### 1

#### USFG is defined explicitly by the constitution- has 3 branches

US Legal copyright 13 http://definitions.uslegal.com/u/united-states-federal-government/

United States Federal Government Law & Legal Definition

The United States Federal Government is established by the US Constitution. The Federal Government shares sovereignty over the United Sates with the individual governments of the States of US. The Federal government has three branches: i) the legislature, which is the US Congress, ii) Executive, comprised of the President and Vice president of the US and iii) Judiciary. The US Constitution prescribes a system of separation of powers and ‘checks and balances’ for the smooth functioning of all the three branches of the Federal Government. The US Constitution limits the powers of the Federal Government to the powers assigned to it; all powers not expressly assigned to the Federal Government are reserved to the States or to the people.

#### Violation - Supreme court is the only constitutionally defined court- district courts are distinct

White House.gov accessed 9-20-13“The Judicial Branch” <http://www.whitehouse.gov/our-government/judicial-branch>

The courts only try actual cases and controversies — a party must show that it has been harmed in order to bring suit in court. This means that the courts do not issue advisory opinions on the constitutionality of laws or the legality of actions if the ruling would have no practical effect. Cases brought before the judiciary typically proceed from district court to appellate court and may even end at the Supreme Court, although the Supreme Court hears comparatively few cases each year.¶ Federal courts enjoy the sole power to interpret the law, determine the constitutionality of the law, and apply it to individual cases. The courts, like Congress, can compel the production of evidence and testimony through the use of a subpoena. The inferior courts are constrained by the decisions of the Supreme Court — once the Supreme Court interprets a law, inferior courts must apply the Supreme Court's interpretation to the facts of a particular case.¶ The Supreme Court of the United States | The Judicial Process¶ The Supreme Court of the United States¶ The Supreme Court of the United States is the highest court in the land and the only part of the federal judiciary specifically required by the Constitution.

#### Vote neg

#### Limits- 13 district courts multiplied by almost limitless grounds and remedies for rulings is ridiculous- justifies “court of the week” affs which makes neg prep impossible

#### Ground- they spike out of supreme court DA’s and counterplans- tiny affs avoid links

#### indpeendlty- they must specify the grounds for the ruling- that’s key to legal education

DoJ 5. Department of Justice 2005 (“Rules of the Supreme Court of the United States,” March 14,<http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf>)

(e) A concise statement of the basis for jurisdiction in this Court, showing: (i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petiti on is ﬁled under this Court’s Rule 11); (i i) the date of any order respecting rehearing, and the date and terms of any order granting an extensi on of time to ﬁle the petiti on for a writ of certi orari; (i i i) express reliance on Rule 12.5, when a crosspetiti on for a writ of certi orari is ﬁled under that Rule, and the date of docketing of the petiti on for a writ of certi orari in connecti on with which the cross-petiti on is ﬁled; (iv) the statutory provision believed to confer on this Court jurisdicti on to review on a writ of certi orari the judgment or order in questi on; and (v) if applicable, a statement that the notiﬁcati ons required by Rule 29.4( b) or (c) have been made. (f ) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisi ons involved are lengthy, their citati on alone sufﬁces at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i). (g) A concise statement of the case setting out the facts material to considerati on of the questi ons presented, and also containing the following: (i) If review of a state-court judgment is sought, speciﬁcati on of the stage in the proceedings, both in the court of ﬁrst instance and in the appellate courts, when the federal questi ons sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of speciﬁc porti ons of the record or summary thereof, with speciﬁc reference to the places in the record where the matter appears (e. g., court opini on, ruling on excepti on, porti on of court’s charge and excepti on thereto, assignment of error), so as to show that the federal questi on was timely and properly raised and that this Court has jurisdicti on to review the judgment on a writ of certiorari. When the porti ons of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i). (i i) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdicti on in the court of ﬁrst instance. (h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10. (i) An appendix containing, in the order indicated: (i) the opinions, orders, ﬁndings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed; (i i) any other relevant opinions, orders, ﬁndings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the capti on showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

### 2

**interpretation**

**War powers authority for detention is explicitly limited to detaining enemy combatants**

**Glazier**, Associate Professor at Loyola Law School in Los Angeles, California, **2006**. (David, Boston University International Law Journal, Spring, 2006, 24 B.U. Int'l L.J. 55, FULL AND FAIR BY WHAT MEASURE?: IDENTIFYING THE INTERNATIONAL LAW REGULATING MILITARY COMMISSION PROCEDURE, l/n)

President Bush's decision to consider the terrorist attacks of September 11, 2001, as an act of war has significant legal ramifications. Endorsed by Congress in the Authorization for the Use of Military Force ("AUMF"), [n1](http://www.lexisnexis.com.ezp1.lib.umn.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371143683321&returnToKey=20_T17601046724&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.13051.626107591917#n1) this paradigm shift away from treating terrorism as a crime to treating terrorism as an armed conflict allows the United States to exercise "fundamental incidents of waging war." [n2](http://www.lexisnexis.com.ezp1.lib.umn.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371143683321&returnToKey=20_T17601046724&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.13051.626107591917#n2) **Among** these **fundamental war powers are the authorities to detain enemy personnel for the duration of hostilities, to subject law of war violators to trials in military tribunals, and to exercise subject matter jurisdiction over the full scope of the law of war, rather than over only those offenses defined in U.S. criminal statutes.** [n3](http://www.lexisnexis.com.ezp1.lib.umn.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371143683321&returnToKey=20_T17601046724&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.13051.626107591917#n3)

