# 1NC

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#### A. Interpretation

#### Substantial increase is 30% to 50%.

Hantash 06, Patent Attorneys & Engineers Lynch Kneblewski - Sâo Paulo

[Feras, 3/16, http://www.freshpatents.com/Method-for-detecting-cystic-fibrosis dt20060316ptan20060057593.php]

 [0011] A substantial increase in the amount of a CFTR target segment identified means that the segment has been duplicated while a substantial decrease in the amount of a CFTR target segment identified means that the target segment has been deleted. The term "substantial decrease" or "substantial increase" means a decrease or increase of at least about 30-50%. Thus, deletion of a single CFTR exon would appear in the assay as a signal representing for example of about 50% of the same exon signal from an identically processed sample from an individual with a wildtype CFTR gene. Conversely, amplification of a single exon would appear in the assay as a signal representing for example about 150% of the same exon signal from an identically processed sample from an individual with a wildtype CFTR gene.

#### Violation- The plan increases restrictions on only a small part of the indefinite detention area. That’s not a substantial increase of restrictions on war power authority in the area of indefinite detention.

#### Authority for Indefinite Detention includes a wide variety of persons

Bates 9 (US district Judge, DC District)

http://www.scotusblog.com/wp-content/uploads/2009/05/bates-on-detention-power-5-19-09.pdf

As Hamdi foretold, drawing the "permissible bounds" of the government's detention¶ authority can only truly occur as courts consider the unique facts of each individual case as they¶ are presented. 542 U.S. at 522 n.1. However, the foregoing analysis and interpretation of the¶ government's authority to detain sets forth some guidance for the parties in that process. After¶ careful consideration, the Court is satisfied that the government's detention authority is generally¶ consistent with the authority conferred upon the President by the AUMF and the core law of war¶ principles that govern non-international armed conflicts. In those instances where the¶ government's framework has exceeded that which is permitted by the law of war -- specifically¶ with respect to the concept of "support" -- the Court rejects such bases for detention. Therefore,¶ the Court concludes that under the AUMF the President has the authority to detain persons that¶ the President determines planned, authorized, committed, or aided the terrorist attacks that¶ occurred on September 11, 2001, and persons who harbored those responsible for those attacks. ¶ The President also has the authority to detain persons who are or were part of Taliban or al¶ Qaeda forces or associated forces that are engaged in hostilities against the United States or its¶ coalition partners, including any person who has committed (i.e., directly participated in) a belligerent act in aid of such enemy armed forces.

#### In means throughout

Words and Phrases, 1959

(p. 546 (PDNS3566))

In the Act of 1861 providing that justices of the peace shall have jurisdiction “in” their respective counties to hear and determine all complaints, **the word “in” should be construed to mean “throughout”** such counties. Reynolds v. Larkin, 14, p. 114, 117, 10 Colo. 126.

#### Best interp

#### Ground- Our interpretation employs a flexible and reasonable definition of substantially but still excludes tiny subsets of each of areas.

#### Education: Our interp ensures the entire category of targeted killings are explored, ensuring the best topic debates.

#### Topicality is a voting issue in order to ensure competitive equity.

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#### Restrictions on executive war powers DO NOTHING for the state of political legal exception we live in and only gives further justification for violent intervention on the basis of legality

Dyzenhaus 05 (David, is a professor of Law and Philosophy at the University of Toronto, and a Fellow of the Royal Society of Canada, “Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?” Cardozo Law Review 27)

Rossiter had in mind Lincoln's actions during the Civil War, including the proclamation by which Lincoln, without the prior authority of Congress, suspended habeas corpus. n35 Lincoln, he said, subscribed to a theory that in a time of emergency, the President could assume whatever legislative, executive, and judicial powers he thought necessary to preserve the nation, and could in the process break the "fundamental laws of the nation, if such a step were unavoidable." n36 This power included one ratified by the Supreme Court: "an almost unrestrained power to act toward insurrectionary citizens as if they were enemies of the United States, and thus place them outside the protection of the Constitution." Rossiter's difficulties here illustrate rather than solve the tensions inherent in the idea of constitutional dictatorship. On the one hand, he wants to assert that emergency rule in a liberal democracy can be constitutional in nature. "Constitutional" implies restraints and limits in accordance not only with law, but with fundamental laws. These laws are not the constitution that is in place for ordinary times; rather, they are the laws that govern the management of exceptional times - the eleven criteria that he developed for constitutional dictatorship. The criteria are either put within the discretion of the dictator - they are judgments about necessity - or are couched as limits that should be enshrined either in the constitution or in legislation. However, Rossiter does not properly address the fact that judgments about necessity are for the dictator to make, which means that these criteria are not limits or constraints but merely factors about which the dictator will have to decide. Other criteria look more like genuine limits. Moreover, they are limits that could be constitutionally enshrined - for example, the second criterion, which requires that the person who makes the decision that there is an emergency should not be the person who assumes dictatorial powers. Yet, as we have seen, Rossiter's foremost example of the modern constitutional dictator, Lincoln, not only gave himself dictatorial powers but, Rossiter supposes, had no choice but to do this. Moreover, if these criteria are constitutionally enshrined, so that part of the constitution is devoted to the rules that govern the time when the rest of the constitution might be suspended, they still form part of the constitution. So, no less than the ordinary constitution, what we can think of as the exceptional or emergency constitution - the constitution that governs the state of emergency - is subject to suspension should the dictator deem this necessary. This explains why, on the other hand, Rossiter equated emergency rule with potentially unlimited dictatorship, with Locke's idea of prerogative. And Rossiter said, "whatever the theory, in moments of extreme national emergency the facts have always been with ... John Locke." So Rossiter at one and the same time sees constitutional dictatorship as unconstrained in nature and as constrainable by principles - his eleven criteria. The upshot is that "constitutional" turns out not to mean what we usually take it to mean; rather, it is a misleading name for the hope that the person who assumes dictatorial powers does so because of a good faith evaluation that this is really necessary and with the honest and steadfast intention to return to the ordinary way of doing things as soon as possible. Giorgio Agamben is thus right to remark that the bid by modern theorists of constitutional dictatorship to rely on the tradition of Roman dictatorship is misleading. n39 They rely on that tradition in an effort to show that dictatorship is constitutional or law-governed. But in fact they show that dictatorship is in principle absolute - the dictator is subject to whatever limits he deems necessary, which means to no limits at all. As H.L.A. Hart described the sovereign within the tradition of legal positivism, the dictator is an uncommanded commander. n40 He [\*2015] operates within a black hole, in Agamben's words, "an emptiness of law." n41 Agamben thus suggests that the real analogue to the contemporary state of emergency is not the Roman dictatorship but the institution of iustitium, in which the law is used to produce a "juridical void" - a total suspension of law. n42 And in coming to this conclusion, Agamben sides with Carl Schmitt, his principal interlocutor in his book. However, it is important to see that Schmitt's understanding of the state of exception is not quite a legal black hole, a juridically produced void. Rather, it is a space beyond law, a space which is revealed when law recedes, leaving the state, represented by the sovereign, to act. In substance, there might seem to be little difference between a legal black hole and space beyond law since neither is controlled by the rule of law. But there is a difference in that nearly all liberal legal theorists find the idea of a space beyond law antithetical, even if they suppose that law can be used to produce a legal void. This is so especially if such theorists want to claim for the sake of legitimacy that law is playing a role, even if it is the case that the role law plays is to suspend the rule of law. Schmitt would have regarded such claims as an attempt to cling to the wreckage of liberal conceptions of the rule of law brought about by any attempt to respond to emergencies through the law. They represent a vain effort to banish the exception from legal order. Because liberals cannot countenance the idea of politics uncontrolled by law, they place a veneer of legality on the political, which allows the executive to do what it wants while claiming the legitimacy of the rule of law. We have seen that Rossiter presents a prominent example which supports Schmitt's view, and as I will now show, it is a depressing fact that much recent post 9/11 work on emergencies is also supportive of Schmitt's view. II. Responding to 9/11 For example, Bruce Ackerman in his essay, The Emergency Constitution, n43 starts by claiming that we need "new constitutional concepts" in order to avoid the downward spiral in protection of civil liberties that occurs when politicians enact laws that become increasingly repressive with each new terrorist attack. n44 We need, he says, to rescue the concept of "emergency powers ... from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal [\*2016] democracy." n45 Because Ackerman does not think that judges are likely to do, or can do, better than they have in the past at containing the executive during an emergency, he proposes mainly the creative design of constitutional checks and balances to ensure, as did the Roman dictatorship, against the normalization of the state of emergency. Judges should not be regarded as "miraculous saviors of our threatened heritage of freedom." n46 Hence, it is better to rely on a system of political incentives and disincentives, a "political economy" that will prevent abuse of emergency powers. He calls his first device the "supramajoritarian escalator" n48 - basically the requirement that a declaration of a state of emergency requires legislative endorsement within a very short time, and thereafter has to be renewed at short intervals, with each renewal requiring the approval of a larger majority of legislators. The idea is that it will become increasingly easy with time for even a small minority of legislators to bring the emergency to an end, thus decreasing the opportunities for executive abuse of power. n49 The second device requires the executive to share security intelligence with legislative committees and that a majority of the seats on these committees belong to the opposition party. Ackerman does see some role for courts. They will have a macro role should the executive flout the constitutional devices. While he recognizes both that the executive might simply assert the necessity to suspend the emergency constitution and that this assertion might enjoy popular support, he supposes that if the courts declare that the executive is violating the constitution, this will give the public pause and thus will decrease incentives on the executive to evade the constitution. n51 In addition, the courts will have a micro role in supervising what he regards as the inevitable process of detaining suspects without trial for the period of the emergency. Suspects should be brought to court and some explanation should be given of the grounds of their detention, not so that they can contest it - a matter which Ackerman does not regard as practicable - but in order both to give the suspects a public identity so that they do not disappear and to provide a basis for compensation once the emergency is over in case the executive turns out to have fabricated [\*2017] its reasons. He also wishes to maintain a constitutional prohibition on torture, which he thinks can be enforced by requiring regular visits by lawyers. Not only is the judicial role limited, but it is clear that Ackerman does not see the courts as having much to do with preventing a period of "sheer lawlessness." n53 Even within the section on the judiciary, he says that the real restraint on the executive will be the knowledge that the supramajoritarian escalator might bring the emergency to an end, whereupon the detainees will be released if there is no hard evidence to justify detaining them. In sum, according to Ackerman, judges have at best a minimal role to play during a state of emergency. We cannot really escape from the fact that a state of emergency is a legally created black hole, a lawless void. It is subject to external constraints, controls on the executive located at the constitutional level and policed by the legislature. But internally, the rule of law does next to no work; all that we can reasonably hope for is decency. But once one has conceded that internally a state of emergency is more or less a legal black hole because the rule of law, as policed by judges, has no or little purchase, it becomes difficult to understand how external legal constraints, the constitutionally entrenched devices, can play the role Ackerman sets out. Recall that Ackerman accepts that the reason we should not give judges more than a minimal role is the history of judicial failure to uphold the rule of law during emergencies in the face of executive assertions of a necessity to operate outside of law's rule. For that reason, he constructs a political economy to constrain emergency powers. But that political economy still has to be located in law in order to be enforceable, which means that Ackerman cannot help but rely on judges. But why should we accept his claim that we can rely on judges when the executive asserts the necessity of suspending the exceptional constitution, the constitution for the state of emergency, when one of his premises is that we cannot so rely? Far from rescuing the concept of emergency powers from Schmitt, Ackerman's devices for an emergency constitution, an attempt to update Rossiter's model of constitutional dictatorship, fails for the same reasons that Rossiter's model fails. Even as they attempt to respond to Schmitt's challenge, they seem to prove the claim that Schmitt made in late Weimar that law cannot effectively enshrine a distinction between constitutional dictatorship and dictatorship. They appear to be vain attempts to find a role for law while at the same time conceding that law has no role. Of course, this last claim trades on an ambiguity in the idea of the rule of law between, on the one hand, the rule of law, understood as the rule of substantive principles, and, on the other, rule by law, where as long as there is a legal warrant for what government does, government will be considered to be in compliance with the rule of law. Only if one holds to a fairly substantive or thick conception of the rule of law will one think that there is a point on a continuum of legality where rule by law ceases to be in accordance with the rule of law. Ackerman's argument for rule by law, by the law of the emergency constitution, might not answer Schmitt's challenge. But at least it attempts to avoid dignifying the legal void with the title of rule of law, even as it tries to use law to govern what it deems ungovernable by law. The same cannot be said of those responses to 9/11 that seem to suggest that legal black holes are not in tension with the rule of law, as long as they are properly created. While it is relatively rare to find a position that articulates so stark a view, it is quite common to find positions that are comfortable with grey holes, as long as these are properly created. A grey hole is a legal space in which there are some legal constraints on executive action - it is not a lawless void - but the constraints are so insubstantial that they pretty well permit government to do as it pleases. And since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes.

#### The violence of detention is not due to lawlessness, but to the perverse injection of law which the affirmative perpetuates. All they do is mutate executive violence with a perverse judicial violence.

Williams ’08 (Daniel R, “After the Gold Rush – Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere”, Penn State law Review 113.1, 55-112. 57-58.)

Part I of this two-part article series (After the Gold Rush—Part I: ¶ Hamdi, 9/11, and the Dark Side of the Enlightenment) emphasizes the ¶ linkage between social consciousness and legal analysis, and thereby ¶ claims that our war-on-terror jurisprudence is a manifestation of a certain ¶ form of consciousness.¶ Specifically, that article endeavors to show that ¶ Guantanamo-style detention, and the consciousness that goes with it (a ¶ belief in America as a normative concept, a consciousness I have termed, ¶ gold-rush American ¶ exceptionalism) ushers in and reinforces a ¶ resurgence of something akin to medieval sovereignty, not unlike the ¶ sovereignty that reactivated its own power through the spectacle of the ¶ scaffold.¶ Hamdi v. Rumsfeld, as an exemplar of a burgeoning war-on-¶ terror jurisprudence, shows that the so-called war on terror is far from ¶ lawless; it is saturated with law, but not of the sort that merely manifests ¶ raw power. Law, the war on terror reveals, is a tactic of ¶ governmentality, an ingredient of biopolitics, an administrative tool ¶ where judicial power, in the case of Guantanamo detention, is exercised ¶ in disguised fashion (as “micropower,” to use Foucault’s terminology) ¶ through the discretionary acts of military personnel, from privates to ¶ generals, who acquire their juridical ¶ authority, their micro-sovereignty, ¶ through legal decisions like ¶ Hamdi.¶ So, not only is it misguided to ¶ critique Guantanamo detention as “lawless,” but it is also misleading to ¶ over-characterize ¶ Hamdi¶ and other war-on-terror cases as reflecting a ¶ struggle over judicial deference. ¶ Arguments over institutional power as a ¶ species of constitutional interpretation obscures the fact that violence at ¶ Guantanamo Bay is not executive violence only; it is judicial violence, ¶ too.

AND, DEMOCRACY’S CLAIM TO BRING PEACE IS EPISTEMOLOGICALLY UNPROVABLE, ANALYTICALLY USELESS, ONTOLOGICALLY DEPOLITICIZES ENMITY AND CAUSES PERMANENT WAR UNDER THE GUISE OF PEACE.

Bishai and Behnke 07 (Linda S. Bishai is Senior Program Ofﬁcer in the Education Program at the United States Institute of Peace where she focuses on university education in international relations, conﬂict resolution, human rights and peace studies. Andreas Behnke is a Lecturer in the Department of Politics and International Relations at the University of Reading. Writing in The international political thought of Carl Schmitt: Terror Liberal War and the Crisis of Global Order pg 111-114)

Democratic Peace Theory (DPT) starts with the observation that liberal democratic states do not go to war with each other. This, its proponents proclaim, is as close as we have come to an empirical law in international relations (Lynn-Jones 1996: ix). Much of the literature and debate within DPT is about the proper explanation of this phenomenon. Some scholars explain it by reference to cul- tural and normative factors, arguing that ‘decision-makers in democracies follow norms of peaceful conﬂict resolution that reﬂect domestic experiences and values’ (Lynn-Jones 1996: xviii). Other students of DPT focus on the structural and institutional characteristics of democracies, arguing that mechanisms such as checks and balances, separation of power, and the need for public debate constrain the options to go to war. What unites these variations on the theme of DPT is the shared commitment to treat ‘democracy’ as an epistemologically unproblematic predicate of certain states. As Lynn-Jones explains, the debate over DPT is in effect a debate with the realists over the relevance of ‘unit-level characteristics’ for the explanation of states’ behaviour (Lynn-Jones 1996: x). What is routinely missing from this explanation is a consideration of the conditions of possibility for coding ‘democracy’ as a unit-level variable in the ﬁrst place. What appears to be a mere methodological problem in fact contains an epistemological and philosophical intervention, the radical nature of which DPT must hide in order not to undermine its own logic. Through this ‘methodological’ move, the political is ostracized and the ground prepared for its replacement with a moralist discourse. Perhaps the best way to problematize this move in terms of its political as well as philosophical implications is to remember that ‘democracy’ is an ‘essentially contested concept’, a concept, in other words, that deﬁes a closure through ﬁxed deﬁnition (Gallie 1955/1956). These concepts defy any such ﬁxation, as they are an essential part of the political contestations that they on the surface seem only to describe or analyse. The uses of the concept ‘democracy’ in political discourse are therefore always political themselves, as they privilege one particular instantiation of it over others, thus legitimizing one form over its alternatives. Thus, the liberal deﬁnition of democracy cannot claim any universal applicability. As Gallie points out, claims about this particular deﬁnition reﬂect our grasp of a particular historical truth ... as to how democracy has taken root and ﬂourished in the west. But if they are put forward as universal political truths expressing the necessary conditions of any genuinely democratic aspirations or achievements, then they are surely open to question. (ibid.: 182, fn. 3) The consequences of the identiﬁcation of ‘democracy’ as an essentially contested concept are also relevant for our assessment of DPT. First, it is logically impossible to adjudicate between contending claims of what democracy *really* is. More speciﬁcally, democracy becomes a purely formal concept, exactly because its contested nature deﬁes any substantive deﬁnition. Second, the assumption of a ‘scientiﬁc perspective’ also offers only another reordered structure of complexity. To the extent that the investigator stakes out a position on these conceptual contests and we know about it, he can be said to participate in our politics itself. For these contests over the correct use of partly shared appraisal con- cepts are themselves an intrinsic part of politics. (Connolly 1993: 39) DPT, in other words, deconstructs itself. Its self-understanding as a scientiﬁcally detached and objectiﬁed stance outside the political processes, through which the meaning of ‘democracy’ is established, becomes itself as political a move as the distinction between democracy and its others. Within states, a temporal adjudication of the contest on the meaning of democracy is possible, and even necessary. Here, constitutions usually decide about the structure of democracy and the reading of new developments as democratic or undemocratic. Yet in the realm of international politics there is no such institutionalized position from which to adjudicate conceptual contests.6 Within the international system, no ‘voice’ is present to declare one form of political organization more democratic than the other. If there is any ‘democratic-ness’ in the international system, it resides exactly within the contestability and the actual contest of different political and social designs. The task DPT faces is therefore a formidable one. It has to extract ‘democracy’ from the very contest that deﬁnes its possibility in the international system and fashion a purely descriptive and analytical concept out of an essentially contested one. DPT can only work with a ﬁxed and stabilized meaning of democracy that does not show much regard for the historically and culturally contingent articulations of this term within political discourse. Based on this methodological reiﬁcation of democracy, the term becomes available for differentiation between types of states. More speciﬁcally, different types of states can now be hierarchically ordered according to their democraticness or lack thereof. Democracy becomes an objectiﬁed set of values and norms that sets states apart not only in terms of being different, but also in terms of being better. DPT, in other words, takes sides. As Ido Oren’s study on the ‘The subjectivity of the “democratic” peace: changing perceptions of Imperial Germany’ demonstrates, ‘democracy’ [in the US foreign policy discourse] is usually coded in terms of current American normative and empirical structures (Oren 1996: 263–300). Any contestability of this particular ordering of democracy’s complex internal structure is disregarded. Consequently, ‘democracy’ should be read as ‘of our kind’ or ‘America-like’. As the author demonstrates, this normative structure between the American self and foreign other is indeed an important feature in the formulation and execution of America’s foreign relations. DPT is therefore an active intervention into the anarchical logic of international politics. ‘Anarchy’, as Alexander Wendt (1992) has put it so succinctly, ‘is what states make of it’ and part of what they make of it is the designation of identities as friends or enemies. The uses and abuses of ‘democracy’ are part and parcel of these processes and should be considered part of the subject matter of our critical studies, rather than serving our methodological assumptions. The fact that we can identify DPT as an expression of a political move itself, however, does not yet tell us how and to what effect it intervenes in the logic of international politics. For Schmitt, conﬂict was made endurable by the creation of an agonistic structure of mutual restraint between equal sovereigns.

