## 1NC

### 1

#### Interpretation- the aff cannot claim advantages not tied to the implementation of the plan

#### Key to predictable limits- infinite number of benefits the aff could claim to their speech act our discourse- impossible to get offense against.

#### Key to education- can’t clash with portions off the aff that aren’t predicated off of affirming the resolution- clash is key to two way education

#### Voting issue for fairness and education

**Discursive focus trades off with focus on structural change—it becomes a psychological substitute for action.**

**Kidner 2k**

Psychology professor, David, Nature and Psyche, p 66-7

Noam Chomsky has noted that if "it's too hard to deal with real problems,' some academics tend to "go off on wild goose chases that don't matter ... [or] get involved in academic cults that are very divorced from any reality and that provide a defense against dealing with the world as it actually is." An emphasis on language can serve this sort of defensive function; for the **study of discourse enables one to stand aside** from issues **and avoid** any **commitment to a cause** or ideal, **simply** presenting all sides of a debate and **pointing out** the **discursive strategies** involved. **As the physical world** appears to **fade into** mere **discourse**, so **it comes to seem less real** than the language used to describe it; and environmental **issues lose** the dimensions of **urgency** and tragedy and become instead the proving grounds for ideas and attitudes. Rather than walking in what Aldo Leopold described as a "world of wounds," the discursive theorist can study this world dispassionately, safely insulated from the emotional and ecological havoc that is taking place elsewhere. Like experimentalism, this is a schizoid stance that exemplifies rather than challenges the characteristic social pathology of our time; and it is one that supports Melanie Klein's thesis that **the internal object world can serve as a psychotic substitute for an external "real" world that is** either absent or **unsatisfying**." Ian Craib's description of **social constructionism as a "social psychosis"** therefore **seems** entirely **apt**. But what object relations theorists such as Klein fail to point out is the other side of this dialectic that withdrawing from the external world and substituting an internal world of words or fantasies, because of the actions that follow from this state of affairs, makes the former even less satisfying and more psychologically distant, so contributing to the vicious spiral that severs the "human" from the "natural" and abandons nature to industrialism.

### 2

#### Text: The United States Congress should eliminate the president’s war power authority to indefinitely detain.

#### CP solves better than the court – Constitutional authority

Bellia 2002

(Patricia Bellia, Professor of Law and Notre Dame Presidential Fellow, Spring 2002, “Executive Power in Youngstown’s Shadows,” Constitutional Commentary, Lexis)

We can in fact detect the seeds of this reluctance to give content to the President's constitutional powers in Justice Jackson's concurrence. Recall Justice Jackson's observation about his second category of executive action, where Congress is silent. Congressional silence, he wrote, may "invite[] measures on independent presidential responsibility." (269) The outcome of the dispute is likely to turn more on "contemporary imponderables" than "on abstract theories of law." (270) If Justice Jackson's statement was purely predictive, he was right. Justiciability doctrines require or permit courts to avoid resolving many significant separation of powers disputes. (271) But Justice Jackson's claim that powers "fluctuate" according to Congress's will also yields two related normative conclusions. The first is a prudential point that the task of policing the Executive should fall to Congress, not the courts, because the political branches are more likely to arrive at a narrow resolution that will preserve the Government's flexibility in later, unforeseen circumstances. This view seemed to animate Justice Powell's concurrence in the Supreme Court's decision to deny review in Goldwater v. Carter, (272) a dispute over President Carter's termination of the United States' mutual defense treaty with Taiwan. Justice Powell argued that judicial intervention was inappropriate because Congress and the President had not yet reached a "constitutional impasse." (273) The Senate had considered a resolution declaring that Senate approval is necessary for termination of a treaty but had taken no final action. (274) Justice Powell suggested that "[i]t cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so." (275) In other words, so long as Congress was silent, Justice Powell saw no role for the Court in resolving questions about the appropriate division of power. (276) The second normative point that flows from Justice Jackson's claim that powers "fluctuate" is one made by some executive primacy scholars--that because the Constitution confers authority over foreign affairs and national security to the political branches, there is a "risk that judicial intervention will itself be a serious violation of separation of powers." (277) Under this theory, judicial intervention would be inappropriate where Congress is silent, and may not even be appropriate when there is a conflict between congressional and presidential will. Four of the Justices who concurred in the decision not to grant review in Goldwater took this view. Because the Justices found no constitutional provision expressly governing the termination of treaties, the dispute presented a political question that "should be left for resolution by the Executive and Legislative Branches of the Government." (278) The concurring Justices observed that a court's resolution of a political question can create "disruption among the three coequal branches of government."

### 3

#### 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.

**only by strategically utilizing biopolitical tools like apocalyptic environmental imagery and policy reform can we resist biopower**

JL **Schatz. 2012**. Professor of English and Feminist Evolutionary Studies & Director of Debate at Binghamton University. The Importance of Apocalypse: The Value of End-Of-The-World Politics While Advancing Ecocriticism. Journal of Ecocriticism: A New Journal of Nature, Society and Literature. 4(2)

