

2015

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## Recommended Citation

Tsai, Robert L., "Three Arguments About War" (2015). *Constitutional Commentary*. 942.  
<https://scholarship.law.umn.edu/concomm/942>

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# THREE ARGUMENTS ABOUT WAR

*Robert L. Tsai\**

## I. INTRODUCTION

America is a nation built on war. This is true not only in the historical fact that armed conflict during the Revolutionary period secured the independence of a freshly imagined people, and that American interests in economics, territory, and security have been regularly advanced through war. It is also reflected, more generally, in the content of the rule of law, which has increasingly been derived from the country's war experience. Although talk of war permeates public debate, it is a grave mistake to presume that all invocations of war are identical. In truth, there is a multiplicity of ways in which references to armed conflict can appear in constitutional discourse. Acquiring a more sophisticated understanding of these occurrences is essential to appreciating the stakes involved and determining what, if anything, can be done about it. The practice of taking rhetorical advantage of war implicates theories of constitutional structure and political development, while raising persistent rule of law concerns.

Consider three very different contexts in which the topic of war has been engaged in recent years: the targeted killing of suspected terrorist Anwar al-Awlaki, President Obama's efforts to mark the end of war in Iraq, and President Obama's decision to "end" his predecessor's "war on terror." Observe, too, three different ways war can be used in a legal argument. In the first example, a claim to an actual state of hostilities plays a central role in legal argumentation. On September 30, 2011, the United States launched a drone attack at the believed location of al-Awlaki,

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\* Professor of Law, American University. Thanks to the Morse Center for Law & Politics, and the Law, Culture & Humanities Initiative at the University of Oregon for providing a scholarly venue to explore this topic. Feedback during a faculty workshop at American University also proved immensely helpful. Generous financial support from Dean Claudio Grossman is gratefully acknowledged. Morgan Lee, a law student at AU, provided fine editorial assistance.

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who was suspected of masterminding Al Qaeda attacks on the U.S. The legality of al-Awlaki's killing depended in large part on the assertion that an actual state of armed conflict against Al Qaeda existed. Relying on a classified Office of Legal Counsel opinion (whose main arguments were later leaked to the media), the administration argued that congressional authorization of military force against the perpetrators of the 9/11 attacks covered this situation and that al-Awlaki was a lawful target in the armed conflict. The bulk of the arguments turned on whether there was a live military conflict against suspected terrorists. Specifically, the memo addressed whether a presidential ban on assassination or laws against murder applied to the situation, whether al-Awlaki and others who might have been present were seized unreasonably or deprived of their lives without due process of law, and whether the action violated international law.<sup>1</sup>

As far-reaching as the OLC position might have been, the presidential action nevertheless involved the use of the fact of war as a general justification. When military engagements are rampant, as they are today, this appears as a routine persuasive technique. In the classical form of the argument, a legal actor relies upon a claim to the existence of a lawful military conflict to defend a course of action. Whether a lawful, live war exists has profound legal repercussions. For instance, according to the Obama administration, if an individual is a suspected "co-belligerent" who might be difficult to capture, the government can take reasonable means to kill the target. In such event, the ordinary rule of law expectations need not apply: the marshaling of evidence, trial in front of an impartial magistrate, an opportunity to be heard, judgment by one's own peers.

Although it represents the most familiar type of war talk, the war-as-justification argument poses a recurring set of rule of law challenges. Some are definitional: how do we determine if there is, in fact, a lawful state of armed conflict and when it starts or ends? How many different kinds of military engagements should be recognized as constitutionally salient? For instance, lawyers for the Bush administration drew a consistent line between a declaration of a "legal state of war," a power accorded to

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1. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1, available at [http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all&_r=0). In response to the stalled judicial confirmation hearing of David Barron, on May 20, 2014, the administration promised to release the contents of the OLC memo jointly authored by Barron and Martin Lederman.

Congress alone, and the President's inherent authority to use military force "in defense of the national security of the United States."<sup>2</sup> For Bush's legal team, this vast category of national security engagements allowed the Commander in Chief to pursue a host of external and internal measures against suspected terrorists and their supporters, including ordering a military strike against a nation-state believed to aid terrorism.

Other standard questions involve how to assess permissible ends and means, i.e., just how far should the fact of military conflict go to justify coercive actions? What kinds of limiting principles on war-justified actions are warranted and feasible? The stakes are enormous, for an entire network of state actions, policies, institutions, and programs can be built upon an initial claim to a temporary state of war.

Now consider another notable reference to war, one that presented a very low possibility for major legal change. As a candidate, Barack Obama repeatedly called for the end of actual hostilities in Iraq, which he believed to be "misguided." Once elected as President, he gave a speech at Fort Bragg marking the end of the Iraq conflict and since then he has repeatedly called attention to its anniversary, but made no discernible effort to harness popular approval of the "historic moment" in favor of legal transformation.<sup>3</sup> At most, he recommended that any savings be reinvested in aid for veterans and other domestic programs, or used to pay for military redeployments to Afghanistan and elsewhere.

Far from calling for the dismantling of the national security state or the advancement of new rights based on the gains from ending the war, Obama remained content to engage in war rhetoric for partisan gain and ordinary policy change. Unlike Lincoln or FDR, Obama never argued that the way that the Iraq war was fought or concluded should alter the way ordinary people understand the Constitution. In passing up the opportunity to engage in what I call "war legacy" rhetoric, his efforts presented little potential for reshaping the legal order. War legacy

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2. See Memorandum from John C. Yoo to Daniel J. Bryant, Assis. Att'y Gen., Office of Legislative Affairs 1-2, 5, 8 (Oct. 21, 2002).

3. See Helene Cooper, *Obama Praises Troops as He Ends the War He Opposed*, N.Y. TIMES, Dec. 15, 2011, at A20, available at <http://www.nytimes.com/2011/12/15/us/at-fort-bragg-obama-showers-praise-on-troops-back-from-iraq.html>. For the impact of war on the construction of time to mark the "end," "beginning," or ongoing nature of war, see generally MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012) [hereinafter DUDZIAK, *WAR TIME*]; Mary L. Dudziak, *Law, War, and the History of Time*, 98 CAL. L. REV. 1669 (2010).

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arguments have their own tenor, structure, and rule of law concerns, but none of these were raised by Obama's orations on Iraq. His election in 2008 heightened expectations of transcendence in foreign affairs, but his actions on this front since then offer a reminder that not every mention of war poses order-altering possibilities.

A third scenario is illustrated by the trope of counterterrorism-as-warmaking, a metaphor that permeated many institutions and all levels of constitutional discourse after 9/11. President George W. Bush coined the phrase "global war on terror," which key figures in the administration then used to mobilize support for dramatic alterations to the constitutional landscape.<sup>4</sup> Once in office Obama decided to depart from his predecessor on public terminology, preferring instead the narrower formulation, "war on al-Qaeda," or the clunky phrase "overseas contingency operation."<sup>5</sup> This rhetorical shift itself is notable, confirming a belief that this particular form of war talk has power and consequences, and that certain negative connotations should be avoided from that point on. Although his change in constitutional language signaled an intention to quit actively governing through terror, much of the justificatory apparatus created by the previous administration remains and new interrogation sites have been established.<sup>6</sup> If anything, the change in public rhetoric hinted at a desire for presidential orations on terrorism to do less partisan work even as they facilitate institutional flexibility for aggressive, often covert, military operations. Ultimately, Obama's shift in rhetoric is consistent with a plan to tinker with the national security order<sup>7</sup>—perhaps even to soften its edges or make it more efficient—but

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4. JAYNE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

5. Scott Wilson & Al Kamen, 'Global War on Terror' Is Given New Name, WASH. POST (Mar. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

6. Not only has President Obama not closed Guantanamo Bay as promised, but the media reports detention centers operating in Afghanistan and Somalia. See, e.g., Jeremy Scahill, *The CIA's Secret Sites in Somalia*, THE NATION, July 12, 2011, <http://www.thenation.com/article/161936/cias-secret-sites-somalia#>; Rod Nordland, *Detainees Are Handed Over to Afghans, but Not Out of Americans' Reach*, N.Y. TIMES, May 30, 2012, at A4, available at <http://www.nytimes.com/2012/05/31/world/asia/in-afghanistan-as-bagram-detainees-are-transferred-united-states-keeps-its-grip.html?pagewanted=all>. To his credit, Obama's Office of Legal Counsel has repudiated certain extreme legal positions on the Eighth Amendment, Due Process, and Fourth Amendment associated with the investigation of suspects and interrogation of detainees.

7. For the contours of the national security order, see generally Jack Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008).

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augured no design to radically downscale it or attack basic assumptions.

The nuances are important. In each case, a legal actor referenced war in making a public law argument, but in each instance the idea of war did a different kind of persuasive work. In the first case, advocates insisted that the fact of an ongoing war licensed a set of coercive programs reasonably adapted to prosecuting that conflict. In the second instance, a hot war had ended or was soon to be concluded, but a public figure declined to use an already mobilized electorate as an engine for legal transformation. If he had done so, the nation would have faced a distinctive set of concerns over how to do justice to military participation and what social meanings should be drawn from the people's wartime experience. In the third case, as with the second, the order-changing potential is immense. By characterizing a social phenomenon in war-like terms, decisionmakers are not so much limited by the parameters of any real military conflict as they are impelled by a general sense of crisis. Insofar as a pervasive sense of siege can be maintained over time through this open-ended discourse, the potential for legal transformation remains.

Why pay close attention to the subtleties in war rhetoric? For one thing, the background fact of American military engagement around the world is unlikely to change anytime soon, infusing war-inspired arguments with a visceral urgency. Americans' experiences, in turn, have altered the tactical possibilities for constitutional debate, granting these kinds of arguments history-laden legitimacy and cultural potency. After generations of military conflict, legal actors have grown adept at taking strategic advantage of the people's fears, hopes, and recollections of war. We can expect war-dependent arguments in one form or another to persist, as advocates of all stripes turn the American people's ideas about armed conflict—either real or imagined—for partisan gain and structural change.

Perhaps the best reason to be more attentive to war speak is that serious rule of law concerns are implicated by these various forms of constitutional discourse. As a family of arguments, war-inspired legal assertions raise concerns about transparency, accountability, duration, and commensurability. For instance, once a nation's war experience is plentiful, a party invoking a particular war may do so less openly, raising concerns about due notice of an effort to undertake constitutional transformation. Casual, oblique references to war can take the place of more

sustained deliberation. Opacity, in turn, may exacerbate deficiencies in democratic accountability—namely, raising doubts that a policy determination or legal change predicated in part on understandings about a nation’s war experience actually captures a robust popular judgment. War-dependent arguments may also be open-ended in dangerous ways, risks best illustrated by such war metaphors as “culture war” or “war on crime.” They blur the line between a single, legally authorized event and a permanent course of action. Along the way, they can make psychological and social linkages between priorities and experiences that are frankly incomparable, at least in ways that facilitate quality policy determinations.

If the Constitution is to survive intact against the onslaught of war talk, it is surely worth gaining a more refined sense of how and why constitutional actors deploy war in their legal arguments. Not every invocation of armed conflict carries with it foundational consequences, but in the modern age, militaristic rhetoric has emerged as a distinctive language of power. The legal system is sustained through a national security order that increasingly depends upon war rhetoric. That discourse, in turn, has been infused with bursts of hyper-patriotism, memories of just wars, and fears about illegal or disastrous military conflicts. War constitutionalism today holds the potential for political and legal development in surprising contexts through the mobilization of war sentiments. It is little wonder, then, that public officials are tempted to turn to this rhetorical tool to gain partisan, policymaking, or interpretive advantage.

The goal of this Article is to evaluate the practice of war constitutionalism and achieve greater clarity about the variations that can arise. I begin by defining war constitutionalism as an accepted practice in legal discourse. I then assess why it has become an integral part of public debate. The remainder of the Article assesses three popular forms of war constitutionalism: war as a justification, the war legacy argument, and war as a metaphor. Each form of war-dependent argumentation not only possesses a distinctive structure as a legal argument, but also poses its own set of rule of law challenges.

## II. WAR CONSTITUTIONALISM: A DEFINITION

Not all public references to war have deep legal implications. But some do. Let us start with some working definitions. As I describe the practice, *war constitutionalism* entails a customary

method of advancing understandings of a governing text.<sup>8</sup> It is not recognized as a formal mode of constitutional interpretation by leading commentators,<sup>9</sup> yet it nevertheless has become a pervasive feature of modern public debate. Certain explicit kinds of war-dependent arguments (especially justifications for war) have been discussed from time to time, but rarely have they been analyzed in the systematic way proposed here. Whatever the precise doctrinal footholds one might use during constitutional discourse (e.g., “Commander in Chief” or “freedom of speech” or “equal protection of the law”), war-based legal forms have an organization and power that is rarely, if ever, cabined by doctrinal rules or decisions themselves. Instead, they have been made and accepted in a variety of doctrinal contexts, whether or not the clauses interpreted deal directly with warmaking.

War constitutionalism takes place when a legal actor makes war-dependent arguments to support an interpretation of a foundational legal text. We can tell it occurs when a participant to a debate over the meaning of a canonical legal text turns to the fact, possibility, memory, or legacy of war as a framing device or an explicit reason for adopting a preferred reading of that text. The exigency and trauma of military conflict can be a reason or a trope, consisting of crises and threats, either real or imagined. Thus defined, the practice is a persuasive strategy with broad utility. It is a transdoctrinal tool deployed energetically by judges as well as activists, and by people with divergent ideological commitments. Excluded from this definition are rhetorical appeals to war to effectuate changes in ordinary law or policy, without broader legal or structural ramifications.<sup>10</sup>

We should recognize a democratic actor may be engaged in war constitutionalism when he or she: (a) references a specific war (a past conflict, an ongoing one, or the prospect of a future war) to support a legal position, (b) alludes to principles, ideas, practices, or lessons supposedly generated during particular wars (e.g., Nazism, Fascism, or anti-totalitarianism), or (c) deploys war as a metaphor to characterize a contemporary social problem

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8. In a constitutional republic, governing texts include any constitution, charter, covenant, landmark laws, or judicial rulings that might announce or codify a government’s basic powers and guarantees.

9. Philip Bobbitt, for instance, identifies six accepted forms of constitutional argument, but nothing resembling war constitutionalism is adequately captured by his typology. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991). I will argue instead that war-dependent arguments straddle several conventional modalities at once.

10. Again, Obama’s celebration of the end to hostilities in Iraq is, by definition, not an instance of war constitutionalism.

(e.g., “war on poverty,” “war on crime,” “war on drugs” or, in more recent decades, “culture war” and “war on terror”). While there are crucial differences to be hashed out, these moves share sufficient family resemblances in terms of structure and function so as to merit treatment as variations of a single legal practice.

