# Round 1—Neg vs Mary Wash SY

## 1NC

### 1nc 1

#### Plan’s restrictions are a paper tiger that reinforces a Trumanite bureaucracy, the vast network of officials responsible for national security policymaking—obfuscates underlying ideologies that jack solvency

**Glennon 14**—Professor of International Law, Fletcher School of Law and Diplomacy, Tufts University [Trumanites=“the network of several hundred high-level military, intelligence, diplomatic, and law enforcement officials within the Executive Branch who are responsible for national security policymaking”]

 (Michael, “National Security and Double Government”, Harvard National Security Journal / Vol. 5, pg 1-114, dml)

The first set of potential remedies aspires to tone up Madisonian muscles one by one **with ad hoc** legislative **and** judicial **reforms**, by, say, narrowing the scope of the state secrets privilege; permitting the recipients of national security letters at least to make their receipt public; broadening standing requirements; improving **congressional oversight of** covert operations, including drone killings **and** cyber operations; **or strengthening** statutory constraints **like** FISA545 and **the War Powers Resolution**.546 Law reviews brim with such proposals. But **their stopgap approach has been tried repeatedly** since the Trumanite network’s emergence. Its futility is now glaring. Why such efforts would be any more fruitful in the future **is hard to understand**. The Trumanites **are committed to the rule of** **law** and their sincerity is not in doubt, but the rule of law to which they are committed **is** largely devoid **of meaningful constraints**.547 Continued focus on legalist band-aids merely buttresses the illusion that the Madisonian **institutions are alive and well**—and with that illusion, **an entire narrative** **premised on the assumption that it is merely a matter of** identifying a solution **and** looking to the Madisonian institutions to effect it. That frame deflects attention from the underlying malady. What is needed, if Bagehot’s theory is correct, is **a fundamental change in** the very discourse **within which U.S. national security policy is made**. For **the question is no longer**: What should the government do? The questions now are: What should be done about the government? What can be done about the government? **What are the responsibilities** not of the government **but** of the people?

#### The impact’s a permanent war economy—the model of the Trumanite bureaucracy is empirically responsible for every policy failure and disastrous authoritarianism—solvency’s a ruse to dissuade public participation

**Glennon 14**—Professor of International Law, Fletcher School of Law and Diplomacy, Tufts University [Trumanites=“the network of several hundred high-level military, intelligence, diplomatic, and law enforcement officials within the Executive Branch who are responsible for national security policymaking”]

 (Michael, “National Security and Double Government”, Harvard National Security Journal / Vol. 5, pg 1-114, dml)

**Enough examples exist to persuade the public** that the network is **subject to** judicial, legislative, **and** executive **constraints**. **This appearance is** important to its operation, for the network **derives legitimacy** from the ostensible authority of the public, constitutional branches of the government. **The appearance of accountability is**, however, largely an illusion fostered by those institutions’ pedigree, ritual, intelligibility, mystery, and superficial harmony with the network’s ambitions. **The** courts**,** Congress**, and** even the presidency **in reality** impose little constraint. Judicial review is negligible; congressional oversight dysfunctional; and presidential control nominal. Past efforts to revive these institutions have thus fallen flat. Future reform efforts are **no more likely to succeed**, relying as they must **upon those same institutions** to restore power to themselves **by exercising** the very power that they lack. External constraints—public opinion and the press—are insufficient to check it. Both are manipulable, and their vitality depends heavily upon the vigor of constitutionally established institutions, which would not have withered had those external constraints had real force. Nor is it likely that any such constraints can be restored **through governmental efforts to inculcate greater civic virtue**, which would ultimately concentrate power even further. Institutional restoration **can come only from an energized body politic**. The prevailing incentive structure, however, **encourages the public to become less,** not more**, informed and engaged.**

To many, **inculcated in the hagiography of Madisonian checks and balances and** oblivious **of the reach of Trumanite power,** the response to these realizations **will be denial**. The image of a double national security government will be shocking. It cannot be right. It **sounds of conspiracy**, “a state within,” and other variations on that theme. “The old notion that our Government is an extrinsic agency,” Bagehot wrote, “still rules our imaginations.”603 That the Trumanite network could have emerged in full public view and without invidious intent makes its presence all the more implausible. Its existence **challenges all we have been taught**.

There is, however, little room for shock. The pillars of America’s double government have long stood in plain view for all to see. We have learned about significant aspects of what Bagehot described—from some eminent thinkers. Max Weber’s work on bureaucracies showed that, left unchecked, the inexorability of bureaucratization **can lead to a “**polar night of icy darkness**” in which humanitarian values are sacrificed for** abstract organizational ends.604 Friedrich Hayek’s work on political organization led him to conclude that “the greatest danger to liberty today comes from the men who are most needed and most powerful in government, namely, **the efficient expert administrators exclusively concerned with what they regard as the public good**.”605 Eric Fromm’s work on social psychology showed how people unconsciously adopt societal norms as their own to avoid anxiety-producing choices, so as to “escape from freedom.”606 Irving Janis’s work on group dynamics showed that the greater a group’s esprit de corps, “the greater the danger that independent critical thinking will be replaced by groupthink, which is likely to result in irrational and dehumanizing actions directed against out-groups.”607 Michael Reisman’s work on jurisprudence has shown how de facto operational codes can quietly arise behind publiclyembraced myth systems, **allowing for governmental conduct that is** not approved openly by the law.608 Mills’ 1956 work on power elites showed that the centralization of authority among officials who hold a common world view and operate in secrecy **can produce a “**military metaphysic**” directed at maintaining a “**permanent war economy**.**”609 One person familiar with Mills’ work was political scientist Malcolm Moos, the presidential speechwriter who five years later wrote President Eisenhower’s prophetic warning.610 “In the councils of government,” Eisenhower said, “we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. **The potential for the** disastrous rise of misplaced power **exists and will persist**.”611

Bagehot anticipated these risks. Bureaucracy, he wrote, is “the most unimproving and shallow form of government,”612 **and the executive that commands it “**the most dangerous.”613 “If it is left to itself,” he observed, “without a mixture of special and non-special minds,” decisional authority “will become technical**,** self-absorbed**,** self-multiplying.”614 The net result is responsibility that is neither fixed nor ascertainable but diffused **and** hidden,615 with implications that are beyond historical dispute. “The most disastrous decisions in the twentieth century,” in Robert Dahl’s words, “turned out to be those made by authoritarian leaders **freed from democratic restraints**.”616

The benefits derived by the United States from double government —enhanced technical expertise, institutional memory and experience, quick-footedness, opaqueness in confronting adversaries, policy stability, and insulation from popular political oscillation and decisional idiosyncrasy —need hardly be recounted. Those benefits, however, have not been costfree. The price lies in well-known risks flowing from centralized power, unaccountability, and the short-circuiting of power equilibria. Indeed, in this regard the Framers thought less in terms of risk than certainty. John Adams spoke for many: “The nation which will not adopt an equilibrium of power must adopt a despotism. There is no other alternative.”617

The trivial risk of sudden despotism, of an abrupt turn to a police state or dictatorship installed with coup-like surprise, **has created a false sense of security** in the United States.618 That a ~~strongman~~ [strongperson] of the sort easily visible in history could suddenly burst forth is not a real risk. The risk, rather, is the risk of slowly tightening centralized power**, growing and evolving organically** beyond public view**,** increasingly unresponsive **to** Madisonian **checks and balances**. Madison wrote, “There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.”619 Recent history **bears out his insight**. Dahl has pointed out that in the 20th century—the century of democracy’s great triumph—**some** seventy democracies collapsed **and quietly gave way to** authoritarian regimes.620 That risk correlates with voter ignorance; the term Orwellian has little meaning to a people who have never known anything different, who have scant knowledge of history, civics, or public affairs, and who in any event have likely never heard of George Orwell. “If a nation expects to be ignorant and free, in a state of civilization,” Thomas Jefferson wrote, “it expects what never was and never will be.”621 What form of government ultimately will emerge from the United States’ experiment with double government is uncertain. The risk is considerable, however, **that it will not be a democracy**.

#### Vote neg—criticism is necessary to shift the frame from a question of law to one of politics—the alt enables public interrogation of the underlying assumptions of the aff which comes prior to their impacts

**Rana 11**—Cornell Law

(Aziz, “Who Decides on Security?”, Cornell Law Faculty Working Papers, Paper 87, dml)

If anything, one can argue that the presumptive gulf between elite awareness and suspect mass opinion has generated its own **very dramatic** political **and** legal **pathologies**. In recent years, the country has witnessed **a variety of security crises** **built on** the basic failure of ‘expertise.’195 At present, part of what obscures this fact is the very culture of secret information sustained by the modern security concept. Today, it is commonplace for government officials to leak security material about terrorism or external threat to newspapers **as a method of shaping the public debate**.196 These ‘open’ secrets allow greater public access to elite information and embody a central and routine instrument for incorporating mass voice into state decision-making. But this mode of popular involvement comes at a key cost. Secret information is **generally treated as** worthy of a higher status **than information already present in the public realm** – the shared collective information through which ordinary citizens reach conclusions about emergency and defense. Yet, oftentimes, as with the lead up to the Iraq War in 2003, although **the** actual content **of this secret information is flawed**,197 its status as secret masks these problems and allows policymakers to **cloak their positions in added authority**. This reality highlights the importance of **approaching security information with** far greater collective skepticism; it also means that security judgments may be more ‘Hobbesian’ – marked fundamentally by epistemological uncertainty **as opposed to verifiable fact** – than policymakers admit.

If both objective sociological claims at the center of the modern security concept are themselves profoundly contested, what does this mean for reform efforts that seek to recalibrate the relationship between liberty and security? Above all, it indicates that **the** central problem **with the procedural solutions** offered by constitutional scholars – emphasizing new statutory frameworks **or** greater judicial assertiveness – is that **they mistake a** question of politicsfor one of law. In other words, such scholars ignore the extent to which governing practices are the product of **background political judgments about** threat**,** democratic knowledge**,** professional expertise**, and the necessity for** insulated decision-making. To the extent that Americans are **convinced that they face** continuous danger from hidden and potentially limitless assailants – danger **too complex** for the average citizen to comprehend independently – it is inevitable that institutions (**regardless of legal reform initiatives**) will **operate to** centralize power **in those hands presumed to enjoy military and security expertise**. Thus, any systematic effort **to challenge the current framing** of the relationship between security and liberty **must begin by challenging** the underlying assumptions **about knowledge and security upon which** legal **and** political **arrangements rest**. **Without a** sustained **and** public **debate** **about** the validity of security expertise, its supporting institutions, **and** the broader legitimacy of secret information, **there can be no substantive shift in our constitutional politics**. The problem at present, however, is that no popular base exists to raise these questions. Unless such a base emerges, we can expect our prevailing security arrangements **to become ever more entrenched**.

#### Demands for concrete alternatives and “weighing the aff” LOCKS IN bureaucratic thinking—full rejection’s key

**Frug 84**—Louis D. Brandeis Professor of Law at Harvard Law School

(Gerald, “THE IDEOLOGY OF BUREAUCRACY IN AMERICAN LAW”, 97 Harv. L. Rev 1276 1983-1984, dml)

In my view, modest realists have not rejected bureaucratic theory in favor of sophisticated reflection about the real world as it is. They have instead absorbed the various bureaucratic theories into their view of the world - indeed, into their very definition of themselves. Notice how the various models of bureaucracy **structure the modest realist position**. Like workers in a formalist bureaucracy, modest realists **only value** instrumental**,** programmatic **thinking**; they want to discuss **not your vision of the world** (or your critique of theirs) **but only** your plan of action**, the next** concrete step **you propose**. They are interested in means not ends, facts not values. Although they retain discretion (they have ideas about how to change the world), they accept as given **that most basic decisions are beyond their control**. Moreover, like managers in the expertise model, modest realists have a sense of the world: they know what it's like. As is characteristic of bureaucratic "experts," their self-assurance rests not on specific ideas but on their ability to assert their authority. They act as if they are in **a** **position** **to** choose dispassionately **among alternative courses of action** - as if they are competent to make impersonal judgments.

Like judicial review theorists, modest realists accept bureaucracy as a fact of life, although they are willing to limit its excesses. They too apply a deferential standard when they inquire into bureaucratic institutions because they fear that excessive attempts to change things will just make matters worse. **When asked to decide something, they act like judges:** they "balance," they "weigh,"they shift burdens of proof. Like judges, they leave the person whose ideas they are evaluating in the dark about how their ultimate decision is being made. Finally, like interest-group pluralists, modest realists think that **any proposals for changing bureaucratic institutions** should be framedin terms of legislative action. Whether or not they seek change through interest-group politics themselves, they are careful not to let their political views influence the way they act in their other roles in life. Thus they avoid using their capacity as shareholders to change the nature of corporate policy, insisting only that the corporations in which they invest advance their economic interests. Similarly, as employees, they think it wrong to bring political conflict into the workplace; they believe they owe their company a duty of loyalty as long as they continue to work for it. In their roles as shareholders and employees, in other words, they act like consumers of bureaucratic services: they are free to sell their stock or quit their jobs **but not to use these roles to transform corporate policy**.

Modest realists have so internalized the bureaucratic moves that, as we have seen, **enable them to argue** for **and** against **everything** - that it is hard to know what form of argument might convince them to rethink their approach. They are not likely to pay much attention to the theoretical critique of their position advanced in this Article; **they want to** put theory aside **and** engage in instru-mental decisionmaking. They feel they can handle the subjective/ objective structure of their position simply by making the tough choices as best they can. Indeed, if I were to conclude this Article with some specific suggestion for nonbureaucratic structures - proposing, for example, the kind of worker cooperative adopted in Mondragon 378 - they would **immediately disregard the rest** of the Article **and focus their attention** solely on the proposed alternative. ("Now," they might say, "here's something real to discuss.") In doing so, they would simply substitute their perspective for my own. **Once the argument is** cast in their preferred form, they would evaluate the suggestion **with their fine-tuned skepticism, no doubt** discarding it as"outweighed" by other, more sophisticated factors. That's the way they approach ideas; that's the way they think.

This Article is **designed to criticize this way of thinking**. I am suggesting that the modest realist approach to the world, like those more closely associated with the particular models themselves, is a way people **accommodate themselves to bureaucracy** in thought as well as in action. Modest realists substitute for the subjective/objective structure of theory the equally flexible, equally manipulable subjective/ objective structure of "modifying" **the "status quo."** They treat some aspects of the world **as** objectively necessary and other aspects as open to our joint reconstruction. Like any other subjective/objective structure, however, this is a form of self-deception - perhaps its most pervasive modern form. My critique will mean something to modest realists only if they try to get outside this way of thinking, **only if they criticize it** as a whole. **A suggestion for change** won't cause them to do so; merely reading this Article will probably not cause them to do so either. Instead, they will have to **experience the manipulability of their way of thinking themselves** - perhaps when they try to teach corporate or administrative law - or actually engage in action with others in a way that **makes the possibility of different ways of approaching the world seem real to them**.

Modest realists could abandon their effort **to treat some aspects of the world as fixed** and others as subject to human modification; they could, in other words, abandon their own characteristic attempt to secure a foundation for social life. If they (and other defenders of the bureaucratic form) thought of the world in terms of human, interpersonal contact, the idea of creating separate spheres of permanence and mobility - of creating separate spheres of subjectivity and objectivity of any kind - would seem bizarre. In our daily encounters with others, we recognize that we help create each other through our interactions. It is because these interactions are both necessary and threatening that all of them must continuously be open to reconstruction and revision. In the everyday world of human interdependence, there can be no such thing as a "foundation" that could render (even part of) social life noncontroversial.

