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## Terror and Race

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# Terror and Race

Girardeau A. Spann\*

## I. INTRODUCTION

The United States is now engaged in an internationally prominent war on terror. That war, however, is being waged in a way that threatens to cause the same types of harm to the democratic values of the United States that the Nation's terrorist enemies are hoping to inflict. Foreign terrorists are attempting to undermine the fundamental liberties that United States culture claims to hold dear. But those are the same liberties that our own government has asked us to forego in its effort to win the war on terror. The paradoxical irony entailed in the United States government's demand that its own citizens oblige the terrorists by voluntarily incurring these self-inflicted injuries suggests that the terrorists may be operating at a more sophisticated level in their external culture wars than is typically understood. However, any terrorist strategy of enlisting the United States government as an unwitting agent for the infliction of domestic oppression is unlikely to succeed. That is because the United States also operates at a more sophisticated level in its internal culture wars than is typically understood. Most citizens of the United States will ultimately *not* have to internalize the burdens on fundamental freedoms that flow from the war on terror. Instead, the bulk of those burdens will be diverted to racial minorities—just as the bulk of the Nation's other domestic burdens typically are. In this way, racial minorities will be used by the majority to reconcile the seemingly divergent liberty and security interests that the war on terror is commonly thought to present.

Some prominent constitutional scholars, such as Professor Erwin Chemerinsky, have highlighted the threats to civil liberties posed by the George W. Bush Administration's war on terror.<sup>1</sup> Other prominent constitutional scholars, such as Professor David Cole, have emphasized that ethnic and religious minorities tend to pay a disproportionately high share of the costs attendant to the Administration's war on terror.<sup>2</sup> Liberal scholars, such as Chemerinsky and Cole, therefore believe that the federal judiciary should be more vigilant in guarding against the erosion of civil liberties that predictably

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1. See Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1, 1 (2005) (discussing threats to civil liberties); see also DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 1-14 (2003) (same).

2. See COLE, *supra* note 1, at 1-14 (arguing that non-citizen Arab and Muslim foreign nationals tend to be the ones whose civil liberties are disproportionately curtailed by the war on terror).

occurs in times of threat to our national security. They also believe that the various players in our democratic governmental process should guard against the natural inclination to impose discriminatory burdens on the liberty of unpopular minorities as a way of advancing the perceived security of the majority.<sup>3</sup> However, more skeptical commentators, such as myself, believe that the present sacrifice of minority liberty for majority security is simply a form of racial discrimination. As such, it is an inevitable feature of United States liberalism that cannot be prevented through heightened judicial vigilance or enhanced democratic attentiveness. The Nation's history suggests that the sacrifice of racial minority interests for majoritarian gain is simply a defining characteristic of United States culture. Moreover, a realistic process by which the culture could surmount that form of entrenched racial inequality is presently unimaginable. The most that can realistically be imagined is a renewed national commitment to the culture's incremental efforts at palliative care. But that will do more to make the majority feel better about its racially discriminatory inclinations than it will to curtail the pervasiveness of those inclinations. The available evidence suggests that racial discrimination, such as that which characterizes the United States war on terror, is a structural feature of United States culture that will remain with us for the foreseeable future.

Part II of this article discusses the relationship between terrorism and loss of liberty. Part II.A argues that the deprivation of liberty constitutes the essence of terrorism. Part II.B argues that the United States war on terror ironically entails a similar deprivation of liberty, both for the foreign targets of that war, and for the domestic residents whose liberty that war is supposed to protect. Part III argues that racial minorities are the ones who end up internalizing the deprivations of liberty that are caused by the war on terror. Part III.A describes how this loss of liberty has been diverted from the majority to racial minorities. Part III.B argues that the sacrifice of racial minority rights for majoritarian gain has historically been so endemic in United States culture that it is unrealistic to expect democratic attentiveness or judicial review to safeguard the liberty of racial minorities. Part IV concludes that it is difficult to imagine how such intrinsic racial discrimination could come to an end in the United States as we know it.

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3. See Chemerinsky, *supra* note 1, at 1-3 (objecting to civil liberties violations in the war on terror); COLE, *supra* note 1, at 206-08 (discussing the need to adhere to the rule of law and to abandon double standards that treat United States citizens more favorably than foreign nationals).

## II. THE WAR ON TERROR

The primary goal of terrorist activity directed against Western democracies, such as the United States, is to undermine the fundamental liberties that those societies value most highly. The general sense of freedom, self-determination, personal autonomy, and security that characterizes liberal culture—which in the United States is sometimes referred to as the “American way of life”—is jeopardized by the psychological sense of fear, anxiety, and insecurity that terrorist activity produces. However, the United States war on terror also shares this feature of terrorism because it too undermines the fundamental liberties of those whom it affects. It infringes the liberties of unintended foreign victims of United States counterterrorism measures. It also infringes the liberties of the very domestic United States citizens and residents whom the war on terror is intended to protect.

### A. *Terrorism and Liberty*

Terrorism is the intentional infliction of violence or turmoil on noncombatants. It is motivated by the desire of political or ideological actors—who have characteristically lost their capacity for empathy with their victims—to convey a message that will have a disruptive psychological impact on the intended “audience for terrorism.” That audience typically consists of a target population, and the desired impact is typically the production of sufficient fear, anxiety, and insecurity to cause the members of that population to be apprehensive about engaging in the normal activities of everyday life. A secondary audience for terrorist activity may consist of potential foreign or domestic sympathizers with terrorist causes. The desired impact on those sympathizers may be an increased sense of identity or solidarity with the terrorists and their political or ideological objectives.<sup>4</sup>

Most terrorism appears to be instrumental in nature. It is intended to prompt the target population to make specific political concessions—such as the removal of military forces, the return of land, or the recognition of independent sovereignty.<sup>5</sup> Other terrorism may be motivated more by ideological animosity than by immediate instru-

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4. See PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* 9, 15-19 (1998) [hereinafter HEYMANN, *TERRORISM AND AMERICA*] (discussing psychological effects of terrorist acts on the “audience for terrorism”); PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 12, 15-16 (2003) [hereinafter HEYMANN, *TERRORISM, FREEDOM, AND SECURITY*] (discussing psychological effects of terrorism on potential sympathizers); JESSICA STERN, *TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL* xx-xxiv, xxvi, xxviii-xxix, 6-8 (2003) (emphasizing violence directed at noncombatants by terrorists who dehumanize, and thereby lose the capacity to empathize with, their victims).

5. See HEYMANN, *TERRORISM AND AMERICA*, *supra* note 4, at 9-12 (discussing political motives of terrorists); STERN, *supra* note 4, at 6-8 (same).

mental objectives.<sup>6</sup> This is illustrated by the post-9/11 suggestion of President George W. Bush that “they hate us” for “our freedoms,”<sup>7</sup> or the more plausible suggestion that some fundamentalist cultures disapprove of the self-indulgent Western hedonism that is epitomized by the “sex, drugs, and rock & roll” metaphor for the United States consumer culture.<sup>8</sup>

Whether instrumental or motivated by animosity, terrorism can be understood as an effort to increase the costs associated with the exercise of fundamental liberties by the target population. When instrumental terrorism raises the economic and non-economic costs of retaining those liberties enough to outweigh the benefits of continued resistance to the political concessions that terrorists seek, the target population will have an incentive to accede to at least some of the terrorist demands. To the extent that terrorism is motivated by more abstract ideological animosity, an increase in the costs of exercising fundamental liberties will intensify the harms that terrorists wish to inflict on the target population.<sup>9</sup>

The governmental leaders of target populations often state that they will not yield to terrorist demands, because to do so would invite additional acts of terrorism, intended to extort additional concessions.<sup>10</sup> However, credible terrorist threats can nevertheless prompt low-visibility concessions. For example, the United States withdrew

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6. See STERN, *supra* note 4, at 6-8 (discussing religious and ideological motives of terrorists).

7. See President George W. Bush, *Address to a Joint Session of Congress* (Sept. 20, 2001), available at <http://www.cnn.com/2001/US/09/20/gen.bush.transcript/> (“Americans are asking ‘Why do they hate us?’ They hate what they see right here in this chamber: a democratically elected government. Their leaders are self-appointed. They hate our freedoms: our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.”).

8. See STERN, *supra* note 4, at 5-7 (discussing desire to “purify[] the world” as a terrorist motive); cf. HEYMANN, *TERRORISM AND AMERICA*, *supra* note 4, at xvii-xx, 12 (discussing how anger at mainstream United States culture and association with right-wing militias prompted Timothy McVeigh to become the central player in the 1995 Oklahoma City bombing of the Alfred P. Murrah Federal Building).