Much of the time, the fact of an ongoing conflict is cited as a general justification for policy. Think of *Korematsu*'s<sup>11</sup> reliance upon a declared war to justify the race-based exclusion and internment of Japanese Americans, or the *Schenck*<sup>12</sup> ruling's reference to World War I to justify relaxed review of the government's suppression of socialist propaganda. Both decisions take the classical form of the war justification.

At other times, subtle but crucial differences can be detected. The legacy of war might be deployed in order to frame an existing controversy or encourage listeners to contemplate the long-term legal consequences of a particular war. One can understand FDR to have initiated just such an ambitious program of war constitutionalism in 1941 when, building support for American involvement in Europe, he urged citizens to dedicate themselves to enhanced liberties and elevate them to universal rights for all. His “Four Freedoms” program (and the altered legal-political order necessary to sustain that activist vision) would be the nation's ultimate legacy to future generations. Justice Robert Jackson's 1943 *Barnette* decision,<sup>13</sup> too, is cut from the same cloth, as that ruling sought to trade on a legacy of the Second World War—the principle of anti-totalitarianism—as a reason to vindicate the Jehovah's Witnesses' First Amendment right not to salute the American flag.

War-dependent arguments can be marshaled for modest ends and discrete matters. They can also be unleashed on a grander scale, making up a deliberate, multi-prong program of ideological and institutional transformation. In more ambitious incarnations, the practice may be directed at altering the path of jurisprudential development, dislodging a dominant political-legal regime, drawing attention to policy priorities, or empowering certain sectors of the political community in the hope

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11. *Korematsu v. United States*, 323 U.S. 214 (1944).

12. The *Schenck* Court stated that free speech rights during wartime differ from rights in “ordinary times.” See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right”).

13. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

of forging an alternative governing coalition. But what makes the rhetorical manipulation of war an exercise in *constitutionalism* are the actor's motivations in reshaping fundamental law. Whatever the substantive areas affected, one's ultimate ends must be the establishment of controlling laws, rules, policies, values, habits, social networks, or dependable institutions for the governance of routine matters.<sup>14</sup>

As we shall see, war constitutionalism has evolved into a legal practice through instrumental deployment by lawyers and elected officials as a problem-solving technique across a wide array of subjects. This has occurred repeatedly over a significant period of time, with a broad spectrum of actors tacitly accepting the legitimacy of the approach.

#### A. WAR DEPENDENT ARGUMENTS IN THE FLAG SALUTE CASES: "THE JUDGEMENT THAT HISTORY AUTHENTICATES"

A few caveats are in order. War constitutionalism is not the exclusive province of particular political parties, institutions, or sectors of society. As a legal practice, it has proven to be pervasive and resilient despite the fact that formally the President serves as Commander in Chief and only Congress is empowered to declare war. Judges as much as politicians have tried to reinterpret the Constitution in the name of war. So have school officials, artists, and activists.<sup>15</sup>

The fact or prospect of military conflict has often been cited to expand governmental powers at the expense of rights. Even so—and contrary to popular lore—the mere mention of war does not automatically result in repressive behavior by the state. Under the right circumstances, the practice can facilitate an expansion of rights. This is precisely what happened with the famous controversy over the compulsory flag salute in the 1940s. The Justices of the United States Supreme Court and other legal actors successfully shaped the meaning of the First Amendment in terms of military conflict, one that ultimately expanded

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14. See generally ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

15. See generally Robert L. Tsai, *The Ethics of Melancholy Citizenship*, 89 OR. L. REV. 557 (2010) (analyzing how Langston Hughes's poetry invoked war strategies, realities, and aspirations to prod social engagement, particularly in relation to racial equality and poverty).

individual liberties. Both sides of the debate engaged in war constitutionalism, but employed somewhat different arguments.

Two forms of war rhetoric appeared in the original *Gobitis* decision that went against the Jehovah's Witnesses: war justification and war legacy. Justice Frankfurter, writing for the majority, emphasized the fact of the global conflict as a reason for deference to school officials engaged in the "promotion of national cohesion."<sup>16</sup> The ongoing military struggle rendered the principle of mutual self-defense not merely salient, but also "an interest inferior to none in the hierarchy of legal values."<sup>17</sup> According to the Supreme Court, "National unity is the basis of national security" and school officials were entitled to play an active role in fostering a political order founded on patriotism even when rituals must be enacted under duress.<sup>18</sup> Frankfurter also made a war legacy argument to bolster this second point, invoking the Civil War: "Situations like the present are phases of the profoundest problem confronting a democracy—the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?'"<sup>19</sup>

Justice Frankfurter's answer favored the perception of national strength ("cohesive sentiment") over an appearance of weakness through division (by "weaken[ing] the effect of the exercise"). Juxtaposing two historical moments when the nation found itself at war (the Civil War and World War II), Justice Frankfurter suggested that the legal stakes should be deemed comparable. Furthermore, the fact that national unity proved critical to the successful prosecution of the war during that past conflict meant that national cohesion should be similarly prized as an appropriate war-facilitating value now. Thus, school officials had the constitutional authority to punish the Jehovah's Witnesses for not saluting the American flag.

Justice Robert Jackson's opinion in *Barnette*, which overruled *Gobitis* three years later, struck a very different posture with regard to the emerging practice of war constitutionalism. Justice Jackson rejected some variations of the practice, while energetically making war-dependent arguments of his own. Jackson scoffed at Frankfurter's Civil War precedent, writing, "It

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16. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

17. *Id.* at 595.

18. *Id.*

19. *Id.* at 596.

may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school.”<sup>20</sup> He simultaneously cast doubt on the suggestion that two wartime presidents would have seen the issues the same way and denied that a significant national power—actual warmaking—was at stake in the flag salute controversy.

Instead, Justice Jackson demanded a close fit between the actual powers used in an earlier war and the powers implicated by the conflict underway before a wartime precedent should be cited. He further rejected Frankfurter’s assertion that ongoing hostilities were sufficient in this instance to alter the legal calculus. Jackson read the power to wage war to be the exclusive province of the federal government, something not implicated by the school board policy. For lack of fit, the *Barnette* decision rejected both the Civil War analogy and any argument premised on the ongoing war.<sup>21</sup>

More generally, Justice Jackson warned of the dangers posed by casual reliance on war-based arguments in judicial decision making: “Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning.”<sup>22</sup> There are two nested ideas captured by this criticism: first, an institutional claim as to the uniqueness of judicial interpretation; and second, an assertion that war-dependent assertions can be inappropriate when judges make law. Beyond logical imprecision, Jackson had a more general objection to war-dependent arguments: they fostered utilitarian calculations. “If validly applied to this problem,” he observed, “the utterance cited [as to the Civil War] would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.”<sup>23</sup> Jackson worried that war-dependent arguments tilted legal analysis decisively in favor of governmental action and encouraged a brute utilitarian calculus in which no individual citizen could prevail. By more carefully restricting the salience

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20. *Barnette*, 319 U.S. at 636.

21. *Id.* at 642 n.19 (“The Nation may raise armies and compel citizens to give military service. It follows, of course, that those subject to military discipline are under many duties, and may not claim many freedoms that we hold inviolable as to those in civilian life” (citations omitted)).

22. *Id.* at 636.

23. *Id.*

and scope of war-based arguments, his analysis created space for a jurisprudence of individual rights.

But things are never quite as simple as they seem. Although Justice Jackson demolished Justice Frankfurter's previous war-inspired arguments in systematic fashion, he never called into question the form of the arguments. Rather, he then resorted to war-dependent arguments of his own by staking a claim to the legacy of the Second World War. He built the case against a mandatory flag salute in part by describing local officials as "village tyrants" and reminding the populace of "the fast failing efforts of our present totalitarian enemies."<sup>24</sup> Along the way, Justice Jackson turned the repressive behavior of external enemies (Nazis then, Communists in subsequent cases) into a negative prototype for measuring the legality of actions by domestic officials. He molded the historically contingent fact of war into a set of normative grounds, legal constructs, and other doctrinal tools for extending the reach of the First Amendment to protect the unusual beliefs of the Jehovah's Witnesses. Ruling in favor of these particular dissenters, and reorienting American institutions toward a generous protection of free speech and religious liberty, comprised part of the politico-legal strategy of winning the war at home.

The war-driven exchanges between the two duly constituted judicial bodies in the early 1940s ultimately resulted in a broadened right of conscience, dependent in part upon a just war as its general rationale.<sup>25</sup> Jackson called this interpretive approach—which entailed taking account of how war-inspired nationalism had fueled racism and authoritarianism—rendering a "judgment that history authenticates."<sup>26</sup> *Barnette* approved war constitutionalism, albeit with a substantive reading of the First Amendment and the nation's war experience that differed from that announced in *Gobitis*.

What this and so many other similar incidents reveal is that the mobilization of people, institutions, resources, and ideas in the

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24. *Id.* at 638, 641.

25. *Barnette* suggests that local school officials' attempt at war-based constitutionalism pales in comparison to the perceived prerogative of Congress in actually trying to wage war. Even so, the decision stops well short of barring state or local officials from conducting patriotic displays altogether. Such actors can step into the gap when they are not prohibited from acting by the federal government, but they must still do so in a way that respects individual rights. As for arguments about war, *Barnette* rejected only a popular form of war constitutionalism when local actions interfere with a constitutional right.

26. *Id.* at 640.

name of war has been a popular technique of adding to the constitutional corpus. In fact, a good many bedrock legal rules and constitutional grammar can be counted as direct descendants of armed conflict.<sup>27</sup> Many of these war-based articulations of rights or powers have little or nothing to do with actually conducting a war. Rather, they take the form of reasons why America fights or consideration of what, looking backward, we consider to be legacies of a war that has been well fought.

Once we become sensitized to the phenomenon of war-inspired interpretations of the Constitution, it is easier to notice its abundance. War-strengthened rights include the right of conscience, mass demonstration, racial equality, the right to serve in the military, religious freedom, and the right of counsel. War-weakened ideals, during hot wars as well as at key moments of the Cold War, have included the rights of dissent and association. At different times and under different legal regimes, one might see distinct patterns with respect to each of these war-inflected rights.

#### B. WHY DOES WAR CONSTITUTIONALISM WORK?

Legal arguments that draw on the phenomenon of war enjoy persuasive power because of America's unique historical experiences, the fact that governing institutions have embraced war-dependent arguments in the past, the cognitive dimensions of war rhetoric, and even because of the significant gaps in constitutional text.

Americans' lived experiences with war represent the largest component of this body of knowledge. War has been a constant and pervasive part of American life.<sup>28</sup> The seemingly never-

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27. As I have argued elsewhere, a great deal of modern First Amendment law consists of the mobilized rhetoric of the Second World War and subsequent Cold War. *See generally* ROBERT L. TSAI, *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE* (2008); *see also* Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 365 (2008). Mary Dudziak and others have made similar arguments on behalf of the development of the discourse of equality, suggesting the conditions under which they might be made, but without making any strong normative claims as to how such arguments might be assessed. *See generally* MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2002); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999). Rogers Smith and Philip Klinkner do make an effort to elaborate the basic conditions of major political change on behalf of rights, but they too are centrally concerned with elaborating an explanatory model rather than coming up with a framework for determining when war-inspired changes ought to be treated as binding norms within the American constitutional tradition. *See* ROGERS SMITH & PHILIP KLINKNER, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (1999).

28. *See generally* DUDZIAK, *WAR TIME*, *supra* note 3.

ending fact of war has allowed popular understandings of war's rationales, ends, and duration to be routinely manipulated for legal and political ends. Not only has military conflict been a defining part of our cultural backdrop, particular wars have been thought to yield legal principles. That is to say, the intensive mobilization that surrounds war is treated not merely as an irrational or irrelevant occurrence, but rather, in some cases, as a legitimate engine of constitutional innovation. The Revolutionary War, Civil War, World Wars, and Cold War are all believed to be historical moments when organized violence threatened the basic legal order, provoked deep reflection on foundational values, and ultimately yielded enduring principles, either during hostilities or after the fighting had ended. Some of these legal ideas have been codified in amendments to the U.S. Constitution (most notably, the Reconstruction Amendments), while other war-inspired ideas have become entrenched in statutes (say, the War Powers Act) and judicial decisions like *Barnette*.

Part of the answer is found in political theory. Liberalism demands that state-sponsored violence be justified. Most theories of the state begin with the need for individual self-defense, which then ripens into a collective right of self-defense. Libertarian theories take the theory through mutual compacts for self-defense and stop at the minimal state.<sup>29</sup> Those who prefer a more robust state go further in elaborating the core powers of the ideal state. But whatever type of state is ultimately envisioned, it is commonplace to say that the state's paramount obligation is to protect the people. "Security against foreign danger is one of the primitive objects of civil society," Madison explained. "It is an avowed and essential object of the American Union."<sup>30</sup> The principle of mutual self-defense forms the theoretical foundation for the classical form of the war justification.

What this also means is that, as a baseline matter, citizens are ideologically conditioned to respond viscerally to claims that a crisis risks the survival of the state and themselves. When legal actors make constitutional arguments justified by the existence of armed conflict, they trigger the complex political, psychological, and cultural frameworks that prioritize such external threats as problems of the first order requiring swift and decisive responses. Thus, we do well not to underestimate the cognitive dimensions

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29. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1977).

30. THE FEDERALIST NO. 41, at 256 (J. Madison) (C. Rossiter ed. 1961).

of war talk—its power to shape mindsets, attitudes, concepts, and even behavior.

War legacy arguments operate somewhat differently than appeals to a live war: they respond to the people's rational need to make sense of a chaotic and destructive event *after the fact*. They trade on a polity's desire for sacrifices to be honored, civilizations rebuilt, and the rule of law restored. In a republic, it is believed that victory on the battlefield should be translated into the terms of virtue, drawing moral lessons from crises to perfect the legal order and foster good citizenship.

Figurative uses of war appeal to a different need entirely, namely, that we need prototypes and analogies from which to make sense of and make snap judgments about our social experiences. This desire to manage the social world through comparisons is deeply rooted in human nature, but also incredibly difficult to control. Once a chain of cultural and psychological associations have been wrought from Americans' war experiences, it is then tempting—in an environment steeped in war—for legal actors to describe other crises or priorities in similarly alarmist terms.

Finally, war-dependent arguments help to fill gaps in constitutional text and practice by satisfying a deep desire for salience. Intellectually, we may understand the law's claim on us even if we never played a part in deliberating over a particular law or consenting to its terms. But social contract theory and brute power arguments still strike many of us as providing incomplete claims to legal legitimacy. This nagging doubt about the Constitution's continuing claim of authority on generations of citizens who did not participate in its framing is exacerbated by the passage of time and by the obstacles to making formal amendments to the document. Enter: the body of customs and precedents that have arisen to help make the 1787 text relevant to our own time. On this view, the ascendance of war constitutionalism as a social practice is evidence that formal approaches to interpreting the Constitution are not enough—each generation demands its own tangible way of making ancient obligations salient to their lives and experiences. By interpreting foundational commitments through their own war experiences, Americans insist that more recent history matters at least as much as ancient history.

