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## Deference DA

#### Deference now

Bazzle, J.D., Georgetown University Law Center, ‘12

[Timothy, “SHUTTING THE COURTHOUSE DOORS:¶ INVOKING THE STATE SECRETS PRIVILEGE TO THWART¶ JUDICIAL REVIEW IN THE AGE OF TERROR”, Civil Rights Law Journal, Vol. 23, No. 1, 2012,]

The war on terror has led to an increased use of the state secrets¶ privilege by the Executive Branch—to dismiss legal challenges to¶ widely publicized and controversial government actions—ostensibly¶ aimed at protecting national security from terrorist threats.1¶ Faced¶ with complaints that allege indiscriminate and warrantless surveillance,2¶ tortious detention, and torture that flouts domestic and international law,3¶ courts have had to reconcile impassioned appeals for¶ private justice with the government’s unyielding insistence on protecting national security. Courts, almost unanimously, have cast their lot¶ with national security, granting considerable deference to government¶ assertions of the state secrets principle. This deference to state secrets¶ shows no signs of abating; indeed, the growing trend is for courts to¶ dismiss these legal challenges pre-discovery,4¶ even before the private¶ litigants have had the chance to present actual, non-secret evidence to¶ meet their burden of proof. Although many looked optimistically at¶ President Obama’s inauguration as a chance to break decisively from¶ the Bush Administration’s aggressive application of the state secrets privilege,5¶ the Obama Administration has largely disappointed on the¶ state-secrets front, asserting the privilege with just as much fervor—if¶ not as much regularity6¶ —as its predecessor.7¶ Judicial deference to such claims of state secrecy, whether the¶ claims merit privileged treatment, exacts a decisive toll on claimants,¶ permanently shutting the courthouse doors to their claims and interfering with public and private rights.8¶ Moreover, courts’ adoption of a¶ sweeping view of the state secrets privilege has raised the specter of¶ the government disingenuously invoking state secrets to conceal government misbehavior under the guise of national security.9¶ By granting greater deference to assertions of the state secrets privilege, courts¶ share responsibility for eroding judicial review as a meaningful check¶ on Executive Branch excesses. This Article argues for a return to a¶ narrowly tailored state secrets privilege—one that ensures that individuals who allege a credible claim of government wrongdoing retain¶ their due process rights.

#### Treaty enforcement is a political question – Supreme Court enforcement violates it kills deferrence

Wu 5 (Timmy, Visiting Professor, University of Chicago, Associate Professor of Law, University of

Virginia, “Treaties’ Domains,” <http://www.law.virginia.edu/pdf/workshops/0405/wu.pdf>)

Unfortunately Treaty cases compounds the complications surrounding a regular Chevron case. Chevron deference is premised on the superior expertise and greater political accountability of an expert agency. 81 That’s reasoning that can apply in a Treaty interpretation case too: for if the Executive has implemented a treaty, it may have done so based on subject matter expertise, and if people don’t like the President’s approach to treaties they can vote against him. But in a treaty interpretation case there is at least one additional basis for deference to the Executive that draws not upon expertise but upon political authority.82 This is the President’s independent not only to enforce treaties, but also to set the foreign policy of the United States. And as Louis Henkin has explained, this second kind of deference, often called political question deference, is best understood to reflect a power reserved to the President, and resulting in a rule binding for a court.83

#### Non-deferential judicial review kills military readiness

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(Robert M. is a Professor at University of Texas School of Law, NATIONAL SECURITY FACT DEFERENCE, VIRGINIA LAW REVIEW, 17 September 2009, http://www.virginialawreview.org/content/pdfs/95/1361.pdf, pg. 1426-1428)

Advocates of deference at times also emphasize the collateral ¶ consequences that non-deferential judicial review of executive ¶ branch factual judgments might have on related government operations or activities. On this view, the benefits of judicial review—¶ measured in terms of enforcement of separation of powers values ¶ or even enhancement of accuracy—in some circumstances may be ¶ outweighed by collateral costs entailed by the very process of nondeferential, or insufficiently deferential, review. ¶ When precisely does this argument come into play? Advocates ¶ of deference do not contend that collateral costs outweigh potential benefits in all national security related litigation. Indeed, the ¶ argument played no significant role in most of the examples surveyed in Part I. Most if not all judicial review of government action, after all, entails some degree of disruption to government operations. Government personnel, for example, often are obliged to ¶ spend some amount of time and resources participating, directly or ¶ indirectly, in the process of litigation, whether by serving as witnesses in a formal sense, gathering and reviewing documents, ¶ speaking informally with attorneys or investigators, and so forth. ¶ These litigation related activities to some extent are bound to disrupt the performance of ordinary government functions. ¶ But some such disruptions are more serious than others. Disruption of military activity, for example, may impose unusually high ¶ costs. So said Justice Jackson in Johnson v. Eisentrager,¶ 218 a postWorld War II decision denying habeas rights to a group of Ger- [page 1427] mans convicted of war crimes and detained in a U.S. controlled facility in Germany. Jackson gave many reasons for the decision, but ¶ placed particular emphasis on the undesirable practical consequences that would, in his view, follow from permitting any judicial ¶ review in this setting. These included: disruption of ongoing military operations, expenditure of scarce military resources, distraction of field commanders, harm to the prestige of commanders, and ¶ comfort to armed enemies.219 The government not surprisingly emphasized such concerns in the Hamdi litigation as well, though with ¶ much less success; and similar arguments continue to play a significant role today as courts grapple with still unresolved questions regarding the precise nature of habeas review of military determinations of enemy combatant status.220¶ But even in the enemy combatant setting, where disruption concerns arguably are near their zenith, this argument does not necessarily point in the direction of fact deference as the requisite solution. It did not persuade the Supreme Court in Hamdi to defer to ¶ the government’s factual judgment, nor did it do so in the more recent decision in Boumediene v. Bush dealing with noncitizen detainees held at Guantánamo. The impact of the argument in those ¶ cases instead was to prompt the Court to accept procedural innovations designed to ameliorate the impact of judicial review, rather ¶ than seeking to avoid that impact via deference.221 This is a useful ¶ reminder that even when the executive branch raises a legitimate ¶ concern in support of a fact deference argument, it does not follow ¶ automatically that deference is the only mechanism by which the ¶ judiciary can accommodate the concern. ¶ This leaves the matter of secrecy. Secrecy relates to the collateral consequences inquiry in the sense that failure to maintain secrecy with respect to national security information can have extralitigation consequences for government operations—as well as for [page 1428] individuals or even society as a whole—ranging from the innocuous ¶ to the disastrous. Without a doubt this is a significant concern. But, ¶ again, it is not clear that deference is required in order to address ¶ it. Preservation of secrecy is precisely the reason that the state secrets privilege exists, of course, and it also is the motive for the ¶ Classified Information Procedures Act, which establishes a process ¶ through which judges work with the parties to develop unclassified ¶ substitutes for evidence that must be withheld on secrecy ¶ grounds.222

#### Military readiness key to heg

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(Thomas, resident fellow at AEI, The Underpinnings of the Bush Doctrine, February 1, <http://www.aei.org/article/foreign-and-defense-policy/the-underpinnings-of-the-bush-doctrine/>)

The preservation of today's Pax Americana rests upon both actual military strength and the perception of strength. The variety of victories scored by U.S. forces since the end of the cold war is testament to both the futility of directly challenging the United States and the desire of its enemies to keep poking and prodding to find a weakness in the American global order. Convincing would-be great powers, rogue states, and terrorists to accept the liberal democratic order--and the challenge to autocratic forms of rule that come with it--requires not only an overwhelming response when the peace is broken, but a willingness to step in when the danger is imminent. The message of the Bush Doctrine--"Don't even think about it!"--rests in part on a logic of preemption that underlies the logic of primacy.

#### Solves escalation of global hotspots- retrenchment causes bickering internationally over leadership and prevents cooperation

Brzezinski 2012 Zbigniew K. Brzezinski (CSIS counselor and trustee and cochairs the CSIS Advisory Board. He is also the Robert E. Osgood Professor of American Foreign Policy at the School of Advanced International Studies, Johns Hopkins University, in Washington, D.C. He is cochair of the American Committee for Peace in the Caucasus and a member of the International Advisory Board of the Atlantic Council. He is a former chairman of the American-Ukrainian Advisory Committee. He was a member of the Policy Planning Council of the Department of State from 1966 to 1968; chairman of the Humphrey Foreign Policy Task Force in the 1968 presidential campaign; director of the Trilateral Commission from 1973 to 1976; and principal foreign policy adviser to Jimmy Carter in the 1976 presidential campaign. From 1977 to 1981, Dr. Brzezinski was national security adviser to President Jimmy Carter. In 1981, he was awarded the Presidential Medal of Freedom for his role in the normalization of U.S.-China relations and for his contributions to the human rights and national security policies of the United States. He was also a member of the President’s Chemical Warfare Commission (1985), the National Security Council–Defense Department Commission on Integrated Long-Term Strategy (1987–1988), and the President’s Foreign Intelligence Advisory Board (1987–1989). In 1988, he was cochairman of the Bush National Security Advisory Task Force, and in 2004, he was cochairman of a Council on Foreign Relations task force that issued the report Iran: Time for a New Approach. Dr. Brzezinski received a B.A. and M.A. from McGill University (1949, 1950) and Ph.D. from Harvard University (1953). He was a member of the faculties of Columbia University (1960–1989) and Harvard University (1953–1960). Dr. Brzezinski holds honorary degrees from Georgetown University, Williams College, Fordham University, College of the Holy Cross, Alliance College, the Catholic University of Lublin, Warsaw University, and Vilnius University. He is the recipient of numerous honors and awards) February 2012 “After America” <http://www.foreignpolicy.com/articles/2012/01/03/after_america?page=0,0>

For if America falters, the world is unlikely to be dominated by a single preeminent successor -- not even China. International uncertainty, increased tension among global competitors, and even outright chaos would be far more likely outcomes. While a sudden, massive crisis of the American system -- for instance, another financial crisis -- would produce a fast-moving chain reaction leading to global political and economic disorder, a steady drift by America into increasingly pervasive decay or endlessly widening warfare with Islam would be unlikely to produce, even by 2025, an effective global successor. No single power will be ready by then to exercise the role that the world, upon the fall of the Soviet Union in 1991, expected the United States to play: the leader of a new, globally cooperative world order. More probable would be a protracted phase of rather inconclusive realignments of both global and regional power, with no grand winners and many more losers, in a setting of international uncertainty and even of potentially fatal risks to global well-being. Rather than a world where dreams of democracy flourish, a Hobbesian world of enhanced national security based on varying fusions of authoritarianism, nationalism, and religion could ensue. RELATED 8 Geopolitically Endangered Species The leaders of the world's second-rank powers, among them India, Japan, Russia, and some European countries, are already assessing the potential impact of U.S. decline on their respective national interests. The Japanese, fearful of an assertive China dominating the Asian mainland, may be thinking of closer links with Europe. Leaders in India and Japan may be considering closer political and even military cooperation in case America falters and China rises. Russia, while perhaps engaging in wishful thinking (even schadenfreude) about America's uncertain prospects, will almost certainly have its eye on the independent states of the former Soviet Union. Europe, not yet cohesive, would likely be pulled in several directions: Germany and Italy toward Russia because of commercial interests, France and insecure Central Europe in favor of a politically tighter European Union, and Britain toward manipulating a balance within the EU while preserving its special relationship with a declining United States. Others may move more rapidly to carve out their own regional spheres: Turkey in the area of the old Ottoman Empire, Brazil in the Southern Hemisphere, and so forth. None of these countries, however, will have the requisite combination of economic, financial, technological, and military power even to consider inheriting America's leading role. China, invariably mentioned as America's prospective successor, has an impressive imperial lineage and a strategic tradition of carefully calibrated patience, both of which have been critical to its overwhelmingly successful, several-thousand-year-long history. China thus prudently accepts the existing international system, even if it does not view the prevailing hierarchy as permanent. It recognizes that success depends not on the system's dramatic collapse but on its evolution toward a gradual redistribution of power. Moreover, the basic reality is that China is not yet ready to assume in full America's role in the world. Beijing's leaders themselves have repeatedly emphasized that on every important measure of development, wealth, and power, China will still be a modernizing and developing state several decades from now, significantly behind not only the United States but also Europe and Japan in the major per capita indices of modernity and national power. Accordingly, Chinese leaders have been restrained in laying any overt claims to global leadership. At some stage, however, a more assertive Chinese nationalism could arise and damage China's international interests. A swaggering, nationalistic Beijing would unintentionally mobilize a powerful regional coalition against itself. None of China's key neighbors -- India, Japan, and Russia -- is ready to acknowledge China's entitlement to America's place on the global totem pole. They might even seek support from a waning America to offset an overly assertive China. The resulting regional scramble could become intense, especially given the similar nationalistic tendencies among China's neighbors. A phase of acute international tension in Asia could ensue. Asia of the 21st century could then begin to resemble Europe of the 20th century -- violent and bloodthirsty. At the same time, the security of a number of weaker states located geographically next to major regional powers also depends on the international status quo reinforced by America's global preeminence -- and would be made significantly more vulnerable in proportion to America's decline. The states in that exposed position -- including Georgia, Taiwan, South Korea, Belarus, Ukraine, Afghanistan, Pakistan, Israel, and the greater Middle East -- are today's geopolitical equivalents of nature's most endangered species. Their fates are closely tied to the nature of the international environment left behind by a waning America, be it ordered and restrained or, much more likely, self-serving and expansionist. A faltering United States could also find its strategic partnership with Mexico in jeopardy. America's economic resilience and political stability have so far mitigated many of the challenges posed by such sensitive neighborhood issues as economic dependence, immigration, and the narcotics trade. A decline in American power, however, would likely undermine the health and good judgment of the U.S. economic and political systems. A waning United States would likely be more nationalistic, more defensive about its national identity, more paranoid about its homeland security, and less willing to sacrifice resources for the sake of others' development. The worsening of relations between a declining America and an internally troubled Mexico could even give rise to a particularly ominous phenomenon: the emergence, as a major issue in nationalistically aroused Mexican politics, of territorial claims justified by history and ignited by cross-border incidents. Another consequence of American decline could be a corrosion of the generally cooperative management of the global commons -- shared interests such as sea lanes, space, cyberspace, and the environment, whose protection is imperative to the long-term growth of the global economy and the continuation of basic geopolitical stability. In almost every case, the potential absence of a constructive and influential U.S. role would fatally undermine the essential communality of the global commons because the superiority and ubiquity of American power creates order where there would normally be conflict. None of this will necessarily come to pass. Nor is the concern that America's decline would generate global insecurity, endanger some vulnerable states, and produce a more troubled North American neighborhood an argument for U.S. global supremacy. In fact, the strategic complexities of the world in the 21st century make such supremacy unattainable. But those dreaming today of America's collapse would probably come to regret it. And as the world after America would be increasingly complicated and chaotic, it is imperative that the United States pursue a new, timely strategic vision for its foreign policy -- or start bracing itself for a dangerous slide into global turmoil.

## Jud Cap DA

#### CSAPR gets upheld in the SQUO: EPA v EME Homer City

Jaffe 6/25/13

(Seth Jaffe Foley Hoag LLP – Environmental law “The Supreme Court Agrees to Review the CSAPR Decision: Might EPA Avoid Version 3 of the Transport Rule?” 6/25/2013 <http://www.jdsupra.com/legalnews/the-supreme-court-agrees-to-review-the-c-73907/>, TSW)

On June 24, 2013, the Supreme Court granted certiorari in EPA v. EME Homer City, the challenge to EPA’s Cross-State Air Pollution Rule, or CSAPR. The Court of Appeals for the District of Columbia had struck down the rule, over a fairly blistering dissent from Judge Judith Rogers.¶ Speculation over the reasons why the Supreme Court takes a case is often pointless, but I will say this: Consideration of the history of EPA’s rulemaking leads to the conclusion that the rule should be upheld.¶ The D.C. Circuit struck down EPA’s original transport rule, known as CAIR, in 2008, in North Carolina v. EPA, in large part because EPA had proposed an interstate trading program not authorized by the Clean Air Act. That trading program did not ensure that each upwind state controlled its “significant contribution” to downwind pollution. I thought – and I’m sure EPA did as well – that, in promulgating CSAPR, it had pretty much done precisely what the court in North Carolina v. EPA had told it to do.¶ Unfortunately, the District of Columbia disagreed, concluding that the CSAPR could require upwind states to reduce their emissions by more than the “significant contribution” that they made to downwind pollution. Following the decision in EME Homer City v. EPA, it was not clear to me that EPA could ever promulgate a rule that would actually satisfy the Court of Appeals. That may be an exaggeration, but it is undoubtedly true that the level of precision required by the Court Appeals seems inconsistent with traditional rules of statutory construction and deference to agency implementation.