9. See HEYMANN, *TERRORISM AND AMERICA*, *supra* note 4, at 15-18 (discussing cost-benefit model of terrorism). Terrorism tends to be most destabilizing when directed at target populations that are sharply divided along political or ideological lines, because government efforts to combat terrorism are less likely to be effective if significant segments of the population are already disaffected or already support the objectives of the terrorists. See *id.* at 12-15 (discussing effect of divided populations).

10. See, e.g., Carlotta Gall, *Taliban Suspected in Killing of 11 Chinese Workers*, N.Y. TIMES, June 11, 2005, at A15, available at 2004 WLNR 5470276 (China will not give in to terrorists); Mary Manning, *Woman Killed in Terrorist Attack Eulogized in Vegas*, LAS VEGAS SUN, Aug. 4, 2005, at B1, available at 2005 WLNR 12465337 (Egypt will not give in to terrorists); Susan Milligan, *Bush Urges Patience, Long View on Iraq War; Cites 9/11 Lessons, Need to Protect U.S.*, BOSTON GLOBE, June 29, 2005, at A1, available at 2005 WLNR 10231479 (President George W. Bush insists that the United States will not give in to terrorists); Fiona O’Brien, *Italian Prime Minister Resolute Despite Slaying; Group Kills Hostage; Berlusconi Vows to Keep Troops in Iraq*, GLOBE & MAIL (Toronto, Can.), Apr. 15, 2004, at A15, available at 2004 WLNR 18403148 (Italian Prime Minister refuses to give in to terrorists); Neil Young, *Make Sure We’re Not Next*, WESTERN MORNING NEWS (U.K.), July 8, 2005, at 1, available at 2005 WLNR 10747671 (British Prime Minister Tony Blair states that the United Kingdom will not give in to terrorists).

military forces from Lebanon in response to the 1983 bombing of its Marine barracks and sold missiles to Iran in a 1986 effort to secure the release of American hostages.<sup>11</sup>

Credible threats to fundamental liberties are perceived as particularly vivid by civilian populations, especially when they entail the risk of random physical violence inflicted at unpredictable times in unpredictable locations. As a result, governmental leaders are under strong domestic pressure to take *some* action to neutralize the anxiety caused by terrorist threats. This can give a small number of loosely organized terrorists the ability to extract a disproportionately high degree of concessions from a government seeking to protect the liberty and personal security of its citizens. When the magnitude of the terrorist threat is further augmented by factors such as persistence, frequency, access to domestic soil, access to suicide bombers, or access to weapons of mass destruction, it is likely that the costs to the target population of preserving fundamental liberties can be made high enough to yield potentially significant concessions.<sup>12</sup>

Because terrorism works best when its costs to the target population are maximized, it is rational for terrorists to pose threats that are as draconian as possible. Terrorists may attempt to do this by threatening to inflict random injury or death on men, women, and children who innocently engage in commonplace activities such as shopping, going to work, going to school, utilizing mass transit, opening mail, ingesting food and water provided for mass consumption, or simply living in high-risk locations. By depriving civilian populations of their fundamental liberty to engage in such activities, terrorism is widely regarded as ruthless, immoral, despicable, and evil. But it is precisely those demonic qualities that are most likely to make governments modify their policies and political agendas in ways desired by terrorists. The greater the threat to liberty, the greater the perceived terror, the more likely the population is to demand remedial action, and the more likely the terrorists are to secure concessions. Accordingly, the essence of terrorism is the imposition of high perceived costs on the exercise of fundamental liberties.

### B. *Liberty and the War on Terror*

Terrorism seems particularly repugnant to residents of the United States because it threatens to undermine the liberal autonomy that characterizes the American way of life. Moreover, United States culture has not yet acclimated to acts of terror in the way that some Eu-

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11. See HEYMANN, *TERRORISM AND AMERICA*, *supra* note 4, at 15, 17 (discussing reluctance to make concessions to terrorist demands, but citing examples of such concessions).

12. See *id.* at 15-18 (discussing terrorist leverage).

ropean countries arguably have, because terrorist acts on United States soil are still of relatively recent vintage, and their occurrence has been of relatively low frequency. As a result, the United States has now declared a vigorous war on terror in a stated effort to preserve the liberties that have traditionally been associated with United States culture.<sup>13</sup>

Ironically, however, the war on terror has itself come to pose a threat to the liberal values that underlie the fundamental liberties that United States culture values so highly. The war on terror undermines the liberty interests of foreign noncombatants who are unintentionally injured by United States counterterrorism measures. It also erodes the liberty interests of United States citizens and residents who are asked to relinquish some of their fundamental liberties in the name of national security. Indeed, some have even characterized the war on terror as promoting the same “evil” that terrorism itself promotes.<sup>14</sup>

### 1. Foreign Infringements

The war on terror directly and seriously infringes the liberty interests of foreign noncombatants who are injured or killed as a result of the “collateral damage” resulting from United States military action directed at suspected terrorists. For example, thousands of non-combatant civilians have been injured or killed by United States ordnance in the post-9/11 military actions that the United States initiated in Afghanistan and Iraq. To date, estimates of civilian casualties have exceeded 3,000 in Afghanistan<sup>15</sup> and have approached 25,000 in Iraq.<sup>16</sup> These estimates are imprecise because the pertinent casualty

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13. See Roger Cohen, *Freedom's New Ring: War on Terror; Recast Globalist*, INT'L HERALD TRIB., Jan. 22, 2005, at 2, available at 2005 WLNR 949691 (discussing President George W. Bush's post-9/11 declaration of war on terror); Richard H. Kohn, *Four More (War) Years; Can He Write a Better Script?*, WASH. POST, Jan. 16, 2005, at B01, available at 2005 WLNR 9619519 (same).

14. See, e.g., MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 1-24 (2004) (equating “evils” in terrorism and war on terror); see also Martha Minow, *What Is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2135-36 (2005) (book review of IGNATIEFF, *supra*).

15. See Barry Bearak et al., *A Nation Challenged: Casualties; Uncertain Toll in the Fog of War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002, § 1, at 1, available at 2002 WLNR 4060955 (describing estimates ranging from a low of hundreds to a high in the range of 1,000 to 3,000 civilian casualties in Afghanistan); Marc W. Herold, *A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting [Revised]*, Mar. 2002, available at [http://www.cursor.org/stories/civilian\\_deaths.htm](http://www.cursor.org/stories/civilian_deaths.htm) (reporting from 3,000 to 3,400 civilian casualties in Afghanistan between October 2001 and March 2002).

16. See Hassan M. Fattah, *The Struggle for Iraq: The Tally; Civilian Toll in Iraq Is Placed at Nearly 25,000*, N.Y. TIMES, July 20, 2005, at A8, available at 2005 WLNR 11332812 (discussing statistical survey of civilian deaths in Iraq); see also Iraq Body Count, <http://www.iraqbodycount.net/> (last visited on July 29, 2005) (Internet homepage for Iraq Body Count survey). Some estimates of civilian casualties in Iraq have been as high as 100,000. See Fattah, *supra*.

figures are not officially compiled or maintained by the United States.<sup>17</sup>

In a very real sense, foreign civilian casualties are not counted, because such casualties appear not to “count” in the United States war on terror.<sup>18</sup> The United States tends to regard those deaths and injuries as inevitable casualties of a war that is necessary to preserve United States liberty and security. However, viewed from the perspective of those who actually suffer the civilian casualties inflicted by the United States in foreign countries, United States military action must look very much like the terrorism that is abhorred in this country. It must appear to be politically motivated violence that is inflicted in a largely random manner, in a way that instills widespread fear and anxiety so as to undermine the liberty of its victims to engage in the normal activities of everyday life.<sup>19</sup>

In addition to the civilian casualties produced by United States ordnance, there are now credible allegations of torture and prisoner abuse conducted by the United States or initiated by United States rendition of prisoners to foreign governments. Such torture and abuse also interferes in obvious ways with the liberty interests of the foreign prisoners who are tortured or abused.<sup>20</sup> Moreover, the United States now detains such prisoners incommunicado for long periods of time as enemy combatants, without charging them with any crime, and without according them the procedural safeguards designed to establish innocence or guilt that the United States typically views as components of a criminal suspect’s fundamental liberty interests. Such detentions are occurring most visibly at the United States military base in Guantánamo, Cuba, where the United States claims the right to leave the fates of those detainees in the hands of military tribunals.<sup>21</sup>

One reason that the United States seems to feel justified in its harsh treatment of foreign prisoners is that the United States views the terrorists against whom the war on terror is being waged as non-state enemies who do not honor the obligations of international law, thereby freeing the United States from its duty to honor the obliga-

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17. See Bearak, *supra* note 15 (discussing difficulty in obtaining accurate information about civilian deaths in Afghanistan); Fattah, *supra* note 16 (noting lack of definitive account of how many civilians have died in Iraq).