#### Restricting authority requires reducing the permission to act, not the ability to act.

Taylor, 1996 (Ellen, 21 Del. J. Corp. L. 870 (1996), Hein Online)

The term authority is commonly thought of in the context of the law of agency, and the Restatement (Second) of Agency defines both power and authority.'89 Power refers to an agent's ability or capacity to produce a change in a legal relation (whether or not the principal approves of the change), and authority refers to the power given (permission granted) to the agent by the principal to affect the legal relations of the principal; the distinction is between what the agent can do and what the agent may do.

**indefinite detention is the process of detaining persons**

**US LEGAL 13** [last modified, US Legal Forms Inc., Indefinite Detention Law and Legal Definition http://definitions.uslegal.com/i/indefinite-detention/]

**Indefinite detention is the practice of detaining an arrested person by a national government or law enforcement agency without a trial.** It may be made by the home country or by a foreign nation. Indefinite detention is a controversial practice, especially in situations where the detention is by a foreign nation. It is controversial because it seems to violate many national and international laws. It also violates human rights laws. **Indefinite detention is seen mainly in cases of suspected terrorists who are indefinitely detained.** The Law Lords, Britain’s highest court, have held that the indefinite detention of foreign terrorism suspects is incompatible with the Human Rights Act and the European Convention on Human Rights. [Human Rights Watch] In the U.S., indefinite detention has been used to hold terror suspects. The case relating to the indefinite detention of Jose Padilla is one of the most highly publicized cases of indefinite detention in the U.S. In the U.S., indefinite detention is a highly controversial matter and is currently under review. Organizations such as International Red Cross and FIDH are of the opinion that U.S. detention of prisoners at Guantanamo Bay is not based on legal grounds. However, the American Civil Liberties Union is of the view that indefinite detention is permitted pursuant to section 412 of the USA Patriot Act.

#### “In the area” means all of the activities

United Nations 13

(United Nations Law of the Sea Treaty, http://www.un.org/depts/los/convention\_agreements/texts/unclos/part1.htm)

PART I¶ INTRODUCTION¶ Article 1

Use of terms and scope¶ 1. For the purposes of this Convention:¶ (1) "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;¶ (2) "Authority" means the International Seabed Authority;¶ (3) "activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area;

**Violation: the aff limits invasive body searches, not detention authority AND they only affect a subset of detention**

**Vote neg**

**limits and ground- infinite things we could do to prisoners- ban waterboarding, ban searches, ban solitary confinement- independnetly tiny subsets moot neg ground and allow infinite affs**

**Precision—they render “authority” meaningless on the legal topic- precision key to predictable division of ground**

**Independently, the aff’s argument that they are an act of “dissent” is extra-t – resolution says USFG**

**Extra topicality is a voter-- proves the resolution is insufficient and makes it a no cost option**

### 3

#### affs piecemeal, legalistic attempt to manage violence abjures a critque of broader structures of militarism

Lichterman 3 (Andrew, Program Director of the Western States Legal Foundation, Missiles of Empire: America’s 21st Century Global Legions, WSLF Information Bulletin, Fall 2003, http://www.wslfweb.org/nukes.htm)

Criticizing the Hubcaps while the Juggernaut Rolls On The U.S. military-industrial complex today is so immense as to defy comprehension. Even those few paying attention tend to focus on one small piece at a time. One month it may be proposals for nuclear weapons with certain new capabilities. Then the attention may shift to missile defense– but there too, only a small part of the program attracts public debate, with immense programs like the airborne laser proceeding almost invisibly. Proposals for the intensive militarization of space like the Space Plane come to light for a day or two, attracting a brief flurry of interest; the continuing, broad development of military space technologies, from GPS-aided guidance to radiation hardened microchips to space power generation, draw even less scrutiny. There is so broad a consensus among political elites supporting the constant refinement of conventional armaments that new generations of strike aircraft, Navy ships, and armored vehicles attract little notice outside industry and professional circles, with only spectacular cost overruns or technical failures likely to draw the occasional headline. A few Congresspeople will challenge one or another particularly extreme new weapon (e.g. the “Robust Nuclear Earth Penetrator”), but usually on narrow pragmatic grounds: we can accomplish the same “mission” with less risky or cheaper weapons. But the question of “why,” seldom is asked, only “how,” or “how much does it cost?” Most of the programs that constitute the military machine glide silently onward undisturbed, like the body of a missile submarine invisible below the deceptively small surfaces that rise above the sea. The United States emerged after both World War II and the Cold War as the most powerful state on earth-- the one with the most choices. The first time, all of this was still new. We could perhaps understand our ever deeper engagement with the machinery of death as a series of tragic events, of the inevitable outcome of fallible humans grappling with the titanic forces they had only recently unleashed, in the context of a global confrontation layered in secrecy, ideology, and fear. But this time around, since the end of the Cold War, we must see the United States as truly choosing, with every new weapon and every new war, to lead the world into a renewed spiral towards catastrophe. The past is written, but our understanding of it changes from moment to moment. The United States began the nuclear age as the most powerful nation on earth, and proclaimed the character of the “American Century” with the bombings of Hiroshima and Nagasaki, a cryptic message written in the blood of innocents. Its meaning has come clear over fifty years of technocratic militarism, punctuated by the deaths of millions in neo-colonial warfare and underscored always by the willingness to end the world rather than share power with anyone. The path ahead still can be changed, but we must begin with an understanding of where we are, and how we got here. In the United States, there is a very long way to go before we have a debate about the uses of military force that addresses honestly the weapons we have and seek to develop, much less about the complex social forces which impel the United States to maintain its extraordinary levels of forces and armaments. Most Americans don’t know what their government is doing in their name, or why. Their government, regardless of the party in power, lies about both its means and its ends on a routine basis. And there is nothing the government lies about more than nuclear weapons, proclaiming to the world for the last decade that the United States was disassembling its nuclear facilities and leading the way to disarmament, while rebuilding its nuclear weapons plants and planning for another half century and more of nuclear dominance.74 It is clear by now that fighting violence with yet more violence, claiming to stop the spread of nuclear weapons by threatening the use of nuclear weapons, is a dead end. The very notion of “enforcement,” that some countries have the right to judge and punish others for seeking “weapons of mass destruction,” has become an excuse for war making, a cover and justification for the power and profit agenda of secretive and undemocratic elites. The only solution that will increase the security of ordinary people anywhere is for all of us, in our respective societies, to do everything we can to get the most violent elements in our cultures– whether in or out of uniform– under control. In the United States, this will require far more than changing a few faces in Washington. We will need a genuine peace movement, ready to make connections to movements for ecological balance, and for social and economic justice, and by doing so to address the causes of war. Before we can expect others to join us, it must be clear that we are leaving the path of violence.