Anything is justified in the name of saving the environment because it is a question of our very survival. Here we find the logic of things like resource wars that strive to secure geopolitical interests in order to get others to clean up their acts in the name of environmental security4. **From this perspective the mobilizing potentials of apocalyptic imagery can influence populations for the purposes of war instead of positive ecological awareness.** **This fear causes such critics to refrain from utilizing descriptions of omnicide while simultaneously criticizing the most effective tactic activists on the frontlines have**. Luke and Darier’s Foucauldian approach to ecocriticism is not without value. They demonstrate how “discourse delineate[s] ... the terms of intelligibility whereby a particular ‘reality’ can be known and acted upon. When we speak of a discourse we may be referring to a specific group of texts, but also importantly to the social practices to which those texts are inextricably linked” (Doty, 1996: 6). Power continuously operates in both hegemonic and resistant ways regardless if we are monkey-wrenching, speaking at a political press conference, or using the written language of the academic. No matter the form, the way we articulate our discourse must construct reality in a precise way in order to render it intelligible for others to understand. Judith Butler notes that “the media’s evacuation of the human through the image has to be understood ... in terms of the broader problem that normative schemes of intelligibility establish what will and will not be human” (146)5. Once other animals and the environment are understood as less than human their lives become inconsequential compared to the short-term benefit of human civilization. To this ends—despite Luke and Darier’s fear of being coopted—**apocalyptic imagery can help** in two regards. First, it helps **people recognize the interconnection of the global ecology in order to appreciate the similarity between humans and other species**. Second, **it provides a self-motivating reason for people to change their behavior to avert extinction even when confronting those who refuse to recognize the intrinsic value of non-human animals**. In either case **omnicidal images change** both the **mindset and** the **actions** of those we encounter, thereby fostering new directions for humanity to evolve. **Any hesitancy to deploy images of apocalypse out of the risk of acting in a biopolitical manner ignores how any particular metaphor—apocalyptic or not—always risks getting coopted. It does not excuse inaction. Clearly hegemonic forces have already assumed control of determining environmental practices when one looks at the debates surrounding** offshore **drilling**, **climate change**, **and biodiversity** within the halls of Congress. “As this ideological quagmire worsens, urgent problems ... will go unsolved ... only to fester more ominously into the future. ... [E]cological crisis ... cannot be understood outside the larger social and global context ... of internationalized markets, finance, and communications” (Boggs 774). **If it weren’t for people such as Watson connecting things like whaling to the end of the world it wouldn’t get the needed coverage to enter into public discourse. It takes big news to make headlines and hold attention spans in the electronic age**. Sometimes it even takes a reality TV show on Animal Planet. As Luke reminds us, “Those who dominate the world exploit their positions to their advantage by defining how the world is known. Unless they also face resistance, questioning, and challenge from those who are dominated, they certainly will remain the dominant forces” (2003: 413). **Merely sitting back and theorizing over metaphorical deployments does a grave injustice to the gains activists are making on the ground. It** also **allows hegemonic institutions to continually define the debate over the environment by framing out any attempt for significant change, whether it be radical or reformist**. **Only by jumping on every opportunity for resistance can ecocriticism have the hopes of combatting the current ecological reality.** This means we must recognize that we cannot fully escape the master’s house since the surrounding environment always shapes any form of resistance. Therefore, **we ought to act even if we may get coopted**. As Foucault himself reminds us, “instead of radial ruptures more often one is dealing with mobile and transitory points of resistance, producing cleavages in a society that shift about[.] ... And **it is** doubtless **the strategic codification of these points of resistance that makes a revolution possible**, somewhat similar to the way in which the state relies on the institutional ntegration of power relationships. It is in this sphere of force relations that we must try to analyze the mechanisms of power” (96-­‐97). Here Foucault “asks us to think about resistance differently, as not anterior to power, but a component of it. If we take seriously these notions on the exercise and circulation of power, then we ... open ... up the field of possibility to talk about particular kinds of environmentalism” (Rutherford 296). This is not to say that all actions are resistant. Rather, the revolutionary actions that are truly resistant oftentimes appear mundane since it is more about altering the intelligibility that frames discussions around the environment than any specific policy change. Again, this is why people like Watson use one issue as a jumping off point to talk about wider politics of ecological awareness. Campaigns that look to the government or a single policy but for a moment, and then go on to challenge hegemonic interactions with the environment through other tactics, allows us to codify strategic points of resistance in numerous places at once. Again, this does not mean we must agree with every tactic. It does mean that even failed attempts are meaningful. For example, while PETA’s ad campaigns have drawn criticism for comparing factory farms to the Holocaust, and featuring naked women who’d rather go naked than wear fur, their importance extends beyond the ads alone6. By bringing the issues to the forefront they draw upon known metaphors and reframe the way people talk about animals despite their potentially anti-Semitic and misogynist underpinnings. Michael Hardt and Antonio Negri’s theorization of the multitude serves as an excellent illustration of how **utilizing the power of the master’s biopolitical tools can become powerful enough to deconstruct its house despite the risk of cooptation or backlash**. For them, the multitude is defined by the growing global force of people around the world who are linked together by their common struggles without being formally organized in a hierarchal way. While Hardt and Negri mostly talk about the multitude in relation to global capitalism, their understanding of the commons and analysis of resistance is useful for any ecocritic. They explain, [T]he multitude has matured to such an extent that it is becoming able, through its networks of communication and cooperation ... [and] its production of the common, to sustain an alternative democratic society on its own. ... Revolutionary politics must grasp, in the movement of the multitudes and through the accumulation of common and cooperative decisions, the moment of rupture ... that can create a new world. In the face of the destructive state of exception of biopower, then, there is also a constituent state of exception of democratic biopolitics[,] ... creating ... a new constitutive temporality. (357) Once one understands the world as interconnected—instead of constructed by different nationstates and single environments—conditions in one area of the globe couldn’t be conceptually severed from any other. In short, we’d all have a stake in the global commons. **Ecocritics can then utilize biopolitics to shape discourse and fight against governmental biopower by waking people up to the pressing need to inaugurate a new future for there to be any future. Influencing other people through argument and end-of-the-world tactics is not the same biopower of the state so long as it doesn’t singularize itself but for temporary moments.** Therefore, “it is not unreasonable to hope that in a biopolitical future (after the defeat of biopower) war will no longer be possible, and the intensity of the cooperation and communication among singularities ... will destroy its [very] possibility” (Hardt & Negri 347). In the context of capitalism, when wealth fails to trickle down it would be seen as a problem for the top since it would stand testament to their failure to equitably distribute wealth. In the context of environmentalism, not-in-my-backyard reasoning that displaces ecological destruction elsewhere would be exposed for the failure that it is. There is no backyard that is not one’s own. Ultimately, **images of planetary doom demonstrate how we are all interconnected and** in doing so **inaugurate a new world where multitudes, and not governments, guide the fate of the planet.**

### 4

#### Obama is prioritizing capture over drone strikes now

Corn 13

David Corn 13, Washington Bureau Chief at Mother Jones, 5/23/13, “Obama's Counterterrorism Speech: A Pivot Point on Drones and More?,” <http://www.motherjones.com/mojo/2013/05/obama-speech-drones-civil-liberties>

So Obama's speech Thursday on counterterrorism policies—which follows his administration's acknowledgment yesterday that it had killed four Americans (including Anwar al-Awlaki, an Al Qaeda leader in Yemen)—is a big deal, for with this address, Obama is self-restricting his use of drones and shifting control of them from the CIA to the military. And the president has approved making public the rules governing drone strikes.¶ The New York Times received the customary pre-speech leak and reported:¶ A new classified policy guidance signed by Mr. Obama will sharply curtail the instances when unmanned aircraft can be used to attack in places that are not overt war zones, countries like Pakistan, Yemen and Somalia. The rules will impose the same standard for strikes on foreign enemies now used only for American citizens deemed to be terrorists.¶ Lethal force will be used only against targets who pose "a continuing, imminent threat to Americans" and cannot feasibly be captured, Attorney General Eric H. Holder Jr. said in a letter to Congress, suggesting that threats to a partner like Afghanistan or Yemen alone would not be enough to justify being targeted.¶ These moves may not satisfy civil-liberties-minded critics on sthe right and the left. Obama is not declaring an end to indefinite detention or announcing the closing of Gitmo—though he is echoing his State of the Union vow to revive efforts to shut down that prison. Still, these moves would be unimaginable in the Bush years. Bush and Cheney essentially believed the commander in chief had unchallenged power during wartime, and the United States, as they saw it, remained at war against terrorism. Yet here is Obama subjecting the drone program to a more restrictive set of rules—and doing so publicly. This is very un-Cheney-like. (How soon before the ex-veep arises from his undisclosed location to accuse Obama of placing the nation at risk yet again?)¶ Despite Obama's embrace of certain Bush-Cheney practices and his robust use of drones, the president has tried since taking office to shift US foreign policy from a fixation on terrorism. During his first days in office, he shied away from using the "war on terrorism" phrase. And his national security advisers have long talked of Obama's desire to reorient US foreign policy toward challenges in the Pacific region. By handing responsibility for drone strikes to the military, Obama is helping CIA chief John Brennan, who would like to see his agency move out of the paramilitary business and devote more resources to its traditional tasks of intelligence gathering and analysis.¶ With this speech, Obama is not renouncing his administration's claim that it possesses the authority to kill an American overseas without full due process. The target, as Holder noted in that letter to Congress, must be a senior operational leader of Al Qaeda or an associated group who poses an "imminent threat of violent attack against the United States" and who cannot be captured, and Holder stated that foreign suspects now can only be targeted if they pose "a continuing, imminent threat to Americans." (Certainly, there will be debates over the meaning of "imminent," especially given that the Obama administration has previously used an elastic definition of imminence.) And Obama is not declaring an end to the dicey practice of indefinite detention or a conclusion to the fight against terrorism. **But the speech may well mark a** pivot point. Not shockingly, **Obama is attempting to find middle ground**, where there is more oversight and more restraint regarding activities that pose serious civil liberties and policy challenges. The McCainiacs of the world are likely to howl about any effort to place the effort to counter terrorism into a more balanced perspective. The civil libertarians will scoff at half measures. But Obama, at the least, is showing that he does ponder these difficult issues in a deliberative manner and is still attempting to steer the nation into a post-9/11 period. That journey, though, may be a long one.

