlled hospital, which, apparently also received funding from the Red Cross, Great Britain and even the United States Agency for International Development.<sup>221</sup>

Many Muslims give to charities in fulfillment of their religious obligation, which may require 2.5 percent of a person's income be given to charity.<sup>222</sup> Many Muslims may choose to give money to support impoverished Palestinians or related humanitarian efforts as a way of supporting the Palestinian struggle more broadly. The targeting of Islamic charities in the war on terrorism has proven a strong disincentive among would-be donors, who now fear that the United States government may confiscate their donations or view them as criminals for having offered material support to "terrorists."<sup>223</sup>

The use of the IEEPA and PATRIOT Acts to attack Islamic charities that have no meaningful chance to defend themselves against charges of supporting terrorism is, as David Cole argues, akin to the kinds of ideological witch hunts of the Cold War.<sup>224</sup> The injury to the free speech and association rights of Muslims who wish to support political causes through charitable contributions, however, is ethnically selective in nature. Similar support from Irish Americans for the Irish Republican Army, or from Jewish Americans to support the illegal and violent extremism of so-called settler groups, did not fall victim to the same kinds of government repression.<sup>225</sup> Muslim leaders in the United States have come together to make

218. *See id.* ("[The Foundation] maintained that due process violations occurred as a result of the government's use of secret evidence and the breach of a federal evidentiary rule on summary judgment.").

219. *See id.* (relaying charity's ties to Hamas and its founders, some of which were denied by charity and others tacitly acknowledged, and finding government's case based on connections to Hamas unpersuasive).

220. *See id.* (pronouncing Holy Land Foundation paid for six trips to United States for Hamas founder, but noting at time of trips, Hamas was not designated terrorist organization).

221. *See id.* (chronicling support by various organizations of Hamas controlled hospital and relaying denial of support by charity of suicide bombers' families).

222. *See* Sahar Aziz, *The Laws on Providing Material Support to Terrorist organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. F. ON C.L. & C.R. 45, 87 (2003) (finding charitable giving requirement common to many Muslims).

223. *See id.* at 50-51, 51 n.21 (citing sources discussing chilling effect).

224. *See* COLE, *supra* note 83, at 77.

225. *See* Aziz, *supra* note 222, at 90 (finding no restrictions on donations to Irish and Jewish groups).

the unusual request that the U.S. government provide a list of approved charities that Muslims could give money to without fearing criminalization or confiscation.<sup>226</sup> An FBI spokesman doubted such a list would be forthcoming, leaving Muslims to fear that their charitable acts, as interpreted by authorities through an anti-Muslim and anti-Arab lens, may loosen the wrath of law enforcement upon them.<sup>227</sup>

C. *Racialization of Muslims, Arabs and South Asians in Post-September 11 Society and Culture*

The American-Arab Anti-Discrimination Committee reported some 700 violent incidents directed at “Arab Americans or those perceived to be Arab Americans,” occurring in the first nine weeks after September 11.<sup>228</sup> These violent incidents, including as many as eleven murders,<sup>229</sup> alone fill nearly 35 pages of the ADC 2002 Report and cannot be summarized in detail here.<sup>230</sup> One case the ADC reported symbolizes the racial nature of these attacks.

October 3 – Noroco, CA:

An Arab-American businessman was beaten by two men in ski masks while he was closing his store. They shoved him to the back of the store, finally pushing his face into a mirror. They beat him, calling him “sand n\*\*\*\*\*.” The two men then chained him as he tried to escape. They sprayed his face with black spray paint, saying they could “make him a n\*\*\*\*\*.” They poured fire starter fluid on him and threw liter bottles at him until he lost consciousness.<sup>231</sup>

In another case in Bridgeview, a suburb of Chicago, a group carried a Confederate flag as it marched to a mosque chanting “kill the Arabs.”<sup>232</sup> Such (literal and figurative) painting of Arab victims of hate violence as black, use of the “n-word” to fix the victims’ place as in the racial hierarchy, and rallying under the symbol of the southern slave republic, indicate

226. See Ron Howell, *Islamic Organizations Low on Funds*, NEWSDAY (New York), July 14, 2004, at A20 (stating that “Muslim leaders asked federal officials . . . to come up with a seal of approval that would assure potential donors that a [charitable] group does not have ties to terrorism”).

227. See *id.* (doubting that FBI would provide list of approved, non-terror supporting charities).

228. See ADC 2002 Report, *supra* note 190, at 47 (confirming over 700 violent acts and describing nature of attacks).

229. See *id.* at 69-70 (finding four confirmed and seven suspected hate crime murders against victims perceived to be Arab).

230. See *id.* at 49-84 (filling nearly one quarter of report with short excerpts from newspapers describing crimes).

231. *Id.* at 66.

232. See Illinois Advisory Committee to the U.S. Commission on Civil Rights, *Arab and Muslim Civil Rights Issues in the Chicago Metropolitan Area Post-September 11*, 9 (May 2003) (reporting story of Ray Hanania, publisher of Arab-American periodical, describing hatred of Arabs in Bridgeview).

the deeper racialization processes at work in these “private” acts of violence. It seems as if the perpetrators of these attacks, needing to give meaning to their acts beyond a formal sense of patriotic defense of country, ground their violence in the images of racist dehumanization with which they are most familiar. Leti Volpp argues that “citizenship” operates against those who appear to be Middle Eastern, Arab or Muslim regardless of formal status.<sup>233</sup> “Citizenship as identity” can function along existing racial fault lines to create boundaries that vigilantes feel empowered to violently enforce.<sup>234</sup>

Hate crimes against Arabs, Muslims and South Asians did not, unfortunately, disappear after the immediate aftermath of September 11. Instead, the Council on American-Islamic Relations (CAIR) found that reported incidents of “harassment, violence and discriminatory treatment increased nearly 70 percent [in 2003] over 2002 (the year after the 9/11 terrorist attacks).”<sup>235</sup> Taken alone, violent attacks against Muslims increased by 121 percent between 2002 and 2003, the largest increase ever in that category.<sup>236</sup> CAIR attributed the rise in reported anti-Muslim incidents to a number of factors, including “[t]he war in Iraq and the atmosphere created by pro-war rhetoric” and “[t]he noticeable increase of anti-Muslim rhetoric, which often painted Muslims as followers of a false religion and as enemies of America.”<sup>237</sup> Again, cultural (religious), racial (foreign-ness) and foreign policy (anti-war, pro-Palestinian) determinants combine in the construction of Arabs and Muslims as demonized and dehumanized outsiders, available to a hateful and fearful public as literal and figurative punching bags.