18. Cf. Herold, *supra* note 15 (suggesting that United States military discounts the value of Afghan lives).

19. Cf. Jane Wardell, *Antiwar Activists Protest Bush Benefit in London*, PHILA. INQ., May 19, 2004, at A13, available at 2004 WL 3680723 (reporting London protests in which George W. Bush is called a terrorist because of war in Iraq).

20. See Minow, *supra* note 14, at 2134-35 (discussing torture and prisoner abuse by United States troops); Josh White, *Documents Tell of Brutal Improvisation by GIs; Interrogated General's Sleeping-Bag Death, CIA's Use of Secret Iraqi Squad Are Among Details*, WASH. POST, Aug. 3, 2005, at A01, available at 2005 WLNR 12159081 (describing United States military participation in prisoner abuse and death in Iraq).

21. See Chemerinsky, *supra* note 1, at 8-12 (discussing detention of foreign prisoners); COLE, *supra* note 1, at 39-46 (same).



tions of the Geneva Conventions with respect to those prisoners.<sup>22</sup> However, while the United States considers the prisoners that it detains to be “enemy combatants,” that designation is made unilaterally by the government with little or no judicial review, and many of those prisoners claim that they are in fact mere innocent civilians. They further claim that they could prove their innocent civilian status if they were accorded the procedural safeguards normally accorded criminal defendants in the United States.<sup>23</sup>

Some people might be inclined to discount the liberty deprivations entailed in the infliction of foreign civilian casualties, or the abuse of foreign detainees, precisely because those deprivations are suffered by foreigners rather than by United States citizens.<sup>24</sup> But such a view is at odds with the liberal equality principle that underlies the stated commitment of the United States to fundamental liberties.<sup>25</sup> Moreover, it also manifests the same dehumanizing lack of empathy that has permitted terrorists to inflict the horrific injuries that they have inflicted on innocent civilians in the United States.<sup>26</sup> Aside from the immediate effect that deprivations of liberty have on foreign citizens, the practice of discounting the interests of foreign citizens should be troubling inside the United States as well. An essential component of the liberties that are at stake in the war on terror is the self-perception of the United States as a country that is committed to maintaining a fair and just society, rather than a society in which violence, coercion, and oppression are permitted to flourish whenever it is in the Nation’s perceived self-interest to look the other way.

Many foreign victims of the United States war on terror are likely to view the United States itself as a practitioner of terrorist acts in its infliction of collateral damage.<sup>27</sup> That is particularly true with respect to the civilian casualties inflicted by the United States in Iraq because the weapons of mass destruction and African-uranium justifications

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22. See HEYMANN, *TERRORISM, FREEDOM, AND SECURITY*, *supra* note 4, at 10-11 (discussing expansive view of United States international authority). This view has also caused an expansion in the United States interpretation of when military action is permitted against foreign states who are suspected of supporting or facilitating terrorism. *See id.*

23. See Chemerinsky, *supra* note 1, at 3-8 (discussing lack of safeguards accorded prisoners designated “enemy combatants”); COLE, *supra* note 1, at 39-46 (same).

24. See, e.g., Herold, *supra* note 15 (suggesting the United States military discounted the value of Afghan lives in its bombing of Afghanistan).

25. The Equal Protection Clause of the United States Constitution states as follows: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. The Supreme Court has held that a tacit equal protection principle contained in the Fifth Amendment Due Process Clause also applies to the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Equal protection principles apply with special force where government actions are alleged to burden the exercise of “fundamental interests.” *See* GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 768-84 (5th ed. 2005) (discussing heightened judicial scrutiny for fundamental interest equal protection).

26. See STERN, *supra* note 4, at xxiii-xxiv, xxviii-xxix (suggesting that terrorists lack empathy with victims of their terrorist acts).

27. *Cf.* Wardell, *supra* note 19 (reporting accusations of United States terrorism).

for those injuries have proved to be false.<sup>28</sup> Although the United States offers a range of national security justifications for the injuries caused by its counterterrorism measures, those justifications are likely to be no more persuasive to the foreign noncombatants who suffer those injuries than the justifications offered by foreign terrorists are to those who suffer injuries inflicted by terrorist acts in the United States. Both are likely to be viewed as little more than political or ideological rhetoric. The United States arguably lacks the purposeful intent to inflict injuries on noncombatants and detainees that is generally attributed to foreign terrorists, but the distinction between actuating intent and the deliberate disregard of known effects is likely too tenuous a distinction for the victims of United States military action to view as analytically coherent.<sup>29</sup>

## 2. Domestic Infringements

The United States war on terror has also caused the United States government to constrain the fundamental liberties of its own citizens and residents in order to advance the government's perceived national security interest in preventing acts of terrorism on United States soil. Among the most notable constraints are those contained in the USA Patriot Act (Patriot Act),<sup>30</sup> which was quickly signed into law six weeks after the 9/11 terrorist attacks on the Pentagon and the World Trade Center, without the benefit of public hearings.<sup>31</sup>

The Patriot Act adopts a broad definition of terrorist activity that includes not only any violation of state or federal law, but also any effort to coerce government or civilian populations—seemingly encompassing even ordinary political protests, such as civil rights or right-to-life demonstrations. Applying this definition, the Act authorizes significant invasions of privacy by permitting the government to gather information from entities such as libraries, book stores, and

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28. See Walter Pincus, *Prewar Findings Worried Analysts*, WASH. POST, May 22, 2005, at A26, available at LEXIS, News (discussing inaccuracy of Administration claims concerning Iraqi uranium program and weapons of mass destruction).

29. The Supreme Court has tried to maintain such a distinction in determining what constitutes unconstitutional "intent" for equal protection purposes. Compare *Washington v. Davis*, 426 U.S. 229, 239-45 (1976) (requiring intentional discrimination to establish equal protection violation), with *Pers. Adm'r v. Feeney*, 442 U.S. 256, 278-79 (1979) (holding that mere awareness of known discriminatory effects was not sufficient to satisfy the intent requirement of the equal protection clause). However, the purported distinction between actuating intent and mere tolerance of known discriminatory effects cannot withstand meaningful analysis. See GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 60-66 (1993) (deconstructing supposed distinction between intent and effects).

30. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter *Patriot Act*] (codified as amended in several titles and scattered sections of U.S.C.).

31. See COLE, *supra* note 1, at 57 (discussing adoption of the Patriot Act); cf. Chemerinsky, *supra* note 1, at 2 (noting that Attorney General John Ashcroft and the Bush Administration rushed Patriot Act proposals to Congress after 9/11 attacks, and noting that Act was passed without public hearings).

credit card companies without the showing of probable cause that is customarily required for law enforcement purposes. Moreover, the Act does not allow individuals to be informed that their records have been provided to the government. The Act also authorizes expanded electronic surveillance of e-mail addresses and Internet websites, as well as roving wiretaps of any cell phone or other phone that could conceivably be used by the target of a government investigation. In addition, the Act permits any information acquired under its foreign intelligence provisions to be used in domestic criminal proceedings not involving terrorism, even though the information was acquired without regard to customary Fourth Amendment safeguards.<sup>32</sup>

Like the Patriot Act's erosions of privacy, other liberty restrictions apply to citizens and non-citizen residents alike. Both are prohibited from providing material support to disfavored organizations, at the risk of having their financial assets frozen after secret administrative proceedings. Attorney General John Ashcroft also expanded the scope of FBI guidelines in order to permit greater FBI surveillance of political and religious activities that are not related to criminal law enforcement. In addition, new Justice Department guidelines now permit the government to monitor traditionally privileged attorney-client communications between prisoners and their lawyers when the government suspects a possible connection to broadly-defined terrorist activities or threats.<sup>33</sup>

The war on terror has also caused an increase in *de facto* ethnic profiling, directed at individuals who appear to be Arab or Muslim, in a way that infringes the liberties of both citizens and non-citizens. Although the government has disclaimed any intent to engage in *de jure* ethnic profiling, most targets of its post-9/11 immigration initiatives have been Arab or Muslim. Moreover, the government's *de facto* ethnic profiling has reinforced private ethnic discrimination, such as the discrimination that occurs when airlines acquiesce in the prejudices of nervous passengers by transferring minority United States citizens to alternate flights when their ethnicity causes other passengers to feel

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32. See Chemerinsky, *supra* note 1, at 14-19 (discussing loss of privacy under the Patriot Act); cf. COLE, *supra* note 1, at 57-69 (discussing loss of privacy under the Patriot Act, but suggesting that some of the described provisions, such as roving wiretaps and sharing of foreign intelligence information with domestic law enforcement officials, do not pose serious civil liberties problems).