#### Plan spurs a shift towards drones

Chesney 11

(Robert, Charles I. Francis Professor in Law, University of Texas School of Law, “ARTICLE: WHO MAY BE HELD? MILITARY DETENTION THROUGH THE HABEAS LENS”, Boston College Law Review, 52 B.C. L. Rev 769, Lexis)

The convergence thesis describes one manner in which law might respond to the cross-cutting pressures associated with the asymmetric warfare phenomenon—i.e., the pressure to reduce false positives (targeting, capture, or detention of the wrong individual) while also ensuring an adequate capacity to neutralize the non-state actors in question. One must bear in mind, however, that detention itself is not the only system of government action that can satisfy that latter interest. Other options exist, including the use of lethal force; the use of rendition to place individuals in detention at the hands of some other state; the use of persuasion to induce some other state to take custody of an individual through its own means; and perhaps also the use of various forms of surveillance to establish a sort of constructive, loose control over a person (though for persons located outside the United States it is unlikely that surveillance could be much more than episodic, and thus any resulting element of “control” may be quite weak).210¶ From the point of view of the individual involved, all but the last of these options are likely to be far worse experiences than U.S.-administered detention. In addition, all but the last are also likely to be far less useful for purposes of intelligence-gathering from the point of view of the U.S. government.211 Nonetheless, these alternatives may grow attractive to the government in circumstances where the detention alternative becomes unduly restricted, yet the pressure for intervention remains. The situation is rather like squeezing a balloon: the result is not to shrink the balloon, but instead to displace the pressure from one side to another, causing the balloon to distend along the unconstrained side. So too here: when one of these coercive powers becomes constrained in new, more restrictive ways, the displaced pressure to incapacitate may simply find expression through one of the alternative mechanisms. On this view it is no surprise that lethal drone strikes have increased dramatically over the past two years, that the Obama administration has refused to foreswear rendition, that in Iraq we have largely (though not entirely) outsourced our detention operations to the Iraqis, and that we now are progressing along the same path in Afghanistan.212¶ Decisions regarding the calibration of a detention system—the¶ management of the convergence process, if you will—thus take place in the shadow of this balloon-squeezing phenomenon. A thorough policy review would take this into account, as should any formal lawmaking process. For the moment, however, our formal law-making process is not directed at the detention-scope question. Instead, clarification and development with respect to the substantive grounds for detention takes place through the lens of habeas corpus litigation.

#### Unchecked drone usage causes great power war and hotspot escalation

Dowd 2013

(Alan W. Dowd, widely published writer on national defense, foreign policy, and international security including contributions to Parameters, Policy Review, The Journal of Diplomacy and International Relations, World Politics Review, American Outlook, The Baltimore Sun, The Washington Times, The National Post, The Wall Street Journal Europe, The Jerusalem Post, and The Financial Times Deutschland, Winter-Spring 2013, “Drone Wars: Risks and Warnings,” Parameters, http://www.strategicstudiesinstitute.army.mil/pubs/parameters/Issues/WinterSpring\_2013/1\_Article\_Dowd.pdf)

If these geo-political consequences of remote-control war do not get ¶ our attention, then the looming geo-strategic consequences should. If ¶ we make the argument that UCAV pilots are in the battlespace, then we are effectively saying that the battlespace is the entire earth. If that is the ¶ case, the unintended consequences could be dramatic.¶ First, if the battlespace is the entire earth, the enemy would seem to ¶ have the right to wage war on those places where UCAV operators are based. ¶ That’s a sobering thought, one few policymakers have contemplated.¶ Second, power-projecting nations are following America’s lead and ¶ developing their own drones to target their distant enemies by remote. ¶ An estimated 75 countries have drone programs underway.45 Many of ¶ these nations are less discriminating in employing military force than ¶ the United States—and less skillful. Indeed, drones may usher in a new ¶ age of accidental wars. If the best drones deployed by the best military ¶ crash more than any other aircraft in America’s fleet, imagine the accident rate for mediocre drones deployed by mediocre militaries. And then ¶ imagine the international incidents this could trigger between, say, India and Pakistan; North and South Korea; Russia and the Baltics or Poland ¶ or Georgia; China and any number of its wary neighbors.¶ China has at least one dozen drones on the drawing board or in production, and has announced plans to dot its coastline with 11 drone bases ¶ in the next two years.46 The Pentagon’s recent reports on Chinese military power detail “acquisition and development of longer-range UAVs ¶ and UCAVs . . . for long-range reconnaissance and strike”; development ¶ of UCAVs to enable “a greater capacity for military preemption”; and ¶ interest in “converting retired fighter aircraft into unmanned combat ¶ aerial vehicles.”47 At a 2011 air show, Beijing showcased one of its newest drones by playing a video demonstrating a pilotless plane tracking a US ¶ aircraft carrier near Taiwan and relaying targeting information.48¶ Equally worrisome, the proliferation of drones could enable nonpower-projecting nations—and nonnations, for that matter—to join the ¶ ranks of power-projecting nations. Drones are a cheap alternative to ¶ long-range, long-endurance warplanes. Yet despite their low cost, drones ¶ can pack a punch. And owing to their size and range, they can conceal ¶ their home address far more effectively than the typical, nonstealthy ¶ manned warplane. Recall that the possibility of surprise attack by drones ¶ was cited to justify the war against Saddam Hussein’s Iraq.49¶ Of course, cutting-edge UCAVs have not fallen into undeterrable ¶ hands. But if history is any guide, they will. Such is the nature of proliferation. Even if the spread of UCAV technology does not harm the ¶ United States in a direct way, it is unlikely that opposing swarms of ¶ semiautonomous, pilotless warplanes roaming about the earth, striking at will, veering off course, crashing here and there, and sometimes ¶ simply failing to respond to their remote-control pilots will do much to ¶ promote a liberal global order.¶ It would be ironic if the promise of risk-free warpresented by drones ¶ spawned a new era of danger for the United States and its allies.

### 5

#### Butler’s politics of vulnerability is based on an abstract notion of the suffering white, American subject. Her appeals to a universal “we” or global community can only reinscribe whiteness.

Thobani 2007 (Sunera, Professor at the University of British Columbia.  White wars: Western feminisms and the `War on Terror' - Feminist Theory 2007; 8; 169 – Sage Publications)

**Butler’s analytic frame** begins with the injury done to the US by the 9/11 attacks: ‘That U.S. boundaries were breached, that an unbearable vulnerability was exposed, that a terrible toll on human life was taken, were, and are, cause for fear and mourning; they are also instigations for patient political reflection’ (2004: xi). The breaching by the US of the boundaries of other countries in the decades preceding the attacks, including Afghanistan and Iraq, are mentioned in passing, but **do not shape the discursive field**, although Butler does note that ‘others have suffered arbitrary violence at the hands of the U.S.’ (p. xiv). But this suffering of others, concretized most pertinently in the bodies of the Iraqi and Afghan populations prior to 9/11, and the many, many other well-known victims of US aggression**, is not the starting point for her analysis** (Mamdani, 2004; Johnson, 2000). **Instead, a particular attack on the US, from which she attends to the generalized suffering of a generic humanity, shapes the frame**. **This framing foregrounds, however unintentionally, the experience of the (white) American subject**, **who has suddenly and graphically discovered its own vulnerability, as it does the imperialist perspective** articulated by the Bush Administration. That this subject neither revels in nor denies the violence done by the US state, complicates, but **does not contest, the imperial perspective**. Butler seems to be deeply disturbed by the US violence in this War **because of the violent *response* it is likely to engender**, and which will **likely threaten US populations in the future**.¶ Butler searches for an understanding of the injury done to the self and to the Other by positing a vulnerability that shapes the experience of human beings: ‘[t]o be injured means that one has the chance to reflect upon injury, to find out the mechanisms of its distribution, to find out who else suffers from permeable borders, unexpected violence, dispossession, and fear, and in what ways’ (2004: xii). Although she allows that this vulnerability is not equally distributed, her analysis nevertheless proceeds on just such an assumption as she reflects **on the possibility of a political community based on this shared experience of vulnerability and loss.**¶ Such a community becomes the ‘we’ of her text: ‘Despite our differences in location and history’, she argues, . . . ¶ my guess is that it is possible to appeal to a “we,” for all of us have some notion of what it is to have lost somebody. Loss has made a tenuous “we” of us all. And if we have lost, then it follows that we have had, that we have desired and loved, that we have struggled to find the conditions for our desire. (Butler, 2004: 20)¶ **In the absence of a discussion of the particularities of the loss of others, the (white) subject’s experience of loss becomes the ground on which this community is to be identified.** Although Butler repeatedly and explicitly cautions against the assumption of a universally shared human condition, her analysis also repeatedly and explicitly **reproduces the notion of a universalized human experience**:¶ I am referring to violence, vulnerability, and mourning, but there is a more general conception of the human with which I am trying to work here, one in which we are, from the start, even prior to individuation itself, and by virtue of bodily requirements, given over to some set of primary others: this conception means that we are vulnerable to those we are too young to know and to judge, and hence, vulnerable to violence; but also vulnerable to another range of touch, a range that includes the eradication of our being at the one end, and the physical support for our lives at the other. (2004: 31)

#### Butler is just wrong. When compared to the bodies of Afghani, Egyptian, Syria, and host of other peoples, we in the US are not vulnerable. She ignores the historical differences between different peoples to assert a universal humanity, which means a white, American, imperialist humanity.

