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Book Review

Viewing September 11 Through the Lens of History


Reviewed by Carol L. Chomsky†

The events of September 11, 2001 stunned America and the world. Four nearly simultaneous airplane hijackings, the collapse of the World Trade Center towers, the attack directly on the heart of the U.S. military command, the presumed but thwarted effort to fly one of the planes into the White House, and the sheer number of casualties combined to shock those who watched the events unfold. It felt as though a seismic change has occurred, in America and the world. In the days and weeks that followed, many of the commentaries and much conversation centered on that premise, as Mary Dudziak notes in her introduction to the essays collected in *September 11 in History: A Watershed Moment?* Examples were everywhere. "Nothing Will Ever Be the Same," a *Philadelphia City Paper* headline declared in a special September 11 edition.1 "[T]he known world had been jerked aside like a mere slide in a projector, and a new world had been rammed into its place," wrote Jonathan Schell a month later in the *Nation.*2 The banner at

† Professor of Law, University of Minnesota Law School. My thanks to the reference staff of the University of Minnesota Law Library for their research assistance and to the editors and staff of the Minnesota Law Review for their assistance through the editorial process. My thanks also to Steven Liss for his helpful comments on an earlier draft.


www.september11news.com, the self-proclaimed “Internet’s #1 Resource for September 11th, 2001 News,” reads “September 11, 2001—The Day the World Changed.” CBSNews.com declares “9/11 the day that changed America.” And the Houston Chronicle memorialized the events three years later under the banner “Our Changed World.”

Published just after the American invasion of Iraq in March 2003, but largely written and edited before that date, the collection of essays in September 11 in History asks us to step back and consider whether September 11 is indeed, or will ultimately be viewed as, a transformative event in American history. In her introduction, Dudziak asks:

Would it become an iconic historical event, marking a transition in the history of the United States and of the world? Or was it instead best understood as an aspect of pre-existing historical trajectories? Did it change law, politics, religion, and culture, or did it instead simply provide a new site for political and cultural conflicts that were already in play?

Two—now three—years after September 11, 2001 hardly provide the historical distance that will ultimately be required to resolve such issues with finality, but it is worth asking the questions and seeking at least preliminary answers now. The argument that the events of September 11 changed at least our world has been used to justify responses such as the enactment of the USA Patriot Act and its erosion of domestic civil liberties, detention and deportation of foreign nationals without hearings, and denial that the Geneva Convention applies to treatment of alleged terrorists. In the face of such a claim, and the rhetoric at its core, it seems vital to ask what really has changed. The essays in this volume prove the value of seeking such perspective, even in these early days. No doubt scholars, policymakers, pundits, and the public will continue to ask the

7. See Part III, infra.
question posed here, and a national and international dialogue on the issue will continue. These essays provide a firm beginning for that effort, and the issues they raise, as well as the analyses they provide, will continue to be important contributions to the ongoing debate.

The nine essays in this collection range widely, addressing four broadly defined subjects: the language we use to describe the events and the impact of such usage on our understanding; the history of Islamic doctrine and the implications of that history; the impact of September 11 on domestic understandings and policies; and the evolution of international law under the impetus of September 11 and its aftermath. Overall, the authors suggest many more continuities than discontinuities, more evolution than revolution, despite the language of transformation with which September 11 has been described. Seeing the events and the rhetoric surrounding September 11 as a reflection of familiar debates and disputes may help us respond more coherently, critically, and fruitfully, in keeping with historically grounded American interests and concerns.

I. RHETORIC AND HISTORY

The first three articles consider the language in which public officials and commentators began to talk about the events of September 11, how that language resonated with moments of American history, and the ways in which that resonance served to align our understanding of and responses to the attacks. In *Ground Zero: Enduring War*, Marilyn Young*8* writes that the events of September 11 did not constitute a "historical watershed" as initial commentaries suggested.*9* Certainly, the existence of terrorism was not new, whether directed at Americans or others around the world. As Young observes, "[t]he only new aspect of this act of terror was its happening in the United States, whose citizens had imagined themselves invulnerable."*10* Perhaps that might have led the public to "a renewed sense of self-sacrifice, civic responsibility, and ethical commitment,"*11* helping to transform the American character and the

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8. Young is a professor of history at New York University and director of the Project on the Cold War as Global Conflict at the International Center for Advanced Studies at New York University.
9. See Young, supra note 2, at 11–12.
10. Id.
11. Id.
American sense of connection with the rest of the world. In keeping with that theme of civic responsibility, at least on the domestic front, President Bush called for citizen commitment to public service and to volunteering in local communities to support those in need as well as to respond to security concerns. But such calls quickly expired in a return to normalcy. In the same speech in which he called for self-sacrifice, the President suggested that the “ultimate repudiation of terrorism” is “[l]ife in America ... going forward,” in people “going about their daily lives, working and shopping and playing, worshipping [sic] at churches and synagogues and mosques, going to movies and to baseball games.”

And indeed, Young reports, “the country became even more itself, almost to the point of caricature.” The American sense of its place in the world moved backward, not forward, she contends. Young notes that “[t]he world that had seemed to crumble with the Berlin Wall in 1989 reappeared, a little dusty. Good and Evil, Us and Them, Enemies Everywhere.” The revival of Cold War metaphors, Young suggests, helped support “revivification” of Cold War tactics in programs like Operation TIPS (encouraging plumbers, letter carriers, utility workers, and others to report “suspicious activity” by calling a toll-free number) and the Office of Strategic Influence (bringing Hollywood executives together with administration officials to plan propaganda efforts abroad, including disinformation). “Non-governmental witch-hunters set up organizations to monitor thought,” including the American Council of Trustees and Alumni, headed by Lynne Cheney, which published a list of over 100 academics “guilty” of criticizing U.S. foreign policy. All of these efforts were short lived, but the vision of an ultimate war of good against evil persists. The “long, indefinite struggle against godless Communism” had been replaced by “a