#### Controversial decisions burn capital – justices need to pick their fights.

Grosskopf and Mondak, ‘98

[Anke (Assistant Prof of Political Science @ Long Island University) and Jeffrey (Professor of Political Science @ U of Illinois), 1998, “Do attitudes toward specific supreme court decisions matter? The impact of Webster and Texas v Johnson on Public Confidence in the Supreme Court” Political Research Quarterly, vol. 51 no 3 633-54]

The existence of a strong link between basic values and diffuse support does not necessarily preclude a role for specific decisions, particularly when we seek to understand how support comes to change over time (e.g., Caldeira and Gibson 1992: 658-61). We believe that any claim that the Supreme Court is fully immune to backlash against controversial decisions can be rejected on a prima facie level. First, consider the extreme case. Were the Supreme Court to make its occasional blockbusters-Brown v. Board of Education, Roe v. Wade, Texas v. Johnson, etc.-the norm by routinely ruling on the thorniest social questions, we see it as implausible that such actions would bring no cumulative impact on how people view the Court. Second, the Supreme Court's typical mode of operation suggests that justices themselves view institutional support as an expendable political capital (Choper 1980). That is, the Court recognizes its own political limitations, and thus justices pick their spots carefully when approaching potentially controversial cases. From this perspective, the apparent dominance of democratic values as a determinant of institutional support (e.g., Caldeira and Gibson 1992) means not that the Court is insulated from backlash, but that strategic justices tread cautiously so as to keep backlash to a minimum. Consequently, how and where we examine whether public response to Supreme Court decisions affects institutional support may shape what answer we find.

#### Plan is POLITICALLY TOXIC to the entire supreme court

Alford '12

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Roger <http://www.libertylawsite.org/liberty-forum/bolstering-american-sovereignty-with-treaties/>

Fourth, there is the unanticipated risk of indirect application of international law. Federal courts occasionally reference international tribunal decisions when interpreting domestic law. The Charming Betsy doctrine, for example, counsels courts to interpret statutes consistent with international law as interpreted by international courts. But in truth, this possibility advances rather than diminishes popular sovereignty. The Charming Betsy doctrine was designed with separation of powers in mind, limiting the instances in which the judicial branch will construe legislative enactments to encroach on executive authority in the foreign affairs arena. To the extent international law runs counter to the popular will, the Charming Betsy doctrine requires deference to the clearly expressed intent of Congress, regardless of what international law may require.¶ Finally, perhaps the greatest risk to popular sovereignty posed by international courts interpreting treaties is the possibility that federal courts will use these decisions as a device to interpret the U.S. Constitution. This was a serious threat in a handful cases a decade ago, but it created such a popular uproar that courts have retreated from this experiment. The very idea has become politically toxic, and every Supreme Court nominee now denounces the practice during confirmation proceedings.

#### DC circuit ruling killed Clean Air act enforceability

Lane ‘12

(William F. Lane is a partner with the Raleigh office of Kilpatrick & Townsend LLP. “D.C. Circuit Vacates EPA Cross State Air Pollution Rule” Monday, October 22, 2012 <http://environmentenergyandnaturalresourceslaw.ncbar.org/newsletters/envoct2012/dccircuit>, TSW)

In a case with significant implications for the Environmental Protection Agency (EPA) Clean Air Act regulatory program, the U. S. Court of Appeals for the District of Columbia Circuit vacated EPA’s Cross State Air Pollution Rule (CSAPR). See EME Homer City Generation, L.P., v. EPA (Case No. 11-1302). In its split decision issued on Aug. 21, 2012, the court determined that EPA exceeded its statutory authority under the “good neighbor” provision of the Clean Air Act (CAA Section 110 (a)(2)(D)(i)(I)), when it promulgated CSAPR last year. Unless it is overturned, the court’s decision will limit EPA’s ongoing efforts to curb interstate transport of air pollution. The court ordered EPA to continue with its implementation of the Clean Air Interstate Rule (CAIR). Background on CSAPR¶ EPA promulgated CSAPR on Aug. 8, 2011. The purpose of CSAPR is to limit emissions from “upwind” States that contribute to degradation of air quality in “downwind” States that fail to attain the National Ambient Air Quality Standards (NAAQS) for fine particulate matter (annual and 24-hour standards for PM2.5) and ozone. CSAPR is a complex rulemaking that established a cap and trade program to limit emissions of nitrogen oxide (NOX) and sulfur dioxide (SO2) from electric generating units in designated upwind States. EPA issued CSAPR as a replacement for CAIR. The D.C. Circuit vacated and remanded CAIR three years before the promulgation of CSAPR. See North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008).¶ EPA applied a two-step process by which it determined that emissions from 28 “upwind” States contribute significantly to nonattainment of air quality in “downwind” States. In the first step of its analysis, EPA used modeling to identify the upwind States whose emissions contributed to an increase in concentration of at least one percent of the relevant NAAQS in any downwind area that does not comply with one of the NAAQS. Any upwind State whose contribution was less than one percent was excluded from CSAPR.¶ In the second step, EPA applied a cost-based standard to determine the required level of emissions reductions from the upwind States that met or exceeded the one percent threshold. EPA established a cost-effectiveness level of $500/ton for ozone season and annual NOX. For SO2, EPA divided upwind States into two cost-based categories: $2,300/ton for “Group 1” States and $500/ton for “Group 2” States. EPA then determined the level of emission reductions that could be achieved at or below the cost thresholds at electric generating units in each affected upwind State. Based on this information, EPA established post-reduction emissions budgets for the upwind States and allocated emissions allowances to each power facility in an amount proportional to its contribution to the State’s historical baseline heat input. The owner of an allowance can emit one ton of the relevant pollutant (NOX or SO2). Similar to other cap and trade programs, the CSAPR allowances can be exchanged between two parties. Ultimately, the emissions of each affected facility are “capped” at the number of allowances provided by EPA or acquired by trading.¶ In previous rulemaking actions, EPA determined that the upwind States failed to meet their obligations under the plan approval process in CAA Section 110(a)(1). Specifically, EPA found that upwind States had not submitted adequate State Implementation Plans (SIPs) to address downwind impacts within three years after the adoption of the 24-hour PM2.5 NAAQS in 2006. Therefore, according to EPA, federal intervention was appropriate under CAA Section110(c)(1). EPA promulgated a CSAPR Federal Implementation Plan (FIP) for each affected upwind State. This approach was a significant departure from EPA’s implementation of other interstate transport rules. In the NOX SIP Call and CAIR, EPA gave upwind States the primary role in program implementation.

#### Independently key to solve global warming, biodiversity, mutations and extinction – key tenet of the EPA and global emission standards

Mendleson and Bowes 10

(The Clean Air Act 40 Years of Success Protecting Public Health 26 Environment Joe Mendelson Director of Global Warming PolicyCatherine Bowes Climate Policy Representative summer 2010 https://www.nwf.org/pdf/Policy-Solutions/CleanAirActFactSheet.pdf)

This fall marks the 40th anniversary of the Clean Air Act, one of our nation’s most effective and ¶ beneficial public health laws. For four decades, the Environmental Protection Agency (EPA) has ¶ used the Clean Air Act to hold polluters accountable and successfully protect the health of millions ¶ of Americans – including our children, our seniors, and the most vulnerable among us – from ¶ dozens of different air pollutants. Cleaning up air pollution has also protected wildlife from harmful ¶ emissions that threaten species directly and also contaminate water, degrade habitats, and ¶ damage the environment.¶ The National Wildlife Federation, on behalf of our four million members and supporters ¶ nationwide, stands with a broad coalition of public health, environmental, business, labor, faith, ¶ and sportsmen organizations in support of the Clean Air Act and in strong opposition to any ¶ attempts by polluter lobbyists to weaken its protections. It is critical that the EPA continue its ¶ important work of reducing air pollution in this country by setting strong emission standards for all ¶ pollutants, including greenhouse gases, as required by the Clean Air Act. It is time for our nation’s ¶ polluters to finally be held accountable for their harmful emissions that contribute to climate ¶ change.¶ Cost-Effective Pollution Reductions¶ Since 1970, the Clean Air Act has a proven track record of protecting public health, wildlife, and the ¶ environment from harmful pollution while ensuring our economy is strengthened. In 1990, the Act ¶ was revised with bipartisan support and signed into law by President George H.W. Bush –¶ demonstrating that clean air and less pollution are goals shared by Republicans and Democrats ¶ alike.¶ The first 20 years of Clean Air Act implementation prevented: 205,000 premature deaths; ¶ 21,000 cases of heart disease; 672,000 cases of chronic bronchitis; 843,000 asthma attacks; ¶ 18 million child respiratory illnesses; and 189,000 cardiovascular hospitalizations.1¶ Clean Air Act programs have resulted in 92% less lead in ambient air than in 1980, ¶ significantly reducing the number of children with lower IQs from toxic lead exposure. 2¶ Since 1990, pollution that causes acid rain, asthma, developmental problems, and ¶ premature deaths has dropped 41%, while our economy has grown 64%.3¶ Between 1970 and 1990, actions to reduce air pollution saved the nation an estimated $22 ¶ trillion in health care expenses and lost productivity at a cost of $523 billion—a remarkable ¶ 40-1 benefit-cost ratio. The innovation and ingenuity of American industry has shown us, ¶ time and time again, that holding polluters accountable can be achieved faster and at lower ¶ cost than initially predicted.4¶ The Clean Air Act’s Acid Rain Program has successfully reduced acid deposition by more ¶ than 30% since 1990, with economic benefits also outweighing the costs more than 40-¶ to-1. Costs of compliance with the program were 83% lower than EPA initially ¶ predicted.5¶ Actions under the Clean Air Act have been extremely successful in cost-effectively ¶ reducing air pollution resulting from cars, trucks, and other vehicles. As a result of new ¶ rules for cleaner fuels and engines, today’s cars, light trucks, and heavy-duty diesel ¶ engines are up to 95% cleaner than past models. According to EPA, the expected ¶ benefits of achieving emission reductions from the newest car standards will outweigh ¶ the costs more than 16-to-1.6¶ Clean Air Act regulation of ozone-depleting chemicals is estimated to result in nearly ¶ 300 million fewer cases of cancer from 1989 thru 2075, while also protecting people ¶ from other harmful impacts of exposure such as immune disorders and cataracts. Phaseout of these chemicals occurred much faster, and cost 30% less, than initially predicted.7¶ According to preliminary EPA analysis, the annual economic benefit of air quality ¶ improvements thanks to the Clean Air Act is estimated to be nearly $2 trillion in 2010 –¶ far exceeding the costs of compliance.8 Limiting Pollution as Congress Intended¶ When Congress passed the Clean Air Act nearly four decades ago, it gave EPA the responsibility ¶ to protect the American people when science shows that new air pollutants threaten our health ¶ or environment. In 2007, the Supreme Court confirmed in its landmark decision, Massachusetts ¶ v. EPA, that the Act requires EPA to protect public health and welfare from air pollutants that ¶ contribute to climate change. Just this past spring, the National Academies of Science again ¶ underscored the urgency of curbing global warming pollution, concluding that "climate change ¶ is occurring, is caused largely by human activities, and poses significant risks for — and in many ¶ cases is already affecting — a broad range of human and natural systems."10¶ Threats to Public Health: Every year that we allow corporate polluters to ¶ dump more greenhouse gases into the air will result in more severe effects ¶ of global warming, now and into the future – including record high ¶ temperatures, stronger storms, more droughts, heavier rainfall, increased ¶ flooding, sea-level rise, and many others. For example, more frequent and ¶ intense heat waves increase the threats of asthma and other respiratory ¶ disease and more frequent and intense rainfall, flooding, and sea-level rise ¶ increase the threats of water-borne diseases. It is the people who have the ¶ least ability to cope with these changes—the poor, very old, very young, or ¶ sick—who are the most vulnerable to the changes we will experience. 12¶ Dangers to Wildlife: All the climate change impacts listed above, from heat ¶ waves to droughts to sea-level rise, pose significant risks to wildlife as well. ¶ As the climate changes, wildlife are especially vulnerable to changes in ¶ habitat, reproductive processes, and migration patterns. America’s ¶ abundant and diverse wildlife resources, which are so important to our ¶ culture and well-being, face a bleak future if we do not address global ¶ warming. Scientists predict that rising global temperatures could move 30% ¶ of all plant and wildlife species toward extinction in the lifetime of a child ¶ born today.13 Taking action to reduce global warming pollution and confront ¶ our climate crisis will greatly benefit wildlife.¶ In passing the Clean Air Act, Congress clearly intended it to serve as a living document, in order to ensure that EPA ¶ has the tools it needs to respond to new air pollution problems. The science is clear: global warming pollution ¶ poses significant threats to public health and welfare, and EPA is obligated under the law to limit sources of this ¶ pollution and address the impacts of climate change.¶ What’s Next: Common Sense, Cost-Effective Action¶ Over the last year, EPA has pursued sensible measures to fulfill its obligations under the Clean Air Act by focusing ¶ on global warming pollution from tailpipes on new vehicles and smokestacks of the biggest corporate polluters.¶ EPA took the first major steps to curb emissions in March 2010, when it issued new standards to cut heat-trapping ¶ pollution from new cars and SUVs through 2016, together with new fuel economy standards from the Department¶ of Transportation. As a result of these important rules, new vehicles will emit 30 percent less carbon pollution by ¶ 2016 and reduce dependence on foreign oil by 1.8 billion barrels over the life of the program. 14¶ New Emissions Standards: EPA is now turning its attention to new emission limits for trucks, cars (post-2016), ¶ power plants, and other large industrial polluters. It is important to recognize that the Clean Air Act has clear ¶ guidelines that EPA must follow, including specific requirements that technical feasibility and cost form the basis for ¶ new emission standards. For example, when developing new regulations for the biggest global warming pollution ¶ sources, EPA must base the emission standards on available and affordable pollution control measures.15

#### Mutations ensure extinction

Yu 9

Victoria Yu, Dartmouth Journal of Undergraduate Science, "Human Extinction: The Uncertainty of Our Fate", 5-22-09 http://dujs.dartmouth.edu/spring-2009/human-extinction-the-uncertainty-of-our-fate

A pandemic will kill off all humans.¶ In the past, humans have indeed fallen victim to viruses. Perhaps the best-known case was the bubonic plague that killed up to one third of the European population in the mid-14th century (7). While vaccines have been developed for the plague and some other infectious diseases, new viral strains are constantly emerging — a process that maintains the possibility of a pandemic-facilitated human extinction.¶ Some surveyed students mentioned AIDS as a potential pandemic-causing virus. It is true that scientists have been unable thus far to find a sustainable cure for AIDS, mainly due to HIV’s rapid and constant evolution. Specifically, two factors account for the virus’s abnormally high mutation rate: 1. HIV’s use of reverse transcriptase, which does not have a proof-reading mechanism, and 2. the lack of an error-correction mechanism in HIV DNA polymerase (8). Luckily, though, there are certain characteristics of HIV that make it a poor candidate for a large-scale global infection: HIV can lie dormant in the human body for years without manifesting itself, and AIDS itself does not kill directly, but rather through the weakening of the immune system. ¶ However, for more easily transmitted viruses such as influenza, the evolution of new strains could prove far more consequential. The simultaneous occurrence of antigenic drift (point mutations that lead to new strains) and antigenic shift (the inter-species transfer of disease) in the influenza virus could produce a new version of influenza for which scientists may not immediately find a cure. Since influenza can spread quickly, this lag time could potentially lead to a “global influenza pandemic,” according to the Centers for Disease Control and Prevention (9). The most recent scare of this variety came in 1918 when bird flu managed to kill over 50 million people around the world in what is sometimes referred to as the Spanish flu pandemic. Perhaps even more frightening is the fact that only 25 mutations were required to convert the original viral strain — which could only infect birds — into a human-viable strain (10).

## Amendment CP

#### TEXT: The United States Congress should pass and at least three-fourths of the states should ratify a constitutional amendment that eliminates Al-Bihani v. Obama as valid law, reaffirms the “Charming Besty” Canon, and states that treaties ratified by the United States are a restriction on the war powers authority of the President of the United States in the area of indefinite detention.

#### Amendments solve better – only check on the Supreme Court

Schaffner ‘05

 American University Law Review, Associate Professor of Law, George Washington University Law School

Because the judicial branch has the ultimate authority over constitutional interpretation and construction, the only "check" on judicial power of constitutional interpretation is the constitutional amendment process. The amendment process should be used to overturn the Court only when it acts beyond its powers or inconsistently with constitutional principles. Otherwise, the careful balance of powers among the branches is compromised. The history of amending the Constitution to overrule Supreme Court decisions is consistent with this view and is particularly relevant here. While the U.S. Supreme Court is not being overturned by the FMA, the Massachusetts Supreme Judicial Court's Goodridge decision is in jeopardy. Goodridge was the catalyst for the fervor behind the proposed marriage amendment. Moreover, the FMA will forever prevent the U.S. Supreme Court from addressing the issue. Only four constitutional amendments have been adopted to overrule the Supreme Court. n186 They are: (1) the Eleventh Amendment, which overruled Chisolm v. Georgia; n187 (2) the Thirteenth Amendment and, most specifically, the first sentence of the [\*1519] Fourteenth Amendment, n188 which overruled Dred Scott v. Sanford; n189 (3) the Sixteenth Amendment, which overruled Pollack v. Farmer's Loan & Trust Co.; n190 and (4) the Twenty-Sixth Amendment, which overruled Oregon v. Mitchell. n191 As we will see, each amendment was in harmony with the basic principles that underlie the Constitution - individual rights, separation of powers, and federalism. Moreover, in the cases where fundamental liberty interests were at stake, the amendment reestablished individual rights in light of the Court's limited interpretation of those rights. Without analyzing the propriety of the individual Supreme Court decisions, the following will demonstrate that, unlike the FMA, the use of the amendment power to overrule these cases was proper and consistent with basic democratic principles.

## Courts CP

#### The United States federal judiciary should affirm in opposition to Al-Bihani v. Obama, through the application of the “Charming Betsy” Canon, that treaties ratified by the United States are a restriction on the war powers authority of the President of the United States in the area of indefinite imprisonment.