#### vote neg to endorse nonviolence as a response to the 1AC’s harms- it’s the only ethical decision

May 13—professor at Clemson

(Todd, “THE DIGNITY OF NONVIOLENCE”, On Violence 1:1, 7-12, dml)

It is in this beyond that that dignity of nonviolence lies. Not content to tread the same paths that always lead to the same impasses—my retaliation against your retaliation against my retaliation against….—those who engage in nonviolent resistance assume that there must be something more to being human than this. Nonviolence, true nonviolence, is creative. It seeks to open up new paths that may lead to new and better destinations. At the very least, it seeks to open people’s eyes anew, so they can see something they had not seen before. And in doing so, it works not only on the minds of those to whom it speaks, but also upon the speakers.

Those who engaged in the lunch-counter sit-ins or rode the busses or filled the jail cells during the civil rights movement flamed the conscience of a nation. But they did more than that. They crafted their own ordinary lives into something extraordinary. They elevated the struggle for equality and in the same gesture elevated themselves. They crafted themselves into something they would otherwise not have been, and in doing so brought us along part of the way with them.

The Danes who, when the Nazis invaded, spirited their fellow Jews across the straight to Sweden so that most of the Danish Jewish population survived; achieved a quiet grandeur that magnified them and continues to inspire us.

We all know that we have had enough of violence. We have had enough of the dying and mutilation that is the legacy of our advanced societies’ military technology. We have had enough of the anger that, in places like Rwanda, issued out in the form of machetes and hatchets. And, as the recent Occupation movement has shown, many of us have had enough of the social and economic conditions that are a more insidious, but not less effective, violence against so many. But we must go beyond “Basta!” We must think at once about what must be resisted and how, as is often said, we can be the change that is resistance. To do so is to pass to the other side of violence. It is not to glimpse a non-violence ready-made but instead to inaugurate it, to create something that was not there before. It is to envision and to improvise another context and other selves.

Michel Foucault once said that his writings were animated by the question of who else we might be. We have been given to ourselves as beings of violence. In most places and in most times, that is how we have been given to ourselves. To think and act nonviolently is precisely to ask the question of who else we might be. Not just what we might undergo or what we might suffer. But what, beyond the selves we have been told to be, we might create of our lives. That is at once our dignity and our task.

### 4

#### unique link- courts avoiding detention controvery now- aff spurs circumvention and backlash- kills legitimacy and judicial strength

**Devins, William & Mary government professor, 2010**

(Neavl, “Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants”, 12 U. Pa. J. Const. L. 491, lexis, ldg)