12. See id.
14. Id.
15. Young, supra note 2, at 11.
16. Id. at 12.
17. Id.
18. Id. at 12-13.
19. Id. at 12.
20. Id. at 13.
struggle of indefinite duration against terrorism."21 Like the earlier struggle, the new struggle brings with it assertions that the threat requires new and more stringent law enforcement tools and allegations that criticism of American policy in general, and the war in particular, will give aid and comfort to the enemy.22

Young also suggests that, like Harry Truman, who used the excuse of the Korean War to pass legislation tripling the defense budget—a result desired but not likely attainable before that war23—the Bush administration is using the threat of terrorism to implement policies of unilateralism favored by the administration but not likely to have enjoyed broad support before September 11.24 Young asserts that

[t]here has been a shift from the recognition of the fact of American preponderance of power to an insistence on maintaining exclusive power; from a multilateral vocabulary, however honored mostly in the breach, to an unabashed unilateralist posture; from an understanding of physics in which a balance requires a fulcrum to one in which exclusive American power constitutes a balanced world. September 11 did not change the world; but it has enabled the Bush administration to pursue, with less opposition and greater violence, policies that might otherwise have appeared too aggressive.25

As examples, Young points to international policies such as a declaration of expanded circumstances in which nuclear weapons may be used and a preemptive war strategy subsequently used to justify the invasion of Iraq,26 as well as domestic policies such as new stringency in releasing documents under the Freedom of Information Act and more severe limitations on public access to presidential papers.27 At base, Young suggests,

[t]he meaning of September 11 for most people seems to be that the world is a dangerous place and that the government of this country, by a careful examination of its own policies and behavior, might contribute to making it a marginally less dangerous place. The meaning

21. Id. at 14.
22. Id.
23. Id.
24. Id. at 14–18.
25. Id. at 18.
26. See id. at 19. Richard Haass, Director of Policy Planning for the State Department, describes the administration’s policy as one of “limited sovereignty,” allowing preemptive action when “you have grounds to think it’s a question of when, and not if, you’re going to be attacked.” Id., quoted in Nicholas Lemann, The Next World Order, NEW YORKER, Apr. 1, 2002, at 46.
27. Id. at 18–19.
of September 11 for the Bush administration, by contrast, seems to be the conviction that it can control the world.28

Though she does not say so in so many words, Young's essay suggests that, although the events of September 11 did not of themselves mark a transformational moment in the history of the United States or the world, they may yet be used in ways that will create transformation. Much depends on how radical the proposals of the Bush administration are, and whether the rhetoric of transformation succeeds in convincing legislators and the public of the need for and desirability of further unprecedented steps in response. The Bush administration appears to have interpreted the election results from November 2004 as a mandate for its agenda,29 despite the doubts on that score evident in the election results and in subsequent polls of public attitudes.30 How that attitude will translate to action remains to be seen. The dynamics of a lame-duck administration, an overextended military, and challenges to the administration's domestic agenda also may bring countervailing influences.31

Elaine Tyler May32 titles her essay Echoes of the Cold War: The Aftermath of September 11 at Home.33 Like Young, May sees the nation's leaders, commentators, and the public searching the past for "reference points" and historical antecedents for September 11, even as they continue to call the event itself unprecedented.34 Drawing on the idea of "frames of acceptance" articulated by cultural critic Kenneth Burke, May de-

28. Id. at 27.
30. See Will Lester & Scott Lindlaw, Poll: 49% Approve of Job Bush Doing; Same Percent Says President Lacking, CHI. TRIB., Jan. 8, 2005, at 13. According to the Washington Post, President Bush "won with the smallest margin of any reelected president in more than a century, and his approval rating as he began his second term . . . was the lowest of any in modern times." Peter Baker & Michael A. Fletcher, Bush Pledges To Spread Freedom, WASH. POST, Jan. 21, 2005, at A1.
32. May is a professor of history and American studies at the University of Minnesota.
33. Elaine Tyler May, Echoes of the Cold War: The Aftermath of September 11 at Home, in SEPTEMBER 11, supra note 1, at 35.
34. Id.
scribes a process by which those responding to an event use an "old frame" to provide the "parameters of response" to a new crisis. But the old frame rarely fits the new events precisely, so the old frame "will be extended to meet the new necessities by casuistic stretching." Thus when officials, commentators, and others call upon the imagery of Pearl Harbor, World War II, and the Cold War, May asks whether those "reference points" are "appropriate or even useful." What limitations grow out of seeing the events of September 11 as similar to those earlier events? Would different historical connections have suggested different responses?

May suggests that the imagery of "ground zero" and of Pearl Harbor evokes the "apocalyptic nightmares of the atomic age," and identifies the events of September 11 as part of a war. Looking back now, after the invasions of Afghanistan and Iraq, the war imagery seems undeniable, but May suggests that the imagery used may have helped trap us into choosing one frame of reference (attack as war) over other possible frames (attack as terrorist and criminal act). That narrowed our options and channeled our perceptions towards one form of response over others. Comparing the attack on September 11 to Pearl Harbor meant that a declaration of war was the appropriate response. The choice of identifying the acts and the United States' response as "war" also forced nations to be either our allies or our enemies. By viewing the attack on September 11 as an act of "war" rather than an international and domestic crime, May says, the criminal perpetrators were given some degree of legitimacy, some status as a legitimate enemy, even though at the same time the administration hastened to deny the legitimacy of the attack and those who orchestrated it. Moreover, declaring "war" against terrorism made Bush a wartime president. "War, if it has widespread support, has al-