## C. CAUTIONARY NOTES

Despite the power and even the growing pedigree of war-dependent arguments, serious risks remain. The primary democratic concerns revolve around how to justify war-based constitutionalism and how to contain the risks of abuse. I begin with four observations. First, by its very nature, war-dependent arguments are not tethered to the language or precise history surrounding the writing or ratification of the Constitution. In this very important sense, it is a non-textual tool of interpretation that is inherently open-ended. Instead, the form of argument is limited only by the actual experiences and memories of the living, along with any interpretative rules imposed upon their usage. Second, and cutting in the other direction, appeals to war in the service of constitutional interpretation usually follow a coherent structure. Third, such appeals are not constrained by the actual circumstances of war, as the arguments are made during hot wars, undeclared wars, military conflicts, and even peacetime. Fourth, opposition to war-inspired arguments rarely, if ever, challenges the propriety of using war as a basis for making legal claims, thus suggesting widespread (if not always overt) acceptance of the legitimacy of war constitutionalism.

War rhetoric is attractive because, in a pluralistic and fragmented legal order, it possesses the power to unify and mobilize. In part because modern liberalism is individualistic and non-judgmental, it can also be alienating. Both modern liberalism and libertarianism promote thin, mutual ties of affinity and respect. The language of war heightens the stakes of a social conflict, identifies allies and enemies, puts opponents on their heels, and spurs people to action like few other techniques can. The argument has what might be called a communitarian quality, with the power to inspire self-sacrifice for others, respect for broader principles, and love of country. Through this mode of argumentation, a constitutional actor can draw upon more recent historical episodes rather than rely on a revolutionary past that may no longer inspire belief and action in Americans living in the twenty-first century. As we have moved farther away from the colonists' break from Great Britain and the particulars of their grievances and lifestyle, it has become harder for that generation's experience alone to generate anything like normative authority among the living. A people's war experiences—to supplement the Founding—can serve as a compelling way of revitalizing history to inculcate constitutional fidelity, *i.e.*, the feelings of attachment, duty, and respect key to the survival of a written constitution.

The problem, however, is that a war experience is not understood in the same way by all who lived through it, much less by those who learn about a war purely through secondary sources. Legal arguments that assert the existence of, and depend upon, a dominant understanding of history may try to impose an impossible or unrealistic consensus. To a large extent, of course, this is true of all history-dependent arguments. This difficulty has never been reason enough to put historical arguments out of bounds. And yet the possibility should not be dismissed out of hand that wars—with the unequal suffering, rancor, and xenophobia that seem always to be unleashed—may prove uniquely polarizing when injected into constitutional debate. In other words, there is a danger that, for any particular military conflict, the anticipated legal stability hoped for is actually undermined by popular memories of that war. This insight about anticipated social cohesiveness offers an explanation for why older wars and victorious wars are more often cited by legal actors in constitutional discourse. In referencing glorious conflicts, it may appear easier to project a unity of purpose and to generate the minimal social approval necessary to maintain legal appearances.

Finally, war-inspired interpretations of the Constitution can be entrenched in any number of ways—through statute, judicial opinion, administrative action, or political rhetoric—that may not be equivalent in terms of visibility, accountability, or permanence. The relative degree to which these legal positions can be codified compounds inherent difficulties in studying war as a vehicle for legal innovation.

### III. WAR AS A JUSTIFICATION

On any number of occasions, the fact that a military conflict is underway or imminent is given as a reason for doing *X*.<sup>31</sup> When this occurs, war is being presented as a *reason for action* or as a *ground for decision*. This form of the war-dependent argument is the most prevalent in constitutional discourse, and, as earlier discussed,<sup>32</sup> for good cause. Because of its general structure (a premise, a proposal, and appeal to logic), such an argument is easily identified and therefore can be most readily disputed. The

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31. War as a justification for doing *X* should not be confused with a justification for war in the first instance. The latter is a rationale for waging war, while the former is a secondary strategic move, contingent on the fact of armed conflict.

32. See generally *supra* Part I.B.

substance of the argument may be explosive and far-reaching, and citizens themselves may be prone to respond to it viscerally, but the form of the argument itself poses no special dangers apart from having to grapple with its particulars. It is susceptible to contestation according to the rule of reason, in law as in politics. And given that self-defense and collective welfare represent core rationales for the state itself, arguments about national security or emergency cannot be excluded from legal argumentation *a priori*.

Because this form of the argument at first blush satisfies the principles of reason and transparency, we rarely see an objection that a war justification is “out of bounds” so long as a claim to a live war is plausible. It may be a poor reason or backed by thin evidence, but these are different kinds of objections. Instead, having encountered such arguments before, one expects to move swiftly to a more fine-grained engagement with the particulars of the position staked out by a proponent of war constitutionalism. A claim of actual exigency organizes the entire conversation: one that is order-threatening, pervasive, and unavoidable.

#### A. JAPANESE-AMERICAN INTERNMENT: THE CONVENTIONAL FORM OF THE ARGUMENT

Arguments predicated on a live war as a justification assume a recurring form. Take *Hirabayashi v. United States*,<sup>33</sup> in which the Supreme Court upheld a curfew for all individuals of Japanese ancestry, as well as for resident aliens from Germany and Italy. This decision laid the logical groundwork for later internment decisions.<sup>34</sup> Writing for a unanimous Court, Chief Justice Harlan Fiske Stone began with this seemingly ironclad proposition: “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>35</sup> But he then briskly pivoted, relying on Congress’s declaration of war against Japan (as well as the Pearl Harbor attack) to justify a relaxation of that standard: “We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, *in time of war and of threatened invasion*,

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33. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

34. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Yasui v. United States*, 320 U.S. 115 (1943).

35. *Hirabayashi*, 320 U.S. at 100.

calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.”<sup>36</sup>

Importantly, the Court defended its parsimonious reading of the Equal Protection Clause in terms of the dangers of espionage and sabotage—concerns heightened by an attack by a foreign power and the commencement of formal hostilities. Justice Stone not only described the context as “a time of war,” but also declared the domestic arena in which the curfew operated as part of the “war setting.”<sup>37</sup> Similarly, Justice Murphy argued that ongoing warfare allowed the executive to control property and persons in ways that might not be permitted in “normal times.”<sup>38</sup> The live war argument influenced the determination of not only whether governmental action was backed by sufficient empirical evidence, but also whether the curfew itself amounted to a reasonable response to war. Existing war conditions made the need for “some restrictive measures . . . urgent.”<sup>39</sup>

Now, an opponent to these measures could reject the causal claim that the affected community has actually interfered with the government’s warmaking powers. One could also doubt the immediacy of any threat of invasion or the risk of sabotage.<sup>40</sup> But there can be no denying that the Court’s persuasive strategy as a whole amounted to the use of a declared war as a general justification for race-based domestic.

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36. *Id.* (emphasis added). This passage raises two possibilities: one, the wartime paradigm calls for special or exigent rules; or two, wartime calls for merely deferential application of ordinary rules. The first option by definition implies a temporary lawlessness during which time effective judicial review is not operable or feasible; the second option suggests normal time in which regular but deferential review occurs. The internment cases are probably best explained by the second reading simply because the Court proceeds to engage in judicial review, though some of the language suggests the review is so deferential as to be non-existent. For example, to conclude that “we cannot reject as unfounded the judgment of the military authorities” suggests the Justices reviewed only for irrationality, and finding no arbitrary motivation, asked no further questions. *Korematsu*, 323 U.S. at 218 (citing *Hirabayashi*, 320 U.S. at 99).

37. *Hirabayashi*, 320 U.S. at 101.

38. *Id.* at 109 (Murphy, J., concurring).

39. *Id.* at 101.

40. In fact, in an effort to undermine the legitimacy of the ruling, advocates later tendered evidence showing that the threat of invasion and sabotage was overblown by the administration, but DOJ lawyers did not apprise the courts of the fruits of their surveillance. See *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (granting *Korematsu*’s *coram nobis* petition because government “deliberately omitted relevant information and provided misleading information in papers before the court”); Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, THE JUSTICE BLOG (May 20, 2011), <http://blogs.justice.gov/main/archives/1346> (stating that the Solicitor General’s failure to inform the Supreme Court of the Ringle Report, which found that Japanese Americans posed a minimal security threat, “might approximate the suppression of evidence”).

The internment decisions served as a crucial link in a complex emergency legal regime that delegated lawmaking powers to military authorities on the West Coast and authorized sweeping detention measures during wartime. According to the war-dependent logic provided by the High Court, “the conditions of modern warfare” require that “the power to protect must be commensurate with the threatened danger.”<sup>41</sup> Once framed this way, the resulting debate centered on actual hostilities and whether the challenged measures implicated the government’s ability to successfully prosecute war, as it should have.

The responses to an argument predicated upon a military crisis are legion. An opponent could deny that a conflict is an authorized war (or contend that its authorization is defective), argue that the proposed course of action is not essential to the conduct of war, and so on. Under the right circumstances, one could argue that the target of regulation is so distant from the nation’s war aims that the claim of emergency is correspondingly weakened. In this instance, one could claim that broad-based domestic restrictions on people not obviously involved in the war should be viewed more skeptically than, say, decisions to safeguard specific national security sites or troop deployment decisions.

Still, to recognize that the form of the argument is legitimate is not to deny that it has its own rule of law challenges. The internment cases illustrate a distinctive feature of war justification arguments: *they appear presentist in orientation*. That is, they typically focus on the emergency at hand, preferring not to dwell on the long-term consequences of a legal action, but instead to wall off such considerations from scrutiny. Hence, we should take note of the argument’s tendency to sharply restrict the scope of relevant conversation.

In *Hirabayashi*, for example, Justice Stone’s opinion upheld a wartime curfew for Japanese Americans and Japanese nationals, along with German and Italian nationals. The Justices adopted a narrow conception of equality when they stated that only strong evidence of racial animus would overcome the war-enhanced legal standard. The fact of a live war changed how the Court viewed the government’s motivations in creating a race-based military order, with the Court finding that the petitioner “was not excluded from the Military Area because of hostility to

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41. *Korematsu*, 323 U.S. at 220.

him or his race [but was rather] excluded because we are at war with the Japanese Empire.”<sup>42</sup>

The *Hirabayashi* Court also denied any far-reaching impact of the ruling simply by refusing to entertain any further thoughts about such a possibility. “We decide only the issue as we have defined it,” Justice Stone insisted,<sup>43</sup> excluding any considerations of the consequences of accepting race-based decisions in the name of making war. Similarly, in *Korematsu*, Justice Black repeatedly stressed that “time was short” because of “military urgency.”<sup>44</sup> He deplored “hindsight” analysis and claimed that the decision was limited to upholding the government’s order excluding Japanese Americans from the military area “as of the time it was made and when the petitioner violated it.”<sup>45</sup> The Court’s presentist orientation led to some surreal and hyperformalist moments, such as when the Justices said they would only review the legality of the government’s exclusion orders rather than any “future” order establishing the internment camps<sup>46</sup>—but by the time the case had reached the High Court, all such orders had been carried out.

But treating doctrinally-oriented consequentialist arguments as irrelevant while throwing open the door to warmaking consequences may not be principled for two reasons. First, if the assumption is that a wartime rationale expires the moment war ends, it assumes we can know when war has ended.<sup>47</sup> This might be relatively easy to do within the traditional paradigm initiated by open declarations of war and concluded through the signing of an armistice, but what happens when we encounter war justifications during military conflicts with no obvious end in sight? Even where, as in the internment cases, doctrinal consequences are left for another day to be dealt with, there is no denying that there may be such an impact at a later date, when the next emergency arises or the next policy measure is to be reviewed (the problem illustrated by Justice Jackson’s proverbial loaded gun).<sup>48</sup>

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42. *Id.* at 223.

43. *Hirabayashi*, 320 U.S. at 102.

44. *Korematsu*, 323 U.S. at 223–24.

45. *Id.* at 219.

46. *Id.* at 220–22.

47. Note, for instance, that Justice Roberts, in dissent, argued that the passage of time since Pearl Harbor should be counted against the government, undermining the government’s claim to require every possible tool at its disposal during wartime. *Id.* at 226 (Roberts, J., dissenting).

48. As Jackson argued in dissent, a judicial decision sanctioning a poor war justification could do more harm than the justification itself. “The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible

Second, one must fight the tendency toward simple utilitarianism at the expense of other constitutional values, such as dignity and equality. Justice Black expressed this logic when he stated that “hardships are part of war, and war is an aggregation of hardships.”<sup>49</sup> But wartime burdens are never equivalent, and there are structural reasons to believe that decisions ostensibly created in wartime can generate path-dependent political investments that later become more difficult to defund or transfer (say, investment in enhanced surveillance and interrogation procedures following even judicial rulings that cautiously approve policies). Not every emergency-style order is reviewed by a court or presents a live controversy once review occurs. By contrast, the logic of war-enhanced justifications can permeate official policy and institutions and acquire an irresistible quality.

If there is a criticism to be leveled here, then, it is that slippery slope arguments are treated as off-limits precisely when they make the most sense. Crises highlight short-term stakes at the expense of long-term consequences. War justifications made during crises marshal enormous amounts of force, rhetorically reducing objections and objectors to a kind of necessary but unfortunate collateral damage. To counter the inclination to mortgage the future by betting everything on immediate, decisive action, one must find ways of ensuring that long-term considerations, both principled and pragmatic, play a role in public deliberation. Even if one does not ultimately stand in the way of emergency measures taken during a hot war, careful consideration of foreseeable doctrinal consequences may lead decision makers to handle war justifications more carefully.

#### B. AUMF AND 9/11

A more recent example of the war justification approach can be found in the 2001 congressional authorization for counterterrorism activities. Citing the attacks of 9/11 as “acts of treacherous violence,” Congress invoked the nation’s “rights to self-defense and to protect United States citizens both at home and abroad.” The terrorists’ “grave acts of violence” served as the basis for a broad grant of authority to the president to “use all necessary and appropriate force against those nations, organizations, or persons” who “planned, authorized, committed,

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claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.” *Id.* at 246.

49. *Id.* at 219.

or aided the terrorist attacks,” or “harbored such organizations or persons” or will “prevent any future acts of international terrorism against the United States.”<sup>50</sup>

Since 2001, the authorization has been cited as the basis for a widening circle of governmental policies, including the detention and interrogation of “enemy combatants,” the war in Afghanistan, the use of military commissions to try suspected terrorists, the program on targeted killings and drone strikes, and even domestic surveillance programs. The AUMF has been invoked not only in public debates, but also during litigation and legal memoranda prepared by administration lawyers.<sup>51</sup>

These developments illustrate that one of the major difficulties with war justifications is subject matter spillover. That is to say, once a state of armed conflict has been more or less established, that fact may be used to justify other exigencies across a spectrum of social domains. The problem then shifts from ascertaining the extent and immediacy of a live threat to determining whether governmental actions taken in the name of fighting a war is reasonably related to existing war policy. The further away from the core of that war policy a measure is, and the more a measure departs from past practices, the more likely external legal limits (those arising from the Bill of Rights, international agreements, or other sources of international law) might be enforced.