#### The use of the term ‘detained’ to describe imprisonment sanitizes the process and smoothly transforms a system of abuse and degradation into a clean administrative procedure---this linguistic move actively legitimizes the worst excesses of the war on terror

National Forum, 6/28/05 (http://72.14.203.104/search?q=cache:3qt2cbGSm7UJ:forum.onlineopinion.com.au/thread.asp%3Farticle%3D3592+%22detention+is%22+euphemism&hl=en&gl=us&ct=clnk&cd=267)

So it is Liberal policy to lock up children who have come to this country to seek refuge and discard those with a conscience. What is their crime? Wrong place wrong time?
How do the Liberals and their supporters justify this cruelty to children? Orwell said " In our time, Political speech and writing are largely the defence of the indefensible." **Today the Liberals dole out the euphemisms and PR to defend the indefensible**. For instance: "mandatory **detention" is really imprisonment without trial;** an "illegal" is a mother, a child, a person - flesh and blood with feelings. The main argument that we get to counter refugees and others who protest against this cruelty in Australia is the "question-begging", the "what if" nonsense comparing the treatment that they would get at the hands of dictators without conscience (that most refugees are escaping from). These mothers, fathers, sons and daughters are denied our help because the humanitarian conscience that they are appealing to no longer recognises their humanity - the "**sheer cloudy vagueness" has swallowed up their humanity. Vague, desperate, fleeting images in the distance behind bars**. According to KD, the Liberals have "legitimised" gaoling children and their parents in prisons to discourage other refugees from entering our shores. A terrorist is a person who uses extreme fear to govern or coerce government or community. So, I think, those condoning this method of coercion, that is, locking up refugees to coerce boat people into staying away is based on the similar thinking as a terrorist uses - it is wrong. Moreover, political conformity of the kind KD encourages, engenders the **machine-like responses** Orwell talks of in his essays. Those in favour of gaoling the mums and dads from afar who seek our help to scare others have no conscience, or more precisely , a sense of justice. Conscience reminds us of our humanity - without it **you are just cogs in a machine**.

#### Detained is a euphemism---it functions to legitimizes government authority---undercuts public capacity to hold the Executive accountable for illegitimate arrests

Shirazi 6

Said Shirazi, Princeton-based analyst for Dissident Voice, 3/9/06 (http://72.14.203.104/search?q=cache:gkwNaqfTznIJ:www.printculture.com/item-771.html+%22detention+is%22+euphemism&hl=en&gl=us&ct=clnk&cd=27)

By all means, if you suspect someone of terrorist activity arrest them, but charge them and let them work with counsel on defending themselves in case it turns out you’re wrong, as the U.S. was practically every time here. The benefit of the doubt must always be for the individual, not the peristaltic torpor of the bureaucratic Leviathan.The linguistic irony is that "**detained" is a less serious word than "arrested**", but to be detained amounts to being arrested and held indefinitely without charge, which is of course much worse. **Detention is a kind of limbo, and while technically accurate as a descriptive term**, functions today as a **euphemism for arrested without charge**, a phrase whose sense is more plain. So if you enjoy paradoxes, here’s a good one for you: the problem is not that people are being arrested, but rather that they are not being arrested.Special Registration, as the program was called, went into effect without proper public notice, only a posting in the Congressional Quarterly. It was already wrong from Day One, regardless of abuses that may have followed during incarceration, because it is based on racist assumptions, and because immigration laws were not intended to be used for an anti-terrorism dragnet. Applying immigration laws selectively to detain one group rather than another is discriminatory and illegal. Adding more groups to try to make it look less racist only makes it worse.The public tends to assume that if the government does something, it must be okay, since the government is who says what's okay and what isn't. This is a dangerous oversimplification that blurs the crucial distinction between the legislative and the executive branch, and that overlooks the reality that agencies can and do **overstep their authority**.

#### This regime of sanitized language actively conceals the horror of totalitarianism---the language of euphemism clinically detaches people from any sense of ethical responsibility

Davidson 03

Elias Davidsson, Centre for Research on Globalization, 2003 (<http://www.aldeilis.net/jus/econsanc/debate.pdf>)

In order to effectively describe a complex and highly politicized phenomenon, such as economic sanctions, the **utmost care in the choice of terminology is necessary**. Among the tools of politicians figure their creative use of language, including the invention of euphemisms and obfuscatory expressions. Discussing the role of euphemisms in political discourse, Stanley Cohen writes: The most familiar form of reinterpretation is the use of euphemistic labels and jargon. These are everyday devices for **masking, sanitising, and conferring respectability** by using **palliative terms** that **deny or misrepresent cruelty or harm**, giving them **neutral or respectable status**. Orwell's original account of the anaesthetic function of political language - how words **insulate their users and listeners** from **experiencing fully the meaning** of what they are doing - remains the classic source on the subject [28]. Judge Weeramantry, in his Separate Dissenting Opinion on The legality of nuclear weapons (International Court of Justice (Advisory Opinion) (1996)), castigates [...] the use of euphemistic language - the **disembodied language** of military operations and the **polite language of diplomacy**. They conceal the horror of nuclear war, diverting attention to intellectual concepts such as self-defence, reprisals, and proportionate damage which can have little relevance to a situation of total destruction. Horrendous damage to civilians and neutrals is described as collateral damage, because it was not directly intended; incineration of cities becomes "considerable thermal damage". One speaks of "acceptable levels of casualties", even if megadeaths are involved. Maintaining the balance of terror is described as "nuclear preparedness"; assured destruction as "deterrence", total devastation of the environment as "environmental damage". **Clinically detached** from their human context, such expressions **bypass the world of human suffering**, out of which humanitarian law has sprung.

## Charming Betsy

#### Al-Bihani clearly didn’t overrule the Charming Betsy doctrine---the decision that denied his appeal for re-hearing explicitly clarified that Charming Betsy didn’t apply to the case

J. Taylor Benson 11, J.D., Creighton University School of Law, June 2011, “INTERNATIONAL LAWS-OF-WAR, WHAT ARE THEY GOOD FOR? THE DISTRICT OF COLUMBIA CIRCUIT IN AL-BIHANI V. OBAMA CORRECTLY CLARIFIED THAT INTERNATIONAL LAWS-OF-WAR DO NOT LIMIT THE PRESIDENT'S AUTHORITY TO DETAIN ENEMY COMBATANTS,” Creighton Law Review, 44 Creighton L. Rev. 1277

Al-Bihani then petitioned the United States Court of Appeals for the District of Columbia for a rehearing en banc. n71 Al-Bihani claimed in part that the circuit panel erred in declaring that international law-of-war principles have no effect on the President's detention authority. n72 The court unanimously voted to deny the petition to hear the case en banc. n73 The seven District of Columbia Circuit Court judges who did not sit on the original panel submitted a brief statement in support of denial. n74 The statement declared, without further explanation, that a determination of the role of international law-of-war principles was unnecessary to the disposition on the merits. n75

 [\*1284] The three original panel judges each filed statements concurring in the denial of rehearing en banc. n76 Judge Janice Rogers Brown wrote a concurring statement in which she sought to clarify what he referred to as the concurring judges' cryptic and confusing statements that she believed served to muddy the clear holding of Al-Bihani I. n77 First, Judge Brown noted that the holding in Al-Bihani I regarding international law could not be dismissed as dicta, as the rehearing panel's statement suggested. n78 Judge Brown reasoned that the discussion of international law in Al-Bihani I was one of two alternative holdings, each holding precedential effect. n79

Addressing what she believed to be a countervailing motivation behind the en banc panel's short concurrence, Judge Brown refuted the scholarly intuition that domestic statutes are not supported by their own authority, but must rely on international common law norms. n80 Judge Brown reasoned that the idea that courts should incorporate international legal norms into domestic statutes, without a clear statement to the contrary, was alien to United States case law. n81 Conversely, Judge Brown stated that nothing in the Constitution compelled Congress to clearly enunciate the inapplicability of international common law principles. n82 Citing Murray v. Schooner Charming Betsy n83 ("Charming Betsy"), Judge Brown admitted that the only role international law played in statutory interpretation was that of construing ambiguous statutes so they do not contradict international law. n84 Stating that the AUMF was not ambiguous, Judge Brown concluded that Charming Betsy did not apply. n85

#### No chance the Courts enforce I-Law

Daniel Abebe & Eric A. Posner 11, Assistant Professor and Kirkland & Ellis Professor, University of Chicago Law School, The Flaws of Foreign Affairs Legalism, 51 Va. J. Int'l L. 507

Foreign affairs legalists make sweeping claims about the American judiciary's promotion of international law, but the support for these claims is weak. In this section, we discuss some examples of contributions to international law by Congress, the courts and the executive. We then evaluate the institutional capacities and incentives of the different branches to promote international law. As we will show, the evidence points to the executive, not the judiciary, as the branch most responsible for advancing international law.¶ [\*528] ¶ 1. The American Judiciary's Contribution to International Law ¶ Foreign affairs legalists celebrate the American judiciary's contributions to international law, but they can only point to a few concrete accomplishments. A handful of judge-made doctrines put limited pressure on the political branches to comply with international law. For example, the Charming Betsy canon makes it more difficult for Congress to pass a statute that violates international law by requiring Congress to be clearer than it would otherwise be. n101 International comity rules, in limited circumstances, avoid violations of international jurisdictional law that suggest that certain types of disputes are best resolved in the state with the most contacts to the litigation. n102 The federal courts' admiralty jurisprudence has developed in tandem with admiralty cases in other states, and in this way it could be considered a contribution to international law. One could also point to the willingness of the federal courts to suspend federalism constraints in order to enforce treaties in cases like Missouri v. Holland, n103 but these cases are weak and inconsistent. n104¶ Moreover, the empirical literature regarding the judiciary's support of international law is thin. Benvenisti cites a handful of cases that suggest that national courts - mainly in developing countries - have used international law in an effort to constrain their executives. n105 Koh also cites a very small number of cases n106 - his best examples are American ATS cases, which we discuss below. n107 Slaughter rests much of her argument on the rise of international judicial conferences, where judges from different countries meet and exchange ideas. n108 She does not provide evidence that these conferences have affected judicial outcomes. Another possibility is that judges enjoy meeting each other and learning about foreign judicial decisions, but they do not, as a matter of pragmatics or principle, allow what they learn to affect the way that they decide cases. n109¶ In contrast, many court decisions and judge-made doctrines cut against the claims of foreign affairs legalism. The early decision in Foster [\*529] v. Neilson n110 to distinguish between self-executing and non-self-executing treaties, n111 recently reaffirmed in Medellin v. Texas, n112 ensures that many treaties cannot be judicially enforced. These rules have been reinforced by the reluctance to find judicially enforceable rights even in treaties that are self-executing. The tradition of executive deference also limits the judiciary's ability to contribute to international law. The judiciary generally follows the executive's lead instead of pushing the executive toward greater international engagement. In treaty interpretation cases, courts frequently defer to the executive. n113¶ On questions of international law - the area most important to foreign affairs legalists - the judiciary's record is poor. In the notable federal common law case The Paquete Habana, n114 the Supreme Court made clear that the executive could unilaterally decide that the United States would not comply with CIL, in which case the victims of the legal violation would have had no remedy. n115 Courts have held that both the executive and Congress have the authority to violate international law n116 and that violations of international law cannot be a basis for federal-question jurisdiction. n117 For example, the Supreme Court found that an illegal, extrajudicial abduction that circumvented the terms of an international extradition treaty did not preclude a U.S. trial court's jurisdiction over the abductee. n118¶ The Supreme Court's treatment of international law in Medellin v. Texas n119 is also instructive. Here, the Court held that the Vienna Convention [\*530] on Consular Relations n120 was not self-executing or judicially enforceable in U.S. courts. n121 That case involved a Mexican national who had been deprived of his right to consular notification under the Convention after he was arrested. He was later sentenced to death. n122 The International Court of Justice held that the United States violated international law by failing to provide the Mexican national with access to his consulate. n123 What is striking in the Medellin context is that not only did the Supreme Court refuse to intervene in order to vindicate rights under international law (earlier, it had held that the ICJ judgment was not binding on U.S. courts), n124 but it also prevented President Bush from vindicating those rights. n125 Bush had tried to order state courts to take account of the ICJ ruling, but the Supreme Court held that he did not have the power to do so. n126

#### Charming betsy canon expansion is inevitable their author AND proves the link to PQD

Waters 07
Melissa A Waters Assistant Professor of Law, Washington 26 Lee Law School.
USING HUMAN RIGHTS TREATIES TO RESOLVE AMBIGUITY: THE ADVENT  OF A RIGHTS­CONSCIOUS CHARMING  BETSY CANON
<http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-38-2007/issue-2/using-human-rights-waters.pdf>

<Their Card Starts>

One of the most significant developments in international law over the past decade has been the

emergence of a rich transnational judicial dialogue among the world's common law courts. While

transnational judicial dialogue is emerging across a wide range of substantive law areas, thus far the

scholarly debate over dialogue has focused largely on the use of international human rights law in

interpreting domestic constitutional texts. Equally significant forms of dialogue are taking place

outside the constitutional context, however, and thus far these other forms have received far less

scholarly attention.

One particularly overlooked arena for transnational judicial dialogue on human rights is in the

interpretation of statutory law. Courts have long looked to international law to interpret statutes. In

the United States, for example, the socalled

Charming Betsy canon of statutory interpretation holds

that "an act of Congress ought never to be construed to violate the law of nations, if any other

possible construction remains." 1 United States courts have applied the Charming Betsy canon to

construe ambiguous statutes in such a manner that they would not violate either international treaties

<AND ends>

Over the past decade, common law courts have begun to transform the centuries old¶ Charming¶ Betsy canon into an extraordinarily powerful judicial tool for entrenching international human rights¶ obligations into domestic law. By developing what I will refer to as a "rightsconscious¶ Charming¶ Betsy canon", courts are able to utilise treaties to interpret domestic statutes consistently with¶ international legal human rights norms. In addition, some judges have urged for the expansion of¶ the rightsconscious¶ approach beyond the statutory context, arguing that courts should adopt the¶ Charming Betsy canon to interpret ambiguities in constitutional texts. In both contexts,¶ transnational judicial dialogue has played a key role in encouraging the development of a rightsconscious¶ approach. Human rights treaties have become a kind of bridging device: courts use them¶ as common reference points around which to construct a dialogue with their foreign counterparts¶ regarding both the content of human rights law and the proper application of that law to interpret¶ domestic legal texts.¶ As we shall see, the emergence of the rights conscious¶ Charming Betsy canon has reinvigorated¶ the debate over the proper role for treaties in common law legal systems. Traditional common law¶ dualism holds that a treaty has domestic legal effect in only two situations: first, if it has been¶ incorporated by legislation, or second, if courts are utilising the treaty as evidence of the existence¶ of a customary international law norm. The traditional Charming Betsy canon fits well within the¶ dualist paradigm, because it emphasises respect for the political branches, particularly the¶ legislature. As Professor Ralph Steinhardt has observed, by seeking to read domestic legislation¶ consistently with international commitments undertaken by the political branches, Charming Betsy¶ "assures that [a country] is not compromised or embarrassed in its foreign relations." 3 From a¶ dualist standpoint, the traditional Charming Betsy canon is "a restrictive and prophylactic doctrine¶ protecting the separation of powers." 4¶ The emerging right sconscious¶ Charming Betsy canon, however, is considerably more monist in¶ orientation than its historical predecessor. It emphasises respect for international law rather than¶ judicial deference to political branch prerogatives in treaty incorporation. Courts employing the¶ canon utilise unincorporated human rights treaties to inform the substantive content of domestic¶ statutes. In so doing, they are developing a flexible, powerful and increasingly controversial judicial¶ tool for entrenching human rights treaty obligations into domestic law. This essay explores the emergence of a rightsconscious¶ Charming Betsy canon in both statutory and constitutional ¶ interpretation, and considers its implications for traditional common law dualism.

#### Congress will backlash. It will functionally bar the Court from exercising its authority

Vladeck 11—Professor of Law and Associate Dean for Scholarship @ American University [Stephen I. Vladeck, “Why Klein (Still) Matters: Congressional Deception and the War on Terrorism,” Journal of National Security Law, Volume 5, 6/16/2011, 9:38 AM

Six weeks later, Congress enacted the USA PATRIOT Act, which included a series of controversial revisions to immigration, surveillance, and other law enforcement authorities.34 But it would be over four years before Congress would again pass a key counterterrorism initiative, enacting the Detainee Treatment Act of 2005 (DTA)35 after—and largely in response to—the Supreme Court’s grant of certiorari in Hamdan v. Rumsfeld.36 In the five years since, Congress had enacted a handful of additional antiterrorism measures, including the Military Commissions Act (MCA) of 2006,37 as amended in 2009,38 the Protect America Act of 2007,39 and the 2008 amendments40 to the Foreign Intelligence Surveillance Act of 1978, known in shorthand as the FAA.41 And yet, although Congress has spoken in these statutes both to the substantive authority for military commissions and to the scope of the government’s wiretapping and other surveillance powers, it has otherwise left some of the central debates in the war on terrorism completely unaddressed.42 Thus, Congress has not revisited the scope of the AUMF since September 18, 2001, even as substantial questions have been raised about whether the conflict has extended beyond that which Congress could reasonably be said to have authorized a decade ago.43 Nor has Congress intervened, despite repeated requests that it do so, to provide substantive, procedural, or evidentiary rules in the habeas litigation arising out of the military detention of noncitizen terrorism suspects at Guantánamo.44

As significantly, at the same time as Congress has left some of these key questions unanswered, it has also attempted to keep courts from answering them. Thus, the DTA and the MCA purported to divest the federal courts of jurisdiction over habeas petitions brought by individuals detained at Guantánamo and elsewhere.45 Moreover, the 2006 MCA precluded any lawsuit seeking collaterally to attack the proceedings of military commissions,46 along with “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”47 And although the Supreme Court in Boumediene invalidated the habeas-stripping provision as applied to the Guantánamo detainees,48 the same language has been upheld as applied elsewhere,49 and the more general non-habeas jurisdiction-stripping section has been repeatedly enforced by the federal courts in other cases.50

Such legislative efforts to forestall judicial resolution of the merits can also be found in the telecom immunity provisions of the FAA,51 which provided that telecom companies could not be held liable for violations of the Telecommunications Act committed in conjunction with certain governmental surveillance programs.52 Thus, in addition to changing the underlying substantive law going forward, the FAA pretermitted a series of then-pending lawsuits against the telecom companies.53

Analogously, Congress has attempted to assert itself in the debate over civilian trials versus military commissions by barring the use of appropriated funds to try individuals held at Guantánamo in civilian courts,54 and by also barring the President from using such funds to transfer detainees into the United States for continuing detention or to other countries, as well.55 Rather than enact specific policies governing criteria for detention, treatment, and trial, Congress’s modus operandi throughout the past decade has been to effectuate policy indirectly by barring (or attempting to bar) other governmental actors from exercising their core authority, be it judicial review or executive discretion.