It may be hard, however, for modest realists, as well as other readers, to think it worthwhile to give up the search for a foundation that would render human relationships unthreatening. They may, for example, believe that we risk tyranny without such a foundation. 379 It is certainly true that, without foundations, there is no guarantee against tyranny; its likelihood will depend on what people do. But foundations have never protected us against tyranny either; there are no such things. Even the fabrication of foundations hasn't helped; we have never been able to "deduce" from some ultimate foundation the things that are worth fighting for and worth fighting against. Without a (mythical) foundation for our views, we admittedly are (still) unable to say what our choices are based on. But **social choices are certainly not arbitrary**: choices about how to live and what kind of world to create **are neither "**objective**" nor "**subjective**,"** neither certain nor meaningless. They cannot be characterized either way once we recognize how crucially the nature of human relationships and institutions affect who we are. The alternative to "foundations" is **not "chaos" but** the joint reconstruction of social life, the prospect I referred to at the outset as the quest of participatory democracy.380 Acting together, **we could begin to dismantle the structure of bureaucratic organizations -** not all at once**,** but piece by piece. In their place we could substitute forms of human relationship that **better reflect our aspirations for human development and equality**. Numerous suggestions for immediate action have already been made;381 if we focus on the institutions **that currently affect our lives,** we can readily think of more ourselves**.**

### 1nc 2

Text—The United States Congress should restrict the use of the Internment Cases as a basis for the war powers authority of the President of the United States in the area of indefinite detention.

#### *Only* Congressional change triggers culture shifting and an effective social change

Stoddard 97 (Thomas B., Professor of Law – New York University, “Bleeding Heart: Reflections on Using the Law to Make Social Change”, New York University Law Review, November, 72 N.Y.U.L. Rev. 967, Lexis)

V   Back to New Zealand   In New Zealand and afterward, I puzzled over the disjunction between that country's formal protections for gay people on the one hand, and its limited cultural integration of gay people on the other. Now I am considerably less puzzled. In enacting legal protections for lesbians and gay men, New Zealand changed the applicable rules of law, but did not alter in any significant way the underlying culture - in short, New Zealand engaged in "rule-shifting" but not "culture-shifting." I remain uncertain of the reasons for New Zealand's formal embrace of gay rights protections, but I think I now better understand the possible disjunctions between law and culture. On reflection, I should not have been surprised by the disjunction. Most legal changes entail "rule-shifting" without "culture-shifting." In only a minority of instances does a legal change have cultural resonance. As already stated, in general such a change must involve the following four elements: (1) A change that is very broad or profound; (2) Public awareness of that change; (3) A general sense of the legitimacy (or validity) of the change; and [\*991]  (4) Continuous, appropriate enforcement of the change. Typically, the absence of any one of these factors will forestall the possibility of "culture-shifting," although, as the story of DOMA indicates, there are exceptions. I have already expressed my view that in most circumstances, change through the legislature is more likely to engender "culture-shifting" than change through a court or an administrative agency, and that legislative change is therefore - in general - preferable to other forms of change. It is deeper and lasts longer. Conversely, it is also harder to attain, since legislatures are rambunctious places that operate slowly, untidily, and often illogically. Legislative change certainly does not assure "culture-shifting," but it does make it more feasible. Many of my colleagues seeking social justice have deliberately avoided legislatures in recent decades, both because of the difficulty of making change there and because of the perception that politicians will not be receptive to their claims. They have turned by and large to the courts. While applauding the changes these lawyer-activists have helped to bring about, and while acknowledging the shortcomings and frustrations of legislative change, I submit that those of us in the business of "culture-shifting" should upend our traditional preference for judicial activity and embrace the special advantages of legislative change. E.M. Forster appended to the title page of his novel Howard's End the enigmatic aphorism: "Only connect ..." It is an apt injunction to lawyers like me. If we lawyer-activists truly seek deep, lasting change, we have to "connect" with the public. We have to accord as much attention to public attitudes as we do to the formal rules that purport to guide or mold those attitudes. That means thinking as concertedly about process as we do about substance. Process matters. How a new rule comes about may, in the end, be as important as what it says. The world yearns for change - and for changemakers. But those of us who try to make change ought to think more systematically about what we do and why. For the world deserves effective change, not just new rules.

### 1nc 3

#### McCutcheon will win in a slim 5-4 ruling – Justice Roberts is key

Reilly and Blumenthal 10-8 (Ryan J., D.C.-based reporter who covers the Justice Department and the Supreme Court for The Huffington Post, and Paul, reporter for the Huffington Post covering money and influence in politics, “McCutcheon v. FEC: Supreme Court Skeptical Of Campaign Contribution Limits,” Huffington Post, 2013, <http://www.huffingtonpost.com/2013/10/08/mccutcheon-v-fec_n_4059180.html2>)

A slim majority of Supreme Court justices seemed skeptical Tuesday that the federal government may cap the total amount of money that individual donors can give to political candidates running for federal office, in a case that could have a massive impact on the campaign finance system.

In McCutcheon v. Federal Election Commission, the high court is set to decide whether the limits on aggregate federal campaign contributions -- the overall cap currently stands at $123,200 per donor for the 2014 election cycle -- are unconstitutional because they place a burden on the free speech rights of donors.

Shaun McCutcheon, the man bringing the case, only seeks to give the maximum individual donation to more candidates. But Senate Minority Leader Mitch McConnell (R-Ky.) is trying to use the case as a vehicle to persuade the Supreme Court to dismantle contribution limits altogether.

Court observers were keeping a close eye on Chief Justice John Roberts, who most campaign finance reform advocates see as the only hope of upholding the aggregate contribution limits. Roberts joined the majority in a 2006 decision holding that contribution limits were constitutional.

Speaking of the aggregate limits on Tuesday, Roberts said, "It seems to me to be a very direct restriction" on donations that, individually, Congress has decided do not pose a corruption threat.

Solicitor General Donald Verrilli Jr., representing the FEC, based his argument to uphold the limits on the possibility that a candidate could solicit a check up to $3.5 million for a joint fundraising committee. This solicitation, Verrilli argued, would violate the ban on the solicitation of extremely large contributions that the court upheld in the 2003 McConnell v. FEC case.

Roberts responded, "I appreciate the argument about the $3.5 million check," but he wondered if there was a way to balance the corruption concern around this solicitation with what Roberts saw as the First Amendment burdens of the aggregate limits.

"I suppose you could calculate and set an aggregate limit that is higher," Verrilli answered.

Justice Anthony Kennedy is usually seen as the high court's swing vote between the conservative and liberal blocs, but he wrote the controversial 2010 Citizens United opinion that paved the way for so-called super PACs to dominate election spending. He was not seen as likely to unite with the liberal-leaning justices in the McCutcheon case.

#### Ruling on war powers directly trades off and hurts the Court’s perceived legitimacy – that results in deference on individual rights

Devins and Fitts 97 (Neal, Ernest W. Goodrich Professor of Law and Lecturer in Government – College of William and Mary, and Michael A., Robert G. Fuller, Jr. Professor of Law – University of Pennsylvania, “The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations,” Georgetown Law Journal, November, 86 Geo. L.J. 351, Lexis)

In contrast, the Supreme Court has good reason to steer clear of these cases. Concerns of interbranch harmony matter more to a Court whose influence and reputation do not hinge on the resolution of separation of powers and administrative law disputes. **For example, to maximize its power to** speak the last wordon individual rights **disputes, the Court may find it advantageous to** trade off **to the elected branches the power to sort out** foreign affairs, war powers, and other structural matters. n67 Beyond the Court's particularized interest in individual [\*364] rights, the Supreme Court is far more likely than lower courts to take social and political forces into account. Acknowledging that it can neither appropriate funds nor command the military, the Court recognizes that its power lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary." n68 As psychologists Tom Tyler and Gregory Mitchell observed, the Court seems to believe that "public acceptance of the Court's role as interpreter of the Constitution -- that is, the public belief in the Court's institutional legitimacy -- enhances public acceptance of controversial Court decisions." n69 Throwing itself into the middle of disputes between disappointed lawmakers and either the Congress or the White House opens the Court up to political retaliation and, as such, is a gambit the Court is disinclined to take. n70 The Court in Raines was well aware of these high stakes, acknowledging the "risk[s]" to its "public esteem" by "improperly and unnecessarily" participating in political battles over the separation of powers. n71

#### That flips Roberts’ decision

Stothers 10-21 (Patrick Stothers-Kwak, Blake, Cassels & Graydon LLP, “Citizens United Did Not Equate Money with Speech—But McCutcheon Will,” 2013, <http://www.thecourt.ca/2013/10/21/citizens-united-did-not-equate-money-with-speech-but-mccutcheon-will/>)

Most debates regarding freedom of expression ultimately boil down to a conflict between free speech utilitarianism—wherein speech is only valuable insofar as it can produce useful social outcomes—and free speech absolutism, which views with extreme skepticism any government attempt to differentiate between useful and non-useful types of speech. The recent line of First Amendment cases has very much skewed towards the latter, and should it continue along this trajectory, Mr. McCutcheon will most likely succeed in his claim. However, Citizens United precipitated a considerable political backlash, and the present case could paint the Court in an even more partisan light—it doesn’t help that the Republican Senate Minority Leader is an amicus curiae. By joining the four liberal justices to uphold key provisions of the Patient Protection and Affordable Care Act in National Federation of Independent Businesses v Sebelius, 567 US (2012), Roberts proved that he has **some regard for the institutional integrity of the Supreme Court and** deference to the political process. It will be interesting to see whether he reprises this role as institutional peacekeeper in McCutcheon.

#### McCutcheon’s key to accountability to political parties – that checks ideological extremists like the Tea Party

Sides 10-16 (John, Associate Professor of Political Science – George Washington University, “Why striking down campaign contribution limits might make politics better,” Washington Post, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/16/why-striking-down-campaign-contribution-limits-might-make-politics-better/>)

Finally, I want to say more about why striking down aggregate contribution limits might actually attenuate ideological extremism (assuming I’m mostly wrong on my first point that people will not try to circumvent contribution limits!). The current campaign finance system – with its emphasis on interest group spending — favors highly ideological factions that have the means and motive to run independent campaigns. Rules that channel more money through party organizations and candidates might dampen the power of groups like the Tea Party. Against this claim, Bob suggests that political parties ran ads in 2012 that were just as “aggressive” and negative as interest groups. Research by the Wesleyan Media Project indicates that this is not true. But this finding is not relevant to my argument.

My point about moderation is not about the tone or content of political ads, but is tied to the nomination process where party factions fight their ideological battles. A generation ago, such battles were waged internally in the proverbial smoke-filled rooms. Today they might be hashed out in the open through primary elections. The advantage goes to the interest group that can raise a lot of money and mobilize its partisan faction of voters. Ideological moderation seems more plausible when political resources are controlled primarily by party leaders whose chief incentive is to win elections rather than take positions.

Like Bob, I support reasonable contribution limits, but I do not think the retention of aggregate limits on party committees and candidates improves the current campaign finance system. I certainly do not think, as Bob suggests, that a favorable ruling for McCutcheon will encourage “more money from fewer sources to flow more freely.” That dynamic was partially spurred by Citizens United. If anything removing the aggregate limits could make the system more accountable by channeling funds to political committees that are transparent, particularly party and candidate committees, which must face the voters at the ballot box.

#### The impact is US/Russia relations

Sokov 13 (Nicholas – Senior Fellow at the Vienna Center for Disarmament and Non-Proliferation (VCDNP), “US-Russian Relations: Beyond the Reset”, 1/29, <http://www.europeanleadershipnetwork.org/us-russian-relations-beyond-the-reset_459.html>)

Looking into the future, most observers of US-Russian relations tend to concentrate on arms control and disarmament – a new treaty to replace New START, missile defense, tactical nuclear weapons and other similar issues. Others pay attention to the human and political rights issues, including first of all the conservative wave that is sweeping through Russia. It is quite sad that nuclear disarmament and political rights dominate the agenda. This only shows that the relationship lacks depth. More than twenty years after the end of the Cold War, trade and investment remain at an extremely low level. They cannot serve as a stabilizer of the relationship (in sharp contrast to Russia’s relations with Europe) and their absence allows other, more volatile and more adversarial issues to top the agenda. Two features are likely to dominate the future of the US-Russian relationship and both will have a negative effect: domestic politics and the political transition in the Middle East and Northern Africa which is commonly known as the “Arab Spring.” Contrary to common opinion, there are very few truly difficult issues on the bilateral agenda that cannot be resolved through negotiation. The increasingly conflictual nature of the relationship results from domestic politics in both countries rather than from strategic, economic, or political differences. A good illustration is the well-known controversy over missile defense. Any decent diplomat could find a solution in a matter of months. Russian concerns concentrate on the fourth – and the last – phase of the American plan (known as the Phased Adaptive Approach), which foresees deployment of systems theoretically capable of intercepting strategic missiles. The solution proposed by Russian military leaders is to limit the capability of the fourth-phase system (for example, through limits on the number of interceptors and the areas of their deployment) so that it does not undermine the existing US-Russian strategic balance while preserving the ability of the American system to intercept a small number of long-range missiles, i.e., to limit the system to its officially proclaimed purpose. In the end, this is about the predictability of the American missile defense capability. The prospect of reaching agreement, however, is barred by the Republican Party, especially its Tea Party wing, which regards any limits whatsoever as anathema. Missile defense is an article of faith. This is not about plans or capabilities: this is about a deeply ideological commitment to unrestricted unilateralism. The increasingly tough and vocal (even shrill) Russian rhetoric also stems from domestic politics. Implementation of phase four of PAA is supposed to begin in the end of this decade and it may be another five to seven years, if not longer, until it begins to affect Russian strategic capability. There is plenty of time to negotiate. However, the rhetoric of the Russian government suggests that the threat is imminent. It is safe to assume that is simply the familiar “rally-around-the-flag” tactic of consolidating the public around the government.