35. Id. (quoting KENNETH BURKE, ATTITUDES TOWARD HISTORY 132–33 (3d ed. 1984)).
36. Id. at 35.
37. Id. at 36.
38. Id. at 36–37.
39. See id. at 38–40, 41.
40. Id. at 41.
41. Id.
42. Id. at 40.
43. See id. at 40–41.
ways contributed to the popularity of presidents. Crime has done just the opposite," May notes.\textsuperscript{44}

Despite the initial reliance on the Pearl Harbor parallel, it was the Cold War imagery that prevailed as our frame of reference:

\[\text{T}he \text{villains seemed to personify the characteristics of the Communist threat: foreigners who infiltrated the nation, studied our technology, and used our own power against us. They blended into society, plotting against us while enjoying the good life they professed to disdain. They turned our own proud monuments of postwar technological and consumer triumph, commercial airliners and towering skyscrapers, into the means of our destruction. Like the suspected Communist spy, they represented the enemy within, loyal to a foreign foe.}\textsuperscript{45}

The administration responded largely in Cold War fashion, urging citizens to spy on the enemy within,\textsuperscript{46} charging that criticism of the government was unpatriotic and would aid the enemy,\textsuperscript{47} focusing intensely on "homeland security,"\textsuperscript{48} and identifying an "axis of evil."\textsuperscript{49} One thing quickly lost in the Cold War invocation of good versus evil and the rhetoric of war was any attempt to explore the role of the United States in the world and the real sociopolitical sources of the hatred that manifested itself in the attacks of September 11. "[W]hy do they hate us?" President Bush asked in his address to a joint session of Congress on September 20, 2001, echoing the question asked by many Americans.\textsuperscript{50} But his answer ignored any inquiry into the actions of America in the Middle East and elsewhere, identified by other commentators as a major source of hostility.\textsuperscript{51} He focused, instead, on the imagery of good and good.
evil. "They hate our freedoms—our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other," President Bush intoned. "They are the heirs of all the murderous ideologies of the 20th century.... [T]hey follow in the path of fascism, and Nazism, and totalitarianism."\(^{52}\)

By using familiar "'frames of acceptance,'" such as Pearl Harbor and the Cold War, policymakers and citizens alike could "react to an unfamiliar situation in familiar ways," May argues.\(^{53}\) But lost in that process is any searching inquiry into the success or, more telling, failure of those responses in their historical context and how well (or badly) the metaphors and imagery of that earlier era fit the current situation. May leaves us on the brink of that analysis, but much more is necessary before we can truly understand the choices made and foreclosed by relying on the imagery of the past.

In her essay, *Homeland Insecurities: Transformations of Language and Space*, Amy Kaplan\(^{54}\) focuses on how three "spaces"—"ground zero," the "homeland," and "Guantanamo Bay"—have been represented in the aftermath of September 11.\(^{55}\) She writes about how those representations not only help to shape our understanding of the events, but also how they are "mapping, blurring, and reconstructing the conceptual, affective, and symbolic borders between spheres once thought of as

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53. May, *supra* note 33, at 52.
54. Kaplan is a professor of English and American studies at the University of Pennsylvania.
distinctly separate, as either national or international, domestic or foreign, 'at home' or 'abroad.' Despite what may seem at the outset a foray into linguistic theory, Kaplan's discussion taps into the same historical tropes invoked by Young and May, and deepens the reflection about the ways in which the words we use create understandings beyond the explicit.

"Ground zero," she notes, entered our lexicon in 1946. Referring literally to "the point directly above, below, or at which a nuclear explosion occurs," its metaphoric meaning extends to "the center or origin of rapid, intense, or violent activity or change." Repeated over and over, it reflects but also evokes the sense that September 11 radically altered the world, that the events and the space of ground zero cataclysmically changed us. Even while invoking the history of the atomic bomb, Kaplan suggests, we have ignored the natural connections to the particular history of the American use of the atomic bomb in Hiroshima and Nagasaki, "the experience of a sudden horrific attack on civilians in an urban center." To acknowledge the connection with Hiroshima and Nagasaki "would trouble the... binary oppositions... erected on that ground, between before and after, between being with us or with the terrorists, between the American way of life and the 'axis of evil.'" So the language selectively invokes history, bringing metaphoric historical baggage while claiming the events as unique and out of history.

"Homeland," Kaplan suggests, is notable for its lack of connection with American history, though not without implications arising from its historical usage in other contexts. Although connoting "an inexorable connection to a place deeply rooted in the past," the word "homeland" is not deeply rooted in America's past, or in past American usage. Americans of all origins may view America as their home, Kaplan writes, but the notion of "homeland" is often connected instead to some other place,

56. Id.
57. Id. at 56.
58. Id. (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 552 (11th ed. 2003)).
59. Id.
60. Id. at 57.
61. Id.
62. See id. at 56–57.
63. See id. at 58–64.
64. See id. at 58.
their “historical, ethnic, or spiritual homeland.” But while the word is not connected to our history, it does carry with it emotional sensibilities, serving paradoxically to divide us even though its presumed intent is to bring us together. It communicates, she suggests, several strains of meaning,

put[ting] into play a history of multiple meanings, connotations, and associations that work on the one hand to convey a sense of unity, security, and stability, but more profoundly, on the other hand, work to generate forms of radical insecurity by proliferating threats of the foreign lurking within and without national borders.