Employment and other forms of economic discrimination also increased sharply after September 11. The ADC reported a fourfold increase in complaints of employment discrimination after September 11.<sup>238</sup> The Equal Employment Opportunity Commission fielded over 700 “Process Type Z” charges of employment discrimination in the 15 months after September 11.<sup>239</sup> Process Type Z charges are a special category created specifically to deal with discrimination “related to the events of September 11, 2001, against individuals who are or are perceived to be Muslim, Arab,

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233. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1592-98 (2002) (finding interpellation of “Middle Eastern, Arab, or Muslim” citizens).

234. See *id.* (concluding non-traditional citizens are outside identity of American “imagined community” and are thus denied citizenship as matter of rights).

235. Council on American-Islamic Relations, *The Status of Muslim Civil Rights in the United States 2004 2* (2004) [hereinafter CAIR 2004 Report].

236. See *id.* at 10.

237. See *id.* at 2.

238. See ADC 2002 Report, *supra* note 190, at 92 (detailing dramatic increase in all types of employment discrimination following September 11, 2001).

239. See Equal Employment Opportunity Commission, *Muslim/Arab Employment Discrimination Charges Since 9/11*, Dec. 2, 2002, available at <http://www.eeoc.gov/origin/z-stats.html> (providing statistics on number of “Process type Z” charges of employment discrimination filed).

Afghani, Middle Eastern or South Asian or individuals alleging retaliation related to the events of September 11, 2001.”<sup>240</sup> In addition, EEOC reported another 841 charges of discrimination against Muslims.<sup>241</sup> Many of these complaints were dismissed with no cause findings, but their sheer numbers give a sense of how members of the affected groups have processed their treatment in the workplace after September 11.

Perhaps the most poignant and telling form of anti-Arab and anti-Muslim violence, intimidation and discrimination is that affecting children in educational settings. ADC reported seventy-four cases of violence or threatened violence in educational settings in the first six months after September 11.<sup>242</sup> Employees reported another thirty-eight cases of harassment to the ADC.<sup>243</sup> Certainly, the reported cases of discrimination and violence in education settings are a fraction of the total, and the children who were targeted will carry the memory and psychological burden of the attacks for the rest of their lives.<sup>244</sup>

In a biting ironic article entitled “Terror-fied,” Nadia Afghani poignantly articulates the effects of societal hostility and violence on the Orange County, California Muslim community:

Almost everyone at my mosque has experienced countless amounts of hatred during the past twenty-some years, and the majority of it seemed to be aimed at children: boys getting their faces smashed to unrecognizable pulps; girls pushed around and their scarves pulled off; students the target of college professors’ racist remarks, not to mention the odd beer can, lit cigarette and trash thrown at them. Retaliation against Muslims created a fear that caused many to lock themselves in their houses and pray to one day see the salad-bowl analogies of this country transpire itself [sic] into myth.<sup>245</sup>

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240. *See id.* (listing disposition of employment discrimination charges).

241. *See ADC 2002 Report, supra* note 190, App. 2, at 148 (listing Process Type Z charges by state).

242. *See id.* at 107-12 (reporting chronologically, cases of educational discrimination, including death threats, vandalism and physical violence).

243. *See id.* at 112-16 (reporting non-violent discrimination including unfounded investigations of Arab students, insensitive comments and racially motivated dismissal of teachers).

244. Nonetheless, ADC singled out certain schools for praise in dealing with the post-September 11 fallout. School districts such as Washington D.C., which had functioning multicultural education units, were able to activate resources for the needed training of teachers who could then better face the problems facing Muslim, Arab and South Asian students in their schools. *See id.* at 105-07 (praising schools in Michigan and Washington D.C. with large Arab populations for relatively few incidents).

245. Nadia Afghani, *Terror-fied: The War on Terror Begins at Home. My Home*, ORANGE COUNTY WKLY., July 9-15, 2004, available at <http://www.ocweekly.com/ink/04/44/cover-afghani.php>.



Afghani's ironic invocation of a desire to transcend the salad bowl analogy highlights the hypocrisy of a system that espouses pluralist principles and tolerance of difference and yet drives Muslims back into a state of private, "terror-fied" repose. Afghani's term, terror-fied, would seem an apt naming of the processes by which Muslim and Arab identities have been racially constructed throughout the 1980s and 90s, but especially after September 11. "Terror-fication" amounts to the projection of a particularly amorphous and potentially expansive form of security threat—terror—onto the cultural and ethnic "essence" of now permanently suspect classes: Muslims, Arabs and South Asians.