Thobani 2007 (Sunera, Professor at the University of British Columbia.  White wars: Western feminisms and the `War on Terror' - Feminist Theory 2007; 8; 169 – Sage Publications)

The analysis of the current destruction of sovereignties by the US, its invasions and occupations, becomes grounded in a shared primal, preindividuated psycho-existential experience of vulnerability that elides the alterity historically instantiated between those doing the occupying and those being occupied.

The common experience of vulnerability that Butler’s conceptualization of the human subject foregrounds may be relevant in some phenomenological, existential sense. But **the use of such ‘primal vulnerability’ as the primary lens for an examination of an imperialist war places her discussion in a liberal-individualist frame so abstract as to severely hinder understandings of how geo-political power relations are being restructured by the US** through this War. Indeed, the specific vulnerabilities created byimperialist relations become secondary to the primary vulnerability of theinfant condition. Consequently, Butler’s imposition of the collective ‘we’in prioritizing a condition of infancy assumes the primacy of this conditionas also the ontological point of departure for the Other (if they are to beincluded in her conception of the human). **The implication is that the experiences of occupied peoples can be approached as being essentially the same as those of imperial subjects**. Such a commonality of experience,I argue, **is practicably impossible in the absence of the transformation of the conditions of imperialist domination**. Butler seems to reject humanistassumptions *and* yet applies them to develop her analysis of violence. Hergeneric ‘human’ subject relies on an implicit denial of the recognition thatthe injuries, violence and losses suffered by occupied populations aresignificantly different, and that **these peoples are immensely more threatened with violence and injury than are the subjects of imperialist powers**.

In making the racialized distinctions between the forms and degrees of violence experienced by Afghans, Iraqis and other Muslims and white subjects disappear through her resort to humanist assumptions, **the experience and perspective of the (imperial) white subject is restored to centrality.**

Richard Dyer points out that one way in which **whiteness is reproduced** is **through the treatment of whites as a human norm**. He argues that it is racial power that enables white subjects to claim this position of the human: **‘There is no more powerful position than that of being “just” human**. The claim to power is the claim to speak for the commonality of humanity. Raced people can’t do that – they can only speak for their race’ (Dyer, 1997: 2). **Butler reproduces a classic feature of racial power by making whiteness invisible, even as the definition of the human is claimed by the white subject.**

#### ALTERNATIVE: Rather than begin from shared vulnerability, we must recognize how vulnerability is differently constituted by different populations. We are not vulnerable the way that detainees in GTMO are vulnerable. For them, Butler’s politics of nonviolence, grief, and memorialization are unacceptable. For them burning down the entire system of indefinite detention is the only alternative.

**Farley ’05** (Anthony Paul, Professor of Law @ Boston College, “Perfecting Slavery”, 1/27/2005, [http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1028&context=lsfp -](http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1028&context=lsfp%20-) SG)

What is to be done? Two hundred years ago, when the slaves in Haiti rose up, they, of necessity, burned everything: They burned San Domingo flat so that at the end of the war it was a charred desert. Why do you burn everything? asked a French officer of a prisoner. We have a right to burn what we cultivate because a man has a right to dispose of his own labour, was the reply of this unknown anarchist. The slaves burned everything because everything was against them. Everything was against the slaves, the entire order that it was their lot to follow, the entire order in which they were positioned as worse than senseless things, every plantation, everything. “Leave nothing white behind you,” said Toussaint to those dedicated to the end of white-over black. “God gave Noah the rainbow sign. No more water, the fire next time.” The slaves burned everything, yes, but, unfortunately, they only burned everything in Haiti. Theirs was the greatest and most successful revolution in the history of the world but the failure of their fire to cross the waters was the great tragedy of the nineteenth century. At the dawn of the twentieth century, W.E.B. Du Bois wrote, “The colorline belts the world.” Du Bois said that the problem of the twentieth century was the problem of the colorline. The problem, now, at the dawn of the twenty-first century is the problem of the colorline. The colorline continues to belt the world. Indeed, the slave power that is the United States now threatens an entire world with the death that it has become and so the slaves of yesterday, today, and tomorrow, those with nothing but their chains to lose, must, if they would be free, if they would escape slavery, win the entire world. We begin as children. We are called and we become our response to the call. Slaves are not called. What becomes of them? What becomes of the broken-hearted? The slaves are divided souls, they are brokenhearted, the slaves are split asunder by what they are called upon to become. The slaves are called upon to become objects but objecthood is not a calling. The slave, then, during its loneliest loneliness, is divided from itself. This is schizophrenia. The slaves are not called, or, rather, the slaves are called to not be. The slaves are called unfree but this the living can never be and so the slaves burst apart and die. The slaves begin as death, not as children, and death is not a beginning but an end. There is no progress and no exit from the undiscovered country of the slave, or so it seems. We are trained to think through a progress narrative, a grand narrative, the grandest narrative, that takes us up from slavery. There is no up from slavery. The progress from slavery to the end of history is the progress from white-over-black to white-over-black to white-overblack. The progress of slavery runs in the opposite direction of the past present future timeline. The slave only becomes the perfect slave at the end of the timeline, only under conditions of total juridical freedom. It is only under conditions of freedom, of bourgeois legality, that the slave can perfect itself as a slave by *freely choosing* to bow down before its master. The slave perfects itself as a slave by offering a prayer for equal rights. The system of marks is a plantation. The system of property is a plantation. The system of law is a plantation. These plantations, all part of the same system, *hierarchy*, produce white-overblack, white-over-black only, and that continually. The slave perfects itself as a slave through its prayers for equal rights. The plantation system will not commit suicide and the slave, as stated above, has knowing non-knowledge of this fact. The slave finds its way back from the undiscovered country only by burning down every plantation. When the slave prays for equal rights it makes the free choice to be dead, and it makes the free choice to not be. Education is the call. We are called to be and then we become something. We become that which we make of ourselves. We follow the call, we pursue a calling. Freedom is the only calling—it alone contains all possible directions, all of the choices that may later blossom into the fullness of our lives. We can only be free. Slavery is death. How do slaves die? Slaves are not born, they are made. The slave must be trained to be that which the living cannot be. The only thing that the living are not free to be is dead. The slave must be trained to follow the call that is not a call. The slave must be trained to pursue the calling that is not a calling. The slave must be trained to objecthood. The slave must become death. Slavery is white-over-black. White-over-black is death. White-over-black, death, then, is what the slave must become to pursue its calling that is not a calling.

### Case

#### President circumvents the judiciary

Scheppele 12

Professor of Sociology and Public Affairs @ Princeton University [Kim Lane Scheppele (Dir. of the Program in Law and Public Affairs @ Princeton University), “The New Judicial Deference,” Boston University Law Review, 92 B.U.L. Rev. 89, January 2012]

In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides—the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won. Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to. n6 But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won [\*92] in these cases—and they prevailed overwhelmingly in their claims, especially at the Supreme Court—but courts looked metaphorically over the suspects' heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question.Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference. n7 Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter arma silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still "hot," courts jumped right in, dealing governments one loss after another. n8 After 9/11, it appears that deference is dead. [\*93] But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice. n9 Suspected terrorists have received [\*94] from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives.Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference.This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted—often bold, ambitious, and brave solutions—nonetheless fail to address the plights of the specific individuals who brought the cases.This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something—an appearance not entirely false in the long run—while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

#### Util is good

Harries, 94

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Performance is the test. Asked directly by a Western interviewer, “In principle, do you believe in one standard of human rights and free expression?”, Lee immediately answers, “Look, it is not a matter of principle but of practice.” This might appear to represent a simple and rather crude pragmatism. But in its context it might also be interpreted as an appreciation of the fundamental point made by Max Weber that, in politics, it is “the ethic of responsibility” rather than “the ethic of absolute ends” that is appropriate. While an individual is free to treat human rights as absolute, to be observed whatever the cost, governments must always weigh consequences and the competing claims of other ends. So once they enter the realm of politics, human rights have to take their place in a hierarchy of interests, including such basic things as national security and the promotion of prosperity. Their place in that hierarchy will vary with circumstances, but no responsible government will ever be able to put them always at the top and treat them as inviolable and over-riding. The cost of implementing and promoting them will always have to be considered.