#### Global nuclear war

Allison 11 (Graham, Director – Belfer Center for Science and International Affairs at Harvard’s Kennedy School, and Former Assistant Secretary of Defense, and Robert D. Blackwill, Senior Fellow – Council on Foreign Relations, “10 Reasons Why Russia Still Matters”, Politico, 2011, <http://dyn.politico.com/printstory.cfm?uuid=161EF282-72F9-4D48-8B9C-C5B3396CA0E6>)

That central point is that Russia matters a great deal to a U.S. government seeking to defend and advance its national interests. Prime Minister Vladimir Putin’s decision to return next year as president makes it all the more critical for Washington to manage its relationship with Russia through coherent, realistic policies. No one denies that Russia is a dangerous, difficult, often disappointing state to do business with. We should not overlook its many human rights and legal failures. Nonetheless, Russia is a player whose choices affect our vital interests in nuclear security and energy. It is key to supplying 100,000 U.S. troops fighting in Afghanistan and preventing Iran from acquiring nuclear weapons. Ten realities require U.S. policymakers to advance our nation’s interests by engaging and working with Moscow. First, Russia remains the only nation that can erase the United States from the map in 30 minutes. As every president since John F. Kennedy has recognized, Russia’s cooperation is critical to averting nuclear war. Second, Russia is our most consequential partner in preventing nuclear terrorism. Through a combination of more than $11 billion in U.S. aid, provided through the Nunn-Lugar Cooperative Threat Reduction program, and impressive Russian professionalism, two decades after the collapse of the “evil empire,” not one nuclear weapon has been found loose. Third, Russia plays an essential role in preventing the proliferation of nuclear weapons and missile-delivery systems. As Washington seeks to stop Iran’s drive toward nuclear weapons, Russian choices to sell or withhold sensitive technologies are the difference between failure and the possibility of success. Fourth, Russian support in sharing intelligence and cooperating in operations remains essential to the U.S. war to destroy Al Qaeda and combat other transnational terrorist groups. Fifth, Russia provides a vital supply line to 100,000 U.S. troops fighting in Afghanistan. As U.S. relations with Pakistan have deteriorated, the Russian lifeline has grown ever more important and now accounts for half all daily deliveries. Sixth, Russia is the world’s largest oil producer and second largest gas producer. Over the past decade, Russia has added more oil and gas exports to world energy markets than any other nation. Most major energy transport routes from Eurasia start in Russia or cross its nine time zones. As citizens of a country that imports two of every three of the 20 million barrels of oil that fuel U.S. cars daily, Americans feel Russia’s impact at our gas pumps. Seventh, Moscow is an important player in today’s international system. It is no accident that Russia is one of the five veto-wielding, permanent members of the U.N. Security Council, as well as a member of the G-8 and G-20. A Moscow more closely aligned with U.S. goals would be significant in the balance of power to shape an environment in which China can emerge as a global power without overturning the existing order. Eighth, Russia is the largest country on Earth by land area, abutting China on the East, Poland in the West and the United States across the Arctic. This territory provides transit corridors for supplies to global markets whose stability is vital to the U.S. economy. Ninth, Russia’s brainpower is reflected in the fact that it has won more Nobel Prizes for science than all of Asia, places first in most math competitions and dominates the world chess masters list. The only way U.S. astronauts can now travel to and from the International Space Station is to hitch a ride on Russian rockets. The co-founder of the most advanced digital company in the world, Google, is Russian-born Sergei Brin. Tenth, Russia’s potential as a spoiler is difficult to exaggerate. Consider what a Russian president intent on frustrating U.S. international objectives could do — from stopping the supply flow to Afghanistan to selling S-300 air defense missiles to Tehran to joining China in preventing U.N. Security Council resolutions.

### racism

#### Indefinite detention key to prevent nuke and bio terror

**Scheid,** **10** – Don, Professor of Philosophy at Winona State University, Minnesota (“Indefinite Detention of Mega-terrorists in the War on Terror,” Criminal Justice Ethics, vol 29, no 1, April 2010, proquest //Red)

Third, this terrorism is stateless. The enemy is not associated with any nation-state, nor, indeed, with any specific geographical location. A terrorist group may have hideouts and training camps in a given country, but the group itself is not committed to that territory. Two significant consequences follow. First, international terrorism cannot be deterred by the threat of retaliatory strikes - as was the case with the nuclear-deterrence doctrine of mutual assured destruction (MAD) during the Cold War. Second, an international-terrorism organization is not responsible to any state, and, crucially, no single state has any control over it. Consequently, there is no recognized state to enforce a ceasefire agreement upon its terrorist-citizens, even if such an agreement could be achieved. A fourth, and the most important, feature that distinguishes al-Qaeda-style terrorism is its **great lethality** of mass murder. The development of science and technology has made it possible for terrorists to acquire highly lethal weapons and even **biological, chemical, or nuclear weapons of mass destruction** (WMD). Indeed, confirmed reports have established that Osama bin Laden and **al-Qaeda have sought nuclear weapons.**18 Globalization and technological developments have enabled small terrorist cells, independent of any state, **to wield deadly force** on a scale that was once only within the capability of states. The possibility of acquiring weapons of mass destruction, especially nuclear weapons, by those who cannot be deterred by the threat of retaliatory strikes, makes al Qaeda-type terrorism tremendously dangerous. The emerging picture is that of possible worldwide anarchy in which any group of any size anywhere in the world might undertake devastating attacks. Indeed, it seems only a matter of time before a so-called "suitcase" nuclear bomb obliterates a major city somewhere in the world.19 Thus, the kind of terrorism we are facing is that of sustained campaigns of highly lethal terrorist groups, like al-Qaeda, who operate globally - the kind of terrorism Richard Falk has dubbed, quite aptly, "mega-terrorism."20 For present purposes, we may understand a mega-terrorist to be a person who is intent on committing one or more acts of catastrophic terrorism. This would include those who have engaged in acts of catastrophic terrorism in the past and are prepared to do so again, and also individuals who attempt or plan to undertake such attacks. Conceptually, the mega-terrorist is a terrorist who poses a significant threat to undertake an act of catastrophic terrorism. As such, a mega-terrorist could be a U.S. citizen or a foreign national, and one who acts alone as well as one who is a member of a terrorist group or organization. Situating Mega-terrorism on a Continuum Since mega-terrorism, like all terrorism, is illegal, it might be thought of as a criminal activity. But megaterrorism really differs markedly from common crime and should be distinguished from it. Most crime is domestic, whereas mega-terrorism is global. More importantly, megaterrorists, such as al-Qaeda, (i) threaten a level of destructive violence far beyond virtually any form of criminal activity, and (ii) seek to challenge the legitimacy of state governments. Ordinary criminals (for example, burglars, auto thieves, rapists, murderers) affect only one or a few people. And run-of-the-mill criminals do not present any direct challenge to the state or its legitimacy. Although such criminals can have devastating effects on their victims (and family and associates), they do not present a threat to the state as such.21 Al-Qaeda, for example, is more than a criminal cartel, for while its proclamations rarely express a coherent grievance, it implicitly challenges the political legitimacy of the United States. By contrast, organized international criminal groups, such as drug-smuggling gangs, do not normally challenge the state directly. Indeed, they have a very strong interest in a state's prosperous economy. And though their activities can cause serious and widespread damage, they do not wreak the destruction of a 9/11. As the attacks of 9/11 forcefully demonstrated, the danger presented by 19 or 20 mega-terrorists is certainly far greater than that presented by any similar number of common criminals or crime-gang members. The 9/11 attacks directly killed some 3,000 people, injured hundreds of others, and caused at least tens of billions of dollars worth of damage to the American economy. Given its challenge to the legitimacy of the state and the magnitude of its destructiveness, mega-terrorism is certainly much more than ordinary criminal activity; it seems more like warfare. I tend to think of the struggle against international terrorism as a kind of "quasi-war."22 The challenges of violence that a society faces may be thought of as lying on a continuum with two dimensions: (a) from least harmful to most destructive, and (b) from the least to the greatest challenge or threat to the state. The continuum would have common, petty crime by individuals at one end and all-out war between states at the other. Clearly, mega-terrorism is somewhere in between, but nearer the warfare end. The outline of a violence continuum could include the following points: \* Petty theft by individual. \* Armed robbery by gang of four. \* Murder by individual. \* Serial murder by individual. \* Multiple murders by small group. \* Organized crime, involving, e.g., robberies, drug smuggling, and murders. \* Large drug cartel activity involving drug smuggling, robberies, kidnapping, murder; but also extensive killing and intimidation of police, judges and other government officials. \* Mega-terrorism by individual or small group (e.g., Timothy McVeigh). \* Mega-terrorism by international terrorism organization (e.g., al-Qaeda, 9/11). \* All-out wars that may or may not include terrorism as a tactic (e.g., World Wars I and II, Korea, Vietnam, First Gulf War). The Sliding Scale of Risk and Precautions The general framework I propose is that as dangers become greater, more extreme measures to protect against those dangers are justified. Thus, as we move along the continuum from petty crimes to full-fledged armed conflict and war, we may assume that more extreme measures can be justified. Most people, for example, agree that personal liberties may properly be curtailed if necessary to insure against increased dangers. In a hostage situation arising from an armed bank robbery, it may be justified to use a heavily armed SWAT team, tear gas and stun (concussion) grenades; but such measures would not be justified for the apprehension of a petty thief. In the normal domestic context, police may not bomb an apartment building to apprehend or kill a known murderer; yet bombing a building from which rocketpropelled grenades are coming is perfectly justified in the context of a war. Usually, the criminal law is applied cautiously and within many constraints during peacetime. But priorities inevitably and properly shift under war-like conditions when an enemy embarks on a campaign to kill thousands of people. As a general rule, individual rights and limitations on the use of force may be reduced as threatened dangers increase. The Consequentialist Rationale for Indefinite Detention The most plausible reason for the indefinite detention of terrorist suspects, I believe, is that they present a serious threat of committing future terrorist acts. In other words, the interest in preventing a person from committing terrorist acts could **justify** incapacitation - thus, **preventive detention.** American law allows for preventive detention in a variety of settings.23 A traditional example is the involuntary civil commitment of a person who is a danger to herself or to others as the result of mental disorder.24 Like the person with a highly infectious disease who is put in quarantine to protect other members of the community, the mentally ill person is put in confinement for similar reasons. Another category of preventive detention - one that has developed in recent years - has to do with sexual-predator statutes. These laws provide for continued incarceration after the sexual offender has completed his criminal sentence in prison. In Kansas v. Hendricks (1997), the Supreme Court permitted indeterminate detention of dangerous individuals who have completed their sentences and have not committed any new crime.25 The argument for sexual-predator laws is, simply, that certain convicted sexual predators are too dangerous to release even after they have served their criminal sentence. Analogous considerations apply to terrorism suspects. A schizophrenic person who has taken it into his head to blow up an apartment building because of paranoid delusions can be civilly committed. A dangerous sexual predator may be preventively detained. By analogy, a mega-terrorist who has taken it into his head to blow up buildings and kill hundreds of people also ought to be liable to preventive detention. Some terrorist suspects are simply **far too dangerous to release once captured.** But how dangerous is dangerous enough to warrant preventive detention? Dangerousness is a function of the degree of harm or destruction and the likelihood of its occurrence. What level of harm and what risk of occurrence are great enough to justify preventive detention are value judgments that society must make. It has been argued that the danger sexual predators pose is no greater than that of other kinds of violent offenders, and that, if there is no justification for the preventive detention of other kinds of violent offenders, then neither can the preventive detention of sexual predators be justified. I shall not join that debate here. It must be acknowledged, however, that the danger the mega-terrorist poses is many orders of magnitude greater than that of a sexual predator. If the danger to society ever warrants preventive detention, certainly that of the mega-terrorist must. In saying a person is too dangerous to release, the implication is that, if released, he will not be deterred from further crime by the threat of future punishment. This may be because he is mentally out of touch with reality, or it may be that the person has overwhelming urges he cannot control.26 In the case of megaterrorists, the individual is **undeterrable**, presumably, because he is committed to carrying out terrorist activities as a matter of **firm, ideological conviction** and/or religious beliefs. The possibility of being captured and punished or losing his life does not deter him. In fact, the prospect of becoming a martyr for his cause **may actually be a positive incentive**, as it apparently is for some suicide bombers. Since the person is undeterrable, his conduct cannot be controlled or significantly influenced by the threat of future punishment. The state's **only realistic option**, therefore, **is preventive detention.**27 The case of Zacarias Moussaoui might serve to illustrate the point. Taking flying lessons is not a crime, even if he was uninterested in learning how to take off or land an airplane. Nevertheless, he was certainly dangerous and undeterrable. Here was an avowed terrorist who repeatedly expressed approval of al-Qaeda's "jihad" against the United States and announced his own desire to kill as many Americans as possible. He stated, for example, "I will be delighted to come back one day to blow myself into your new W.T.C, if ever you rebuild it."28 Imagine - contrary to fact - that Zacarias Moussaoui had been acquitted of all charges at his federal trial. The Moussaoui trial, in fact, was something of a circus. He was mentally unstable, filed crazy pleadings and, for some time, insisted on acting as his own counsel. He made speeches in court that compromised his defense, including belligerent behavior toward the judge, as well as toward both prosecution and defense lawyers; and, ultimately, he pled guilty. Had Moussaoui been a sane and shrewd defendant, the Government might well have failed to carry its burden of proof. In such circumstances, should the Government simply release him? To do so would be extremely foolish, as he would still present a **continuing and extreme danger** to the United States. Apart from this hypothetical, there are reports of any number of actual terrorism prisoners who have been **released only to rejoin** jihad and **the**ir **fight** against the West. For example, one Guantánamo detainee, Abdullah Ghulam Rasoul, was transferred to Afghanistan in 2007 and then released by the Kabul government. According to reports, he is now the commander of operations for the Taliban in southern Afghanistan. Another detainee, Said Ali al-Shihri, was returned to his native Saudi Arabia in 2007 and is now reportedly a leader of al-Qaeda's affiliate in Yemen.29 The argument from dangerousness is essentially a utilitarian or consequentialist one. It is a kind of cost-benefit argument, balancing individual liberty against the collective security of society. To mistakenly release an enemy soldier during a conventional war between states may be of little consequence; but in a fight with mega-terrorists where each one is intent on killing thousands of civilians, **a mistaken release could be disastrous.** Referring to military conscription, Justice Oliver Wendell Holmes long ago noted, "No society has ever admitted that it could not sacrifice individual welfare to its own existence." When the stakes are high enough, it will do so. I believe this consequentialist approach is essentially correct, but it is important to emphasize that there is no suggestion here that we detain people indiscriminately. The idea is to detain indefinitely only very dangerous persons, that is, megaterrorists.