Wasserman views these developments as a period of what Professor Blasi described as “constitutional pathology,” typified by “an unusually serious challenge to one or more of the central norms of the constitutional regime.” Nevertheless, part of how Wasserman defends the “Klein vulnerable” provisions of the MCA and FAA is by concluding that the specific substantive results they effectuate can be achieved by Congress, and so Klein does not stand in the way. But if Redish and Pudelski’s reading of Klein is correct, then the fact that Congress could reach the same substantive results through other means is not dispositive of the validity of these measures. To the contrary, the question is whether any of these initiatives were impermissibly “deceptive,” such that Congress sought to “vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate.”56 pg. 257-259

#### Obama will disregard the Court. He is on record

Pyle 12—Professor of constitutional law and civil liberties @ Mount Holyoke College [Christopher H. Pyle, “Barack Obama and Civil Liberties,” Presidential Studies Quarterly, Volume 42, Issue 4, December 2012, Pg. 867–880]

Preventive Detention

But this is not the only double standard that Obama's attorney general has endorsed. Like his predecessors, Holder has chosen to deny some prisoners any trials at all, either because the government lacks sufficient evidence to guarantee their convictions or because what “evidence” it does have is fatally tainted by torture and would deeply embarrass the United States if revealed in open court. At one point, the president considered asking Congress to pass a preventive detention law. Then he decided to institute the policy himself and defy the courts to overrule him, thereby forcing judges to assume primary blame for any crimes against the United States committed by prisoners following a court-ordered release (Serwer 2009).

According to Holder, courts and commissions are “essential tools in our fight against terrorism” (Holder 2009). If they will not serve that end, the administration will disregard them. The attorney general also assured senators that if any of the defendants are acquitted, the administration will still keep them behind bars. It is difficult to imagine a greater contempt for the rule of law than this refusal to abide by the judgment of a court. Indeed, it is grounds for Holder's disbarment.

As a senator, Barack Obama denounced President Bush's detentions on the ground that a “perfectly innocent individual could be held and could not rebut the Government's case and has no way of proving his innocence” (Greenwald 2012). But, three years into his presidency, Obama signed just such a law. The National Defense Authorization Act of 2012 authorized the military to round up and detain, indefinitely and without trial, American citizens suspected of giving “material support” to alleged terrorists. The law was patently unconstitutional, and has been so ruled by a court (Hedges v. Obama 2012), but President Obama's only objection was that its detention provisions were unnecessary, because he already had such powers as commander in chief. He even said, when signing the law, that “my administration will not authorize the indefinite military detention without trial of American citizens,” but again, that remains policy, not law (Obama 2011). At the moment, the administration is detaining 40 innocent foreign citizens at Guantanamo whom the Bush administration cleared for release five years ago (Worthington 2012b).

Thus, Obama's “accomplishments” in the administration of justice “are slight,” as the president admitted in Oslo, and not deserving of a Nobel Prize. What little he has done has more to do with appearances than substance. Torture was an embarrassment, so he ordered it stopped, at least for the moment. Guantanamo remains an embarrassment, so he ordered it closed. He failed in that endeavor, but that was essentially a cosmetic directive to begin with, because a new and larger offshore prison was being built at Bagram Air Base in Afghanistan—one where habeas petitions could be more easily resisted. The president also decided that kidnapping can continue, if not in Europe, then in Ethiopia, Somalia, and Kenya, where it is less visible, and therefore less embarrassing (Scahill 2011). Meanwhile, his lawyers have labored mightily to shield kidnappers and torturers from civil suits and to run out the statute of limitations on criminal prosecutions. Most importantly, kidnapping and torture remain options, should al-Qaeda strike again. By talking out of both sides of his mouth simultaneously, Obama keeps hope alive for liberals and libertarians who believe in equal justice under law, while reassuring conservatives that America's justice will continue to be laced with revenge.

It is probably naïve to expect much more of an elected official. Few presidents willingly give up power or seek to leave their office “weaker” than they found it. Few now have what it takes to stand up to the national security state or to those in Congress and the corporations that profit from it. Moreover, were the president to revive the torture policy, there would be insufficient opposition in Congress to stop him. The Democrats are too busy stimulating the economies of their constituents and too timid to defend the rule of law. The Republicans are similarly preoccupied, but actually favor torture, provided it can be camouflaged with euphemisms like “enhanced interrogation techniques” (Editorial 2011b).

## Warming

#### No uniqueness for backing down from treaties

Crootoff  11
Rebecca Crootof, J.D. Yale Law School
Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon (April 5, 2011). Yale Law Journal. Available at SSRN: [http://ssrn.com/abstract=1803380](http://ssrn.com/abstract%3D1803380)
 The Charming Betsy Canon Encourages Domestic Courts’ Engagement with International Agreements and International Adoption

Much of domestic law already accords with international law, in large part because the United States actively influences the development of treaties. The United States often plays a pivotal role in drafting international treaties, and U.S. ratifications of multilateral treaties often are accompanied by declarations that U.S. obligations under the treaty are already fulfilled by domestic law. Therefore, aside from the fact that the Charming Betsy canon does not obligate or encourage courts to override domestic law, its proper application will likely favor interpretations that harmonize with provisions previously endorsed by the United States.

#### No norms impact

**Ikenberry ’11** – Professor of Politics and International Affairs @ Princeton

G. John Ikenberry, the Albert G. Milbank Professor of Politics and International Affairs at Princeton University. “A World of Our Making”. Democracy A Journal of Ideas. Issue #21, Summer 2011. http://www.democracyjournal.org/21/a-world-of-our-making-1.php?page=1

The main alternatives to liberal order—both domestic and international—have more or less disappeared. The great liberal international era is not ending. Still, if the liberal order is not in crisis, its governance is. Yet, given the fundamental weakness of the past international orders—brought down by world wars and great economic upheavals—the challenges of reforming and renegotiating liberal world order are, if anything, welcome ones.

There are four reasons to think that some type of updated and reorganized liberal international order will persist. First, the old and traditional mechanism for overturning international order—great-power war—is no longer likely to occur. Already, the contemporary world has experienced the longest period of great-power peace in the long history of the state system. This absence of great-power war is no doubt due to several factors not present in earlier eras, namely nuclear deterrence and the dominance of liberal democracies. Nuclear weapons—and the deterrence they generate—give great powers some confidence that they will not be dominated or invaded by other major states. They make war among major states less rational and there-fore less likely. This removal of great-power war as a tool of overturning international order tends to reinforce the status quo. The United States was lucky to have emerged as a global power in the nuclear age, because rival great powers are put at a disadvantage if they seek to overturn the American-led system. The cost-benefit calculation of rival would-be hegemonic powers is altered in favor of working for change within the system. But, again, the fact that great-power deterrence also sets limits on the projection of American power presumably makes the existing international order more tolerable. It removes a type of behavior in the system—war, invasion, and conquest between great powers—that historically provided the motive for seeking to overturn order. If the violent over-turning of international order is removed, a bias for continuity is introduced into the system.

Second, the character of liberal international order itself—**with or without** American **hegemonic leadership**—reinforces continuity. The complex interdependence that is unleashed in an open and loosely rule-based order generates expanding realms of exchange and investment that result in a growing array of firms, interest groups, and other sorts of political stakeholders who seek to preserve the stability and openness of the system. Beyond this, the liberal order is also relatively easy to join. In the post-Cold War decades, countries in different regions of the world have made democratic transitions and connected themselves to various parts of this system. East European countries and states within the old Soviet empire have joined NATO. East Asian countries, including China, have joined the World Trade Organization (WTO). Through its many multilateral institutions, the liberal international order facilitates integration and offers support for states that are making transitions toward liberal democracy. Many countries have also experienced growth and rising incomes within this order. Comparing international orders is tricky, but the current liberal international order, seen in comparative perspective, does appear to have unique characteristics that encourage integration and discourage opposition and resistance.

Third, the states that are rising today do not constitute a potential united opposition bloc to the existing order. There are so-called rising states in various regions of the world. China, India, Brazil, and South Africa are perhaps most prominent. Russia is also sometimes included in this grouping of rising states. These states are all capitalist and most are democratic. They all gain from trade and integration within the world capitalist system. They all either are members of the WTO or seek membership in it. But they also have very diverse geopolitical and regional interests and agendas. They do not constitute either an economic bloc or a geopolitical one. Their ideologies and histories are distinct. They share an interest in gaining access to the leading institutions that govern the international system. Sometimes this creates competition among them for influence and access. But it also orients their struggles toward the reform and reorganization of governing institutions, not to a united effort to overturn the underlying order.

Fourth, all the great powers have alignments of interests that will continue to bring them together to negotiate and cooperate over the management of the system. All the great powers—old and rising—are status-quo powers. All are beneficiaries of an open world economy and the various services that the liberal international order provides for capitalist trading states. All worry about religious radicalism and failed states. Great powers such as Russia and China do have different geopolitical interests in various key trouble spots, such as Iran and South Asia, and so disagreement and noncooperation over sanctions relating to nonproliferation and other security issues will not disappear. But the opportunities for managing differences with frameworks of great-power cooperation exist and will grow.

#### No impact—threat overestimated and global warming is solved by adaptation and mitigation.

Mendelsohn 9,

(Robert O. the Edwin Weyerhaeuser Davis Professor, Yale School of¶ Forestry and Environmental Studies, Yale University, June 2009, “Climate Change and¶ Economic Growth,” online: http://www.growthcommission.org/storage/cgdev/documents/¶ gcwp060web.pdf

The heart of the debate about climate change comes from a number of warnings from scientists and others that give the impression that human induced climate change is an immediate threat to society (IPCC 2007a,b; Stern 2006.) Millions of people might be vulnerable to health effects (IPCC 2007b) crop production might fall in the low latitudes (IPCC 2007b), water supplies might dwindle (IPCC 2007b), precipitation might fall in arid regions (IPCC 2007b), extreme events will grow exponentially (Stern 2006), and between 20-30 percent of species will risk extinction (IPCC 2007b). Even worse, there may be catastrophic events such as the melting of Greenland or Antarctic ice sheets causing severe sea level rise, which would inundate hundreds of millions of people. (Dasgupta et al. 2009) Proponents argue there is no time to waste. Unless greenhouse gases are cut dramatically today, economic growth and wellbeing may be at risk (Stern 2006). These statements are largely alarmist and misleading. Although climate change is a serious problem that deserves attention, society’s immediate behavior has an extremely low probability of leading to catastrophic consequences. The science and economics of climate change is quite clear that emissions over the next few decades will lead to only mild consequences. The severe impacts predicted by alarmists require a century (or two in the Case of Stern 2006) of no mitigation. Many of the predicted impacts assume there will be no or little adaptation. the net economic impacts from climate change over the next 50 years will take more than a century or even a millennium to unfold and many of these “potential” impacts will never occur because people will adapt. It is not at all apparent that immediate and dramatic policies need to be developed to thwart long‐range climate risks. What is needed are long-run balanced responses.

#### 6 degree warming’s inevitable

AP 9

(Associated Press, Six Degree Temperature Rise by 2100 is Inevitable: UNEP, September 24, <http://www.speedy-fit.co.uk/index2.php?option=com_content&do_pdf=1&id=168>)

Earth's temperature is likely to jump six degrees between now and the end of the century even if every country cuts greenhouse gas emissions as proposed, according to a United Nations update. Scientists looked at emission plans from 192 nations and calculated what would happen to global warming. The projections take into account 80 percent emission cuts from the U.S. and Europe by 2050, which are not sure things. The U.S. figure is based on a bill that passed the House of Representatives but is running into resistance in the Senate, where debate has been delayed by health care reform efforts. Carbon dioxide, mostly from the burning of fossil fuels such as coal and oil, is the main cause of global warming, trapping the sun's energy in the atmosphere. The world's average temperature has already risen 1.4 degrees since the 19th century. Much of projected rise in temperature is because of developing nations, which aren't talking much about cutting their emissions, scientists said at a United Nations press conference Thursday. China alone adds nearly 2 degrees to the projections. "We are headed toward very serious changes in our planet," said Achim Steiner, head of the U.N.'s environment program, which issued the update on Thursday. The review looked at some 400 peer-reviewed papers on climate over the last three years. Even if the developed world cuts its emissions by 80 percent and the developing world cuts theirs in half by 2050, as some experts propose, the world is still facing a 3-degree increase by the end of the century, said Robert Corell, a prominent U.S. climate scientist who helped oversee the update. Corell said the most likely agreement out of the international climate negotiations in Copenhagen in December still translates into a nearly 5-degree increase in world temperature by the end of the century. European leaders and the Obama White House have set a goal to limit warming to just a couple degrees. The U.N.'s environment program unveiled the update on peer-reviewed climate change science to tell diplomats how hot the planet is getting. The last big report from the Nobel Prize-winning Intergovernmental Panel on Climate Change came out more than two years ago and is based on science that is at least three to four years old, Steiner said. Global warming is speeding up, especially in the Arctic, and that means that some top-level science projections from 2007 are already out of date and overly optimistic. Corell, who headed an assessment of warming in the Arctic, said global warming "is accelerating in ways that we are not anticipating." Because Greenland and West Antarctic ice sheets are melting far faster than thought, it looks like the seas will rise twice as fast as projected just three years ago, Corell said. He said seas should rise about a foot every 20 to 25 years.

#### CO2 isn’t key

Watts 12

Watts, 25-year climate reporter, works with weather technology, weather stations, and weather data processing systems in the private sector, 7/25/’12

(Anthony, <http://wattsupwiththat.com/2012/07/25/lindzen-at-sandia-national-labs-climate-models-are-flawed/>)

ALBUQUERQUE, N.M. — Massachusetts Institute of Technology professor Richard Lindzen, a global warming skeptic, told about 70 Sandia researchers in June that too much is being made of climate change by researchers seeking government funding. He said their data and their methods did not support their claims.¶ “Despite concerns over the last decades with the greenhouse process, they oversimplify the effect,” he said. “Simply cranking up CO2 [carbon dioxide] (as the culprit) is not the answer” to what causes climate change.¶ Lindzen, the ninth speaker in Sandia’s Climate Change and National Security Speaker Series, is Alfred P. Sloan professor of meteorology in MIT’s department of earth, atmospheric and planetary sciences. He has published more than 200 scientific papers and is the lead author of Chapter 7 (“Physical Climate Processes and Feedbacks”) of the International Panel on Climate Change’s (IPCC) Third Assessment Report. He is a member of the National Academy of Sciences and a fellow of the American Geophysical Union and the American Meteorological Society.¶ For 30 years, climate scientists have been “locked into a simple-minded identification of climate with greenhouse-gas level. … That climate should be the function of a single parameter (like CO2) has always seemed implausible. Yet an obsessive focus on such an obvious oversimplification has likely set back progress by decades,” Lindzen said.¶ For major climates of the past, other factors were more important than carbon dioxide. Orbital variations have been shown to quantitatively account for the cycles of glaciations of the past 700,000 years, he said, and the elimination of the arctic inversion, when the polar caps were ice-free, “is likely to have been more important than CO2 for the warm episode during the Eocene 50 million years ago.”¶ There is little evidence that changes in climate are producing extreme weather events, he said. “Even the IPCC says there is little if any evidence of this. In fact, there are important physical reasons for doubting such anticipations.”¶ Lindzen’s views run counter to those of almost all major professional societies. For example, the American Physical Society statement of Nov. 18, 2007, read, “The evidence is incontrovertible: Global warming is occurring.” But he doesn’t feel they are necessarily right. “Why did the American Physical Society take a position?” he asked his audience. “Why did they find it compelling? They never answered.”¶ Speaking methodically with flashes of humor — “I always feel that when the conversation turns to weather, people are bored.” — he said a basic problem with current computer climate models that show disastrous increases in temperature is that relatively small increases in atmospheric gases lead to large changes in temperatures in the models.¶ But, he said, “predictions based on high (climate) sensitivity ran well ahead of observations.”¶ Real-world observations do not support IPCC models, he said: “We’ve already seen almost the equivalent of a doubling of CO2 (in radiative forcing) and that has produced very little warming.”¶He disparaged proving the worth of models by applying their criteria to the prediction of past climatic events, saying, “The models are no more valuable than answering a test when you have the questions in advance.”¶ Modelers, he said, merely have used aerosols as a kind of fudge factor to make their models come out right. (Aerosols are tiny particles that reflect sunlight. They are put in the air by industrial or volcanic processes and are considered a possible cause of temperature change at Earth’s surface.)¶ Then there is the practical question of what can be done about temperature increases even if they are occurring, he said. “China, India, Korea are not going to go along with IPCC recommendations, so … the only countries punished will be those who go along with the recommendations.”¶ He discounted mainstream opinion that climate change could hurt national security, saying that “historically there is little evidence of natural disasters leading to war, but economic conditions have proven much more serious. Almost all proposed mitigation policies lead to reduced energy availability and higher energy costs. All studies of human benefit and national security perspectives show that increased energy is important.”¶ He showed a graph that demonstrated that more energy consumption leads to higher literacy rate, lower infant mortality and a lower number of children per woman.¶ Given that proposed policies are unlikely to significantly influence climate and that lower energy availability could be considered a significant threat to national security, to continue with a mitigation policy that reduces available energy “would, at the least, appear to be irresponsible,” he argued.¶ Responding to audience questions about rising temperatures, he said a 0.8 of a degree C change in temperature in 150 years is a small change. Questioned about five-, seven-, and 17-year averages that seem to show that Earth’s surface temperature is rising, he said temperatures are always fluctuating by tenths of a degree.