#### Biopower is necessary to preserve value to life

**Ojakangas 2005.** Mika Ojakangas, Helsinki Collegium for Advanced Studies, FOUCAULT STUDIES, 2005, p. http://www.foucault-studies.com/no2/ojakangas1.pdf

In fact, the history of modern Western societies would be quite incomprehensible without taking into account that there exists a form of power which refrains from killing but which nevertheless is capable of directing people’s lives. The effectiveness of biopower can be seen lying precisely in that it refrains and withdraws before every demand of killing, even though these demands would derive from the demand of justice. In biopolitical societies, according to Foucault, capital punishment could not be maintained except by invoking less the enormity of the crime itself than the monstrosity of the criminal: "One had the right to kill those who represented a kind of biological danger to others." However, given that the "right to kill" is precisely a sovereign right, it can be argued that the biopolitical societies analyzed by Foucault were not entirely biopolitical. Perhaps, there neither has been nor can be a society that is entirely biopolitical. Nevertheless, the fact is that present day European societies have abolished capital punishment. In them, there are no longer exceptions. It is the very "right to kill" that has been called into question. However, it is not called into question because of enlightened moral sentiments, but rather because of the deployment of biopolitical thinking and practice. For all these reasons, Agamben’s thesis, according to which the concentration camp is the fundamental biopolitical paradigm of the West, has to be corrected. **The biopolitical paradigm of the West is not the concentration camp, but, rather, the presentday welfare society** and, **instead of homo-sacer, the paradigmatic figure of the biopolitical society can be seen,** for example**, in the middle class Swedish social democrat**. Although this figure is an object – and a product of the huge biopolitical machinery, it does not mean that he is permitted to kill without committing homicide. Actually, the fact that he eventually dies, seems to be his greatest "crime" against the machinery. (In biopolitical societies, death is not only "something to be hidden away," but, also, as Foucault stresses, the most "shameful thing of all.") Therefore**, he is not exposed to an unconditional threat of death, but rather to an unconditional retreat of all dying**. In fact, **the biopolitical machinery does not want to threaten him, but to encourage him, with all its material and spiritual capacities, to live healthily, to live long and to live happily – even when, in biological terms, he "should have been dead long ago". This is because bio power is not bloody power over bare life for its own sake but pure power over all life for the sake of the living. It is not power but the living, the condition of all life – individual as well as collective – that is the measure of the success of biopower.**

## FW

## CASE

### circumvention

#### Executive justification overrides the aff

Pushaw 4

Professor of law @ Pepperdine University [Robert J. Pushaw, Jr., “Defending Deference: A Response to Professors Epstein and Wells,” Missouri Law Review, Vol. 69, 2004]

Civil libertarians have urged the Court to exercise the same sort of judicial review over war powers as it does in purely domestic cases—i.e., independently interpreting and applying the law of the Constitution, despite the contrary view of the political branches and regardless of the political repercussions.54 This proposed solution ignores the institutional differences, embedded in the Constitution, that have always led federal judges to review warmaking under special standards. Most obviously, the President can act with a speed, decisiveness, and access to information (often highly confidential) that cannot be matched by Congress, which must garner a majority of hundreds of legislators representing multiple interests.55 Moreover, the judiciary by design acts far more slowly than either political branch. A court must wait for parties to initiate a suit, oversee the litigation process, and render a deliberative judgment that applies the law to the pertinent facts.56 Hence, by the time federal judges (particularly those on the Supreme Court) decide a case, the action taken by the executive is several years old. Sometimes, this delay is long enough that the crisis has passed and the Court’s detached perspective has been restored.57 At other times, however, the war rages, the President’s action is set in stone, and he will ignore any judicial orders that he conform his conduct to constitutional norms.58 In such critical situations, issuing a judgment simply weakens the Court as an institution, as Chief Justice Taney learned the hard way.59 Professor Wells understands the foregoing institutional differences and thus does not naively demand that the Court exercise regular judicial review to safeguard individual constitutional rights, come hell or high water. Nonetheless, she remains troubled by cases in which the Court’s examination of executive action is so cursory as to amount to an abdication of its responsibilities—and a stamp of constitutional approval for the President’s actions.60 Therefore, she proposes a compromise: requiring the President to establish a reasonable basis for the measures he has taken in response to a genuine risk to national security.61 In this way, federal judges would ensure accountability not by substituting their judgments for those of executive officials (as hap-pens with normal judicial review), but rather by forcing them to adequately justify their decisions.62 This proposal intelligently blends a concern for individual rights with pragmatism. Civil libertarians often overlook the basic point that constitutional rights are not absolute, but rather may be infringed if the government has a compelling reason for doing so and employs the least restrictive means to achieve that interest.63 Obviously, national security is a compelling governmental interest.64 Professor Wells’s crucial insight is that courts should not allow the President simply to assert that “national security” necessitated his actions; rather, he must concretely demonstrate that his policies were a reasonable and narrowly tailored response to a particular risk that had been assessed accurately.65 Although this approach is plausible in theory, I am not sure it would work well in practice. Presumably, the President almost always will be able to set forth plausible justifications for his actions, often based on a wide array of factors—including highly sensitive intelligence that he does not wish to dis-close.66 Moreover, if the President’s response seems unduly harsh, he will likely cite the wisdom of erring on the side of caution. If the Court disagrees, it will have to find that those proffered reasons are pretextual and that the President overreacted emotionally instead of rationally evaluating and responding to the true risks involved. But are judges competent to make such determinations? And even if they are, would they be willing to impugn the President’s integrity and judgment? If so, what effect might such a judicial decision have on America’s foreign relations? These questions are worth pondering before concluding that “hard look” review would be an improvement over the Court’s established approach. Moreover, such searching scrutiny will be useless in situations where the President has made a wartime decision that he will not change, even if judicially ordered to do so. For instance, assume that the Court in Korematsu had applied “hard look” review and found that President Roosevelt had wildly exaggerated the sabotage and espionage risks posed by Japanese-Americans and had imprisoned them based on unfounded fears and prejudice (as appears to have been the case). If the Court accordingly had struck down FDR’s order to relocate them, he would likely have disobeyed it. Professor Wells could reply that this result would have been better than what happened, which was that the Court engaged in “pretend” review and stained its reputation by upholding the constitutionality of the President’s odious and unwarranted racial discrimination. I would agree. But I submit that the solution in such unique situations (i.e., where a politically strong President has made a final decision and will defy any contrary court judgment) is not judicial review in any form—ordinary, deferential, or hard look. Rather, the Court should simply declare the matter to be a political question and dismiss the case. Although such Bickelian manipulation of the political question doctrine might be legally unprincipled and morally craven, 67 at least it would avoid giving the President political cover by blessing his unconstitutional conduct and instead would force him to shoulder full responsibility. Pg. 968-970

### Discourse

**Reps don’t shape reality—focusing on them obscures material and political analysis which turns the criticism**

**Tuathail 96** (Gearoid, Department of Georgraphy at Virginia Polytechnic Institute, Political Geography, 15(6-7), p. 664, science direct)