#### D. *Political Identity and Racialization*

The race-based civil rights movements of the mid-twentieth century brought about a "great transformation" in U.S. political culture. Omi and Winant identify the two elements of this transformation as the eclipse of the ethnicity paradigm, with its embrace of a misleading "immigrant analogy" that ignored structural disparities between the situations of white ethnic versus non-white racial groups, and the rise of new social movements that expanded the "concerns of politics to the social, to the terrain of everyday life."<sup>246</sup> Importantly, the transformation entailed the articulation of collective, race-based political identities that proved resilient enough to survive the demise of the civil rights movement and many of the policies that movement shaped.<sup>247</sup> Omi and Winant show how the notion of "interests" in politics expanded to include not just economic but also social and cultural dimensions, important areas of everyday life that powerfully structured racial inequality.<sup>248</sup> According to Omi and Winant, the civil rights movement's most permanent success lay in creating new racial subjects; race-based political identities that formed around the practices and possibilities of "*collective* opposition."<sup>249</sup>

In this section, I will briefly expand the analysis regarding the racial status of Muslims, Arabs and South Asians by working backwards, so to speak, from evidence of collective—pan-ethnic or racial—political identity formation among Muslims, Arabs and South Asians. Racialized collective identities are pragmatic in that they allow for effective group mobilization, but differ from more conventional interest-group formations in projecting a desire to confront the deeper social structures of racial subordination.<sup>250</sup> In modern United States history, racialized and collectively conscious political subjects stand as an unmistakable challenge to the equality

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246. OMI & WINANT, *supra* note 125, at 90.

247. *See id.* at 97 (describing necessary movement).

248. *See id.* at 98-99 (advocating political structure of interest groups that include race).

249. *See id.* at 100-11 (describing movement towards penetrating mainstream politics and other mass participation tactics).

250. *See id.* at 101 ("This new state, however, was not the institutional fulfillment of the movements' ideals. Rather it held a cloudy mirror up to its antago-

claims of liberal democracy. The consolidation of such identities has corresponded with the great fault lines of social, political and legal closures that characterize the United States as a settler-colony.<sup>251</sup> Typically, such identities move collectivities beyond political advocacy of narrow material interests or attempts to reshape United States foreign policy in support of national causes abroad.

Racialization of political identities in the United States has entailed the bridging of national or ethnic differences through “pan-ethnic” formations.<sup>252</sup> Evidence of such a trend among Muslims and Arabs existed well before September 11. As Karen Leonard’s extensive survey of the research on Muslims in the United States has shown, a decade of intense political organization led to the creation in 1999 of the American Muslim Political Coordinating Council (AMPCC).<sup>253</sup> The AMPCC was a coalition of Muslim political organizations that together, represented multi-ethnic Muslim political leadership.<sup>254</sup> The four organizations that came together to form AMPCC reflected a shift in Muslim-American political identity that resulted when the leadership in the 1980s moved away from a strictly outsider identity—one that valorized temporary residence in the United States—and instead began advocating acquisition of United States citizenship and involvement in mainstream political life.<sup>255</sup> The result was the creation of a number of professional national Muslim political advocacy groups in the late 1980s and early 1990s that sought to politicize Muslims in the United States.<sup>256</sup>

The American Muslim political organizations acted as lobbyists for Muslim interests and as recruitment vehicles to encourage Muslims to run for office.<sup>257</sup> Just before the elections in 2000, a merger of organizations occurred that indicated the further consolidation of Muslim political orga-

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nists, reflecting their demands (and indeed their rearticulated racial identities) in a distorted fashion.”).

251. See Natsu Taylor Saito, *For “Our” Security: Who is an “American” and What is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23, 26 (2003) (laying out structural and racial determinants of U.S. citizenship and membership in “America” generally).

252. See, e.g., YEN LE ESPIRITU, *ASIAN AMERICAN PAN-ETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* (1992) (discussing theory of “reactive solidarity,” whereby outside threat may create conditions of solidarity across ethnic lines).

253. See KAREN ISAKSEN LEONARD, *MUSLIMS IN THE UNITED STATES: THE STATE OF RESEARCH* 18 (2003) (discussing politicalization of American Muslim community).

254. See *id.* (stating diversity of leadership among Muslim groups).

255. See *id.* (identifying four organizations: Muslim Public Affairs Council (Los Angeles), American Muslim Alliance (Oakland), American Muslim Council (Washington, D.C.) and Council on American-Islamic Relations (Washington, D.C.)).

256. See *id.* (“Further political shifts occurred at the end of the twentieth century as the national-origin communities reached out to other Muslims and the American public.”).

257. See *id.* at 19 (“They engage in political lobbying and encourage Muslims to run for electoral office.”).

nizations.<sup>258</sup> Moreover, in the same year, a historic meeting brought together the four major Arab and five major Muslim organizations.<sup>259</sup> This pan-ethnic group agreed to a common agenda involving the “future of Jerusalem, civil and human rights, participation in the electoral process, and inclusion in political structures,” thus entailing a mix of foreign policy and domestic civil rights and political empowerment issues.<sup>260</sup> Still, Leonard argues that foreign policy concerns channeled much of the political energy of these organizations and coalitions, including the decision by some Muslim organizations to push the Muslim vote to support George W. Bush in the presidential election.<sup>261</sup> After September 11, however, Leonard observed that Muslim political organizations dramatically changed directions by emphasizing domestic policy concerns over foreign ones.<sup>262</sup>

Hussein Ibish, Communications Director for the ADC, also wrote shortly after September 11 about the changes affecting “secular” Arab-American political organizations.<sup>263</sup> Ibish’s analysis tied pre-September 11 Arab-American civil rights activism back to problems created by United States foreign policy in the Middle East:

It is ADC’s belief that until there is a more rational American foreign policy, more of congruence of views about the United States stands for and why in the Middle East and how to interpret events in the Arab world, one cannot really address the discrimination that the community faces: barriers to full political participation, for example, or the kind of negative and hostile discourse in the news media and the kind of representations you get in film and television. Because of that ADC also focuses on foreign policy.

This is integral to our civil rights effort. ADC sees a civil liberties or civil rights agenda as inseparable from a foreign policy agenda. Without the foreign policy agenda, it would be impossible to treat the causes of discrimination. It might be possible to patch the symptoms a little bit, but not the roots and the causes of discrimination.<sup>264</sup>

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258. *See id.* (“The then-head of the AMA [American Muslim Alliance] and AMPCC, Dr. Agha Saeed (2000) said the merger marked, ‘the beginning of a new phase of American Muslim politics . . . .’”).