33. See COLE, *supra* note 1, at 72-82 (discussing restrictions on citizen and non-citizen liberties).

uncomfortable.<sup>34</sup> This phenomenon has been referred to as the problem of “flying while brown.”<sup>35</sup>

Some restrictions on liberty apply with special force to resident aliens. Massive numbers of United States residents who are foreign nationals have apparently been held in indefinite preventive detention by the government. They have been detained pretextually for either technical immigration violations or as “material witnesses.” The government no longer discloses the number of these detainees, but virtually none have been charged with or convicted of offenses related to terrorism.<sup>36</sup> United States residents who are foreign nationals are subject to a broader definition of terrorism under the Patriot Act than are United States citizens. These resident aliens are also subject to special sanctions such as deportation and incarceration for political speech, associational activities, or the provision of material support to disfavored organizations. The Attorney General unilaterally determines which disfavored organizations trigger the legal prohibitions on political association or material support, and those determinations are subject to little or no judicial review. Moreover, “material support” could include activities that would normally be considered far removed from terrorism, such as the provision of funds to the African National Congress to fight apartheid, or the provision of blankets to a hospital affiliated with a charity that the Attorney General might deem to have terrorist sympathies.<sup>37</sup> When judicial review is provided under the Act for government determinations affecting the liberty of foreign nationals (or United States citizens), those proceedings are sometimes held in secret, and sometimes only the government is authorized to appeal from adverse decisions.<sup>38</sup> In many Patriot Act proceedings, therefore, the judicial review on which we typically rely to ensure the protection of fundamental liberties is either ephemeral or entirely absent.

The United States government’s declaration of a “war” on terror has increased the government’s self-perceived authority to operate militarily on foreign soil and to diminish the liberties of United States citizens and residents on domestic soil. Moreover, the current Bush Administration has invoked this state of “war” as a justification for

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34. *See id.* at 47-56 (discussing ethnic profiling). The presence of any real threat to airline security is belied by the fact that the airlines simply put the ethnically troubling passengers on later flights, without additional security checks. *See id.* at 47.

35. *See* Sasha Polakow-Suransky, *Flying While Brown: Must Arab Men Be Racially Profiled?*, AMER. PROSPECT, Nov. 19, 2001, at 14 (describing practice of discriminatory removal of airline passengers).

36. *See* COLE, *supra* note 1, at 22-46 (discussing use of technical immigration violations and material witness status for purposes of preventive detention).

37. *See id.* at 57-64 (discussing restrictions on liberty of resident aliens).

38. *See id.* at 65-69 (discussing secret judicial proceedings); *see also* Chemerinsky, *supra* note 1, at 2, 17 (same).

resisting judicial and congressional efforts to protect fundamental liberties from executive overreaching, and for operating behind a veil of secrecy that helps to insulate executive action from oversight by the co-ordinate branches of government.<sup>39</sup> The rhetorical value of the term “war” is that it conveys the idea that some sacrifice of liberty is essential for national security, but that the sacrifice will be only temporary in nature—lasting only as long as the duration of hostilities. Such “war” rhetoric, however, may be inappropriate in the context of terrorism.

The abridgments of liberty that the Administration favors in the name of national security, like the terrorism to which those abridgments respond, seem likely to persist for an indefinite period of time. This undercuts any constructive democratic “consent” to restrictions on liberty that might otherwise be said to flow from the Administration’s use of “war” rhetoric, suggesting instead that political acquiescence in such restrictions may reflect merely a popular misunderstanding of what is at stake.<sup>40</sup> Nevertheless, the Administration seems to promote the view that current terrorism problems are temporary rather than indefinite in nature by insisting repeatedly that the United States will “win” the war on terror.<sup>41</sup>

The Administration has tried to reduce political challenges to the loss of liberty entailed in its war on terror by questioning the loyalty and patriotism of those who oppose the Administration’s policies—a political move that is captured by the Administration’s decision to

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39. See HEYMANN, *TERRORISM, FREEDOM, AND SECURITY*, *supra* note 4, at 11, 13, 17 (discussing claimed expansion of executive power resulting from declaration of “war” on terror).

40. See *id.* at xii-xiii, 18 (discussing inappropriateness of “war” rhetoric to justify sacrifice of liberties that are likely to be of indefinite duration). As testimony to the likely indefinite duration of both terrorism and the war on terror, the Bush Administration is presently attempting to secure passage of legislation that would make the restrictions on liberty contained in the Patriot Act permanent, rather than merely temporary, in nature. See Dan Eggen, *Senate Approves Partial Renewal of Patriot Act; Measure Would Limit Search and Seizure Powers*, WASH. POST, July 30, 2005, at A03, available at 2005 WLNR 11977714 (discussing efforts to renew expiring provisions of the Patriot Act).

41. See, e.g., Shailagh Murray, *House Approves War Funding; 81.4 Billion Exceeds Combat Request, Trims Other Plans*, WASH. POST, Mar. 17, 2005, at A23, available at LEXIS, News (President Bush emphasizing need to win war on terror); Richard W. Stevenson, *The 2004 Campaign: The President; Bush Attacks Kerry as Weak on Security*, N.Y. TIMES, Oct. 23, 2004, at A13, available at 2004 WLNR 4537794 (Bush claiming that his opponent John Kerry would not be able to win war on terror). *But cf.* Elisabeth Bumiller, *The Republicans: The Convention in New York—The President; Bush Cites Doubt America Can Win War on Terror*, N.Y. TIMES, Aug. 31, 2004, at A1, available at 2004 WLNR 5537218 (stating that United States might not be able to win the war on terror, but could make it less of a world threat). There is at least one hopeful sign that the expanding reign of world terrorism will not ultimately prove to be of indefinite duration. Recently, the Irish Republican Army declared a cessation of its thirty-year campaign of paramilitary terrorism against British rule in Northern Ireland, pledging to continue its struggle through political rather than violent means. See Jim Dwyer & Brian Lavery, *I.R.A. to Give Up Violence in Favor of Political Struggle, American Publisher Says*, N.Y. TIMES, July 27, 2005, at A12, available at 2005 WLNR 11754738; Glenn Frankel, *IRA Says It Will Abandon Violence; Shift Follows Decades of N. Ireland Conflict*, WASH. POST, July 28, 2005, at A01, available at LEXIS, News.

name its primary statute the “USA Patriot Act.”<sup>42</sup> Moreover, the Administration understands that the suggested benefits of heightened security are likely to be viewed by the public as relatively immediate, whereas the costs of the attendant incursions on civil liberties are likely to be perceived as more remote. That skews the perceived cost-benefit balance that the public is asked to strike between liberty and security in a way that is likely to promote sympathy for the government’s counterterrorism proposals.<sup>43</sup> This is particularly true when one realizes that most United States citizens will not actually have to pay the costs entailed in the trade-off between liberty and security that the war on terror is said to demand.