While theoretical debates at academic conferences are important to academics, the discourse and concerns of foreign-policy decision- makers are quite different, so different that they constitute a distinctive problem- solving, theory-averse, policy-making subculture. **There is a danger that academics assume that the discourses they engage are more significant** in the practice of foreign policy and **the exercise of power than they really are**. This is not, however, to minimize the obvious importance of academia as a general institutional structure among many that sustain certain epistemic communities in particular states. In general, I do not disagree with Dalby’s fourth point about politics and discourse except to note that his statement-‘Precisely because reality could be represented in particular ways political decisions could be taken, troops and material moved and war fought’-evades the important question of agency that I noted in my review essay. **The assumption that it is representations that make action possible is inadequate by itself.** **Political, military and economic structures, institutions, discursive networks and leadership are all crucial in explaining social action and should be theorized together with representational practices**. Both here and earlier, Dalby’s reasoning inclines towards a form of idealism. In response to Dalby’s fifth point (with its three subpoints), it is worth noting, first, that his book is about the CPD, not the Reagan administration. He analyzes certain CPD discourses, root the geographical reasoning practices of the Reagan administration nor its public-policy reasoning on national security. Dalby’s book is narrowly textual; the general contextuality of the Reagan administration is not dealt with. Second, let me simply note that I find that the distinction between critical theorists and post- structuralists is a little too rigidly and heroically drawn by Dalby and others. Third, Dalby’s interpretation of the reconceptualization of national security in Moscow as heavily influenced by dissident peace researchers in Europe is highly idealist, an interpretation that ignores the structural and ideological crises facing the Soviet elite at that time. Gorbachev’s reforms and his new security discourse were also strongly self- interested, an ultimately futile attempt to save the Communist Party and a discredited regime of power from disintegration. The issues raised by Simon Dalby in his comment are important ones for all those interested in the practice of critical geopolitics. While I agree with Dalby that questions of discourse are extremely important ones for political geographers to engage**there is a danger of fetishizing this concern with discourse so that we neglect the institutional and the sociological, the materialist and the cultural, the political and the geographical contexts within which particular discursive strategies become significant**,. Critical geopolitics, in other words, should not be a prisoner of the sweeping ahistorical cant that sometimes accompanies ‘poststructuralism nor convenient reading strategies like the identity politics narrative; it needs to always be open to the patterned mess that is human history.

### 2NC bare life

Biopwer

Sinnerbrink 5

Robert Sinnerbrink 5, Professor of Philosophy at Macquarie University, Critical Horizons, Vol. 6, No. 1, p. 258-259

Foucault and Agamben leave us with a stark alternative: either to take the ethical turn towards practices of freedom compatible with neo-liberalist governmentality, or accelerate biopolitical nihilism in the hope that a messianic overcoming of the breach between bare life and sovereign power will institute a redeemed human community. In short, affirm pragmatic practices of ethical self-formation, or prepare for the messianic overcoming of biopolitical domination. These alternatives, however, seem partial and inadequate. Foucault’s turn to ethics and liberalism underplays the political urgency of confronting societies of biopolitical control; this is a point not lost on Deleuze and taken up by Hardt and Negri in their neo-Marxist version of biopolitical production.70 Agamben’s despairing account of biopolitical nihilism, on the other hand, overemphasises the ontological ‘sameness’ of biopower regimes, and retreats from concrete politics into a metaphysical messianism prophetically gesturing towards a utopian community to come. What my brief genealogy of biopower and biopolitics suggests, then, is the need to find a path between these alternatives. We should retain the Foucaultian emphasis on a critical analysis of biopower without acquiescing to an ethical accommodation with neo-liberalism. And we ought to affirm Agamben’s profound questioning of the biopolitical foundations of modernity without succumbing to a utopian metaphysical messianism. We also need to question the Heideggerian metaphysical critique of modernity that has profoundly marked both Foucaultian and Agambenian conceptions of biopower and biopolitics. Finally, this genealogy suggests the need to restore the experience of injustice, the suffering of human beings, to any philosophical account of biopolitics, and to articulate political responses to biopower that go beyond ethical acquiescence and metaphysical longing.

## CP

#### Congress has comparatively better enforcement means than courts

Bryant 2007

(A. Christopher, Rufus King Professor of Constitutional Law at the University of Cincinnati, "Presidential Signing Statements and Congressional Oversight", 16 Wm. & Mary Bill Rts. J. 169)

This premise has matters backwards. Congress has far greater competence and legitimacy than do the courts to undertake the awesome task of compelling presidential compliance with the Constitution and laws of the United States. It is the judicial role in so doing that can be best understood as incidental and sharply circumscribed by concerns about competence and legitimacy. Indeed, absent long-standing congressional neglect of its many powerful tools for disciplining the executive branch, routine and open presidential assertions of the intent to disregard statutory provisions just signed into law would be all but inconceivable. Were Congress to act on the fifth ABA resolution, the resulting legislation would further entrench this congressional neglect and atrophy the congressional muscles alone capable of resisting a truly lawless President. Ironically, the unintended but most significant long term consequence of the fifth ABA resolution would be to make all the more likely the kind of presidential usurpation of the lawmaking function that the ABA Task Force Report warned against.

#### Congress Key to Check the Executive – external checks avoid failure turns the aff

Sunstein ‘04

(Cass R. Sunstein, University of Chicago. John M. Olin Law & Economics Working Paper No. 321 (2D Series). “Minimalism at War” December 2004. Public Law and Legal Theory Working Paper No. 80)

To summarize: **National Security Maximalism cannot claim much support in the Constitution itself; on the contrary, the document does not give the President “the war power.” The strongest claim for a maximalist approach emphasizes the Commander in Chief Clause, which does give the President some “inherent” power; but that power must be read in the light of a host of other provisions conferring broad authority on Congress. In addition, National Security Maximalism reposes excessive confidence in the President. Deliberative processes within a unitary branch are likely to lead to an amplification of preexisting tendencies, not toward a system of internal checks and balances.** When deprivations of liberty are limited to an identifiable few—as they frequently are—external checks on the executive provide an insufficient safeguard of civil liberties. But Liberty Maximalism is neither feasible nor desirable. Is there anything that courts might do to help? And what does American history say about that question?

#### Congress has a multiplicity of enforcement mechanisms—the courts can’t enforce

Bryant 2007

(A. Christopher, Rufus King Professor of Constitutional Law at the University of Cincinnati, "Presidential Signing Statements and Congressional Oversight", 16 Wm. & Mary Bill Rts. J. 169)

Alexander Hamilton observed that the federal courts "have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of [their] judgments."' 1 8 Or as President Andrew Jackson allegedly retorted with regard to the Court's decision in Worcester v. Georgia, 9 Chief Justice "John Marshall has made his decision, now let him enforce it." ' 2 0 Unlike the judiciary, however, Congress has its own mechanisms for coercion. Most prominently, the Constitution's Framers counterpoised the powers of the purse and the sword in the legislative and executive branches respectively. 2 ' But Congress has numerous tools in addition to control over appropriations to bring a wayward chief executive to heel. First, Congress enjoys an investigative authority at least as extensive as its legislative authority. Though the adversarial method effectively limits the judge to a passive, referee role, Congress's power to inform itself (and the country) is inquisitorial and, therefore, active. Rooted in seventeenth-century British Parliamentary practice, Congress first asserted its power to compel the production of relevant testimony and documentation in its 1792 inquiry into General St. Clair' s failed military expedition to the Northwest territory. 2 2 In the intervening centuries, numerous Court rulings have established beyond peradventure that "although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony.., the investigatory power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress. 2 3 It is firmly established that Congress's inquisitorial power is at its zenith when probing "charges of misfeasance and nonfeasance" in the executive branch. 2 4 The Constitution clearly commits to Congress the task of ferreting out presidential disregard of the laws. The threat of politically costly exposure alone provides Congress with an important weapon for deterring presidential lawlessness. Should that deterrent fail, however, Congress has an almost limitless capacity to pressure a reluctant President to do his constitutional duty to "take Care that the Laws be faithfully executed. 2 5 Impeachment constitutes the ultimate congressional discipline on the executive and judicial branches. 2 6 But far less draconian measures are available as well. In addition to with- holding appropriations, 2 7 Congress can decline to (1) re-authorize executive departments, agencies, or programs; (2) confirm presidential appointments; (3) ratify treaties; or (4) take action on the President's legislative agenda. 2 8 In each case, because congressional inaction is sufficient to burden the incumbent administration, a minority in a single house of Congress may hold the President's program hostage, provided it controls at least one of the "veto gates" through which the desired congressional action must pass. 2 9 As Professor Michael Paulsen colorfully observed, "[i]n a bare-knuckled brawl, Congress can reduce the President to little more than a bureaucrat drawing a fixed salary, vetoing bills, granting pardons, and receiving foreign ambassadors-but without funds for hosting a state dinner (or even taking the ambassador to McDonald's)." 3