259. *See id.* (noting merger of four Arab-American and five Muslim organizations).

260. *Id.* (stating goals of organization).

261. *See id.* at 20 (stating critical swing occurring when “Bush declared himself opposed to secret evidence in a debate with Gore in Michigan”).

262. *See id.* at 23 (describing organizations’ reasoning to concentrate on domestic political issues).

263. *See generally* Hussein Ibish, *Patterns of Arab-American Activism*, available at <http://wwics.si.edu/events/docs/ibish.pdf> (summarizing thesis of article).

264. *Id.* at 2.

Asserting such linkages between ADC's domestic civil rights agenda and United States foreign policy is not unprecedented in United States racial formation history.<sup>265</sup> Indeed, Ibish cites to a "long tradition of protests, vigils, and letter writing campaigns," along with boycotts and local protests by Arab-Americans all of which recalls the civil rights tactics of African American and other racialized minorities.<sup>266</sup>

In the post-September 11 context, several important shifts have occurred that may augur in the direction of an even more sustained civil rights-based political identity for Muslims, Arabs and South Asians. One simple way of gauging the effect of post-September 11 repression on the political life of Muslims, Arabs and South Asians would be to observe how it might impact voting preferences. Press reports uniformly held that groups of Muslim and Arab voters in the 2000 presidential election supported the conservative candidate George W. Bush for President, perhaps even supplying the margin of victory in the disputed Florida race.<sup>267</sup> By summer 2004, the percentage surveyed who said they planned to vote for Bush in the 2004 election had dropped to as low as ten percent in some polls.<sup>268</sup>

The story about how this shift in electoral preferences has occurred is more complex than surface appearances might suggest, but it nonetheless signals a shift away from what many saw as a trend among Muslim and Arab voters supporting conservative candidates.<sup>269</sup> Political interests understood more narrowly and strictly as a function of certain pivotal foreign

265. See, e.g., Gil Gott, *Critical Race Globalism?: Global Political Economy, and the Intersections of Race, Nation, and Class*, 33 U.C. DAVIS L. REV. 1503 (2000) (discussing history of race internationalists such as DuBois and Robeson).

266. See Ibish, *supra* note 263, at 6 (discussing effectiveness of grassroots movements).

267. See Abdullah A. Al-Arian, *Soul Survival: The Road to Muslim Political Empowerment*, 23 WASH. REP. ON MIDDLE E. AFF. 74, 81 (2004) (discussing survey of Muslim voters in Florida during 2000 election showing that, "[i]f taken to be representative . . . 18,496 Muslims in Florida voted for Bush, while only 3,709 voted for Gore, a difference of 14,787 votes—nearly 30 times the margin of victory").

268. See Deborah Horan, *Muslims, Arabs Say Key Bush Vote May Swing Other Way*, CHI. TRIB., Jan. 18, 2004, at A3 (stating that according to one poll, "Arab-American Muslims rate Bush's overall performance 'unfavorable'").

269. See LEONARD, *supra* note 253, at 20 (discussing shift after Bush-Gore Debate in Michigan); Al-Arian, *supra* note 267, at 80-81 (describing overarching desire among Muslim American leaders to impact election of one of candidates as way of demonstrating Muslim electoral clout). It seems Hillary Clinton's decision to return a \$50,000 check to the American Muslim Alliance may have played a significant role in creating the conditions behind Muslim Americans voting in a bloc for Bush, suggesting a strategic decision to bring Democrats in line with Muslim interests. Bush's public opposition to the use of secret evidence, as stated in one of the 2000 presidential debates, also played a large role. Generally, it seems leaders in the Muslim community wanted to demonstrate the existence of a Muslim voting bloc that would not allow itself to be taken for granted by putatively liberal candidates. See LEONARD, *supra* note 253, at 20 (discussing American Muslim participation in 2000 election); Al-Arian, *supra* note 267, at 80-81 (discussing "Birth of the Muslim Bloc").

policy concerns may have fostered the possibility of electoral party-shopping among Muslims and Arabs in the United States. Neither major political party in the United States, for example, has unambiguously championed the rights of Palestinians. In 2000, a perception existed among Muslim American leaders that Bush/Cheney might be more supportive of Palestinians than Gore/Lieberman, leading Muslim voters in the United States to vote Republican.<sup>270</sup> Conversely, as more traditional civil rights concerns have come to the forefront after September 11, large numbers of Muslims and Arabs in the United States have shifted their support toward Democrats, the party more strongly associated with a traditional civil rights agenda.<sup>271</sup>

Studies have shown a marked increase in both religiosity and political ambition among Muslims since September 11.<sup>272</sup> Researchers draw a connection between the strengthening of Islamic ties among Muslims and an increased desire to participate in United States politics. Amaney Jamal shows such a correlation in her study of mosques attendance and political participation.<sup>273</sup> Interestingly, Jamal's work drew inspiration from the role played by Black churches in the creation of politicized group consciousness among African Americans.<sup>274</sup> Jamal found that for Arab Muslims, "mosques are directly linked to political activity, civic participation and group consciousness."<sup>275</sup> A sense of "common fate," a characteristic of the group consciousness for which Jamal tested, brings Arab Muslims to see "the injustice that occurs to one Muslim" as "an injustice that has fallen the entire Muslim community."<sup>276</sup> In light of Jamal's work, it would

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270. See LEONARD, *supra* note 253, at 20 (discussing political inclinations of Muslims in 2000 election).

271. See William McKenzie, *What's on Muslim Minds?: Bush Shouldn't Take This Vote for Granted*, DALLAS MORNING NEWS, July 6, 2004, at 15A (citing civil rights concerns among Muslim voters supporting John Kerry for president). It should be noted that the issue of secret evidence being used in deportation cases does sound in traditional civil rights conceptions of justice. See Al-Arian, *supra* note 267, at 80 (concluding that 2000 election was first time foreign policy issues were afforded secondary status).