The use of “homeland” thus helps to construct more definite borders, to distinguish between domestic and foreign, and at the same time to make claims for a unitary domestic sphere (always referred to as the homeland), as opposed to “pluralistic definitions of national identity.” The word “homeland” carries with it, Kaplan suggests, a connotation of racial purity, because of its linguistic connection with the effort in South Africa to establish black “homelands” and its evocation of the “motherland” and “fatherland” associated with Germany’s fascist past. “Homeland” suggests a commonality of ancestry and history, not just a common political allegiance, and therefore serves to reinforce an exclusionary reaction to immigrants. It offers linguistic support, then, to the political and legal policies that have resulted in detentions and deportations of thousands of immigrants, as well as the enfolding of the enforcement division of the Immigration and Naturalization Service into the Department of Homeland Security and its implicit statement that immigrants should be seen as a threat to the security of the (our and not their) homeland. The sense of insecurity is compounded by the connection of the phrase with communities who aspire to nationhood but do not yet have homelands—such as the Palestinian, Kurdish, Sikh, Tamil, and Basque peoples—

65. Id.
66. See id. at 58–61.
67. Id. at 64.
68. Id. at 59.
69. See id. at 61–62. Kaplan reports that, in October 2002, an advertisement was placed in Texas Monthly magazine by the Texas Homeland Security chief. Presumably unintentionally, but perhaps revealingly, the backdrop to the advertisement’s text was a military officer standing in front of an American flag—unremarkable until people noticed that the officer was a German Luftwaffe officer, “complete with military decorations, insignias, and a name tag bearing the German flag.” Id. at 62.
70. Id. at 61.
71. Id.
and also with the nostalgic idea of homeland as "a place you came from—no matter how long ago—and long to go back to but cannot ever really return to." The constant invocation of "homeland security" reinforces the insecurity by depicting the homeland itself as a "battleground," one that must always be alert to the danger within.

Kaplan perhaps stretches too far when she concludes that "[t]he notion of 'the homeland' draws on comforting images of a deeply rooted past to legitimate modern forms of imperial power," but she is surely right to call us to explore the complexities of meaning embedded in the idea of "homeland" and its subconscious effect on our understanding of both this historical moment and our responses to government policies implemented in defense of it. While some may find the connections she identifies as strained, her explanations helped at least this reviewer put words to an immediate and seemingly visceral discomfort with the use of the term "homeland." Deep linguistic references of this sort are often not obvious; naming them may help us to see the invisible and to dissipate some of their power.

Kaplan concludes with a section discussing the "anomalous" space of Guantanamo Bay, where the U.S. government has claimed both complete control over the territory and the absence of the kind of "sovereignty" that warrants the application of U.S. constitutional guarantees to protect the prisoners held there. She sees this "floating colony" as an image that serves, like "homeland," to blur the distinctions between foreign and domestic. At the time the book went to press, the legal status of Guantanamo had been reviewed by the U.S. Court of Appeals for the District of Columbia, which affirmed the government's right to deal with the prisoners without recourse to the laws of the United States. The Supreme Court later overturned that judgment in a six-to-three decision, ruling that U.S. courts have jurisdiction to hear the prisoners' claims that...
their detention was illegal and rejecting at least some aspects of the government claims of exceptional status for prisoners at Guantanamo. But the importance of considering how language—and policy—have the effect of “mapping, blurring, and reconstructing . . . conceptual, affective, and symbolic borders between spheres once thought of as distinctly separate” is reinforced by administration efforts to define prisoners in Iraq as outside the protections of the Geneva Convention, to argue that torture may be permitted to extract information from prisoners in Iraq, and to classify Yaser Hamdi, Richard Reid, and Jose Padilla as “enemy combatants” not entitled to constitutional protections, despite their presence in the United States (and, in the case of Padilla, even despite U.S. citizenship).

Taken together, the three initial essays demonstrate the ways in which the events of September 11 connect with our historical past, even while policymakers continue to claim exceptionalism and a break with that past. They remind us of the subtle power of language to shape human reactions and understandings, and the need to question the assumptions buried in that language. They do not answer the question whether September 11 was transformative, but they provide a richer sense of the landscape within which to consider the question. Finally, they warn of the potential that September 11 may become transformative in part because we (or our leaders) declare and treat it so and then use the declaration as an argument for creating that very transformation.

II. ISLAM AND HISTORY

The next two essays shift the focus of inquiry and ask whether the events of September 11 mark, or will mark, a transformation of Islamic theology. They provide a much more complex and nuanced vision of Islam than generally appears in Western public policy discussions. In the process, they present

79. Rasul, 124 S. Ct. at 2698–99. Finding jurisdiction was only the first step, of course. The Supreme Court found jurisdiction in the federal courts to hear habeas corpus claims by prisoners, thereby mandating some form of hearings for detainees, but the level of scrutiny by the federal courts remains unsettled. Id. ("Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now."). The first federal district court to rule on the claims of individual detainees in light of Rasul rejected all arguments by the petitioners. See discussion infra notes 121–26 and accompanying text.

80. Kaplan, supra note 55, at 55.

81. Id. at 65.
a view of Islam that should resonate with legal audiences, especially those trained in the realist common law tradition. "[M]eaning in Islam," writes Khaled Abou El Fadl,82 "is acquired through the formation of communities of interpretation."83 He describes how the theology of Osama bin Laden—even though it is "at odds with the main interpretive communities of classical Islam"84—could nevertheless operate to renegotiate the meaning of Islam.85 El Fadl continues:

Whether one likes it or not, and for better or worse, what a Muslim does in the name of Islam is in fact a part of the Islamic experience.... Although one can plausibly maintain that bin Laden's behavior was foremost an act of vengeance against a modern reality that has increasingly alienated and marginalized Muslims, and that the classical literary sources of Islam do not support his vengeful behavior, the fact remains that what bin Laden did does have normative value. If Muslims do not succeed in debunking, rejecting, and marginalizing bin Laden's behavior, his ideology, vengeful as it is, will set a normative precedent.86