**Risk of nuclear terrorism is high – causes extinction**

**Costello, 12** – Ryan, coordinator of the Fissile Materials Working Group at the Connect U.S. Fund (“Involuntary response,” Bulletin of the Atomic Scientists, 1/26/12, http://thebulletin.org/involuntary-response //Red

Earlier this month, widespread inaction on the increasing dangers posed by nuclear proliferation and climate change forced the Bulletin's Doomsday Clock to move one minute closer to midnight, indicating the **mounting perils confronting humanity's survival**. One factor pushing the clock forward to five minutes to midnight was the failure to ensure strict security and comprehensive international oversight for nuclear weapons and materials, which continue to accumulate in a few nations. Despite several ongoing initiatives to strengthen global defenses against nuclear terrorism, it is clear that **much more needs to be done to ensure that the nightmare doesn't become reality.** In April 2010, 47 heads of state met in Washington, DC, for the first Nuclear Security Summit in order to find ways to address the largely overlooked threat of nuclear terrorism. The summit was the largest meeting of heads of state called by an American president since 1945, when leaders gathered in San Francisco in the effort that launched the United Nations. Major obstacles confronted planners for the first Nuclear Security Summit, including a lack of consensus on the dangers of nuclear terrorism and how best to enhance global nuclear security (problems that still persist). By gathering world leaders -- rather than bureaucrats -- to address the issue head on, the first summit made some important steps in helping to raise global awareness about the threat of nuclear terrorism. The 47 heads of state, representing countries from all corners of the globe, concluded in a nonbinding communiqué that "nuclear terrorism is one of the greatest threats to global security" and that "strong nuclear security measures" are the best means to prevent the threat from becoming reality. Additionally, the leaders joined President Obama's goal to secure all vulnerable nuclear material within four years. In addition to the strong normative support generated for preventing nuclear terrorism, the 2010 Nuclear Security Summit resulted in approximately 50 concrete national commitments to strengthen global nuclear security -- many of which have already been fulfilled heading into the second summit this March in Seoul, South Korea. Of particular note are the pledges to eliminate nuclear bombmaking materials. Since April 2010, nearly 400 kilograms of highly enriched uranium (HEU) has been removed from 10 countries. Russia, meanwhile, has destroyed more than 48 metric tons of HEU, with the United States eliminating seven additional metric tons of HEU. Such measures reduce the amount of material that could slip onto the black market and into the wrong hands. Other states, meanwhile, helped to bolster the international legal framework for nuclear security, with 13 additional countries ratifying the amendment to the Convention on the Physical Protection of Nuclear Materials and 12 ratifying the International Convention for the Suppression of Acts of Nuclear Terrorism. Several states made additional contributions to the Office of Nuclear Security of the International Atomic Energy Agency (IAEA), thus increasing the resources of an organization that provides vital guidance on how nations can best enhance their nuclear security. Yet, while the first Nuclear Security Summit greatly enhanced international attention on the threat of nuclear terrorism and gained tangible commitments, it is evident that **much more work remains to ensure that all nuclear materials are secure.** In 2009, the Fissile Materials Working Group (FMWG), a coalition of nongovernmental organizations dedicated to preventing nuclear terrorism, released a set of five consensus policy recommendations: • Launch a new "Next Generation Nuclear Security Initiative." • Accelerate efforts to consolidate and eliminate global HEU, plutonium, and nuclear weapons stockpiles. • Minimize all forms of HEU use and set a timetable for a ban on the civil use of HEU. • Request and aggressively pursue sufficient funding for removing and securing all vulnerable nuclear materials around the world in four years. • Extend and expand the G-8 Global Partnership Against the Spread of Weapons of Mass Destruction for another 10 years. Despite strong international expert consensus on the nature of the threat, the FMWG's original policy recommendations still remain largely applicable two years after they were released. Unfortunately, **governments and citizens don't seem to recognize the urgency of the problem**, and a detailed plan for securing all vulnerable nuclear materials has yet to be created. And, while significant progress has been made to secure fissile materials around the globe, there is enough military and civilian HEU in the world to produce another 60,000 nuclear weapons -- without considering stockpiles of plutonium -- according to the International Panel on Fissile Materials. Plus, the future budget outlook for the United States and Europe is grim, potentially jeopardizing funding for vital programs that secure nuclear materials around the globe. The current nuclear security regime, meanwhile, may **not** be **adequate to prevent potential terrorists from** acquiring nuclear material and **constructing a** crude **nuclear device.** Kenneth Brill, former US ambassador to the IAEA, argues that the "existing global architecture for nuclear security is more like a shantytown than a coherent structure." Nuclear security remains a national responsibility, with very little international oversight, peer review, or enforcement measures. According to Brill: "The existing pastiche of niche treaties, like-minded initiatives, and IAEA recommendations give the appearance of dealing effectively with nuclear security, while the reality is the 'best efforts' and voluntary nature of virtually all international action on nuclear security leave **loopholes through which a determined terrorist group could drive one or more improvised nuclear devices.**" Given the international ramifications of a nuclear terrorist attack, it seems that a regime relying on voluntary national commitments is inadequate, particularly when governmental consensus on the nature of the threat can be uneven and fleeting.

#### Their morals are self-defeating and evil. Consequences trump ideals

**Isaac 2002** – political science professor at Indiana University (Jeffrey, Dissent, Spring, “Ends, means, and politics”, http://www.dissentmagazine.org/article/?article=601, WEA)

What is striking about much of the political discussion on the left today is its failure to engage this earlier tradition of argument. The left, particularly the campus left—by which I mean “progressive” faculty and student groups, often centered around labor solidarity organizations and campus Green affiliates—has become moralistic rather than politically serious. Some of its moralizing—about Chiapas, Palestine, and Iraq—continues the third worldism that plagued the New Left in its waning years. Some of it—about globalization and sweatshops— is new and in some ways promising (see my “Thinking About the Antisweatshop Movement,” Dissent, Fall 2001). But what characterizes much campus left discourse is a substitution of moral rhetoric about evil policies or institutions for a sober consideration of what might improve or replace them, how the improvement might be achieved, and what the likely costs, as well as the benefits, are of any reasonable strategy. One consequence of this tendency is a failure to worry about methods of securing political support through democratic means or to recognize the distinctive value of democracy itself. It is not that conspiratorial or antidemocratic means are promoted. On the contrary, the means employed tend to be preeminently democratic—petitions, demonstrations, marches, boycotts, corporate campaigns, vigorous public criticism. And it is not that political democracy is derided. Projects such as the Green Party engage with electoral politics, locally and nationally, in order to win public office and achieve political objectives. But what is absent is a sober reckoning with the preoccupations and opinions of the vast majority of Americans, who are not drawn to vocal denunciations of the International Monetary Fund and World Trade Organization and who do not believe that the discourse of “anti-imperialism” speaks to their lives. Equally absent is critical thinking about why citizens of liberal democratic states—including most workers and the poor—value liberal democracy and subscribe to what Jürgen Habermas has called “constitutional patriotism”: a patriotic identification with the democratic state because of the civil, political, and social rights it defends. Vicarious identifications with Subcommandante Marcos or starving Iraqi children allow left activists to express a genuine solidarity with the oppressed elsewhere that is surely legitimate in a globalizing age. But these symbolic avowals are not an effective way of contending for political influence or power in the society in which these activists live. The ease with which the campus left responded to September 11 by rehearsing an all too-familiar narrative of American militarism and imperialism is not simply disturbing. It is a sign of this left’s alienation from the society in which it operates (the worst examples of this are statements of the Student Peace Action Coalition Network, which declare that “the United States Government is the world’s greatest terror organization,” and suggest that “homicidal psychopaths of the United States Government” engineered the World Trade Center attacks as a pretext for imperialist aggression. See http://www.gospan.org). Many left activists seem more able to identify with (idealized versions of) Iraqi or Afghan civilians than with American citizens, whether these are the people who perished in the Twin Towers or the rest of us who legitimately fear that we might be next. This is not because of any “disloyalty.” Charges like that lack intellectual or political merit. It is because of a debilitating moralism; because it is easier to denounce wrong than to take real responsibility for correcting it, easier to locate and to oppose a remote evil than to address a proximate difficulty. The campus left says what it thinks. But it exhibits little interest in how and why so many Americans think differently. The “peace” demonstrations organized across the country within a few days of the September 11 attacks—in which local Green Party activists often played a crucial role—were, whatever else they were, a sign of their organizers’ lack of judgment and common sense. Although they often expressed genuine horror about the terrorism, they focused their energy not on the legitimate fear and outrage of American citizens but rather on the evils of the American government and its widely supported response to the terror. Hardly anyone was paying attention, but they alienated anyone who was. This was utterly predictable. And that is my point. The predictable consequences did not matter. What mattered was simply the expression of righteous indignation about what is wrong with the United States, as if September 11 hadn’t really happened. Whatever one thinks about America’s deficiencies, it must be acknowledged that a political praxis preoccupation with this is foolish and self-defeating. The other, more serious consequence of this moralizing tendency is the failure to think seriously about global politics. The campus left is rightly interested in the ills of global capitalism. But politically it seems limited to two options: expressions of “solidarity” with certain oppressed groups—Palestinians but not Syrians, Afghan civilians (though not those who welcome liberation from the Taliban), but not Bosnians or Kosovars or Rwandans—and automatic opposition to American foreign policy in the name of anti-imperialism. The economic discourse of the campus left is a universalist discourse of human needs and workers rights; but it is accompanied by a refusal to think in political terms about the realities of states, international institutions, violence, and power. This refusal is linked to a peculiar strain of pacifism, according to which any use of military force by the United States is viewed as aggression or militarism. case in point is a petition circulated on the campus of Indiana University within days of September 11. Drafted by the Bloomington Peace Coalition, it opposed what was then an imminent war in Afghanistan against al-Qaeda, and called for peace. It declared: “Retaliation will not lead to healing; rather it will harm innocent people and further the cycle of violence. Rather than engage in military aggression, those in authority should apprehend and charge those individuals believed to be directly responsible for the attacks and try them in a court of law in accordance with due process of international law.” This declaration was hardly unique. Similar statements were issued on college campuses across the country, by local student or faculty coalitions, the national Campus Greens, 9- 11peace.org, and the National Youth and Student Peace Coalition. As Global Exchange declared in its antiwar statement of September 11: “vengeance offers no relief. . . retaliation can never guarantee healing. . . and to meet violence with violence breeds more rage and more senseless deaths. Only love leads to peace with justice, while hate takes us toward war and injustice.” On this view military action of any kind is figured as “aggression” or “vengeance”; harm to innocents, whether substantial or marginal, intended or unintended, is absolutely proscribed; legality is treated as having its own force, independent of any means of enforcement; and, most revealingly, “healing” is treated as the principal goal of any legitimate response. None of these points withstands serious scrutiny. A military response to terrorist aggression is not in any obvious sense an act of aggression, unless any military response—or at least any U.S. military response—is simply defined as aggression. While any justifiable military response should certainly be governed by just-war principles, the criterion of absolute harm avoidance would rule out the possibility of any military response. It is virtually impossible either to “apprehend” and prosecute terrorists or to put an end to terrorist networks without the use of military force, for the “criminals” in question are not law-abiding citizens but mass murderers, and there are no police to “arrest” them. And, finally, while “healing” is surely a legitimate moral goal, it is not clear that it is a political goal. Justice, however, most assuredly is a political goal. The most notable thing about the Bloomington statement is its avoidance of political justice. Like many antiwar texts, it calls for “social justice abroad.” It supports redistributing wealth. But criminal and retributive justice, protection against terrorist violence, or the political enforcement of the minimal conditions of global civility—these are unmentioned. They are unmentioned because to broach them is to enter a terrain that the campus left is unwilling to enter—the terrain of violence, a realm of complex choices and dirty hands. This aversion to violence is understandable and in some ways laudable. America’s use of violence has caused much harm in the world, from Southeast Asia to Central and Latin America to Africa. The so-called “Vietnam Syndrome” was the product of a real learning experience that should not be forgotten. In addition, the destructive capacities of modern warfare— which jeopardize the civilian/combatant distinction, and introduce the possibility of enormous ecological devastation—make war under any circumstances something to be feared. No civilized person should approach the topic of war with anything other than great trepidation. And yet the left’s reflexive hostility toward violence in the international domain is strange. It is inconsistent with avowals of “materialism” and evocations of “struggle,” especially on the part of those many who are not pacifists; it is in tension with a commitment to human emancipation (is there no cause for which it is justifiable to fight?); and it is oblivious to the tradition of left thinking about ends and means. To compare the debates within the left about the two world wars or the Spanish Civil War with the predictable “anti-militarism” of today’s campus left is to compare a discourse that was serious about political power with a discourse that is not. This unpragmatic approach has become a hallmark of post–cold war left commentary, from the Gulf War protests of 1991, to the denunciation of the 1999 U.S.-led NATO intervention in Kosovo, to the current post–September 11 antiwar movement. In each case protesters have raised serious questions about U.S. policy and its likely consequences, but in a strikingly ineffective way. They sound a few key themes: the broader context of grievances that supposedly explains why Saddam Hussein, or Slobodan Milosevic, or Osama bin Laden have done what they have done; the hypocrisy of official U.S. rhetoric, which denounces terrorism even though the U.S. government has often supported terrorism; the harm that will come to ordinary Iraqi or Serbian or Afghan citizens as a result of intervention; and the cycle of violence that is likely to ensue. These are important issues. But they typically are raised by left critics not to promote real debate about practical alternatives, but to avoid such a debate or to trump it. As a result, the most important political questions are simply not asked. It is assumed that U.S. military intervention is an act of “aggression,” but no consideration is given to the aggression to which intervention is a response. The status quo ante in Afghanistan is not, as peace activists would have it, peace, but rather terrorist violence abetted by a regime—the Taliban—that rose to power through brutality and repression. This requires us to ask a question that most “peace” activists would prefer not to ask: What should be done to respond to the violence of a Saddam Hussein, or a Milosevic, or a Taliban regime? What means are likely to stop violence and bring criminals to justice? Calls for diplomacy and international law are well intended and important; they implicate a decent and civilized ethic of global order. But they are also vague and empty, because they are not accompanied by any account of how diplomacy or international law can work effectively to address the problem at hand. The campus left offers no such account. To do so would require it to contemplate tragic choices in which moral goodness is of limited utility. Here what matters is not purity of intention but the intelligent exercise of power. Power is not a dirty word or an unfortunate feature of the world. It is the core of politics. Power is the ability to effect outcomes in the world. Politics, in large part, involves contests over the distribution and use of power. To accomplish anything in the political world, one must attend to the means that are necessary to bring it about. And to develop such means is to develop, and to exercise, power. To say this is not to say that power is beyond morality. It is to say that power is not reducible to morality. As writers such as Niccolo Machiavelli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness undercuts political responsibility. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one’s intention does not ensure the achievement of what one intends.

Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of complicity in injustice. This is why, from the standpoint of politics—as opposed to religion—pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that politics is as much about unintended consequences as it is about intentions; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with “good” may engender impotence, it is often the pursuit of “good” that generates evil. This is the lesson of communism in the twentieth century: it is not enough that one’s goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

### legacy

#### Court rulings are toothless – enforcement is delayed and merely result in legal limbo

Scheppele 12 (Kim Lane, Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values; Director of the Program in Law and Public Affairs, Princeton University, “THE NEW JUDICIAL DEFERENCE BOSTON UNIVERSITY LAW REVIEW,” vol 92, <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SCHEPPELE.pdf>)

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.7 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.8 After 9/11, it appears that deference is dead. 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.9 Suspected terrorists have received 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.

#### Obama circumvents the plan – he’ll use creative lawyering

Hafetz 13 (Jonathan, Law Professor – Seton Hall University School of Law, “Outrage Fatigue: The Danger of Getting Used to Gitmo,” World Politics Review, <http://www.worldpoliticsreview.com/articles/13311/outrage-fatigue-the-danger-of-getting-used-to-gitmo>)

The congressional transfer restrictions have, to be sure, made it more difficult to close Guantanamo. But it would be a mistake simply to blame Congress for the political logjam. Obama not only repeatedly signed the annual military appropriations bills that created the transfer restrictions, despite periodic veto threats, but he also retains considerable latitude to operate notwithstanding the restrictions.

In addition to barring detainee transfers to the United States, Congress previously prohibited the use of funds to transfer detainees to other countries unless the defense secretary personally certified that the detainee in question would never engage in terrorist activity—a virtually impossible standard to meet. Congress, however, has since amended the National Defense Authorization Act (NDAA) to loosen the transfer restriction. The secretary may now waive that certification requirement and transfer detainees to other countries if he finds that the receiving country will take steps to “substantially mitigate” the risk that the detainee will engage in terrorist activity, and that the transfer is in the national security interests of the United States.

While the current certification requirement undoubtedly complicates the transfer process, it still gives Obama latitude to maneuver. As Carl Levin, chairman of the Senate Armed Services Committee, noted, the modified certification requirement affords “a clear route for the transfer of detainees to third countries.”

Additionally, the NDAA exempts detainees transferred by a court order from the certification requirement. The Obama administration has administratively cleared more than half of the remaining detainees for release. If it conceded their detention was no longer lawful and agreed to court orders for their release, the administration could transfer them outside the existing congressional restrictions. So far, however, the administration has agreed to a court-ordered release in only one case, and that case involved a prisoner suffering from significant mental and physical illness.