Conﬂict, to repeat the point, is inherent in politics, and not something imported into an otherwise harmonious system by ‘pathological’ actors. Moreover, there is an economy of truth in the international system, (more or less) isomorphic with its anarchical structure. As truth is always involved with power, it hardly exceeds the boundaries of the latter, tying it intimately to the geographics of sovereignty and anarchy. DPT goes up against all of these features. For liberalism, anarchy understood this way is a scandal that needs to be resolved. First of all, truth becomes centralized, as it now becomes possible to give voice to the proper identiﬁcation of democracy and the universal validity of the values associated with it. Consequently, the agonistic respect that characterizes the relationship between states in Schmitt’s realism is now replaced with a hierarchical relation, in which ‘tolerance’ deﬁnes the benevolent, and ‘intervention’ the belligerent extremes (Rawls 1999).7 Liberalism therefore creates a hierarchy of states in which some are virtually *a priori* suspicious, dangerous and threatening. As such, they are the object of constant strategic surveillance, concern and, if needed, intervention by democratic states. DPT therefore produces a particular ontology of the international system, in which the meaning of anarchy is virtually voided of any content. The dispersion of power, truth and identities into a ‘system of difference’ is now overcome and resolved into a binary and logocentric deﬁnition of identities in terms of democracy and its ‘other’. Convinced of the universality of its own civilizational standards and understanding difference as potential danger, DPT opens again the possibility of a ‘discriminatory concept of war’ (Schmitt 1988). War now becomes either the use of force for a greater, indeed universal good, or it is considered a perpetration, a rebellion against the order, or a crime (ibid.: 42–43). The introduction of a discriminatory concept of war therefore ultimately abolishes war. What it does not abolish is violence among states. In fact, to the extent that this new law of war extinguishes the limitations and inhibitions that were founded on the mutual recognition of states as equals, it opens the ﬂoodgates of ‘total war’, because a perpetrator, a ‘rogue state’, does not deserve the equal respect of the world community. It has to be punished, its crime eradicated, its leadership removed. War turns from instrumental to righteous, from justiﬁable to just (Schneider 2002: 168).

#### Human Rights become a tool to exclude those we view as subhuman- this is the logic that caused us to military intervene in the first place

Rasch 03 (William, Professor of Germanic Studies at Indiana University, “Human Rights as Geopolitics Carl Schmitt and the Legal Form of American Supremacy”, Cultural Critique, 2003)

And yet, despite—indeed, because of—the all-encompassing embrace, the detested other is never allowed to leave the stage altogether. Even as we seem on the verge of actualizing Kant's dream, as Habermas puts it, of "a cosmopolitan order" that unites all peoples and abolishes war under the auspices of "the states of the *First World*" who "can afford to harmonize their national interests to a certain extent with the norms that define the halfhearted cosmopolitan aspirations of the UN" (1998, 165, 184), it is still fascinating to see how the barbarians make their functionally necessary presence felt. John Rawls, in his *The Law of Peoples* (1999), conveniently divides the world into well-ordered peoples and those who are not well ordered. Among the former are the "reasonable liberal peoples" and the "decent hierarchical peoples" (4). Opposed to them are the "outlaw states" and other "burdened" peoples who are not worthy of respect. Liberal peoples, who, by virtue of their history, possess superior institutions, culture, and moral character (23-25), have not only the right to deny non-well-ordered peoples respect, but the duty to extend what Vitoria called "brotherly correction" and Habermas "gentle compulsion" (Habermas 1997, 133). [13](http://oboler.isu.edu:2202/journals/cultural_critique/v054/54.1rasch.html%22%20%5Cl%20%22FOOT13) That is, Rawls believes that the "refusal to tolerate" those states deemed to be outlaw states "is a consequence of liberalism and decency." Why? Because outlaw states violate human rights. **What are human rights? "What I call human rights," Rawls states, "are ... a proper subset of the rights possessed by citizens in a liberal constitutional democratic regime, or of the rights of the members of a decent hierarchical society" (Rawls 1999, 81). Because of their violation of these liberal rights, nonliberal, nondecent societies do not even have the right "to protest their condemnation by the world society" (38), and decent peoples have the right, if necessary, to wage just wars against them. Thus, [End Page 140] liberal societies are not merely contingently established and historically conditioned forms of organization; they become the universal standard against which other societies are judged. Those found wanting are banished, as outlaws, from the civilized world**. Ironically, one of the signs of their outlaw status is their insistence on autonomy, on sovereignty. As Rawls states, "Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy. In this way they reflect the two basic and historically profound changes in how the powers of sovereignty have been conceived since World War II" (79). Yet, what Rawls sees as a postwar development in the notion of sovereignty—that is, its restriction—could not, in fact, have occurred had it not been for the *unrestricted* sovereign powers of the victors of that war, especially, of course, the supreme power of the United States. The limitation of (others') sovereignty is an imposed limitation, imposed by a sovereign state that has never relinquished its own sovereign power. What for Vitoria was the sovereignty of Christendom and for Scott the sovereignty of humanity becomes for Rawls the simple but uncontested sovereignty of liberalism itself. [14](http://oboler.isu.edu:2202/journals/cultural_critique/v054/54.1rasch.html%22%20%5Cl%20%22FOOT14)

#### Our alternative is to recognize the necessity of the opposition. Sovereignty necessarily functions in exception to the law. This exception is necessary to avoid the universal violence of the Law and the affirmative.

Rasch 2000 (William. "Conflict as a Vocation: Carl Schmitt and the Possibility of Politics." Theory Culture Society 17.1)

It is not difficult to see that the polemical elevation of sovereignty over the rule of law replicates a lively historical opposition, one that can be perhaps best evoked by that happy pair, Hobbes and Locke. Within the liberal tradition, the rule of law invokes reason and calculability in its battles against the arbitrary and potentially despotic whim of an unrestrained sovereign. The legitimacy of the sovereign is thus replaced by a legality that claims to provide its own immanent and unforced legitimacy. Predictable and universally accessible reason - the normative validity of an "uncorked consensus", to use the words of a prominent modern exponent - gently usurps, so it is claimed, the place that would otherwise be occupied by a cynical, pragmatic utilitarianism and the tyranny of a dark, incalculable will. The rule of law brings all the comforts of an uncontroversial, rule-based, normative security as if legality preceded by way of simple logical derivation, abolishing above all the necessity of decisions. Schmitt clearly will have none of this and in various writings attempts to expose what he considers to be the two-fold fallacy of the liberal position. As we have seen, if taken at its word, legality, or the rule of law, is seen by Schmitt to be impotent; it can neither legitimize nor effectively defend itself against determined enemies in times of crisis. Were law truly the opposite of force, it would cease to exist. But this self-description is deceptive, for if judged by its deeds, the same liberal regime that enunciates the self-evidence validity of universal norms strives to enact a universal consensus that is, indeed, far from uncorked. The rule of law inevitably reveals itself, precisely during moments of crisis, as the force of law, perhaps, not every bit as violent and "irrational" as the arbitrary tyrant, but nonetheless compelling and irresistible - indeed, necessarily so. Thus, Schmitt would argue the distinction between "decision", "force" and sovereignty", on the one hand, and the "rule of law", on the other, is based on a blithe and simple illusion. What agitates Schmitt is not the force, but the deception. More precisely, what agitates Schmitt is what he perceives to be the elimination of politics in the name of a higher legal or moral order. In its claim to a universal, normative, rule-bound validity, the liberal sleight-of-hand reveals itself to be not the opposite of force, but a force that outlaws opposition. In resurrecting the notion of sovereignty, therefore, Schmitt sees himself as one who rescues a legitimate notion of politics. Of course, this rescue attempt is itself political, a battle over the correct definition of politics. That is, we are not merely dealing with a logical problem, and not merely dealing with a desire to provide constitutional mechanisms that would prevent the self-dissolution of the constitution. Rather, we are dealing with a contest between a particularist notion of politics, in which individual conflicts can be resolved, but in which antagonism as a structure and reservoir of possible future conflicts is never destroyed, versus politics as the historical unfolding and pacific expansion of the universal morality. To evoke the long shadows of an ongoing contemporary debate, we are dealing with the difference between a politics of dissensus and a politics of consensus. Whereas the latter ideology entails an explicit or implicit belief in the "highest good" that can be rationally discerned and achieved, a "right regime", to use Leo Strauss's term, or the "just society" that hopes to actualize aspects of the City of God here on earth, the former stresses the necessity of determining a workable order where no single order bears the mantle of necessity, in fact, where all order is contingent, hence imperfect, and thus seeks to make the best of an inherently contradictory world by erecting structures that minimize self-inflicted damage. In Schmitt's eyes, the elements of such a structure must be the manifold of sovereign states. The liberal says there can only be one world-wide sovereign, the sovereignty of a universal moral and legal order. Schmitt counters with a plurality of equal sovereigns, for only in this way, he believes, can the economic and moral extinction of politics be prevented. Politics, on this view, is not the means by which the universally acknowledged good is actualized, but the mechanism that negotiates and limits disputes in the absence of any universally acknowledged good. Politics exists, in other words, because the just society does not.

#### This requires the unchecked authority of the executive to respond to the exception.

Nagan and Haddad 12 (Winston and Aitza, "Sovereignty in Theory and Practice." San Diego International Law Journal 13)

Although Schmitt was German, his ideas about sovereignty, and the political exception have had influence on the American theory and practice of sovereignty. Carl Schmitt was a philosophic theorist of sovereignty during the Third Reich. n375 His ideas about sovereignty and its above the law placement in the political culture of the State have important parallels in the developing discourse in the United States about the scope of presidential authority and power. His views have attracted the attention of American theorists. Schmitt developed his view of sovereignty on the concept described as "the exception". n376 This idea suggests that the sovereign or executive may invoke the idea of exceptional powers which are distinct from the general theory of the State. In Schmitt's view, the normal condition of the functions of the theory of a State, rides with the existence of the idea of the "exception." The exception is in effect intrinsic to the idea of a normal State. In his view, [\*487] the normal legal order of a State depends on the existence of an exception. n377 The exception is based on the continuing existence of an existential threat to the State and it is the sovereign that must decide on the exception. n378 In short, the political life of a State comprises allies and enemies. For the purpose of Statecraft, "an enemy exists only when at least potentially, one fighting collectivity of people confronts another similar collectivity." n379 In this sense, the political reality of the State always confronts the issue of the survival of the group. This reality is explained as follows. The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping. \*\*\* As an ever present possibility [war] is the leading presupposition which determines in a characteristic way human action and thinking and hereby creates a specifically political behavior.\*\*\* A world in which the possibility of war is utterly eliminated, a completely pacified globe, would be a world without the distinction between friend and enemy and hence a world without politics. n380 Schmitt's view bases the supremacy of the exception on the supremacy of politics and power. n381 Thus, the exception, as rooted in the competence of the executive, is not dependent on law for its authority but on the conditions of power and conflict, which are implicitly pre-legal. n382 The central idea is that in an emergency, the power to decide based on the exception accepts its normal superiority over law on the basis that the suspension of the law is justified by the pre-legal right to self-preservation. n383 Schmitt's view is a powerful justification for the exercise of extraordinary powers, which he regards as ordinary, by executive authority. This is a tempting view for executive officers but it may not be an adequate explanation of the interplay of power, legitimacy, and the constitutional foundations of a rule of law State. In a later section, we draw on insights from the New Haven School, which deals empirically with the problem of power and the problem of constituting authority using the methods of contextual mapping. Nonetheless, Schmitt's view provides support for theorists who seek to enlarge executive power on the unitary presidency theory.

### 1NC

#### The United States Court of Appeals for the District of Colombia Circuit should require that detained individuals who are unlawfully detained or who have been denied any due process be released and prevented from transference by the executive, The D.C. Circuit should implement the decision through the use of writs of mandamus if necessary to compel compliance. The United States Supreme Court should not grant certiorari to any appeal of the ruling.

#### DC ciricut court can rule on detention – past cases prove

Siegel ‘12

(Ashley E. Siegel J.D., Boston University School of Law, 2012; B.A. Philosophy and Political Science, Simmons College, 2007. Many thanks to Martha Manoian, Marisa Siegel, Avi Robinson, Christine Dieter, Peter Shults, and Brian Daluiso for their comments and suggestions throughout the editing process, as well as to the staff and editorial board of the Boston University Law Review. “SOME HOLDS BARRED: EXTENDING EXECUTIVE DETENTION HABEAS LAW BEYOND GUANTANAMO BAY” July, 2012¶ Boston University Law Review¶ 92 B.U.L. Rev. 1405 lexis, TSW)

Challenging Congressional Acts: Hamdan v. Rumsfeld¶ ¶ The Supreme Court next heard a challenge to executive authority to limit detainee challenges to trials by military commission in Hamdan v. Rumsfeld. n68 Petitioner Hamdan was an alien captured by U.S. forces abroad and sent to Guantanamo Bay in June 2002. n69 A year later, the President determined that Hamdan was eligible for trial by military commission, though for undefined crimes. n70 The government waited another year to charge Hamdan officially with conspiracy "to commit ... offenses triable by military commission." n71 Hamdan pursued writs of habeas corpus and mandamus even though he was in military commission procedures, arguing that the Executive lacked the authority to try him through military commission. n72 Although a plurality of the Supreme Court in Hamdi had found that AUMF did not conflict with the Non-Detention Act, a majority in Hamdan determined that, while AUMF gave the Executive expansive war powers, it could not be read to replace the limited authority to convene military commissions granted by Congress in the Uniform Code of Military Justice (UCMJ). n73 However, Justice Breyer in his concurrence indicated that the Court would support the President's policies if he were to "return to Congress to seek the authority he believes necessary." n74¶ 4. Judicial Assertion: Boumediene v. Bush¶ ¶ Within months of Hamdan, Congress worked with the President to enact the Military Commissions Act of 2006 (MCA). n75 With the MCA, Congress expressly authorized the procedural differences from the UCMJ at issue in Hamdan and amended the habeas statute to clarify that federal courts would not have jurisdiction over any pending habeas petitions brought by enemy combatants. n76 The new system granted the D.C. Circuit Court of Appeals exclusive jurisdiction to review "any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." n77 The Tribunal would operate as an administrative proceeding conducted by the military to determine if a Department of Defense designation of a detainee as an enemy combatant was proper. n78 The D.C. Circuit could review only [\*1414] whether the Tribunal's conclusion was "consistent with the standards and procedures specified by the Secretary of Defense" and whether the Tribunal's use of the Secretary of Defense's standards was "consistent with the Constitution and laws of the United States" to the extent both were applicable in a given case. n79¶ In Boumediene v. Bush, aliens detained at Guantanamo Bay and designated as enemy combatants by the Department of Defense challenged the new military tribunal scheme created by the DTA and MCA. n80 The detainees contended that they had a constitutional privilege of habeas corpus that could not be removed except as set forth in the Suspension Clause. n81 The Supreme Court ultimately agreed, holding that the DTA procedures "are not an adequate and effective substitute for habeas corpus" and that the MCA therefore "operates as an unconstitutional suspension of the writ." n82 The Court declined to address either the question of whether the Executive could legally detain the petitioners or the substantive merit of their habeas petition. n83 Instead, the Court left "those and other questions regarding the legality of the detention ... to be resolved in the first instance by the District Court." n84

#### Writ of mandamus solve

O’Brien ‘11

(David M. Orsquo;Brien is Leone Reaves and George W. Spicer Professor of Government and Foreign Affairs at the University of Virginia. He is the author of several books, including Constitutional Law and Politics and Storm Center: The Supreme Court in American Politics , winner of the American Bar Associationrsquo;s Silver Gavel Award and now in its widely adopted Seventh Edition.¶ *Storm Center: The Supreme Court in American Politics* W W Norton & Company Incorporated, 2011, TSW)

Although most cases now come as certiorari petitions, Congress provides that appellate courts may also submit a writ of certification to the Court, requesting the justices to clarify or "make¶ more certain" a point of federal law. The Court receives only¶ a handful of such cases each term. Congress also gave the Court¶ the power to issue certain extraordinary writs, or orders. In a¶ few cases, the Court may issue writs of mandamus and prohibition, ordering lower courts or public officials either to do some-¶ thing or to refrain from some action. In addition, the Court has¶ die power to grant writs of habeas corpus (“produce the body"),¶ enabling it to review cases by prisoners who claim that their constitutional rights have been violated and that they are unlawfully¶ imprisoned.