### III. TERROR AND RACE

Instrumental terrorism “works” only to the extent that the political or ideological concessions demanded by terrorists can be met at a cost that is lower than the cost of continued resistance to terrorist demands. As a result, terrorists have an incentive to maximize the costs associated with the exercise of fundamental liberties in the cultures that they target, and the targeted cultures have an incentive to minimize those costs.<sup>44</sup> The self-inflicted loss of domestic liberty that is produced by the United States war on terror, therefore, has the ironic effect of actually facilitating terrorist objectives by increasing the costs inflicted by terrorism. However, to the extent that United States culture can divert those domestic infringements on fundamental liberties so that they are not actually experienced as costs, terrorist objectives will be frustrated rather than facilitated. Whether done intentionally or subconsciously, the United States has managed to divert to racial minorities most of the domestic liberty loss occasioned by the war on terror. As a result, the costs associated with that liberty loss are not

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42. See COLE, *supra* note 1, at 57 (commenting on strategic naming of statute); *id.* at 208 (quoting Attorney General Ashcroft’s admonition that criticizing loss of liberty, and differential treatment accorded citizens and aliens, aids United States enemies and gives pause to its friends); Lewis H. Lapham, *Buffalo Dances*, HARPER’S MAG., May 1, 2004, at 9, available at 2004 WLNR 11290427 (“The disdain for disloyal or unpatriotic fact defines the Bush Administration’s approach not only to questions likely to embarrass the oil, weapons, and insurance industries but also to those that might interfere with its fanciful conceptions of war and money.”); Dale Minami, *Day of Remembrance Speech*, 9 ASIAN PAC. AM. L.J. 36, 41-42 (2004) (discussing suggestion in Bush Administration’s “war on dissent” that those who oppose United States counterterrorism efforts are disloyal); Helen Tunnah, *Muted Protest from a Nation at War*, N.Z. HERALD, Oct. 14, 2004, at B4, available at 2004 WLNR 12453669 (“To criticise the war has been deemed unpatriotic, disloyal, uncaring of the thousands who died on September 11. That means people have generally stayed off the streets in protest.”); cf. HEYMANN, TERRORISM, FREEDOM, AND SECURITY, *supra* note 4, at 13-14, 16-17 (commenting on Administration tactic of characterizing foreign allies as “either with us or against us”); Wolfgang Legien, *Thank You America*, NAVAL FORCES, Jan. 1, 2004, at 5, available at 2004 WLNR 15582159 (praising those in United States who are willing to criticize Administration policies at risk of being labeled disloyal).

43. See HEYMANN, TERRORISM, FREEDOM, AND SECURITY, *supra* note 4, at 15 (discussing perceived remoteness of costs associated with loss of liberties).

44. See *id.* at 15-18 (discussing cost-benefit model of terrorism).

internalized by most United States citizens. The United States, therefore, ends up sacrificing the liberty interests of racial minorities in order to benefit the majority. However, such sacrifices are not limited to the war on terror. Rather, they have been so common throughout the history of the United States that the sacrifice of racial minority interests for majoritarian gain appears to be an intrinsic feature of United States culture. Although such sacrifices would seem to constitute racial discrimination that directly violates the equal protection guarantee of the Constitution, the Supreme Court has consistently tolerated this level of “societal discrimination.” It has now simply become part and parcel of the very “American way of life” that the United States is trying to defend from the terrorist threat.

### A. *Diverting the Infringements*

The war on terror is widely regarded as entailing a trade-off between liberty and security. Although most people in the United States report that they are willing to tolerate restrictions on their liberty in order to gain enhanced security, only a small percentage of the population reports actually having experienced any significant limitations on their liberty as a result of the war on terror.<sup>45</sup> There is a reason for this.

Professor David Cole has described the many ways in which the liberty infringements caused by the war on terror have been diverted to Arab and Muslim foreign nationals rather than being imposed on United States citizens.<sup>46</sup> Most of those who are killed, injured, tortured, abused, or whose everyday lives are disrupted by the collateral damage inflicted through United States military action are, of course, foreign citizens.<sup>47</sup> But most of those who suffer domestic restrictions on their liberty as a result of the war on terror are also foreign citizens. It is primarily disfavored foreign nationals at whom the war on terror directs its domestic harms, including: invasions of privacy; FBI surveillance of religious organizations; blacklisting of supposed terrorist organizations; unilateral executive designations as “enemy combatants”; incommunicado detentions; pretextual immigration roundups; freezing of assets based on secret evidence without hearings; monitoring of attorney-client communications; monitoring of library use; monitoring of e-mail; monitoring of Internet use; and *de facto* ethnic profiling.<sup>48</sup> Professor Cole points out that it is politically expedient

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45. See COLE, *supra* note 1, at 17-18 (discussing willingness to forego liberties in the name of enhanced security).

46. See *id.* at 1-21 (describing how foreign nationals have been forced to bear the liberty loss produced by the war on terror).

47. See *supra* Part II.B.1 (discussing foreign infringements of liberty).

48. See COLE, *supra* note 1, at 5-6, 18 (discussing domestic infringements of liberty); see also *supra* Part II.B.2.

for our governmental leaders to divert these liberty infringements to foreign nationals because the benefits of such diversions are internalized by citizen constituents who possess political power, while the burdens are imposed on non-citizen foreigners who lack the political power to hold governmental leaders accountable for their actions.<sup>49</sup> Indeed, it is precisely this sort of failure of political accountability that has created paradigmatic representation-reinforcement defects in the democratic process “authorizing” the war on terror.<sup>50</sup>

I think that a better way to understand the diversion of liberty costs produced by the war on terror is to recognize that diversion as a form of classic racial discrimination. The concept of racial discrimination conveys the invidiousness inherent in the sacrifice of minority liberty for perceived majority security that might otherwise be mistaken for a mere convenient and justifiable differentiation based on citizenship.<sup>51</sup> Most of the non-citizens who have had their fundamental liberties infringed by the war on terror are Arabs or Muslims.<sup>52</sup> However, it is striking how little public outrage has been generated by the targeting of those minority group members in the war on terror.<sup>53</sup> Even established racial minorities—who should know better—seem willing to acquiesce in the discriminatory imposition of burdens on Arabs and Muslims.<sup>54</sup>

Presumably, this lack of public outrage is traceable to the view that it is Arabs and Muslims who are primarily responsible for the terrorist threat that confronts the United States. But only a tiny fraction of the Arab and Muslim population of the United States has any connection with terrorist activities.<sup>55</sup> Therefore, infringing the liberties of all Arabs and Muslims as a counterterrorism measure makes about as much sense as interning all Japanese American citizens because a tiny fraction of them had a connection with World War II sabotage activities.<sup>56</sup> It is worth remembering that the immediate United

49. See COLE, *supra* note 1, at 5-6 (discussing discrimination against those who lack political power).

50. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135-79 (1980) (elaborating representation reinforcement theory of judicial review).

51. Professor Cole has noted the racial overtones that have historically accompanied discrimination against aliens in the United States. See COLE, *supra* note 1, at 88-104.

52. See *id.* at 5-7 (discussing Arab and Muslim targets of war on terror); HEYMANN, *TERRORISM, FREEDOM AND SECURITY*, *supra* note 4, at 14-15 (same).

53. See COLE, *supra* note 1, at 17-24 (arguing that United States citizens have accepted restrictions on the liberty of foreign nationals because they have not had to internalize the costs of those restrictions).

54. See Manning Marable, *Racism in a Time of Terror*, 4 *SOULS* 1, 11-12 (2002) (discussing complex social forces that cause some blacks to acquiesce in post-9/11 discriminatory imposition of burdens on Arabs and Muslims).

55. See COLE, *supra* note 1, at 6-7 (rhetorically positing that only one-tenth of one percent of Arabs and Muslims are involved in terrorist activities).

56. See *Korematsu v. United States*, 323 U.S. 214, 216-18 (1944) (upholding World War II exclusion order that led to the internment of Japanese American citizens); see also *id.* at 239-41 (Murphy, J., dissenting) (discussing racial prejudice and internment of Japanese Americans but not German or Italian Americans). Commentators have emphasized the disturbing similarities



States response to the 1995 bombing of the Murrah Federal Building in Oklahoma City was to blame foreign terrorists, and to adopt anti-immigration legislation directed at Arabs and Muslims—even though it turned out that those responsible for the bombing were white domestic terrorists.<sup>57</sup> Such reflex submission to the lure of stereotypes is the hallmark of racial discrimination, and it seems to be a pervasive feature of the war on terror.

One might initially wonder whether discrimination against ethnic and religious minorities, such as Arabs and Muslims, should technically be viewed as “racial” discrimination. As a doctrinal matter, the Supreme Court has applied the same strict scrutiny standard of judicial review to discrimination against ethnic and religious minorities as it applies to racial minorities. That is because ethnic and religious minorities are often subject to the same sorts of exploitation and invidious discrimination to which racial minorities are commonly subject.<sup>58</sup> More important, however, contemporary United States culture conceptualizes the category of “race” in a way that includes Arabs and Muslims.