272. See Geneive Abdo, *Study gauges 9/11 effect on U.S. Muslims; Interest in Religion, Politics Deepens*, CHI. TRIB., Apr. 6, 2004, at 13 (linking stronger sense of religious identity to greater concern with political participation among Muslims in United States).

273. See generally Amaney Jamal, *Political Engagement and the Participation of Muslim Americans* (2005), available at <http://apr.sagepub.com/cgi/reprint/33/4/521.pdf> (discussing effect of religious involvement on political participation in America's Muslim communities).

274. See *id.* at 2 (stating that "politicized black churches foster a sense of group consciousness by collectivizing the interests of the sub-group in an effort to counter prejudice and discrimination from the mainstream theory").

275. *Id.* at 17.

276. See *id.* Jamal's study disaggregates Muslims in the United States into three groups: Arab Muslims, South Asian Muslims and African American Muslims. See *id.* (stating categories of Muslims used in research). Her findings on politicization and group consciousness apply most strongly to Arab Muslims, but not necessarily to the other two groups. See *id.* ("For Arab Muslims, mosque participation

seem that the United States government's policy of targeting mosques for investigation and surveillance will only deepen mosque-goers' collective consciousness and politicization.<sup>277</sup>

The impact of Muslim and Arab politicization has been felt in many cities where Arab-American activists were instrumental in successful campaigns to pass resolutions condemning the PATRIOT Act, or denouncing the invasion of Iraq.<sup>278</sup> Most recently, Arab and Muslim organizations have coordinated efforts supporting a law that would rectify many of the abuses those communities have experienced at the hands of the federal government. The bill, called the Civil Liberties Restoration Act, would insure that all deportation hearings are open to the public, that detentions are limited to forty-eight hours before a bond hearing is provided, and that the NSEERS program is terminated.<sup>279</sup> These efforts mark a clear turn toward a more traditional civil rights-based political agenda and identity that seems capable of drawing together Muslims and Arabs from a range of ethnic and national backgrounds.<sup>280</sup>

Equally as impressive is the sustained and effective organization of Muslim and Arab political voices; not just through voter participation, but also through fielding candidates in local, state and national elections. This trend began in the early 1990s and, though the number of Muslim and Arab candidates sometimes failed to meet the ambitious goals of organizers, continues through the current 2004 election cycle.<sup>281</sup> These electoral trends are paralleled by an active Muslim and Arab civil society, where organizations such as ADC and CAIR must be counted among some of the most effective and professional national civil rights organizations. The leaders of these groups vary in how they approach the question of political identity formation, but oppositional politics emanating from such

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increase is linked to greater forms of political activity.”). Jamal explains the different reactions of the Muslim groups to mosque involvement using pre-existing ethnic and cultural differences. *See id.* at 14-16 (discussing reasoning for these variances).

277. *See id.* (describing United States government's focus on mosque attendance as “worrisome”).

278. *See* Hillary Wundrow, *Arab Americans on the Move: Anti-War and Civil Rights Resolutions*, ARAB AMERICAN INSTITUTE, Mar. 24, 2003, at [http://www.aaiusa.org/anti-war\\_resolution.htm](http://www.aaiusa.org/anti-war_resolution.htm) (“Civil rights organizations, constitutional experts and lawmakers have challenged these laws at all levels of government. These groups are leading the fight to repeal the laws and protect individual rights.”). It is reported that 357 cities and towns have passed such ordinances. *See* Bill of Rights Defense Committee, at <http://www.bordc.org/index.html> (last modified Nov. 12, 2004) (discussing ordinances).

279. *See Civil Liberties Restoration Act* (May 27, 2004), available at <http://www.immigrationforum.org/documents/TheDebate/DueProcessPost911/CLRAsechbysec.pdf>.

280. *See* Niraj Warikoo, *Michigan Residents Push Civil Rights Bill; Arabs, Muslim Groups to Lobby U.S. Legislators*, DET. FREE PRESS, June 10, 2004, at 4B (describing efforts by Pakistani, Muslim and other Arab groups lobbying on Capitol Hill for passage of civil liberties bill).

281. *See* Al-Arian, *supra* note 267, at 80.

groups in the post-September 11 context evinces a pronounced reliance on identity as a basis for gathering support.

#### E. *Evaluation*

Sucheng Chan's social history of Asian Americans provides some fundamental themes for understanding the processes by which "alien" outsiders are racialized and subordinated.<sup>282</sup> Chan's book presents Asian American history as shaped in significant part by a dialectical process involving movement between the poles of "hostility and conflict" and "resistance." Within this general schema, Chan shows how Asian Americans are viewed as both "perpetual foreigners" and a nonwhite racial minority group, insisting that both aspects are indispensable elements to understanding the group's history.<sup>283</sup> Chan's categorization of the various types of hostilities faced by Asian Americans reflects both anti-immigrant and racist dimensions of anti-Asian American hostility: "prejudice, economic discrimination, political disenfranchisement, physical violence, immigration exclusion, social segregation, and incarceration."<sup>284</sup>

The evidence presented here reveals that the status of Muslims, Arabs and South Asians in the United States society has been, and continues to be, shaped by forces similar to those Chan identifies in the Asian American context.<sup>285</sup> These forces, operating at the levels of the state, society and market, roughly fit the categories Chan induces from her research. Hostility and conflict, evincing cultural and racial but also ideological forms of animus, have been met with responses indicating the formation of racialized, group-based political identities. At the level of the state, policies affecting Muslims, Arabs and South Asians have included selective immigration and law enforcement actions, which, taken together with the stigmatization of Arabs or Muslims in the public sphere, have created conditions of political disenfranchisement. In the realm of social relations, prejudice and ethnic hatred toward Muslims, Arabs and South Asians have most notoriously been manifested in hate crimes, but also in exclusions from civil society organizations and in characteristically bigoted and stereotyping representation in popular culture and the media. Subordination in the market has been reflected in employment and other forms of economic discrimination. Finally, various forms of race-conscious resistance to such hostility and conflict are everywhere in evidence.