In Part III of this Essay, I will argue that the Court's actions in the first year of the Obama administration are cut from the same cloth as its decision to intervene in Bush-era disputes. As this section has suggested, the Court has never risked national security or executive branch non-acquiescence in its enemy combatant decision making. Moreover, as I argued in Part I, Court decision making in this area has largely tracked social and political forces. For reasons I will now detail, the Court's decisions both to steer clear of this issue in the spring and summer of 2009 and its fall 2009 decision to hear the Uighur petition match past Court practices. Throughout the enemy combatant dispute, the Court has found ways to expand its authority without risking an institutionally costly backlash. III. Conclusion: The Past Is Prologue Supreme Court interventions in the enemy combatant disputes never pushed the limits of what was acceptable to the political [\*523] branches of government. The Court, instead, maximized its authority by moving incrementally and expanding judicial power in ways generally acceptable to the political branches. This was true of Bush-era decision making and there is no reason to think that the Court will depart from past practices during the Obama administration. Consider, for example, the Court's March 2009 decision to back away from a case involving Bush administration efforts to detain a legal resident without charges. After agreeing - in December 2008 - to hear a challenge to the Bush administration's detention of Ali Saleh Kahlah al-Marri at a South Carolina Navy brig, the Court sided with the Obama administration and removed the case from its docket. n170 The administration had claimed the case was moot because - in February 2009 - it formally filed federal criminal charges against al-Marri (so that he would be tried in federal court and not held indefinitely at a military base). n171 Mr. Marri's lawyers objected, arguing (unsuccessfully) that the administration could subsequently relocate him to a military base and, consequently, the Court should still resolve his legal challenge. n172 The Court's decisions to hear and then moot al-Marri are readily understandable. The Fourth Circuit had upheld the Bush administration in al-Marri and - when agreeing to hear the case - the Justices had good reason to slap down the Bush administration for their continuing efforts to sidestep federal court review over enemy combatant policy-making. Not only had the Court taken a strong stand in favor of judicial review in Boumediene and other decisions, but the November 2008 election of Barack Obama and the Democratic Congress further solidified the Court's position with elected officials and the American people. And, with none of the eighteen amicus briefs in the case supporting the Bush administration, n173 a Court ruling against [\*524] Bush administration actions would have further buoyed the Court's status with academics and other interest groups. By March 2009, however, there was no good reason to ask the new administration to sort out its views on the al-Marri detention. Candidate Obama had campaigned against the Bush administration efforts to fence out federal courts from war-on-terror litigation. Indeed, when asking the Court to moot the case, the Obama administration told the Justices that it was willing to have the Fourth Circuit ruling vacated (showing "that the government is not attempting to preserve its victory while evading review"). n174 Against this backdrop, there was simply no reason for the Justices to force the Obama administration to formally disavow or embrace Bush administration legal arguments. An Obama administration decision disavowing Bush administration arguments would not strengthen the Court's position vis-a-vis the executive (as the Obama Justice Department had already conceded the Court's authority to vacate the lower court ruling); an administration decision supporting Bush administration arguments would set the stage for a costly battle between the Court and the new administration. A decision on the merits, moreover, would have opened the Court up to charges of judicial over-reaching. In its brief seeking to moot al-Marri, the government argued that keeping the case alive "would lead only to an advisory opinion with no real-world impact on any individual" and that the Court should not reach out to decide "in a hypothetical posture" "complex constitutional questions" about the line where "national security policy and the Constitution intersect." n175 The Court's participation in Kiyemba likewise displays the Court's sensitivity to its status vis-a-vis the other branches and to the risks of unnecessarily interjecting itself in national security policy. This was true of both the June 2009 decision to hold over the appeal of the Uighur petitioners and the October 2009 decision to hear the case (but to schedule oral arguments so as to delay any decision until the summer of 2010). n176 June 2009 was too early for the Court to enter this dispute. Even though petitioners cast the case as an opportunity for the Court to defend its turf (suggesting that Boumediene had become an empty shell and it was up to the Court to give meaning to the decision), n177 [\*525] the Court well understood the costs of entering this dispute. At that time, the Obama administration and Democratic Congress were sorting out their policy priorities on Guantanamo, Bagram detainees, and much more. Correspondingly, the Court had reason to think that a ruling demanding the relocation of Uighur detainees to the United States would not sit well with either the administration or Congress. Not only did the Obama administration oppose the relocation of the Uighurs to the United States, n178 Congress enacted legislation in June 2009 that severely limited the President's power to move Guantanamo detainees to the United States or resettle them in another country. n179 By holding the issue over, however, the Court gave the Obama administration time both to sort out its policy priorities and to relocate the Uighur detainees (and, in so doing, to try to moot the case). n180 In its brief opposing certiorari, the Obama administration made clear that it was trying both to close Guantanamo and to relocate the Uighur petitioners and asked the Court to