#### Congress has control over detaining of US citizens

Turin ‘04

JD Candidate at the University of Virginia, Summer 04. Danielle, “Will an Attack on America Justify an Attack on Americans?” Virginia Journal of International Law Association lexis

According to Curtis Bradley and Jack Goldsmith, Bas may be read to suggest "that the President is required to comply with limitations imposed by Congress on the conduct of such undeclared wars." Thus, Congress may have authority to regulate outside absolute war.¶ The current war is an imperfect or limited war since Congress has not declared the current war on terror. In light of Bas, this means that Congress has the power to regulate the war on terror, including the detention of U.S. citizens. If the government detains U.S. citizens during an undeclared war, such as the war on terror, then U.S. enemy combatant detentions are regulated by U.S. municipal law, governed by Congress. In fact, Congress has regulated in this area and has stated unambiguously its will. Section 4001(a) makes clear Congress's intent to prohibit the detention of U.S. citizens without explicit congressional authorization. As argued above, no such authorization exists. Therefore, Congress has prohibited the President's detentions of U.S. citizens as enemy combatants, and, as such, the President's detentions cannot be upheld.

### A2: Perm Do both Generic (Jud Cap NB)

#### Perm kills deference to congress burns Judicial Capital

Puro, 2K

(Poli Sci Prof -- Saint Louis, 19 St. Louis U. Pub. L. Rev. 117)

In both positive political theory and attitudinalist models, scholars agree **that Supreme Court Justices take strategic actions to avoid negative responses by Congress**, especially regular reversal or reversals in major cases. 35 Positive political theorists emphasize that **the Court protects its preferred policies by deferring to Congress's preferences,** especially in statutory cases. 36 Attitudinal theorists do not see as many constraints from Congress or the President on Justices' votes. 37 As noted earlier, Congressional achievement of legislative outcomes may require cooperation through Supreme Court decisions. In any given case, Congress cannot be assured of Court cooperation. However, in a series of cases, **Congress may have strong expectations that Court behavior will be compliant with Congressional decisions**. Few instances exist where the opposite pattern occurs, where Congress has strong expectations that Court decisions will oppose Congressional decisions. 38

#### Mootness Doctrine

#### A. Perm breaks it

Watson ‘91

(Corey Watson, Associate @ Kirkland and Ellis LLP, 1991, “Mootness and the Constitution,” 86 Nw. U.L. Rev. 143, l/n)

A case becomes "moot" when "its factual or legal context changes in such a way that a justiciable question no longer is before the court." n32 [\*147] Defining mootness as the absence of a justiciable issue, however, merely raises the question of what is meant by the term "justiciability." n33 The Supreme Court has distinguished a justiciable controversy "from one that is academic or moot." n34 Accordingly, a justiciable controversy is one that is "definite and concrete, touching the legal relations of parties having adverse legal interests." n35 The controversy must be "real and substantial[,] . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." n36 The rule that a court will not decide a moot case is recognized in virtually every American jurisdiction. n37

#### B. Links to the disad and dissolves the Constitution

Watson ‘91

(Corey Watson, Associate @ Kirkland and Ellis LLP, 1991, “Mootness and the Constitution,” 86 Nw. U.L. Rev. 143, l/n)

From this core meaning, according to the model, have sprung various interpretative doctrines which, when taken together, flesh out the meaning of the case and controversy clause. These doctrines are incorporated under the broad label of "justiciability." The doctrine of mootness, a species of justiciability, is umbilically attached to the case and controversy clause and is thus subservient to article III of the Constitution. n113 Hence, the relationship between the mootness doctrine and the Constitution is symbiotic: the Constitution gave birth to the doctrine of mootness while the doctrine itself illuminates the limitation of federal judicial power. Although courts are permitted to entertain prudential considerations when deciding questions of jurisdiction, n114 the model forbids courts from allowing prudential concerns to compromise the fundamental principles of article III. n115 Consequently, whether a case is justiciable is a threshold question throughout the judicial proceeding which must be answered affirmatively for a court to assume jurisdiction. n116 [\*158] The textual constitutional model, therefore, contends that the language chosen to formulate the Constitution has particular significance. Attempts to manipulate this language by superimposing specific value systems n117 or by tossing prudential factors into the constitutional calculus n118 dissolve the integrity of the Constitution itself. The Constitution retains flexibility by establishing procedures for its amendment, and judicial or scholarly glosses which essentially rewrite the Constitution circumvent the amendment process. Such circumvention, the model asserts, is violent to democratic and representative ideals.

#### C. Constitutional violations are an absolute side-constraint – as a policymaker you cannot vote for the perm

Levinson ‘00

<Daryl Levinson, Associate Professor, University of Virginia, 2K, University of Chicago Law Review Spring 2000>

Extending a majority rule analysis of optimal deterrence to constitutional torts requires some explanation, for we do not usually think of violations of constitutional rights in terms of cost-benefit analysis and efficiency. Quite the opposite, constitutional rights are most commonly conceived as deontological side-constraints that trump even utility-maximizing government action. n69 Alternatively, constitutional rights might be understood as serving rule-utilitarian purposes. If the disutility to victims of constitutional violations often exceeds the social benefits derived from the rights-violating activity, or if rights violations create long-term costs that outweigh short-term social benefits, then constitutional rights can be justified as tending to maximize global utility, even though this requires local utility-decreasing steps. Both the deontological and rule-utilitarian descriptions imply that the optimal level of constitutional violations is zero; that is, society would be better off, by whatever measure, if constitutional rights were never violated.

## Jud Cap

### 2NC Overview

#### 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.

### A2: Luke/Debrix

#### Risk framing motivates new social movements and re-democratizes politics

Borraz, ‘7 [Olivier Borraz, Centre de Sociologie des Organisations, Sciences Po-CNRS, Paris, Risk and Public Problems, Journal of Risk Research Vol. 10, No. 7, 941–957, October 2007, p. 951]

These studies seem to suggest that risk is a way of framing a public problem in such a way as to politicize the search for solutions. This politicization entails, in particular, a widening of the range of stakeholders, a reference to broader political issues and debates, the search for new decision- making processes (either in terms of democratization, or renewed scientific expertise), and the explicit mobilization of non-scientific arguments in these processes. But if this is the case, then it could also be true that risk is simply one way of framing public problems. Studies in the 1990s, in particular, showed that a whole range of social problems (e.g., poverty, housing, unemployment) had been reframed as health issues, with the result that their management was transferred from social workers to health professionals, and in the process was described in neutral, depoliticized terms (Fassin, 1998). Studies of risk, on the contrary, seem to suggest that similar social problems could well be re-politicized, i.e., taken up by new social movements, producing and using alternative scientific data, calling for more deliberative decision-making procedures, and clearly intended to promote change in the manner in which the state protects the population against various risks (health and environment, but also social and economic). In other words, framing public problems as risks could afford an opportunity for a transformation in the political debate, from more traditional cleavages around social and economic issues, to rifts stemming from antagonistic views of science, democracy and the world order.

### Judicial Capital Finite

#### Court capital is limited – controversial decisions trade off

Young ‘99

Ernest Young, assistant professor at the University of Texas Law, 1999, The Supreme Court Review, p. lexis

1. **The opportunity cost** of immunity rulings. The first reason, and the simplest, **is that** the Court has **limited political capital**. 261 **As** Dean **Choper has argued, "**the federal judiciary's ability to **persuade** the populace and public leaders that it is right and they are wrong is determined by the number and frequency of its attempts [\*59] to do so, **the felt importance of the policies** it disapproves, **and** the **perceived substantive correctness** of its decisions." 262 There is thus likely to be, at some point, a **limit on the Court's ability to continue striking down** federal **statutes** in the name of states' rights. 263 To the extent that this limit exists, then the Court's **extended** adventure **in aggressive enforcement** of state sovereign immunity will **trade off with its ability to develop a meaningful jurisprudence** of process or power federalism. If protecting state authority to regulate private conduct is the key to a viable state/federal balance, then a considered reaffirmation, explanation, or extension of Lopez may do more good than another expansion of Seminole Tribe. "Political capital," of course, is a pretty vague concept. It might be that the Court's ability to enforce federalism limits is more like muscles than money: it atrophies unless it is exercised regularly. 264 The National League of Cities story arguably illustrates this phenomenon, in that the Court's failure to apply the doctrine to check federal power in a series of subsequent cases may have helped lead to the outright rejection of the doctrine in Garcia. 265 The important point, however, is that **the** Justices **who matter most on these issues tend to think in terms of limited capital** and worry about **judicial** actions that may **draw down the reserves**. 266 **Political** capital [\*60] is **thus** likely to function as an **internal constraint on the Court's willingness repeatedly to confront Congress**.