#### Supreme Court wont reverse the decision

Friedman 5

(Barry, Professor of Law – New York University School of Law, 84 Tex. L. Rev. 257, Lexis)

3. The Problematics of Supreme Court Supervision. - If lower court judges are inclined to willful or ideological behavior, how does the Supreme Court keep them in line? Much positive work has been devoted to figuring out exactly how the Supreme Court governs the judicial hierarchy - a problem normative scholars think about insufficiently, likely because of their assumption that lower courts simply follow precedents. The problem is a vexing one, because - as is common knowledge - the Court hears an infinitesimal number of the adjudicated cases by the lower courts and a small fraction of those that even are offered to it for review. n244 For positive scholars, reversal is the key weapon in the Supreme Court's arsenal, n245 yet on [\*303] its face, "Reversal is a particularly unimpressive sanction in the context of circuit-Supreme Court interactions, where the likelihood of reversal by the Supreme Court in any individual case is so small as to render it essentially meaningless as a sanction." n246 The models of Supreme Court governance offered by positive scholars are extremely creative and ought to be thought provoking for normative theorists. Some scholars explore the idea of the Supreme Court "auditing" lower court cases by some criteria to determine which require review. n247 Others examine techniques of "monitoring" and "signaling" by litigants and lower court judges. n248 Some conceptualize the appellate review game as a "tournament" in which judges compete to not get reversed. n249 These models pose a problem for normative constitutional theory because they are driven largely by ideology. One of the more intriguing models employs a "Nixon goes to China" strategy in which, for example, a conservative Supreme Court is most likely to hear cases involving liberal courts rendering liberal decisions, eschewing review of liberal outcomes by conservative lower courts and conservative outcomes by any court. n250 Empirical testing of the model in the area of search and seizure cases indicated good predictive capacity. n251 The implication is that the Supreme Court's ideology drives case selection (and outcomes), n252 with much else neglected. Similarly, models that rely on the threat of review assume lower courts can conform their decisions to the precedents of the higher court. n253But in cases that make it to the Supreme Court, the law is almost always [\*304] open-ended enough that if lower courts are "complying," it is likely by guessing the correct outcome based on an evaluation of the Supreme Court's ideology. n254 There is some empirical evidence that they do this, despite the Court's instructions otherwise. n255 Most important, these positive studies suggest that lower courts can force the Supreme Court's hand n256 and, in turn, influence the substantive content of constitutional law. n257 As Walter Murphy explained, "working in its interstices, inferior judges may materially modify the High Court's determinations." n258 In order to assure lower court compliance, the Supreme Court must modify constitutional doctrine. One interesting model suggests that when the preferences of lower court judges deviate substantially from those of the Supreme Court, the Court will have to widen the range of acceptable outcomes to ensure compliance. n259 Some empirical work, and some experience, suggest that at other times the Court will have to employ very specific tests to ensure its mandates are followed. A recent study of taxpayer standing law finds that "when the legal precedent is clear, unambiguous, and narrow (or it is perceived to be such) ... judges adhere to it, apparently in an effort to achieve "correct' outcomes." n260 The Miranda rule is a familiar example of lower court deviation driving the Supreme [\*305] Court's doctrine. n261 Although, since its inception, the rule has been criticized as too "legislative," n262 scholars also recognize that the specific rule was adopted because the Supreme Court could not find any other way to police its views about tolerable interrogation practices. n263 Similarly, whether the Supreme Court can rely on "rules" or "standards" when it decides cases - much mooted as a normative matter - may turn as much on questions of lower court compliance as on jurisprudential preferences. n264

### 1NC

#### 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.

#### A decision regarding indefinite detention would spark massive backlash – past decisions and the status quo prove.

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,]

Throughout the course of its enemy combatant decision making,¶ the Court has moved incrementally. In so doing, the Court has expanded its authority vis-A-vis the President. Obama administration efforts to moot al-Marri and to relocate Uighur detainees (thereby¶ mooting that litigation) speak to the administration's desire to avoid¶ Supreme Court rulings that might limit the scope of presidential¶ power. Unlike the Bush administration (whose politically tone deaf¶ arguments paved the way for anti-administration rulings), 84 the Obama administration understands that the Court has become a player¶ in the enemy combatant issue.¶ What is striking here, is that the Court never took more than it¶ could get-it carved out space for itself without risking the nation's¶ security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in Boumediene, while clearly constraining the¶ political branches, reflected the views of the new Democratic majority¶ in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain. 8 Its decision to steer clear of early Obama-era disputes likewise avoids the risks of a costly backlash while¶ creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court).186 Put¶ another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully¶ undermining the policy preferences of the President and Congress.

#### Homer City decision key to cooperative federalism

Hartman ‘12

(Barry M. Hartman, Ankur K. Tohan, and Christine Jochim Boote “D.C. Circuit Calls Strike Two on EPA’s

Cross-State Air Pollution Rule” August 24, 2012 http://www.klgates.com/files/Publication/aa0dbc12-0116-4e22-a5bf-4006d39f371c/Presentation/PublicationAttachment/2035d837-df7b-4953-b656-f828be89a4c4/Environmental\_Alert\_08242012.pdf, TSW)

The Homer City Dissent ¶ The dissent, however, argues that the Court did not have jurisdiction to decide the issues before it ¶ because the petitioners in this case did not timely challenge the Transport Rule or challenge it with ¶ reasonable specificity. Judge Rogers criticizes the majority opinion because it ¶ is an unsettling of the consistent precedent of this court strictly enforcing ¶ jurisdictional limits, a redesign of Congress’s vision of cooperative ¶ federalism between the States and the federal government in implementing ¶ the [CAA] based on the court’s own notions of absurdity and logic that are ¶ unsupported by a factual record, and a trampling on this court’s precedent ¶ on which the [EPA] was entitled to rely in developing the Transport Rule ¶ rather than be blindsided by arguments raised for the first time in this ¶ court.26¶ Among other concerns, Judge Rogers argues that the petitioners in this case failed to challenge EPA’s ¶ two-step approach to determining a State’s air pollution reduction obligation during the administrative ¶ rulemaking process. For example, Judge Rogers objects to the majority’s reliance on a comment in ¶ another rulemaking first cited by petitioners during rebuttal oral arguments to establish jurisdiction to ¶ challenge EPA’s statutory authority.27¶ In addition, Judge Rogers asserts that the States were required to submit their “good neighbor” SIPs, ¶ regardless of whether EPA had determined the State’s air pollution reduction obligations.28¶ Consequently, the June 2010 EPA Federal Register notice, which determined that 29 States had failed ¶ to submit adequate “good neighbor” SIPs, started the two-year deadline for EPA to promulgate FIPs ¶ for those States.29 If any of those States objected to EPA’s SIP determination or the timing for when ¶ States must submit a SIP or SIP-revision, Judge Rogers argues, then those States should have raised ¶ their objections during that rulemaking process.30 The majority “fundamentally” disagreed with Judge ¶ Roger’s reading of the record and the Court’s jurisdiction.31 Implications ¶ Given the size and scope of this opinion, and the significant dissent, the air has hardly cleared ¶ regarding whether EPA will return to the drawing board and redraft its interstate air emission rules ¶ based on the Court’s interpretation of the CAA’s “good neighbor” provisions or seek rehearing or ¶ rehearing en banc. Some considerations that may impact whether rehearing is sought and/or granted ¶ include: ¶ Five of the Circuit’s judges participated in at least one of these three cases, with Judge Rogers ¶ participating in all three. ¶ Circuit Judge Rogers’s 44-page dissent strongly disagreed with the majority’s interpretation of ¶ Michigan and North Carolina. She was on both of the panels that issued per curiam opinion in ¶ both cases. ¶ One of the key issues on which there may be some dispute within the Circuit is whether or not ¶ certain key issues were adequately raised in the record for the purpose of determining whether they ¶ were properly before the Court. The impacts of this ruling could well extend beyond CAA cases. ¶ EPA and the States will have to address the impacts of the Homer City decision on other air rules. ¶ For example, regional haze reduction rules and trading schemes for power plants – i.e., the best ¶ available retrofit technology (BART) requirements for power plants – were modified and tied to ¶ the Transport Rule in the “Better than BART” rule. The “Better than BART” rule allows States to ¶ rely on the Transport Rule to satisfy BART requirements for power plants. ¶ Finally, the Homer City decision, which focuses on the important role of “cooperative federalism” ¶ and the shared responsibilities of the federal and state governments, could well have some impact ¶ on how EPA exercises its authority under other similarly structured statutes, such as the Clean ¶ Water Act and the Resource Conservation and Recovery Act. These implications could also ¶ influence whether rehearing is sought. ¶ Conclusion ¶ There is little doubt that Homer City will have an influence on how EPA, and possibly Congress, ¶ addresses the issue of interstate air pollution. Stay tuned for Part II, which will evaluate how various ¶ aspects of the decision may influence future challenges to agency rulemakings and similar ¶ administrative proceedings.

#### Solves warming

Osofsky 11

(Hari M., Associate Professor, University of Minnesota Law School; Associate Director of Law, Geography & Environment, Consortium on Law and Values in Health, Environment & the Life Sciences and Affiliated Faculty, Geography and Conservation Biology, University of Minnesota; 2011, “Diagonal Federalism and Climate Change Implications for the Obama Administration,” 62 Ala. L. Rev. 237 - Kurr)

Cooperative federalism's greatest advantage as a basis for climate change regulation is its ability to create coordinated multiscalar action in which each actor provides its unique contribution. A number of scholars and policymakers have taken significant steps to sketch a framework for cooperative action. They are exploring the nuances of how collaboration might work among specific entities in particular policy areas. This analysis makes clear that cooperative approaches, if crafted well, incentivize action while making room for innovation. For instance, a Center for Progressive Reform study by William Andreen and others presents how localities, [\*286] states, and the federal government can work together on this problem. n222 Alice Kaswan has also published an interesting cooperative federalism proposal bringing together these three levels of government, and Holly Doremus and W. Michael Hanemann have argued that the Clean Air Act provides a cooperative federalism model that could be used in crafting effective climate change legislation. n223 Some dynamic environmental approaches combine cooperative federalism with other theories. For example, Brad Karkkainen's analysis of information-forcing environmental regulation brings together cooperative federalism and new governance approaches to consider how "properly structured, penalty default rules might be used to induce meaningful participation in locally devolved, place-based, collaborative, public-private hybrid, new governance institutions, aimed at integrated, adaptive, experimentalist management of watersheds and other institutions." n224 This particular combination of cooperative federalism and new governance approaches allows for innovative structures that encompass the multidimensionality of these problems.

#### Causes extinction

Speth 2008

[James, dean of the Yale School of Forestry and Environmental Studies at Yale University, New Haven, Connecticut. Currently he serves the school as the Carl W. Knobloch, Jr. Dean and Sara Shallenberger Brown Professor in the Practice of Environmental Policy, The Bridge @ the Edge of the World, pg. 26]

The possibility of abrupt climate change is linked to what may be the most problematic possibility of all—"positive" feedback effects where the initial warming has effects that generate more warming. Several of these feedbacks are possible. First, the land's ability to store carbon could weaken. Soils and forests can dry out or burn and release carbon; less plant growth can occur, thus reducing nature's ability to remove carbon from the air. Second, carbon sinks in the oceans could also be reduced due to ocean warming and other factors. Third, the potent greenhouse gas methane could be released from peat bogs, wetlands, and thawing permafrost, and even from the methane hydrates in the oceans, as the planet warms and changes. Finally, the earth's albedo, the reflectivity of the earth's surface, is slated to be reduced as large areas now covered by ice and snow diminish or are covered by meltwater. All these effects would tend to make warming self-reinforcing, possibly leading to a greatly amplified greenhouse effect. The real possibility of these amplifying feedbacks has alarmed some of our top scientists. James Hansen, the courageous NASA climate scientist, is becoming increasingly outspoken as his investigations lead him to more and more disturbing conclusions. He offered the following assessment in 2007: "Our home planet is now dangerously near a 'tipping point.' Human-made greenhouse gases are near a level such that important climate changes may proceed mostly under the climate system's own momentum. Impacts would include extermination of a large fraction of species on the planet, shifting of climatic zones due to an intensified hydrologic cycle with effects on freshwater availability and human health, and repeated worldwide coastal tragedies associated with storms and a continuously rising sea level. .. . "Civilization developed during the Holocene, a period of relatively tranquil climate now almost 12,000 years in duration. The planet has been warm enough to keep ice sheets off North America and Europe, but cool enough for ice sheets on Greenland and Antarctica to be stable. Now, with rapid warming of o.6°C in the past 30 years, global temperature is at its warmest level in the Holocene. "This warming has brought us to the precipice of a great 'tipping point” If we go over the edge, it will be a transition to 'a different planet,' an environment far outside the range that has been experienced by humanity. There will be no return within the lifetime of any generation that can be imagined, and the trip will exterminate a large fraction of species on the planet.

## CASE

### Torture

#### Global movements to close Guantanamo are coming now and will solve the case

Olzen 13

[Jake, May 13, <http://wagingnonviolence.org/feature/hunger-strike-reinvigorates-movement-to-close-gitmo/>, mg]

In the aftermath of the Boston bombings, **it is quite shocking that the renewed vigor to close Guantánamo has found the footing that it has.** Even though many of the terrible myths started by the Bush administration’s War on Terror rhetoric linger, especially regarding the so-called “worst of the worst” at Guantánamo, Boston Globe columnist James Carroll recently added his name to the growing list of citizens and institutions calling for an end to America’s most infamous gulag. Carroll wrote that “**if Americans want this spectacle to end — if they want to tell Congress and President Obama that Guantánamo must be shut down — now is the time for them to make their voices heard**. But how?”

#### The plan is a piecemeal governmental reform--- derails the movement, turns case:

**Amnesty International 09**

[http://www.amnistia-internacional.pt/dmdocuments/USA\_Mixed\_messages\_Obama100days\_report.pdf, mg]

Under the Bush administration, a number of **investigations and reviews were held into allegations¶ of abuses in Guantánamo, Iraq and Afghanistan** and elsewhere. **Most of these**, however, **were¶ piecemeal, generally lacked independence or the mandate to reach up the chain of command or¶ outside the military,** and failed to interview victims or apply international standards. Many of their¶ findings remain classified as secret. Much has still not been investigated. **Much is still obscured¶ from public view.**

#### Torture doesn’t happen – conditions at Guantanamo are better than at supermax prisons

Chasmar 7/30

(Jessica, staff writer, 7/30/2013, The Washington Times, “Rep. Frank Wolf on Guantanamo tour: ‘There is no torture,’” <http://www.washingtontimes.com/news/2013/jul/30/rep-frank-wolf-guantanamo-tour-there-no-torture/>, accessed 8/24/2013, BS)

As lawmakers on Capitol Hill battle over whether to close the detention facility in Guantanamo Bay, Cuba, a four-member congressional delegation from Virginia, led by Democratic Rep. Jim Moran, traveled there Friday. Rep. Frank Wolf, a Republican, released a statement Tuesday saying that upon touring the facility, he has determined there is no torture or abuse going to warrant its closure. “On Friday, I travelled to Guantanamo Bay at the request of my colleague Congressman Moran, who also invited Senator Kaine and Congressman Connolly to join,” he said. “The American service men and women working at Guantanamo Bay are doing an outstanding job, despite the constant threat of physical and verbal attacks, mass disturbances and ‘splashing,’ when detainees mix urine and feces with milk and throw it in the guards’ faces.” Mr. Wolf insisted that prisoners at Guantanamo are “still in the fight” and direct that aggression at the men and women serving as guards. “Despite these challenges, the center is run in a safe, humane, transparent and, above all, legal manner,” he added. “There is no torture. There is no abuse. The detainees are treated with respect. In fact, the detainees live in better conditions than they would at a supermax prison.”

#### Plan can’t solve human rights—too many alt causes and institutional barriers

Nossel 2008

(Suzanne, Guardian Staff, November 19, "Closing Gitmo is just the beginning", http://www.guardian.co.uk/commentisfree/cifamerica/2008/nov/19/obama-guantanamo-human-rights)

While abuses carried out as part of the fight against terrorism cost the US its position of leadership on human rights issues globally, regaining that status will require more than just bringing counter-terrorism tactics in line with international norms. While the Bush administration hailed democracy and freedom as centrepieces of its foreign policy, in practice it tended to sideline human rights considerations within its important bilateral relationships.¶ To cite just a few examples, disregard for human rights has contributed to a culture of lawlessness in Pakistan's tribal areas. Despite $10-12bn in mostly military US aid to Pakistan since 2001, civilians affected by the current conflict are left defenceless in squalid, disease-infested camps – some of which the UN refugee agency cannot reach – where their frustration with the US-led war effort only grows. As part of its effort to stabilise this strategically vital region, the US must invest in building institutions that support the rule of law and ensuring that approaches to security uphold human rights. In neighbouring Afghanistan, the US needs to take immediate steps to reduce civilian casualties in military operations, and to press for an end to corruption, which is both fuelling the conflict and undermining popular faith in democratic governance.¶ In contemplating political agreements to end the conflict the US must avoid strengthening the hands of the region's most brutal warlords. While human rights will not be the sole consideration governing multi-faceted relationships with foreign governments, the new administration needs to affirm their place on the agenda and work with like-minded voices to press for progress.¶ The US also has work to do in terms of strengthening the international human rights infrastructure. The Bush administration distanced itself from the international human rights community by failing to ratify key treaties and absenting itself from new institutions of human rights enforcement. The next administration must demonstrate in tangible ways that the US is prepared to cooperate with others in building and strengthening mechanisms to protect and advance human rights in the 21st century. Its absence from key forums and debates has created space for spoilers who seek to vitiate existing human rights norms and prevent new ones from taking hold.¶ In 2005 the UN adopted a new norm, the "responsibility to protect", affirming the duty of states to protect their own populations, and the obligation of the international community to step in when they won't do so. But the new norm has flunked its first test in [Darfur](http://www.guardian.co.uk/world/2008/nov/12/sudan), where the government has suborned rampant human rights abuses and the international community has failed to intervene effectively. Working with allies to build broad-based support for rigorous human rights enforcement is a long-term project that needs to start right away. Necessary steps also include re-engaging with the international criminal court, a body that has begun to prove itself as a vital instrument of international accountability for war crimes. ¶ Building US credibility on human rights will be a long-term project requiring a steady hand against the buffeting forces of foreign policy reality. Done right, the wider human rights agenda could make closing Guantánamo look like the easy part.