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282. See SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 45, 167-69 (1991) (discussing conflict of being part of "model minority" while maintaining "second-class" citizenship).

283. See *id.* at 187 ("[A]s people of nonwhite origins bearing distinct physical differences, they [Asians] have been perceived as 'perpetual foreigners' who can never be completely absorbed into American society and its body politic.").

284. *Id.* at 45 n.1.

285. See also Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 24 COLUM. HUM. RTS. L. REV. 1, 13-19 (2002) (discussing "racialization of foreignness" in context of Wen Ho Lee case).

#### IV. THE RACIALIZATION OF SECURITY AND THE PROBLEM OF "POST-POLITICAL" STATE VIOLENCE

The previous section makes two important points that should be taken into account in rethinking the problem of the security exception in American liberal democracy. First, Muslims, Arabs and South Asians are increasingly positioned as a racialized minority, marked by both legal and social forms of discrimination and subordination. Second, security in the war on terrorism is itself a racialized, and thus uniquely contested concept, characterized by ambiguity and line-blurring that accompanies romanticized renderings of threats and of the friend-enemy distinction. There is, in other words, both securitization of race,<sup>286</sup> as Muslims, Arabs and South Asians become racially and immutably constructed as enemy others (terror-fication), and racialization of security,<sup>287</sup> the process by which threat and conflict are conceptually stripped of their social and political meanings as the products of interest divergences and rearticulated as racially psychologized anxieties over threatened security and national identity.<sup>288</sup>

In this section, I will briefly consider a theoretical re-contextualization of the problem of the exception by looking to the international system within which regimes of exception have paradigmatically arisen and operated. I will argue that the changing structure of the international political system within which states exercise their power over "bare life" has created a plethora of new openings for states to pursue problematic (irrational, ambiguous, arbitrary, racist, etc.) deployments of violence and regimes of exception. Such transformations of the international political structures conduce, generally, to the racialization of security. At a minimum, liberal legal assessments of the proper law/security tradeoff, particularly those tilting toward tolerance of political branch autonomy in the exercise of national security power, should account for such structural changes.

State violence, the seeming embodiment of the extra-legal Hobbesian or Schmittian moment, appears quite rational as an element of the modern international state system. This rationality is grounded in the territorial logic of the modern international political system by which violent acts of states are linked to national material interests. State violence of a pre-modern or irrational kind, "crusades" bent on imposing particular forms

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286. See *infra* Part III (discussing securitization of race, speaking to ways that racial formation in United States relates to state's exercise of its security function and that we may be seeing new form of racialization).

287. The racialization of security refers to the various ways that threatening aspects of the external realm are racialized.

288. See MICHAEL ROGIN, RONALD REAGAN, THE MOVIE AND OTHER EPISODES IN AMERICAN POLITICAL DEMONOLOGY 68-80 (Univ. of Cal. Press 1987) (1981) (discussing Cold War as third movement in history of counter-subversion). I extrapolate from Rogin, who was making a more general, non-race critical point about the "counter-subversive response" to Cold War challenges from communists and labor. Rogin argues that the psychologization of threat begat "exaggerated responses" that "narrowed the bounds of permissible political disagreement and generated a national-security state." *Id.* at 68.



of cultural or political identity, ideologies or conceptions of “the good” on other states, for example, violate the logic of the modern system.<sup>289</sup> This rationalist understanding of state violence is what Clausewitz meant when he referred famously to war as politics pursued by other means.<sup>290</sup> Politics, viewed as the competitive pursuit of material interests, simply adopts in war forceful means in pursuit of rational ends.

Within this generalized system of legitimated state violence, democracies must additionally ground their deployments of violence and exception-creation in the consent, real or implied, of the constituting sovereign—the people. State violence occurring within a tightly structured modern international political system made up of territorially defined, rational, self interest-seeking states readily comports with the authorization story democracies must tell. The “national interest” may be said to stand in harmony with state violence and regimes of exception so long as certain basic territorial and rationalist assumptions hold. A broad range of violent acts may be “authorized” in this sense, ranging from international “preventive” uses of force to the creation domestically of states of exception that subordinate the interests and status of “enemy” groups to the interests of the state and the popular sovereignty it embodies.<sup>291</sup> This is, at bottom, the minimal authorizing story that liberal accommodationists must tell when they countenance exceptional security powers, relatively unchecked by substantive norms or judicial process.

Nevertheless, what if the world described by the model of the modern international political system has passed? Here, Samuel Huntington’s notion of civilization clashes as the fundamental conflict form in the post-Cold War international system conveys a sense of the structural-historical transformations that make modern internationalist notions of politics and territory seem dated. As Rob Walker notes, even though we may find little to recommend Huntington’s scholarship generally, his civilizations thesis

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289. See R.B.J. Walker, *War, Terror, Judgement* 1, 5 (2002), available at <http://www.isv.uit.no/ansatte/edvarda/stuartr/911walkerfinalmsword.htm> (comparing modern conflicts with those of seventeenth century religious wars, Renaissance humanism, etc.).

290. See *id.* at 17-18 & n.5 (“He is most famous for the notion that war is the continuation of politics by other means . . .”).