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that exist between the wartime detention of Japanese Americans that was upheld in *Korematsu* and the summary detentions of Arabs and Muslims now authorized under executive orders, administrative agency regulations, and the Patriot Act in our post-9/11 war on terror. See, e.g., Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 466-69 (2002) (discussing parallels between post-9/11 racial profiling and World War II treatment of Japanese American citizens); *Developments in the Law—Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1930-39 (2002) (same); Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195, 197-200 (2002) (same); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 33-39 (2002) (arguing that 9/11 has begun to skew the balance between liberty and security, just as the balance was skewed in World War II); Lori Sachs, Comment, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1728-35 (2002) (discussing role of Supreme Court in permitting sacrifice of liberties during World War II); Huong Vu, Note, *Us Against Them: The Path to National Security Is Paved by Racism*, 50 DRAKE L. REV. 661, 661-64, 691-93 (2002) (discussing scapegoating of minorities in times of national threat); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2825-30, 2836-41 (2001) (arguing that modern terrorism legislation repeats prior United States habit of targeting and stigmatizing immigrants and racial minorities).

57. See HEYMANN, *TERRORISM AND AMERICA*, *supra* note 4, at xvii-xx, 12 (discussing the 1995 Oklahoma City bombing of the Alfred P. Murrah Federal Building by domestic terrorist Timothy McVeigh); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 853 (2003) (noting that anti-immigration legislation was enacted in the wake of the Oklahoma City bombing, despite the fact that domestic terrorists were responsible); Craig B. Mousin, *A Clear View from the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 S. ILL. U. L.J. 285, 292 (2005) (same); Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1606-07 (1996) (same); Vu, *supra* note 56, at 677-79 (same); Whidden, *supra* note 56, at 2825-30 (same).

58. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-12 (2001) (prohibiting discrimination against religious organizations in after-school use of school property); *Rice v. Cayetano*, 528 U.S. 495, 511-17 (2000) (treating ancestry as proxy for race in prohibiting denial of voting rights to individuals who were not descendants of indigenous Hawaiians); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830-32 (1995) (prohibiting discrimination against religious organizations in use of student activity fees); cf. *Hernandez v. New York*, 500 U.S. 352, 371-72 (1991) (stating in dicta that Latino ethnicity could act as surrogate for race); *Korematsu*, 323 U.S. at 216 (applying strict scrutiny to Japanese American exclusion order, but upholding exclusion order).

Race is now widely regarded by scientists as a concept that is socially constructed, rather than a concept describing traits that are biologically determined.<sup>59</sup> Genetic variations between individuals of the same race exceed the genetic variations that exist between individuals of different races.<sup>60</sup> Accordingly, the racial differences that we perceive—as well as the cultural attributes that we attribute to those racial differences—are a function of little more than the social mythologies that we have created about race.<sup>61</sup> Commentators have noted that race has been socially constructed in contemporary United States culture in a way that treats minority groups such as Arabs, Middle Easterners, South Asians, and Muslims as potentially disloyal, and therefore entitled to less constitutional protection than more mainstream groups in the United States.<sup>62</sup> Note that this social construction dovetails with the suggestions of disloyalty that are often leveled at opponents of the current Administration's counterterrorism policies.<sup>63</sup>

The thing that is perhaps most important for present purposes is that we have constructed "race" to include Arabs, Muslims, and other "threatening" ethnic minorities because we have determined that members of those groups are sufficiently inferior to members of mainstream United States culture that their liberty interests can be safely sacrificed to benefit the majority. That may superficially seem like an

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59. See MICHAEL J. GERHARDT ET AL., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 387-95 (2000) (discussing social construction of race).

60. See *id.* at 388-89 (discussing genetic variations and citing Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3-7, 11-18, 27-28, 61-62 (1994)).

61. See *id.* at 391 (discussing social mythologies and citing Haney López, *supra* note 60, at 61-62).

62. See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1399-1405 (1997) (arguing that non-white immigrants are treated as racial minorities entitled to less constitutional protection than members of the white majority); Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188-92 (1985) (suggesting that non-black "[o]ther non-[w]hites" are treated as a racial minority group entitled to less constitutional protection than members of the white majority); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2002) (highlighting suspicions of disloyalty attached to non-white minorities); Kang, *supra* note 56, at 195-97 (arguing that threats to national security cause United States culture to overestimate the threats posed by non-white racial minorities, and to reduce the constitutional protection accorded those minorities); Arvin Lugay, Book Note, "In Defense of Internment": Why Some Americans Are More "Equal" Than Others, 12 ASIAN L.J. 209, 210-12 (2005) (arguing that non-white immigrants are treated as a socially constructed racial minority and accorded reduced constitutional protection); Minami, *supra* note 42, at 38-39 (discussing surge in post-9/11 racial prejudice and violence against individuals of Middle Eastern or Muslim descent, and other racial minorities such as Sikhs mistakenly thought to be of Middle Eastern or Muslim descent); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 1-3 (2001) (arguing that the World War II Japanese internment was not aberrational, and that the United States is presently repeating the same mistake by "racing" Arab Americans as "terrorists"); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575-76 (2002) (arguing that post-9/11 United States culture treats individuals of Middle Eastern, Arab, or Muslim descent as racial minorities and accords them reduced respect and protection).

63. See *supra* note 42 (discussing suggestions of disloyalty).

expedient counterterrorism strategy, but it is a strategy that poses profound risks. It risks exacerbating the cultural divisions that already exist in the United States in a way that might actually facilitate the destabilizing objectives of the terrorists.<sup>64</sup> In addition, it risks undermining the coherence and integrity of the liberal equality values for which the United States claims to stand. Nevertheless, the strategy of sacrificing racial minority rights to advance majority interests is all too familiar a component of United States culture.

### B. *Intrinsic Discrimination*

Liberals such as Professors Chemerinsky and Cole recognize that the war on terror entails a sacrifice of domestic liberty that is disproportionately imposed on non-citizens who lack the political power to protect their own interests.<sup>65</sup> Accordingly, they seek to remind both the courts and the players in the democratic process that a serious tension exists between such discriminatory treatment and the liberal equality values enshrined in the United States Constitution.<sup>66</sup> However, because the discrimination that the war on terror promotes is a species of racial discrimination, I fear that it cannot be eliminated through recourse to liberal equality values. Racial discrimination is simply too intrinsic a component of United States culture to be meaningfully displaced. It is firmly rooted in United States history, and Supreme Court judicial review has done more to promote than to prevent its recurrence.

#### 1. History

The history of the United States reveals a consistent and continuing pattern of racial discrimination, pursuant to which the interests of

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64. Professor Heymann has argued that one of the greatest dangers of terrorism is that the target's counterterrorism responses will end up isolating disfavored groups from mainstream culture in the way that Ku Klux Klan terrorism facilitated the cultural isolation of blacks. Heymann also stresses that terrorism is most likely to be effective in a culture that is already divided along racial, ethnic, religious, or ideological lines. See HEYMANN, *TERRORISM AND AMERICA*, *supra* note 4, at 2-3, 15-18 (discussing alienation and isolation); see also COLE, *supra* note 1, at 193 (describing counterterrorism alienation that occurred in Northern Ireland). Perhaps one of the greatest dangers of terrorism is that it will solidify the very cultural divisions that will make future terrorist acts even more effective.

65. See generally Chemerinsky, *supra* note 1, at 2 (describing loss of domestic liberty); COLE, *supra* note 1 (same).

66. Presumably, that is why Professors Chemerinsky and Cole have published articles and books about the deprivations of liberty occasioned by the war on terror. See *supra* note 1 (citing publications). Both have argued that the Bill of Rights prohibits many of the dual standards that are applied to justify distinctions between citizens and non-citizens. See Chemerinsky, *supra* note 1, at 2-3; COLE, *supra* note 1, at 211-33. Chemerinsky and Cole have also both represented plaintiffs in litigation seeking to invalidate liberty-restricting measures adopted by the Administration as counterterrorism measures. See COLE, *supra* note 1, at 27-28, 76 (describing litigation in which Cole has participated); Erwin Chemerinsky, Foulston Siefkin Lecture at Washburn University School of Law: Civil Liberties and the War on Terror (Mar. 4, 2005), <http://washburnlaw.edu/wlj/foulston/2005chemerinskytranscript.php> (describing litigation in which Chemerinsky has participated).

racial minorities have routinely been sacrificed for the benefit of the white majority. A brutal form of chattel slavery was introduced in the colonies even prior to the founding of the United States, as a means of promoting the economic interests of the white majority at the expense of black slaves.<sup>67</sup> Rather than protecting the liberty interests of black slaves after the Nation was founded, the Constitution instead protected the institution of slavery.<sup>68</sup> Prominent in the early history of the United States was the appropriation of Indian lands for the benefit of white settlers, followed by the genocide of Indian populations through armed combat and forced relocations.<sup>69</sup>

After the Civil War, the white majority tried to protect United States citizens from foreign labor competition through the anti-immigration provisions of the Chinese exclusion laws<sup>70</sup>—a tactic that seems to have been reprised in the contemporary United States treatment of undocumented aliens.<sup>71</sup> During the Reconstruction period, the government did little to prevent or punish the racial terrorism that expressed itself in the form of Ku Klux Klan violence and vigilante lynchings of blacks.<sup>72</sup> And even after slavery and the subordinate status of blacks were formally abolished by the post-Civil War Reconstruction amendments, the Constitution was still interpreted to permit the maintenance of a regime of official segregation based on the racial inferiority of blacks.<sup>73</sup>

In World War II, the United States chose to promote its national security interests through the now-infamous internment of Japanese American citizens, although it did not intern white citizens who shared

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67. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 85-89 (2d ed. 1985) (discussing harshness of United States chattel slavery); ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 94-97 (1982) (same).