The Obama administration has shown no shortage of creative lawyering in justifying U.S. military involvement in Libya and Syria as well as in expanding America’s use of targeted drone strikes. In those instances, the administration has interpreted presidential authority robustly, while narrowly construing congressional attempts to cabin that authority, as in the War Powers Resolution. Yet, when it comes to releasing Guantanamo detainees, the administration remains sheepish. It has failed to apply the same interpretive approach to congressional transfer restrictions despite what the president has described as the clear national security interests in closing the prison. Only external events, such as the hunger strike, now seem to prompt any action. And even there, the urgency tends to dissipate once the public pressure and media attention fades.

#### And he’ll use immigration authority as a fallback justification for internment camps

Hernández-López 12 (Ernesto, UC Irvine School of Law, “Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World,” UC Irvine Law Review, Vol. 2, http://www.law.uci.edu/lawreview/vol2/no1/hernandez-lopez.pdf)

While all of the Kiyemba cases raised constitutional issues regarding common law habeas,9 habeas remedies, and separation of powers, they demonstrate that immigration law doctrine provides generous justification for detention even in situations when noncombatants are detained indefinitely.10 In theory, if certiorari were granted in any of the Kiyemba cases, the Supreme Court may provide the next step in habeas doctrine since Boumediene v. Bush found constitutional habeas does protect base detainees.11 In Boumediene the Supreme Court held that habeas extends despite detainees’ noncitizen status and their presence outside domestic borders. Accordingly, before the Kiyemba disputes in 2009, alienage and extraterritorial location were not formal bars to constitutional rights or judicial remedies. This Article argues that by relying on immigration law to justify detentions, the Kiyemba triumvirate suggests immigration law provides courts a way to minimize the effect of Boumediene: extraterritorial habeas for aliens is checked by plenary powers reasoning regarding political questions, alien status, and their location. The Kiyemba cases suggest that the plenary powers doctrine, as applied to aliens detained overseas, limits extraterritorial constitutional protections implied in Boumediene.

The D.C. Circuit’s reasoning sanctioning detention reflects hallmark plenary powers doctrine norms. The Supreme Court effectively agreed with this reasoning, as evident in its denial of certiorari in Kiyemba III. These plenary powers doctrine norms include: deference for political questions, the denial of certain rights to aliens, and that an alien’s physical location precludes rights protection. Even if the Supreme Court did actually rule in a Kiyemba dispute, it would most likely focus on habeas and not limit the immigration law justifications in Court of Appeals’ opinions.12 Nevertheless, the doctrinal consistency of plenary powers effectively has shaped the legal identity of these five Uighurs. They are aliens in overseas detention.

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### legacy

#### He’ll circumvent – Obama CHOOSES to sideline the courts

Worthington 10 (Andy, Investigative journalist and Guantanamo expert, “With Indefinite Detention and Transfer Bans, Obama and the Senate Plumb New Depths on Guantánamo,” 12-28, <http://www.andyworthington.co.uk/2010/12/28/with-indefinite-detention-and-transfer-bans-obama-and-the-senate-plumb-new-depths-on-guantanamo/>)

Lawmakers have, presumably, taken Lt. Col. Frakt’s criticism on board, but unfortunately, when it comes to freeing prisoners whose release was ordered by judges after they won their habeas petitions, a further problem is the Obama administration itself.

Although judges in the District Court in Washington D.C. have ruled on 57 habeas corpus petitions since the Supreme Court confirmed, in June 2008, that the prisoners had constitutionally guaranteed habeas rights, and have found in the prisoners’ favor in 38 of those cases, the administration has pushed back, appealing several successful petitions, and endorsing a broader definition of the standard required for ongoing detention, which has found support in the far more conservative D.C. Circuit Court.

This, combined with the evident unwillingness of either President Obama or Attorney General Eric Holder to provide any guidance to the Justice Department lawyers working on the Guantánamo cases — by, for example, conducting any kind of review of cases that should not be challenged in court — is worrying enough, but what is also apparent is that the Obama administration has, from the beginning, regarded the objectivity of the District Court judges as *less important* than the decisions made by the Guantánamo Review Task Force, which operated in secret, and, essentially, sidelined the courts.

#### Obama will claim AUMF authority – he’ll use his lawyers to circumvent Court decisions

Andrews 12 (John, “Obama moves to overturn court ruling invalidating indefinite detention law,” 9-22, International Committee of the Fourth International, <https://www.wsws.org/en/articles/2012/09/cour-s22.html>)

Obama administration lawyers have appealed last week’s court ruling invalidating the indefinite detention provision of the National Defense Authorization Act (NDAA), passed by Congress and signed by Obama last New Year’s Eve.

Section 1021, a single paragraph buried within the 565-page NDAA, gives the president express authority “to detain covered persons… under the laws of war.”

“Covered persons” are defined in Section 1021(b)(2) of the NDAA as those who “substantially supported al-Qaeda, the Taliban, or associated forces,” and include “any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”

In plain English, the law authorizes the military to abduct and imprison people anywhere in the world without charge or trial—including US citizens within the United States—if they are deemed to be “supporting” Al Qaeda, the Taliban or “associated forces.”

The law provides no mechanism to challenge the military’s decision other than a protracted court battle for a writ of habeas corpus—if a lawyer can be found to penetrate the military prison system and represent the inmate. It deprives detainees of protection under the most important provisions of the Bill of Rights.

Two weeks after Obama signed the bill, a lawsuit challenging its constitutionality was filed in the United States District Court in New York City. Former New York Times reporter and Pulitzer Prize winner Christopher Hedges is the lead plaintiff. Having interviewed, dined with and even visited the homes of members of 17 organizations deemed “terrorist” by the US State Department, Hedges claims that the potential sweep of phrases such as “associated forces,” “substantially support,” and “directly support” subjects him to the threat of indefinite detention for publishing articles deemed critical of the US military’s operations.

Hedges is joined in the lawsuit by five others, including Daniel Ellsberg, who leaked the Pentagon Papers on Viet Nam; liberal professor Noam Chomsky; Birgitta Jonsdottir, a member of the Iceland parliament who supports WikiLeaks; Kai Wargalla of Occupy London; and Alexa O’Brien of the US Day of Rage. All have provided sworn testimony that they fear their activities and publications may result in their seizure by the military and indefinite detention without trial.

Last May, US District Judge Katherine Forrest, an Obama appointee who assumed office just last year, issued a preliminary injunction temporarily halting the use of Section 1021(b)(2)’s indefinite detention provision after government lawyers refused to state that the plaintiffs’ activities were outside the law’s scope. She invited Congress to amend the law, and government lawyers to come forward with a more narrow interpretation. Neither happened.

After further legal arguments, on September 12 Judge Forrest issued a thorough 112-page decision invalidating the law. The injunction means that anyone detained under the authority of Section 1021(b)(2) can bring a motion for contempt of court against the involved government officials.

Judge Forrest made clear that the “key question throughout these proceedings” is “what and whose activities” the law “is meant to cover.”

“That is no small question bandied about amongst lawyers and a judge steeped in arcane questions of constitutional law; it is a question of defining an individual’s core liberties,” she wrote. “The due process rights guaranteed by the Fifth Amendment require that an individual understand what conduct might subject him or her to criminal or civil penalties. Here, the stakes get no higher: indefinite military detention—potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever. The Constitution requires specificity—and that specificity is absent from Section 1021(b)(2).”

After listing the various criminal statutes already on the books to prosecute people who “materially support” terrorist organizations—such prosecutions trigger due process rights including counsel, bail, motions to suppress illegally obtained evidence, public trials by jury and appeals—Judge Forrest wrote: “This Court rejects the Government’s suggestion that American citizens can be placed in military detention indefinitely, for acts they could not predict might subject them to detention, and have as their sole remedy a habeas [corpus] petition adjudicated by a single decision-maker (a judge versus a jury), by a ‘preponderance of the evidence’ standard [rather than proof beyond a reasonable doubt]. That scenario dispenses with a number of guaranteed rights.”

Judge Forrest sided with the plaintiffs’ claims that the threat of summary, indefinite military imprisonment “chilled” their free speech rights. She lambasted the government lawyers for their reliance on Ex parte Quirin (1942), a World War II case which upheld the military detention and summary execution of saboteurs transported from Germany to Long Island on a submarine.

“Quirin is not a case in which an American, not in uniform, carrying arms, or reporting to a foreign government, was taken from his home in the United States, and detained by the military, for writing or having written works speaking favorably about enemy forces, or for raising questions regarding the legitimacy of American military actions,” Judge Forrest wrote. “It is those activities which Section 1021(b)(2) captures (so far as one can decipher from the Government’s position).”

Judge Forrest continued, “The Government is wrong to ground a wide-sweeping ability of the executive branch to subject anyone at all to military detention in Quirin. That argument eliminates Constitutional guarantees (under many provisions of the Constitution) in one fell swoop; it ignores as irrelevant all of the language, past and present, regarding limits on executive authority to arrest and—as applied to First Amendment activities—would privilege such detention ability above the prohibition that ‘Congress shall pass no law… abridging the freedom of speech.’ The Government’s reading of Quirin is therefore both wrong and dangerous and this Court rejects it.”

The extreme holding of the Quirin case was seized on by Bush administration lawyers to support their assertion of virtual police-state powers in the aftermath of September 11. Now the same ruling is embraced by the Obama administration to justify even broader unchecked executive powers.

On September 17, US Department of Justice lawyers acting expressly on behalf of “Barack Obama” as the principal appellant filed an emergency motion for a stay of Judge Forrest’s ruling in the United States Court of Appeals for the Second Circuit.

After contemptuously dismissing the plaintiffs’ claims of constitutional injury, the Obama administration lawyers argued that the new indefinite detention law simply “affirms the President’s detention authority under the earlier Authorization for Use of Military Force.” The AUMF, however, is limited by its terms to those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” It does not extend to people who “substantially” or “directly” supported Al Qaeda, the Taliban, or “associated forces.”

Moreover, in the case involving Yaser Esam Hamdi, the Supreme Court construed the AUMF to allow the detention only of “enemy combatants” actually “engaged in armed conflict against the United States.” In comparison, as explained by Judge Forrest, Section 1021(b)(2) authorizes “indefinite military detention of US citizens for conduct that could occur in their own home in New York City, Washington, DC, Toledo, Los Angeles—anywhere in this land.”

Obama’s lawyers do not explain why, if the “detention authority” affirmed in Section 1021(b)(2) was already provided by the AUMF, Congress even bothered to enact the new law. More tellingly, if Section 1021(b)(2) gives Obama no more power to summarily imprison people than he already had, there is no reason for his appeal, as Judge Forrest did not enjoin detentions under the AUMF.

Obama’s lawyers sought to pass over the stripping of constitutional rights from the imprisoned. “The district court misunderstood the fundamental purpose of Section 1021(b)(2) and the AUMF,” they argued, declaring that, “they are war authorizations conferred upon the President, not penal statutes intended to regulate and punish conduct.”

When he signed the law, Obama claimed to have done so with “serious reservations” about the possibility of “indefinite military detention without trial of US citizens” which would “break with our most important traditions and values as a nation.”

Having authorized the appeal of Judge Forrest’s ruling, however, Obama’s New Year’s statement is shown to be as worthless as his campaign pledge of four years ago to close the Guantanamo Bay concentration camp.

Instead of rolling back Bush administration attacks on democratic rights, Obama is intensifying them—including the compilation of assassination lists and ordering of murders, including those of the New Mexico-born Islamic cleric Anwar al-Awlaki and his 16-year-old son, both American citizens.

In a one-page order, Second Circuit Judge Raymond J. Lohier this week granted an interim stay of Judge Forrest’s injunction until September 28, when a three-judge panel is scheduled to hold a hearing on a stay until the Obama administration appeal is decided, likely sometime next year.

#### Motive – Obama wants to maintain detention authority – he’s willing to use immigration doctrine – this takes out every court advantage

Chow 11 (Samuel, J.D. – Benjamin N. Cardozo School of Law, “The Kiyemba Paradox: Creating a Judicial Framework to Eradicate Indefinite, Unlawful Executive Detentions,” Cardozo J. Of Int’l & Comp. Law, Vol. 19, http://www.cjicl.com/uploads/2/9/5/9/2959791/cjicl\_19.3\_chow\_note.pdf)

The government’s arguments are seemingly driven by its desire to maintain control over an area of law which it has traditionally regulated, that is, the determination of which individuals may or may not enter the United States. That goal is arguably justified. However, it must still be reconciled with the fact that the “Great Writ” is one of the most important checks the courts have on arbitrary executive detention.188 By using immigration to limit the writ’s functional application, the government is severely limiting the ability of courts to protect the liberty interests of detainees courts have on arbitrary executive detention.

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#### Eternal return

**Frug 84**—Louis D. Brandeis Professor of Law at Harvard Law School [gendered language modified—the first instance of “Man” is struck through rather than substituted because it’s referring to a book title]

(Gerald, “THE IDEOLOGY OF BUREAUCRACY IN AMERICAN LAW”, 97 Harv. L. Rev 1276 1983-1984, dml)

These stances represent ways to define ourselves in terms of the formalist vision. But these forms of self-definition, like the model itself, are tolerable only as long as there is some space (at home, in the voting booth) where we can express our subjectivity - our sense of self - **without its being infected by the bureaucracies we have created**. The dangerous supplement analysis should help us see how **such a protection of the self is** unattainable. Because the experience of subjectivity **cannot be disentangled from the structures in which people live**, no realm of subjectivity can be protected **from the attempt to objectify bureaucratic life**. There are no "shareholders" or "citizens" in the world **who are not simultaneously** subordinates within bureaucratic structures. The attempt to objectify human life **within bureaucracies threatens to** affect people in their lives as a whole - **it shapes their way of dealing with the world** even in their "free" activities as citizens or shareholders. Thus, the inability to divide people into components means that bureaucratic objectivity invades **and** transforms **the subjective experience** of the very people who are supposed to control - and take responsibility for - bureaucratic objectivity. Everyone is in danger of becoming "One Dimensional ~~Man~~," 122 **a human being who has** lost the ability **to** sense the rich possibilities of human existence **by reducing life** to the terms of instrumental rationality. Because all human existence is affected by bureaucratic structures, the formalist model's attempt to rob some aspects of life of "personal" qualities threatens the life experience itself. Max Weber articulated this fear by imagining the cloak of rationality becoming in the end [hu]man's iron cage:

#### This is the critical internal link into education—restraints are meaningless absent a focus on what debate can train us as students to do

**Young 13**—didn’t expect this card to be read this way

(Kelly, Associate Professor of Communication and Director of Forensics, Wayne State University, “Why Should We Debate About Restriction of Presidential War Powers”, <http://public.cedadebate.org/node/13>, dml)

 Lastly, debating presidential war powers is important because we the people **have an important role in affecting the use of presidential war powers**. As many legal scholars contend, regardless of the status of legal structures to check the presidency, an important political restrain on presidential war powers **is the presence of a** well-informed **and** educated **public**. As Justice Potter Stewart explains, “the only effective restraint upon executive policy and power…**may lie in** an enlightened citizenry – in **an** informed **and** critical **public opinion** which alone can protect the values of a democratic government” (http://www.law.cornell.edu/supct/html/historics/USSC\_CR\_0403\_0713\_ZC3.html). As a result, this is not simply an academic debate about institutions and powers that that do not affect us. As the numerous recent foreign policy scandals make clear, anyone who uses a cell-phone or the internet is potential affected by unchecked presidential war powers. Even if we agree that these powers are justified, it is important that today’s college students understand and appreciate the scope and consequences of presidential war powers, as **these students’ opinions will stand as an** important potential check **on the presidency**.