291. The term “authorize” is used here simply to mean that preventive attacks of the sort contemplated in President Bush’s National Security Strategy, which will in most cases violate international laws governing use of force, can be conceived as legitimate from the perspective of the ultimate sovereign, the people. See generally *National Security Strategy of the United States of America* (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (discussing fear of terrorist attacks on United States). Even the whipping up of patriotic fervor to goad the public into supporting state violence can claim a rational basis so long as the state’s violent campaign can be construed to relate back through the territorial and rational model of the modern state in the modern state system to the interests of the people. Manipulated patriotism is just the means to achieve the rational end of mass mobilization in the people’s interest. See Walker, *supra* note 289, at 15 (explaining that political mobilization and fear is disguised by patriotism).

usefully characterizes a “decisive transformation.”<sup>292</sup> Hegemonic states operating in a world of truly clashing civilizations might behave as the United States does. But, this does not mean that Huntington’s civilizations really exist or that such “entities” would be structurally destined to conflict as he suggests.

Instead, we might understand the conceptual shift to civilizations as part of a “snappy historical script” signaling a broader shift away from the modern international state system and its assumption about states as the authors and objects of legitimate violence, the purveyors of rational politics.<sup>293</sup> Declaring war on terrorism makes sense within the logic of a civilizations clash, but not simply because so-called Islamist terrorists fall neatly into one of the ontologically anti-Western civilizational categories that Huntington proposes. The enemy in the war on terrorism shares with civilizations a disjointed relationship to the world of territorial states. As Walker suggests, the United States and its allies are positioned to deploy interventionary force globally in ways that are unpredictable, if not arbitrary, from the perspective of the old rules.<sup>294</sup>

The new game seems more akin to a “post-political” imperial system where sovereignty is a strictly hierarchical concept, no longer paired with equality (as in the modern political doctrinal coupling “sovereign equality”), and where violence is authorized according to a developmental narrative that makes of freedom and self-determination the type of hollow rhetorical compliment hypocrisy pays to virtue. Just as nineteenth century liberalism legitimated imperialism by creating anthropological pre-qualifications for the right to self-government, which colonized peoples, of course, mostly failed to meet, sovereign prerogative is today categorically denied to a wide range of non-Western, non-neoliberal forms of political and social organizations, categorized variously as barbaric, rogue, un-free or un-democratic.<sup>295</sup>

Walker links a fundamental shift in conceptions of sovereignty, politics and the exception with the way the war on terrorism is able rather arbitrarily to ascribe enemy status and unleash violence:

The most striking feature of Bush’s declarations of war has been that they have been understandable less in relation to a sovereign capacity to declare a state of emergency, a capacity to suspend all norms of everyday behavior, in relation to another sovereign state than in relation to an enemy that is essentially intangible and disconnected from any territorial state and which can be projected almost at will onto any convenient territories, bodies

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292. *See id.* at 19 (discussing Huntington’s theory).

293. *See id.* at 19-20 (articulating new distinctions between friends and enemies).

294. *See id.* at 19-21 (discussing likely tactics of United States and Great Britain in response to threat of terror).

295. *See generally* UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE* (1999).

and peoples. This may be sovereignty, but it is not sovereignty as we are supposed to know it.<sup>296</sup>

Walker's observation suggests that conditions today are every bit as conducive to the racialization of security as in the days of the Japanese internment.<sup>297</sup> The openings in the international system created by the onset of the new "logic" are, unfortunately, openings onto the "irrational"—the atavisms by which the world is carved up along identity lines.

Certainly, it was also true that the old international system's logic of sovereign equality did not prevent racialized enemy groups from being constructed and violated. What has changed is that in the war on terrorism, the identities of demonized groups are decoupled from the logic of the international system of states. "Islam," "terrorists" and "Arabs" make no sense as enemies of the United States from the perspective of the modern international system. In this sense, racialization of security has become a process that is unbound by the constraints of territorialized political identity. In the Japanese internment, race made the citizenship distinctions between Japanese and Japanese Americans irrelevant. Today's racialized enemy groupings transcend the very system of territorialized politics, reminiscent of the way pirates were constructed as enemies of mankind.

If indeed we are witnessing the spread of irrational and "depoliticized" state violence, i.e., as decoupled from the logic of Clausewitzian politics and the international system of rational state violence, it seems worthwhile to contemplate a more robust role for substantive legal norms, legal process and reasoning. Liberal legal models emphasizing social learning or "ameliorative trends" in the culture of civil liberties as elements in a more enlightened security state should not ignore the ways state action and actors respond to conditions that cut against the effectiveness of such social learning to liberalize the state's exercise of the security function. Accommodationist approaches, in particular process-based approaches, should grapple with the substantive questions regarding democratic authorization of state violence under reconfigured post-political and imperial forms of state sovereignty. The prevalence of conditions under which security may so easily become subject to irrational, ambiguous, arbitrary and racist line-drawing along the friend-enemy distinction renders decisions on the exception suspect and should open them to the widest possible outcomes-oriented scrutiny.

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296. Walker, *supra* note 289, at 16.

297. It is hard, for example, even to imagine one non-racialized "enemy" of the United States in the post-Cold War era, unless we count the countries of Rumsfeld's "old Europe."

## V. CONCLUSION: THE SECURITIZATION OF RACE

“The tradition of the oppressed teaches us that the ‘emergency situation’ in which we live is the rule.”<sup>298</sup> The Japanese internment constitutes a thematic common denominator in practically all post-September 11 legal analyses of state security powers. This is actually somewhat surprising since the internment jurisprudence had not been viewed as a precedential centerpiece in the sub-discipline of national security and foreign affairs prior to September 11.<sup>299</sup> The internment, however, has become important for the ways it symbolizes a trauma or an evil that the nation as a whole somehow acknowledges (as past), survives and transcends.<sup>300</sup> Viewing the internment as symbolic of a nationally transcended evil parallels the dominant constitutional “survivor story” that legal liberalism in the United States tells with regard to slavery.<sup>301</sup>

Such survivor stories, according to which everyone within the nation is equally a “victim” and survivor of the past evil, along with related regimes of “survivor justice,” assume a strategic role in moving the “nation” forward in the aftermath of systemic evil, while also in purging the state of accountability. Unsurprisingly, the winners under conditions of survivor justice are not the real victims of the past or present evils, but rather those who benefit under the hegemonic conditions of such systemic injustice.<sup>302</sup> Under the logic of survivor justice, equal protection principles can be interpreted as being void of anti-subordinationist commitments such that would legitimate robust substantive and effects-based “victim justice.”<sup>303</sup> Indeed, just as Lincoln viewed demonization of the defeated South as an evil in itself, attempts to rectify injustices at the expense of “innocent” ben-

298. Walter Benjamin, *The Concept of History*, GESAMMELTEN SCHRIFTEN I:2 Suhrkamp Verlag, Frankfurt am Main (Dennis Redmond trans., 2001) (1974), available at [http://www.efn.org/~dredmond/Theses\\_on\\_History.PDF](http://www.efn.org/~dredmond/Theses_on_History.PDF).