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50. Authorization for Use of Military Force § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note) (2001)[hereinafter AUMF].

51. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 515 (2004) (stating that AUMF authorized Afghanistan action and detention of person marked as “enemy combatant”); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> (explaining that drone attacks are legal in part because the AUMF authorizes the president “to use all necessary and appropriate forces” against those “nations, organizations, and individuals responsible for 9/11”); U.S. DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 1-2 (2011), available at [http://msnbcmmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf); *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009) (citing Respts’ Mem. Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, Dkt. No. 126, Civ. No. 05-889, at 1, 3-8 (Mar. 13, 2009); U.S. Dep’t of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (explaining the President authorized the NSA to intercept international communication between individuals linked to Al Qaeda). My limited goal here is to observe the commonality of these reforms rather than to opine on the wisdom of any of the proposals themselves.

Concluding that even broad war justifications can be stretched beyond all reason, some advocates and scholars have called for the repeal, amendment, or replacement of the AUMF.<sup>52</sup> The major premises underlying such reform proposals are that war justifications must be codified and reflect, as much as possible, cooperation between the political branches.<sup>53</sup> On this view, a tenuous statutory authorization worsens the problem of spillover and exposes a war justification to charges that it is politically illegitimate, unconstitutional, or in violation of international law.

### C. RIFFS ON A CLASSIC: GAYS IN THE MILITARY, GAY MARRIAGE

Now consider a variation on the war justification formulation, in a more far-reaching incarnation that actually helped to expand individual rights. On September 20, 2011, President Obama certified the end of the military's "Don't Ask, Don't Tell" policy, which had barred gays and lesbians from serving their country openly. In his announcement, he cited not only the country's longtime commitment to egalitarianism, but also a growing realization that the anti-gay policy "undermined our military readiness." In this way, a war justification once again contained consequentialist arguments about effective warmaking relevant to a constitutional question. In this case, fighting a war more effectively encompassed pursuing the goal of a more expansive notion of equality for those engaged in the fighting.

Sexual orientation should be stricken from the criteria for fitness to serve in the military, Obama insisted, with service itself to be treated as a valuable social good. According to the president, the nation's fighting force should not be "deprived of the talents and skills of patriotic Americans" simply on the basis of their sexual preference, "especially with our nation at war"<sup>54</sup> —

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52. See, e.g., Robert Chesney et al., *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INST. 2 (2013); Robert Golan-Vilella, *Time to Narrow the AUMF*, THE NAT'L INTEREST (Sept. 18, 2013), <http://nationalinterest.org/blog/the-buzz/time-narrow-the-aumf-9082>; Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 449 (2011) (arguing that the war in Iraq exceeded the terms of AUMF).

53. The ideal of inter-branch cooperation over foreign affairs is powerfully stated in Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).

54. Press Release, The White House Office of the Press Sec'y, Statement by the President on Certification of Repeal of Don't Ask, Don't Tell (July 22, 2011), <http://www.whitehouse.gov/the-press-office/2011/07/22/statement-president-certification-repeal-dont-ask-dont-tell>.

an obvious allusion to ongoing military engagements. Obama's presentation involved a textbook replay of Harry Truman's arguments in support of desegregating the military on the basis of race. At both historical moments, a sitting President advanced equal protection of the law by arguing that the fact of ongoing military conflict itself tipped the scales in favor of the anti-discrimination principle.<sup>55</sup> According to the form of the argument, the demands of successfully waging war—acquiring resources, recruiting manpower, inculcating a sense of commitment and trust among soldiers—aligned with the promotion of racial equality. Treating sexual minorities the same as heterosexuals made the military more capable of meeting modern challenges. America's fighting forces were stretched thin around the world. Notably, Obama pointed out that the change in policy ensured that patriotic Americans “will no longer have to lie about who they are in order to serve the country they love.” In this way, he drew upon an abiding traditionalist belief that an effective military required soldiers who were not only fierce warriors, but also honorable people. The exclusion of homosexuals from the armed forces distorted the very ideal of the citizen-soldier.<sup>56</sup>

A few months later, President Obama described the evolution of his thinking that led to his newfound public support for gay marriage. In an ABC interview, he said:

I have to tell you that over the course of—several years, as I talked to friends and family and neighbors. . . . When I think about—those soldiers or airmen or marines or—sailors who are out there fighting on my behalf—and yet, feel constrained, even now that ‘Don’t Ask, Don’t Tell’ is gone, because—they’re not able to—commit themselves in a marriage.

At a certain point I’ve just concluded that—for me personally, it is important for me to go ahead and affirm that—I think same sex couples should be able to get married.<sup>57</sup>

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55. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948).

56. Senator Joseph Lieberman (I-CT) and Patrick Murphy (D-PA), who co-sponsored the repeal legislation, echoed these themes: “It is our firm belief that it is time to repeal this discriminatory policy that not only dishonors those who are willing to give their lives in service to their country but also prevents capable men and women with vital skills from serving in the armed forces.” Michael D. Shear & Ed O’Keefe, *Obama Backs ‘Don’t Ask, Don’t Tell’ Compromise That Could Pave Way for Repeal*, WASH. POST, May 25, 2010, at A1.

57. Interview by Robin Roberts with President Obama (May 9, 2012), available at <http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043>. For a critique of Obama’s personal tone in discussing gay

President Obama's statement proved noteworthy in two respects. First, he drew on changed legal conditions—namely, the recent end to sexual orientation discrimination in military service. He bootstrapped the military service question into the one about marriage, implying that action on one front ineluctably leads to progress on the other. If one perceives the two issues as implicating essential rights and obligations of equal citizenship, then the idea that sexual equality applies in the military service suggests that the principle also has a strong claim of application in other domains of civic life. Second, he relied on ongoing, active military service—that the nation found itself in wartime—to justify equality in domestic life. The fact that “soldiers or airmen or marines or sailors . . . are out there fighting on my behalf” at that very moment was tendered as a reason to support gay marriage.

His point was not to convey any personal feelings of guilt but rather his considered judgments on how war altered the very conditions for evaluating what equality required. The fact that gay soldiers were putting themselves in harm's way, Obama, suggested, demanded a more searching inquiry by policymakers into the issues these soldiers hold dear. Third, this attitude drew upon an ancient linkage between civil equality and a citizen's duty to defend the republic. In this neoclassical view (new because the rights to which citizens are entitled are treated as an open set), the duty to fight entails a reciprocal obligation of fair treatment on the part of the state towards the loyal subject of law.

Still, there was one crucial area where the new war justification argument differed from the conventional form of the argument: the permanence of one's legal ends. Note that the fact of war was not used to create an extraordinary legal outcome for gay rights, as with the internment cases, but rather to justify a permanent state in civil equality for sexual minorities.<sup>58</sup> In other words, the fact of armed conflict (ordinarily understood as an exigent state) can be used to fashion legal principles that, going forward, will depend on no live war in the future for its legitimacy. Civil equality for gays and lesbians—in the military and in

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marriage, see Elliott Abrams, ‘*On My Behalf*,’ *WEEKLY STANDARD*, May 9, 2012, available at [http://www.weeklystandard.com/blogs/my-behalf\\_644310.html](http://www.weeklystandard.com/blogs/my-behalf_644310.html).

58. Gay soldiers are certainly offered up as virtuous and deserving of autonomy and dignity, while in the internment cases, enemy aliens and those of Japanese ancestry (regardless of legal citizenship) are treated as imperfect citizens. So models of ideal citizenship, whether made explicit or latent in the debate, can and do influence constitutional debate.

matrimony—will not expire at the close of the latest war or international police action. One might find this a happy outcome because a war going on the time of decision was simply one of many reasons to support gay equality (and perhaps not even the most convincing one). It does, however, illustrate the malleability of war justifications, whose scope can be broadened to include everything from battle readiness to fairness for those who fight the nation's wars. And it is fair, I think, to ask of a proponent of this argument: just how crucial is war to the debate over a legal change? Is war being invoked cynically or with good cause?

Some might see little reason to worry. At first blush, the argument seems to admit of inherent limitations: it is most forceful when one is talking about the people engaged in warmaking, activities associated with those efforts, and resources involved. But we eventually have to face the question that looms over every allocation of rights and other valuable social goods, at least from the standpoint of equality: why for some but not for others? If soldiers are entitled to certain rights because of their sacrificial acts, why not civilians as well?<sup>59</sup> War justification arguments may no longer be doing the analytical work when such a claim arises, but there is no denying they might have altered the conditions in which later arguments are evaluated.

#### IV. WAR LEGACY: VALUES, PRINCIPLES, EVENTS

At times, certain ideas, principles, frameworks, or events associated with specific wars may be drawn upon to support a desired interpretation of the Constitution. Collateral claims about the normative significance of a war are best understood as war legacy arguments. Consider President Obama's September 25, 2012, speech before the United Nations, in which he addressed the anti-Islamic YouTube video that helped spark anti-American demonstrations and violence around the world. At the same time he denounced the slander of the prophet Muhammad, he also extolled the principle of free speech. Taking a page from FDR's playbook,<sup>60</sup> President Obama stressed that "Americans have fought and died around the globe to protect the right of all people to express their views, even views that we profoundly disagree

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59. Or as *Eisenstadt v. Baird*, 405 U.S. 438, 438 (1972), famously posed: if there is a right to contraceptives for marrieds, why not for singles as well?

60. FDR was the first modern president to make prominent war legacy arguments to elevate the importance of First Amendment rights. See generally Tsai, *Reconsidering Gobitis*, *supra* note 27.

with.” The fact that lives had been sacrificed in the armed defense of freedom of expression served several goals. First, he established free speech as essential to the survival of “true democracy” (rather than some facsimile of self-government). Second, he suggested that worldwide sacrifice justified the trans-border reach of a principle sometimes thought to be an indulgence among Western countries. Third, his speech tried to foster an ethic of rights foundationalism—a sense that the state is obligated to protect some core of individual rights, perhaps because such rights even preexist the state. Obama then moved from discussing the armed defense of rights on the battlefield (in the past) toward the need to remain vigilant (today) to protect “the capacity of each individual to express their own views and practice their own faith” wherever that “threat” exists—“for our own people and for people all across the world.”

Unlike arguments deploying a live war as a general justification, which contain a presentist structure (whose future implications should be taken into account only later), war legacy arguments are simultaneously forward-looking and backward-looking. The past is interrogated to fashion a coherent vision for the future, such that a synthesis of  $T_1$  and  $T_3$  will tell us how to live our lives in the here and now ( $T_2$ ). As an argument, it is free to be ambitious while the general formulation must be constrained by exigency. What is important to the proponent is that the anticipated conclusion of a war presents the opportunity for reflection on the meaning of a war and the implementation of newfound legal commitments.

For the most part, scholars have generally overlooked the prevalence and internal structure of war legacy arguments.<sup>61</sup> Phillip Bobbitt, for example, has identified only six legitimate constitutional arguments, and war legacy arguments do not neatly fit into any of them.<sup>62</sup> Those who have observed how the role that

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61. For some exceptions to this trend, see *supra* text accompanying note 27.

62. See BOBBITT, *supra* note 9. Bobbitt identifies only six types of constitutional arguments: textual, historical, structural, ethical, doctrinal, and prudential. A war legacy argument, depending on how it is constructed, might be sandwiched in the historical category (to the extent it references a particular event), the ethical category (by invoking a war-inspired principle), or the prudential one (underscoring certain benefits from offering a war-inspired interpretation). But the better view is that most war legacy claims straddle the historical-ethical categories. Jack Balkin’s theory of living originalism permits consideration of “narrative understandings of the trajectory and meaning of national history,” and one might treat reference to America’s collective war experience to fit this category. See BALKIN, *supra* note 5 at 256. Yet Balkin himself does not spend time analyzing whether war is a legitimate feature of narrative arguments; nor does he wrestle with the inherent difficulties of war dependent arguments.

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war can play in arguments often miss the ways in which war legacy arguments resemble or depart from more established constitutional arguments.

War legacy arguments are a hybrid of historical and ethical arguments. They resemble historical arguments in that they draw upon some historical occurrence, but they are not strictly “originalist” in the sense that they must be confined to a singular moment of legal creation (say, 1789) or tethered to a particular act of legal writing. A legal actor might draw on the Revolutionary War, certainly (in which case the war legacy claim can accompany more traditional originalist arguments), but she might just as well draw upon the Civil War, the Great War, or World War II as armed conflicts yielding important legal principles. When this happens, a war’s aftermath is presented as a moment of constitutional creativity. By focusing more on grand substantive principles, rather than the specific intentions of draftsmen, war legacy arguments mirror traditional ethical arguments about the purpose or function of a constitution.

All war legacy arguments rest on the assumptions that wars can and should operate as engines for the production of normative principles. Wisely or not, such arguments insist that a sufficient degree of democratic reflection and shared sacrifice during wartime can generate something akin to popular consent for legal change. Some of these assumptions could be factually incorrect upon empirical testing, of course, but nevertheless all war legacy claims presume that a desirable degree of deliberation and consensus is theoretically possible. These legal principles might be already inscribed elsewhere at a high level of abstraction, as in the case with Lincoln’s plea on behalf of racial equality (i.e., the Declaration of Independence states that “all men are created equal”). But many war legacy claims are not articulated with any degree of certitude, or even in any single place, leading to inherent difficulties in evaluating the claim of democratic consent implicit in a war-dependent argument and the proper scope of a war-derived principle.

#### A. EXAMPLES OF WAR LEGACY ARGUMENTS

##### 1. Lincoln and Racial Equality

One of the most famous instances of war legacy arguments can be found in Abraham Lincoln’s Gettysburg Address. It occurred after decisive battlefield developments—Robert E. Lee

attempted a second invasion of the North but suffered such extensive losses that he was forced to retreat. Symbolically, after the bloodiest battle of the Civil War, the North believed the outcome to be a sign of impending victory. Even before there was any serious debate over the content of formal amendments to the Constitution, or even a formal end to hostilities, Lincoln laid the groundwork for major constitutional change. At the dedication of a cemetery at Gettysburg, Pennsylvania, he linked the Founding, which he called the birth of “a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal,” with the war sacrifices of the Civil War armies.<sup>63</sup> Lincoln invoked the glorious dead, “those who here gave their lives so that that nation might live.”<sup>64</sup> Instead of merely recognizing a past event, he urged listeners—“the living”—to join him in “unfinished work”: erecting a more permanent memorial to honor those who fought, “a new birth of freedom.”<sup>65</sup> Thus sanctified, the war would gain the power to remake the legal order.