respect the "efforts of the political Branches to resolve issues relating to petitioners and other individuals located at Guantanamo Bay." n181 Furthermore, the decision to hold the case over bought the Court time to see how the enemy combatant issue would play out among politicians, interest groups, the media, and the American people. As Part I reveals, Court enemy combatant decisions track social and political forces. As Part II reveals, the Court has moved incrementally - advancing its authority to say "what the law is" without risking backlash or national security. The Court's October 2009 decision to hear Kiyemba does not break from this pattern. By scheduling oral arguments for spring 2009, the Court both provided elected government with additional time to settle this issue and provided itself with an opportunity to calibrate its decision making against the backdrop of elected government action and other subsequent developments. n182 More than that, [\*526] since Boumediene only decided the threshold issue that enemy combatants were entitled to habeas corpus relief, Kiyemba is a good vehicle for the Court to provide some details on how habeas proceedings should be conducted. In particular, there is little prospect that the decision will impact the rights on many Guantanamo detainees. By the summer of 2010, Guantanamo may be closed; if not, most detainees who prevail in habeas proceedings are likely to have been relocated to another country. Moreover, Kiyemba raises a quite narrow issue, namely, whether federal courts can mandate that Guantanamo detainees be relocated to the United States if no foreign nation will take them. n183 In other words, there is next to no prospect that Kiyemba will result in the type of scrutinizing judicial review that might raise national security risks (assuming, of course, that the Court will rule against the administration). Instead, Kiyemba seems likely to further tighten judicial control over the executive - but only in a very modest way. Throughout the course of its enemy combatant decision making, the Court has moved incrementally. In so doing, the Court has expanded its authority vis-a-vis the President. Obama administration efforts to moot al-Marri and to relocate Uighur detainees (thereby mooting that litigation) speak to the administration's desire to avoid Supreme Court rulings that might limit the scope of presidential power. Unlike the Bush administration (whose politically tone deaf arguments paved the way for anti-administration rulings), n184 the Obama administration understands that the Court has become a player in the enemy combatant issue. What is striking here, is that the Court never took more than it could get - it carved out space for itself without risking the nation's security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in Boumediene, while clearly constraining the political branches, reflected the views of the new Democratic majority in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain. n185 Its decision to steer clear of early Obama-era [\*527] disputes likewise avoids the risks of a costly backlash while creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court). n186 Put another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully undermining the policy preferences of the President and Congress. I, of course, recognize that the Court's willingness to engage the executive and, in so doing, to nullify a signature campaign of the Bush administration, is a significant break from the judiciary's recent practice of steering clear of disputes tied to unilateral presidential war making. n187 At the same time, I see the Court's willingness to challenge, and not defer, as not at all surprising. The Bush administration made arguments that backed the Court into a corner. The Court could either bow at the altar of presidential power, or it could find a way to slap the President down. It is to be expected that the Court chose to find a way to preserve its authority to "say what the law is." n188 The Justices, after all, have incentives to preserve the Court's role in our system of checks and balances - especially when their decisions enhance their reputations with media and academic elites. n189 This is true of the Supreme Court in general, and arguably more true of the current Court - given its penchant to claim judicial supremacy and given the importance of these institutional concerns to the Court's so-called swing Justices. n190 It is also noteworthy that the enemy combatant cases were at the very core of the judicial function. At oral arguments in Hamdan, Justice Kennedy emphasized the importance of habeas corpus relief, n191 suggesting that limitations on habeas relief would "threaten[] the status of the judiciary as a co-equal partner of the legislature and the executive." n192 [\*528] One final comment on the nature of the dialogue that took and is taking place between the three branches on the enemy combatant issue: Throughout the Bush-era, these cases were anything but a constitutional dialogue. The executive persisted in making the same argument, and, as its political fortunes diminished, the Court carved over more and more issue space for itself. For its part, the Bush-era Congress played no meaningful role - it simultaneously backed the executive while signaling to the Court that it would support judicial invalidation of executive initiatives. With a new administration in place, there is reason to think that the inter-branch dynamic will change. The Obama administration has advanced its policies while pursuing a less confrontational course; avoiding absolutist arguments and trying to steer clear of an adverse Supreme Court ruling. In so doing, the administration has yet to launch the type of broadsides that challenge the foundations of judicial authority. Up until now, the Court has responded in kind, leaving the administration breathing room to pursue its policies without a Supreme Court pronouncement on the scope of presidential power. It is a matter of pure speculation whether this pattern will continue. At the same time, there is good reason to think that the Court will follow the path it has laid down in Bush-era cases, taking social and political forces into account so as to protect its turf without risking national security or elected government backlash.