#### Torture doesn’t happen and EITs are used rarely

Rodriguez 12

(Jose A, Director of the National Clandestine Service of the CIA, 5/10/2012, CNN, “Harsh terror interrogations were necessary, legal and effective,” <http://www.cnn.com/2012/05/10/opinion/rodriguez-interrogations-legal>, accessed 8/21/2013, BS)

As I detail in my new book: "Hard Measures, How Aggressive CIA Actions After 9/11 Saved American Lives," there are many myths surrounding the detention of a relatively small number of top terrorists at CIA-run "black sites" from 2002 until they were sent to Guantanamo Bay in 2006. The biggest myth is that the detainees were "tortured." Some of the stories coming out of Gitmo this past weekend simply state that as a fact. There is no "allegedly" attached to the allegation in these stories. About 30 out of the 100 or so detainees that the CIA held were subjected to some harsh treatment. But the Office of Legal Counsel in the Department of Justice assured us in writing that the treatment was specifically not torture. Many of the techniques were essentially bluffs -- designed to get the attention of a detainee and perhaps scare him -- but to cause no physical harm. Some of the stories this weekend talked of "years" of abusive treatment these detainees endured. In fact, the enhanced interrogation techniques (EITs) that CIA used were applied at most for only 30 days. On average, it was much less. Abu Zubaydah, the first detainee subjected to EITs, received them for less than three weeks. Mohammed's period of harsh -- but legal and necessary -- treatment was even less. The public impression, aided and abetted by the media, is that the practice of waterboarding was rampant. In fact, only three detainees: Mohammed, Zubaydah and one other were ever waterboarded, the last one more than nine years ago. Many of the stories this weekend repeated the assertion that Mohammed was waterboarded 183 times. But 183 is a count of the number of pours of water from a plastic water bottle. Mohammed told the International Committee of the Red Cross in 2007 that he had been waterboarded five times.

### Judicial Modeling

#### No modeling – This card alone destroys their advantage

**Law & Versteeg 12**

(David S. Law & Mila Versteeg, Professor of Comparative Constitutional Law @ Washington University & Professor of Comparative Constitutional Law @ University of Virginia “The Declining Influence of the United States Constitution,” 87 N.Y.U.L. Rev. 762 – kurr)

The appeal of American constitutionalism as a model for other countries appears to be waning in more ways than one. Scholarly attention has thus far focused on global judicial practice: There is a growing sense, backed by more¶ than purely anecdotal observation, that foreign courts cite the constitutional jurisprudence of the U.S. Supreme Court less frequently than before.267 But the behavior of those who draft and revise actual constitutions exhibits a similar¶ pattern. Our empirical analysis shows that the content of the U.S. Constitution is¶ becoming increasingly atypical by global standards. Over the last three decades, other countries have become less likely to model the rights-related provisions of¶ their own constitutions upon those found in the Constitution. Meanwhile, global adoption of key structural features of the Constitution, such as federalism, presidentialism, and adecentralized model of judicial review, is at best stable¶ and at worst declining. In sum, rather than leading the way for global¶ constitutionalism, the U.S. Constitution appears instead to be losing its appeal as¶ a model for constitutional drafters elsewhere. The idea of adopting a constitution¶ may still trace its inspiration to the United States, but the manner in which constitutions are written increasingly does not.¶ If the U.S. Constitution is indeed losing popularity as a model for other countries, what—or who—is to blame? At this point, one canonly speculate as to the actual causes of this decline, but four possible hypotheses suggest themselves: (1) the advent of a superior or more attractive competitor; (2) a general decline in American hegemony; (3) judicial parochialism; (4) constitutional obsolescence; and (5) a creed of American exceptionalism.¶ With respect to the first hypothesis, there is little indication that the U.S.¶ Constitution has been displaced by any specific competitor. Instead, the notion that a particular constitution can serve as a dominant model for other countries may itself be obsolete. There is an increasingly clear and broad consensus on the types of rights that a constitution should include, to the point that one can articulate the content of a generic bill of rights with considerable precision.269 Yet it is difficult to pinpoint a specific constitution—or regional or international¶ human rights instrument—that is clearly the driving force behind this emerging paradigm. We find only limited evidence that global constitutionalism is following the lead of either newer national constitutions that are often cited as influential, such as those of Canada and South Africa, or leading international¶ and regional human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Although Canada in particular does appear to exercise a quantifiable degree of constitutional influence or leadership, that influence is not uniform and global¶ but more likely reflects the emergence and evolution of a shared practice of constitutionalism among common law countries.270 Our findings suggest instead that the development of global constitutionalism is a polycentric and multipolar¶ process that is not dominated by any particular country.271 The result might be likened to a global language of constitutional rights, but one that has been collectively forged rather than modeled upon a specific constitution.¶ Another possibility is that America’s capacity for constitutional leadership is at least partly a function of American “soft power” more generally.272 It is reasonable to suspect that the overall influence and appeal of the United States and its institutions have a powerful spillover effect into the constitutional arena. The popularity of American culture, the prestige of American universities, and the efficacy of American diplomacy can all be expected to affect the appeal of American constitutionalism, and vice versa. All are elements of an overall American brand, and the strength of that brand helps to determine the strength of each of its elements. Thus, any erosion of the American brand may also diminish the appeal of the Constitution for reasons that have little or nothing to do with the Constitution itself. Likewise, a decline in American constitutional influence of the type documented in this Articleis potentially indicative of a broader decline in American soft power.¶ There are also factors specific to American constitutionalism that may be¶ reducing its appeal to foreign audiences. Critics suggest that the Supreme Court has undermined the global appeal of its own jurisprudence by failing to acknowledge the relevant intellectual contributions of foreign courts on questions of common concern,273 and by pursuing interpretive approaches that lack acceptance elsewhere.274 On this view, the Court may bear some responsibility for the declining influence of not only its own jurisprudence, but also the actual U.S. Constitution: one might argue that the Court’s approach to constitutional issues has undermined the appeal of American constitutionalism more generally, to the point that other countries have become unwilling to look either to American constitutional jurisprudence or to the U.S. Constitution itself for inspiration.275¶ It is equally plausible, however, that responsibility for the declining appeal of American constitutionalism lies with the idiosyncrasies of the Constitution itself rather than the proclivities of the Supreme Court. As the oldest formal constitution still in force, and one of the most rarely amended constitutions in the world,276 the U.S. Constitution contains relatively few of the¶rights that have become popular in recent decades,277 while some of the provisions that it does contain may appear increasingly problematic, unnecessary, or even undesirable with the benefit of two hundred years of¶ hindsight.278 It should therefore come as little surprise if the U.S. Constitution¶ strikes those in other countries–or, indeed, members of the U.S. Supreme Court279–as out of date and out of line with global practice.280 Moreover, even if the Court were committed to interpreting the Constitution in tune with global¶ fashion, it would still lack the power to update the actual text of the document.¶ Indeed, efforts by the Court to update the Constitution via interpretation may actually reduce the likelihood of formal amendment by rendering such amendment unnecessary as a practical matter.281 As a result, there is only so¶ much that the U.S. Supreme Court can do to make the U.S. Constitution an¶ attractive formal template for other countries. The obsolescence of theConstitution, in turn, may undermine the appeal of American constitutional jurisprudence: foreign courts ////have little reason to follow the Supreme Court’s lead on constitutional issues if the Supreme Court is saddled with the¶ interpretation of an unusual and obsolete constitution.282 No amount of ingenuity or solicitude for foreign law on the part of the Court can entirely divert attention from the fact that the Constitution itself is an increasingly atypical document.¶ One way to put a more positive spin upon the U.S. Constitution’s status as a global outlier is to emphasize its role in articulating and defining what is unique about American national identity. Many scholars have opined that formal constitutions serve an expressive function as statements of national identity.283 This view finds little support in our own empirical findings, which suggest instead that constitutions tend to contain relatively standardized packages of rights.284 Nevertheless, to the extent that constitutions do serve such a function, the distinctiveness of the U.S. Constitution may simply reflect the uniqueness of America’s national identity. In this vein, various scholars have argued that the U.S. Constitution lies at the very heart of an “American creed of exceptionalism,” which combines a belief that the United States occupies a unique position in the world with a commitment to the qualities that set the United States apart from other countries.285 From this perspective, the Supreme Court’s reluctance to make use of foreign and international law in constitutional cases amounts not to parochialism, but rather to respect for the exceptional character of the nation and its constitution.286¶ Unfortunately, it is clear that the reasons for the declining influence of American constitutionalism cannot be reduced to anything as simple or attractive as a longstanding American creed of exceptionalism. Historically, American exceptionalism has not prevented other countries from following the example set by American constitutionalism. The global turn away from the American model is a relatively recent development that postdates the Cold War. If the U.S. Constitution does in fact capture something profoundly unique about the United States, it has surely been doing so for longer than the last thirty years. A complete explanation of the declining influence of American constitutionalism in other countries must instead be sought in more recent history, such as the wave of constitution-making that followed the end of the Cold War.287 During this period, America’s newfound position as lone superpower might have been expected to create opportunities for the spread of American constitutionalism. But this did not come to pass.¶ Once global constitutionalism is understood as the product of a polycentric evolutionary process, it is not difficult to see why the U.S. Constitution is playing an increasingly peripheral role in that process. No evolutionary process favors a specimen that is frozen in time. At least some of the responsibility for the declining global appeal of American constitutionalism lies not with the Supreme Court, or with a broader penchant for exceptionalism, but rather with the static character of the Constitution itself. If the United States¶ were to revise the Bill of Rights today—with the benefit of over two centuries of experience, and in a manner that addresses contemporary challenges while remaining faithful to the nation’s best traditions—there is no guarantee that other countries would follow its lead. But the world would surely pay close attention.

#### Courts can’t stop the prez

Nzelibe ‘04

(Bigelow Fellow and Lecturer in Law, University of Chicago Law School Iowa Law Review¶ March, 2004¶ 89 Iowa L. Rev. 941 Lexis, TSW)

Interestingly, the judiciary's perceived lack of institutional authority to adjudicate foreign affairs controversies is not unique to the U.S. experience. As one commentator has observed, judicial timidity on foreign affairs issues is commonplace among other national legal systems. n219 This commentator correctly attributes this judicial apprehension to the fact that the political branches have no "incentive to bestow legitimacy on an international legal system, in which their state is only one actor among numerous actors, many of whom do not face judicial restrictions." n220¶ Finally, there is another significant reason why the courts might believe that they are unable to enforce their decision against the political branches in foreign affairs cases. Simply put, given the breadth of the political [\*991] branches' authority in foreign affairs, they often possess tools that would enable them to avoid judicial determinations adverse to their interests. A survey of some real and hypothetical cases involving disputes over the allocation of foreign affairs powers will help illustrate this point. For instance, in Goldwater v. Carter, the issue at stake was whether the President had to submit a formal termination of a treaty for Senate ratification. n221 In the end, the Court refused to require the President to do so, but could not garner a majority behind any single justification. n222 Assume, however, that the Court reached the contrary conclusion - that the President could not terminate the treaty without the approval of a supermajority of the Senate. The problem with this hypothetical outcome is that the President could effectively avoid the Court's determination by refusing to enforce the treaty, or by independently making a decision to breach the treaty. It is widely understood that the President has the authority to breach treaty commitments with another country, if he so chooses. n223 If this is the case, then it does not make much sense for the courts to try to adjudicate the question of whether the President alone can formally terminate such treaties. Similar constraints on the interpretive authority of the courts can also be demonstrated in the war-powers context. Assume that pursuant to the "declare war" clause, a court rules that a President cannot engage in war without prior congressional approval. Presumably, such a court would concede, as even most pro-Congress scholars in the war-powers debate do, that the President still retains the residual authority to engage in a defensive war without congressional approval. n224 What happens if the President launches an offensive war without congressional approval, but insists that it is really a defensive war? Should the courts have the authority to distinguish between defensive and offensive wars? If so, what criteria or standards should they employ? In the end, such a system would likely prove unworkable in practice. Once the President starts a war, it is difficult, if not almost impossible, to make post-hoc determinations from a legal point of [\*992] view as to whether the war is properly an offensive or defensive war. Moreover, inviting the courts to make such a distinction would invariably draw the courts into making a determination as to whether another country poses a significant enough "offensive" threat to the security of the United States to warrant a defensive reaction by the President. It seems obvious that such a determination would be clearly beyond the institutional competence of the courts.

#### Court ruling on foreign policy unenforceable – no popular support

Nzelibe 2004

[Jide Nzelibe Bigelow Fellow and Lecturer in Law, University of Chicago Law School, March 2004 89 Iowa L. Rev. 941, “The Uniqueness of Foreign Affairs”]

Unlike in domestic constitutional controversies, it is also doubtful that the judiciary can draw on the popular underpinnings of its legitimacy should the political branches ignore its foreign affairs determinations. As one commentator has explained, the public appetite for judicial involvement in international issues is not particularly strong. 217 The judiciary's lack of popular legitimacy in foreign affairs is particularly understandable when the relevant controversy touches on matters of national security. As demonstrated above, in matters involving the domestic operations of the government, the court plays an important role in legitimizing the activities of the other branches, as well as providing a reliable mechanism for the resolution of disputes between private individuals. When matters touch on the very existence of the state, however, such as when the state faces an external threat, the justifications for judicial involvement correspondingly diminish. 218 Thus, far from getting popular support in the event of a confrontation with the political branches, it is more likely that the courts will face public criticism for intervening improperly in foreign affairs or jeopardizing national security.

#### Democracy does not prevent war

Ackerman ‘6

(Spencer, editor New Republic, “Against Democracy,” The American Prospect, 8-29,

http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=11933)

For American interests, it gets worse. During the Bush era, the United States has seen that democratic processes in Iraq, Lebanon, Palestine, and Egypt have strengthened precisely the religious extremists that Hamid thinks they will ultimately defeat. But the United States is insane to promote democratic elections in which the victors proclaim eschatological hostility to it. Hamid blithely writes that "over the long-term, the responsibilities of government are likely to privilege pragmatism over ideology, practicality over posturing," but democracies, both advanced and maturing, are always vulnerable to demagoguery, and are particularly vulnerable when faced with security threats like those likely to plague the Middle East for the foreseeable future. (India, Israel, Turkey, and the United States -- all democracies under threat -- have grown more reactionary in recent decades, not less.) Hamid concedes that in the "short term," the rise of radical Islamists will be "frustrating," but "in the right conditions and with sustained international involvement," those Islamists will moderate themselves. The idea of democratic failure -- the idea that democracy in certain conditions cannot meet social expectations, leading to its collapse -- never occurs to him, despite three and a half years of the Iraq War. Even more perversely, Hamid argues that living with such "frustrations" is the mark of a progressive foreign policy. For all its tough-minded posturing, this is doughfaced liberalism at its worst: the implicit assumption that good intentions excuse actual, real-world consequences. To take the example of Iraq, the rise of democracy is directly correlative with marauding death squads. Among the most powerful figures in democratic Iraq is Moqtada al-Sadr, whose followers serve in parliament, run ministries, and slaughter men in barber shops for insufficient beard growth. Recently, Iraq's most famous archeologist, Donny George, fled to Syria when Sadr's thugs at the Ministry of Antiquities had raised an eyebrow at George's interest in Iraq's pre-Islamic historical treasures. If he returns to democratic Iraq, he will surely be murdered for crimes against Islam. Hamid's argument entails telling George that if he survives enough elections, Sadr's men will eventually change their minds. This is liberalism?

#### Long timeframe for solvency—transition to functional democracy takes centuries

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)

This approach has triggered criticism even from close allies of the United States. As Sir Michael Howard, president emeritus of the Institute of International Strategic Studies, has pointed out, "The Enlightenment may have liberated us from traditional feudal and religious constraints, but it has taken us nearly two centuries, including two world wars and God knows how many revolutions, to adjust to our new 'freedoms.' There is no reason to suppose that the peoples of the Middle East can do any better than we did." [3](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#fnote3) It is neither realistic nor practical to presuppose that democracy promotion, especially implemented through coercive regime change, would result in a functional democracy in a relatively short period of time. Furthermore, failed attempts at democracy promotion would boost China's "non-interference" approach, and thus lead to further deterioration of U.S. leadership.

#### Democracy doesn’t check war—actually amplifies nationalist tensions—Egypt proves

Joshua Goldstein September 2011 (Writer for Foriegn Policy, "Think Again: War--World Peace Could Be Closer Than You Think"http://www.foreignpolicy.com/articles/2011/08/15/think\_again\_war?page=full)

"A More Democratic World Will Be a More Peaceful One."

Not necessarily. The well-worn observation that real democracies almost never fight each other is historically correct, but it's also true that democracies have always been perfectly willing to fight non-democracies. In fact, democracy can heighten conflict by amplifying ethnic and nationalist forces, pushing leaders to appease belligerent sentiment in order to stay in power. Thomas Paine and Immanuel Kant both believed that selfish autocrats caused wars, whereas the common people, who bear the costs, would be loath to fight. But try telling that to the leaders of authoritarian China, who are struggling to hold in check, not inflame, a popular undercurrent of nationalism against Japanese and American historical enemies. Public opinion in tentatively democratic Egypt is far more hostile toward Israel than the authoritarian government of Hosni Mubarak ever was (though being hostile and actually going to war are quite different things).

#### Democracy doesn’t solve global problems – doesn’t correlate with good governance.

Raby and Teorell 10**—**\*Department of Political Science at Lund University \*\*The Quality of Government Institute, Department of Political Science at Lund University

(Nils and Jan, “A Quality of Government Peace? Bringing the State Back Into the Study of Inter-State Armed Conflict”, The Quality of Government Experiment, University of Gothenburg, September 2010, http://www.qog.pol.gu.se/working\_papers/2010\_20\_Raby\_Teorell.pdf)//AW

That democracies do not wage wars against each other is undoubtedly one of the most widely accepted claims within the study of international relations. Probably less well known is the fact that, when seen from the perspective of the broader literature on domestic consequences of democracy, the democratic peace effect is something of an exception. Despite countless of studies, there are for example no robust evidence linking democracy to economic growth or even to poverty reduction or human development more generally (for an overview, see Rothstein and Teorell 2008). True, democracy usually comes out as a strong predictor of human rights, but democracy should arguably be defined at least partly in terms of key personal integrity rights, so this finding is not all that surprising. This contrasts sharply with the more robust findings linking “good governance” and highquality government institutions — other than democracy — to preferred social, economic and political outcomes. To begin with, economists have started to view dysfunctional government institutions as the most serious obstacle to economic development across the globe (e.g., Hall and Jones 1999; Acemoglu, Johnson, and Robinson 2001, 2002; Easterly and Levine 2003; Rodrik, Subramanian, and Trebbi 2004). Unlike democracy, the quality of government (QoG) factor has also been argued to have substantial effects on a number of important noneconomic phenomena, both at the individual level — such as subjective happiness (Frey and Stutzer 2000; Helliwell 2003; Tavits 2007; Helliwell and Huang 2008), citizen support for government (Anderson and Tverdova 2003; Chang and Chu 2006), and interpersonal trust (Rothstein and Uslaner 2007; Rothstein and Stolle 2008; Rothstein and Eek 2009) — and at the societal level — such as improved public health and environmental sustainability (Holmberg et al. 2009), and state legitimacy (Gilley 2006). In this paper we attempt to bring the study of interstate conflict more in line with this more general literature. More specifically, drawing on dyadic Militarized Interstate Disputes data in 1985-2000, we show that the impact of quality of government on the risk of interstate conflict by large amounts trumps the influence of democracy. We thus find stronger evidence in favour of a quality of government as compared to a democratic peace. These results hold even under control for incomplete democratization, realist claims and geographic constraints. We also find that the relationship between quality of government and peace is robust to controls for the “capitalist peace” (Gartzke 2007), an alternative account that in recent years has been 4 put forward as a challenge to democratic peace theory. Theoretically, we argue that the causal mechanism underlying this finding is that quality of government reduces information asymmetry among potentially warring parties, improves their ability to communicate resolve, and to credibly commit to keep to their promises. By taking into account broader features of the state as a complex organization, we conceive of the quality of government peace as an argument for brining “the state back in” to the study of armed conflict and international relations more generally.