### A2: Court Not Motivated By Capital

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

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

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

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

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

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

### Oceans

#### It acidifies the oceans—extinction

Romm ‘9

(Joe, a Fellow at American Progress and is the editor of Climate Progress, which New York Times columnist Tom Friedman called "the indispensable blog" and Time magazine named one of the 25 “Best Blogs of 2010.″ In 2009, Rolling Stone put Romm #88 on its list of 100 “people who are reinventing America.” Time named him a “Hero of the Environment″ and “The Web’s most influential climate-change blogger.” Romm was acting assistant secretary of energy for energy efficiency and renewable energy in 1997, where he oversaw $1 billion in R&D, demonstration, and deployment of low-carbon technology. He is a Senior Fellow at American Progress and holds a Ph.D. in physics from MIT, “Imagine a World without Fish: Deadly ocean acidification — hard to deny, harder to geo-engineer, but not hard to stop — is subject of documentary ,” http://thinkprogress.org/romm/2009/09/02/204589/a-sea-change-imagine-a-world-without-fish-ocean-acidification-film/)

Global warming is “capable of wrecking the marine ecosystem and depriving future generations of the harvest of the seas” (see Ocean dead zones to expand, “remain for thousands of years”). A post on ocean acidification from the new Conservation Law Foundation blog has brought to my attention that the first documentary on the subject, *A Sea Change:* Imagine a World without Fish, is coming out. Ocean acidification must be a core climate message, since it **is** hard to deny and **impervious** **to** the delusion that **geoengineering** is the silver bullet. Indeed, a major 2009 study GRL study, “Sensitivity of ocean acidification to geoengineered climate stabilization” (subs. req’d), concluded: The results of this paper support the view that climate engineering will not resolve the problem of ocean acidification, and that therefore deep and rapid cuts in CO2 emissions are likely to be the most effective strategy to avoid environmental damage from future ocean acidification. If you want to understand ocean acidification better, see this BBC story, which explains: **Man-made pollution is raising ocean acidity at least 10 times faster than previously thought**, a study says. Or see this *Science* magazine study, “Evidence for Upwelling of Corrosive “Acidified” Water onto the Continental Shelf” (subs. req’), which found Our results show for the first time that a large section of the North American continental shelf is impacted by ocean acidification. Other continental shelf regions may also be impacted where anthropogenic CO2-enriched water is being upwelled onto the shelf. Or listen to the Australia’s ARC Centre of Excellence for Coral Reef Studies, which warns: The world’s oceans are becoming more acid, with potentially devastating consequences for corals and the marine organisms that build reefs and provide much of the Earth’s breathable oxygen. The acidity is caused by the gradual buildup of carbon dioxide (CO2) in the atmosphere, dissolving into the oceans. Scientists fear it could be lethal for animals with chalky skeletons which make up more than a third of the planet’s marine life”¦. Corals and plankton with chalky skeletons are at the base of the marine food web. They rely on sea water saturated with calcium carbonate to form their skeletons. However, as acidity intensifies, the saturation declines, making it harder for the animals to form their skeletal structures (calcify). “Analysis of coral cores shows a steady drop in calcification over the last 20 years,” says Professor Ove Hoegh-Guldberg of CoECRS and the University of Queensland. “There’s not much debate about how it happens: put more CO2 into the air above and it dissolves into the oceans. “When CO2 levels in the atmosphere reach about 500 parts per million, you put calcification out of business in the oceans.” (Atmospheric CO2 levels are presently 385 ppm, up from 305 in 1960.) I’d like to see an analysis of what happens when you get to 850 to 1000+ ppm because that is where we’re headed (see U.S. media largely ignores latest warning from climate scientists: “Recent observations confirm “¦ the worst-case IPCC scenario trajectories (or even worse) are being realised” “” 1000 ppm). The CLF post notes: Dr. Jane Lubchenco, Administrator of the National Oceanic and Atmospheric Administration (NOAA) warns that an acidic ocean is the “equally evil twin” of climate change. Scott Doney, a senior scientist at the Woods Hole Oceanographic Institution noted in a public presentation that “New England is the most vulnerable region in the country to ocean acidification.” In June, dozens of Academies of Science, including ours and China’s, issued a joint statement on ocean acidification, warned “Marine food supplies are likely to be reduced with significant implications for food production and security in regions dependent on fish protein, and human health and wellbeing” and “Ocean acidification is irreversible on timescales of **at least** tens of thousands of years.” They conclude: Ocean acidification is a direct consequence of increasing atmospheric CO2 concentrations. To avoid substantial damage to ocean ecosystems, deep and rapid reductions of global CO2 emissions by at least 50% by 2050, and much more thereafter are needed. We, the academies of science working through the InterAcademy Panel on International Issues (IAP), call on world leaders to: “¢ Acknowledge that ocean acidification is a direct and real consequence of increasing atmospheric CO2 concentrations, is already having an effect at current concentrations, and is likely to cause **grave harm to important marine ecosystems as CO2 concentrations reach 450 ppm and above;** “¢ Recognise that reducing the build up of CO2 in the atmosphere is the only practicable solution to mitigating ocean acidification; “¢ Within the context of the UNFCCC negotiations in the run up to Copenhagen 2009, recognise the direct threats posed by increasing atmospheric CO2 emissions to the oceans and therefore society, and take action to mitigate this threat; “¢ Implement action to reduce global CO2 emissions by at least 50% of 1990 levels by 2050 and continue to reduce them thereafter. If we want to save life in the oceans “” **and save ourselves**, since we depend on that life “” the time to start slashing carbon dioxide emissions is now.

### A2: Case not controversial/Burns no capital

#### Lower Court ruling guarantees CSAPR case will be controversial proves SCOTUS decision key

Lamb ‘12

(Daniel Lamb, Legal Summaries Editor Pepperdine University School of Law, Journal of the National Association of Administrative Law Judiciary¶ 32 J. Nat'l Ass'n L. Jud. 403 Spring, 2012 Lexis, TSW)

In EME Homer City Generation, the Court of Appeals for the District of Columbia Circuit granted a stay on the implementation of the Environmental Protection Agency's ("EPA") latest, and controversial, air pollution rule. A group of power companies challenged the rule arguing it placed an undue financial burden on power producers. The per curium order was handed down forty-eight hours before the rule was to come into effect and stated only that the petitioners had met the requirements for a stay. The court emphasized that the order was not a decision on the merits, but only a delay pending the court's completion of its review.¶ Facts and Analysis:¶ Several private companies, in addition to the states of Alabama, Florida, Kansas, Nebraska, Oklahoma, South Carolina, Texas and Virginia, sued the EPA in federal District Court challenging the implementation of the EPA's Cross-State Air Pollution Rule ("the Rule"). n61 The parties originally filed seven separate cases, which had been consolidated into a single case. n62¶ The Rule was promulgated by the EPA in 2011 pursuant to the authority given to it under the Clean Air Act, and requires certain states to reduce sulfur dioxide and nitrogen oxide emissions in order to reduce the impact of air quality down-wind in other states. n63 [\*413] Impacting a total of twenty-seven states, the Rule was scheduled to come into effect on January 1, 2012. n64 The Rule significantly expands the EPA's authority because, where the EPA is now limited to only setting air quality standards, the Rule includes enforcement provisions, a prerogative long maintained by individual state governments.