### Judicial Globalism

#### Law and Versteeg ignore key measures like case law—variance in constitutional texts are explained by latter judicial developments—US influence is strong

Jackson 12

[November 2012, Vicki C. Jackson is a Thurgood Marshall Professor of Constitutional Law, Harvard Law School., “COMMENT ON LAW AND VERSTEEG”, NEW YORK UNIVERSITY LAW REVIEW ONLINE, Vol. 87:25, November 2012, <http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-87-5-Jackson.pdf>]

Thus, the headline-grabber of “decline” may depend on whether the focus is on larger ideas or more detailed provisions. But even as to the content of a constitution’s specific provisions, the study’s methodology may understate the degree of similarity that continues to exist between the U.S. constitutional system and those of other countries. Indeed, one might wonder whether there has been any substantial decline in influence, rather than a set of departures in discrete, albeit significant, areas. For one thing, the authors’ research design rests, generally, on comparisons only of formal constitutional texts.10 The exclusion of constitutional case law and conventions may have contributed to the quantifiability and reliability of the empirical analysis. But the study of what can readily be quantified and coded, while interesting, should not obscure that other equally or more important phenomena may be harder to quantify reliably. And the impact of U.S. case law on constitutional design and interpretation in the rest of the world has been considerable. The impact of the authors’ methodology is suggested by the fact that a number of specific rights that the authors describe as existing in “generic”—that is, widely held—constitutions, but not in the United States, are in fact well-fixed in U.S. constitutional case law.11 These include rights of freedom of movement12 and women’s rights.13 Indeed, U.S. case law may well have influenced the adoption of formal rights in later adopted written constitutions.14 Moreover, among the provisions listed as being found only in the U.S. Constitution, and not in the “generic” constitution, are speedy and public trial rights.15 But cognate rights are set out in the European Convention on Human Rights (ECHR)16 and are enforced by the European Court of Human Rights (ECtHR);17 both the Convention and the ECtHR’s case law function as a form of quasiconstitutional supranational public law for forty-seven member states. Law and Versteeg’s methodological choice to focus only on formal constitutional texts (and not to include externally binding human rights commitments) may thus also have resulted in some overstatement of the degree of separation between the U.S. constitutional system and those of other countries.

### DA

#### The status quo triggers their DAs but not the advantages—the executive has functionally released all of the Uighurs, but it still happened on the executive’s terms and the court hasn’t ordered the release

Goldman 12/31

[12/31/13, Adam Goldman, “Final three Uighur prisoners moved from U.S. military prison at Guantanamo Bay”, <http://www.washingtonpost.com/world/national-security/final-three-uighur-prisoners-moved-from-us-military-prison-at-guantanamo-bay/2013/12/31/834c1eea-7220-11e3-8def-a33011492df2_story.html>]

The United States has transferred three Uighur Muslim detainees to Slovakia from the military prison at Guantanamo Bay, Cuba, U.S. officials said Tuesday. They were the last members of the ethnic minority from China to be held at the military prison. The trio had languished at Guantanamo for more than a decade since their capture in Pakistan after the Sept. 11, 2001, attacks — despite prior military assessments that they had no ties to al-Qaeda or the Taliban.

#### Be skeptical of their link evidence – entous cites one us official who tenuously admits that targeted killing may replace indefinite detention – that’s not indicative ov broader administrative policy

#### Drone use is still high

Mazzetti and Landler, August 2013 - Pulitzer Prize for reporting on the intensifying violence in Pakistan and Afghanistan and Washington's response. (August 2, Mark and Mark, “Despite Administration Promises, Few Signs of Change in Drone Wars ” <http://www.nytimes.com/2013/08/03/us/politics/drone-war-rages-on-even-as-administration-talks-about-ending-it.html?pagewanted=print>)