#### New laws of physics prove that there global warming is an impossibility

Myers, 2/9/2010 (Kirk, staff writer, “New research into greenhouse effect challenges theory of man-made global warming” Seminole County Environmental News Examiner, February 9, 2010)

A former NASA contractor whose theory demonstrating that the greenhouse effect is constant and self-regulating and that increases in human CO2 emissions are not the source of global warming is fighting an uphill battle to publish his controversial work. Developed by prominent atmospheric physicist Dr. Ferenc Miskolczi, the new theory is enormously significant because it demolishes the prevailing doctrine of anthropogenic greenhouse warming (AGW), which blames humans for pumping CO2 into the atmosphere and triggering runaway global warming that could eventually lead to catastrophic climate change. All conventional greenhouse concepts are based on the idea that rising greenhouse gases cause an increase in atmospheric absorption, which in turn leads to atmospheric warming and higher surface temperatures. But Miskolczi’s research upends that conventional theory. After studying hundreds of atmospheric profiles (extracted from the TIGR2 global radiosonde database from the Laboratoire de Météorologie Dynamique in Paris), Dr. Miskolczi, a former contract researcher for NASA’s Langley Research Center, discovered a self-regulating mechanism, or “constant,” that keeps Earth’s greenhouse gases in equilibrium. According to his equilibrium theory, this constant cannot be altered by increases in emissions of CO2 or other atmospheric gases such as methane. “The only thing my theory is telling us is that the nature of the greenhouse effect is such, that under the conditions we have here on Earth, the atmosphere will maximize its cooling by keeping its infrared optical depth – or infrared absorption – at a preferred critical value,” explains Miskolczi. In simple terms, Miskolczi has discovered a new law of physics that sets an upper limit to the greenhouse effect. According to this law, the surplus temperature from greenhouse gases is constant and cannot be increased. Why? Because the earth’s greenhouse blanket functions dynamically to maintain equilibrium in response to changes in greenhouse gases such as water vapor, CO2, methane and ozone. “With relatively simple computations using NOAA's annual mean temperature, H20 and CO2 time series, I have shown that in the last 61 years, despite a 30 percent increase in the atmospheric CO2 concentration, the cumulative atmospheric absorption of all greenhouse gases has not been changed and has remained constant. There is no runaway greenhouse effect. The anthropogenic global warming theory is a lie, unless somebody proves otherwise,” Miskolczi says. The most plausible explanation of the equilibrium effect is that rising CO2 in the atmosphere replaces an equivalent amount of water vapor to maintain a constant greenhouse effect. The chief cause of global warming, according to Miskolczi, is not CO2, but changes in albedo (reflected sunlight) and in the solar constant (amount and rate of solar energy reaching Earth).

#### Courts are inherently racist and evil

Zinn 2005(Howard, The Progressive, It’s Not Up to the Court, <http://progressive.org/mag_zinn1105>)

Still, knowing the nature of the political and judicial system of this country, its inherent bias against the poor, against people of color, against dissidents, we cannot become dependent on the courts, or on our political leadership. Our culture--the media, the educational system--tries to crowd out of our political consciousness everything except who will be elected President and who will be on the Supreme Court, as if these are the most important decisions we make. They are not. They deflect us from the most important job citizens have, which is to bring democracy alive by organizing, protesting, engaging in acts of civil disobedience that shake up the system. That is why Cindy Sheehan's dramatic stand in Crawford, Texas, leading to 1,600 anti-war vigils around the country, involving 100,000 people, is more crucial to the future of American democracy than the mock hearings on Justice Roberts or the ones to come on Judge Alito.

#### Utilization of the law necessarily leads to disciplining and coercive destruction of those outside of its norms

Schlag 91

[Professor of Law @ U of Colorado (Pierre Stanford Law Review p. lexis]

For the trial lawyer, the field is already in part constituted. As the litigation proceeds, countless factors increasingly limit the trial lawyer's possible strategies. The positive law sets the bounds of possible litigation. Discovery sets the bounds of the possible factual positions in the case. The identity of the judge sets the bounds of permissible evidence. Still, many of the power relations are the creation of the trial lawyer herself. She will establish a relation with the jurors and judge, and in doing so, will influence the jurors' relation with the judge, their task, and opposing counsel. Neither the truth, nor the rational content, nor the moral effect of this relation matters. What matters is the relation itself: who commands, who silences, who is believed, etc. The trial lawyer knows all this. And the last thing she wants to do is re-present to herself all these relations in terms of a conventional separation and stabilization of truth, rationality, or moral value. On the contrary, to be effective, all of this must be implicitly understood -- indeed internalized -- as a system of differentiated relations among power, truth, rationality, rhetoric, and deceit. As Dauer and Leff put it: A lawyer is a person who on behalf of some people treats other people the way bureaucracies treat all people -- as nonpeople. Most lawyers are free-lance bureaucrats, not tied to any major established bureaucracy, who can be hired to use, typically in a bureaucratic setting, bureaucratic skills -- delay, threat, wheedling, needling, aggression, manipulation, paper passing, complexity, negotiation, selective surrender, almost-genuine passion -- on behalf of someone unable or unwilling to do all that for himself.

#### Law is pre-determined by itself, which dooms any attempts to reform law within the legal system

Schlag 97

[Professor of Law @ U of Colorado (Pierre Stanford Law Review p. lexis]

Legal thinkers may well face the same predicament. What legal thinkers know is what other legal thinkers believe they know. Legal thinkers know how other legal thinkers will think about things - what kinds of arguments they are likely to make, what sources they [\*911] will draw upon, what values and concerns they will invoke, and what conclusions they will offer. 125 This knowledge is, in short, knowledge of the beliefs shared by particular kinds of persons - namely, persons who have undergone the same formal legal training. Knowing such beliefs allows legal thinkers to operate competently within the web of beliefs known as "law." In this minimalist sense, one might say law "works." Mastery of these beliefs and knowledge of their self-referential organization, however, guarantees nothing about the status of those beliefs. It suggests nothing about whether the web of belief is true, insightful, ethically appealing, or intellectually interesting. For those who operate within this self-referential web of belief, knowledge of the ropes, the knowledge of how to "move" within the system, produces the illusion that they have knowledge of the law. The ability to produce results, outcomes, and conclusions that are accepted by the relevant community operates to confirm the sense that the members of the legal community actually possess knowledge of the law. Because legal actors see each other "doing law," they come to believe that they too know how to do law. Further, they come to believe that there is a knowledge of the law, a discipline, that informs their knowledge of how to do law.

# 2NC

## Amendment CP

#### 7. Our counterplan is predictable and good for debate.

Forsythe and Presser ‘06

[Clarke D. Director of the Project in Law & Bioethics @ American United for Life and Stephen B., Prof of Legal History @ Northwestern U School of Law, 10 Tex. Rev. Law & Pol. 301, ln]

Our constitutional system provides only two ways to overturn a Supreme Court holding interpreting the Constitution: an overruling decision by the Court itself or a constitutional amendment. Obviously, constitutional amendments are among the most difficult political goals to achieve in our constitutional system. This article is unique in its explanation of the legal effect and implications of a federalism amendment on abortion. Because no previous legal analysis of this kind exists, this article is limited to evaluating the legal impact of a federalism [\*341] amendment. It is beyond the scope of this article to evaluate fully the political obstacles or implications involved in the passage of such an amendment. For those who believe, as we do, that Roe has poisoned our political and judicial discourse, the political obstacles facing such an amendment ought to be weighed against the political obstacles to changing the Court's membership in the coming years to accomplish the same goal. Given that these political obstacles have resulted in a situation where there are only two publicly-declared Justices remaining on the Supreme Court who advocate the overturning of Roe thirty-three years after Roe, the obstacles to a constitutional amendment, while severe, may be less formidable than attempting to overrule Roe by changing the membership of the Court. Even if an amendment is impossible to accomplish, we do believe that legal and strategic dialogue and debate on abortion is healthy for its own sake. It is also possible that the arguments, public education, and political support involved in advocating a federalism amendment, even if Congress fails to consider an amendment, might move future Justices closer to the point of finally overturning this tragic decision.

#### CP forces judicial compliance solves better than the aff

Shany ‘06

[Yuval, Hersch Lauterpacht Chair in Public International Law, Hebrew University, 31 Brooklyn J. Int'l L. 341, ln]

Another concern raised by opponents of incorporation is that the introduction of international law at the CL level might disrupt the existing legal discourse and create disharmonizing tensions. 175 Incorporation would require the importation into the domestic legal system of foreign normative concepts that are not based upon local notions of justice and specific social structures. Differences between national and international [\*390] law -- from differences in legal drafting techniques to differences in the methods of balancing competing social interests -- further complicate integration efforts. 176 For example, IHR law might require a more intrusive standard of governmental involvement in social life (through the introduction of positive human rights obligations) than what is acceptable within a given society. 177 The introduction of such far-reaching reforms through judicial action, without correlative changes in the structure and machinery of government, might be ineffective and disruptive. When linked to the argument addressed below regarding the lack of familiarity of domestic judges with IHR law, the formidability of the task of incorporation becomes apparent. Arguably, a **more prudent course of action** would be to encourage legislators and other constitutional actors to gradually introduce constitutional amendments necessary to meet the state's international obligations. 178 Such a process would not only meet separation of powers and accountability concerns, 179 but it would also ensure smoother integration of international norms into the domestic legal system.

#### Constitutional amendments are key to check presidential war powers

Goldstein 1988

(Yonkel, J.D. from Stanford Law School, July, "The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment", 40 Stan. L. Rev. 1543, Lexis)

The lack of a major nuclear war, so far, may suggest to some that the legal system of controls over United States war powers is operating well. As Professor Spanier states, however, in discussing the principle of civilian control of the military, factors which are extrinsic to the legal system have been primarily responsible for the American military's subservience to civilians. n1 My argument is an analogous one, namely that the system of checks and balances, designed to ensure that entry into war either be in response to an emergency thrust upon the nation or the result of a thorough examination of policy alternatives and considerations, is no longer functioning. Consequently, credit for the lack of nuclear war since World War II belongs more to factors extrinsic to the legal system designed to control American war power than it does to [\*1544] any workable system intended to regulate that power. The constitutional war-making provisions have now been tested; under modern-day pressures they have been found wanting. As a result, it is time to amend the Constitution for both practical and symbolic reasons. A constitutional amendment would have a consciousness-raising effect on the American people. It would signal a clear change from immediate past precedent and, simultaneously, legitimate that change in the most authoritative way possible under our system. The proposed amendment would both (1) clearly establish congressional authority to set policy in all matters relating to the preparation and execution of war, hostilities, aggression, or defense of the United States, American citizens, and American interests, and (2) establish a private right of action against Congress for its failure to make diligent efforts to ascertain the relevant facts, to debate, and to set policy in this area. The first part of this amendment would help to settle any lingering debate over the proper congressional role in defense matters, yet allow the system to retain the flexibility necessary to execute a sound and responsive defense policy; Congress would be able to delegate responsibility and authority however it sees fit. The second part recognizes the appropriateness of a mechanism to allow United States citizens to stimulate congressional and judicial action in order to protect against the risks of nuclear war; courts would not be empowered to judge substantive legislative decisions, but would be able to ensure that Congress, in reaching those decisions, adhere to constitutional principles. Thus, the courts would function similarly to how they have operated in the due process area.

#### Amendments institutionalize US position on war powers – solves the signal

White 4 (William W., Lecturer in Public and International Affairs and Senior Special Assistant to the Dean at Woodrow Wilson School of Public and International Affairs – Princeton University, “Human Rights and National Security: The Strategic Correlation,” Harvard Human Rights Journal, Spring, 17 Harv. Hum. Rts. J. 249, Lexis)

C. Addressing Aggressor States: Human Rights and Interstate Signaling

A foreign policy which accounts for the linkage between human rights and interstate aggression would view a state's human rights record as a potential signaling device for its international intentions. Traditionally, it is very difficult for a state to send a signal to other states that it does not have aggressive international intentions. Asymmetric information in any international negotiation presents a significant challenge. One side rarely fully understands the interests and intent of the other. n118 Signaling offers a means by which states can overcome the problems of incomplete information by revealing their intentions to others. The difficulty with signaling, however, is that states often send misleading signals or they are misinterpreted by their audiences. n119 For signaling to be effective it is necessary to identify a clear indicator that can not easily be manipulated by the sending state or misinterpreted by the receiving state. Lasting institutionalized changes in human rights policy can provide such a signaling mechanism.

Significant improvements in a previously repressive state's human rights policy can signal an intent not to engage in international aggression. For such a signal to be credible the state must clearly do more than release a few political prisoners or offer pro-human rights rhetoric. But institutionalized changes in human rights policies--such as new legislation or constitutional amendments that are actually practiced, genuine limits on police and military power over citizens, or the independence of the judiciary to review the executive's human rights policies--offer credible signals that the state is less likely to engage in international aggression. n120 States of concern can utilize the linkage between human rights and international aggression as a means to send unambiguous signals of the lack of aggressive intent through institutionalized improvements in human rights practices. A foreign policy informed [\*273] by human rights would closely monitor human rights developments so as to properly read such signals and potentially improve relations with states that institutionalize human rights protections.

The institutionalization of human rights protections is not only a means of signaling benign intent, but is also inversely correlated with a state's ability to engage in aggressive conduct. As a state embeds human rights protections in its domestic system--even without democratization--a number of structural changes occur within the society that limit aggressive potential. First, as Thomas Risse and Kathryn Sikkink have argued, a culture of human rights may develop within the population and become institutionalized domestically. n121 Such a human rights culture would reject international aggression as a threat to the human rights of citizens in other states. Second, institutionalization of human rights protections expands the ability of citizens to voice opposition to aggressive state policy through freedoms of belief, speech, and assembly. Third, institutionalization erodes the ability of the state to coerce its citizens into providing the resources and human capital necessary for aggressive war. n122

A brief example is illustrative of the use of human rights policy as a signaling device. Iran is currently a state of considerable concern to U.S. foreign policy because of alleged WMD programs and links to terrorists. n123 Obviously, it is difficult for Iran to show that it does not seek WMD or links with terrorist organizations. One powerful means for Iran to escape its current categorization as a member of the "axis of evil" is to signal benign international intent through institutionalization of human rights protections. If Iran, for example, were to greatly expand its de jure and de facto freedoms of speech, assembly, and belief, the United States should read that as a signal of potentially benign international intent and seek to improve bilateral relations. This is not to say that WMD and terrorism should be ignored, but where allegations are hard to prove and impossible to falsify, human rights policy offers a good proxy of a state's international intentions and should be responded to as such. If, on the other hand, significant denigration of human rights policy, such as the January 2004 disqualification of nearly half the parliamentary candidates by the Guardian Council, were to continue in Iran, [\*274] that would signal a greater likelihood of international aggression and provide sound reason for a firmer U.S. policy. n124

The institutionalization of human rights protections also provides a way for a current government to prevent future governments from aggressive international behavior. By locking in human rights protections now through constitutional changes or judicial review, a present government can limit the hand of future governments, denying them the institutional or political ability to engage in aggressive war or impinge on human rights.

#### Support for international law requires a balance—defering to Congressional interpretation and not setting a precedent is the only way to avoid a backlash that is net worse

**Young, 05—**professor of law, University of Texas (Ernest**, “**INSTITUTIONAL SETTLEMENT IN A GLOBALIZING JUDICIAL SYSTEM,” 54 Duke L.J. 1143, lexis)

Failure to develop thoughtful accommodations between supranational and domestic institutions will undermine international law, especially in a community like the U.S. that is already ambivalent about constraints on national sovereignty. Speaking of cases like Loewen, for example, Renee Lettow Lerner has observed that "our desire for international trade is starting to collide with our unusual (by international standards) system of civil justice, and that collision may generate tension that saps support for international trade agreements." [n463](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265850138398&returnToKey=20_T8533601300&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.882078.0951306019" \l "n463) And the U.S.'s recent withdrawal from the Vienna Convention's dispute resolution protocol in the wake of Avena demonstrates this risk of backlash in the most concrete way. [n464](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265850138398&returnToKey=20_T8533601300&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.882078.0951306019" \l "n464) Demonstrably workable accommodations, by contrast, should allay  [\*1260]  fears about the loss of sovereignty and to build public confidence in international institutions. To be sure, both nationalist opponents and internationalist proponents of international norms have something to lose in this sort of compromise. But the benefit of the bargain is a stronger, if more moderate, international law.