In Islam(s) East and West: Pluralism Between No-Frills and Designer Fundamentalism, Sherman Jackson87 is even more explicit about the nature of the process that results (or at least in the past resulted) in interpretive validity in Islam. The classical tradition, he says, credited procedure over substance and was therefore willing "to countenance all manner of substantively repugnant views as long as these were derived (or authenticated) through proper and recognized procedures."88 Because only the Prophet is immune from interpretive error, views of Islam could not be silenced as long as they were grounded in authoritative and authentic sources and based on recognized interpretive methods—unless they contradicted a preexisting unanimous consensus of the juridical community,

82. El Fadl is an acting professor at UCLA School of Law and the Omar and Azmeralda Alfi Distinguished Fellow in Islamic Law.
83. Khaled Abou El Fadl, 9/11 and the Muslim Transformation, in SEPTEMBER 11, supra note 1, at 73.
84. Id. at 73. Bin Laden may claim to be offering a return to "lost Islamic authenticity," El Fadl writes, but in reality is presenting "a nihilistic response to the postcolonial marginalization of Islam." Id. at 71–72.
85. Id. at 73.
86. Id.
87. Jackson is an associate professor of medieval Arabic law and theology at the University of Michigan.
88. Sherman A. Jackson, Islam(s) East and West: Pluralism Between No-Frills and Designer Fundamentalism, in SEPTEMBER 11, supra note 1, at 112, 122.
which is rare. Bin Laden's views about Islam thus follow a history of "an embarrassingly broad range of lamentable, dangerous, or even downright repulsive views" that coexisted in the Islamic community alongside views more acceptable to modern Western sensibilities. The views of bin Laden and others are thus not as aberrational as some have suggested. The golden age of Islam, in this description, was not grounded in a vision of equality and justice as much as it was pluralistic and tolerant, encompassing multiple and conflicting visions. And Jackson reminds us that the cost of such pluralism is that "[i]nsincere, wrong-minded, and even repugnant views" cannot be repressed or forbidden or "'shamed' away" by claiming them to be non-Islamic. "Infelicitous views could only be displaced through the production of other views that showed integrity to agreed-on sources and methods and were broader and deeper in their appeal within the interpretive community." Described in this fashion, the airing of views of Islam, including bin Laden's, sounds much like our own constitutional jurisprudence and commitment to evolving standards based on reference back to authoritative texts. Jackson warns that the events of September 11 have motivated an effort to declare that Islam categorically condemns such terrorist acts, to establish a "false universal" that seeks to define Islam in conformity with ideals that accord with Western notions of justice. It would be more fruitful, he argues, for Western Muslims to discuss not a universal Islam but the truth of Islam for particular interpretive communities and to focus as well on pragmatic arguments about the impact of conduct engaged in by their coreligionists who act on interpretations of Islam that seem correct for them but bring retaliation from Western powers.

Both authors argue that the attacks of September 11—and the theology that has been asserted to support them—were shaped by sociopolitical realities, the "outgrowth of social and political frustrations that have steadily grown since the onset of modernity." "Today's Islam, no less than historical Islam, is a product of time, space, and community. What is Islamic de-

89. Id. at 122-23.
90. Id. at 123.
91. See id.
92. Id. at 124.
93. Id.
94. Id. at 126.
95. El Fadl, supra note 83, at 72.
pends on "neither a particular set of verses nor a particular set of legal texts, nor even a particular interpretive method. It is rather the history and experience of a particular people in a particular time and in a particular part of the world." That view presents both risks and opportunities. Risks, because bin Laden, like others before him who have claimed to speak in the name of Islam, by that very act may shape Islam for the future. Opportunities, because Islamic communities in the West may argue and work in opposition to bin Laden's aims and methods without the need to posit a universal and unitary image of Islam for widely different communities with entirely different experiences of interaction with the world. The actions undertaken on September 11 reflect the world and religious view of a portion of the Islamic community, grown out of the postcolonial political and social realities of the Middle East. Whether they signal a transformation of Islam remains to be seen. As with American political ideology and practice, the answer remains in the hands of the relevant political community. For non-Muslims in the United States who cannot be a part of that particular conversation, the significance of the El Fadl and Jackson essays resides in the more nuanced view of the complexities of Islam, the sources of "radical" Islamic theology, and the nature of the theological—and political—debate that needs to occur.

III. DOMESTIC LAW AND HISTORY

The next two essays shift focus once again, this time to the impact of the events of September 11 on domestic law and policy. In The Citizen and the Terrorist, Leti Volpp focuses on the post-September 11 social construction of a racial category (those who appear to be Middle Eastern, Arab, or Muslim) and how that categorization helps to set the boundaries between "American" and "foreign," between citizen and noncitizen. The events of September 11 have also brought back old (and, Volpp argues, gendered) "Orientalist tropes," portraying the West as civilized, modern, democratic, rational, and progressive and the East as primitive, barbaric, despotic, and rooted in passion.

96. Jackson, supra note 88, at 119.
97. Volpp is an associate professor of law at the Washington College of Law at American University.
99. Id. at 148, 153–54.
She describes how, in the aftermath of September 11, racial profiling emerged as a frequent and newly acceptable practice, based on popular and government-reinforced understandings of “who is the terrorist and who is the citizen.” Despite statements warning people not to target members of particular racial groups, government actions spoke louder. Detention of non-citizens (most of whom were Middle Eastern, Muslim, or South Asian), Department of Justice dragnet interviews of some 5000 male noncitizens from Middle Eastern or Islamic countries, accelerated deportations of noncitizens “from countries in which there has been Al Qaeda terrorist presence or activity,” and special registration provisions for close to 100,000 male temporary visa holders, almost exclusively from Muslim countries, all served to rationalize individual racially based action such as refusals to fly with airline passengers, or assaults against individuals who appeared to be Middle Eastern or Muslim. Even violent assaults against those in the targeted racial group were understood, even if not legally justified, as crimes of misdirected passion, she and others have suggested, distinguishing them from hate crimes. Thus, Volpp notes, the murders of Matthew Shepard (a gay man tied to a wooden fence and brutalized by two young straight men) and James Byrd (an African American man chained to a pickup truck by two white men and dragged for three miles) were crimes that were seen as morally depraved and incomprehensible individual acts, while the murders of a Sikh Indian in Mesa, Arizona and two East Asian immigrants in Dallas were patriotic acts, in retaliation for what was done to America. Of course, the justifications offered by the perpetrators do not establish community sentiment, and each of the murders she describes evoked widespread community support for the victims and condemnations of the actions and animus of the attackers. But just as the language of war frames public reactions to September 11, so too, do the racial characterizations by the government frame public sensibilities about race and responsibility.