There were more drone strikes in Pakistan last month than any month since January. Three missile strikes were carried out in Yemen in the last week alone. And after Secretary of State John Kerry told Pakistanis on Thursday that the United States was winding down the drone wars there, officials back in Washington quickly contradicted him. More than two months after President Obama signaled a sharp shift in America’s targeted-killing operations, there is little public evidence of change in a strategy that has come to define the administration’s approach to combating terrorism. Most elements of the drone program remain in place, including a base in the southern desert of Saudi Arabia that the Central Intelligence Agency continues to use to carry out drone strikes in Yemen. In late May, administration officials said that the bulk of drone operations would shift to the Pentagon from the C.I.A. But the C.I.A. continues to run America’s secret air war in Pakistan, where Mr. Kerry’s comments underscored the administration’s haphazard approach to discussing these issues publicly. During a television interview in Pakistan on Thursday, Mr. Kerry said the United States had a “timeline” to end drone strikes in that country’s western mountains, adding, “We hope it’s going to be very, very soon.” But the Obama administration is expected to carry out drone strikes in Pakistan well into the future. Hours after Mr. Kerry’s interview, the State Department issued a statement saying there was no definite timetable to end the targeted killing program in Pakistan, and a department spokeswoman, Marie Harf, said, “In no way would we ever deprive ourselves of a tool to fight a threat if it arises.” Micah Zenko, a fellow with the Council on Foreign Relations, who closely follows American drone operations, said Mr. Kerry seemed to have been out of sync with the rest of the Obama administration in talking about the drone program. “There’s nothing that indicates this administration is going to unilaterally end drone strikes in Pakistan,” Mr. Zenko said, “or Yemen for that matter.”

#### Double bind – their ackerman evidence indicates that still 50 drone strike have happened – means global war should of happened already and the disad is already triggered or that’s not enough drones and there’s no brink to the link

### K#1

#### Legal and rights based detention strategies are a critical form of resistance—even if it fails, the act of demanding habeas rights affirms the life of detainees and provides a check on state violence