#### Current-day democracy tactics will never work—they only lead to true democracy downfall.

Farrelly 10—Winner of the CICA International Critics' Award, the Pascall Prize for Critical Writing, and the Marion Mahony Griffin Award; columnist for the *Sydney Morning Herald,* a commentator on Australian television and radio, and Adjunct Associate Professor of Architecture at the University of Sydney (Elizabeth, “Democracy - seeds of doubt or seeds that will sprout strong?”, News and Features, Sydney Morning Herald, October 7, 2010, LexisNexis)//AW

Democracy was born with the seeds of its destruction in its mouth and, right now, we're seeing them sprout. Not so dangerous really. John Adams said it two centuries ago: "Democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy yet that did not commit suicide." Maybe this is obvious. Democracy, as the politics of desire, has proved less adept at eradicating monarchy than at making fat little sovereigns of us all, pleasure-seeking, pain-intolerant. Our leaders are our creatures; what we won't accept, they daren't impose. Thus, the Prime Minister, Julia Gillard, cannot so much as mouth the words "carbon tax". Our hedonism demands her cowardice. And it is this hedonic addiction, this bondage to small, salient desirables such as big-screen tellies and Kuta holidays that has left democracy paralyzed in the face of the elephant-size undesirables such as climate change and the GFC. A century ago, America led the rising graph on this desire-democracy. Now it may be leading the fall. (Although Brazil, its electoral circus comprising six footballers, four singers, two stand-up comics, a celebrity transsexual, a catwalk model and an allegedly illiterate clown, might take the cake here.) This wasn't always so. Early on, as democracy grew from the husk of aristocracy, it was still capable of imposing the taxes and statutes, the checks and balances needed to constrain desire for the greater good. And perhaps, over time, we were always going to vote away such constraints, just as we voted away the constraints of theology in order to swim freely in the warm springs of liberalism. But now, as resentment builds at a free-market oligarchy that not only allows itself to fail, and fail spectacularly, but expects us plebs to pick up the tab, a strange new cross-fertilization is apparent. It's a conservative people-power movement where people cherry-pick values from old-right and old-left to make a new political blend. In Britain "Red Tory" Phillip Blond has become the philosopher-king of this new synthesis, arguing that since 1945 "liberalism has undone both the left and the right" by making desire central. The presumption of self-interested individualism, he says, as propagated by Rousseau and Adam Smith, necessitated the nanny-state in place of the personal conscience. (Blond, one notes, has a background in Anglican theology.) For Blond, then, "individualism and statism are two sides of the same coin". Paradoxically, he says, the presumption of individual equality has led to "a perverse corporatism" on both sides, in which the "equality of opportunity" doctrine has only entrenched and perpetuated disadvantage until it seems almost genetic. Blond has the ear of the British Prime Minister, David Cameron, and is credited with his "Big Society" answer to big government. How that translates on the ground remains to be seen. Some expect little advance on notorious "get on yer bike" advice to the poor from the Thatcher-era minister Norman Tebbit, and Blond fears that Labour's Ed Miliband (equipped with his own whispering philosopher, "blue Labour" academic Maurice Glasman) might take this new middle ground first. But at least they're having the debate. At least it's actually about ideas, and the arguments are genuinely thoughtful in a way that suggests there's life in democracy yet. Here, where we're entertaining the same weirdly refreshing mix of values, it seems almost accidental. Perhaps it was no accident. Perhaps, faced with choosing between our own circus of semi-literate clowns, and confronting the terrible irony that just when we get sufficiently fed-up with two-party posturing to vote otherwise, the third party vanishes, we did the only reasonable thing. We elevated a ruffian gang of independents who may not amount to much as individuals but jointly render the system more honest and operable than it has been for years. This is not a "hung" parliament. That's the loaded terminology of a two-party orthodoxy. This parliament - suddenly and unexpectedly freed from the morbidities of the whip system - is a working parliament. So perhaps it's not democracy eating itself. Perhaps what we're seeing is democracy feeding itself; perhaps the seeds in its mouth were not those of destruction, but of renewal? Perhaps. This suggests we'll need to drop the bicameral system. Redesign our parliaments to be not oppositional shoe-boxes but round, maybe, or square, with cross-benches as long as the sides. Further, far from mandating the vote, restrict it, turning a duty into a privilege, earnable by demonstrating some semblance of knowledge. (I'm thinking a really challenging test, like naming the deputy PM.) This way we might hope for a trickle-up effect, whereby a smarter constituency eventually demands and gets smarter politicians. But how long have we got?

#### Democracy fails—preconditions dictate.

Sowell 11—Rose and Milton Friedman Senior Fellow, The Hoover Institution at Stanford University (Thomas, “Instant Democracy Doesn’t Work”, WorldNetDaily, March 1, 2011, http://www.wnd.com/index.php?pageId=269313)AW

The fact that Egyptians or others in the Middle East and elsewhere want freedom does not mean that they are ready for freedom. Everyone wants freedom for himself. Even the Nazis wanted to be free to be Nazis. They just didn't want anybody else to be free. There is very little sign of tolerance in the Middle East, even among fellow Muslims with different political or religious views, and all too many signs of gross intolerance toward people who are not Muslims. Freedom and democracy cannot be simply conferred on anyone. Both have preconditions, and even nations that are free and democratic today took centuries to get there. If there were ever a time when people in Western democracies might be excused for thinking that Western institutions could simply be exported to other nations to create new free democracies, that time has long passed**.** It is easy to export the outward symbols of democracy – constitutions, elections, parliaments and the like – but you cannot export the centuries of experience and development that made those institutions work. All too often, exported democratic institutions have meant "one man, one vote – one time." We should not assume that our own freedom and democratic form of government can be taken for granted. Those who created this country did not. As the Constitution of the United States was being written, a lady asked Benjamin Franklin what he and the other writers were creating. He replied, "A republic, madam – if you can keep it." Generations later, Abraham Lincoln also posed it as a question, whether "government of the people, by the people and for the people" is one that "can long endure." Just as there are nations that have not yet developed the preconditions for freedom and democracy, so there are some people within a nation who have not. The advance toward universal suffrage took place slowly and in stages. Too many people, looking back today, see that as just being biased against some people. But putting the fate of a nation in the hands of the illiterate masses of the past, many with no conception of the complexities of government, might have meant risking the same fate of "one man, one vote – one time." Today, we take universal literacy for granted. But literacy has not been universal across all segments of the American population during all of the 20th century. Illiteracy was the norm in Albania as recently as the 1920s and in India in the second half of the 20th century. Bare literacy is just one of the things needed to make democracy viable. Without a sense of responsible citizenship, voters can elect leaders who are not merely incompetent or corrupt, but even leaders with contempt for the constitutional limitations on government power that preserve the people's freedom.

#### Democracies do not prevent war.

Hayes 11—PhD at Georgia Institute of Technology (Jarrod, “The Democratic Peace and the New Evolution of an Old Idea”, European Journal of International Relations, June 10, 2011, http://ejt.sagepub.com/)//AW

In this critical overview, I argue that, while the idea of a democratic peace has enjoyed an immense amount of attention, the nature of inquiry has created significant lacunae that have only recently begun to be addressed. Methodologically, large-N quantitative studies dominate the field.ii While these studies have been invaluable in establishing the claim that the democratic peace phenomenon exists (what I call the ‘statistical democratic peace’**), by their very nature they are able to demonstrate only correlation, not causation**. Not surprisingly, what effort these studies did make towards understanding and explaining the democratic peace focused on causes—norms and institutions (Maoz and Russett, 1993)—that could be quantified, either directly or by proxy. Yet the quantitative nature of the studies does not enable access to causal forces. The mechanisms behind the democratic peace remained shrouded in shadow. The end of the Cold War and the subsequent (at least rhetorical) inclusion of the democratic peace in U.S. foreign policy means the field, now more than ever, needs to develop a better understanding of the mechanisms within (and without) democracies that generate the observed peace. In the process of expanding our inquiry of the mechanisms behind the democratic peace, we will actually generate a new, broader field of study: democratic security. This review derives its emphasis on mechanisms from the scholarship on scientific realism (Bhaskar, 1975; Harré and Madden, 1975; Manicas, 2006) and Mario Bunge’s systemism philosophy (Bunge, 1996; Bunge, 2000; Bunge, 2004b). While the social sciences have largely been oblivious, philosophers of science have questioned the Humean, deductive-nonological model of science. These questions have given rise to a model of science focused on processes and mechanisms: “the real goal of science is neither the explanation of events nor the explanation of patterns, though this idea catches dome of the truth of the matter. Rather, it has as its goal an understanding of the fundamental processes of nature” (Manicas, 2006: 14). Explanation, then, “requires that there is a "real connection," a generative nexus that produced or 1brought about the event (or pattern) to be explained” (Manicas, 2006: 20). Accordingly, correlation on its own cannot serve as explanation (much less understanding) because it does not allow the analyst access to the mechanisms at play: what causes what *and how*. The ongoing focus by social scientists on covering laws thus betrays a romantic understanding of science that is not only *not* what physical scientists do, but that is fatally flawed as a mode of intellectual inquiry. Bunge likewise emphasizes the importance of mechanisms in systemism, his philosophy of social science. Bunge argues that the study of the social sciences is the study of social systems and thus requires a ‘‘systemist’’ approach over traditional approaches that compartmentalize social studies (holism, for example structural realism, versus individualism, for example rational choice). The central focus of the systemist approach is the human system: the interaction between individuals and society. Explanation links rather than separates the structural and individual levels.

#### Democracy doesn’t work—the democratic peace theory is oversimplified.

Hayes 11—PhD at Georgia Institute of Technology (Jarrod, “The Democratic Peace and the New Evolution of an Old Idea”, European Journal of International Relations, June 10, 2011, http://ejt.sagepub.com/)//AW

A broader critique of the efforts to explain the democratic peace through structural and normative mechanisms lies in the artificial separation of the two. Clearly the separation serves analytical purposes: it serves as tool for isolating dynamics that would be lost in the complexity of international affairs. However, often the literature loses sight of the big picture. As Kahl points out, norms and structure are complimentary (Kahl, 1999: 99). While some effort has been made to integrate the two into a coherent holistic explanation (Oneal et al., 1996; Doyle, 2005; 8Lipson, 2003), these efforts have a tentative quality to them. The Oneal et al article typifies much of the literature: a large N-regression finding that states characterized by economic interdependence, constrained political actors, and norms of non-violent conflict resolution are peaceful. There is very little in the paper, however, that sheds light on how these factors affect the pacific outcome. Doyle’s 2005 article, which builds off his previous work on the democratic peace (Doyle, 1983a; Doyle, 1983b; Doyle, 1986), likewise suggests a linkage between norms and structure. In democracies, according to Doyle, representation (structure) should ensure that wars are fought only for liberal (norms) purposes. However, Doyle speaks only to this point very briefly, and does so in the context of a wide-ranging explanation that implicates a multitude of processes in the eventual democratic peace outcome. How exactly representation ensures liberal wars remains somewhat ambiguous. Clarifications of the relative weight of the various mechanisms or whether they actually operate in the ways Doyle indicates are left to others to resolve. Lipson argues that ‘constitutional’ democracies are peaceful with each other because of stable contracting. That is, through the contracting advantages of democracy—regime stability, audience costs, entrenched procedures—democracies are able to forge “reliable, forward-looking agreements that minimize the dead-weight costs of direct military engagement” (Lipson, 2003: 4). This approach, Lipson argues, takes account of both norms and structure. A careful read of the argument, however, shows an extremely limited discussion of norms. Instead, the argument overwhelmingly focuses on the political structures that give rise to stable, reliable contracting between democracies. Lipson’s major contribution then is to develop an approach that binds together many of the structural explanations rather than building a theory that meaningfully incorporates norms and structure in explanation. However, as with other efforts at reconciling norms and structure, the underlying theoretical framework do not give us a solid basis for understanding how the two fit together. Perhaps a more fundamental problem with the second wave literature lies in the failure of these explanations to account for how threat is constructed. The democratic peace is at its core about threat construction of the lack thereof. Structural explanations have little to say on this point, marking a significant weakness of those approaches. Normative arguments fare better, but do not go far enough; their underlying assumption that threats are self-evident, informed by democratic norms, assumes too much. Both explanations, possibly arising out of their birth nested within large-N studies, are overly deterministic. Security policy, indeed most state policies, arises out of a complicated dynamic between elected officials, bureaucracy, divisions of government, political parties, and individuals. Efforts to explain the democratic peace through a singular cause, to the exclusion of all others, are bound to be found wanting. Several scholars have to varying degrees indicated that the contention between structural and normative explanations is a false one (Ray, 1995). Thus, while the critique is not new, it does bear repeating. Rosato also notes the (implicitly) deterministic nature of structural and normative explanations and while Slantchev and his coauthors argue Rosato misreads the probabilistic nature of democratic peace research, it remains the case that most of the literature is implicitly rather than explicitly probabilistic (Rosato, 2003; Slantchev et al., 2005). Within the second wave and standing apart from much of the literature on the democratic peace, Elman’s edited volume of comparative case studies deserves particular mention (Elman, 1997a). It is, to date, one of the most coherent efforts to utilize case studies to explore the democratic peace. Unfortunately for advocates of the democratic peace, it makes for difficult reading.xiii 9 Skeptical of the claims of the democratic peace, Elman claims that she and her coauthors are “gate crashers at the democratic peace party” (Elman, 1997b: vii). Like the other counterarguments to the democratic peace, the volume focuses on the normative and structural explanations of the democratic peace as the principal explanatory mechanisms. Throughout the nine cases, the monadic approach to the democratic peace is thoroughly disabused and the dyadic proposition is significantly qualified, although it should be said that not all the cases focus on dyadic relations, or even democracies. One section of the book focuses almost exclusively on nondemocratic interactions, for example Malin examines relations between Iraq and Iran from 1975-1980 (Malin, 1997). The volume is not all critical, and some interesting new information is produced—notably the suggestion that shared democratic governance is particularly important to the United States in foreign policy making (Rock, 1997). While Elman’s conclusions take neorealist theorists to task for outright dismissal of the democratic peace regime—an irony given Layne’s effort to do just that in the first case study of the book—she (rightly) points out that the democratic peace program at the time oversimplified explanatory mechanisms and overreached on the resulting conclusions. In particular, she notes the failure of democratic peace research to appreciate the complexity of democracy and its neglect of domestic democratic politics (Elman, 1997a: 483).

# 2NC

#### Lots of restrictions on indefinite detention in the SQ: Aff must substantially increase BEYOND THESE

Jacob ‘12

Greg Jacob, Partner at O’Melveny & Myers in Washington, D.C, and Policy Director at the Service Women's Action Network,

“Detention Policies: What Role for Judicial Review?”, October 2012,

http://www.abajournal.com/magazine/article/detention\_policies\_what\_role\_for\_judicial\_review/

Does the Maqaleh rule create the possibility, and perhaps even the likelihood, of erroneous detentions? Certainly. Mankind has not¶ yet devised a perfect system for correcting such errors. But the decision is founded on a principle long recognized by the courts: That¶ absent extraordinary circumstances, the cost to security of judicial interference in active overseas¶ military operations outweighs the liberty cost of potentially erroneous detentions pursuant to¶ those operations. Thus, five years after World War II formally ended, the Supreme Court declined to extend the writ of¶ habeas corpus to prisoners held in Germany, explaining that “such trials would hamper the war effort and bring aid and comfort to¶ the enemy. … It would be difficult to devise more effective fettering of a field commander than to¶ allow the very enemies he is ordered to reduce to submission to call him to account in his own¶ civil courts and divert his efforts and attention from the military offensive abroad to the legal¶ defensive at home.” Through Maqaleh, these legitimate concerns continue to govern the enemy combatant jurisprudence of today. The law developed by the D.C. Circuit for reviewing enemy combatant habeas petitions is¶ perhaps more important for its symbolic than its practical effect, as the government has stopped¶ transferring detainees to Guantanamo Bay, and the number of individuals to which the body of law applies is thus small and¶ shrinking. Nevertheless, we are a nation that prizes liberty, fairness and the rule of law, and the Boumediene court may well have been correct that outside the theater of war, the liberty cost of potentially erroneous detentions must under some circumstances¶ outweigh the security costs attendant to habeas review. The key question in a habeas inquiry concerning a captured enemy¶ combatant is not whether the individual committed a crime, but whether the government properly designated the individual an enemy combatant. This inquiry requires review of highly classified intelligence reports, which often contain hearsay statements¶ gathered from a variety of intelligence sources. The D.C. Circuit has established that hearsay evidence is admissible in detainee review cases (al-Bihani v. Obama), that the recording of hearsay statements by government agents is entitled to a presumption of regularity, but not to a presumption that the recorded hearsay statements are actually true (Latif), that the various items of¶ evidence used by the government to support a detention must be viewed by a reviewing court as a whole, rather than in isolation¶ (Salahi v. Obama), and that a governmental showing by a preponderance of the evidence is sufficient to support a detention¶ (Bihani). These standards, which have for the most part gained the support of judges across the¶ D.C. Circuit’s ideological spectrum, are both flexible and fair, ensuring that detainees are not¶ held at the whim of the executive and with no supporting evidence, while recognizing that judicial review¶ of military detentions requires some reasonable alterations to the habeas standards to which we are more accustomed.