#### Their framework is depoliticizing and teaches the wrong solutions—beginning with individual action is comparatively more productive

Pitkin 98 (hanna, Prof of polis ci @ Berkeley, *The Attack of the Blob*, pp 274-284, thanks zane)

That brings us to the second half of Arendt's account of how our thinking furthers the social: the void in what we think about. Besides being thoughtless, we lack the very ideas of action, of politics, of freedom. We use those words, but only as empty cliches, in hortatory and manipulative ways or cynical and reductionist ones. These ideas are not serious for us, not actionable. So our thinking promotes the social also because we cannot even imagine a real alternative. Action and freedom are our lost treasure: forgotten, inadequately articulated, never theorized systematically, desperately difficult to convey to people who lack the relevant experiences.

To restore access to these ideas, Arendt employed several methodological devices, which also illuminate the sort of thinking that encourages free citizenship. The first of these devices is what she called "pearl diving," dredging up from the depths of the past the lost meaning of some crucial term. As the term, which had become a cliche, is restored to lively, actionable meaning, it is like a precious gem, refracting light on contemporary realities we had missed. Arendt quoted Shakespeare's Tempest: "Full fathom five thy father lies. . . .w78 She was trying, she said, "to discover the real origins of traditional concepts in order to distill from them anew their original spirit which has so sadly evaporated from the very key words of political language—such as freedom and justice, authority and reason, responsibility and virtue, power and glory—leaving behind empty shells."7\*

Most words, however, do not have an identifiable "real origin" nor any "original meaning" that scholarship can recover. Linguists simply trace a word's ancestry back from one language to another until the evidence runs out. Furthermore, Arendt never made clear why the earlier meanings of words should be authoritative for us, and indeed for some words, such as "society" and "revolution," she preferred the modern to the earlier meaning.

Arendt's "pearl diving" thus remains ambiguous. It can be understood in two distinct ways, with radically different implications for thinking and the social: as authoritative scholarly research or as a mode of empowerment accessible to everyone. On the first reading, Arendt is one more expert, a scholar of ancient languages who teaches the rest of us what a word "originally" meant and therefore still ought to mean, issuing an authoritative definition to which we are expected to submit. As chapter 8 suggested, Arendt is particularly drawn to this mode of presenting her work when she doubts her own authority and wants to fend off any possible objections in advance. Paradoxically, this way of explicating the lost treasure actually teaches unthinking deference, and thus is likely to promote the social.

On the second reading, however, what is to be retrieved is not a word's original meaning but, as in the passage quoted above, its "original spirit," which I take to mean the spirit of origins, the creative capacity of speakers, employed in a word's "origin" but also in every subsequent extension of its meaning. A word, as Arendt wrote late in her life, "is something like a frozen thought that thinking must unfreeze."\*0 Young-Bruehl reports that Arendt also sometimes called her enterprise "conceptual analysis," a phrase suggesting that it involves not a historical but a contemporary investigation, within the capabilities of any thoughtful person.81 Etymological information can sometimes help, as can a knowledge of history that reveals the real political struggles, with real winners and losers, which shaped the meanings of words that we inherit. But ulti-....CONTINUES

The depressing sense of hopelessness that results from examining the array of conditions in our lives conducive to the social and inhibiting free citizenship is partly an artifact of the way we have been examining those conditions. There is something else to be said, something so far omitted from consideration, not exactly an additional fact or condition but another perspective on what we have seen: a fourth and final path into the thicket of the social. It would be ironic indeed if a study criticizing Arendt for having mystified the social were to end with only the three unmystified approaches we have examined, for each and all of them srill miss what is most valuable in her theorizing. Stopping with these three paths would amount to throwing out Arendt's achievement along with her unfortu nate Blob. So we must add one more approach, akin to the outlook of existentialism, which we shall call the path of "Just do it!"

We have been discussing the lost ideas of action, politics, and freedom, but discussing them in the same manner as we discussed institutional arrangements and character structure: as possible explanations for the social, suggesting possible remedial policies. These are certainly relevant to politics, but they still lack the existential impetus that might carry us across the conceptual gap between the spectator's outlook and that of the engaged citizen. A political approach must include not just thinking *about* *action* but thinking *as an actor*: not as a hypothetical world dictator magically imposing an ideal policy but as one free citizen among others, whose joint commitment and effort will be required for accomplishing the right sort of changes.

The fourth approach to the problem of the social, then, is not one more rival explanation or policy prescription but more like an essential supplement to any and all of the other approaches, more about how they are to be employed than an alternative to them. If one puts the perspective of the agent at the center, then the only "explanation" of the social one needs or can have is that we aren't (yet) doing anything to diminish it. And the only "policy" that can help bring about free politics is to start enacting it. As an explanation of how we are getting in our own way and as a prescription for what we should do, this obviously is not much help. As a way of persuading people to act and use their capacities, it is just about useless. Yet as a supplement to explanations and policy suggestions it is essential, if our goal is free politics or diminishing the social. For this fourth approach reminds us that whatever we may learn along the other paths will have to be enacted by and among people, not imposed on inanimate material or cattle, because this particular goal can only be achieved by enlisting people's action, inducing their own free citizenship. Action, as Arendt insists, has no causes. That is a logical or conceptual point: to look on human conduct from the perspective of agency is to see (some of) that conduct as originating in the agent "whose" action it is, so that he deserves the credit or the blame, unlike a storm, a chemical process, or the movements of a puppet. That is why she says that, from the perspective of explanation and policy prescription, action always "looks like a miracle."" The agent is hy definition an unmoved mover, the inexplicable origin ot something uncaused, even though we know that from a different perspective action does not exist and that every apparent action also has a causal history and an intended goal. If politics is concerted action, then, the kind of "taking charge" it involves will be very different from homo faber\ efficient technical mastery of materials. The basic political question remains "What shall we do?" and both the "do" and the "we" are always problematic, contestable, continually being (reconstituted.

Approaching the social by the fourth path reminds us that the various conditions discovered along the other paths arc, singly and in combination, neither necessary nor sufficient to displace the social or assure free politics, though they can indeed facilitate or hinder, invite or discour-age, aid or inhibit. They are not necessary because the social is a matter of degree, not a metaphysical transformation, and the human capacities for action and judgment cannot be lost. We learn that truth from ihe Resistance; we learn it from popular rebellions and revolutions; we learn it from social movements; we learn it from the story of Anton Schmidt: action can never be ruled out. Whether one inquires conceptually—about the meaning of agency—or historically—about past times and places where previously apolitical people in large numbers have begun to engage actively in a concerted effort to direct their shared fate—the result is the same: there can be no absolute prerequisite to freedom. We are always already free-to-become-free. Or at least, since there is no guarantee of success, we are always already free-to-begin-moving-toward-freedom, free-to-enlarge-the-degree-of-our-freedom, both individually and collectively. A public arena already institutionalized may facilitate action, but concerted action can also create arenas. Courage and responsibility may be conducive to action, but often we only discover our real capacities in action. Awareness of what action and freedom really are may help, but one of the best ways to gain such awareness is through experiencing them.

Similarly, no set of facilitating conditions is sufficient to produce action or assure free citizenship. No conceptualization or theorizing can guarantee their remembrance; no institutions can assure their continuation; no type of character suffices to make people free agents, because freedom is not something that can be caused, given, or imposed. It has to be taken, chosen, exercised, enacted, if it is to exist at all. Nothing can guarantee its coming into existence except doing it; nothing can make it endure except continuing to do it.

These matters are too often discussed today in terms of "resistance" and "identity," located in "civil society," and contrasted to government and politics." Though Arendt began from Jewish identity and resistance to the Nazis, it seems to me that she was right to move beyond them toward a more general theory of active citizenship and to identify such citizenship with politics. Resistance to unjust power is surely important, and there may be need for it in any collectivity. But it retains a conceptual division between "they," who have power and are guilty, and ourselves, who resist their initiatives but are not in charge. The problem of the social, however, is that people are power without having it, that even the "powerful," whose decisions affect hundreds of thousands, are unable to alter the ineni.il drift as long as everyone keeps doing as we now do.

One may have to begin with resistance, but it is not the goal, is not enough. Seeking to force "them" to change "their" government and pol-icy does not yet recognize that government and policy as (potentially and properly) ours, everyone's concern. And though, under conditions of the social, the beginnings of free action are very likely to take place outside of the formal institutions of government, thus in "civil society," they surely are political if they aim at redirecting, taking some charge of the collectivity. When, as Tocqueville said of France in the 1830s, the officially political institutions of government are devoid of "political life itself," so that in them all is "languor, impotence, stagnation, and boredom," then it may happen that elsewhere, among those excluded or withdrawn, "political life beg[ins] to make itself manifest."99 Such unofficial political life is not merely resistance—negative or defensive—but instead, as Char said about the French Resistance, "a public realm" where free citizens address the real "affairs of the country."100 Thus Arendt was right to insist, with Tocqueville, that what we need is politicization, the arousal of now subjected, withdrawn, or irresponsible people to their own real capacities, needs, and responsibilities. Politicization here implies neither increased managerial intrusion into people's personal lives nor dutiful submission to official authorities, but, on the contrary, responsible and effective participation in self-government that addresses people's real troubles and needs.

Reviewing the conditions of our world along any of the first three paths into the thicket of the social, we noted, can be discouraging, suggesting that we have become entrapped in a vicious cycle. The conditions we would need for escaping it are precisely what we lack: institutions reflect character, character reflects ideas, ideas emerge out of praxis, everything depends on everything else, and here we are, deep in the social. The fourth path into the thicket reminds us that, precisely because everything depends on everything else and because freedom has no absolute preconditions, any step in the right direction—be it institutional, charac-terological, or ideational—can have further, widening effects, enlarging the space for freedom. Where one steps forward, others may follow. Where one speaks the truth, others may recognize it and take heart to do the same. The only place to begin is where we are, and there are a hundred ways of beginning, as Arendt says, "almost any time and anywhere," because action "is the one activity which constitutes" our public, shared world.101 Once we do begin, moreover, we may find others already under way, may discover all sorts of organizations and movements—be they about ecology, feminism, disarmament, torture, human rights, or nuclear power—movements locally generated but aimed at public responsibility and power.

Too hortatory and idealistic? Out of keeping with this book's stress on dialectical balance and on the seriousness of the problem of the social? Yes, of course. But that is because we have been pursuing the fourth path in isolation, when it is actually an essential supplement to the others. Blind activism is no help—no more than impotent thought. Political action requires realism, responsibility, thoughtfulness about conditions and trends, possibilities and policies, ends and means, and only then does it also require something more. Though Arendt calls action a miracle, if you wait for your own action to befall you, it will not; you have to just do it. Others may or may not join you. Your action and the others may or may not succeed in extending freedom rather than furthering the social. There are no guarantees. But who will do it if we do not? Reversing our present drift into the social is everyone's task, and one we must do together. That follows from recognizing that the social is not a Blob. The task is not slaying an alien monster but reconstituting ourselves: reorganizing institutions, reforming character, contesting ideas. That may not be easy, but it can never become impossible. We arc depressingly the problem; we are encouragingly the solution.

#### The interruption disad—the 1nc was a process of systemic critique which is both necessary and sufficient to resist the bureaucratic structure—but, the perm interrupts this process of critique with a normative demand that obscures underlying legal structures and jacks solvency for both the aff and the alt

**Schlag 90**—the grumpiest lawyer in all the land

(Pierre, “Normative and Nowhere to Go”, Stanford Law Review, Vol. 43, No. 1 (Nov., 1990), pp. 167-191, dml)

But then again, that is precisely one of my points. And there is no point in overdoing it-normative legal thought is overdoing it all by itself, getting more repetitive all the time, **asking "**What should we do?What should the law be?What do you propose?**" over and over again**.

In fact, even as you read and even as I write, normative legal thought is busy urging us (you and me) to ask these very same questions of this very essay at this very moment. "What should we do? What's the point?" asks normative legal thought. "If normative legal thought isn't going anywhere, what should we do instead?" "What do you propose?" "What's the solu- tion?" These familiar questions are usually asked in searching, serious, som- ber tones. There is no trace of irony in their articulation-no self- consciousness at all. It is as if the intellectual legitimacy, the political im- port, of the questions **were themselves self-evident**, beyond question.27 "Yes, yes-but what should we do? How do these observations help?" Usually, the questions are asked with such earnest, self-assured self-certainty that it is as if **the body of knowledge that** **enables the questions** to be stated in the first place **were somehow** outside the problem, outside the difficulty-already in- tellectually whole, **already** politically competent **to provide the answers**.2 "Right, right, but the question is, what should we do with all this?"

Now you'll notice that here the "What should we do?" **is an interruption**. It is an interruption posing as an origin. It poses as an origin in that it takes itself to be the original motivation for engaging in legal thought.29 And yet here, **the "What should we do?"** interrupts the process **of** trying to under- stand **what enterprise we, as legal thinkers,** are already engaged in. It inter- rupts the process of attempting to **reveal the character of our** disciplines **and our** practices **as legal thinkers**. "O.K., O.K., but how would such revelations help us decide what we should do?"

You'll notice that here (as elsewhere) normative legal thought has a very pressing and urgent tone. It wants to know right away **what should be done**. Right away. And true to its name, normative legal thought wants to engage right away in the enterprise of norm-selection. Normative legal thought wants to decide as quickly as possible which norm (which doctrine, which rule, which theory) should govern a particular activity.

Now as intellectually stifling and politically narrow as the enterprise of norm-selection may be,30 it still offers legal thinkers some residual possibility of posing interesting philosophical, social, psychological, economic, or semi- otic inquiries about law. Yet **normative legal thought** can't wait **to shut down** these intellectual **and** political **openings** as well. It cannot wait to en- velop these inquiries in its own highly stylized ethical-moral form of norm- justification. Normative legal thought cannot wait to enlist epistemology, semiotics, social theory or any other enterprise in its own ethical-moral argu- ment structures about the right, the good, the useful, the efficient (or any of their doctrinally crystallized derivatives). It cannot wait to reduce world views, attitudes, demonstrations, provocations, and thought itself, to norms. In short, **it cannot wait to tell you** (or somebody else) **what to do**.

In fact, normative legal thought is so much in a hurry that **it will tell you what to do even though** there is not the slightest chancethat you might actually be in a position to do it. For instance, when was the last time you were in a position to put the difference principle31 into effect, or to **restruc-ture** the doctrinal corpus of **the first amendment?** "In the future, we should ... ." When was the last time you were in a position to rule whether judges should become pragmatists, efficiency purveyors, civic republicans, or Her- cules surrogates?