68. Article I, section 9, clause 1 prohibited Congress from abolishing the slave trade until 1808, and it authorized the federal taxation of imported slaves. See U.S. CONST. art. I, § 9, cl. 1. Article I, section 2, clause 3 apportioned seats in the House of Representatives on the basis of population, counting a slave as three-fifths of a white person. See U.S. CONST. art. I, § 2, cl. 3. Article IV, section 2, clause 3 prohibited one state from according free status to slaves who had escaped from another state. See U.S. CONST. art. IV, § 2, cl. 3.

69. See FRIEDMAN, *supra* note 67, at 508-09 (discussing harsh treatment of Indians).

70. See *id.* at 509-10 (discussing Chinese exclusion laws).

71. See George J. Borjas, *Making It Worse: President Bush Has Tackled the Immigration Problem—Wrongly*, NAT'L REV., Feb. 9, 2004, at 24, available at 2004 WLNR 17898865 (arguing that Bush Administration proposal to loosen restrictions on immigration is undesirable because it will increase labor competition); Greg Lucas, *Sacramento; Border Security Debate Revived; Governor's Praise of Minutemen Leads to Talk of Costs, Benefits*, S.F. CHRON., May 16, 2005, at B1, available at 2005 WLNR 7696367 (discussing "Minutemen" private border patrols and effect of illegal immigration on competition for jobs and government services).

72. See FRIEDMAN, *supra* note 67, at 352, 401, 506-07, 579-80 (discussing Ku Klux Klan and vigilante lynchings); see also Avis Thomas-Lester, *A History Scarred by Lynchings; State Lives with a Legacy of Terror as Nation Pays Tribute to Victims' Descendants*, WASH. POST, July 7, 2005 (Va. Extra), at T1, available at 2005 WLNR 11389519 (discussing recent Senate resolution apologizing for congressional failure ever to enact federal anti-lynching legislation).

73. See *Plessy v. Ferguson*, 163 U.S. 537, 550-52 (1869) (upholding separate-but-equal law); see also FRIEDMAN, *supra* note 67, at 505-08 (discussing segregation).

ethnicity with the German and Italian enemies of the United States.<sup>74</sup> At the end of the war, the United States became the only nation in the world ever to use a nuclear weapon to kill another human being, and it has used nuclear weapons only against the Japanese.<sup>75</sup>

*Brown v. Board of Education*<sup>76</sup> is commonly said to have ushered in an era of racial equality in the United States by ending public school segregation and by prohibiting governmental use of racial classifications. However, *Brown* has not prohibited the widespread *de facto* segregation that exists throughout the United States,<sup>77</sup> and it has not prohibited racial classifications in the form of racial profiling that has become a pillar of the war on terror.<sup>78</sup> Rather, *Brown* spawned the ubiquitous colorblind, race-neutrality rhetoric that is now commonly invoked as the basis for contemporary constitutional attacks on racial affirmative action and remedial voting rights programs.<sup>79</sup>

The attitudes and effects of historical discrimination in the United States continue today. As previously noted, the Oklahoma City bombing was conducted by white terrorists, but it was followed by the reflex enactment of anti-immigration legislation directed at racial minorities.<sup>80</sup> Racial minorities remain disadvantaged in the allocation of all significant societal resources, including income, wealth, housing, education, employment, healthcare, and consumer goods.<sup>81</sup> Blacks and other minorities are so disproportionately disadvantaged in the criminal justice system that commentators have posited the existence of separate criminal justice systems for whites and minorities, with minorities bearing the costs of anti-crime initiatives that are thought to benefit whites.<sup>82</sup> Other commentators have argued that racial minori-

74. See *Korematsu v. United States*, 323 U.S. 214, 215-20 (1944) (upholding exclusion order that led to internment of Japanese American citizens); *id.* at 239-41 (Murphy, J., dissenting) (discussing racial prejudice and exclusion order directed at Japanese Americans but not German or Italian Americans); FRIEDMAN, *supra* note 67, at 672 (referring to *Korematsu* and other decisions as "blot" on reputation of Supreme Court).

75. See SPANN, *supra* note 29, at 147-48 (discussing United States use of nuclear weapons).

76. 347 U.S. 483 (1954).

77. See SPANN, *supra* note 29, at 105-10 (discussing failure of Supreme Court to desegregate schools outside of the South).

78. See *supra* text accompanying note 34 (discussing continued *de facto* use of ethnic profiling in war on terror).

79. See GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 156-89 (2000) [hereinafter SPANN, *THE LAW OF AFFIRMATIVE ACTION*] (discussing Supreme Court affirmative action and Voting Rights Act cases); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 221-23 (2004) [hereinafter Spann, *The Dark Side of Grutter*] (tracing Supreme Court preference for colorblind race neutrality back to *Brown*); *cf.* *Grutter v. Bollinger*, 539 U.S. 306, 323-24, 327-43 (2003) (recent case upholding educational affirmative action program giving holistic and individualized consideration to applicants). *But see* *Gratz v. Bollinger*, 539 U.S. 244, 268-76 (2003) (case decided same day as *Grutter*, invalidating educational affirmative action program as too mechanical to be narrowly tailored).

80. See *supra* text accompanying note 57 (discussing Oklahoma City bombing).

81. See *Gratz*, 539 U.S. at 298-301 (Ginsburg, J., dissenting) (citing statistics showing disadvantages suffered by racial minorities).

82. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 1-15 (1999) (describing dual criminal justice systems).

ties benefit in the United States only when such benefits happen to coincide with the conferral of benefits on whites.<sup>83</sup> Racial discrimination has been so pervasive and persistent throughout the history of the United States that it seems to be an intrinsic feature of the culture. Both legal commentators and social cognition theorists have demonstrated that significant amounts of racial prejudice continue to operate on an unconscious level throughout most of United States culture.<sup>84</sup> Racial discrimination is so firmly entrenched that it has simply become second nature to assume that the interests of racial minorities should give way whenever necessary to advance the interests of the white majority. And somehow, the Constitution seems to tolerate this form of entrenched discrimination.

## 2. Judicial Review

In theory, judicial protection of individual rights should supplement the democratic process in a way that prevents the sacrifice of racial minority rights for the benefit of the majority. Realistically, however, the supposed safeguard of judicial review has proved to be an ineffective remedy for the culture's intrinsic racial discrimination. Rather, the Supreme Court has typically interpreted the Equal Protection Clause and other antidiscrimination laws in a way that both *promotes* pervasive forms of societal discrimination, and *protects* majorities in their efforts to exploit minority rights.

I have argued in the past that a largely unrecognized function of the Supreme Court has historically been to facilitate the exploitation of racial minority interests for the benefit of the white majority.<sup>85</sup> It is noteworthy that the Supreme Court acquiesced in all of the majoritarian racial abuses discussed in the previous section of this article—from protecting the institution of slavery to facilitating the World War II internment of Japanese American citizens.<sup>86</sup> More recently, the Supreme Court spearheaded the current cultural backlash against affirmative action and remedial voting rights programs. Even when the majoritarian political process deemed it appropriate to provide

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83. See, e.g., Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91-106 (Derrick Bell ed., 1980).

84. See Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489, 1508-10 (2005) (discussing unconscious racial bias revealed by Implicit Association Test); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 322-23 (1987) (arguing that much contemporary racial discrimination is unconscious).