Ahmad 9, Professor of Law

[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

This Article is about the work that rights do, and the work of the lawyers who assert them on their clients‘ behalf, particularly in the face of inordinate state violence, as is the case with Guantánamo. I write this story of Guantánamo based on my experiences of nearly three years of representing a prisoner there.14 While commentators can point to an unbroken record of legal victories in Guantánamo cases at the Supreme Court,15 the view from the prisoners‘ perspective is quite different, and throws into question the claim of transformative legal practice that the Court cases might otherwise suggest. This is not to say that the lawyering has itself been a failure. Rather, I argue that instead of expecting rights-based legal contest at and around Guantánamo to produce transformative results, we might better understand it as a form of resistance to dehumanization. Such a reframing of the Guantánamo litigation invites comparison with other forms of resistance, and helps explain both the power and the limitations of legal practice in extreme instances of state violence. When placed in a human rights frame, Guantánamo is often described in terms of the government‘s denial of rights to the prisoners, but equally important has been the denial of their humanity. Guantánamo has been a project of dehumanization, in the literal sense; it has sought to expel the prisoners—consistently referred to as ―terrorists‖—from our shared understanding of what it means to be human, so as to permit, if not necessitate, physical and mental treatment (albeit in the context of interrogation) abhorrent to human beings. This has been accomplished through three forms of erasure of the human: cultural erasure through the creation of a terrorist narrative; legal erasure through formalistic legerdemain; and physical erasure through torture. While these three dimensions of dehumanization are distinct, they are also interrelated. All are pervaded by law, and more specifically, by rights. This is to say that law has been deployed to create the preconditions for the exercise of a state power so brutal as to deprive the Guantánamo prisoners of the ability to be human. In this way, Guantánamo recalls Hannah Arendt‘s formulation of citizenship as the right to have rights.16 By this she meant that without membership in the polity, the individual stood exposed to the violence of the state, unmediated and unprotected by rights. The result of such exposure, she argued, was to reduce the person to a state of bare life, or life without humanity. What we see at Guantánamo is the inverse of citizenship: no right to have rights, a rights vacuum that enables extreme violence, so as to place Guantánamo at the center of a struggle not merely for rights, but for humanity—that state of being that distinguishes human life from mere biological existence.17 In order to better understand the work that rights do, this Article explores why prisoners‘ advocates, including myself, adopted a rights-based advocacy strategy in an environment defined explicitly by the absence of rights. Since the first prisoners arrived at Guantánamo, the Bush Administration‘s position had been that they lack any rights whatsoever, under any source of law.18 Thus did the Bush Administration attempt to define a rights-free zone, through a manipulation of rights which seemed demonstrably political. And yet, despite the overwhelming evidence of politics animating law at Guantánamo, as advocates we made a conscious decision to engage in rights-based argument, and ―rights talk‖ 19 more generally. This approach finds some support in the work of rights scholars (and critical race theorists in particular) regarding the continuing vitality of rights-based approaches and the promise of ―critical legalism‖ 20 or ―radical constitutionalism‖ 21—the very kinds of progressive constitutional optimism that the Rasul and Boumediene decisions inspire. But the subsequent litigation history demands further inquiry into the political, cultural, jurisprudential, and strategic value of arguing rights in the historical moment and place of Guantá- namo. I argue that while we might hope for rights to obtain transformative effect—to close Guantánamo, for example, or to free those who are wrongfully imprisoned—at Guantánamo and in other places of extreme state violence, rights may do the more modest work of resistance. Rather than fundamentally reconfiguring power arrangements, as rights moments aspire to do, resistance slows, narrows, and increases the costs for the state‘s exercise of violence. Resistance is a form of power contestation that works from within the structures of domination.22 While it may aspire to overturn prevailing power relations, its value derives from its means as much as from its ends. Through resistance, new political spaces may open, but even if they do not, the mere fact of resistance, the assertion of the self against the violence of the state, is self- and life-affirming. Resistance is, in short, a way of staying human. This, then, is the work that rights do: when pushed to the brink of annihilation, they provide us with a rudimentary and perhaps inadequate tool to maintain our humanity. In Part I of this Article, I discuss the cultural erasure of the Guantánamo prisoners through the creation of a post-September 11 terrorist narrative, or what I term an iconography of terror, their legal erasure through the crea-tion of the now abandoned ―enemy combatant‖ 23 category and their physical erasure through torture. I contextualize these discussions with narrative descriptions of the place and space of Guantánamo, which I argue are necessary to understand the contextual nature of rights and rights claims, and the integral connection between law and narrative. In Part II, I deepen the discussion of legal erasure through critique and analysis of my representation of a teenage Canadian Guantánamo prisoner, Omar Khadr, in military commission proceedings, and through a doctrinal analysis of the shifting meanings of core legal terms in the Guantánamo legal regime. In so doing, I suggest how the experience of lawyering in and around Guantánamo helped to prove up its lawless nature. Part III considers the tactical, strategic, and theoretical values of adopting rights-based legal approaches in the rights-free zone of Guantánamo, paying particular attention to the value of rights as recognition, and ultimately arguing the importance of rights as a mode of resistance to state violence. In Part IV, I build upon this discussion of resistance by considering direct forms of resistance in which prisoners themselves have participated. In particular, I suggest the hunger strike as a paradigmatic form of prisoner resistance, and argue the lawyers‘ rights-based litigation and the prisoners‘ hunger strikes share a conceptual understanding of the relationship between rights, violence, and humanity. I conclude by reflecting on the value and limitations of reframing the work of the Guantánamo prisoners‘ lawyers as nothing more, but also nothing less, than resistance. I suggest that neither the resistance of the lawyers nor that of the prisoners may be enough to gain the prisoners‘ freedom, but that they are nonetheless essential when, as at Guantánamo, state violence is so extreme as to attempt to extinguish the human.

War turns structural violence

Goldstein 1—Prof PoliSci @ American University, Joshua, War and Gender , P. 412

First, peace activists face a dilemma in thinking about causes of war and working for peace. Many peace scholars and activists support the approach, "if you want peace, work for justice". Then if one believes that sexism contributes to war, one can work for gender justice specifically (perhaps among others) in order to pursue peace. This approach brings strategic allies to the peace movement (women, labor, minorities), but rests on the assumption that injustices cause war. The evidence in this book suggests that causality runs at least as strongly the other way. War is not a product of capitalism, imperialism, gender, innate aggression, or any other single cause, although all of these influences wars' outbreaks and outcomes. Rather, war has in part fueled and sustained these and other injustices. So, "if you want peace, work for peace." Indeed, if you want justice (gener and others), work for peace. Causality does not run just upward through the levels of analysis from types of individuals, societies, and governments up to war. It runs downward too. Enloe suggests that changes in attitudes toward war and the military may be the most important way to "reverse women's oppression/" The dilemma is that peace work focused on justice brings to the peace movement energy, allies and moral grounding, yet, in light of this book's evidence, the emphasis on injustice as the main cause of war seems to be empirically inadequate.