## Lower Courts

#### Lower Courts have same authority as the Supreme Court

Koch, Prof of Law at William and Mary, 05

[“ARTICLE: POLICYMAKING BY THE ADMINISTRATIVE JUDICIARY,” Alabama Law Review, Spring, P. Lexis]

**Caminker posits a nonhierarchical system in which courts at all levels have equal lawmaking authority**. [**64**](http://www.lexis.com/research/retrieve?_m=5455fecf3fd6e7cdcf5b635d053f5e3c&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAB&_md5=f2d8f891fc7fb74da958c274759c15c6&focBudTerms=inferior%20courts%20w/15%20atleast20%28precedent&focBudSel=all#n64#n64) Interestingly, **such a system is not merely hypothetical. As strange as such a system might feel to common-law lawyers**, Caminker notes the error in dismissing the system as implausible **because the system apparently works in civil-law countries**. [**65**](http://www.lexis.com/research/retrieve?_m=5455fecf3fd6e7cdcf5b635d053f5e3c&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAB&_md5=f2d8f891fc7fb74da958c274759c15c6&focBudTerms=inferior%20courts%20w/15%20atleast20%28precedent&focBudSel=all#n65#n65) Moreover, **some administrative systems, especially in the states** to be discussed in subpart V.A, **are increasingly giving the administrative judges such autonomy.** Caminker examines the possible gains accrued from disobedience by an inferior adjudicative authority, or "underruling." **Disobedience may spur reform; indeed, some refusal to follow prior authority is a necessary element to reevaluation**. Still, in the end, Caminker concludes that the benefits of disobedience are ambiguous, conceding that "one might identify discrete instances in which the benefits of forced rethinking likely outweigh the costs, but a flat prohibition of underruling might better balance benefits and costs over the entire range of cases." [**66**](http://www.lexis.com/research/retrieve?_m=5455fecf3fd6e7cdcf5b635d053f5e3c&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAB&_md5=f2d8f891fc7fb74da958c274759c15c6&focBudTerms=inferior%20courts%20w/15%20atleast20%28precedent&focBudSel=all#n66#n66) These observations support a cabined opportunity for experimentation and even disobedience at the administrative judge level.

#### Lower courts solve – they produce legal change

Anleu and Mack 06

Professor of Sociology at Flinders University, PhD AND Professor of Law at Flinders University, BA from Rice, JD from Stanford¶ [Sharyn Roach and Kathy, "Courts as a Location of Social Change: A View from the Lower Courts," 8-10, http://www.allacademic.com//meta/p\_mla\_apa\_research\_citation/0/9/5/3/3/pages95331/p95331-1.php]

Those commentators who consider law and social change only from the perspective of the higher courts often emphasise the apparent distance of law from everyday life and concerns (Coombs 1976: 1). Law on the books may have few practical consequences for ordinary people and their everyday lives. Indeed, ‘for most of us the law generally sits on a distant horizon of our lives, remote and often irrelevant to the matters before us’ (Ewick & Silbey 1998: 15). However, the many people before the magistrates court do experience the law in action, not just the law on the books. Here there are many opportunities for change, many opportunities to positively (and of course negatively) affect people’s lives but there are also limits on the ability of individual magistrates and courts as an institution. The idea of the dialectic ‘takes the interaction of people and institutions as the starting point for an understanding of social relations’ and social change (Chambliss 1979: 8). Magistrates and magistrates’ courts should not only be seen as reacting to broader social changes, i.e., always responding to their environments. They also have the capacity to affect those changes and to be proactive. The court, as a structure, simultaneously constrains magistrates’ autonomy and offers opportunities for them to work in creative or innovative ways. While at the level of the lower courts the scope to affect social life, in particular diverse inequalities, may not be revolutionary or dramatic, the changes will be local, personal and incremental and perhaps enduring.

#### Federal Courts can rule on War on terror related detainment

Siegel ‘12

(Ashley E. Siegel J.D., Boston University School of Law, 2012; B.A. Philosophy and Political Science, Simmons College, 2007. Many thanks to Martha Manoian, Marisa Siegel, Avi Robinson, Christine Dieter, Peter Shults, and Brian Daluiso for their comments and suggestions throughout the editing process, as well as to the staff and editorial board of the Boston University Law Review. “SOME HOLDS BARRED: EXTENDING EXECUTIVE DETENTION HABEAS LAW BEYOND GUANTANAMO BAY” July, 2012¶ Boston University Law Review¶ 92 B.U.L. Rev. 1405 lexis, TSW)

The September 11, 2001, terrorist attacks have had a radical impact on the United States and the world. The subsequent war on terror changed the face of modern warfare and created novel legal issues that test the boundaries of separation of powers and sovereignty doctrines. This has been particularly true in the detainee and prisoner-of-war context. With the United States' detention of prisoners in Guantanamo Bay, the Supreme Court and lower federal courts have been forced to grapple with petitions to extend habeas protection to alien detainees held by the United States in offshore facilities.¶ Federal courts have started to provide some guidance as to when a war-on-terror detainee might be afforded habeas rights. In Boumediene v. Bush, n9 the Supreme Court held that the Suspension Clause applied to Guantanamo detainees, giving federal courts jurisdiction to hear detainee habeas petitions. n10 The Supreme Court analyzed three factors that contributed to its decision to extend the Suspension Clause - the citizenship and status of the detainee and the adequacy of the process that determined that status, the "nature of the sites where apprehension and then detention took place," and the "practical obstacles" faced in resolving the prisoner's invocation of the writ - but acknowledged that those factors might not be exhaustive and that they might [\*1407] apply differently depending on the factual scenario. n11 In Al Maqaleh v. Gates, the U.S. Court of Appeals for the D.C. Circuit reiterated the Supreme Court's explanation that the Boumediene factors were not exhaustive. n12 The court of appeals applied the factors set forth in Boumediene to deny habeas rights to alien detainees held by the United States at Bagram Air Force Base in Bagram, Afghanistan. n13 The court of appeals explained that one factor against extending habeas rights to the detainees was that the United States did not have de facto control over Bagram in the same way it had over Guantanamo Bay. n14 Although denying the prisoner's claim, the court emphasized that lack of de facto control over a detainment facility was not decisive; it was merely one factor to consider. n15 Thus, the Boumediene factors potentially allow claims to be brought by foreign detainees held offshore in circumstances distinguishable from Bagram.¶ Another context of extraterritorial detention might also help answer the question of what rights alien detainees held by foreign governments possess. In Arar v. Ashcroft, n16 the Second Circuit dealt not with a habeas petition but with a Torture Victim Prevention Act civil tort claim against the U.S. government for its extraordinary rendition of the petitioner. n17 The Second Circuit reviewed the case of a Canadian and Syrian dual citizen who was detained in the United States en route to Canada. n18 The U.S. government detained Arar, who the government claimed was a suspected terrorist, for a week in the United States before removing him to Syria. n19 In Syria, Arar was detained for over a year by the Syrian government, interrogated, and tortured. n20 The Second Circuit, however, concluded that Arar's claim ultimately failed because Arar had not established a close enough relationship between the U.S. and Syrian governments to implicate the United States in any activity beyond "encouragement." n21 Yet questions remain about what might result should a detainee establish a more significant relational tie between two such actor-governments.

#### Strong and independent use of lower court rule-making is critical to effective rule of law

Bhagwat 00

Professor of Law at University of California, JD from University of Chicago Law School

[Ashutosh, "SEPARATE BUT EQUAL?: THE SUPREME COURT, THE LOWER FEDERAL COURTS, AND THE NATURE OF THE "JUDICIAL POWER"," 80 B.U.L. Rev. 967, October, Lexis]

Most notably, one of the gravest institutional problems the Court faces is its splendid isolation from facts, and from the practical experience gained by observing the legal system in action on a day to day basis. There is, however, an obvious place for the Court to look to reduce its isolation: the lower federal courts. Those courts, which share many of the institutional strengths of the Court, such as life tenure and a careful (albeit not as careful) selection process, are in the thick of the administration of justice, rather than situated in a temple on Capitol Hill. The Court could access a great deal of knowledge simply by paying more, and more systematic, attention to those courts' attempts to implement the doctrines promulgated by the Supreme Court. This, of course, would require the Court to take the theory of "percolation" seriously, not merely as an excuse for avoiding decision, but as a source of ideas and practical experience. Relatedly, the Court might take a more generous view of lower courts who in light of experience experiment with, or even deviate from, the Court's apparent preferences and doctrinal formulations. Of course, for this kind of interaction to succeed, the lower courts must themselves be willing to engage in independent and sometimes aggressive reasoning. Unfortunately, as recent, self-abnegating remarks made by lower court judges suggest, n212 such willingness is often lacking. Moreover, there is now a long tradition in the legal community, again dating back to Felix Frankfurter, of denigrating the significance and independence of lower federal courts, and instead portraying them as mere "intake" points for the Supreme Court. n213 The docility of the [\*1007] lower courts should not, however, be overstated. Over the years, the lower courts have displayed their independence often, both in creative decision-making and occasionally in a willingness to flout the Supreme Court. n214 Moreover, there exists an enormous wealth of talent in the lower federal courts, particularly in the Courts of Appeals; the Supreme Court's decision making would benefit from taking advantage that talent. If a system of independent, and aggressive lower courts could be created, it would reintroduce some of the strengths of the common law process, including notably the evolutionary nature of the common law, into the Court's formulation of legal rules.

#### CP is uniquely key to creating stronger lower courts

Bhagwat 00

Professor of Law at University of California, JD from University of Chicago Law School

[Ashutosh, "SEPARATE BUT EQUAL?: THE SUPREME COURT, THE LOWER FEDERAL COURTS, AND THE NATURE OF THE "JUDICIAL POWER"," 80 B.U.L. Rev. 967, October, Lexis]

Of course, none of these checks resemble the blunt limits on power available against the political branches. It should be noted in this regard that the changes that I propose here do not require any tangible modifications to existing procedures and doctrines (other than, perhaps, overruling the doctrine of Rodriguez de Quijas and Agostini). n247 They instead require some evolution in the institutional culture and attitudes of the federal judiciary, a far more subtle and difficult thing. At bottom, I suggest that the Court would do a better job, and would better serve its constitutional role, if it treated the lower federal courts as collaborators, rather than as employees. Of course, all collaborators are not created equal, and nothing I propose would deny the Court the power to have the final word on cases or issues; but it would change the extent to which the Court tries to micromanage the activities of the lower courts. Realistically, therefore, the possibility of such change is probably slight because the Court is composed of human beings, and human beings are notoriously unwilling to yield power for the sake of abstract benefits. It may also be in vain to hope for such limited resistance from the lower courts. Such a reaction against the leaders of their own branch of government would be difficult, especially because as noted the Supreme Court seems unlikely to cooperate in a project which would curtail its own power. Any assertion of independence on the part of the lower judiciary will necessarily be in the face of opposition, active resistance, and criticism by the Supreme Court, a force which in truth most federal judges are likely to find irresistible. And in fact, lower courts show only a limited willingness to express their dissatisfaction, or to try and nudge [\*1014] the Court towards a more collaborative approach. External pressure thus seems essential if reform is to proceed, but there is no obvious source for such pressure. Congress might possess the power to alter the relationships within the federal judiciary, including the nature and force of stare decisis (and thus overrule, at a minimum, the rule of Rodriguez de Quijas); n248 but it seems unlikely that Congress, or the President, would wish to get involved. And in truth, they probably should not, given this country's long and healthy tradition of judicial independence. Moreover, even if the Court is willing to contemplate a loss of power, such changes in the Court's culture and practices will take some time to become useful, because of the effects that the modern Court's approach of stripping independence and authority has had on the culture of the lower federal courts. Many if not most lower court judges no longer think of themselves as participants in the joint process of formulating legal rules, and the consequent loss of intellectual independence and curiosity makes those courts ill-suited to (and apparently uninterested in) the collaborative process which I espouse. None of this, however, is irreversible, and such resistance, if it were to emerge, would provide at least some check on the Court's power. That can only be an improvement on the current situation: a Court which faces essentially no external restraints on its power, and has largely abandoned any internal ones

### A2: Legitimacy DA/Links to Jud Cap

#### Lower court action boosts legitimacy

Denning and Reynolds 03

Assistant Professor of Law at Southern Illinois University AND Professor of Law at University of Tennessee [Brannon and Glen, "Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts" Arkansas Law Review, Lexis]

That complexity holds a number of lessons. One is that the way we teach constitutional law is simplistic: the way that Supreme Court opinions affect the system is far more complex and indeterminate than the casebooks suggest. That complexity exists in a variety of forms, but the way in which Supreme Court precedents do (or do not) percolate down through the lower courts is surely more important than the standard tale would make it seem. [n293](http://www.lexisnexis.com.proxy.lib.umich.edu/us/lnacademic/frame.do?tokenKey=rsh-20.973785.4109820046&target=results_DocumentContent&reloadEntirePage=true&rand=1245781268448&returnToKey=20_T6830345146&parent=docview" \l "n293) Another is that the lower courts simply are not living up to the general expectations we have had for them, in terms of thoughtfulness, fairness, and a willingness to give a hearing to litigants regardless of their stature or of the crimes of which they are accused. This failure is a serious one, not only for justice but for the very legitimacy of the system. [n294](http://www.lexisnexis.com.proxy.lib.umich.edu/us/lnacademic/frame.do?tokenKey=rsh-20.973785.4109820046&target=results_DocumentContent&reloadEntirePage=true&rand=1245781268448&returnToKey=20_T6830345146&parent=docview" \l "n294) We hope  [\*1311]  that our examination of this issue will spark greater concern and scrutiny in the future.

#### 4. Independent lower courts check Supreme Court power and lead to better decisions

Bhagwat 00 Professor of Law at University of California, JD from University of Chicago Law School

[Ashutosh, "SEPARATE BUT EQUAL?: THE SUPREME COURT, THE LOWER FEDERAL COURTS, AND THE NATURE OF THE "JUDICIAL POWER"," 80 B.U.L. Rev. 967, October, Lexis]

What does this have to do with the lower federal courts? If Congress and the President, with their vastly greater power and influence, cannot effectively check the Supreme Court, how can a district court judge in Iowa? Perhaps she cannot, or at least not much. But, the judges of the lower federal courts do enjoy one great advantage over Congress and the President - they are not elected. As a result, they are insulated from popular reaction, and indeed share some of the luster enjoyed by the Supreme Court because of their nonpolitical status. As to how the lower courts can check the Court, it is probably not thorough full-scale civil disobedience. Ultimately, the lower courts largely are, and will remain, the "messengers" and implementers of the Court's will. n246 However, a greater independence on the part of "inferior" federal judges, a greater willingness to think for themselves, to deviate from doctrine which does not make sense, and to try and impose doctrinal coherence on the Court's work, would in practice limit the Court's power to some extent. At a minimum, it would force the Court to focus more on reasons and on traditional legal analysis than on the raw exercise of power in reaching decisions and formulating doctrine. It might even lead the Court to take notice of the effects of, and difficulties in, implementing its decisions.

#### 5. Allowing rulings to percolate makes better Supreme Court decisions

Tiberi 93

law degrees from Columbia University Law School and the University of Pittsburgh

[Todd J, "SUPREME COURT DENIALS OF CERTIORARI IN CONFLICTS CASES: PERCOLATION OR PROCRASTINATION?," Spring, 54 U. Pitt. L. Rev. 861, Lexis]

The argument goes something like this: The more attorneys who have briefed and argued an issue, and the more judges who have decided it, the better will be the decision from the Supreme Court. This is so because numerous arguments will have been advanced, and judges will have either accepted or rejected them, all the while providing their reasons for doing so. Because the weaker arguments are weeded out during this legal Darwinism, the Court is left with only the stronger ones. Thus, after thorough percolation, the Supreme Court is prepared to reach the proper result because it then, and only then, enjoys the benefit of being apprised of the most salient arguments. The ultimate decision rendered therefore will be of such high quality that it is worth the wait. Percolationists, judges and academics alike, view conflicts among the circuits as a generally positive occurrence. n13 Justice Stevens has expressed [\*865] his view that toleration of inter-circuit conflicts sometimes has virtue: It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretation of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result. n14 In proposing a narrower scope of certiorari jurisdiction, Judge Posner has suggested that where a conflict does not subject the same person to different application of the same law, the Court should wait until most circuits have decided the issue before granting certiorari. n15 After a majority of circuits have spoken to the issue, the Court still should not intervene, in Judge Posner's view, unless the circuits are "closely divided." n16 According to the judge, a conflict-provoking issue is more likely to be answered "correctly" after "different sets of judges" have examined the problem. n17 While acknowledging that some conflicts demand immediate resolution, Judge Wallace of the Ninth Circuit has written that conflicts contribute to the "quality of federal justice" by informing the Supreme Court of "differing perspectives" on the interpretation of federal statutes. n18 These various perspectives allow the Court to formulate judgments that are "clearer and better reasoned." n19 Judge Wallace, like many percolationists, invokes a laboratory metaphor to capture his thoughts on the theory when he equates courtrooms to laboratories [\*866] where issues become better defined and novel theories are tried. n20 To him, the end products from the conflicting circuits provide the necessary "raw materials" from which the Court is to create "better judgments." n21 In light of the relative finality of Supreme Court decisions, Professor Hellman has suggested that sometimes the more sensible course for the Court is to wait for some circuit decisions to be "tested in the crucible of litigation." n22 Similarly, Professors Estreicher and Sexton share the laboratory perception of Supreme Court decisionmaking. While claiming that "[o]ur system is already committed in substantial measure to the principle of percolation," they too equate lower courts to laboratories where the law is experimented upon. n23 The results of these experiments are to provide the Court with the needed data to "fashion sound binding law." n24

## Case

### 2NC Ext Prefer ev

#### Law and Versteegs study was awesome

Choudry 12

December, 2012¶ New York University Law Review¶ 87 N.Y.U.L. Rev. 2078¶ LENGTH: 3818 words¶ RESPONSE & REJOINDER: METHOD IN COMPARATIVE CONSTITUTIONAL LAW: A COMMENT ON LAW AND VERSTEEG¶ NAME: Sujit Choudhry\*¶ BIO: \* Copyright © 2012 by Sujit Choudhry, Cecelia Goetz Professor of Law, Faculty Director, Center for Constitutional Transitions (www.constitutionaltransitions.org), New York University School of Law. I thank the editors of the New York University Law Review for inviting me to contribute this comment, David Law and Mila Versteeg for sharing a portion of their dataset with me, and Aqeel Noorali for excellent research assistance.

One of the great values of Law and Versteeg's article is that it will substantially assist in the identification of a much broader set of cases for study. Because it provides a measure of divergence and convergence with respect to the generic bill of rights across all constitutions in a sixty-year time frame, it provides small-n researchers with a rich source of data from which to select jurisdictions for closer examination through traditional case study methods.¶ For single country case studies, the dataset identifies potential candidates for further study because of radical change across time (from divergence to convergence or vice versa), because a country is on the vanguard of convergence, or because a country persists in its divergence in the face of growing convergence. For small-n case studies, the dataset permits researchers to isolate sets of cases that persist in divergence but where one remains divergent while others converge. Likewise, it assists researchers in identifying sets of cases where countries have persisted for many years in being differently situated vis-a-vis the generic bill of rights (one divergent, others convergent) and the change of the outlier country to a stance of convergence. Of course, the identification of case studies is merely the starting point of small-n studies. The elucidation of causal mechanisms is required through historical institutionalist methods.¶ Indeed, Law and Versteeg may wish to consider turning to such methods as they move forward with their exciting research agenda. As they note, there are many possible reasons for constitutional convergence toward the generic bill of rights. Their large-n work does not itself differentiate among them. The most basic question is why convergence happens. Toward the end of their article, Law and Versteeg provocatively suggest that "the development of global constitutionalism is a polycentric and multipolar process that is not dominated by any particular country. The result might be likened to a [\*2087] global language of constitutional rights, but one that has been collectively forged rather than modeled upon a specific constitution." n26 Similarity does not necessarily connote influence - or the migration of constitutional ideas - although it is consistent with this practice. Single country case studies and small-n case studies will enable them, and other scholars, to substantiate this account.¶ In sum, there is a tight interdependence between quantitative and qualitative studies of comparative constitutional law. Quantitative studies, such as Law and Versteeg's, enhance the selection of cases for qualitative work. Qualitative studies supply the evidence to differentiate among the causal mechanisms suggested by quantitative studies. Given the paucity of high quality quantitative work, Law and Versteeg's article represents an important contribution to the literature.