Looking ahead, the main legacy of the Civil War would have to be stable government dedicated to equality for all. Issued some ten months after the Emancipation Proclamation, the Gettysburg Address can be understood as an effort to pivot from fighting the war to rebuilding the legal order. Issued pursuant to his Commander in Chief authority over the field of war, the Proclamation’s nascent assertions of racial equality needed sounder footing to survive. Initially, slaves were treated as “captives of war,” with their war-time freedom resting on Lincoln’s assertion of exigent powers to fight the seceding states as insurrectionists. But the Proclamation also made a forward-looking promise that liberated slaves “shall be forever free of their servitude and not again held as slaves.” Could such a promise be kept? Only some lasting codification of war-inspired principles could fulfill this commitment, especially if orderly reintegration of the defeated states, too, was a priority. The Gettysburg Address can thus be considered an exercise in war constitutionalism, with the entrenchment of new constitutional principles begun through public oration and popular texts (e.g., newspaper coverage and editorials). Indeed, the *Chicago Daily Tribune* expressed confidence that the President’s remarks “will

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63. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

64. *Id.*

65. *Id.*

live among the annals of man.”<sup>66</sup> To be sure, speeches can begin, but not end in new constitutional commitments. Such sentiments must ultimately be codified in some authoritative legal writing. Lincoln would not live long enough to finish that work, but his appeal to building a war legacy initiated the constitutional process.

## 2. Truman on the Right to Healthcare

Similarly, consider Truman’s speeches in the fall of 1945, upon Japan’s sudden surrender. On September 6, 1945, Truman congratulated Congress for its hard work and then pivoted to another “great emergency” requiring “the same energy, foresight, and wisdom as we did in carrying on the way and winning this victory.”<sup>67</sup> The reconstructive program he outlined included not only the demobilization of the military and the relaxation of economic controls, but also the advancement of an “Economic Bill of Rights” first articulated by FDR. That list included “the right to adequate medical care and the opportunity to achieve and enjoy good health.”<sup>68</sup> Throughout, Truman argued that these rights were the fruits of the American people’s labors during the war. “In this hour of victory over our enemies abroad,” he urged listeners “to use all our efforts to build a better life here at home and a better world for generations to come” by elaborating these rights.<sup>69</sup> Two months later, Truman recast the right to health care as a universal right. “Our new Economic Bill of Rights should be mean health security for all,” he insisted, “regardless of residence, station, or race—everywhere in the United States.”<sup>70</sup>

To be sure, like other affirmative rights, much would depend on the precise services, legal entitlements, and enforcement mechanisms created. But at the conceptual level and the level of dialogic mechanics, at least, we have all the hallmarks of war

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66. See Editorial, *Lincoln at Gettysburg, 150 Years Later*, CHI. TRIB., Nov. 19, 2013, available at [http://articles.chicagotribune.com/2013-11-19/opinion/ct-lincoln-gettysburg-edit-1119-20131119\\_1\\_gettysburg-address-150-years-speech](http://articles.chicagotribune.com/2013-11-19/opinion/ct-lincoln-gettysburg-edit-1119-20131119_1_gettysburg-address-150-years-speech).

67. President Harry S. Truman, Special Message to the Congress Presenting a 21-Point Program for the Reconversion Period (Sept. 6, 1945), available at <http://www.trumanlibrary.org/publicpapers/index.php?pid=136&st=&st1=>.

68. President Franklin D. Roosevelt, Message to the Congress of the United States on the State of the Union (Jan. 11, 1944), available at [http://www.fdrlibrary.marist.edu/archives/address\\_text.html](http://www.fdrlibrary.marist.edu/archives/address_text.html).

69. See *supra* note 67.

70. President Harry S. Truman, Special Message to the Congress Recommending a Comprehensive Health Program (Nov. 19, 1945), available at <http://www.trumanlibrary.org/publicpapers/index.php?pid=483>.

constitutionalism through presidential leadership: the president has proposed the establishment of a fundamental right and made the case for the right in part by arguing that post-war reconstruction efforts require its legal development. The method of implementing these constitutional changes remained uncertain: the right to “health security” at this stage sounded like one that will have to be fashioned legislatively, but it also could be taken as an invitation to judicial creativity in sketching such a right. And by linking the welfare of individuals and their families to the security of the nation as a whole, Truman claimed that affordable health care implicates a president’s duty as Commander in Chief. Truman may only have been setting an agenda at this point, but by invoking rights-based rhetoric, he laid a foundation for later presidential interventions on this issue.

### 3. Judicial Decisions Resorting to War Legacy Arguments

A noteworthy war-inspired decision can be found in *Chambers v. Florida*,<sup>71</sup> where Hugo Black threw out the Due Process Clause with an eye toward the European conflict, he wrote: “Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless religious, or confessions of several black youths interrogated over the course of several days with little rest and no access to assistance. Reading racial minorities and those who differed, who would not conform and who resisted tyranny. . . . *Today, as in ages past, we are not without tragic proof* that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny”<sup>72</sup> Importantly, a desire to fight a live war more effectively was not presented as the reason for acting. Rather, the High Court developed certain ideas associated with a widening global conflict against authoritarian governments—individual dignity, anti-discrimination, open and fair process—to help explain why these convictions must be overturned.

Because the U.S. was not formally fighting the war yet, the case dramatizes the malleability of the war legacy argument. Mere anticipated involvement or association with a democratic nation at war can be enough to make a credible war legacy argument credible.

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71. 309 U.S. 227 (1940).

72. *Id.* at 236, 241 (italics added).

An example of the war legacy argument after American participation in the war can be found in *Kotteakos v. United States*.<sup>73</sup> Today, *Kotteakos* is remembered as a criminal procedure decision clarifying the “harmless error” standard. In its own time, it amounted to a work of war constitutionalism. The question presented in 1946 was whether defendants in a criminal conspiracy trial suffered substantial prejudice from being convicted during a single trial. Many differences between the defendants turned up during trial, and only a common figure tied the defendants together. Writing for the majority, Justice Rutledge reversed. Throughout the opinion, he stressed the virtues of individualized justice over the democratic failures of “mass trial.” Although participants to a conspiracy to some extent “invite mass trial by their conduct,” nevertheless “the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass.”<sup>74</sup>

The Supreme Court stopped short of relying on the Sixth Amendment, but made clear that its reading of relevant criminal procedure statutes and precedents was intended to do substantive justice and prevent “miscarriage of justice.”<sup>75</sup> Just in case the casual reader missed the reference to Nazi and Soviet methods, Justice Rutledge added several sentences explaining why exposing ordinary criminals to a single unruly trial violated the lessons of World War II as well as the precepts of the emerging Cold War order:

Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be convenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.<sup>76</sup>

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73. 328 U.S. 750 (1946).

74. *Id.* at 773.

75. *Id.* at 776; *see also id.* at 760 (analyzing how criminal procedure is intended to “preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record”).

76. *Id.* at 773.

The Justices gave two principles a new gloss through the experience of armed conflict: equal dignity and deliberation. The first principle was underscored by the Justices' frequent mention of the "individual and personal," the "stake" of "every citizen," and one's "identity" separate from the "mass." The second principle, related to the first, may be extracted from the Justices' suggestion that a jury's ability to deliberate in a way that satisfies democratic standards may be at odds with "convenience," "efficiency," or "fashion."

By measuring the government's conduct against such ideals, it was said that Americans could distinguish themselves from peoples who depend on "totalitarian institutions." The entire comparison rested on the assumption that the war was being fought for a democratic legacy, one that judges ought to not merely acknowledge but also purposefully incorporate into the law as principles, concepts, and categories. The field of action had so broadened that a jurist, as much as the elected official, should be understood to be resisting an anti-democratic "fashion that has become rampant over the earth." *Kotteakos* concluded by issuing this war-inspired command:

Here, if anywhere, . . . extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from *loss of identity in the mass*.<sup>77</sup>

For the *Kotteakos* Court, the principal dangers to be avoided encompassed not only substantive injustice, but also dignitary interests that are harder to quantify: a loss of personality brought about by a faceless, nameless treatment by the state.<sup>78</sup> Destruction of the self through a flawed legal process can be understood in terms of how the individual feels about herself after being subjected to such impersonal treatment, but it can also refer to a general perception among the population at large that the state

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77. *Id.* at 776 (italics added). Justice Douglas's dissent tackles this charge not by disagreeing with the characterization of mass trials, but merely arguing that the facts do not warrant such a finding:

On the record no implication of guilt by reason of a mass trial can be found. The dangers which petitioners conjure up are abstract ones. Moreover, the true picture of the case is not thirty-two defendants engaging in eight or more different conspiracies which were lumped together as one. The jury convicted only four persons in addition to petitioners. The other defendants and the evidence concerning them were in effect eliminated from the case.

*Id.* at 777–78. Thus, we sense that some broader terrain has shifted because the "abstract" dangers themselves are not considered outlandish.

78. Here, the injury comes about because of a curable procedural defect, whereas in other situations, such a "loss of personality" may not be so easily remedied.

has behaved in an unduly coercive fashion. If there was no longer a hot war in 1946, there remained a continuing war by proxy over foundational ideas.

*Kotteakos* illustrates both the strengths and pitfalls of this approach to interpretation. There is both a past and ongoing feature to the Justices' invocation of war legacy arguments, as the lessons of World War II are uncomfortably merged with more pressing concerns about constructing an enduring war legacy for Americans fighting the Cold War. More specific experiences of battling Nazi Germany, Fascist Italy, and Imperial Japan have become an imperative to wage ideological war against "totalitarianism" more broadly. One set of objections sound in the breadth and ambiguity of this principle: just what is meant by adopting an anti-authoritarian approach to the Constitution?<sup>79</sup> To be sure, legal principles are often open-ended (see "equal protection of the law"). The difference, here, though, is that anti-totalitarianism as an idea can cut across any number of doctrinal boundaries, with the potential for dramatically remaking past legal limits. Are trial rights the only ones that can be appropriately characterized as implicating America's war legacy or can other procedural rules be so described?

In *Kotteakos*, anti-totalitarianism appears as some set of procedural values and the dignitary interests that are fostered by following protocol. Justice Rutledge's opinion resonates precisely because of the mass trials and show trials conducted by the Nazis and Soviets that horrified so many Americans. In other words, there is a plausible (if not perfect) fit between one historical event and a pending legal problem. There were, in fact, procedurally flawed forms of justice being meted out by other countries. Because the American Constitution is ideologically and culturally distinctive, our legal practices must reflect this distinctiveness. Note that the argument is not that America is an authoritarian regime, but that certain kinds of behavior can be seen as totalitarian. American courts both honor our war experience and

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79. See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (proposing an anti-totalitarian approach to abortion). On the other hand, opponents of abortion have likened the right to abortion to slavery. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 984 (1992) (Scalia, J., concurring & dissenting in part); Laura Vozzella, *Dems Blast Comparison of Slavery, Abortion*, WASH. POST, Mar. 19, 2013, [http://www.washingtonpost.com/local/va-politics/dems-blast-comparison-of-slavery-abortion/2013/03/19/b4eea6b2-909d-11e2-9abd-e4c5c9dc5e90\\_story.html](http://www.washingtonpost.com/local/va-politics/dems-blast-comparison-of-slavery-abortion/2013/03/19/b4eea6b2-909d-11e2-9abd-e4c5c9dc5e90_story.html). See generally Jamin B. Raskin, *Roe v. Wade and the Dred Scott Decision: Justice Scalia's Peculiar Analogy in Planned Parenthood v. Casey*, 1 AM. U. J. GENDER & L. 61 (1993).

fulfill the ethical facet of constitutionalism by embracing well-founded war legacy arguments.

A significant part of modern First Amendment law can be traced to war constitutionalism. At times, concerns about an impending or ongoing war led jurists to circumscribe civil liberties. On other occasions, however, a desire to create a rule of law legacy for a particular war led judges to favor enhanced protections for the rights of speech, assembly, or religion. This occurred most dramatically in a series of lawsuits in the post-war period. The lessons of World War II quickly merged with the Cold War imperative. During this formative era, not everyone agreed that legacy should favor the radical speaker. Robert Jackson and Felix Frankfurter were among the most passionate proponents of the view that a commitment to anti-totalitarianism as a constitutional value occasionally means that certain speakers should be silenced to protect democracy itself. For instance, *Beauharnais v. Illinois*<sup>80</sup> upheld a group libel law. Justice Frankfurter not only rested the decision on the notion that individual libel was unprotected speech, he also tried to show how the war effort justified this outcome. He wrote: “Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct . . . free, ordered life in a metropolitan, polyglot community,”<sup>81</sup> and cited such publications as Loewenstein, *Legislative Control of Political Extremism in European Democracies*<sup>82</sup> and Riesman, *Democracy and Defamation*.<sup>83</sup>

Robert Jackson made a similar, though unsuccessful attempt, to make a legacy-of-war argument in *Terminiello v. Chicago*<sup>84</sup> when he urged readers to consider “recent European history.” In that case, an individual espousing anti-Semitic and anti-

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80. 343 U.S. 250 (1952). *Beauharnais* has never been overruled, though the Supreme Court has had opportunities to do so. It does stand in tension with more expansive pro-speech rulings since 1952.

81. *Id.* at 258–59 (citation omitted).

82. See Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies I*, 38 COLUM. L. REV. 591, 725 (1938).

83. See David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 1085, 1282 (1942). That this was understood as an exercise in war constitutionalism is attested by Justice Douglas, who despite his difference of opinion on the ultimate question nevertheless acknowledges that “Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy.” *Beauharnais*, 343 U.S. at 284 (Douglas, J., dissenting).

84. 337 U.S. 1 (1949).

Communist views before an unruly crowd was arrested for breach of the peace. The Supreme Court overturned the conviction on free speech grounds, but Justice Jackson dissented. He pointed out that “mastery of the streets by either radical or reactionary mob” became “a tragic reality” through Hitler’s demagoguery.<sup>85</sup> The fact that revolutionary and racist ideology had “devastated Europe” gave a strong reason for interdicting such speech in America; those espousing such beliefs in the streets represented “totalitarian groups” seeking to “undermine the prestige and effectiveness of local democratic governments.”<sup>86</sup> The rest of the Justices disagreed. Written by William O. Douglas, the majority opinion opted for the rights-protective version of America’s war legacy: “The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes.”<sup>87</sup> Having difficulty drawing lines between dangerous anti-democratic propaganda and merely controversial political speech, the Court chose the maximalist liberty position.