The effect of the racial categorization, Volpp suggests, has been to redefine who is to be considered a citizen—not in terms

100. Id. at 150.

101. Id. at 148–50. As Volpp notes, the fact that racial profiling is underinclusive (Jose Padilla and Richard Reid do not fit the mold, for instance) and overinclusive (the vast majority of those in the targeted racial category are not terrorists) has not impeded its progress. Id. at 152.

102. See id. at 154.
of formal legal status or legal rights, which are only part of the notion of citizenship, but in terms of identity and solidarity. Who would turn around, she asks, rhetorically, to an imaginary hail of "'Hey, you noncitizen!' (or foreigner, or enemy alien, or terrorist)." Even citizens who appear Middle Eastern, Arab, or Muslim "do not stand in for or represent the nation," and by being stripped of their sense of identity as "citizen," their attachment to citizenship rights and status is also reduced. Those who are Middle Eastern, Arab, or Muslim and noncitizens stand even farther outside the orbit. "How can you guys tell us that people who are not American citizens have rights? Bull crap!" exhorted one caller to the hotline of the American Civil Liberties Union after the Michigan chapter offered to "assist the 566 'men' the FBI contacted for investigatory interviews in the Detroit area." "What makes you think these people have rights? Those are Arabs; they have no rights. Deal with it!" said another. While these may not represent either official government policy or accurate statements of the law, they do likely represent the attitudes of large numbers of Americans reacting to the imagery with which they have been presented repeatedly since September 11. Among the transformative effects of the events of September 11 and their aftermath, then, are the changes in our images of our own community, who belongs and who does not, who is and who is not entitled to be considered "citizens" of America in the broader sense.

In their essay, Civil Liberties in the Dragons' Domain: Negotiating the Blurred Boundary Between Domestic Law and Foreign Affairs After 9/11, Christopher Eisgruber and Lawrence Sager raise concerns about muddying the distinctions between domestic and foreign as the administration crafts its
policy on dealing with terrorists and as the courts struggle to determine what rules apply.\textsuperscript{109} In blunt terms, they say that the events of September 11 "made hash" of the boundaries between domestic law (an ordered, reasoned universe) and the international arena (an "unordered wilderness" ruled by "real-politik rather than reason," where courts have traditionally granted "almost complete discretion" to Congress and the president).\textsuperscript{110} The antiterrorism measures adopted since September 11 "blend criminal law enforcement with immigration policy, foreign intelligence operations, and military force,"\textsuperscript{111} and the courts must venture into the relatively uncharted arena of foreign affairs if they are to maintain vigilance in their protection of civil liberties.\textsuperscript{112}

Eisgruber and Sager offer several examples of the "new, mixed regime" conflating these boundaries.\textsuperscript{113} The USA Patriot Act allows more sharing of information between intelligence and law enforcement agents, making it easier for the government to "spy" on people inside the United States and reversing restrictions enacted in response to abuses perpetrated in the 1950s and 1960s.\textsuperscript{114} The administration's declared policy of trying suspected terrorists in military tribunals without recourse to American, foreign, or international courts, or of holding them indefinitely as enemy combatants without recourse to any court proceeding, challenges judicial ability to identify constitutional limits on law enforcement.\textsuperscript{115} And the government has increased its use of immigration regulation—detaining and deporting suspects, often by way of hearings considered nonappealable—thereby circumventing the protections that would be available if the same immigrants were charged under domestic criminal law.\textsuperscript{116} The authors acknowledge that the mixing of domestic policy and foreign affairs is hardly surprising in response to an event that itself involved both. Their point, rather, is that "[i]f courts are to play any role in sculpting antiterrorism policy so that it respects civil liberties, they can no longer

\begin{thebibliography}{99}
\bibitem{110} \textit{Id.}
\bibitem{111} \textit{Id.}
\bibitem{112} \textit{See id.} at 166–67.
\bibitem{113} \textit{Id.} at 164.
\bibitem{114} \textit{See id.}
\bibitem{115} \textit{See id.} at 164–65.
\bibitem{116} \textit{See id.} at 165.
\end{thebibliography}
treat foreign affairs as terra incognita.” Courts must be willing to enter the arena of foreign affairs, to deny the government the free rein it has often been given in that sphere, or the government will be able to evade the protections so painstakingly crafted into our constitutional law. Further, they say, Congress must be a partner in that process, crafting limitations on the exercise of federal power so that antiterrorism policy can both be effective and respectful of civil liberties. They suggest three doctrinal concepts that may be particularly fruitful in providing a check on government power: increased procedural regulation of areas, like immigration, traditionally left to governmental discretion; sunshine provisions to ensure government accountability when it exercises discretionary authority; and gatekeeping doctrines to limit the executive’s discretion to route cases from the criminal law to the foreign affairs track. Eisgruber and Sager have been joined by others in a growing body of commentary on the appropriate role of courts in times of war and crisis. Their central insight—that courts must rid themselves of the tendency to view international and military affairs as a chartless wilderness where only the executive may venture—is an important and early contribution to the ongoing discussion.