#### Democracy does not prevent war

Ackerman ‘6

(Spencer, editor New Republic, “Against Democracy,” The American Prospect, 8-29,

http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=11933)

For American interests, it gets worse. During the Bush era, the United States has seen that democratic processes in Iraq, Lebanon, Palestine, and Egypt have strengthened precisely the religious extremists that Hamid thinks they will ultimately defeat. But the United States is insane to promote democratic elections in which the victors proclaim eschatological hostility to it. Hamid blithely writes that "over the long-term, the responsibilities of government are likely to privilege pragmatism over ideology, practicality over posturing," but democracies, both advanced and maturing, are always vulnerable to demagoguery, and are particularly vulnerable when faced with security threats like those likely to plague the Middle East for the foreseeable future. (India, Israel, Turkey, and the United States -- all democracies under threat -- have grown more reactionary in recent decades, not less.) Hamid concedes that in the "short term," the rise of radical Islamists will be "frustrating," but "in the right conditions and with sustained international involvement," those Islamists will moderate themselves. The idea of democratic failure -- the idea that democracy in certain conditions cannot meet social expectations, leading to its collapse -- never occurs to him, despite three and a half years of the Iraq War. Even more perversely, Hamid argues that living with such "frustrations" is the mark of a progressive foreign policy. For all its tough-minded posturing, this is doughfaced liberalism at its worst: the implicit assumption that good intentions excuse actual, real-world consequences. To take the example of Iraq, the rise of democracy is directly correlative with marauding death squads. Among the most powerful figures in democratic Iraq is Moqtada al-Sadr, whose followers serve in parliament, run ministries, and slaughter men in barber shops for insufficient beard growth. Recently, Iraq's most famous archeologist, Donny George, fled to Syria when Sadr's thugs at the Ministry of Antiquities had raised an eyebrow at George's interest in Iraq's pre-Islamic historical treasures. If he returns to democratic Iraq, he will surely be murdered for crimes against Islam. Hamid's argument entails telling George that if he survives enough elections, Sadr's men will eventually change their minds. This is liberalism?

#### Long timeframe for solvency—transition to functional democracy takes centuries

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)

This approach has triggered criticism even from close allies of the United States. As Sir Michael Howard, president emeritus of the Institute of International Strategic Studies, has pointed out, "The Enlightenment may have liberated us from traditional feudal and religious constraints, but it has taken us nearly two centuries, including two world wars and God knows how many revolutions, to adjust to our new 'freedoms.' There is no reason to suppose that the peoples of the Middle East can do any better than we did." [3](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#fnote3) It is neither realistic nor practical to presuppose that democracy promotion, especially implemented through coercive regime change, would result in a functional democracy in a relatively short period of time. Furthermore, failed attempts at democracy promotion would boost China's "non-interference" approach, and thus lead to further deterioration of U.S. leadership.

#### Democracy doesn’t check war—actually amplifies nationalist tensions—Egypt proves

Joshua Goldstein September 2011 (Writer for Foriegn Policy, "Think Again: War--World Peace Could Be Closer Than You Think"http://www.foreignpolicy.com/articles/2011/08/15/think\_again\_war?page=full)

"A More Democratic World Will Be a More Peaceful One."

Not necessarily. The well-worn observation that real democracies almost never fight each other is historically correct, but it's also true that democracies have always been perfectly willing to fight non-democracies. In fact, democracy can heighten conflict by amplifying ethnic and nationalist forces, pushing leaders to appease belligerent sentiment in order to stay in power. Thomas Paine and Immanuel Kant both believed that selfish autocrats caused wars, whereas the common people, who bear the costs, would be loath to fight. But try telling that to the leaders of authoritarian China, who are struggling to hold in check, not inflame, a popular undercurrent of nationalism against Japanese and American historical enemies. Public opinion in tentatively democratic Egypt is far more hostile toward Israel than the authoritarian government of Hosni Mubarak ever was (though being hostile and actually going to war are quite different things).

### Torture

#### Movements ev

#### Aff can’t solve the turn - doesn’t reverse perception of indefinite detention

Drew 2009

(Anne Marie Drew, English instructor at US Naval Academy, visited Guantanamo Bay detention facilities, September 11, 2009, “Closing Guantanamo will be a mistake,” Christian Science Monitor, <http://www.csmonitor.com/Commentary/Opinion/2009/0911/p09s01-coop.html>)

The general perception of the detention camps is erroneous. What I saw was a state-of-the-art, climate-controlled, clean facility.¶ President Obama is determined to close these camps by winter. Gitmo, he said in May, "has weakened American national security. It is a rallying cry for our enemies.... By any measure, the costs of keeping it open far exceed the complications involved in closing it."¶ It will be wrong to close these camps, in what can only be a symbolic gesture, simply for the sake of closing them.¶ Whatever moral authority America has lost by its treatment of these detainees will not be regained by moving them. Whatever mistakes we made will not be erased. Closing Gitmo will not make us safer.¶ Many people believe that the executive order Mr. Obama issued just two days after taking office means shutting down torture chambers and freeing innocent detainees, held for years without due process.¶ It does no such thing.¶ The problems, real or imagined, will simply move if the camps close.¶ There is no geographic cure for Gitmo.¶ The executive order does not release the suspects. If they are not freed or deported, then they will be transferred. But moving them to another prison somewhere in the United States seems pointless at best and dangerous at worst.

#### No torture at Guantanamo – those alleging it are lying

Abboud 2006

(Alexandra, Washington File Staff Writer, 3/6/2006, US Embassy, “There Is No Torture at Guantanamo Bay, Rumsfeld Says,” <http://iipdigital.usembassy.gov/st/english/article/2006/03/20060303154832maduobba0.7438776.html#axzz2d6HYPDnH>, accessed 8/26/2013, BS)

Washington -- Defense Secretary Donald Rumsfeld said that a draft U.N. report on the Guantanamo Bay Naval Base in Cuba that alleges torture of detainees contains no firsthand accounts of the detainees’ conditions. Prior to capture, prisoners are “taught to allege that they have been tortured,” Rumsfeld said. “We know that torture is not occurring there.” Those who conducted the 18-month investigation reached their conclusions by interviewing former detainees, their families and lawyers, according to the Defense Department, but the investigators did not travel to the detention facility in Guantanamo Bay. (See related article.) In a March 2 radio interview, Rumsfeld said hundreds of American members of Congress and journalists have had access to the detention center since it opened in 2002 to hold prisoners captured in the global war on terrorism. “The International Committee of the Red Cross was in residence there for a period of years,” he added. “We see nothing, absolutely nothing from all of those various people who visit Guantanamo that even begins to represent the kind of information that these two or three rapporteurs who have never visited the place put out,” the secretary said. In a February 28 digital videoconference with the London-based al-Hayat newspaper, Alan Liotta, principal director for detainee affairs at the Defense Department, said there are many misconceptions about the detention center at Guantanamo Bay, but, in reality, the detention center “is extremely transparent.”

#### No torture at Guantanamo – the detainees are in better condition that the guards

Indy Channel 2005

(The Indy Channel, Indiana News, 7/20/2005, “Marine Investigator: No Torture At Guantanamo,” <http://www.theindychannel.com/news/marine-investigator-no-torture-at-guantanamo>, accessed 8/26/2013, BS)

An Indiana Marine who investigated allegations of abuse at a U.S. prison for terror suspects dismisses claims that detainees are being tortured. Lt. Col. Paul Nawa Lt. Col. Paul Nawa, a member of the Marine Corps Reserve, said prisoners at the Guantanamo Bay, Cuba, facility are being treated well. "If anything happens, it's investigated. I know because I was one of the investigators," Nawa told RTV6's Jennifer Carmack on Wednesday. Nawa recently returned to Indiana after coming out of retirement to serve on an administrative review board at Guantanamo Bay for five months. One of the board's tasks was to determine whether detainees are dangerous and whether they should be released. Human rights groups have called for the closure of the detention center, claiming that interrogators have abused and tortured inmates. The White House has said the center will remain open to house what it calls hardcore terrorists. Nawa said detainees are kept in clean facilities and are afforded many of the rights of prisoners of war, even though the U.S. doesn't classify them as such. Asked if detainees are being tortured in any way, Nawa said no. According to the Indianapolis resident, the guards are the ones who face abuse. "They have things thrown at them. I won't go into what they have thrown at them, and they face a lot of abuse," the 35-year military veteran said.

# 1NR

## CSPER

### 2NC Overview

#### It’s a conflict multiplier – triggers all their impacts and make war inevitable

Ginsborg et al. 12

Mikkel Funder, Signe Marie Cold-Ravnkilde and Ida Peters Ginsborg - in collaboration with Nanna Callisen Bang, Denmark Institute for International Studies, 2012, "ADDRESSING CLIMATE CHANGE AND CONFLICT IN DEVELOPMENT COOPERATION EXPERIENCES FROM NATURAL RESOURCE MANAGEMENT" [www.diis.dk/graphics/Publications/Reports2012/RP2012-04-Addressing-climate-change\_web.jpg.pdf](http://www.diis.dk/graphics/Publications/Reports2012/RP2012-04-Addressing-climate-change_web.jpg.pdf)

2.2 Climate change as a conﬂict multiplier¶ **Climate change is therefore best seen as a** conﬂict multiplier**, rather than as a major direct cause of conﬂict in itself. Climate change may aggravate and extend the scope of existing conﬂicts, or trigger underlying and latent conﬂicts to break out into the open**. ¶ Previous studies have identiﬁed a number of areas in which **climate change may contribute to a worsening of conﬂicts** (Brown & Crawford 2009). These include:¶ • Land and water access**. Access and use rights to land are a key feature in most situations where climate change has contributed to natural resource conﬂicts so far. Climate change can intensify existing conﬂicts over land, as land becomes less fertile or is ﬂooded, or if existing resource sharing arrangements between diﬀerent users and land use practices are disrupted. In some parts of Africa, climate change may lead to a decline in available water resources of some 10–20% by the end of the century** (op cit.). **This may intensify existing competition for access to water at intra-state and/or subnational levels.** ¶ • Food security**. Reduced rainfall and rising sea levels may lead to a decline in agricultural production and a substantial loss of arable land in some parts of Africa. Reduced yields for own consumption and increasing domestic food prices may in some cases lead to civil unrest, and competition over access to land may intensify**.¶ • Migration and displacement. In some cases, **increased scarcity of and competition over access to water and arable land may contribute to internal or regional migration, and disasters such as ﬂoods may lead to temporary or long-term local displacement. This may in turn strengthen conﬂicts between host societies/communities and migrants looking for access to new land and resources**. ¶ • Increasing inequality and injustice. Through processes such as the above, **some population groups may be particularly hard hit, leading to increased inequality and a sense of injustice. This may intensify existing grievances and disputes between natural resource users and/or between resource users and outside actors such as governments – thereby** increasing the risk and intensity of conﬂict**.**

#### Causes hydrogen sulfide poisoning – causes extinction

**Ward 10**

(Peter, Professor of Biology and Earth and Space Sciences at the University of Washington, Paleontologist and NASA Astrobiologist, Fellow at the California Academy of Sciences, The Flooded Earth: Our Future in a World Without Ice Caps, June 29, 2010)

In the rest of this chapter I will support a contention that within several millennia (or less) the planet will see a changeover of the oceans from their current “mixed” states to something much different and dire. Oceans will become stratified by their oxygen content and temperature, with warm, oxygen-free water lining the ocean basins. **Stratified oceans** like this in the past (and they were present for most of Earth’s history) **have always been preludes to biotic catastrophe**. Because the continents were in such different positions at that time, models we use today to understand ocean current systems are still crude when it comes to analyzing the ancient oceans, such as those of **the Devonian or Permian Periods**. Both times **witnessed major mass extinctions**, and **these extinctions were** somehow **tied to events in the sea.** Yet catastrophic as it was, the event that turned the Canning Coral Reef of Devonian age into the Canning Microbial Reef featured at the start of this chapter was tame compared to that ending the 300 million- to 251 million-year-old Permian Period, and for this reason alone the Permian ocean and its fate have been far more studied than the Devonian. But there is another reason to concentrate on the Permian **mass extinction**: it **took place on a world with a climate more similar to that of today** than anytime in the Devonian. Even more important, **it was a world with ice sheets at the poles**, something the more tropical Devonian Period may never have witnessed. For much of the Permian Period, the Earth, as it does today, had abundant ice caps at both poles, and there were large-scale continental glaciations up until at least 270 million years ago, and perhaps even later.4 **But** from then until the end of the Permian, **the planet rapidly warmed**, the **ice caps disappeared**, and the **deep ocean bottoms filled with great volumes of warm**, virtually **oxygen-free seawater**. **The trigger for disaster was** a short-term but **massive infusion of** carbon dioxide and other **greenhouse gases into the atmosphere** at the end of the Permian from the spectacular lava outpourings over an appreciable portion of what would become northern Asia. The lava, now ancient but still in place, is called the “Siberian Traps,” the latter term coming from the Scandinavian for lava flows. The great volcanic event was but the start of things, and led to changes in oceanography. **The** ultimate **kill mechanism seems to have been a lethal combination of rising temperature**, **diminishing oxygen**, **and influx into water** and air **of the highly poisonous compound hydrogen sulfide**. The cruel irony is that this latter poison was itself produced by life, not by the volcanoes. The bottom line is that **life produced the ultimate killer in this and surely other ancient mass extinctions**. This finding was one that spurred me to propose the Medea Hypothesis, and a book of the same name.5 **Hydrogen sulfide poisoning might** indeed **be the worst biological effect of global warming**. **There is no reason** that **such an event cannot happen again**, **given short-term** global **warming**. And because of the way the sun ages, it may be that such events will be ever easier to start than during the deep past. How does the sun get involved in such nasty business as mass extinction? Unlike a campfire that burns down to embers, any star gets ever hotter when it is on the “main sequence,” which is simply a term used to described the normal aging of a star—something like the progression we all go through as we age. But new work by Jeff Kiehl of the University of Colorado shows that because the sun keeps getting brighter, amounts of CO2 that in the past would not have triggered the process result in stagnant oceans filled with H2S-producing microbes. His novel approach was to estimate the global temperature rise to be expected from carbon dioxide levels added to the energy hitting the earth from the sun. Too often we refer to the greenhouse effect as simply a product of the gases. But it is sunlight that actually produces the heat, and that amount of energy hitting the earth keeps increasing. He then compared those to past times of mass extinctions. The surprise is that a CO2 level of 1,000 ppm would—with our current solar radiation—make our world the second hottest in Earth history—when the five hottest were each associated with mass extinction. In the deep history of our planet, there have been at least five short intervals in which the majority of living species suddenly went extinct. Biologists are used to thinking about how environmental pressures slowly choose the organisms most fit for survival through natural selection, shaping life on Earth like an artist sculpting clay. However, mass extinctions are drastic examples of natural selection at its most ruthless, killing vast numbers of species at one time in a way hardly typical of evolution. In the 1980s, Nobel Prize-winning physicist Luis Alvarez, and his son Walter Alvarez, first hypothesized that the impact of comets or asteroids caused the mass extinctions of the past.6 Most scientists slowly come to accept this theory of extinction, further supported by the discovery of a great scar in the earth—an impact crater—off the coast of Mexico that dates to around the time the dinosaurs went extinct. An asteroid probably did kill off the dinosaurs, but the causes of the remaining four mass extinctions are still obscured beneath the accumulated effects of hundreds of millions of years, and no one has found any credible evidence of impact craters. Rather than comets and asteroids, **it now appears that short-term global warming was the culprit for** the **four** other **mass extinctions**. I detailed the workings of these extinctions first in a 1996 Discover magazine article,7 then in an October 2006 Scientific American article, and finally in my 2007 book, Under a Green Sky.8 In each I considered whether such events could happen again. In my mind, **such extinctions constitute the worst that could happen to life and the earth** as a result of short-term global warming. But before we get to that, let us look at the workings of these past events. The **evidence** at hand **links** the **mass extinctions with a changeover in the ocean from oxygenated to anoxic bottom waters**. The source of this was a change in where bottom waters are formed. It appears that in such events, the source of our earth’s deep water shifted from the high latitudes to lower latitudes, and the kind of water making it to the ocean bottoms was different as well: it changed from cold, oxygenated water to warm water containing less oxygen. **The result was the extinction of deep-water organisms**. Thus a greenhouse extinction is a product of a changeover of the conveyor-belt current systems found on Earth any time there is a marked difference in temperatures between the tropics and the polar regions. Let us summarize the steps that make greenhouse extinction happen. First, **the world warms over short intervals due to** a sudden increase in **carbon dioxide and methane**, caused initially by the formation of vast volcanic provinces called flood basalts. **The warmer world affects** the **ocean circulation** systems **and disrupts the position of the conveyor currents**. Bottom waters begin to have warm, low-oxygen water dumped into them. The **warming continues**, **and the decrease of equator-to-pole temperature differences brings ocean winds and surface currents to a near standstill**. The **mixing of oxygenated surface waters with** the **deeper and volumetrically increasing low-oxygen bottom waters lessens**, **causing** ever-shallower **water to change from oxygenated to anoxic**. Finally, **the bottom water exists in depths where light can penetrate**, **and the combination of low oxygen and light allows green sulfur bacteria to expand** in numbers, **filling the low-oxygen shallows**. The **bacteria produce toxic amounts of H2S**, **with** the flux of **this gas into the atmosphere occurring at as much as 2,000 times today’s rates**. The **gas rises into the high atmosphere**, **where it breaks down the ozone layer**. The **subsequent increase in u**ltra**v**iolet **radiation** from the sun **kills much of the photosynthetic** green **plant phytoplankton**. On its way up into the sky, the **hydrogen sulfide also kills** some **plant and animal life**, and **the combination of** high **heat and hydrogen sulfide creates a mass extinction on land.**9 Could this happen again? No, says one of the experts who write the RealClimate.org Web site, Gavin Schmidt, who, it turns out, works under Jim Hansen at the NASA Goddard Space Flight Center near Washington, DC. I disagreed and challenged him to an online debate. He refused, saying that the environmental situation is going to be bad enough without resorting to creating a scenario for mass extinction. But special pleading has no place in science. Could it be that global warming could lead to the extinction of humanity? That prospect cannot be discounted. To pursue this question, let us look at what might be the most crucial of all systems maintaining habitability on Planet Earth: the thermohaline current systems, sometimes called the conveyor currents.