#### congress will strip the court

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

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

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

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

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

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

#### Legitimacy turns rule of law and compliance with decisions

Schapiro 8-5-’13, Robert A. Schapiro, dean and Asa Griggs Candler professor of law at Emory University School of Law., Op-ed contributor, Christian Science Monitor, Objection! Americans' opinion of Supreme Court can't keep dropping, Lexis, jj

Public confidence in the judiciary provides a critical foundation for a society committed to the rule of law. As America's unelected justices confront controversial questions, the legitimacy of their decisions depends on public support for the institution. The court must rely on other government officials, including elected leaders and law enforcement officers, to implement its rulings. Examples around the world suggest that obedience to judicial decisions may well depend on the level of respect that the courts enjoy.

**rule of law and strong judiciaries solve war, terror, failed states, econ, effective power projection**

**Feldman ‘8** [Noah Feldman, a contributing writer for the magazine, is a law professor at Harvard University and an adjunct senior fellow at the Council on Foreign Relations, “When Judges Make Foreign Policy”, NEW YORK TIMES, 9—25—08, www.nytimes.com/2008/09/28/magazine/28law-t.html]

Looking at today’s problem through the lens of our great constitutional experiment, it emerges that there is no single, enduring answer to which way the Constitution should be oriented, inward or outward. The truth is that we have had an inward- and outward-looking Constitution by turns, depending on the needs of the country and of the world. Neither the text of the Constitution, nor the history of its interpretation, nor the deep values embedded in it justify one answer rather than the other. In the face of such ambiguity, the right question is not simply in what direction does our Constitution look, but where do we need the Constitution to look right now? Answering this requires the Supreme Court to think in terms not only of principle but also of policy: to weigh national and international interests; and to exercise fine judgment about how our Constitution functions and is perceived at home and abroad. The conservative and **liberal approaches to legitimacy and the rule of law need to be supplemented with a healthy dose of real-world pragmatism**. In effect, the fact that the Constitution affects our relations with the world requires the justices to have a foreign policy of their own. On the surface, it seems as if such inevitably political judgments are not the proper province of the court. If assessments of the state of the world are called for, shouldn’t the court defer to the decisions of the elected president and Congress? Aren’t judgments about the direction of our country the exclusive preserve of the political branches? Indeed, the Supreme Court does need to be limited to its proper role. But when it comes to our engagement with the world, that role involves taking a stand, not stepping aside. The reason for this is straightforward: the court is in charge of interpreting the Constitution, and the Constitution plays a major role in shaping our engagement with the rest of the world. The court therefore has no choice about whether to involve itself in the question of which direction the Constitution will face; it is now unavoidably involved. Even choosing to defer to the other branches of government amounts to a substantive stand on the question. That said, when the court exercises its own independent political judgment, it still does so in a distinctively legal way.For one thing, the court can act only through deciding the cases that happen to come before it, and the court is limited to using the facts and circumstances of those cases to shape a broader constitutional vision. The court also speaks in the idiom of law — which is to say, of regular rules that apply to everyone across the board. It cannot declare, for instance, that only this or that detainee has rights. It must hold that the same rights extend to every detainee who is similarly situated. This, too, is an effective constraint on the way the court exercises its policy judgment. Indeed, it is this very regularity that gives its decisions legitimacy as the product of judicial logic and reasoning. Why We Need More Law, More Than Ever So what do we need the Constitution to do for us now? The answer, I think, is that the Constitution must be read to help us remember that while the war on terror continues, we are also still in the midst of a period of rapid globalization. An enduring lesson of the Bush years is the extreme difficulty and cost of doing things by ourselves. **We need to build and rebuild alliances — and law has** historically **been** one of **our best tool**s for doing so. In our present precarious situation, **it would be a** terrible **mistake to abandon our** historic **position of leadership in the g**lobal **spread of** the **rule of law. Our leadership** matters for reasons both universal and national. Seen from the perspective of the world, **the fragmentation of power** after the cold war **creates** new dangersof disorder that need to be mitigated by the sense of regularity and predictability **that only the rule of law can provide. Terrorists need to be deterred. Failed states need to be brought under the umbrella of international organizations so they can govern themselves. And economic interdependence demands coordination, so that the collapse of one does not become the collapse of all**. From a national perspective, our interest is less in the inherent value of advancing individual rights than in claiming that our allies are obligated to help us by virtue of legal commitments they have made. The Bush administration’s lawyers often insisted that lawwas a tool of the weak, and that therefore as a strong nation we had no need to engage it. But this notion of “lawfare” as a threat to the United States is based on a misunderstanding of the very essence of how law operates. **Law** comes into being and is sustained not because the weak demand it but because it is a tool of the powerful — as it has been for the United States since World War II at least. The reason those with power prefer law to brute force is that it **regularizes and legitimates the exercise of authority. It is easier and cheaper to get the compliance of weaker** people or **states by promising them rules** and a fair hearing **than by threatening them constantly with force.** After all, if those wielding power really objected to the rule of law, they could abolish it, the way dictators and juntas have often done the world over.

### 5

#### EPA wins the case now- Solicitor General support gets it done

Lyle Denniston 12-10 Reporter¶ Posted Tue, December 10th, 2013 1:35 pm¶ “Argument recap: A good day for the EPA?” http://www.scotusblog.com/2013/12/argument-recap-a-good-day-for-epa/