It appears that the courts have at least begun to venture into the uncharted waters outlined by Eisgruber and Sager and have demonstrated some willingness to challenge claims that the government has authority to act unchecked in pursuit of foreign policy and military objectives. In Hamdi v. Rumsfeld, for example, the Supreme Court rejected Bush administration arguments that “respect for separation of powers and the lim-

117. Id. at 167.
118. See id.
119. Id. at 167–68.
Concurring, Justice Souter particularly criticized the government's "mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war," reiterating Justice Jackson's observation that "the President is not Commander in Chief of the country, only of the military." He noted that decisions about what degree of liberty is compatible with wartime exigency are "not well entrusted to the Executive Branch . . . whose particular responsibility is to maintain security." Justices Scalia and Stevens also rejected the government's claims of extraordinary power and would have ordered Hamdi released if not charged under traditional criminal law. Only Justice Thomas agreed that the executive's authority in foreign affairs and national security necessarily trumps the Court's power to review its actions, concluding that the Court lacked "the expertise and capacity to second-guess the executive's determination."

In Rasul v. Bush, decided the same day as Hamdi, the Supreme Court reversed lower court judgments that had been more deferential to government arguments.

Hamdi and Rasul suggest the courts may be less reluctant than in past times of crisis to question government claims of authority, but whether the courts will remain willing to "interfere" with executive power (the characterization is Justice

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121. 124 S. Ct. 2633, 2645 (2004) (quoting the Brief for Respondents). The government also argued that "Hamdi's incommunicado imprisonment as an enemy combatant seized on the field of battle falls within the President's power as Commander in Chief under the laws and usages of war." Id. at 2652-53 (Souter, J., concurring in judgment).
122. Id. at 2659.
123. Id. at 2655. In contrast to the majority holding, Justice Souter (and Justice Ginsburg, concurring) would have found Hamdi's detention unauthorized either by the president's inherent authority or by congressional passage of the Authorization for Use of Military Force and would therefore not have required any further showing by Hamdi to gain release from custody. See id. at 2653-60.
124. Id. at 2671-72 (Scalia, J., dissenting).
125. Id. at 2674 (Thomas, J., dissenting).
Thomas's from his dissent in *Hamdi* remains to be seen. Signals are mixed so far. In *Khalid v. Bush*, the first district court hearing a habeas claim mandated by *Rasul*, Judge Richard J. Leon ruled against the petitioning Guantanamo prisoners, determining that they were entitled only to the legal process the executive branch gave them. "As a general rule, ... the judiciary should not insinuate itself into foreign affairs and national security issues," Leon wrote. "While a state of war certainly does not give the President a 'blank check,' and the courts must have some role when individual liberty is at stake, any role must be limited when, as here, there is an ongoing armed conflict and the individuals challenging their detention are non-resident aliens." In contrast, less than two weeks later, in *In re Guantanamo Detainee Cases*, Judge Joyce Hens Green ruled that procedures established by the government to confirm enemy combatant status for the detainees at Guantanamo are unconstitutional violations of the prisoners' due process rights. "Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats," she wrote, "that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years."

The courts' rhetoric in *Hamdi*, *Rasul*, and *Guantanamo Detainee Cases* indicate healthy skepticism of government claims for plenary authority over foreign and military affairs and the need to rein in civil liberties. To continue down that path, courts will have to weather claims that they are interfering with the country's security needs, perhaps in the face of future terrorist acts on American soil. Even the assaults on a so-called "activist judiciary," launched in the context of court decisions on gay marriage and the Terri Schiavo case, may have an impact on the willingness of judges to play the crucial independent role they must play to maintain a responsible check on gov-

129. *Id.* at *13.
130. *Id.* (internal citations omitted).
132. *Id.* at *18.
ernment authority in the context of the wars in Iraq and Afghanistan.

IV. INTERNATIONAL LAW AND HISTORY

The final two essays focus attention on the international arena itself. In *Transforming International Law After the September 11 Attacks? Three Evolving Paradigms for Regulating International Terrorism*, Laurence Helfer argues that September 11 could, but need not, be seen as representing a paradigm shift in the legal landscape of world affairs. He responds to pre-September 11 arguments, notably by legal scholar Richard Falk, that recent years have seen a shift from a "state-centric legal order" to one in which individuals and non-territorial actors maintain allegiances to "centralized structures above the state and to local communities and subnational movements operating within it." This, Falk suggests, represents a paradigmatic transformation, akin to the transition from "a medieval world in which ecclesiastical authority dominated secular power to a world controlled by independent and sovereign nation-states," identified by seventeenth-century Dutch scholar Hugo Grotius. Helfer disagrees:

"I do not see the September 11 attacks as a "Grotian moment" that changed the world order. Instead, their enduring legacy for international law is likely to be as a catalyst for both multilateral and unilateral efforts—sometimes consistent efforts, sometimes conflictual ones—to recalibrate existing legal paradigms in light of the changed geo-strategic climate that transborder private terrorist networks have engendered."

Helfer notes that there are three existing, and Helfer argues, adequate frameworks in international law for imposing responsibility for the attacks of September 11, each of which has been invoked in the past by the United States in response to terror attacks: "terrorism as international crime," "terrorism as armed conflict," and "terrorism asatrocity." Helfer ac-

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133. Helfer is a professor of law and the Lloyd Tevis Fellow at the Loyola Law School, Los Angeles.
135. *Id.* at 181. The view that we are moving from one paradigm to another is based on the writings of Richard Falk over the past twenty years. See *id.* at 181 n.5.
136. *Id.* at 180–81.
137. *Id.* at 187–88.
138. *Id.* at 182.
knowledges the drawbacks and limitations of these approaches. First, treating terrorism as international crime is grounded in an assumption that terrorists act without the support of state governments and that states will be willing and able to fulfill obligations to identify, arrest, and either prosecute or extradite perpetrators—assumptions that do not hold for the al Qaeda operatives sought by the United States. Second, and more importantly, all three paradigms depend upon a multilateralist view of the world, acknowledging and relying on an international system that defines what constitutes unlawful terrorism, unjustified armed conflict, or atrocity. After September 11, the United States has favored unilateral rather than multilateral responses, rejecting standards and restraints imposed through international agreements and understandings. Such unilateral action by the United States is problematic within an international system of law meant for responding to terrorism in a unified, consistent fashion with broad international support, Helfer notes.