### Link Turns Case – President Specific

#### President will ignore controversial court decision – kills court power and enforcement

Benson, J.D., University of California, Berkeley, School of Law, ‘9

[Josh, “The Guantanamo Game: A Public Choice Perspective on Judicial Review in Wartime”, California Law Review, Vol. 97,]

First, Howell notes that the judiciary can issue decisions, but it cannot¶ enforce them without the executive. Thus, the Court is reluctant to reach a¶ decision that the president might ignore-which could severely limit the¶ institutional power of the Court. Howell draws on several studies (and builds¶ his own) to suggest that, as a result, the Court rarely overturns unilateral¶ presidential actions (which also explains why d, the parameter capturing the¶ president's unilateral power, is quite large vis-A-vis the judiciary).55¶ Second, the president has more latitude in certain policy areas, such as¶ national security, where the courts are reluctant to confront the president.¶ Throughout history, courts have avoided direct conflicts with a wartime¶ president on foreign affairs.56 I consider this phenomenon-and how the¶ Supreme Court may have finally upended it-in Part IV.¶ Third, the Supreme Court has developed several techniques of¶ constitutional and statutory interpretation to enshrine such deference: the¶ political question doctrine, the constitutional avoidance canon, the clear¶ statement rule, among others. Howell argues that only when Congress or¶ special interest groups oppose the president on a salient public issue does the¶ Court even consider intervening. 57 In general, the Supreme Court gives the¶ president a wide berth to move policy-again, subject to the limitations noted¶ in this Comment.

### Link Turns Case

#### 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

### Uniqueness Ext

#### Basis of DC Circuit Court ruling means CSAPR will be upheld

Bayne 7/19/13

(Brian Bayne “Supreme Court to Review EPA’s Cross State Air Pollution Rule” July 19, 2013 <http://www.legislationandpolicy.com/933/supreme-court-to-review-epas-cross-state-air-pollution-rule/>, TSW)

When the US Supreme Court hears this case next session I believe the correct ruling is to reverse the decision of the D.C. Circuit Court and uphold CSAPR. The decision should be reversed because the petitioners that challenged CSAPR did not have standing to challenge the rule. The Clean Air Act limits the time period to file for judicial review of an EPA regulation to 60 days. While the petitioners did file a complaint within 60 days of CSAPR being promulgated, this was still too late to challenge the EPA’s decision to create implementation plans for the state. The proper time to file a complaint would have been within 60 days of the EPA announcing that the states failed to create adequate state implementation plans. The Clean Air Act also limits judicial review to issues that were raised with reasonable specificity during the public comment period. In the case at hand, industry groups did not raise the issue that the emission reductions were too great and therefore waived their ability to raise that complaint in judicial review. Because the petitioners did not properly bring their complaint before the court, the Supreme Court should reverse the D.C. Circuit’s decision and uphold CSAPR.

#### Supreme Court is taking up the case to reverse the ruling

Bastasch 6/24/13

(Michael Bastasch “Supreme Court may revive economy-crushing EPA rule” 11:52 PM 06/24/2013 <http://dailycaller.com/2013/06/24/supreme-court-may-revive-economy-crushing-epa-rule/>, TSW)

The Supreme Court may revive a costly Environmental Protection Agency coal-fired power plant emissions rule that was struck down by courts last year.¶ The controversial rule was criticized as one of the costliest EPA regulations ever issued under the Clean Air Act.¶ The court could revive the Cross-State Air Pollution Rule, or CSAPR, which was stuck down by a federal court for going beyond the EPA’s legal authority under the Clean Air Act.¶ “In this case, however, we conclude that EPA has transgressed statutory boundaries,” stated the opinion by Circuit Judge Brett Kavanaugh in 2012. “Therefore, the rule must be vacated.”¶ CSAPR would have required sharp reductions in sulfur dioxide and nitrogen oxide emissions from power plants in 28 eastern states, including coal-fired and natural gas-fired plants — by one estimate, costing $853 million annually.¶ “The U.S. Supreme Court is likely taking this case in order to reverse the D.C. Circuit panel’s decision that is contrary to law and would further delay long-needed clean air standards necessary to protect our public health,” Howard Lerner, executive director of the Environmental Law and Policy Center, said a statement.¶ The Obama administration is looking to have the policy reinstated, but 14 states, led by Texas; several power companies; and the United Mine Workers of America urged the court not to take up the case.¶ A study done last year by the Institute for Energy Research found that CSAPR and another costly EPA rule — Mercury Air Toxics Standards — would shutter more than 10 percent of the country’s coal-fired power generation.¶ “We believe that the Supreme Court will uphold the EPA’s scientific and technical expertise in moving forward to clean up the air we breathe, reduce asthma and protect public health, especially for children and the elderly,” Lerner added.¶ According to the EPA the rule would prevent up to 34,000 premature deaths a year as well as generate up to $280 billion in economic benefits.

### A2: Court Not Motivated By Capital

#### 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

#### 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."**

#### Judicial restrictions on rendition and detention are controversial and the Supreme Court has tried to avoid ruling on these cases

**Abrams 06**

[Norman, Chancellor of UCLA Law; Nexis, mg]

A selection of recent legal developments is examined here, namely: recent US Supreme Court decisions involving habeas corpus lawsuits brought by persons who have been detained in the government′s war against terror; issues arising out of the renewal of provisions of the USA PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act that had been scheduled to sunset on 31 December 2005; a new statute, the Detainee Treatment Act (DTA) of 2005, and its effect both on detainee lawsuits and on the use of torture in interrogations; **the controversy and legal issues arising out of** the disclosure of NSA eavesdropping on international calls emanating from the United States and a related disclosure that certain telephone companies have turned over a database of millions of telephone calls to the NSA; **the reported practice of extraordinary rendition of terror suspects** for interrogation in foreign countries; and another new statute, the Military Commissions Act (MCA) of 2006, which legislates regarding the procedures to be used before military commissions in the prosecution of aliens deemed unlawful enemy combatants and accused of war crimes.¶ ¶ A. Judicial Review of Executive Action in Terrorism Matters: the US Supreme Court¶ In 2004, n3 the Supreme Court reviewed three significant cases growing out of the detention of persons suspected of involvement in terrorist organizations and activities. One of the cases tested the right of the detainees at Guantánamo, most of whom had been captured in the fighting against Al Qaeda and Taliban in Afghanistan, to obtain access to US courts. n4 The second involved issues arising out of the detention of a person who, having been captured in Afghanistan and originally detained at Guantánamo as an enemy combatant, was discovered to have US citizenship, and was moved to military custody in Virginia. n5 The third was a US citizen who was arrested in Chicago, Illinois, initially as a material witness in a terrorist plot to explode a radioactive bomb. Shortly thereafter, he was declared an enemy combatant by the President and transferred from civilian to military custody in South Carolina. n6 In all three of these 2004 cases brought by detainees, the Supreme Court handed down decisions that either avoided reaching the constitutional issues raised by the plaintiffs or only decided a very limited version of those issues.¶ In Rasul v. Bush, the Court issued a very limited though important ruling - that US courts have jurisdiction under the US habeas corpus statute to consider challenges to the legality of the prisoners captured abroad and incarcerated at the Guantánamo Bay Naval Base in Cuba. The Court was careful, however, to limit its ruling to ′only whether the federal courts have jurisdiction ..., and not to address the merits of petitioners′ claims′. So it was possible for a lower court, subsequently considering the implications of the Supreme Court′s decision in Rasul, to conclude on the merits of claims by Guantánamo prisoners: ′that no viable legal theory exists by which it could issue a writ of habeas corpus ...′. n7¶ In Hamdi v. Rumsfeld, a plurality opinion joined in by four justices of the nine member Court arguably rendered the most significant of the decisions in the three cases, but here too, the most important of the issues that might have been considered was not addressed. The plurality ruled: (i) that detention in the United States of a US citizen seized on the battlefield in Afghanistan and incarcerated as an enemy combatant was authorized by prior action by the legislature - a Congressional joint resolution, Authorizing the Use of Military Force (AUMF), enacted in the immediate aftermath of the 9/11 terrorist attacks; and (ii) that due process required that the detainee be given a meaningful opportunity before a neutral decision-maker to test the factual basis for his detention.¶ What this opinion avoided deciding was a much larger and more significant question: whether Hamdi could be detained as long as the ′war on terror′ or the war against Al Qaeda continued. The plurality indicated that it did not have to reach that issue since: ′Active combat operations against Taliban fighters apparently are ongoing in Afghanistan ... The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants ... .′¶ The case that potentially presented the most challenging of the issues in the three cases was that of Jose Padilla. Could the President acting on the theory that a wartime basis had been created by the 9/11 attacks and the Congressional passage of the AUMF, authorize the indefinite detention by the military of an American citizen seized in the United States on the ground that he was an agent of the enemy - i.e. the Al Qaeda terror organization? **In this instance**, too, **the Court avoided having to decide a major constitutional question:** indeed, the Court majority avoided even reaching the merits of petitioner′s claim by rendering what was only a decision on the jurisdiction of the Court - that the wrong defendant had been sued in the wrong court. But that is not the end of the Padilla story. His attorney then properly re-filed the case, and in the district court won an order for his freedom. The government appealed, and the court of appeals reversed the lower court decision and ruled in favour of the government. n8 Padilla then filed a petition seeking review by the Supreme Court.¶ Before the high court had an opportunity to decide whether to review the case, the government announced that Padilla was being transferred back to civilian custody for a criminal trial on terrorism-related offences that allegedly occurred before he had been declared an enemy combatant. The government then moved to dismiss the petition seeking Supreme Court review, arguing that the issues presented by the case were moot since Padilla was no longer in military custody. Padilla responded that the issues in the case were not moot because the government might transfer him back into military custody at a later date. Subsequently, the petition for review was denied; the necessary four (of nine) votes needed to grant review not having been obtained; n9 only three justices voted to grant review. What is noteworthy, however, is the fact that three other justices (including the Chief Justice) who had voted to deny review wrote a separate opinion stating: ′Were the Government to seek to change the status or conditions of Padilla′s custody, [the district] ... court would be in a position to rule quickly ... Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court ... .′¶ These three justices thus put the government on notice that they might review the merits of the matter at some point in the future, if the government returned Padilla to military custody. A majority of the Court (these three plus those who had dissented from the denial of review) were moving closer to be willing to review the serious constitutional issues presented by the case. **The result** in the particular matter **was,** however, once again, **avoidance of consideration of the merits of the issues presented by the case**.¶ Of the numerous significant constitutional questions posed by various actions of the government as part of the war against terrorism, very few have as yet been resolved by the Supreme Court, although as the case law reviewed above reveals, there have been clear opportunities to do so. In these first three instances, avoidance has been self-imposed; it has occurred through decisions of the high court itself. In the second review of the Padilla case, it was **the executive action in shifting him into civilian custody** and the decision of the Supreme Court not to review the results of that decision that, in combination, **had the effect of avoiding a Supreme Court decision on the merits of his claims arising out of his detention as an enemy combatant.** n10

#### Kennedy thinks overruling expends political capital – he will preserve capital in future instances.

Rappaport, 04 (Law Professor – San Diego, Fall, 99 Nw. U.L. Rev. 369)

If these critiques of the Rehnquist Court are not accurate, then how should we portray the Court? The answer can be summarized in a sentence: It is the O'Connor Court or perhaps the O'Connor-Kennedy Court. The three conservatives cannot obtain a majority without both O'Connor and **Kennedy** joining the opinion, and therefore these justices **dominate the Court's decisions**. The O'Connor-Kennedy appellation fairly reflects the decisions and overall work product of the Court as I have been describing it. O'Connor [\*377] and **Kennedy are political moderates**, often leaning in a conservative direction, but sometimes following liberal views. In addition, **neither Justice appears willing to consistently impose his or her views on other political institutions.** One important element of O'Connor and **Kennedy's judicial behavior is that they appear especially concerned with protecting the Court's political capital.** Consequently**, these Justices would be unlikely to reach too many decisions that would lead to significant attacks on the Court.** Many of the decisions that have been criticized for excessive judicial supremacy are actually better understood as reflecting an undue concern with the Court's political capital. For example, Larry Kramer portrays United States v. Dickerson, which held unconstitutional a congressional statute that conflicted with Miranda v. Arizona, as reflecting a judicially supremacist view that took umbrage at, and refused to defer to, a constitutional interpretation by Congress. 46 In my view, however, Dickerson is better understood as deriving from the Court's unwillingness to be seen as overruling Miranda. Miranda arguably is the most famous decision in all of constitutional law. Citizens who know little else about constitutional law know from television and movies about "the right to remain silent." If the Rehnquist Court had overruled Miranda, it would have not only been criticized by elite opinion but also taken a highly visible action to eliminate "a constitutional right." As a result, Dickerson could have been used to suggest that the Court was demolishing the people's liberties generally. In this situation, the most politically sensitive "conservative" Justices - O'Connor, Kennedy, and Rehnquist - bolted. **A similar analysis applies to** Planned Parenthood v. **Casey, where the** joint **opinion of** Justices O'Connor, **Kennedy,** and Souter **refused to overrule** Roe v. Wade. 47 Kramer again views this case as involving undue judicial supremacy because **the joint opinion was concerned about the appearance created to its independence and credibility if it were to "overrule under fire ... a watershed decision**." 48 While I certainly do not want to defend the joint opinion on legal grounds, I see no reason to doubt that **it was motivated by its stated fear for the political capital of the Court** rather than disrespect for the public's constitutional views.

#### Controversial cases proves the link makes Kennedy the swing vote

Adler 2008

(Jonathan H., Professor of Law at Case Western Reserve University; JD, Yale University; Fall, “The Roberts Court at Age Three: Getting the Roberts Court Right: A Response to Chemerinsky,” 54 Wayne L. Rev. 983 – Kurr)

Insofar as the current court is more properly considered the Kennedy Court, this further undermines Dean Chemerinsky's claim of a particularly conservative court. While Justice Kennedy is a moderately conservative justice on most issues, he is anything but a reliable "conservative" vote on a wide-range of politically charged issues. Justice Kennedy frequently joins his more liberal colleagues in some of the most contentious and controversial cases, including those involving capital punishment, executive authority, standing, and sexual liberty. Indeed, Justice Kennedy's ideological separation from the next most conservative justices on the Court is one of the things that makes such an important median justice-what some would call a "super median." n188¶ Justice Kennedy is the least likely member of the Court to uphold government restrictions on speech. n189 Thus, he joined Justices Scalia and Thomas in urging the Court to overturn portions of the Court's 2003 decision in McConnell v. FEC n190 and void federal limits on political advertising adopted as part of the McCain-Feingold campaign finance reforms, rejecting the incremental approach adopted by Chief Justice Roberts that would have preserved the recent precedent. n191 He also joined Justice Alito's concurrence in Morse v. Frederick, n192 the "Bong hits 4 Jesus" case, to ensure the Court's ruling would not permit limits on political speech by students. n193 Justice Kennedy was also the only member of the Court to embrace the narrow holding of Flast v. Cohen, n194 rejecting the more conservative justices' desire to revisit (if not overturn) the holding that taxpayers could have standing to challenge legislative enactments that violate the First Amendment's Establishment Clause. n195¶ If Roberts and Alito are consistent minimalists, Justice Kennedy has a "maximalist" streak, making him the justice least likely to defer to the political branches and among the most likely to reconsider past precedents. Justice Kennedy joined Justice Stevens' opinion for the Court in Massachusetts v. EPA that expanded citizen standing to sue for [\*1011] the violation of environmental laws and effectively ordered the EPA to begin the federal regulation of greenhouse gas emissions. n196 As noted above, this decision worked a dramatic change in several doctrinal areas and could have profound economic and political implications. Kennedy also wrote the majority opinion in Leegin Creative Leather Products v. PSKS, Inc., n197 overturning a decades-old antitrust precedent, n198 and another in Panetti v. Quarterman adopting an innovative and expansive interpretation of federal law allowing convicted criminal defendants to file additional habeas corpus petitions. n199 It was also Justice Kennedy who embraced the consideration of international law and the Court's own moral compass to invalidate the death penalty for child rape in Kennedy v. Louisiana. n200

### A2: Winners Win

#### 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.

### AT: Case Outweighs

#### EPA enforcement of CAA key to the economy – study proves

Huffington Post 11

(Rob Perks, Director of NRDC, March 1, “EPA: Clean Air Act Saves Millions of Lives and Trillions of Dollars”, <http://www.huffingtonpost.com/rob-perks/epa-clean-air-act-saves-m_b_829924.html>)

According to EPA, in 2010 alone the reductions in fine particle and ozone pollution from the 1990 Clean Air Act amendments prevented more than:160,000 cases of early death; 130,000 heart attacks; 1.7 million asthma attacks; and 13 million lost work days. Things will get even better in 2020, as the agency estimates that in that year alone the Clean Air Act will save the lives of 230,000 Americans while preventing 200,000 heart attacks, 2.4 million asthma attacks, and 17 million lost work days.¶ NRDC's own analysis of the agency's data reveals even more staggering health gains, showing that more than 2.2 million lives will be saved between 2010 and 2020thanks to reductions in air pollution achieved by amendments to the Clean Air Act in 1990. But wait, the news gets even better. According to my colleague Christina Angelides, [NRDC's analysis](http://switchboard.nrdc.org/blogs/cangelides/the_1990_clean_air_act_will_sa.html) of EPA's report shows that the 1990 amendments will have saved 4.2 million lives and avoided millions of cases of pollution-related illness by 2020--including 43.8 million cases of asthma exacerbation, 3.3 million heart attacks, 2.1 million hospital admissions and 2.2 million emergency room visits, and 313 million lost work days.¶ Further [analysis](http://switchboard.nrdc.org/blogs/ljohnson/gains_from_clean_air_act_a_bul.html) by NRDC economist Laurie Johnson finds the benefits of the 1990 amendments to the Clean Air Act exceeding costs by a ratio of 26 to 1 in 2010, and 30 to 1 in 2020. She breaks it down like this:¶ In 2010 alone, we gained approximately1.3 trillion in public health and environmental benefits, for a cost of only 50 billion. That's a value worth more than 9% of GDP, for a cost of only .4% of GDP. For comparison, we spent approximately 5% of our GDP on the Defense budget in 2010.¶ The ratio of benefits to costs in 2010 is more than 26 to 1.¶ In 2020, we will have a staggering gain of approximately2 trillion in benefits, at a cost of65 billion. That's a value worth more than 14% of today's GDP, for an expenditure of only .46%. The ratio of benefits to cost is more than 30 to 1.¶