Normative legal thought **doesn't seem overly concerned with such worldly questions** **about** the character and the effectiveness of its own dis- course. It just goes along and proposes**,** recommends**,** prescribes**,** solves**, and** resolves. Yet despite its obvious desire to have worldly effects, worldly con- sequences, normative legal thought remains seemingly unconcerned that for all practical purposes, **its only consumers are** legal academics **and** perhaps a few law students-persons who are virtually never in a position **to put any of its wonderful normative advice into effect**.32

#### Their aff scape goats the decision on indefinite detention to legal bureaucrats who will make racist decisions about who will be indefinitely detained RATHER than applying the plan’s case law equally

Tagma 09. Halit Mustafa Tagma, Professor of Political Science and International Relations, Sabanci University, Alternatives: Global, Local, Political, Vol. 34, No. 4 (Oct.-Dec. 2009), pg. 422

Besides the manual Standard Operating Procedures that dictates the minute-to-minute details on disciplining prisoners and Human Ter- rain Systems to classify and discipline populations, there is also a mushrooming psychiatric discipline that has the prisoners as its ob- ject. Allison Howell argues that the psychiatric discourse, as a regime of truth, has pathologized the Guantánamo prisoners such that it "play[ed] a part in the conditions of possibility for indefinite deten- tion**.**"89 Howell shows how the scientific discourse on the mental health of the prisoners has constructed them as "crazy, fanatical mad- men" who are dangerous to themselves and society.90 She argues that this regime of truth has legitimated the indefinite detention of the prisoners. This supports my central argument that the "regime of truth" of biopower supplements sovereign power. This means that tactics of power create the conditions of possibility for the justifica- tion of exceptional sovereign practices. In other words, techniques of power that attempt to individualize, divide, and discipline bodies feed back into and justify the conditions of possibility for the exceptional logic in the articulation of emergency powers - a logic of supplemen- tarity par excellence. All this is not to say that there is a simple chronol- ogy to this logic, and that such affairs occur in abstraction, external to chance, contingency, historicity, interpretation, and the regime of truth of a given society. Instead, the techniques of power go hand in hand with the regime of truth in a given space and time. Exclusion- ary practices and the production of bare life do not operate, as Agam- ben would have us believe, in a uniform and universal manner that gets replicated across time and space, be it in the Greek city-state Nazi Germany. Agamben declares that thanks to sovereign power Ve are all Homo Sacer" Historically and theoretically, however, the articu- lation of the Ve" is at the core of the problem. The prisoners of the war on terror are also subject to standards of classification, categorization, and profiling. In the case of John Phillip Walker Lindh, the son of a white suburban US family, who was captured in the opening of the war in Afghanistan, "justice" was meted out swiftly, and he was given a twenty-year sentence. On the other hand, Jose Padilla, "an American citizen of color," and in the case of thousands of other subjects put on indefinite detention, normal law is put on hold.91 What accounts for this difference are the marks of difference on a subject's body (race, religion, national back- ground, and ideology) that all come in to play at the ground level when petty bureaucrats get to decide who is to be treated according to what standard of operation. The workings of racism can be identi- fied in the speeches of petty bureaucrats at the local level, as in this statement from one of the Tipton Three: I recall that one of them said "you killed my family in the towers and now it's time to get you back." They kept calling us mother fuckers and I think over the three or four hours that I was sitting there, I must have been punched, kicked, slapped or struck with a rifle butt at least 30 or 40 times. It came to a point that I was simply too numb from the cold and from exhaustion to respond to the pain.92 Although the Three were British citizens and had nothing to do with the 9/11 terrorist attacks, they were quickly associated with ter- rorism because of their racial background and apprehension in Af- ghanistan. Despite the fact that they had nothing to do with terrorism, as their release from Guantánamo Bay suggests, their treatment stands as an indication not of senseless sovereign vengeance but of a vengeance informed by a certain racist bias. Their capture, torture, and treatment was all made possible by a prior initial racial profiling that resulted in innocent men being held in captivity. Sovereign vio- lence does not operate in the absence of a regime of truth that iden- tifies those whose bodies could be subjected to violence. As developed in particular, there was an unmistakable racist disposition toward the "different" bodies of the prisoners. As Reid-Henry points out, the flesh of the Oriental, both as an exotic and an inferior sub- ject, probably had something to do with the stripping and beating of Middle Eastern prisoners.93 It may be argued that the decision not to apply the Geneva Convention and other standards of legal treatment to the prisoners captured in Afghanistan is representative of an exceptional decision. However, in line with what I have been arguing, such a resolution is not a simple act of deciding on the part of the leading politicomili- tary cadres of a state. This is not to deny the importance of subjects in key positions; however, such decisions do not take place in a space external to interpretation, culture, and history. Furthermore, much of the sovereign decisions, such as "who is to be detained indefi- nitely," are made at the local level based on interpretation of petty bureaucrats. Sovereign decisions are always already informed by historical and cultural understandings as to who counts as a member of the "good species**."** The "good species," "the inside," and the body politic have been constructed by colonial discourse. As Roxanne Doty has pointed out, colonial discourse has had a vital role in the construction of Western nations. She further points out that race, religion, and other marks of difference have played an important role in national classi- fication.94 The treatment of faraway people as inferior and exotic has played an important role in nation building in its classic sense. There- fore, who counts as a citizen, a "legitimate" member of a "legitimate" nation, is the product and effect of centuries of interaction of the West with its others. Understood in this sense, sovereign decisions (whether made at the top or bottom level) are informed and shaped by a cultural and colonial history. This is neglected in Agamben's grand analysis of Western politics. Therefore, sovereign power needs the classification, hierarchization, and othering provided by a regime of truth in order to conduct its violent power. Only certain types of peo- ple could be rendered as bare life and thrown into a zone of indis- tinction. Understood this way, it is easier to comprehend the "smooth" production of homines sacri out of Middle Eastern subjects.

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#### Congress and courts are zero-sum – congress will stop oversight and defer to judicial supremacy

Williams 04 (Norman, Assistant Professor of Law, Willamette University, October, 79 N.Y.U.L. Rev. 1398, lexis)

But there is a deeper point here regarding the severity of the choice between the current regime of judicial supremacy and one committed to popular constitutionalism. Popular constitutionalism is not an incontestably superior conception of constitutional interpretation. Even if we could put aside our partisan biases - even if we could consider popular constitutionalism from the standpoint of a disinterested constitutional observer with no stakes in particular doctrinal outcomes - resolving the question whether our republic would be better served by an emboldened Congress and a timid Court in matters of constitutional interpretation would remain a tricky question. We would need to determine the likelihood of constitutional errors made by the Court under our current system of **judicial supremacy**, which discourages constitutional analysis **by the political branches**, and compare it to the likelihood of constitutional errors made by the political branches in a system of popular constitutionalism, which distorts the constitutional deliberations of the judicial branch. 512 That is no easy feat, and it is one that must be confronted head-on. It cannot be finessed by claiming that popular constitutionalism does not affect the Court's ability to identify and articulate its own independent interpretation of the Constitution - that it does not necessarily entail a timid Court. To the contrary, Gibbons reminds us that the competition among the three branches for authoritativeness in matters of constitutional interpretation is very much a zero-sum game. **The gains of one branch invariably come at the expense of the others.**

#### Judicial rulings cause backlash that destroys solvency. Congressional debates are key to culture shifting and broad social change. Civil Rights Act proves.

Stoddard 97 (Thomas B., Professor of Law – New York University, “Bleeding Heart: Reflections on Using the Law to Make Social Change”, New York University Law Review, November, 72 N.Y.U.L. Rev. 967, Lexis)

The first three goals comprise the traditional role of the law in expressing the formal rulemaking function for a society. The law sets  [\*973]  and alters rules; if it is effective, it also enforces those rules. I will call this the law's "rule-shifting" capacity. But lawyers of my generation, inspired by Supreme Court decisions like Brown v. Board of Education, [8](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n8) Baker v. Carr, [9](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n9) and Roe v. Wade, [10](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n10) and by the success of the African American civil rights movement and companion movements for political change, have sought to do more with the law than make rules. We have, in the last half of this century, adapted the law's traditional mechanisms of change to a newfangled end: making social change that transcends mere rulemaking and seeks, above and beyond all the rules, to improve the society in fundamental, extralegal ways. In particular, we have sought to advance the rights and interests of people who have been treated badly by the law and by the culture, either individually or collectively, and to promote values we think ought to be rights. I will call this concept the law's "culture-shifting" capacity. The fourth and fifth items on my list of lawmaking's aims reflect the conception of the law as a "culture-shifting" tool. The law has always been an instrument of change, of course, but in recent decades it has become, through the deliberate, indeed passionate, efforts of a new breed of lawyer-activists, a favored engine of change. The law has thus become increasingly "culture-shifting." The Civil Rights Act of 1964, [11](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n11) enacting probably the most famous reform statute of the twentieth century, may be the statutory paradigm of legal reform intended to make social change. The Act established new rules of law, but it accomplished much more, and its full effects are still being felt - and I do mean "felt" - throughout the society. The new rules were simply stated. The Act banned "discrimination or segregation" in the provision of goods and services, even by private entities, on the basis of "race, color, religion, or national origin," [12](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n12) and outlawed discrimination or segregation in employment because of a person's "race, color, religion, sex, or national origin." [13](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n13) It also forbade discrimination by the federal government on the ground of "race, color, or national origin" in any of its programs and activities. [14](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n14)  [\*974]  The new law did not represent a simple recrafting of the applicable rules and remedies. It did not merely rewrite the canons of employment law. It did not mean only that in the future, employers, merchants, and the government (if law-abiding) would have to adhere to a new set of guidelines. The Act brought into being a whole new model of conduct that, consciously and deliberately, overturned doctrines embedded in American culture - and, more widely speaking, European culture - for several centuries. These doctrines carried different articulations and emphases over time - black inferiority, "separate but equal," and "states' rights" are but three - but, when reduced to their essentials, they resulted in the basic notion of white privilege. Enactment of the Civil Rights Act of 1964 constituted a formal, national rebuke of this detestable, but time-honored concept. The Act was, as already stated, far more than an employment manual or sales guide. It put forward new ideas about everyday relations between individuals - not only in the workplace or in stores, but, implicitly, in all aspects of human interaction. The ideas were essentially two: (1) that each human being has rights equal to any other, at least in the public realm, and (2) that segregation by race is wrong. The Act, put into its full historical context, constituted "culture-shifting" as well as "rule-shifting," attaining simultaneously all five aims of legal reform. It gave victims of discrimination new rights and remedies. It instructed the government to promulgate and enforce new rules of conduct for itself. It altered the conduct of private entities and citizens - dramatically, in the South. It expressed a new moral standard. And - I believe, although I cannot easily document my belief - it changed cultural attitudes. There is no sure way to measure changes in cultural attitudes. Legal and economic statistics about jobs and income may help somewhat, but they reflect external rather than internal realities - formalities rather than conceptions. Even opinion polls are not especially instructive, because respondents to such polls often are not truthful, especially when the subject is race. I offer merely my own sense of things. But I see signs of the change all around me. Perhaps the most credible monitor is television - the cultural medium that binds together more Americans than any other. On the American television screen of 1996, black and brown faces [15](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n15) are everywhere: on situation comedies, in dramas, on talk shows, on sports programs, at news desks, and in advertisements; in 1966 - when I was in high school -  [\*975]  integrated depictions on television were exceedingly rare. Many forces have helped to integrate the world of television - and the world of television is admittedly not an imitation or reflection of the day to day experiences of Americans off the screen - but the change does seem attributable, at least in part, to changes in the law that sent new cultural signals, primary among them the Civil Rights Act of 1964. Americans may not yet live fully in a world of equal opportunity and integration, but their principal cultural medium suggests that they have at least embraced the ideals - the desiderata - of equality and integration. "Chicago Hope" depicts an integrated world, even if the real Chicago does not. I cannot, as I said, prove my point about cultural change, and I realize that there is plenty of evidence to show deterioration rather than improvement of relations between blacks and whites in the United States, such as the increase in rates of poverty among African Americans. I would never contend that the Civil Rights Act of 1964, even three decades after its passage, ended discrimination or racism. (I am also, admittedly, neither a sociologist nor an historian.) But this point seems instinctively right, at least to someone who has seen the evolution of American culture over the past fifty years: cultural ideals have changed, even if cultural realities still lag. At least in part because of the Civil Rights Act of 1964 [16](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n16) - the most important statutory embodiment of the ideal of racial justice - American culture, American government, and the American people have absorbed the concepts of equality and integration embodied in the Act as the proper ethical framework for the resolution of issues of race. Outright segregationists like David Duke, and genetic supremacists like William Shockley, are remarkable for their contemporary scarcity; in 1954, views similar to theirs were widely held and admired, both within and without government. [17](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n17) Let me also suggest this: the Civil Rights Act of 1964 has had such a powerful cultural impact not just because of what it said, but also because of **how it came into being**. The Act was the product of a  [\*976]  continuing passionate and informal national debate of at least a decade's duration (beginning, vaguely, with the Supreme Court's decision in Brown v. Board of Education [18](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n18) invalidating the concept of "separate but equal" in the public schools) over the state of race relations in the United States. The debate took place every day and every night in millions of homes, schools, and workplaces. It is this debate - not the debate in the Congress - that really made the Act a reform capable of moral force. Through a continuing national conversation about race, ordinary citizens (especially white citizens) came to see the subject of race anew. The arena of change may also have influenced the scope and power of the result. Imagine that the new rules enacted by the Civil Rights Act of 1964 had, instead, emanated from a ruling of the U.S. Supreme Court. (Such a decision, even under the Warren Court, would have seemed unlikely, but not completely implausible. The Court could arguably have relied on a Thirteenth Amendment theory, because the Thirteenth Amendment, unlike the Fourteenth Amendment, is not limited in scope to state action, [19](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n19) or it could have turned alternatively to the principle relied on by the Court in Shelley v. Kraemer [20](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n20) to invalidate restrictive covenants in housing - the idea that the government must not be an accessory to private discriminatory schemes.) Imagine further no substantial difference between the provisions of the Civil Rights Act of 1964 as enacted and the holdings of one or several hypothetical decisions from the Supreme Court. Would American history have evolved in the same way? Would the  [\*977]  difference in the forum of decisionmaking have resulted in a different public reaction to the new rules of law? I think history would have been different. The new rules of law were widely disliked, especially by whites in the South, but the opponents of the Civil Rights Act of 1964 never rose in rebellion, either formal or informal, against enforcement of the statute. If the new rules had come down from on high from the Supreme Court, many Americans would have probably considered the change of law illegitimate, high-handed, and undemocratic - another act of arrogance by the nine philosopher-kings sitting on the Court. Because the change emanated from Congress, however, such sentiments of distrust (whether grounded in principle or in simple racism) never came to affect the legitimacy of this stunning change in American law and mores. The Civil Rights Act of 1964 came into being because a majority of the members of the national legislature believed it represented sound policy and would improve the life of the country's citizens as a whole; the ideas motivating the Act must therefore have validity behind them. In general, then, not only did the historical fact of the continuing national debate on race facilitate the public's acceptance of the Civil Rights Act of 1964, even in the South, but so did the additional (I believe crucial) fact that the change came through legislative consideration rather than judicial or administrative fiat - lending it "culture-shifting" as well as "rule-shifting" power. [21](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=5e4109beeaa63debe4e7aae6a9c53b91&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAb&_md5=77f2fb9ccbec2f0d8c93616932a88dd5&focBudTerms=congress%21+w%2F35+culture+shifting+and+stoddard&focBudSel=all#n21) The astonishing effectiveness of the Civil Rights Act of 1964 - the breathtaking sweep of its cultural tailcoats - suggests that it should be a model for social change in other settings. It also indicates that how change is made matters almost as much as what is, in the end, done.