Likewise, in *Kunz v. New York*,<sup>88</sup> a street preacher prevailed, but only over a withering dissent by Justice Jackson. Jackson’s dissent once again offered a vision of the First Amendment marked by war. The Baptist minister saw his speech permit revoked based on his repeated public denunciations of various religious beliefs. Writing for the Court, Chief Justice Vinson’s decision found that municipal permit regulations lacked sufficient standards. In dissent, Jackson favored restricting religiously inflammatory speech in part because “Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz,” would surely find immediate offense when they are described as “Christ-killers.”<sup>89</sup> He argued for the incorporation of Europe’s historical-ethical lesson as part of America’s own. Jackson’s implication: one of the lessons of the recent global war was that racist or anti-Semitic expression not only fails to contribute meaningfully to public debate but also foments illiberal agendas. At some point, the nation-state is entitled to interdict such speech in the name of self-preservation. The key, for our purposes, is that Justice Jackson’s argument in *Kunz*, as in

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85. *Id.* at 24 (Jackson, J., dissenting). At another point in his dissent, Jackson quoted Goebbels to the effect that Nazism arose by taking advantage of overly naïve democratic practices. *See id.* at 35.

86. *Id.* at 24.

87. *Id.* at 4.

88. 340 U.S. 290 (1951) (Jackson, J., dissenting).

89. *Id.* at 299.

*Terminiello*, makes sense only when the First Amendment is authoritatively interpreted through America's war experience.

Decades later, the Supreme Court upheld the right of public schoolchildren to express their opposition to the Vietnam War by wearing black armbands.<sup>90</sup> Like Justice Frankfurter's original opinion in *Gobitis*, school officials raised the fact of a raging war in Vietnam as a reason for silencing the students to foster social unity.<sup>91</sup> But Justice Fortas's opinion in *Tinker* rejected the war justification rationale, instead grounding the pro-speech decision in America's war legacy. The mere fact of the ongoing struggle in Southeast Asia was not enough to curtail freedom of expression, the High Court concluded, unless the students' own behavior posed a "material and substantial" risk of disturbance. Public schools "may not be enclaves of totalitarianism," Justice Fortas wrote, invoking one of the political lessons of World War II and the resulting Cold War. The frightening image of Nazi and Soviet mind control through legalized propaganda shaped the Court's interpretation of the First Amendment. American school officials simply could not enjoy "absolute authority" over students, who should be treated as rights-bearing persons rather than "closed-circuit recipients of only that which the State chooses to communicate." In that instance, America's war legacy triumphed over the exigencies cited in waging the Vietnam conflict.

#### B. RULE OF LAW CONCERNS

In many ways, war legacy arguments combine the best and worst of historical and ethical arguments. Substantively, they are open-ended enough that conservatives and liberals who accept the idea of a living constitution find the interpretive approach difficult to resist. Yet the collective indulgence shown such arguments and the intrinsic pliability of the argument creates recurring interpretive problems.

Transparency is one concern with war legacy claims. Compared to arguments in which war figures as a general justification, these moves can be harder to discern. First, the tactic assumes social and historical knowledge on the part of other actors. Without some awareness of certain brute historical facts,

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90. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

91. In enacting the no-armband policy, the School Board had cited "[t]he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the armband regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities." *Id.* at 510 n.4.

this form of war constitutionalism is nonsensical, not to mention unpersuasive. This risk of unintelligibility (as well as reduced persuasiveness) increases over time as the generation that fought a war dies out, replaced by individuals who paid no tangible price in that conflict (discounted by official and non-official efforts to control historical memory in this regard). Second, arguing over the legacy of a war assumes sufficient social agreement when in fact the lessons of war may be poorly established or polarizing. Third, insofar as a consensus view may exist,<sup>92</sup> an appeal to consensus about the legacy of a particular war may be casual, oblique, or incomplete.

Concerns about democratic accountability also lurk. War legacy claims that traverse institutions in a relatively orderly fashion and are widely disseminated might have some claim on popular approval, but more obscure or isolated war legacy claims could reflect nothing more than ruminations by elites. War legacy arguments, like any war-dependent modality, can be resisted (as the *Gobitis* to *Barnette* episode shows), but the question remains: how easily?

Significant challenges can arise in determining the proper scope of a war-derived legal principle. Some claims to advance the anti-totalitarian ethic surely won't be plausible. If, for example, one claims "totalitarianism" in a way that makes no obvious reference to an analogous historical event or practice, the argument runs the risk of severing the historical-ethical link at the heart of the approach. Overly broad appeals to war legacy arguments can, I think, be rebuffed on such grounds. So, too, one can resist a war legacy argument by undermining the historical component of the argument: e.g., no totalitarian regime actually did *X*, the war was not really about *Y*, and so on.

Choosing which war experience to privilege, and what legal lessons to draw from the wars that matter, has indubitably shaped the meaning of the American Constitution. But are such interpretations truly lasting? Much of the initial power of appeals to the Second World War, and the Cold War that followed, can be understood as generational. In fact, sometimes such arguments collapse into thinly-veiled suggestions that the generation that fought the good fight has special insight into the mysterious meanings of the U.S. Constitution.

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92. There may be reasons to think that the lessons of some conflicts, such as World War II, have generated greater consensus, while others, such as Korea or Vietnam, have yielded a more scattered and divisive lessons.

Consider John Paul Stevens's statement in *Young v. American Mini Theaters* that "few of us would march our sons and daughters off to war" in order to ensure the availability of pornography or the right to engage in public nudity.<sup>93</sup> Pointing not to any particular war but rather America's collective war experience, he suggests that certain legal controversies—and the perspectives offered to justify those positions—are trivial compared to the noble wartimes sacrifices of the many. Justice Stevens (who served in the Navy during World War II) does not elaborate what, precisely, a war legacy could be, but instead insists that, whatever it is, it is not about sexual liberty of this sort. To wax lyrical about the right to view nudity is to cast shame on the actual wartime sacrifices of those who gave their all. This kind of war legacy argument may seem patently unfair, as most every matter pales in comparison to wartime sacrifice. It may be doubly troubling to mention the honorable dead as a reason for decision when no war is even remotely involved in the controversy at hand. Even so, Justice Stevens seems to be implying that ideas about sexual liberty are beyond the ambit of any reasonable war legacy argument. If that is so, he simply fails to offer any reason why repression of sexual ideas cannot be captured by the ethic of anti-totalitarianism. This is why his conclusory statement is objectionable, and can be read as an officer pulling rank.

Worth noting, too, is that once such a war-dependent argument is made, however poorly, it can be repeated as persuasive authority. Justice O'Connor, a quarter century later, adapted Justice Stevens's war argument in a nude dancing case.<sup>94</sup> It is hard to know for certain, but perhaps she felt emboldened to pronounce on the Second World War's legacy once her senior colleague and member of the Greatest Generation did so.

## V. WAR AS A METAPHOR

When war is deployed as a metaphor in legal discourse, it does more creative, and sometimes nefarious, constitutive work. Unlike the war as justification formulation, which subjects itself to the rule of reason, a war metaphor retains its vitality and utility by remaining deliberately vague. Unlike the war justification, the metaphor is unmoored from the foundational principle of self-defense, as that concept plays no necessary part of the analysis; when it is unleashed, there is merely a gesture toward the need for

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93. 427 U.S. 50, 70 (1976) (plurality).

94. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294 (2000).

immediate, collective action. Nor do speakers feel that a war metaphor must be authorized by a particular deliberative moment or activity, as with the war legacy argument. Thus, the war metaphor is entirely unconstrained by legal principle or even the terms of historical evaluation.

Each time the policy issue-as-war formulation has entered public debate, few actually believed Americans faced armed hostilities. The metaphor is thus dependent on war in a very different sense than the other forms of the argument. Instead of a live war, the pitch has worked by drawing on the more general connotations of war. But these connotations nevertheless proved to be invaluable for winning elections, altering mindsets, reordering priorities, altering institutional arrangements, and reshaping the law. To a large extent, legal transformations in the name of fighting a metaphorical war have occurred in the domestic sphere. Structurally, the war metaphor depends on already well-established cultural attitudes and cognitive pathways that rationalize vigorous governmental activity, high resource and human costs, and other kinds of collective sacrifice. But the major shift is that such frames of understanding and legal doctrines, once created with external threats in mind, are now harnessed for perceived internal threats to law and order.

In terms of ambition, the metaphor's order-remaking potential is on a different scale altogether. The "war on X" formula assumed most visible form in Lyndon B. Johnson's "War on Poverty," Nixon's "War on Crime," Reagan's "War on Drugs," Patrick Buchanan's "Culture War," and George W. Bush's "War on Terror." On each occasion, political leaders sought to improve their party's standing with the electorate, knit new intergenerational coalitions and pursue a different combination of national policies. It is no accident, moreover, that such war-inflected arguments were frequently launched as an assertion of leadership by presidents and aspirants to that office. These rhetorical performances then impacted the development of constitutional law.

Legal limits previously deemed essential may be put under severe duress by a barrage of war metaphors. For instance, under conditions of ordinary politics there may be excellent reasons for narrow agendas and separate agency functions, but the pressure to coordinate may erode rule-of-law safeguards and distinctive institutional functions. Linguists have observed that a destructive

metaphor “hides reality in a harmful way.”<sup>95</sup> Used to describe public policies matters, the war metaphor typically obscures more of the salient issues than it illuminates. If the war legacy argument is characterized by the problem of popular consent, then the war metaphor magnifies that concern through a lack of transparency. It mobilizes without bothering with a full accounting of costs, benefits, or moral considerations. Uncertainty over the nature and scope of a problem can lead not only to mission creep but also difficulty in evaluating ends and means.

War metaphors also frequently raise a concern about commensurability. For the argument to work, they imply that comparisons between large-scale social problems are possible and appropriate. But to what extent is the problem of poverty or drug dependence really like the problem of war? Surely much depends on assumptions left unsaid: whether one believes, for example, that the causes for such problems lie in man’s nature (selfish or violent), or a particular ideology (radical Islam, capitalism), or environmental factors (politics, economic conditions, events). Further, war metaphors presume that incommensurable phenomena require roughly the same solutions: massive harnessing of governmental resources, the expansion of the law, any and all means that might be adapted to conquering the enemy.

One further problem is worth taking seriously: It is possible that other types of successful war-dependent arguments “prime” citizens for this more aggressive and open-ended form of war talk. If so, normative approaches must take into account the possibility that war-dependent arguments can be layered in ways that can become difficult to untangle and expose to the rule of reason.

## A. HISTORICAL EXAMPLES

### 1. War on Poverty

On March 16, 1964, President Lyndon B. Johnson gave a State of the Union Address adopting a militaristic attitude toward a domestic problem: “This administration today, here and now, declares unconditional war on poverty in America.”<sup>96</sup> His explicit intentions entailed mobilizing “Congress and all Americans” to support federal intervention in problems that might otherwise be

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95. See George Lakoff, *Metaphor and War: The Metaphor System Used to Justify War in the Gulf* (Jan. 1, 1991) (paper on file with author).

96. President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 8, 1964), available at <http://www.presidency.ucsb.edu/ws/?pid=26787>.

treated as state or local concerns. The fight against poverty would not be limited to legislative achievements in Washington, LBJ argued, but rather “must be won in the field, in every private home, in every public office, from the courthouse to the White House.”<sup>97</sup>

President Johnson needed volunteers, job training programs, loans, programming. He found war-speak attractive to convey a long-term struggle necessitating flexible tactics: “It will not be a short or easy struggle, no single weapon or strategy will suffice.”<sup>98</sup> Like a live battle against an external enemy, the forces of poverty could only be eradicated through tireless efforts, with no American resting “until that war is won.” Our “chief weapons in a more pinpointed attack will be better schools, and better health, and better homes, and better training, and better job opportunities to help more Americans.”<sup>99</sup> A National Service Corps, expanded food stamp program, minimum wage law, job training, anti-discrimination laws were appropriate measures—even tax cuts and foreign aid.

For LBJ, the formulation of “all-out war on human poverty and unemployment in these United States” had the benefit of drawing together policy issues typically treated as separate projects.<sup>100</sup> The anti-poverty program was aimed at those who “live on the outskirts of hope—some because of their poverty, and some because of their color, and all too many because of both.”<sup>101</sup> Economic blight and strained race relations could be attacked together, with funding disbursed to an array of programs that could make headway on both goals. Importantly, the language of war also knit together disparate constituencies Democrats feared losing over its embrace of racial egalitarianism. LBJ spoke of reaching “chronically distressed areas of Appalachia” as well as “city slums.” Federal policy would help “sharecropper shacks or in migrant worker camps, on Indian Reservations, among whites as well as Negroes, among the young as well as the aged, in the boom towns and in the depressed areas.”<sup>102</sup> Even so, the programs were “not for the poor or underprivileged alone,” but benefited “all Americans.” LBJ then seamlessly moved to military and foreign spending, characterizing “food as an instrument of

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

peace.”<sup>103</sup> External enemies and international problems must be addressed to “frustrate those who prey on poverty and chaos.”

Toward the end of his speech, one could detect a flash of recognition that this global war against poverty would be different from fighting a live war. The President’s use of the war metaphor was more about mobilizing people and resources, and effectuating legal change than vanquishing actual enemies of the state. He admitted that the causes of poverty are multifarious and not easy to identify and defeat. “We shall neither act as aggressors nor tolerate acts of aggression,” LBJ stated. “We intend to bury no one, and we do not intend to be buried.”<sup>104</sup> But the ends of war, metaphorical or real, were supposedly one and the same: peace and stability. “We can fight, if we must, as we have fought before, but we pray that we will never have to fight again.”<sup>105</sup>

At one moment in his speech, LBJ made a war legacy argument in favor of anti-discrimination laws, drawing on previous foreign conflicts. He noted: “Today, Americans of all races stand side by side in Berlin and in Viet Nam. They died side by side in Korea. Surely they can work and eat and travel side by side in their own country.”<sup>106</sup> In that moment, he tied together not only memories of successful just wars like World War II, but also more contested military conflicts in Korea and Vietnam against the spread of Communism. The ease with which LBJ glided from issue to issue, and from live wars in the past to his proposed metaphorical war in the present shows the layered quality of constitutional discourse—how one kind of war argument can bolster another.

LBJ’s address also underscores how war talk can be utilized for either progressive or conservative goals. Not only for the extension of equal protection of the law for average citizens, but also for a strong military and foreign policy. Thus, the war metaphor is “stickier” than its counterparts in the sense that it goes farther than the typical war justification in wrapping together disparate policies and ideas.

## 2. War on Crime

Nixon’s strategy entailed governing through criminal policy by recapitulating liberal war rhetoric for conservative ends.

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

Having labored to “achieve a lasting peace in the world,” Nixon argued, the time had come to work toward “peace in our own land.” Yet Nixon gave the metaphor a harsher tone than LBJ. Once ordinary citizens viewed crime control as a cousin to armed conflict, it would become obvious “that the only way to attack crime in America is the way crime attacks our people—without pity.”<sup>107</sup> Criminal offenders should be viewed as enemies with which citizens are in a death-struggle, who must be defeated without remorse.