It is rare these days in Washington for the Environmental Protection Agency to have a good day, with important figures showing sympathy for the difficulty of its task. But the EPA could walk away from Tuesday’s oral arguments on how the agency acted to limit foul air from floating from state to state, with a sense that maybe it did it about right. As usual, it faced some criticism, true, but this time that did not dominate.¶ The combined cases the Court heard for about ninety minutes (EPA v. EME Homer City Generation and American Lung Association v EME Homer City Generation) are deeply complex. So the Justices found it helpful to approach them through more familiar analogies and hypotheticals. But those, too, seemed to work in the EPA’s favor.¶ At issue is how the EPA can carry out the task assigned by Congress of making sure that states which generate pollution that then impairs the quality of air for their neighbors can be held accountable and made to do something about it. As the Court explored that issue, it became increasingly apparent that the Justices appreciated that, because it is not possible to blame State A or State B in precise portions for endangering the environment in State C or State D, maybe the EPA should be allowed a healthy amount of discretion to devise a plan.¶ Deputy U.S. Solicitor General Malcolm L. Stewart, defending the EPA’s so-called “Transport Rule,” helped his case a good deal by suggesting that what EPA had to do was to answer a question like the one a basketball coach might get, on why his team lost a close game. Was it that missed layup, or was it that missed desperation shot at the buzzer, which caused the loss?¶ Both, he suggested, had “contributed significantly” to the loss, so that is what the coach had to confront. The EPA, under the Clean Air Act, has the similarly difficult task of deciding which state’s transported pollution across a border “contributed significantly” to a neighbor state’s inability to satisfy a federal clean air standard. The EPA came up with a cost-based formula, apportioning an “upwind” state’s duty to control emissions from power plants within its own borders according to how feasibly it could reduce the cross-state impact.¶ A group of upwind states that object to the EPA’s approach complains that it has no authority to impose such obligations on a state without first giving each state both notice of its share of blame and a chance to devise control strategies on their own. Texas’s state solicitor general, Jonathan F. Mitchell, put that argument before the Court.¶ But a group of private firms, mainly power companies, along with a labor union, complains that the Clean Air Act nowhere gives the EPA the authority to devise a cost-based method of calculating state control obligations, because that makes some states responsible for more than their share of transported pollution. Washington attorney Peter Keisler offered that argument to the Justices.¶ As the argument unfolded, it appeared that one or both of those challenges got a sympathetic hearing from Justice Antonin Scalia — but, in the main, only from him. The two attorneys for the challengers were reminded repeatedly by the Justices that the Act did not lay down hard-and-fast directives to the EPA on how to devise control strategies, so the agency was left to come up with those using its expertise.¶ The case is being reviewed by eight Justices, since Justice Samuel A. Alito, Jr., somewhat late in the process took himself out, without giving a reason. It will still take five votes for either side to win, but the risk for the EPA is that — with eight on the bench — there is always a chance it would divide evenly. That outcome, of course, would uphold the D.C. Circuit’s ruling nullifying the EPA’s Transport Rule.¶ Aside from Justice Scalia, who aggressively pushed the full range of arguments against the EPA rule, the members of the Court kept returning to the text of the Clean Air Act and finding in it what Justice Anthony M. Kennedy suggested was “a judgmental component” — that is, one that invited the EPA to use its judgment to achieve the Act’s goal of helping downwind states meet air quality goals.¶ Chief Justice John G. Roberts, Jr., identified what may be the weakest point in the EPA’s defense of its rule: that is, that it had to go ahead and spell out for each state what new steps it must take to limit cross-state pollution, without first giving the states a chance to devise plans to do so on their own. Roberts wondered what the EPA would tell a state if it wanted to take action, but had no idea what EPA’s ultimate control strategy would turn out to be.¶ Deputy Solicitor General Stewart said it was the Act itself that imposed on the EPA the duty to fashion a plan that helps control downwind pollution transport, when the states fail to do so. The Chief Justice did not press the point at length, however, and his other comments suggested that he, too, had some sympathy for the EPA’s task.

#### War on terror cases increase perception of SG politicization – uniquely polarized, ideological and empirics prove

Lewis 9

Andrew R. Lewis, Adjunct Instructor, Department of Government, American University, “The Role of the Solicitor General in Church-State Cases within the Clinton and Bush Administrations: A Case Study Supporting the Politicization of the Solicitor General.” Public Purpose

7 (Spring 2009), pp. 99-119, <http://www.american.edu/spa/publicpurpose/upload/The-Role-of-the-Solicitor-General.pdf>

While the solicitors general for both administrations were politicized, adhering to the policy agendas of the president, the Office of the Solicitor General under Bush was more polarized than the Clinton administration was. Bush’s solicitors general filed briefs and made arguments in controversial and political cases regarding religious displays and expression, while Clinton’s solicitors general decided to refrain from being involved in similar cases. This is congruent with Bush’s agenda of promoting policies favorable to conservative Christians and supporting government programs such as the faith-based initiatives that expand the relationship between government and religion. The solicitors general under Bush went beyond supporting government laws, as the Clinton solicitors general did, supporting individual rights and the expansion of the government’s relationship with religion. This was a result the Office of the Solicitor General being more ideological on church-state issues under the Bush administration, and is consistent with the growing view that Bush not only significantly politicized the solicitor general’s office into supporting his agenda, but that it used the solicitor general to promote ideologically conservative issues such as church-state policy and the war on terror (Blum 2004). To further support this argument, both Olson and Clement are known for their partisan and ideological activity. Olson was rewarded with the solicitor general position after supporting Bush and Cheney before the Court during the 2000 election, and Clement has gained a reputation in Washington and in legal circles for is partisan actions in defending the Bush Administration’s polices used to fight the War on Terror in multiple court cases. Therefore, while both the Clinton and Bush Administrations politicized the solicitor general to achieve their policy goals, the Bush Administration used the solicitor general in a much more polarizing way in church-state cases. It is likely that this is predominantly due to Bush’s agenda on certain conviction issues such as the role of religion in the public square. Clinton, by contrast, took a moderate approach to church-state policy, not opposing the expansion of religion into public life, but only favoring it when it provided political rewards or coincided with his more important agenda items—education and civil rights.

#### Solicitor General’s finite influence determines outcome – plan drains it and spills over – best studies prove

Wohlfarth, ‘9

Patrick C. Wohlfarth University of North Carolina at Chapel Hill, The Journal of Politics, Vol. 71, No. 1, January 2009, Patrick C. Wohlfarth is Assistant Professor in the Department of Government and Politics at the University of Maryland, College Park. Research Fellow, Center for American Politics and Citizenship, Ph.D. in Political Science in 2010 from the University of North Carolina at Chapel Hill, Post-Doctoral Fellow in the Department of Political Science and Center for Empirical Research in the Law at Washington University in St. Louis. Dr. Wohlfarth’s research interests include American politics and quantitative methodology, focusing on judicial politics, interinstitutional politics, and time series analysis. His current research projects examine judicial influence on the executive branch, the impact of public opinion on the U.S. Supreme Court, executive branch litigation on the U.S. Supreme Court, and bureaucratic politics. Patrick’s published research has appeared in the American Journal of Political Science and The Journal of Politics.)