85. See SPANN, *supra* note 29, at 1-6 (discussing “veiled majoritarian” function of Supreme Court).

86. See *supra* Part III.B.1 (discussing history of majoritarian exploitation of racial minority interests); see also *Korematsu v. United States*, 323 U.S. 214, 215-20 (1944) (upholding World War II exclusion order that led to the internment of Japanese American citizens); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 464-65 (1856) (invalidating congressional effort to limit spread of slavery and holding that blacks could not be “citizens” within meaning of United States Constitution).

race-conscious remedies for past discrimination, the Rehnquist Supreme Court typically held those efforts to be unconstitutional.<sup>87</sup> Although the Court did not seem particularly concerned with race neutrality while historically upholding efforts to discriminate against racial minorities, the Court now appears to be preoccupied with color-blind race neutrality whenever race consciousness is used for remedial rather than discriminatory purposes.<sup>88</sup>

There are structural reasons to doubt whether the Supreme Court could ever operate in a truly countermajoritarian manner. The Justices are socialized in an elite majoritarian culture, and legal doctrine is simply too indeterminate to insulate judicial decision-making from the socialized value preferences of the Justices.<sup>89</sup> Accordingly, it is not surprising that Supreme Court judicial review has failed to provide a significant degree of protection against majoritarian incursions on minority rights, such as those that are presently being inflicted on racial minorities as part of the war on terror. However, the Supreme Court at times seems to be affirmatively going out of its way to perpetuate the effects of racial discrimination. This is evident in the Court's tolerance for general societal discrimination and in its aversion to racial balance.

Curiously, the Supreme Court's affirmative action decisions have made a point of holding that the Constitution prohibits the use of race-conscious remedies to address the low-level, institutionalized, everyday racial discrimination that has become an intrinsic aspect of United States culture. The Court refers to this as general "societal discrimination," and it seems to have adopted the position that minorities must simply endure this sort of routine discrimination-through-inertia, notwithstanding the Constitution's guarantee of equal protection.<sup>90</sup> Because the Court reads the Constitution to prohibit even majoritarian political efforts to eradicate this form of systemic dis-

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87. See SPANN, *THE LAW OF AFFIRMATIVE ACTION*, *supra* note 79, at 156-89 (discussing Supreme Court affirmative action and Voting Rights Act cases).

88. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (asserting preference for race neutrality); see also Spann, *The Dark Side of Grutter*, *supra* note 79, at 223 (discussing Supreme Court preoccupation with colorblind race neutrality).

89. See SPANN, *supra* note 29, at 19-82 (discussing inability of doctrine to constrain the exercise of socialized judicial discretion).

90. This prohibition on the use of legal remedies to redress general societal discrimination, as opposed to identifiable acts of particularized discrimination, was articulated by Justice Lewis Powell in *Regents of University of California v. Bakke*, 438 U.S. 265, 307-10 (1978) (opinion of Powell, J.), and reasserted by Justice Powell in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-79 (1986) (plurality opinion of Powell, J.). Led by Justice Sandra Day O'Connor, this view has now been adopted by a majority of the full Supreme Court. See *Grutter*, 539 U.S. at 323-25 (majority opinion of O'Connor, J.) (citing *Bakke* as rejecting interest in remedying societal discrimination); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) (majority opinion of Rehnquist, C.J.) (rejecting societal discrimination); see also *Metro Broad. v. F.C.C.*, 497 U.S. 547, 610-14 (1990) (O'Connor, J., dissenting) (same); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-98 (1989) (plurality opinion of O'Connor, J.) (same); *Johnson v. Transp. Agency*, 480 U.S. 616, 647-53 (1987) (O'Connor, J., concurring in the judgment) (same); *Wygant*, 476 U.S. at 288 (O'Connor, J. concurring) (same). See generally SPANN, *THE LAW OF AFFIRMATIVE ACTION*,

crimination, the Court is actually *constitutionalizing* the level of intrinsic racial discrimination that exists in the culture at large. This is, sadly, reminiscent of cases like *Dred Scott*,<sup>91</sup> and of the Constitution's affirmative safeguards for the intrinsic cultural practice of slavery when the Constitution was adopted.<sup>92</sup>

Closely related to the Supreme Court's tolerance for societal discrimination is its *intolerance* for efforts to achieve racial balance. The pursuit of racial balance in the allocation of resources such as jobs, educational opportunities, and voting strength seems to offer the most promising strategy for solving the persistent problem of intrinsic racial discrimination—a problem that the United States has been unable to solve in its 229-year history.<sup>93</sup> Notwithstanding the failure of race-neutral strategies to eradicate discrimination, the Supreme Court adamantly insists that direct efforts to achieve racial balance are “patently unconstitutional” because they offend the Court's current fetish for colorblind race neutrality.<sup>94</sup> Like its insensitivity to the problem of general societal discrimination, the Supreme Court's hostility to racial balance ends up simply freezing present inequalities in the allocation of resources that were produced by centuries of past discrimination. In so doing, the Supreme Court is itself guilty of perpetuating racial discrimination in a way that seems to violate any meaningful interpretation of the Equal Protection Clause.<sup>95</sup>

Judicial review has proved an unreliable safeguard for the equal protection rights that the Constitution nominally accords racial minorities. It is true that racial minorities sometimes secure sporadic victories before the Court.<sup>96</sup> But those “victories” are best understood as palliatives whose primary function is to reduce some of the pressure generated by intrinsic cultural discrimination, so that this pressure does not rise to a high enough level to threaten a subcultural explosion. The rhetorical value of judicial review undoubtedly helps the culture feel better about itself as the Supreme Court certifies that the

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*supra* note 79, at 168-69 (same); Spann, *The Dark Side of Grutter*, *supra* note 79, at 229-31 (discussing general societal discrimination).

91. See *Dred Scott*, 60 U.S. (19 How.) at 464-65 (invalidating congressional effort to limit spread of slavery, and holding that blacks could not be “citizens” within meaning of United States Constitution).

92. See *supra* note 68 (enumerating constitutional provisions protecting slavery).

93. See Spann, *The Dark Side of Grutter*, *supra* note 79, at 239-42 (advocating conscious efforts to achieve racial balance).

94. See *Grutter*, 539 U.S. at 330 (stating that pursuit of racial balance would be “patently unconstitutional”).

95. See Spann, *The Dark Side of Grutter*, *supra* note 79, at 222-23, 239 (arguing that Supreme Court rejection of racial balance in favor of colorblind race neutrality is itself a form of racial discrimination).

96. See, e.g., *Grutter*, 539 U.S. at 343-44 (upholding affirmative action plan); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954) (ordering desegregation of public schools). *But see* Spann, *The Dark Side of Grutter*, *supra* note 79, at 229-31 (arguing that *Grutter*'s insistence on colorblind race neutrality will ultimately harm racial minorities); SPANN, *supra* note 29, at 105-10 (arguing that *Brown* did not ultimately desegregate public schools outside of the South).



culture's intrinsic racial discrimination does not violate the Constitution. But like the racial discrimination that it is supposed to prevent, this model of judicial review amounts to little more than another way for the majority to advance its own interests by sacrificing the interests of racial minorities.

#### IV. CONCLUSION

The United States war on terror ends up inflicting the same sorts of liberty infringements on United States residents that the terrorists themselves are trying to inflict through the threat of terrorism. However, United States citizens will not have to internalize most of those liberty infringements, because they are being diverted primarily to Arab and Muslim foreign nationals. In this way, United States culture is treating those ethnic and religious minorities as racial minorities, and it is engaging in the same form of racial discrimination that has characterized United States race relations throughout the Nation's history. The interests of racial minorities are simply being sacrificed in order to advance the interests of the majority, in a way that has become an intrinsic feature of United States culture.

Unfortunately, there is at least one other parallel between terrorism and the war on terror. Both inflict harms that seem likely to persist into the indefinite future. The terrorist threat has now become such a routine part of everyday life throughout the world that it is difficult to imagine how the problem of terrorism realistically could ever be overcome. It may be a problem that we will simply have to learn to live with. Similarly, the practice of intrinsic racial discrimination remains such a routine part of everyday life in the United States that it is also difficult to see how that problem realistically could ever be overcome. It too appears to be a problem that we will simply have to learn to live with. Liberal efforts to remind the players in our political and judicial processes of their constitutional obligations to guard against the abuses of racial subordination are noble efforts, but they seem unlikely to be any more successful now than they have been in the past.

If there were a way for United States culture to evolve beyond its historically persistent sacrifice of minority rights for majoritarian gain, it would likely entail a new and more highly evolved understanding of the concept of racial equality. Although it is difficult to imagine what could prompt such an evolution, it is easy to imagine that such an evolution would begin with a recognition of the flaws in our present understanding of that concept.