Nixon’s figurative use of war accomplished primarily political work rather than adjudicative work. First, in a *partisan* sense: the language, which emphasized a threat to security and well-being, was useful for fostering the impression of unity. It mobilized citizens already predisposed toward the Republican Party’s platform—the rank and file—but it also invited others (Independents, Southern Democrats, anyone tired of urban crime) to join forces with the ruling party. Nixon reprised Goldwater’s goal of making “crime in the streets” a national issue and cast it in FDR’s older Four Freedom’s rhetorical strategy, which had emphasized “freedom from fear.”<sup>108</sup> The Republican Party would now “reestablish” American leadership on matters of security at home and abroad—glory that had been lost through years of mismanagement by the Democratic Party.

Second, in a *policy* sense: the rhetoric wrapped together everything from a pro-death penalty position to increased financial and organizational resources for officers on the street. For Nixon, Freedom from Fear meant not only better relations with China, but also an unprecedented assault on criminal elements in America and neighboring countries.<sup>109</sup> “Operation Intercept,” launched to stem the flow of drugs across the U.S.-

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107. *The Law: Nixon’s Hard Line*, TIME (Mar. 26, 1973), <http://content.time.com/time/magazine/article/0,9171,906998,00.html>. See generally NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: THE RISE OF THE CARCERAL STATE (book manuscript on file with author); JOHN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035 (2002). In the Bush administration’s riff on the war metaphor, John Ashcroft urged in memoranda the need “to use . . . aggressive arrest and detention tactics in the war on terror” and to use “every available law enforcement tool” to arrest persons who “participate in, or lend support to, terrorist activities.” *Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1131 n.1 (9th Cir. 2010).

108. “We shall reestablish freedom from fear in America so that America can take the lead of reestablishing freedom from fear in the world.” Richard Nixon, Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida (Aug. 8, 1968) available at <http://www.presidency.ucsb.edu/ws/?pid=25968>.

109. See James Vorenberg, *The War on Crime: The First Five Years*, THE ATLANTIC MONTHLY (May 1972), <http://www.theatlantic.com/past/politics/crime/crimewar.htm>.

Mexico border, brought about a union of foreign and domestic domains as well as a coordination of agencies such as Treasury and Justice.<sup>110</sup>

Third, in a *reconstructive* sense: the war on crime created a coherent basis for Nixon to mobilize opposition to the Warren Court and alter the composition of the federal courts. In 1968, Nixon repeatedly attacked liberal judges for aiding and abetting criminals through their expansive interpretation of the Fourth and Fourteenth Amendments. Successfully prosecuting the war on crime therefore required opening a new battlefield: the judiciary. Federal law, agencies, programs, and even interpretations of the U.S. Constitution would have to be reevaluated with these new commitments in mind.

### 3. War on Drugs

The war on drugs metaphor that became popular in the late twentieth century can be understood as a subset of war on crime rhetoric. Nixon apparently first used the formulation, “war on drugs,” in 1971, calling drug abuse “public enemy number one in the United States.” He spoke of attacking the problem “on many fronts.”

Reagan’s innovation entailed explicitly characterizing the metaphorical war on drugs as a matter of national security and embarking upon initiatives with global reach. Speaking at the U.S. Department of Justice in 1982, President Reagan called on Americans to “mobilize all our forces to stop the flow of drugs into this country, to let kids know the truth, to erase the false glamour that surrounds drugs, and to brand drugs such as marijuana exactly for what they are—dangerous, and particularly to school-age youth.”<sup>111</sup> He compared his administration’s determination to rid the country of drugs to the commitment of the French army at Verdun. Even neighborhood garden spots had become “a battlefield for competing drugpushers.”<sup>112</sup> His plan

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110. In the same vein, the War on Terror produced new networks of authority to national governance and arguably increased governance through secret executive orders and legal memoranda. See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

111. President Ronald Reagan, Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions, June 24, 1982, *available at* <http://www.presidency.ucsb.edu/ws/?pid=42671>.

112. President Ronald Reagan, Radio Address to the Nation on Federal Drug Policy, Oct. 2, 1982, *available at* <http://www.presidency.ucsb.edu/ws/?pid=43085>.

consisted of attacking “youth-oriented drug culture”<sup>113</sup> by “running up a battle flag.” In his second term, Reagan reaffirmed his belief that “drug abuse can be conquered,”<sup>114</sup> promising to take the fight to schools, workplaces, and abroad. At some point, reducing drug abuse transformed into the “overriding goal of a drug-free America.”<sup>115</sup>

The 1986 mandatory minimum sentencing guidelines and drug-testing programs comprised additional tools to deter drug use and trafficking through federal law. Waging war on drugs necessitated the creation of new bureaucracies for this “concerted campaign,” such as a national Drug Czar, anti-drug task forces coordinating law enforcement activities,<sup>116</sup> and a public awareness campaign aimed at children. War rhetoric led to the disbursement of federal monies for the interdiction of drugs before they reached America’s shores. Military and national security agencies became active in drug interdiction activities, including the arrest of drug lords. The U.S. Attorneys offices in every state became the aggressive enforcers of federal drug policies.

#### 4. Culture War

One of the more potent ways of encapsulating the constitutional stakes raised by social issues is to raise the specter of a fearsome “culture war.” The *kulturkampf* idea, taken from the German experience, had occasionally been used in early twentieth century America to discuss rising class conflict.<sup>117</sup> Since the 1980s and 90s, however, the construct has been systematically deployed by social conservatives and prominent Republican figures, to describe a great religious and social battle in the public sphere and to issue a call to arms to defend traditional values.

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113. President Ronald Reagan, Proclamation 5236-National Drug Abuse Education and Prevention Week, Sept. 21, 1984, *available at* <http://www.reagan.utexas.edu/archives/speeches/1984/92184d.htm>.

114. President Ronald Reagan, Message to the Congress Transmitting a Report on a National Strategy for the Prevention of Drug Abuse and Drug Trafficking, Sept. 27, 1984, *available at* <http://www.presidency.ucsb.edu/ws/?pid=40445>.

115. President Ronald Reagan, Memorandum Urging Support of Federal Initiatives for a Drug-Free America, Oct. 4, 1986, *available at* <http://www.reagan.utexas.edu/archives/speeches/1986/100486b.htm>.

116. President Ronald Reagan, Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, Oct. 14, 1982, *available at* <http://www.presidency.ucsb.edu/ws/?pid=43127>.

117. In Canada, the term has lately been used to describe values-based conflict along regional lines.

For instance, in 1992, Patrick Buchanan's speech at the Republican National Convention described "a religious war going on in our country for the soul of America."<sup>118</sup> He called it "a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself." Buchanan's move—to pile one extended metaphor on top of another—illustrates some of the dangers already identified. One set of issues (relations with the Soviet Union and the world) had been acceptably defined as a multi-generational militarized struggle, and now Buchanan hoped to draw upon the legitimacy and perceived success of that conflict to mobilize an internal fight over public morality. If elected president, Buchanan promised to use "the full extent of my power and ability" to "defend American traditions and the values of faith, family, and country."<sup>119</sup>

In its contemporary incarnation, the culture-as-war metaphor captures a broad range of dissenting views on constitutional development. Among the issues Buchanan highlighted were abortion, gay rights, "discrimination against religious schools," "purveyors of sex and violence" (presumably through expansive free speech protections), and women in combat.<sup>120</sup> Others have extended these complaints to cover any policy or law that affects the family, the public role of women and sexual minorities, religious freedom and expressive liberty. Operationally, the contrast invites the people to take sides: to either be with authentic values and those who might wish to destroy all that is good about American law and culture. Thus, the aligning function of a potent constitutional metaphor (whose side are you on?) and its redirecting function (of influence over social issues away from courts toward the church or elected assemblies) are most prominent.

Once adopted by lawyers and jurists, the metaphor can take on additional regime-altering tones. The most prominent user of the litigation-as-war model has been Justice Scalia, who has consistently deployed the tool when discussing gay rights issues.<sup>121</sup>

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118. Patrick J. Buchanan, Speech to the Republican National Convention, Aug. 17, 1992, available at <http://buchanan.org/blog/1992-republican-national-convention-speech-148>.

119. Patrick J. Buchanan, Announcement Speech, Mar. 20, 1995, available at <http://edition.cnn.com/ALLPOLITICS/1996/candidates/republican/withdrawn/buch.announcement.shtml>.

120. Buchanan, RNC Speech, *supra* note 118.

121. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620 (1996) (Scalia, J., dissenting). The metaphor's popularity is further

By characterizing the equal protection claims of gay Americans as implicating a “culture war,” he implies several things: gay citizens started the fight by assaulting majoritarian values; gay rights by their nature raise different kinds of jurisprudential problems; judicial review will inflame rather than reduce or redirect cultural conflict; and such matters are better left for the political branches because decisions inevitably entail “tak[ing] sides in the culture war.”<sup>122</sup>

But there is potentially something more dramatic in Justice Scalia’s use of the term. He also appears to be launching a subtle, though popular, assault on the *Carolene Products* framework, which has long been utilized to authorize intermittent judicial involvement in politics to protect “discrete and insular minorities.”<sup>123</sup> In his deployment of the war metaphor, Justice Scalia is not only suggesting that sexual minorities are not such minorities worthy of protection, but may even be undermining the framework itself. If the metaphorical approach were to be taken seriously in the legal domain, it would reorganize the courts’ relationship to other institutions, rights claimants, and the Constitution in important ways. First, legal questions implicating strong cultural or religious values might be placed beyond the reach of courts. Taking Scalia’s conflict avoidance rhetoric seriously might lead to the creation of a tiered or rule—and—exception standard to the treatment of individual rights. Second, doing so would introduce a potentially unprincipled threshold question into nearly every adjudicatory proceeding implicating the Bill of Rights. Third, it would effectively alter the relationship between federal courts that could review such matters and the many states in which “cultural” issues would arise. States that are especially active on such social questions might, under Scalia’s approach, be entitled to greater leeway to make value-laden judgments.

It is hard to know for certain how to operationalize Scalia’s insights, and that vagueness underscores a major defect of the litigation-as-war metaphor. The construct plays on popular

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evidence of intent to do primarily political work: rousing social conservatives, ridiculing legal liberals, encouraging other jurists to stay their hand.

122. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

123. To be sure, some critics of *Carolene Products* have found the approach outdated and suggested alternatives that would be sufficiently protective of minority rights. *See, e.g.*, Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). Justice Scalia’s culture war metaphor, however, contends that equal protection jurisprudence is overly protective of minority rights and is accompanied by no alternative framework.

concerns about judicial overreaching, and some citizens' moral and policy preferences against gay rights, but he never tells us what it would mean for judges to start carving out subject matter issues from judicial review. Justice Scalia could disclaim any of the doctrinal consequences that might come with taking the comparison between cultural debate and warmaking seriously. In the meantime, he has gained attention for anti-gay forces and institutional conservatives alike, rallying elites and ordinary people through strategic ambiguity. Though highly quotable, the war metaphor in judicial rulings appears to accomplish more political work than jurisprudential.

### 5. War on Terror

President George Bush's metaphorical war on terror had its genesis in the Sept. 11 terrorist attacks by Islamic Jihadists. On September 20, 2001, President Bush gave a speech to a Joint Session of Congress in which he declared, for the first time, "war on terror."<sup>124</sup> Although they did not appear to be state-sponsored, President Bush characterized the terrorist attacks by Al Qaeda as an "act of war against our country" by the "enemies of freedom."<sup>125</sup> Though counterterrorist efforts do not involve conventional enemies or tactics, war-talk primed the public for an open-ended conflict licensing aggressive, overwhelming, and creative technologies: "We will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war, to the disruption and to the defeat of the global terror network."<sup>126</sup>

President Bush warned that it would be hard to identify clean victories or even an end to the need for war. Unlike the first war against Iraq, there will be no "decisive liberation of territory and a swift conclusion." Rather, it will involve a "lengthy campaign."<sup>127</sup> Note that war rhetoric had now been adapted for open-ended conflict: "Our war on terror begins with Al Qaida,

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124. President George W. Bush, Address to the Joint Session of the 107th Congress, Sept. 20, 2001, available at [http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected\\_Speeches\\_George\\_W\\_Bush.pdf](http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf).

125. *Id.*

126. *Id.* For accounts of the events and major players in this legal transformation, see JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2009); MAYER, *supra* note 109.

127. President Bush, Address to Congress, *supra* note 124.

but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”<sup>128</sup> The war on terror is to protect “our way of life,” perhaps even civilization itself.

Once again, the war-on-terror formulation divided the world into two camps: allies and enemies. “Every nation, in every region, now has a decision to make,” as President Bush declared. “Either you are with us, or you are with the terrorists.”<sup>129</sup> Constituents and other legal actors heard a similar message: public policies and legal rules must help our allies and hurt our enemies. Legal uncertainty or modesty could only embolden terrorists. The invocation of inflexible communal boundaries points the way to simplistic answers, almost always intended to rationalize the use of force. Critically, presidential orations advancing this view of terrorism altered the political environment in which official legal arguments are made and evaluated by others.

As vague and troublesome as the rhetorical technique can be in political domains, the perils are of a different order of magnitude in the realm of constitutional interpretation.<sup>130</sup> War as a metaphor has the potential for destroying legal limits, or at least blurring lines sufficiently to render institutional checks inoperable. The problem of rhetorical layering described earlier—of different kinds of war-dependent arguments sustaining one another—is dramatized by ongoing counterterrorism efforts. Even as political actors advanced the terror-as-war metaphor in public discourse, legal actors pushed other war-inspired arguments in legal memoranda and briefs. War metaphors piled on top of war justifications made it difficult to evaluate these arguments.

For instance, attorneys at the Office of Legal Counsel argued in June 2002 that America found itself in “a state of armed conflict.”<sup>131</sup> Then-Assistant Attorney General Jay Bybee argued, that war began with the attacks of September 11, which justified America’s armed response to “subdue the al Qaeda terrorist

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128. *Id.*

129. *Id.*

130. Louis Henkin observes an added problem: war and terrorism separately are troublesome concepts not clearly defined in international law. *See* Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 820-22 (2005). Neither is mentioned in the U.N. Charter. Thus, mixing such popular, fluid notions in constitutional discourse can create more problems than they solve.

131. Memorandum from Jay S. Bybee to the Att’y Gen., *Determination of Enemy Belligerency and Military Detention*, June 8, 2002, at 2–3.

network and the Taliban regime” in the broadest possible sense. Congressional support itself did not “distinguish between deployment of the military either at home or abroad,” but the president’s inherent power is not limited in such a fashion either. Just as important, executive branch lawyers did not believe the war to be conventional in nature or scope. Instead of fighting a “traditional nation-state,” America “is at war with an international terrorist organization, whose members have entered the nation covertly and have infiltrated our society in sleeper cells.”<sup>132</sup> The state’s ability to confront its enemies must adapt to this new threat. Accordingly, the government had lawful authority to detain Jose Padilla, a U.S. citizen believed to be associated with Al Qaeda, as an unlawful enemy combatant subject only to the laws of war.