### K#2 (AKA K#1 THE REMIX)

#### Democracy limits totalitarian biopower

Dickinson, History Prof at UC Davis, ‘4 (Edward, “Biopolitics, Fascism, Democracy: Reflections On Our Discourse Concerning 'Modernity’” Central European History, Vol 37, p 1-48)

In an important programmatic statement of 1996 Geoff Eley celebrated the fact that Foucault's ideas have "fundamentally directed attention away from institutionally centered conceptions of government and the state ... and toward a dispersed and decentered notion of power and its 'microphysics.'"48 The "broader, deeper, and less visible ideological consensus" on "technocratic reason and the ethical unboundedness of science" was the focus of his interest.49 But the "power-producing effects in Foucault's 'microphysical' sense" (Eley) of the construction of social bureaucracies and social knowledge, of "an entire institutional apparatus and system of practice" (Jean Quataert), simply do not explain Nazi policy.3'1 The destructive dynamic of Nazism was a product not so much of a particular modern set of ideas as of a particular modern political structure, one that could realize the disastrous potential of those ideas. What was critical was not the expansion of the instruments and disciplines of biopolitics, which occurred everywhere in Europe. Instead, it was the principles that guided how those instruments and disciplines were organized and used, and the external constraints on them. In National Socialism, biopolitics was shaped by a totalitarian conception of social management focused on the power and ubiquity of the volkisch state. In democratic societies, biopolitics has historically been constrained by a rights-based strategy of social management. This is a point to which I will return shortly. For now, the point is that what was decisive was actually politics at the level of the state. A comparative framework can help us to clarify this point. Other states passed compulsory sterilization laws in the 1930s — indeed, individual states in the United States had already begun doing so in 1907. Yet they did not proceed to the next steps adopted by National Socialism — mass sterilization, mass "eugenic" abortion and murder of the "defective." Individual figures in, for example, the U.S. did make such suggestions. But neither the political structures of democratic states nor their legal and political principles permitted such policies actually being enacted. Nor did the scale of forcible sterilization in other countries match that of the Nazi program. I do not mean to suggest that such programs were not horrible; but in a democratic political context they did not develop the dynamic of constant radicalization and escalation that characterized Nazi policies.

#### Legal norms are good—prevents liberal democracies from sliding into totalitarianism by eliminating instances of exclusion

Heins, Professor PolSci Concordia, ‘5 (Volker, “Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy” German Law Journal, Vol 6 No 5)

According to this basic Principle of Distinction, modern humanitarian action is directed towards those who are caught up in violent conflicts without possessing any strategic value for the respective warring parties. Does this imply that classic humanitarianism and its legal expressions reduce the lives of noncombatants to the "bare life" of nameless individuals beyond the protection of any legal order? I would rather argue that humanitarianism is itself an order-making activity. Its goal is not the preservation of life reduced to a bare natural fact, but conversely the protection of civilians and thereby the protection of elementary standards of civilization which prevent the exclusion of individuals from any legal and moral order. The same holds true for human rights, of course. Agamben fails to appreciate the fact that human rights laws are not about some cadaveric "bare life", but about the protection of moral agency.33 His sweeping critique also lacks any sense for essential distinctions. It may be legitimate to see "bare life" as a juridical fiction nurtured by the modern state, which claims the right to derogate from otherwise binding norms in times of war and emergency, and to kill individuals, if necessary, outside the law in a mode of "effective factuality."34 Agamben asserts that sovereignty understood in this manner continues to function in the same way since the seventeenth century and regardless of the democratic or dictatorial structure of the state in question. This claim remains unilluminated by the wealth of evidence that shows how the humanitarian motive not only shapes the mandate of a host state and nonstate agencies, but also serves to restrict the operational freedom of military commanders in democracies, who can- not act with impunity and who do not wage war in a lawless state of nature.35 Furthermore, Agamben ignores the crisis of humanitarianism that emerged as a result of the totalitarian degeneration of modern states in the twentieth century. States cannot always be assumed to follow a rational self-interest which informs them that there is no point in killing others indiscriminately. The Nazi episode in European history has shown that sometimes leaders do not spare the weak and the sick, but take extra care not to let them escape, even if they are handicapped, very old or very young. Classic humanitarianism depends on the existence of an international society whose members feel bound by a basic set of rules regarding the use of violence—rules which the ICRC itself helped to institutionalize. Conversely, classic humanitarianism becomes dysfunctional when states place no value at all on their international reputation and see harming the lives of defenseless individuals not as useless and cruel, but as part of their very mission.36 The founders of the ICRC defined war as an anthropological constant that produced a continuous stream of new victims with the predictable regularity and unavoidability of floods or volcanic eruptions. Newer organizations, by contrast, have framed conditions of massive social suffering as a consequence of largely avoidable political mistakes. The humanitarian movement becomes political, to paraphrase Carl Schmitt,37 in so far as it orients itself to humanitarian states of emergency, the causes of which are located no longer in nature, but in society and politics. Consequently, the founding generation of the new humanitarian organizations have freed themselves from the ideals of apolitical philanthropy and chosen as their new models historical figures like the Swedish diplomat Raoul Wallenberg, who saved thou- sands of Jews during the Second World War.38 In a different fashion than Agamben imagines, the primary concern in the field of humanitarian intervention and human rights politics today is not the protection of bare life, but rather the rehabilitation of the lived life of citizens who suffer, for in- stance, from conditions such as post-traumatic stress disorder. At the same time, there is a field of activity emerging beneath the threshold of the bare life. In the United States, in particular, pathologists working in conjunction with human rights organizations have discovered the importance of corpses and corporal remains now that it is possible to identify reliable evidence for war crimes from exhumed bod- ies.39