299. See Gott, *supra* note 16, at 194-202 (describing discipline’s treatment of *Curtiss-Wright* and *Youngstown* cases as discipline’s orienting precedents). On another level, of course, discussion of the internment seems quite natural in the post-September 11 context. Conditions facing Muslims, Arabs and South Asians recall the anti-Japanese racial animus of the World War II era, and the scholarship rightly focuses on the internment as symbolic of the nation’s relationship to racialized subordination of “enemy minorities.”

300. See generally Robert Meister, *Two Concepts of Victimhood in Transitional Regime* (1998). (“The point of survivor’s justice, thus conceived, is to go forward on a common moral footing—not because the past has been forgiven or forgotten, but because continuing to struggle against an evil that is gone is no longer appropriate, and may be morally equivalent to reviving it.”).

301. See Robert Meister, *Sojourners and Survivors: Two Logics of Constitutional Protection*, 3 U. CHI. L. SCH. ROUNDTABLE 121, 123 (1996) (“The figure of the sojourner was generalized to encompass the believer in an alien creed, the member of a marginal group, and eventually the bearer of an alternative conception of human normality. The figure of the slave was similarly generalized . . .”).

302. See *id.* at 170 (discussing that survival protections are typically afforded only after victimized groups survive).

303. See *id.* at 137-44 (emphasizing recognition and change to encourage unity rather than reparations for past actions that continue to discriminate).

efficiaries-cum-victims of that injustice can be viewed as evil under survivor justice.<sup>304</sup>

In the immediate context of the war on terrorism, treating the internment as transcended/survived has the effect of de-historicizing the current repression of Muslims, Arabs and South Asians, disconnecting it from the ongoing related national traumas of racist psychologization of security and threat, reactionary assertions of white national identity and the attendant subjection of liberal democratic values to the paranoid closures of the security state.<sup>305</sup> When the internment is instead taken to symbolize an imperative of political accountability toward racial injustices, it underwrites a model of constitutional justice as a continuation of the various justice struggles that Japanese Americans and their supporters have waged, from the “no-no” movement and other resistance efforts in the internment camps themselves, to the reparations and redress campaign of the 1980s and 90s.<sup>306</sup>

Viewing the “internment this time” as rooted in these ongoing traumas puts into play strategies and models of constitutional justice that form part of an unbroken chain—call it a constitutional solidarity—with anti-internment justice struggles. Under such models of justice the state—in distinction from the security state with its racialized friend-enemy logic, overweening assurance imperative, legitimation issues, etc.—links the present with the past, in Benjamin’s terms, messianically. Accountability is insured in a present that is “shot through” with the traumatic past. Contemporary institutions and actions are rooted in a-temporal solidarity with anti-subordinationist struggle. There can be no easy redemption through “transcendence” of past evil, a notion premised on a positivist view of history that Benjamin rejects. Past and present form a constellation, and grasping that constellation is a redemptive act that itself necessarily transcends positivist management of the past.

As ambitious as such an anti-subordinationist vision may sound under current conditions, it seems entirely in sync with the spirit of Justice William Brennan’s pragmatic security jurisprudence, summed up in a speech he gave at the Law School of Hebrew University in 1987:

A jurisprudence capable of braving the overblown claims of national security must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact, explores their relation to the exercise of civil freedoms, and probes the limits of their compass. This sort of true

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304. *See id.* at 143-44 (“For Lincoln the central point is that, together, we survived an experience that almost killed us . . . . Lincoln’s story of national survival is not reparations, but rather a new beginning—a new covenant between former victim and the former perpetrator . . . .”).

305. *See* ROGIN, *supra* note 288, at 76 (resulting in increased reactionary surveillance and FBI activities).

306. Again, I owe this framing to Robert Meister. For a further discussion of Meister’s position, *see* Meister, *supra* note 300 and accompanying text.

familiarity cannot be gained merely by abstract deduction, historical retrospection, or episodic exposure, but requires long-lasting experience with the struggle to preserve civil liberties in the face of a continuing national security threat.<sup>307</sup>

Though framed literally in the familiar terms of individual civil liberties, Brennan's jurisprudence entails a substantive and processual pre-commitment to combat security-induced injustices, especially in light of "overblown" national security claims. Brennan also incorporates a critical understanding of the constructedness of security threats themselves and an awareness of the complex linkages between the realm of national security and threat construction and the realm of social freedom.

Brennan's vision, then, comprises substantive and processual commitments as well as conceptual complexity in a way that appears wholly in accord with the primacy afforded here to group-based dimensions of state security overreach. The record from the new war on terror makes it abundantly clear that in order to be effective now our venerated liberal democratic tradition of resisting and containing state security overreach must be nurtured by our "long-lasting experience" and "intimate familiarity" with the subordinationist, group-based effects of national security law. Otherwise, we will fail to engage the central crisis of the time, involving at once the various devils the state tells us it knows and the sort of subordinationism that our society knows all too well.

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307. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis*, 18 *ISR. Y.B. HUM. RTS.* 11, 20 (1988).