#### An amendment solves all of the benefits of a judicial decision, without the costs of violating precedent

Vermeule ’04

(Adrian, Prof of Law @ The University of Chicago, “Constitutional Amendments and the Constitutional Common Law” September <http://www.law.uchicago.edu/academics/publiclaw/index.html>)

These points, however, capture only one side of the ledger. Precedent, and the constraint that new decisions be related analogically to old decisions, effect a partial transfer of authority from today’s judges to yesterday’s judges. As against claims of ancestral wisdom, Bentham emphasized that prior generations necessarily possess less information than current generations. If the problem is that changing circumstances make constitutional updating necessary, it is not obvious why it is good that current judges should be bound either by the specific holdings or by the intellectual premises and assumptions of the past. Weak theories of precedent may build in an escape hatch for changed circumstances, but the escape hatch in turn weakens the whole structure, diluting the decisionmaking benefits said to flow from precedent. Another cost of precedent is path dependence. Path dependence is an ambiguous term, but a simple interpretation in the judicial setting is that the order in which decisions arise is an important constraint on the decisions that may be made. Judges who would, acting on a blank slate, choose the constitutional rule that is best for the polity in the changed circumstances, may be barred from reaching the rule, even though they would have reached it had the cases arisen in a different order. Precedent has the effect of making some optimal rules inaccessible to current decisionmakers. When technological change threatened to render the rigid trimester framework of Roe v. Wade obsolete, the Supreme Court faced the prospect, in Pennsylvania v. Casey, that precedent would block a decision revising constitutional abortion law in appropriate ways, even though a decisive fraction of the Justices would have chosen the revised rule in a case of first impression.78 The joint opinion in Casey resorted to intellectual dishonesty, proclaiming adherence to precedent while discarding the trimester framework that previous cases has taken to be the core of Roe’s holding.79 The lesson of Casey is sometimes taken to be that precedent imposes no real constraint, but absent precedent the Justices would have had no need to write a mendacious, and widely ridiculed, opinion. The institutions that participate in the process of formal amendment, principally federal and state legislatures, are not subject to these pathologies. The drafters of constitutional amendments may write on a blank slate, drawing upon society’s best current information and deliberation about values, while ignoring precedent constraints that prevent courts from implementing current learning even if they possess it. The contrast is overdrawn, because legislatures deliberating about constitutional amendments use precedent in an informal way. But precisely because the practice of legislative precedent is relatively less formalized than the practice of judicial precedent, legislative practice may capture most of the decisional benefits of formal precedent while minimizing its costs. Legislatures may draw upon their past decisions purely to conserve on decisionmaking costs, while shrugging off precedential constraints whenever legislators’ best current information clearly suggests that the constitutional rules should be changed.

#### Amendments cause judicial modeling

Marron ‘03

[Brian P. Editor in Chief of MARGINS Symposium @ Maryland Law, 3 Conn. Pub. Int. L.J. 157, ln]

Raskin explains that some of the solutions require the adoption of new Constitutional amendments such as the ones he has mentioned earlier. Congress lacks the power to effectively reverse the Supreme Court's (mis)interpretations of the Constitution that rejected democratic values. 129 In fact, a movement for democratic constitutional change itself can influence the reasoning of the Court. For instance, although the Equal Rights Amendment failed to pass, the Supreme Court apparently took notice of the movement's principles and began to apply "heightened" scrutiny to cases of gender-based classifications. 130

#### 2. No rollback but aff would be challenged

Vermeule ’04

(Adrian, Prof of Law @ The University of Chicago, “Constitutional Amendments and the Constitutional Common Law” September <http://www.law.uchicago.edu/academics/publiclaw/index.html>)

A benefit of formal amendments, then, is to more effectively discourage subsequent efforts by constitutional losers to overturn adverse constitutional change. Precisely because the formal amendment process is more costly to invoke, formal amendments are more enduring than are judicial decisions that update constitutional rules;83 so losers in the amendment process will less frequently attempt to overturn or destabilize the new rules, in subsequent periods, than will losers in the process of common-law constitutionalism. This point does not necessarily suppose that dissenters from a given amendment come to agree with the enacting supermajority’s judgment, only that they accept the new equilibrium faute de mieux. Obviously more work might be done to specify these intuitions, but it is at least plausible to think that the simplest view, on which formal amendments incur decisionmaking costs that exceed their other benefits, is untenably crude. The overall picture, rather, is a tradeoff along the following lines. Relative to common-law constitutionalism, the Article V process requires a higher initial investment to secure constitutional change. If Mueller is right, however, constitutional settlements produced by the Article V process will tend to be more enduring over time than is judicial updating, which can be unsettled and refought at lower cost in subsequent periods.

#### 3. We cause legal and social change even if its rolled back

Siegal ‘06

[Reva B., Prof of Law and American Studies @ California, 94 Calif. L. Rev. 1323, ln]

For the first century of the Fourteenth Amendment's life, no court interpreted the Constitution to prohibit state action favoring men over women. 1 In the 1970s, a mobilized feminist movement persuaded Congress to send an Equal Rights Amendment to the states for ratification. With energetic countermobilization, the ERA was defeated. In this same period, the Court began to interpret the Fourteenth Amendment in ways that were responsive to the amendment's proponents - so much so that scholars have begun to refer to the resulting body of equal protection case law as a "de facto ERA." 2 When President Reagan proposed a nominee to the Supreme Court who argued that the original understanding of the Fourteenth Amendment allowed government to discriminate between the sexes, the Senate rejected his nomination. Instead of viewing Fourteenth Amendment cases influenced by the ERA as an antidemocratic usurpation, the public viewed the authority of a nominee who questioned the sex discrimination case law as suspect. 3 Debate over whether to amend the Constitution changed the meaning of the Constitution - in the process forging modern understandings of discrimination "on account of sex." 4 The ERA was not ratified, but the amendment's proposal and defeat played a crucial role in enabling and shaping the modern law of sex discrimination. Yet constitutional law lacks tools to explain constitutional change of this kind. No act of lawmaking produced the sex discrimination cases; and if the cases can be justified as legitimate judicial interpretations of eighteenth-and nineteenth-century constitutional text, it is only by repressing their roots in popular mobilization for and against an Article V amendment. Citizens regularly seek constitutional change through the arduous lawmaking procedures of Article V as well as outside of them, and officials charged with enforcing the Constitution often act in response to their claims; yet when these interactions do not conform to paradigms of lawmaking or adjudication, constitutional law discounts their role in constitutional change.

#### 4. Neither the courts nor executive can stop amendments

Chemerinsky ‘06

[Erwin, Prof of Law and PoliSci @ Duke, “The Assault on the Constitution: Executive Power and the War on Terrorism,” lawreview.law.ucdavis.edu/articles/Vol40/Issue1/DavisVol40No1\_Chemerinsky.pdf]

To be sure, there are some areas where the Constitution assigns power to only one branch, unchecked by any other. For example, the President alone has the pardon power and there is no oversight of pardons by any other branch of government. 8 Congress may impeach and remove the President, the Vice President, federal judges, and other officers of the United States. 9 Impeachment and removal decisions are not reviewable by any other branch of government. 10 Congress’s choice to propose a constitutional amendment is not reviewable by the courts or the executive branch. 11 However, even these areas of seemingly unilateral executive authority must be understood as part of an overall system of checks and balances. For example, the President’s pardon power is a final check to make sure that no one is incarcerated in violation of the Constitution and laws of the United States, and impeachment acts as a check on abuses by the other branches of government. Impeachment has the added protection of requiring a two-thirds vote of the Senate to remove a person from office. Constitutional amendments must be approved by three-fourths of the states.

#### 2. Amendments pass quickly

Jackson ’01

(Jesse L. Jackson, Jr., 2001, U.S. Representative, “A More Perfect Union: Advancing New American Rights”)

Some will say that amending the Constitution once, not to mention eight times, takes too long, requires too much energy, and costs too much money – that it’s an inefficient stewardship of time and resources.¶ The answer to the first argument is that the Constitution has been amended twenty-seven times, including seventeen times since the original Bill of Rights was passed. (The Bill of Rights itself required 811 days – from September 25, 1789, to December 15, 1791 – for ratification.) Following the initial, usually lengthy struggle to get an amendment through two-thirds of the House and Senate, there is no time limit for ratifying it – that is, no seven-year limitation on ratifying amendments, as many people believe. This schedule was arbitrarily placed on the Equal Rights Amendment (and later extended to ten years) and the D.C. Statehood Amendment. Once a state legislature votes for an amendment, that affirmation remains in place, unless a later body reverses it.¶ How long it takes for my amendments to be passed by House and Senate, and ratified by three-quarters of the state legislatures, will be determined by a combination of political leadership and the will of the American people. If Americans have a strong desire for these rights – have a political fire burning in their bellies – such amendments can be shuttled through the House and Senate and ratified relatively quickly after a legitimate national debate on their substance and implications.

#### 3. Delay assumes conventions—congressional amendment is quick

Ishikawa 96

[Brendon Troy, Board of Legal Specialization, “Amending the Constitution: Just Not Every November,” 44 Clev. St. L. Rev. 303, ln]

Further contributing to this lack of interest in the second procedure was the fact that Congress indeed proved to be the most efficient way to generate amendments when it quickly proposed twelve amendments as Bill of Rights. 141 Since then, Congress has generated every proposed amendment that has been submitted to the states for ratification. In the few instances in which calls for a particular amendment have come close to the requisite two-thirds of states, Congress has acted to propose the amendment rather than allow a special convention to take over the opportunity to debate and draft a proposal. 142 In light of Congress's ability to avert a called convention, a number of scholars now declare the second procedure to be almost irrelevant. 143 Whatever the merits of such an assertion, this latter procedure has remained unfruitful for [\*333] purposes of amendment. 144 Nonetheless, it too shows the elements that the Framers thought essential for constitutional amendment procedures.

#### Strauss agrees specificity solves

Strauss 01

[David A., not David P. but Prof of Law @ Chicago, 114 Harv. L. Rev. 1457, ln]

Finally, for an amendment to matter, it must be unusually difficult to evade. An amendment that specifies a precise rule, for example, is more likely to have an effect than one that establishes only a relatively vague norm. If its text is at all imprecise, an amendment that is adopted at the high-water mark of public sentiment will be prone to narrow construction or outright evasion once public sentiment recedes, as the Fourteenth and Fifteenth Amendments were.

#### Strauss is wrong

Denning and Vile 02

[Brannon P., Prof of Law @ Samford, and John R., Dept. Chair of PoliSci @ MTSU, “The Relevance of Constitutional Amendments: A Response to David Strauss,” 77 Tul. L. Rev. 247, ln]

But let us concede, for the sake of argument, that informal channels for constitutional change would have developed. 28 We are then faced with another of Strauss's troubling assumptions: that constitutional change advances, uninterrupted, toward whatever progressive norms that we have heretofore relied on amendments to install in the Constitution - racial equality, full political participation for women and eighteen-year-olds, and the elimination of barriers to [\*256] full enfranchisement for the poor and other minorities. 29 In Strauss's world, there is no reaction, no backlash that forestalls future gains (perhaps placing them out of reach), and no backsliding by courts or legislatures. Again and again, he assures us that whatever gains were secured by amendment were already secured in large part or would have been in due time, amendment or not. 30 But often these assertions are made on his own authority, and he does not entertain the possibility that circumstances would have intervened that slowed change, or reversed its direction. Even in the case of a failed amendment, one might argue that by putting the changesought on the Nation's political agenda, the amendment's proponents acted as a catalyst for that change**,** which, in the absence of an amending mechanism, would not have otherwise progressed in the same way. 31 Strauss also ignores the inherently unstable nature of informal change. Congress may pass laws, but those laws are subject to repeal (or presidential veto). Executive orders may be rescinded. Court decisions may be overruled, distinguished, or ignored. And so on. Consider the New Deal. David Kyvig contrasts Reconstruction with the New Deal by noting the absence of any trace left by the latter in [\*257] the text of the Constitution. 32 If Strauss's theory is correct, one would have expected that the Supreme Court's federalism decisions during the 1990s (and early 2000s) would have encountered more resistance from a public that had demanded substantial changes to the small-c-constitution effected after 1937. 33 Yet it is precisely because the New Deal did not enshrine its changes in the Constitution that change was provisional and subject to yet more change in the future. 34

#### Strauss is wrong – Amendments are a key way to accomplish Constitutional change

Latham ‘05

(Darren R. Latham, Assistant Professor @ Florida Coastal School of Law, October 2005 55 Am. U.L. Rev. 145)

d. The general irrelevance of Strauss's "irrelevance" thesis In his 2001 article, David Strauss argues that "our constitutional order would look little different if a formal amendment process did not exist," because "at least since the first few decades of the Republic, constitutional amendments have not been an important means by which the Constitution, in practice, has changed." n184 As evidence for this thesis, Strauss cites four phenomena: (1) many constitutional changes have occurred without formal amendment; (2) despite the rejection of some particular amendments, the [\*186] constitution has changed; (3) several amendments initially thought important had little effect until society later changed by other means; and (4) some amendments merely ratified changes that had already occurred through other means. n185 Strauss provides two qualifications to his general thesis. First, he limits the claim about irrelevance to the context of a "mature democratic society." n186 Amendments in "fledging constitutional order," by contrast, may play a significant role in the initial establishment of the constitutional regime. n187 Second, amendments have served the two ancillary functions of establishing the rules of the road on uncontroversial issues that must be settled (such as presidential disability through the Twenty-fifth Amendment) and suppressing outliers by turning "all-but-unanimity into unanimity" on a particular issue (such as the abolishing of poll taxes through the Twenty-fourth Amendment). n188 The validity of Strauss's thesis aside, n189 it does not claim that the factual degree of difficulty of formal constitutional amendment is irrelevant. Rather, Strauss at least implicitly suggests that low amendability may legitimate informal means of constitutional change. n190 And, by extension, the degree of amendability may determine the degree of legitimacy of the practice. n191

## Jud Cap

#### No big threat from terrorism – top expert agrees

Keck ‘12

(Zachary Keck Interview with Kenneth Neal Waltz an American political scientist who was a member of the faculty at both the University of California, Berkeley and Columbia University and one of the most prominent scholars in the field of international relations. “Kenneth Waltz on “Why Iran Should Get the Bomb”” July 08, 2012 <http://thediplomat.com/2012/07/08/kenneth-waltz-on-why-iran-should-get-the-bomb/>, TSW)

Finally, what is your general assessment of the Obama Administration’s handling of foreign policy? What has the Administration done right in your opinion, and what are some of the policies you think are most in need of change? The Obama Administration has done well in trying to reduce the prominence of the military dimension in American foreign policy. But there is much farther to go. Our military spending has still not been reduced nearly as much as it could be. The United States faces no fundamental military threat, and seldom has a country enjoyed this position.¶ We need to complete the job of disengaging from Afghanistan. Why we are following the foolhardy, centuries-old example of getting bogged down in this country is beyond me. In Iraq, we were wrong to go in. So I certainly support Obama on his withdrawal. I’d like to see the same in Afghanistan as soon as possible.¶ The Obama Administration has also adopted a more systematic approach to terrorism. The Bush Administration understandably reacted strongly to a terrorist attack, but terrorism as a threat to American interests was greatly exaggerated in those years—we overacted to an absurd extent. Terrorists are a disruption. But they cannot threaten the vital interests of a major power. They can do significant local damage and are dramatic, sensational, and capitalize on surprise. Their long-run implications are small, however. The reaction of the Bush Administration to terrorism was unsurprising because we had very little experience with international terrorism. But the Obama Administration has adopted a somewhat more level-headed policy—a sign of increased wisdom that comes with several years of experience with what this phenomenon is all about. This level-headedness has been a characteristic of the Obama Administration’s foreign policy in general.

**Terrorism will not cause extinction**

**Kato ‘8**

(Yoichi, bureau chief of the American General Bureau of the Asahi Shimbun, “Return from 9/11 PTSD to Global Leader,” Washington Quarterly, Fall 2008, lexis)

The administration has become a prisoner to the newly emergent threats that it faces. **It is** therefore **encouraging to see the emergence of a new strategic discussion within the United States that recognizes the fact that nonstate actors such as al Qaeda "do not pose an existential threat" to the United States**. [**4**](http://www.lexis.com/research/retrieve?_m=d876d724b079e57e89a7ea5587b2fef1&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=1a7f22db2fcafa2d7f387d9c26ae8501&focBudTerms=%22united%20states%22%20and%20leadership%20and%20%22soft%20power%22&focBudSel=all#fnote4) **Al Qaeda** rejects the expansion of U.S. values, especially in the Middle East, and has proven that it can inflict enormous pain on the United States and its friends and allies and disrupt regions and the globe through terrorist attacks. Yet, it **possesses neither the strategic vision nor the capability to topple the existing world order and U.S. predominance**. Overreactions based on the overestimation of such threats were the fundamental reasons underlying the failure of the current U.S. strategy. A calm and objective reassessment of the threats and challenges must be the first step toward restoration of the U.S. reputation.

## Case

#### Their author also concludes in the un-highlighted portions of the 1AC that Al-Bihani is UNLIKELY to impact other court decisions and that it only contributes to an already negative image of the U.S.