#### Agamben offers no realistic alternative that has the potential to be successful against the sovereign

**Babias, 7** – Director of the Neuer Berliner Kunstverein

(Marius, “Zones of Indiferrence,” Eurozine, http://www.eurozine.com/articles/2007-11-15-babias-en.html)

What are the consequences now of the “state of exception” having become a long-term provisional measure that threatens democracy or of the emotionalisation of politics by means of “populism” as a social “state of nature”? How can the “public sphere” be separated from the ideological clinch of the “community”, to be recharged with resistance and made capable of conflict management? The “war on terror” appears to be ringing in a long “state of exception” in the early twenty-first century; the major cities of Western democracies are turning into temporary high-security zones for survival. Political analysts predict a period of increasing military actions over the next thirty years; future forms of domination will not, however, be based exclusively on military power and economic strength but increasingly on cultural soft power. The wars in Yugoslavia, Afghanistan and Iraq that appear to be territorially limited, as well as the conflicts in Kashmir and the Caucasus, will extend to the Western democracies in the form of terrorist attacks; the world finds itself in a state of war, even if for now there will be no open military actions on western soil in the near future, at least in the form of soldiers standing eye to eye. The “state of exception” has been institutionalised in Colombia, Chiapas, Guatemala, Afghanistan, Indonesia, Angola, Congo and Turkey. In the former Yugoslavia the normal state of affairs has turned from war to conflicts between warlords, in which political and military aspects, as well as mafia-like and entrepreneurial ones, have come together. The European military presence in the Balkans ensures that the “state of exception” will become the rule, which benefits above all the hegemonic ambitions of the leading European states, Germany and France. The controversial discussion of recent years about the basic conflict between politics and morality, which briefly threatened the material interests and cultural-ideological hegemonic ambitions of the elites, has since died down; instead, the politics of security have been promoted to the central focus of action in the *democracies. The conservative zeitgeist* – shocked by the world bestseller *Empire* by Antonio Negri and Michael Hardt, which inspired again the worldwide movement of the critics of globalisation – longs for a biopolitical order for the world that Agamben’s political conception of the “state of exception” provides by asserting the primacy of a “sovereign” philosophy for politics. Whether referring to refugee camps in Australia, *sans papiers* in France, the torture of immigrants on the borders of the European Union or the torture of Taliban and Al Qaeda prisoners, Agamben’s analyses may comprehend the increasing loss of rights and degradation of human beings today, but he refrains from a call for resistance and rebellion, and seems to argue for the irreversible historical necessity of injustice and oppression. The difference between “law” and “justice”, however, remains, now as ever, the basis for a political critique of violence. Continuing to recognise this difference is synonymous with a battle against injustice and oppression.