But do these strains on extant frameworks for dealing with terrorism as a matter of international law demonstrate a need to replace them with a new vision? As Helfer notes, the failure of the United States to invoke or act consistently with the available international legal constructs may itself have a transforming influence on those constructs, even though its failure is formally a breach of the multilateral rules rather than an interpretive act. But he views the changes so far, even those reflected in and resulting from September 11, as evolutionary rather than paradigmatically transformative. International law will no doubt "evolve in a post-September 11 world," he notes. The need to combat stateless terrorism is already leading to a "more robust condemnation of terrorism in international law extending beyond the suppression of specific wrongful acts," to the rethinking of definitions of atrocity for the

139. See id.
140. See id. at 183–85.
141. Id.
142. See id. at 184–85.
143. See id. at 185.
144. See id. at 182–86.
145. See id. at 180.
146. Id. at 182.
147. Id. at 186.
purposes of international prosecution,¹⁴⁸ and to international reconsideration and refinement of the appropriateness of the use of force against states unable to control or exclude terrorists or against “autonomous terrorist networks who operate across borders.”¹⁴⁹ Helfer argues that such evolutionary change is preferable, and more descriptive of reality, than the paradigmatic shift described by Falk and others.

In the final essay, Empire’s Law: Foreign Relations by Presidential Fiat, Ruti Teitel¹⁵⁰ concludes that “we are indeed in a constructed transformative moment” in the relationship between law and politics.¹⁵¹ In particular, she argues that the legal responses of the Bush administration to September 11 are operating to shift the political balance in the United States towards vesting more, and at times unreviewable, legal discretion in foreign affairs in the executive.¹⁵² She describes the debate between the “war” and “justice” models that emerged immediately after September 11 but concludes that the debate hardly mattered because the administration sought to follow neither the laws of war nor domestic criminal or constitutional law, arguing instead for “exceptional” law that superceded either model.¹⁵³ While calling the moment potentially “transformative,” Teitel shows that those administration efforts may be viewed as an extension of a direction already seen in the international arena in the waning days of the last century and the first years of this one, a trend towards a politicized jurisprudence and the entrenchment of exceptional uses of the law to justify interventions that would have previously been viewed as illegitimate.¹⁵⁴ Even within this context, however, she sees Bush administration actions as claiming an extraordinary degree of control over the juridical standards. She cites the November 13, 2001, “military” order authorizing the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” the administration’s attempt to exercise absolute control over the nature and scope of military tribunals

¹⁴⁸. Id. at 187.
¹⁴⁹. Id.
¹⁵⁰. Teitel is the Ernst C. Stiefel Professor of Comparative Law at New York Law School.
¹⁵². See id. at 197–98.
¹⁵³. Id. at 197.
¹⁵⁴. See id. at 197–98.
to be used to try terrorism suspects.\textsuperscript{155} In the order, the administration arrogates to itself the power to determine unilaterally and without review the definition of "terrorist" and to decide when and if such military tribunals would be appropriate—and to pursue unilateral action internationally and "to eschew the parameters of international law."\textsuperscript{156} She points in particular to the U.S. position vis-a-vis the International Criminal Court and its claim not that the United States is above the law (which would be "characteristic of non-rule-of-law states") but that its exception from the law "is grounded from within the law and its enforcement."\textsuperscript{157} She finds the U.S. position consistent with an overall attitude she calls "the U.S. sovereign police logic," an attempt to view the United States as outside the bounds of international law because of its position as the "self-appointed world police."\textsuperscript{158} Teitel decries the move towards operating free of constraint on the international scene and "free of congressional oversight or constitutional checks" at home, and she contends that the current "stat[e] of exception" should be considered at best (or worst) "provisional accommodatio[n] subject to constitutional limitations," not "an occasion for lawlessness."\textsuperscript{159} What makes her call all the more critical is the possibility that the administration's declared war on terror has no foreseeable end, given the nature of the terrorist threat and the likelihood that today's wars and "enforcement actions" will produce a perhaps unending stream of new recruits who can operate anywhere in the world.

**CONCLUSION**

As should be evident from this Book Review, the essays in this volume draw on the expertise of scholars from a wide variety of disciplines and range broadly, touching on subjects as disparate as domestic and international law, the nature of Islamic theology and politics, understandings of citizenship, and the balance between security and civil liberties. Each of the topics presented has been, and will continue to be, the subject of debate and discussion by the public and by experts in each of the fields represented. The value of this volume lies in part in

\textsuperscript{155} Id. at 200 n.20.
\textsuperscript{156} Id. at 203–05.
\textsuperscript{157} Id. at 205–06.
\textsuperscript{158} Id. at 207.
\textsuperscript{159} Id. at 207–08.
bringing together such varying themes, all of them implicated by the central and critical question addressed: what truly has changed through the actions of the September 11 terrorists and those who have followed them? The essays in this collection raise concerns and voice cautions; they do not provide answers, nor do they claim to do so. They provide a starting place, not an endpoint, for analysis. But their analyses all point to one critical conclusion: it is not the actions of the terrorists that have transformed the legal and political landscape, rather it is our actions in response that threaten to do so. If we follow our leaders down the path of radical change, then September 11 will, indeed, have been a watershed moment. The essays in this collection sharply delineate the risks involved in taking that path and make clear that following that path is a choice, not an inevitability.