Tarnogorski ’10

Polish Inst. For Int’l Affairs, USA and Laws of War (Al-Bihani v. Obama), PDF can be found at here:<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=112282>

The trial court rejected his arguments on the grounds that his detention as a member of a force¶ supporting the Taliban regime and Al-Qaeda—evidence of which was drawn from his own¶ admissions during interrogations—was lawful. When hearing the appeal, the Court of Appeal acted¶ on the premise that U.S. law rather than “vague treaty provisions and amorphous customary principles”¶ was the sole appropriate standard by which to judge the facts of the case. The detention was¶ lawful because the government acting within the bounds of domestic law, rather than international¶ law, is the agency determining the terms and the legal criteria for the identification and detention of¶ suspects. The international laws of war are not a source of authority for U.S. courts; their significance¶ is ancillary and limited. In this context the court found the citing of international law without purpose¶ and effect.¶ The significance of this appellate ruling extends beyond one specific case of a Yemeni petitioner kept in detention. Firstly, it could sway the direction of judicial decisions in similar cases—though this seems rather unlikely in view of the shift of the Obama administration’s stance on the treatment of enemy combatants and Supreme Court’s Hamdi v Rumsfeld (2004) and Boumediene v. Bush (2008) decisions. Secondly and more importantly, the court took a position on the powers of the U.S. president as the commander-in-chief under the 18 September 2001 Authorization for Use of Military Force against states, organizations and persons responsible for the terrorist attacks of 11 September 2001. The court found that these presidential prerogatives were not limited by the international laws of war, which had not been transposed as a whole into the domestic law. It is for the legislative branch, not for international law, to delineate the limits of the president’s constitutional powers to use armed force. These powers extend to leaving at the president’s discretion the detention of persons deemed to be enemy belligerents or supporters thereof. The Al-Bihani v. Obama decision is consistent with the U.S. dualist stance on international law, as reflected, for instance, in the Supreme Court’s Medellin v. Texas ruling (2008). The United States respects binding international laws, but the extent of its commitment is at all times determined by the American sovereign. The ruling on Al-Bihani’s appeal does not amount to a permission to violate international law; it only means that international law does not constitute the basis for judicial decisions of a U.S. court. This judgment is without prejudice to the binding power of international humanitarian law, yet it effectively restricts the application of international public law and contributes to cementing a negative image of the U.S. as a power given to opportunistic treatment of international standards.

#### Waring concludes that more recent cases by the D.C. Circuit have reigned in the impact of Al-Bihani – at worst only a handful of detainees are impacted

Waring ’12

Associate @ Winston & Strawn LLP, J.D. from Georgetown University Law Center Spring, 2012 Georgetown Journal of International Law 43 Geo. J. Int'l L. 927, Lexis

B. Revival of International Law Despite Al-Bihani?¶ 1. Al Warafi: Affirmed in Part, Remanded in Part¶ The case of Mr. Al Warafi presented a new issue in the ongoing saga of litigation to determine the scope of the President's detention authority. Mr. Al Warafi was found to be "part of" the Taliban by the District Court, n197 and this determination was affirmed by the Circuit Court. n198 However, Mr. Al Warafi claimed to be medical personnel under Article 24 of the First Geneva Convention. n199 The Geneva Convention states that "[m]edical personnel exclusively engaged in the . . . treatment of the wounded or sick, or in the prevention of disease . . . shall be respected and protected in all circumstances [and] shall be retained only in so far as the state of health . . . of prisoners of war require." n200 Mr. Al Warafi argued that when such personnel are not needed to care for detainees they should be returned to their home country, in accordance with the Geneva Conventions. n201¶ The District Court did not make a determination on Mr. Al Warafi's Geneva Convention protection claim because it found that Al-Bihani and the MCA 2006 precluded the Geneva Conventions from being invoked as a source of rights. n202 Surprisingly, however, the D.C. Circuit Court remanded and ordered a factual finding into whether Mr. Al Warafi was "permanently and exclusively medical personnel" according to Article 24 of the First Geneva Convention. n203 The Circuit Court stated that, "assuming arguendo [the Geneva Convention's applicability]," the District Court needed to make a determination on Mr. Al Warafi's status. n204 This order seemed to imply that the results could be used to limit the scope of detention authority. Even though Al-Bihani said that international law has no role in detention authority, the Circuit Court's order in Al Warafi calls that into question. n205¶ [\*956] VI. RECOMMENDATIONS¶ The Supreme Court should review the holding in Al-Bihani because the removal of international law has caused significant upheaval in Guantanamo litigation. Since the D.C. Circuit Court is the only court system that can hear Guantanamo habeas appeals, a grant of certiorari is even more important since there are no other courts that can review. n206 As Judge Janice Brown's concurrence in Al-Bihani noted, "The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts . . . [but in the Guantanamo context] [t]he petitions . . . are funneled through one federal district court and one appellate court." n207¶ Additionally, the Al-Bihani opinion should be reviewed because it directly conflicts with prior Supreme Court precedent. The Court in Hamdi expressly stated that the law of war should inform the scope of detention authority, and in Hamdan, the Court directed lower courts to use international law in the Guantanamo context. n208¶ However, the Supreme Court instead denied certiorari. n209 Some Court observers saw this denial as a clear signal that the Court was "at least strongly hesitant, if not entirely unwillingly, to second-guess how the D.C. Circuit Court fashions the law of detention of individuals by the U.S. military." n210 And at least two Justices have indicated that this [\*957] area of law needs to have clarification from the Court. n211 In a dissent from a certiorari denial in Noriega v. Pastrana, Justice Thomas, joined by Justice Scalia, stressed that regarding the question of whether a habeas corpus petition can invoke the Geneva Conventions as a source of rights in habeas proceedings, "[i]t is incumbent upon [the Court] to provide what guidance we can . . . ." n212 The dissent further explained that "our opinion will help the political branches and the courts discharge their responsibilities over detainee cases, and will spare detainees and the Government years of unnecessary litigation." n213¶ In light of the contradiction between the ruling in Hamdi and the ruling in Al-Bihani, the Supreme Court should take up the issue to clarify the rule of law. It is the Supreme Court's role to say "what the law is," n214 and it should do so here. The need for clarity is particularly salient given that the lives of the Guantanamo detainees are at stake. n215¶ VII. CONCLUSION¶ After the 9/11 attacks, the United States wanted to quickly gather intelligence to prevent another deadly attack from happening. In response, Congress passed the AUMF to provide the President with the authority to "prevent any future acts of international terrorism against the United States." n216 However, as the war in Afghanistan progressed and the use of Guantanamo Bay increased, it became clear that there were several questions as to just how far the President's authority extended. With respect to detention, the sources of such authority in [\*958] the twentieth century has come from explicit legislation from Congress and international law. n217 However, the AUMF did not expressly lay out the terms or scope of detention. n218 As such, the Supreme Court in Hamdi interpreted the AUMF to include detention, as this was a fundamental principle of the law of war. n219 The Court also limited the scope of detention through the application of the law of war. n220 As the Guantanamo habeas litigation began working its way through the D.C. District Court a few different formulations of detention authority developed, all using the law of war to inform that authority. n221 However, all of this changed when the D.C. Circuit Court ruled in Al-Bihani that international law had no role in limiting the President's detention authority. n222 This decision directly conflicted with Hamdi and failed to acknowledge this conflict. In addition to creating a precedent that conflicted with the Supreme Court, this decision also conflicted with the scope of detention authority described by the President and Congress. n223 As a result of Al-Bihani, the international law principles developed by the lower courts have been eliminated. The repercussions of this elimination were that several decisions that had granted habeas relief to detainees were reversed. n224 Finally, although it seemed that Al-Bihani and its progeny closed the door on international law, a recent opinion out of the D.C. Circuit Court has implied that at least some provisions of the Geneva Conventions may be relevant. n225 However, such statements are irrelevant for detainees whose petitions have been denied on the basis of expansive detention authority unlimited by the law of war.

#### 1ac card says that single decisions don’t implicate Charming Betsy – plan doesn’t spillover

Crootoff  11
Rebecca Crootof, J.D. Yale Law School
Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon (April 5, 2011). Yale Law Journal. Available at SSRN: [http://ssrn.com/abstract=1803380](http://ssrn.com/abstract%3D1803380)
 The Charming Betsy Canon Encourages Domestic Courts’ Engagement with International Agreements and International Adoption

Conclusion

There are legitimate reasons to celebrate and criticize Medellin’s reasoning.

The case clarifies murky areas of domestic law, but it does so at the expense of

the United States fulfilling its international commitments. However, those

who rejoice in or bemoan Medellin’s seeming presumption in favor of non-selfexecution

mistake the case’s import. While high-profile decisions like Medellin

will draw fire, treaties’ influence in domestic jurisprudence remains largely

unaffected.Treaties, eve self-executing treaties, are rarely used directly. Instead, in concert with the Charming Betsy canon, both self- and non-self-executing treaties serve as useful tools in statutory construction. Existing court practice reflects this understanding, and normative arguments support it. The limited application of the Charming Betsy canon results in relatively costless compliance with international law, accords with separation-of-powers principles by avoiding unintended and possibly undesirable breaches of international obligations, and allows domestic courts to engage with and influence developing norms. In giving meaning to U.S. international obligations while respecting the limits of international law in domestic jurisprudence, judicious application of the Charming Betsy canon in conjunction with non-self-executing treaties reconciles often-opposing interests.

# 1NR

## Jud Cap DA

#### Unpopular decision kills enforcement turns the case

Devins, Goodrich Professor of Law and Professor of Government, College of William & Mary, ‘10

[Neal, “Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants”, Journal of Constitutional Law, Vol. 12, No. 2, February 2010,]

Supreme Court decision making rarely deviates from dominant¶ social and political forces.2 6 Nominated by the President and confirmed by the Senate, Supreme Court Justices are part of the social and political forces at the time of their nomination.27 Lacking the¶ power of the purse and the sword, moreover, the Court is well aware • • 28¶ of its need to enlist elected officials to implement its decisions. Finally, judges-like other people-care about the "esteem of other¶ people."29 "[Oiverwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities,"¶ economic and social leaders' views matter more to the Court than to¶ popularly elected lawmakers (who must appeal to popular sentiment¶ in order to win elections).3 In particular, since the Justices' reputations are shaped by the media, law professors, lawyers groups, and¶ other judges and justices, they maximize their status by taking opinions of the elite into account.3¶ 1

#### Mutated disease cause extinction

Discover 2000 (“Twenty Ways the World Could End” by Corey Powell in Discover Magazine, October 2000, http://discovermagazine.com/2000/oct/featworld)

If Earth doesn't do us in, our fellow organisms might be up to the task. Germs and people have always coexisted, but occasionally the balance gets out of whack. The Black Plague killed one European in four during the 14th century; influenza took at least 20 million lives between 1918 and 1919; the AIDS epidemic has produced a similar death toll and is still going strong. From 1980 to 1992, reports the Centers for Disease Control and Prevention, mortality from infectious disease in the United States rose 58 percent. Old diseases such as cholera and measles have developed new resistance to antibiotics. Intensive agriculture and land development is bringing humans closer to animal pathogens. International travel means diseases can spread faster than ever. Michael Osterholm, an infectious disease expert who recently left the Minnesota Department of Health, described the situation as "like trying to swim against the current of a raging river." The grimmest possibility would be the emergence of a strain that spreads so fast we are caught off guard or that resists all chemical means of control, perhaps as a result of our stirring of the ecological pot. About 12,000 years ago, a sudden wave of mammal extinctions swept through the Americas. Ross MacPhee of the American Museum of Natural History argues the culprit was extremely virulent disease, which humans helped transport as they migrated into the New World.

#### Public perceives contentious Supreme Court decisions.

Grosskopf & Mondak, ’98

(Poli Sci Profs -- Pitt & FSU, Political Research Quarterly, Sept, Vol. 51, No. 3)

Despite these caveats, it would be rash to dismiss the effects identified here as the products of a liberal testing procedure. Using individual-level opinion data from national surveys, we have shown that **specific decisions do matter for what people think about the Supreme Court**. At minimum, **this means that the Court is not fully insulated from backlash against its most controversial actions**. Further, although Webster and Texas v. Johnson were of high salience, **information about other decisions does reach the public** (e.g., Franklin and Kosaki 1995). For instance, Adamany and Grossman (1983) reported that **40 percent of respondents could name at least one recent Supreme Court decision they either liked or disliked, suggesting that exposure to information about decisions is higher still.**

#### Backlash is guaranteed – Courts can’t sway public opinion for unpopular rulings – especially true in terms of national security risks.

Silverstein and Hanley, ‘10

[Gordon (Assistant Professor of Political Science, University of California, Berkeley and Fellow in the

Program of Law and Public Affairs, Princeton University) and John (Ph.D. Candidate, Political Science, University of California, Berkeley), “The Supreme Court and Public Opinion in Times of War and Crisis”, Hastings Law Journal, Vol. 61,]

Does this suggest that the Supreme Court merely follows the polls? ¶ There seems to be no credible evidence to suggest that the Justices ¶ determine their votes based on popular opinion.26 Indeed, far from ¶ slavishly following public opinion, there is research that suggests the ¶ Court has some ability to move public opinion through its decisions and ¶ rulings27 by serving as something of a “republican schoolmaster,”28¶ though this is mediated by the salience of the issue and the intensity of ¶ public sentiment. The public deference to judicial resolution of disputes ¶ over the allocation of power to the other branches may well diminish, ¶ however, in times of crisis when the Court may perceive a risk of ¶ backlash from a public concerned for national security and favorably ¶ inclined toward the executive.29 And even though the Court may have some ability to bring public opinion over to its side, the empirical work ¶ does not suggest that the Court would be able to win public support for ¶ deeply unpopular rulings, particularly in the midst of what is widely ¶ perceived to be a national crisis—a scenario that is suggested by an ¶ alternative reading of the Court’s ruling in Korematsu which we will ¶ discuss below.30

#### Even if Kennedy is pro-detainee, he saves his capital for those decisions because he is the central swing vote on the issue. Means capital is still burned

Johnsen 2012

(Dawn, Walt W. Foskett Professor of Law at Indiana University, Spring, “The ‘Essence of a Free Society’: The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference,” 106 Nw. U.L. Rev. 467 – Kurr)

In the Supreme Court's last opinion to date on the rights of the Guantanamo detainees, Boumediene v. Bush, n116 the Court for the first time disagreed with both the President and Congress. Also for the first time, Justice Stevens did not write an opinion; he joined Justice Kennedy's majority opinion for five Justices, which held that in enacting the MCA, Congress unconstitutionally deprived the detainees of habeas review without providing an adequate alternative. Justice Stevens initially had voted with Justice Kennedy to deny certiorari. n117 After the experience of losing the majority in Padilla, Justice Stevens apparently made the strategic decision to wait to grant certiorari until Justice Kennedy agreed that review was desirable, and then allowed him to write the opinion, in recognition of his key position at the center of the Court on 9/11 detainee issues. n118¶ Chief Justice Roberts wrote a dissenting opinion for four Justices. He agreed with DOJ that the Court should abstain from reaching the merits of this "grossly premature" constitutional challenge and instead required the detainees to exhaust remedies provided under the DTA that permitted limited review of "enemy combatant" status. n119 On the merits, the dissenters found the DTA procedures constitutionally adequate. n120 In a second dissent also for four Justices, Justice Scalia noted that DOJ's Office of Legal Counsel (OLC) had advised President Bush that the federal courts could not exercise habeas jurisdiction over the Guantanamo detainees; Justice Scalia accused the Court of a "game of bait-and-switch" with "the Nation's [\*489] Commander in Chief" that "will almost certainly cause more Americans to be killed." n121¶ The Court's majority found further delay unwarranted, given the Court's central role in upholding the Constitution against political branch violations and the fact that the detainees already had been imprisoned for years without judicial review. n122 Unlike the statutory provision at issue in Hamdan, a provision of the MCA enacted in response to Hamdan unambiguously denied the federal courts jurisdiction to hear habeas corpus actions pending at the time of enactment. n123 The Court therefore reached the constitutional challenge and held that the Constitution's Suspension Clause applied to the Guantanamo detainees and that Congress had not provided a constitutionally adequate substitute for habeas review. n124¶ The process by which the Court decided to review Boumediene exemplifies the central roles of Justices Stevens and Kennedy in the detainee cases - and the centrality as well of the flawed nature of the Bush Administration's policies. When both Justices initially voted to deny certiorari, they issued a jointly signed statement saying that review was premature but that the Court would remain open to a renewed appeal if circumstances warranted it. n125 A few months later, Boumediene's lawyer filed a remarkable motion for reconsideration attaching an affidavit from an army officer, Stephen Abramson, who had been a member of a military review board making individual detention determinations. Abramson reported that the process was badly flawed; commanding officers, for example, pressed officers on the boards to decide in favor of detention. n126 The Court responded with an unusual grant of certiorari just months after a denial, suggesting that Justice Kennedy changed his mind in light of the Abramson statement, and that Justice Stevens strategically waited for Justice Kennedy and later assigned him the majority opinion. n127¶ As is apparent from this review of the Court's detainee cases, Justice Stevens led the Court in upholding detainees' rights by authoring key opinions and building majorities in support of a strong judicial check on [\*490] presidential overreaching. Equally clear, Justice Stevens needed Justice Kennedy - the only Justice who has voted with the majority in every detainee case. n128 Justice Kennedy, more than Justice Stevens, was willing to avoid reaching the merits and to defer to the Executive on the merits: he joined the Hamdi plurality's less liberty-protective approach; wrote separately in Rasul to emphasize the deference due the Executive; provided a necessary fifth vote to dismiss in Padilla from which Justice Stevens passionately dissented; concurred in Hamdan to limit its holding; and initially voted against certiorari in Boumediene - as did Justice Stevens, until Justice Kennedy was willing to hear the case. In the end, Justice Kennedy rejected the government's arguments and ruled for the detainees in four out of five cases. After Justice Stevens's retirement, Justice Kennedy likely remains an essential vote for upholding contested rights of the Guantanamo detainees and constraining unlawful executive action amid the pressures of war and threats to national security.