#### Sequencing solves the case – Courts look to Congress

Bradley 10 (Curtis A., Professor of Law and Professor of Public Policy Studies – Duke Law School, “Clear Statement Rules And Executive War Powers,” Harvard Journal of Law & Public Policy, January, 33(1), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2730&context=faculty_scholarship>)

The scope of the President’s independent **war powers** is notoriously unclear, and courts are understandably reluctant to issue constitutional rulings that might deprive the federal government as a whole of the flexibility needed to respond to crises. As a result, courts often look for signs that Congress has either supported or opposed the President’s actions and rest their decisions on statutory grounds. This is essentially the approach out‐ lined by Justice Jackson in his concurrence inYoungstown. 1 For the most part, the Supreme Court has also followed this approach in deciding executive power issues relating to the war on terror. In Hamdi v. Rumsfeld, for example, Justice O’Connor based her plurality decision, which allowed for military detention of a U.S. citizen captured in Afghanistan, on Congress’s September 18, 2001, Authorization for Use of Mili‐ tary Force (AUMF).2 Similarly, in Hamdan v. Rumsfeld, the Court grounded its disallowance of the Bush Administration’s military commission system on what it found to be congressionally imposed restrictions.

Balkin 3 (Jack, Knight Professor of Constitutional Law and the First Amendment at Yale Law School, “Good Judging and "Following the Rules Laid Down”, 5/18, http://balkin.blogspot.com/2003/05/good-judging-and-following-rules-laid\_18.html)

The Supreme Court, and the federal courts generally, work in conversation with the political branches, not in isolation from them. Courts change the content of constitutional doctrines in response to social movement contestation and changing social mores. It's pretty clear that decision according to precedent does not explain the sex equality cases. The reasons lie elsewhere: in the Civil Rights Act of 1964 which required sex equality in employment, in the Civil Rights Movement of the 1950's and 1960's, and above all in the second wave of American feminism, which succeeded, in a very short time, in changing most Americans' attitudes about what political equality meant. Under this account, the fact that Congress had passed the ERA and submitted it to the states was a clear signal that the meaning of political equality had changed in the country, and therefore the Court was authorized to overrule its previous precedents and bring the Constitution in line with the times. Indeed, this is exactly what Justice White said to his colleagues in the conference notes on Frontiero v. Richardson. That is to say, although the standard story is that judging is supposed to be independent of politics, nothing could be further from the truth. Judgments of political principle are inextricable from legal interpretation of the Constitution, particularly its abstract generalities like equal protection, due process, and free speech. That is often true of decisions that people despise, but more importantly, it is also true of decisions, that, in retrospect, we regard as the greatest achievements of the courts, decisions that have made our Constitution the charter of liberty and equality worthy of our respect and admiration. Our Constitution is great not because it was great when it left the hands of its Framers; it has become great, and worthy of our admiration, because of what happened to it afterward, because of continuous political struggles over the larger meanings of liberty and equality that were eventually assimilated and codified by courts. That is how a Constitution originally designed to protect aristocratic white male property owners gradually was transformed into a charter of freedom. The account that Larry offers of good judging is internalist: it tries to identify features of sound legal argument and juridical practice that are isolated from what is happening in the political world outside the courts. I think that every such account of judging is doomed to failure, not because the judicial virtues he identifies are unimportant, but because they are incomplete, and because they don't capture the historical realities of constitutional change in the United States. The more one studies the history of constitutional doctrine, the more one recognizes that the work of judges, although formally independent from politics, is never practically isolated from political contestation about the basic values of American life. That connection, which is sometimes hidden, and sometimes overt, is the by far the most important source of constitutional change, and, if I may say so, of constitutional legitimacy as well.

#### And --- it avoids court DAs

Lee 5 (Edward, Assistant Professor of Law – Ohio State University Moritz College of Law, “The New Canon: Using or Misusing Foreign Law To Decide Domestic Intellectual Property Claims”, Harvard International Law Journal, Winter, 46 Harv. Int'l L.J. 1, Lexis)

The sliding scale is intended to facilitate the benefits of judicial dialogue, particularly for complex issues that recur among jurisdictions. [174](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=2fe113f3c144f57faed81d9d82da317c&docnum=50&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAA&_md5=b1d9e5e1353b8e4b551f37ea1388cd8e&focBudTerms=%28judici%21+or+court%29+w%2F50+congress%21+w%2F50+judicial+internationalism+or+%28incorporat%21+w%2F25+international+law+or+foreign+law%29+w%2F35+first+or+unilateral%21+or+sequenc%21&focBudSel=all" \l "n174" \t "_self) I believe the first two categories of the sliding scale--express incorporation statutes and borrowing statutes--present little controversy, since both ultimately rest on a prior action of Congress that signals the relevance of foreign law. The case for relying on foreign law in either case is established by either an express connection between the statutes or some indication of borrowing or modeling on foreign law. In the former case, the legislature has expressly decided the relevance of the foreign law. In the latter, the relevance of foreign law is less strong or direct, but nevertheless is still established by the use of the foreign law as a model for drafting the domestic law.

#### Plus --- there’s spill-over --- plan acts as fly-paper --- draws other movements to the Court and crushes them

**Rosenberg 8** (Gerald N., University of Chicago political science and law professor, Ph.D. from Yale University, member of the Washington, D.C. bar, The Hollow Hope: Can Courts Bring about Social Change?, p. 427)

If this is the case, then there is another important way in which courts affect social change. It is, to put it simply, that courts **act as “fly-paper”** **for social reformers** who succumb to the **“lure of litigation.”** If the constraints of the Constrained Court view are correct, then courts can seldom produce significant social reform. Yet if groups advocating such reform continue to look to the courts for aid, and **spend precious resources** in litigation, then the courts also **limit change by deflecting claims** from substantive political battles, where success is possible, to harmless legal ones where it is not. Even when major cases are won, the achievement is often **more symbolic that real**. Thus, courts may serve an ideological function of luring movements for social reform to an institution that is **structurally constrained** from serving their needs, providing only an illusion of change.

#### Also crushes the environmental justice movement --- focused on Congress now

**Cha 7** (J. Mijin, Esq., JD, LLM, PhD, “Environmental Justice in Rural South Asia,” Georgetown International Environmental Law Review, 19 Geo. Int'l Envtl. L. Rev. 185, Winter, LexisNexis)

The environmental justice movement in the United States highlights two important issues: movement inclusivity and diversity of tools. The more groups and members that can be included in a social movement, especially one as far-reaching as environmental justice, the more political power and energy the movement can generate. Additionally, diversifying tools to include a multi-leveled approach to increasing environmental justice can lead to greater success. Relying exclusively on the legal system, for instance, would result in limited movement success due to the unpredictable, and at times hostile, nature of the judiciary. Including other tools would also shift the emphasis from a purely legal battle to a more multi-tiered battle. Environmental justice aims not only to win legal battles, but also to increase community empowerment. Community empowerment can grow in several ways, only one of which needs to include legal action.

#### Extinction

Bryant 95 (Bunyan Professor in the School of Natural Resources and Environment – University of Michigan, Environmental Justice: Issues, Policies, and Solutions, p. 208-212)

Although the post-World War II economy was designed when environmental consideration was not a problem, today this is no longer the case; we must be concerned enough about environmental protection to make it a part of our economic design. Today, temporal and spatial relations of pollution have drastically changed within the last 100 years or so. A hundred years ago we polluted a small spatial area and it took the earth a short time to heal itself. Today we pollute large areas of the earth – as evidenced by the international problems of acid rain, the depletion of the ozone layer, global warming, nuclear meltdown, and the difficulties in the safe storage of spent fuels from nuclear power plants. Perhaps we have embarked upon an era of pollution so toxic and persistent that it will take the earth in some areas – thousands of years to heal itself.  To curtail environmental pollutants, we must build new institutions to prevent widespread destruction form pollutants that know no geopolitical boundaries. We need to do this because pollutants are not respectful of international boundaries; it does little good if one country practices sound environmental protection while its neighbors fail to do so. Countries of the world are intricately linked together in ways not clear 50 years ago; they find themselves victims of environmental destruction even though the causes of that destruction originated in another part of the world. Acid rain, global warming, depletion of the ozone layer, nuclear accidents like the one at Chernobyl, make all countries vulnerable to environmental destruction.  The cooperative relations forged after World War II are now obsolete. New cooperative relations need to be agreed upon – cooperative relations that show that pollution prevention and species preservation are inseparably linked to economic development and survival of planet earth. Economic development is linked to pollution prevention even though the market fails to include the true cost of pollution in its pricing of products and services; it fails to place a value on the destruction of plant and animal species.  To date, most industrialized nations, the high polluters, have had an incentive to pollute because they did not incur the cost of producing goods and services in a nonpolluting manner. The world will have to pay for the true cost of production and to practice prudent stewardship of our natural resources if we are to sustain ourselves on this planet. We cannot expect Third World countries to participate in debt-for-nature swaps as a means for saving the rainforest or as a means for the reduction of greenhouse gases, while a considerable amount of such gases come from industrial nations and from fossil fuel consumption. Like disease, population growth is politically, economically, and structurally determined. Due to inadequate income maintenance programs and social security, families in developing countries are most apt to have large families not only to ensure the survival of children within the first five years, but to work the fields and care for the elderly. As development increases, so do education, health, and birth control. In his chapter, Buttel states that ecological development and substantial debt forgiveness would be more significant in alleviating Third World environmental degradation (or population problems) than ratification of any UNCED biodiversity of forest conventions. Because population control programs fail to address the structural characteristics of poverty, such programs for developing countries have been for the most part dismal failures. Growth and development along ecological lines have a better chance of controlling population growth in developing countries than the best population control programs to date. Although population control is important, we often focus a considerable amount of out attention on population problems of developing countries. Yet there are more people per square mile in Western Europe than in most developing countries. “During his/her lifetime an American child causes 35 times the environmental damage of an Indian child and 280 times that of Haitian child” (Boggs 1993:1) The addiction to consumerism of highly industrialized countries has to be seen as a major culprit, and thus must be balanced against the benefits of population control in Third World countries. Worldwide environmental protection is only one part of the complex problems we face today. We cannot ignore world poverty; it is intricately linked to environmental protection. If this is the case, then how do we deal with world poverty? How do we bring about lasting peace in the world? Clearly we can no longer afford another Somalia we can no longer afford a South Africa as it was once organized, or ethnic cleansing by Serbian nationalists. These types of conflicts bankrupt us morally and destroy our connectedness with one another as a world community. Yet, we may be headed on a course where the politically induced famine, poverty, and chaos of Somalia today will become commonplace and world peace more difficult, particularly if the European Common Market, Japan, and the United States trade primarily among themselves, leaving Third World countries to fend for themselves. Growing poverty will lead only to more world disequilibrium to wars and famine – as countries become more aggressive and cross international borders for resources to ward off widespread hunger and rampant unemployment. To tackle these problems requires a quantum leap in global cooperation and commitment of the highest magnitude; it requires development of an international tax, levied through the United Nations or some other international body, so that the world community can become more involved in helping to deal with issues of environmental protection, poverty, and peace. Since the market system has been bold and flexible enough to meet changing conditions, so too much public institutions. They must, indeed, be able to respond to the rapid changes that reverberate throughout the world. If they fail to change, then we will **surely meet the fate of the dinosaur**. The Soviet Union gave up a system that was unworkable in exchange for another one. Although it has not been easy, individual countries of the former Soviet Union have the potential of reemerging looking very different and stronger. Or they could emerge looking very different and weaker. They could become societies that are both socially and environmentally destructive or they can become societies that are both socially and environmentally destructive or they can become societies where people have decent jobs, places to live, educational opportunities for all citizens, and sustainable social structures that are safe and nurturing. Although North Americans are experiencing economic and social discomforts, we too will have to change, or we may find ourselves engulfed by political and economic forces beyond our control. In 1994, the out-sweeping of Democrats from national offices may be symptomatic of deeper and more fundamental problems. If the mean-spirited behavior that characterized the 1994 election is carried over into the governance of the country, this may only fan the flames of discontent. We may be embarking upon a long struggle over ideology, culture, and the very heart of soul of the country. But despite all the political turmoil, we must take risks and try out new ideas – ideas never dreamed of before and ideas we though were impossible to implement. To implement these ideas we must overcome institutional inertia in order to enhance intentional change. We need to give up tradition and “business as usual.” To view the future as a challenge and as an opportunity to make the world a better place, we must be willing to take political and economic risks. The question is not growth, but what kind of growth, and where it will take place. For example, we can maintain current levels of productivity or become even more productive if we farm organically. Because of ideological conflicts, it is hard for us to view the Cuban experience with an unjaundiced eye; but we ask you to place political differences aside and pay attention to the lyrics of organic farming and not to the music of Communism. In other words, we much get beyond political differences and ideological conflicts; we must find success stories of healing the planet no matter where they exist – be they in Communist of non-Communist countries, developed or underdeveloped countries. We must ascertain what lessons can be learned from them, and examine how they would benefit the world community. In most instances, however, we will have to chart a new course. Continued use of certain technologies and chemicals that are incompatible with the ecosystem will take us down the road of no return. We are already witnessing the catastrophic destruction of our environmental insults on communities of color and low-income groups. If such destruction continues, it will undoubtedly deal harmful blows to our social economic and political institutions. As a nation we find ourselves in a house divided, where the cleavages between the races are in fact getting worse. We find ourselves in a house divided where the gap between rich and the poor has increased. We find ourselves in a house divided where the gap between the young and the old has widened. During the 1980’s, there were few visions of healing the country. In the 1990’s, despite the catastrophic economic and environmental results of the 1980’s, and despite the conservative takeover of both houses of Congress, we much look for glimmers of hope. We must stand by what we think is right and defend our position with passion. And at times we need to slow down and reflect and do a lot of soul searching in order to redirect ourselves, if need be. We must chart out a new course of defining who we are as a people, by redefining our relationship with government, with nature, with on another, and where we want to be as a nation. We need to find a way of expressing this definition of ourselves to one another. Undeniably we are a nation of different ethnic groups and races, and of multiple interest groups, and if we cannot live in peace and in harmony with ourselves and with nature it bodes ominously for future world relations. Because economic institutions are based upon the growth paradigm of extracting and processing natural resources, we will surely perish if we use them to foul the global nest. But is does not have to be this way. Although sound environmental policies can be compatible with good business practices and quality of life, we may have to jettison the moral argument of environmental protection in favor of the self-interest argument, thereby demonstrating that the survival of business enterprises is intrivately tied to good stewardship of natural resources and environmental protection. Too often we forget that short-sightedness can propel us down a narrow parth, where we are unable to see the long-term effects of our actions. The ideas and policies discussed in this book are ways of getting ourselves back on track. The ideas presented here will hopefully provide substantive material for discourse. These policies are not carved in stone, nor are they meant to be for every city, suburb, or rural area. Municipalities or rural areas should have flexibility in dealing with their site-specific problems. Yet we need to extend our concern about local sustainability beyond geopolitical boundaries, because dumping in Third World countries or in the atmosphere today will surely haunt the world tomorrow. Ideas presented here ay irritate some and dismay others, but we need to make some drastic changes in our lifestyles and institutions in order to foster environmental justice. May of the policy ideas mentioned in this book have been around for some time, but they have not been implemented. The struggle for environmental justice emerging from the people of color and low-income communities may provide the necessary political impulse to make these policies a reality. Environmental justice provides opportunities for those most affected by environmental degradation and poverty to make policies to save not only themselves from differential impact of environmental hazards, but to save those responsible for the lion’s share of the planet’s destruction. This struggle emerging from the environmental experience of oppressed people brings forth a new consciousness – a new consciousness shaped by immediate demands for certainty and solution. It is a struggle to make a true connection between humanity and nature. This struggle to resolve environmental problems may force the nation to alter its priorities; it may force the nation to address issues of environmental justice and, by doing so, it may ultimately result in a cleaner and healthier environment for all of us. Although we may never eliminate all toxic materials from the production cycle, we should at least have that as a goal.