The thrust of Bybee’s letter may have focused on the detention of parties linked to organizations responsible for the 9/11 attacks, but other legal memoranda extended the war rationale to other contexts. OLC advanced the terrorism-as-war argument to claim that the president had inherent authority to convene military tribunals to try detainees, who would not enjoy constitutional protections in that setting.<sup>133</sup> For the Bush administration, the war on terror was, for all legal purposes, equivalent to the prosecution of past wars in determining the scope of presidential power. For precedent, lawyers cited President Washington’s appointment of a Board of General Officers to try a suspected spy, President Jackson’s creation of military tribunals to try English suspects accused of inciting Creek Indians to war with the United States, and in-the-field decisions by military officers to administer justice during the Mexican American War and the Civil War.<sup>134</sup> Once the analogy was accepted, lawyers argued, actions taken in the name of the war on terror are subject only to the rules governing the laws of war rather than constitutional protections articulated in the Bill of Rights.

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132. *Id.* at 6.

133. See Memorandum for Alberto R. Gonzalez from Patrick F. Philbin, *Legality of the Use of Military Commissions to Try Terrorists*, Nov. 6, 2001 [hereinafter Philbin, *Legality of the Use of Military Commissions*].

134. *Id.* at 8. The Civil War has played a prominent role in justifying sweeping presidential authority to deter and repel attacks on domestic soil. See Memorandum for Alberto R. Gonzalez & William J. Haynes from John C. Yoo & Robert J. Delahunty, *Authority for Use of Military Force to Combat Terrorist Activities Within the United States*, Oct. 23, 2001, at 10.

But how should one determine in the first place whether a state of war exists? The administration's approach blurred various terms of art, including "war," "state of war," "armed attack," and "terrorism." Whatever the case may be, OLC lawyers argued that, despite the Constitution's vesting of the power to declare war in Congress, the president as Commander in Chief possesses "full authority to determine when the nation has been thrust into a conflict that must be recognized as a state of war and treated under the laws of war."<sup>135</sup> That determination, moreover, is a political decision that cannot be countermanded by the courts.

OLC lawyers proceeded to state the case for Al Qaeda's attacks to be treated as "more akin to war than terrorism."<sup>136</sup> Focusing on the destructiveness of the 9/11 attacks, legal memos claimed that the death toll (some 3,000 lives lost) "surpasses that at Pearl Harbor, and rivals the toll at the battle of Antietam in 1862, one of the bloodiest engagements in the Civil War." In an important and far-reaching move, lawyers also encouraged readers to treat past acts of terrorism, regardless of the instigators, "as part of that continuing series of attacks" and as "a systematic campaign of hostilities."<sup>137</sup>

Separately, lawyers defended the accuracy of the metaphor because in calling for jihad against the United States, bin Laden had started a "self-proclaimed war."<sup>138</sup> On this view, a state of war exists in part when an attacking party calls it a war. The problem is that reliance on others is fraught with problems of inter-system translation, namely, whether a legal actor's words and actions in one legal order mean the same thing when he uses similar terminology in another legal system. A further complication is that according to bin Laden's call for jihad against Jews and Western invaders, he arguably makes the same claim: that others initiated armed conflict against Muslims so they, in turn, are justified in repelling violence with violence.<sup>139</sup>

OLC memoranda underscore my concern about cross-domain bolstering. Lawyers argued that the fight against terror should be treated as a war in part because the president himself had already "described the current situation as a 'war'" and taken

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135. Philbin, *Legality of the Use of Military Commissions*, *supra* note 133, at 22.

136. Yoo & Delahunty, *supra* note 134, at 2.

137. Philbin, *Legality of the Use of Military Commissions*, *supra* note 133, at 28.

138. *Id.*

139. See, e.g., Bernard Lewis, *License to Kill: Usama bin Ladin's Declaration of Jihad*, 77 FOREIGN AFFAIRS, Nov.-Dec. 1998, available at <http://www.foreignaffairs.com/articles/54594/bernard-lewis/license-to-kill-usama-bin-ladins-declaration-of-jihad>.

actions consistent with that understanding.<sup>140</sup> Political rhetoric now was being harnessed to shape legal interpretation. Lawyers did so in two ways: first, by formally demanding that courts defer to a presidential description of hostilities as a war, and second, by inviting the courts to adopt and replicate the president's war characterization. The overall strategy entailed seeking what I have previously called "rhetorical congruence": an appearance of political-legal consensus among the branches of government.<sup>141</sup> To put it simply, the approach involves political actors aggressively declaring a constitutional vision and inviting others (for the sake of institutional cooperation or social unity) to tow the party line. To the extent that courts speak about a social phenomenon in ways preferred by political actors, the field in which constitutional decisions are rendered has already shifted. Constitutional struggles entail fights over not simply outcomes but also public terminology, background facts, and institutional habits. Victories in how other actors or ordinary citizens view a situation can increase the odds of legal success as well as how setbacks are perceived.

At the same time that lawyers wished to enjoy all of the consequences of describing counterterrorism as warmaking, they did not want to be saddled by all its limitations. They did not want to be overly constrained by the war metaphor because of the law of war's dominant metaphor: war as a game, one generally fought by national armies under rules of fair competition. If fighting terror was akin to making war, then the Bush administration nevertheless insisted on even greater flexibility in fighting a new kind of "war." First, unlike many past wars, "this conflict may take place, in part, on the soil of the United States." It no longer made sense to talk of the "war front" separately from the "home front" or of restricting the government's power along such dimensions. Second, U.S. fought clandestine organizations and individuals rather than traditional nation-states. Legal rules created to protect "non-combatant civilian populations" would have to be reconsidered.

In short, the "scale of the violence involved in this conflict" as well as the ill-fitting quality of the war metaphor required altering well-settled treaties, laws, and constitutional rights.

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140. Philbin, *Legality of the Use of Military Commissions*, *supra* note 133, at 29. In particular, lawyers pointed out the president's decision to mobilize the armed forces and reserves.

141. See generally TSAI, *ELOQUENCE AND REASON*, *supra* note 27; Tsai, *Reconsidering Gobitis*, *supra* note 27, at 382–83.

Through a series of legal memos and policy directives, the Bush administration pursued an expansive theory of presidential power and effectuated a major transformation in how the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments are understood.

Inherent problems with the terror-as-war formulation linger. The rhetorical needs for adjudication are not identical to those for political mobilization. As Justice O'Connor pointed out in *Hamdi*, though national security is no doubt implicated by U.S. efforts against terrorism, the "war on terror" formulation makes claims of national security "broad and malleable."<sup>142</sup> This suggests that judicial decisionmakers find war metaphors difficult to assess and worse, perhaps renders programs unsusceptible to rational review. The metaphorical strategy invites endorsement of highly coercive policies to meet a grave threat. And, over time, it lowers institutional resistance to "indefinite or perpetual" programs by reference to vague, though ongoing threats of unknown origin or duration.

The chain of connotations that might initially be resisted as awkward or absurd can eventually become naturalized through repeated usage. *Hamdi*, decided in 2007, put quotation marks around "War on Terror" to mark the phrase as the administration's own. In more recent years, jurists have taken to describing the War on Terror as a historical fact.<sup>143</sup> Although the sample is small, the pattern seems somewhat more pronounced in the D.C. Circuit. There are a few possible explanations. It might be that judges are more institutionally or ideologically conservative on certain courts, or it could be that, having encountered repeated legal controversies involving terrorism (along with the administration's aggressive framing of the stakes), judges have internalized the politically preferred terminology. Having done so, they then set about reproducing the vision preferred by public officials. In these moments, jurists accomplish more political work than jurisprudential. Once completed, that work, in the law as in politics, may no longer need the original linguistic infrastructure to sustain it.

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142. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

143. See, e.g., *Abdah v. Obama*, 630 F.3d 1047, 1053 (D.C. Cir. 2011); *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 617 (D.C. Cir. 2011); *Al-Bihani v. Obama*, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010); *Boumediene v. Bush*, 476 F.3d 981, 1009 (D.C. Cir. 2007).

## B. RULE OF LAW CONCERNS

Metaphors can be powerful tools by which to organize ideologies, knit together disparate legal and policy positions, and put opponents on the defensive. There are any number of ordinary metaphors that have been proven useful for elucidating legal ideas.<sup>144</sup> Even so, war metaphors in public debate may be particularly insidious. First, they can inject fears over first-order survival into questions that might, properly evaluated, raise no such foundational concerns. Second, war metaphors may facilitate extreme measures when complexity or modesty in legal design are more appropriate. Third, they invite overly abstract debate in a context where transparency and accountability are at a premium. Fourth, the expansive quality of war metaphors can facilitate mission creep.<sup>145</sup>

In theory, it may be possible to undermine a prevalent metaphor by subverting it. More often, what happens is that a potent metaphor gets recycled so that competing constructs become available in an existing body of knowledge.<sup>146</sup> Historical practice seems to bear this out. The more entrenched patterns in law and politics suggest that it has been far easier for opponents of one type of war metaphor to simply repurpose it for a different agenda rather than to undermine the metaphor's basic structure. Progressives had their favorite war metaphor; over time, conservatives built their own versions of the war metaphor. During this process, each side has merely reinforced the basic cultural and cognitive features of that metaphor, enhancing its transformative potential rather than destroying it.

Opponents of a war metaphor may be best advised to engage in the politics of the literal. Showing all the ways in which a social problem differs from military conquest is a start. It may also be productive to demonstrate how the policy problem-as-war metaphor implicitly excludes such considerations as morality or

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144. See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (2003); TSAI, *ELOQUENCE AND REASON*, *supra* note 27; STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, MIND* (2003); Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779 (2002); Jeffrey M. Lipshaw, *Metaphors, Models, and Meaning in Contract Law*, 116 PENN. ST. L. REV. 987 (2012); Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004).

145. Cf. Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1, 4 (2011) (contending that the war on drugs did not originally target teenagers but did so over time).

146. For instance, property and fire metaphors in First Amendment law, originally yielding anti-speech outcomes, have been repurposed over time to facilitate more expansive protections for expressive liberty. See generally TSAI, *ELOQUENCE AND REASON*, *supra* note 27, at 49–77.

feasibility. Still another tactic would be to highlight the serious, understated costs of treating a domestic social problem like a problem of national self-defense. These approaches reject the propriety of the implicit analogy being drawn without denying the necessity of preparation for an actual war. The overly simplistic, seemingly natural linkages between fighting a war and tackling a social problem may simply fall away.

This is not to say that symbolism should be altogether avoided. After all, constitutional discourse is in part an exercise in popular lawmaking. If there are sounder metaphorical models to be presented, ones that better encapsulate a social issue without the attendant problems of characterizing it in warlike terms, then all the better. President Obama has used the punishment metaphor in describing his policy on Syria.<sup>147</sup> While this law-and-order construct has its problems, the metaphor nevertheless poses fewer risks from the standpoint of constitutional transformation.

The key is to find ways of talking about social problems that are effective while drawing away excessive heat and urgency. For reasons of efficiency and short-term solidarity, it is tempting to move to language that mobilizes people and institutions quickly. But strident discourse is also likely to generate (if not right away, then down the road), a significant amount of pushback. The strength of a popular reaction will determine whether a rapid transformation becomes a lasting one. Calling counterterrorism efforts part of a global “war on terror” allowed an ad hoc working group in the Bush administration to alter long-standing legal commitments in a host of areas, foreign and domestic. But doing so also disrupted diplomatic relations, led to key OLC legal memos to be repudiated and withdrawn, and paved the way for the election of a Democratic president who campaigned against such changes.

## VI. CONCLUSION

Does it matter how we talk about war? This paper has proceeded on the premise that words matter a great deal when we inject war-dependent arguments into debates over the Constitution. Although war constitutionalism is an old practice, how we choose to talk about war affects not only how power and rights are understood, but also what we choose to remember to be

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147. See George Lakoff, *Obama Reframes Syria: Metaphor and War Revisited*, HUFFINGTON POST (Sept. 6, 2013), [http://www.huffingtonpost.com/george-lakoff/obama-reframes-syria-meta\\_b\\_3879335.html](http://www.huffingtonpost.com/george-lakoff/obama-reframes-syria-meta_b_3879335.html).

important about our war experiences. War rhetoric possesses a transformative capacity, and that potential must always be carefully justified, scrutinized, and disciplined.

As we have seen, war constitutionalism can help to fundamentally alter the environment in which claims over powers and rights are decided. The layering of different war-dependent arguments, the conditioning of the citizenry to tolerate claims about war, and the constant manipulation of political memories foster a war-laden legal culture. Once a lynchpin decision is made—whether it resembles *Barnette* or *Hirabayashi*—future decisions can be built upon its infrastructure without being as visible or explanatory. The war weary can become more amenable to such arguments, without the level of engagement one would want in a democratic society. In such an environment, it becomes imperative to be watchful for both visible changes to the law and mindful of the foreseeable use of legal arguments.

I began this essay by observing that President Obama had, upon taking office, changed the way he publicly discussed America's counterterrorism program. No longer would he use the counterterrorism-as-war metaphor, though he freely engaged other forms of war-dependent arguments for a host of domestic and foreign policy purposes. But changing the overarching rhetoric may be less important once new institutions and rationales have been established. By several measures—the ferocity and frequency of drone strikes, the continuation of renditions, the dogged pursuit of terrorists across national boundaries—military efforts against terror continue unabated, just under a different moniker.

My goal has been modest: to begin a conversation about the nature of America's war-saturated legal culture and to begin to tease apart the multiple ways that war-dependent arguments are made during constitutional debate. Strong normative solutions are beyond the scope of this essay, though one can imagine several possible remedies: (1) more rigorous use of historical methods when past wars are cited as precedent; (2) highly fact-specific rulings when war justifications are made; (3) open consideration of downstream doctrinal consequences to counteract the logic of war instrumentalism; (4) more historical proof both to authorize war legacy claims and to determine the scope of any asserted war-inspired legal principles; (5) greater specificity in articulating the scope of war legacy arguments and principles; and (6) a moratorium on war metaphors in judicial rulings.

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Whether implementing these or other methods during judicial decision making can help to discipline war constitutionalism I will leave for another day, for doing the topic justice requires a systematic accounting of methods and contexts, and careful consideration of the tradeoffs of each possible measure. In the meantime, appreciating the different forms that war arguments take will hopefully serve as an important first step, helping us to assert more control over a militarized culture instead of allowing that culture to wreak havoc with our legal order.