#### Breaking PQD kills court capital – lack of expertise

Litwak 2012

Brian, UNC JD Candidate “PUTTING CONSTITUTIONAL TEETH INTO A ¶ PAPER TIGER: HOW TO FIX THE WAR POWERS RESOLUTION”, National Security Law Brief, Vol. 2, No. 2, 2012

The court’s exercise of the political question doctrine, excusing itself from deciding the differing positions of the Executive and Congress, combines multiple aligning considerations. First, as a practical matter, courts lack the institutional capacity to decide the presence of hostilities.50 Second, ¶ the Constitution delegates foreign affairs decisions to the two political branches, not the courts.51¶ Third, deciding the issue of hostilities in foreign affairs would take the courts into “uncharted ¶ legal terrain,” where no law exists and applicable standards are wanting.52 Given the omission of a ¶ definition of “hostilities” in the WPR53 and the absence of a workable legal standard, courts would have an extremely difficult time navigating this “uncharted terrain” in foreign affairs. Consequently, ¶ courts have opted to leave the resolution of the disputes to those elected branches both capable and ¶ constitutionally committed to making decisions concerning the use of force abroad.54 Although not ¶ the only tool invoked by courts to skirt tough decisions concerning the separation of war powers,55¶ the political question doctrine is an oft-accepted argument by courts in justifying the dismissal of ¶ claims made pursuant to the WPR.56

#### The link only goes one direction-Negative reactions to court decisions are more intense and last longer than positive ones.

Friedman-prof law NYU-05**,** Jacob D. Fuchsberg Professor of Law, New York University School of Law, December, 2005 (Texas Law Review, Article: The Politics of Judicial Review, 84 Tex. L. Rev. 257, p. Lexis)

The critical question thus becomes how deep the Court's diffuse support among the general public is; for if theory holds, this is the leash on which the Court operates. Actually, a bungee cord might be a better analogy; for, in operation, the diffuse support hypothesis suggests that the judiciary can stray a certain distance from public opinion but that ultimately it will be snapped back into line. n393 Testing the length and flexibility of the cord is hard to do, however. It may be that there is greater tolerance for judicial deviation in some directions, such as with regard to the First Amendment. n394 Although the Court's degree of freedom of movement around public opinion may not be certain, positive scholars are fairly confident that one major determinant is information. The dynamics here are complex, but some generalities may be possible. Both negative and positive reactions to the Court influence public opinion, but negative reactions seem to be more intense and have a shorter half-life. n395 Perhaps it is for this reason that the [\*328] less people hear about the Court, the better for it. n396 As time passes, people develop a store of good feelings about the Supreme Court, reflected in the Court's relatively strong performance in public mood indicators. n397 Commentators who have studied public opinion and the Court regularly advise it to keep a low profile. n398

#### History proves that Capital can only be finite.

Choper, 80

(Law School Dean – Berkeley, Judicial Review and the National Political Process, p. 162-3)

Therefore, if the question of whether the Court gain or loses enforcement capacity by continual invalidations were one of mere behavioral speculation, the broad approach outlined above could not easily be dismissed. But, as indicated herein, the hard data of **history**—by no means irrefutably conclusive or totally immune from reinterpretation, but nevertheless highly persuasive—**points in the opposite direction**. **Many invalidations have dissipated the Court’s capital**, and, as most recently illustrated by the Warren Court’s passage, **the efforts of the defenders of judicial review cannot fully compensate for what the political majority believes to be excessive judicial expenditure of capital.**¶The record of **past invalidations** plainly **suggests that the Court’s educative facilities are not unlimited, and the presently available information reveals that**, although the views of ordinary citizens are strongly subject to influence by public leaders, **only an insignificant segment of the people fervently values the protection of individual rights.** After an extensive review of various facts, Samuel Krislov found that “the American public emerges as profoundly indifferent to liberties long established and presumably noncontroversial.”

#### Court capital is always finite – losers mobilize faster and capital is hard to restore.

Adamany, ’80

(CSU – Long Beach, Western Political Quarterly, pg. 592)

In protecting individual rights**, the Supreme Court is limited by the “fragile character” of judicial review**. **Judicial policies have periodically met with disobedience, reversal, retaliation, and noncompliance. Losers in the judicial arena mobilize more readily than do winners. Elected officials easily shift blame to the judiciary** for their own policies. And public opinion studies show that **popular support for the Court is thin**, at best. Hence, **“the people’s reverence** and tolerance **is not infinite and the Court’s** public prestige and **institutional capital is exhaustible.”**¶ **Successfully to pursue** individual rights **activism, while avoiding exhaustion of its political capital, the Court must forego the costs of judicial review** in cases involving federalism and congressional/executive relations. These disputes present only prudential issues of who will exercise power, not whether power should be exercised. Moreover, here constitutional and political arrangements compel accommodation. The states are formally represented in Congress and the Electoral College. Congress and the President are armed against each other’s specific incursions through such devices as impeachment, the budget, and the veto. And a branch losing a specific constitutional dispute can strike broadly at the other’s unrelated initiatives or needs:¶ Congress can refuse the President’s programs and he can veto theirs.

#### 3. A consensus of scholarship support our interpretation – The Court is conscious of their institutional capital and decide based on that.

Kramer, 04 (Law Professor – NYU, 92 Calif. L. Rev. 959)

According to Louis Fisher, among the most prolific writers associated with this idea, 37 "**the historical record proves overwhelmingly**" **that "the Court is neither final nor infallible. Judicial decisions rest undisturbed only to the extent that Congress, the President, and the general public find the decisions** [\*970] **convincing,** reasonable, and acceptable. Otherwise, **the debate on constitutional principles will continue**." 38 A model of law that rests on a simple one-to-one correspondence between what the Court says and what affected actors do is misleading. Not only do Congress, the President, the states, and other relevant players find room to act in, around, and between judicial decisions, but **the Court often finds that it must work in partnership with these nonjudicial actors to give shape to constitutional values in the first place**. 39 **A particularly rich strand in this line of scholarship explores the Supreme Court's strategic interactions with other political actors and finds that the Justices "rarely oppose strong majorities and almost never do so for any length of time.**" 40 Mr. Dooley's familiar adage about the Court's attention to election results may be somewhat overstated, 41 but **a sizeable body of empirical work supports the view that the judiciary is seldom far out-of-step with legislative majorities** at the national level and that when there is a divergence it rarely lasts. 42 Lawyers hate this sort of stuff. Witness the ill will provoked by Gerald Rosenberg's concededly provocative book, The Hollow Hope, which argued that even celebrated cases like Brown, Roe v. Wade, 43 and Miranda v. Arizona 44 were either [\*971] inconsequential or ineffective as engines of social change. 45 But the data are numerous and consistent, and **there is now a general consensus among social scientists that courts have not been a strong or consistent countermajoritarian force** in American politics. No similar consensus yet exists about why this should be so, 46 but that it is so seems hard to deny. ¶ I do not wish to overstate what the evidence actually shows: judges are not irrelevant, nor do courts merely replicate what the political system would otherwise produce. On the contrary, most scholars agree that courts play a significant role in shaping the strategic terms of political debate and that, in certain circumstances, they may even have a part in defining those terms. To say the Supreme Court can rarely undertake or sustain bold policy initiatives is not to deny that judicial rulings can nudge matters in one direction or another when public opinion is uncertain or divided. And even apart from directly molding substantive values, judicial decisions can shape the political agenda by addressing issues that elected officials do not or will not face, by offering a means for weak or excluded groups to enter the public debate, by providing one side or another with leverage in ongoing political bargaining, by creating constraints or disincentives that affect how or which parties proceed, by stimulating counter-mobilization, and in a myriad of other, similar ways. 47 But look how far the discussion has moved: rather than assuming that constitutional law is what the Supreme Court says it is, we are now explaining how and why the Court is not irrelevant. Some of the most interesting and important work in this vein has been done by sociolegal scholars exploring how judicial rulings are absorbed and understood by nonlegal actors. 48 This work begins with the following [\*972] straightforward (and presumably undeniable) proposition: "The messages disseminated by courts do not ... produce effects except as they are received, interpreted, and used by (potential) actors." 49 Scholars who study this process of reception reject as simplistic and inaccurate the conventional view that "law is formulated by legal elites (such as judges) in insular institutional settings of the state (such as the federal courts) and imposed as an alien, exogenous force upon a society otherwise structured largely by extralegal interests and conventions." 50 Law is not so much enforced against society, these scholars say, as constituted through it, "inscribed within the very institutional fabric of social relations." 51 Rather than existing as independent, self-sufficient constructs that regulate social activity, legal rules are comprehensible only because and insofar as they are embedded in community understandings that determine their actual meaning in practice. Ordinary citizens are more than mere subjects of law. though they are that too: they are participants, "mobilizers," whose activities create and shape legal norms in routine social and political interactions. 52 There is no separation between law and society, and culture is as constitutive of law as the reverse. ¶ This work has multiple and important applications in the study of legal systems generally. 53 What is most pertinent for our purposes, however, is simply to recognize that what citizens and nonjudicial actors hear may not be what a court wanted to say - and that the difference often matters. Popular understandings inexorably overtake and reshape judicial pronouncements, a process facilitated by the fact that opinions are virtually always indeterminate to some extent and so invariably open to multiple interpretations. As a result, Michael McCann observes, "citizens routinely reconstruct legal norms into resources for purposes quite unintended by judicial officials." 54 In actual practice, **Supreme Court decisions do not settle constitutional disputes so much as provide ammunition for their continuation,** often in settings beyond the power of courts to reach. Consider, for example, the complex ways in which the Lochner Court ended up supplying Populists and Progressives with intellectual and ideological tools [\*973] (such as the sanctity of property) that they then used to promote their own, very different agendas. 55 We can, in a sense, view all this work on the existence and necessity of popular constitutionalism as a kind of upping the ante on legal realism. Where the realists taught us to look beyond "the rules" to what courts actually do, we now see that even this does not go far enough. We must also look beyond the courts to see how judicial rulings are absorbed, transformed, and sometimes made irrelevant. This is especially true when it comes to the Supreme Court's constitutional jurisprudence. Whether **because of** practical institutional limitations or a need for support from other branches or **a willingness to behave strategically to preserve institutional capital** or an inability to overcome deeply inscribed societal norms, **the Supreme Court can never monopolize constitutional lawmaking** or law interpreting. Popular constitutionalism is, to some extent, perhaps a very great extent, inevitable and unavoidable. The question is what to make of this fact. **That the Supreme Court does not fully determine the course of constitutional law is something most** lawyers and **judges already know - including**, I am sure, **the Justices of the Supreme Court**. We sometimes talk or write as if we thought otherwise, but that is because most legal scholarship is about (and so mainly interested in) only the formal legal system. Aware that there are limits to this system's effectiveness, we leave them unspoken because such qualifications are beyond the problem being addressed and because we assume they will be taken for granted. Maybe this is a mistake. By declining to qualify what we say or failing to consider the fate of law beyond the courthouse, legal scholars have almost certainly overestimated the influence of judicial pronouncements and overlooked extrajudicial influences that matter. To that extent, the work of scholars like Griffin, Whittington, Galanter, Rosenberg, McCann, and others provides a useful and important corrective, a reminder that judicial lawmakers face substantial obstacles and that nonjudicial actors and activities have real significance for law and especially for constitutional law. 56

#### 4. Historical record goes negative – Court has continually rationed their decisions based on their political effects.

Choper, 80 (Law School Dean – Berkeley, Judicial Review and the National Political Process, p.160-1)

By both words and action, **the Court itself has long recognized that heightened judicial activism contrary to popular sentiment may weaken its authority to continue**. **As Justice Powell** recently **stated**, "**repeated and essentially head-on confrontations** between the life-tenured branch and the representative branches of government **will not**, in the long run, **be beneficial** to either. The public confidence essential to the former...may well erode if we do not exercise self-restraint in the utilitization of our power to negative the actions of the other branches....The power recognized in Marbury v. Madison is a potent one...Were we to utilize this power...indiscriminately...we may witness efforts by the representative branches drastically to curb its use.¶ **History confirms** Justice **Powell's fears**. Walter Murphy reports that "Marshall was ready to submit to congressional review of Court decisions, and while such a concession was never forced, his Court did pass up the opportunity to declare unconstitutional the peremptory removal of circuit judges by the Jeffersonians. Twenty years later, in the face of new attacks, the Court cut back into Marshall's earlier opinions and eased its restrictions on state authority. During reconstruction, the judges at first courageously defended civil liberties against martial law and bills of attainder. When confronted with Radical threats, however, the Justices, as Gideon Welles said, 'caved in.' Jeremiah Black was less kind in his comments: "The Court stood still to be ravished and did not even hallo while the thing was being done." Alan Westin concludes that **since the beginning, the Court has consciously avoided rulings against the President when the Justices felt that such decisions would tarnish their image.**¶The Hughes Court's legendary "switch in time" was followed less dramatically, but still quite perceptively, by the Warren Court's modifications in the internal security area in the late 1960s. And while **the Burger Court's** forays have themselves been more modest than those of its predecessor, its **refusal to extend the reach of its abortion rulings** to cover government payment of medical costs for indigents **also illustrates the Court's inevitable self-rationing of the power of invalidation**. As Westin has observed, "as constitutional statesmen, **the justices must arrive at some ultimate accommodation with dominant opinion."**

#### The Supreme Court Will Balance By Reigning In Controversy

Bentley ‘07

(Curt, J.D. from Brigham Young University, Lead Articles Editor for BYU Law Review, Recipient of the 2007 Scholarly Writing Award for this article, "Constrained by the Liberal Tradition: Why the Supreme Court has not Found Positive Rights in the American Constitution" Brigham Young University Law Review, 2007, vol 1721, Lexis)

I believe Sunstein misses the mark and reaches the wrong conclusion because he considers the merits of the institutional and cultural arguments separately. Because of this separation, he discounts the probability that the Supreme Court's "new property" retrenchment of the 1970s and Humphrey's defeat in 1968 resulted, at least in part, from a cultural backlash to the liberal movement of the Court's jurisprudence during previous Democratic administrations played out through institutional structures - as opposed to simply being a bit of bad political luck. This public response resulted from certain Supreme Court decisions that portended a course of action fundamentally hostile to American political culture and that seriously threatened to endanger the legitimacy of the Supreme Court. Because the Court's effective operation within American government depends upon its ability to maintain public confidence, the Court, rather than risk its legitimacy and influence, made significant course corrections - including abandoning any constitutional positive rights agenda.

#### Spillover occurs – the plan’s unpopular ruling minimizes the likelihood of other controversial decisions

Mondak ‘91

Jeffrey Mondak, professor of political science at Florida State, April 1991, Substantive and procedural aspects of supreme court decisions as determinants of institutional approval, American Politics Quarterly, Vol. 19, No. 2, p. 185

**The impact of the content of Supreme Court rulings has important ramifications for the future credibility** of the Court. Because **unpopular decisions exert negative influence on institutional approval**, the Supreme Court would seem to be the master of its own institutional fate. **As Choper** (1980) **explains: The Court’s prestige** and authority **is of a broad institutional nature, and when the Court expends its** store of **capital it tends to do so in a cumulative fashion**…[**I[f one** or another **of the Court’s rulings sparks** a markedly **hostile reaction, then the likelihood that subsequent judgments will be rejected is greatly increased**. (P. 156) The substance of a majority of Court decisions does mirror the policy preferences of the American public (Marshall 1988, 1989), suggesting that **the Court has been able to preserve its institutional credibility**, whether deliberately or coincidentally, **by minimizing rulings likely to prompt hostile public reaction**.

#### Mixing I-Law and US law burdens is massively controversial but Congress avoids

Alford ‘06

(Roger P. Alford Associate Professor of Law, Pepperdine University School of Law, Malibu, California. B.A. Baylor University, 1985; M. Div. Southern Seminary, 1988; J.D. New York University, 1991; LLM. University of Edinburgh, 1992. Albany Law Review¶ 2006¶ 69 Alb. L. Rev. 653 Lexis, TSW)

V. The Mistake About Statutes¶ ¶ A third mistake in the debate on outsourcing authority is to fail to [\*671] distinguish between statutory and constitutional interpretation. Some proponents of constitutional comparativism note approvingly the longstanding tradition of interpreting statutes consistent with international norms. n102 A proper appreciation for outsourcing authority would make a sharp distinction between this relatively uncontroversial practice of importing international law through statutory presumptions, and the quite controversial practice of interpreting constitutional liberties consistent with international law.¶ Statutory interpretation has long employed presumptions that are animated by concerns for international law. The presumption against extraterritoriality, for example, counsels ""that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" n103 The purpose of this canon is "to protect against unintended clashes between our laws and those of other nations which could result in international discord." n104 The scope of this presumption reflects international law principles of prescriptive jurisdiction, reflecting the assumption that "legislators take account of the legitimate sovereign interests of other nations when they write American laws." n105¶ In a similar vein, the Charming Betsy canon of statutory interpretation provides that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." n106 The purpose of the canon has been debated. n107 The rule of construing statutes to avoid violations of the law of nations supports the "cardinal principle" rooted in Charming [\*672] Betsy that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." n108