The solicitor general (S.G.), as the executive branch’s chief lawyer on the U.S. Supreme Court, represents perhaps the most important inﬂuence on the Court’s decisions beyond the justices themselves. While ofﬁcially a presidential appointee and member of the Justice Department, scholars widely regard the S.G. as the independent bridge connecting the executive branch to the Court. As a result, Court observers view the S.G. as an informational tool the justices utilize throughout the decision-making process. Perry (1991) claims that the solicitor general, on many cases at the agenda setting stage, functions as a ‘‘surrogate of the Court’’ in signaling the merit for granting certiorari. This unique status affords the S.G. unmatched success when seeking the Court’s support for legal positions (Caldeira and Wright 1988; Caplan 1987; McGuire 1998; O’Connor 1983; Salokar 1992; Scigliano 1971; Segal 1988). In fact, the S.G.’s success on the merits as a litigant and amicus curiae, and the deference commonly received from the Court, is so well established that scholars often refer to the solicitor general as the ‘‘Tenth Justice’’ (Caplan 1987). Judicial scholars offer several explanations for the Court’s disproportionate attention to the ofﬁce’s arguments and commonly view the S.G. as a representative of both executive and judicial interests. Historically, solicitors general have acknowledged and respected the ofﬁce’s reputation for legal integrity and relative independence from partisan inclinations. Yet by many accounts, recent solicitors general have increasingly politicized the ofﬁce by frequently behaving as a direct advocate of the executive’s often narrow legal philosophy (Caplan 1987; Ubertaccio 2005). Solicitors general commonly enter the ofﬁce with a reservoir of decision-making capital. The ofﬁce’s esteemed reputation affords the S.G. a degree of freedom to act as the president’s political advocate. The heightened sense of political behavior within the contemporary ofﬁce suggests that solicitors general are indeed willing to utilize this discretion and expend such resources. However, the S.G. who exhausts that capital and excessively politicizes the ofﬁce might jeopardize both the president’s immediate ability to advance the administration’s policy agenda through the Court as well as the longterm integrity of the S.G.’s ofﬁce as an institution. The recent controversy surrounding the ﬁring of several U.S. attorneys and Attorney General Alberto Gonzales’ eventual resignation further illustrates the consequences that may arise when perceptions of excessive political bias pervade the Justice Department. The S.G., even more so than the attorney general, stands at the intersection of law and politics. This unique position carries an expectation that its ofﬁce holders will maintain an independent balance. Existing empirical accounts of the S.G.’s behavior have not fully explored the degree to which the Court’s perceptions of political bias may jeopardize the ofﬁce’s reputation as an unbiased informational cue. In this article, I examine the extent to which the S.G.’s politicization adversely affects the ofﬁce’s credibility. If the Court perceives that solicitors general repeatedly abuse their discretion by acting as the president’s political advocate, then it should not trust the information provided and, thus, discount the ofﬁce’s arguments. I employ an individual-level analysis of all solicitor general amici between 1961 and 2003. The results reveal that increased politicization diminishes the likelihood that the Court will support the S.G.’s positions on the merits. In addition, I demonstrate that politicization’s negative impact yields a spillover effect by endangering the success of the United States as a litigant beginning with Reagan’s solicitors general.

#### ruling in favor of CSPAR key to solve warming and air pollution

By Emily Atkin 12-9 “4 Reasons The Supreme Court Might Want To Uphold The EPA’s Cross-State Air Pollution Rule” December 9, 2013 at 5:00 pm <http://thinkprogress.org/climate/2013/12/09/3039061/4-reasons-supreme-court-cross-state-air-pollution-rule/>

Those states that create large amounts of pollution are called “upwind” states, and they are responsible for higher ozone levels, increased healthcare costs, and decreased air quality in their neighboring “downwind” states.¶ The issue of how to regulate it has long perplexed the EPA and the courts. Cross-state transport rules implemented in 1977 and tightened in 1990 were never able to effectively combat the complex problem. For example, it’s not just upwind states that bring pollution to downwind states. Some upwind states receive emissions from other upwind states which contribute to their own pollution problems. The EPA has thus deemed the cross-state pollution problem as a “dense, spaghetti-like matrix” of overlapping soot.¶ But in 2011, the EPA finalized its Cross-State Air Pollution Rule (CSAPR), which promised to “slash hundreds of thousands of tons of smokestack emissions that travel long distances through the air leading to soot and smog, threatening the health of hundreds of millions of Americans living downwind.” CSAPR, according to the EPA, would achieve up to $280 billion in annual health benefits by preventing up to 34,000 premature deaths, 15,000 nonfatal heart attacks, 19,000 cases of acute bronchitis, 400,000 cases of aggravated asthma, and 1.8 million sick days a year beginning in 2014.¶ In response, a coalition of fossil fuel companies, unions and those upwind states sued the EPA seeking to invalidate the rule, and they won. In August 2012, the conservative D.C. Circuit Court of Appeals ruled that the EPA exceeded its authority by making upwind states reduce more pollution than what federal air quality standards prescribe. In other words, they said the EPA’s rule makes upwind states cut too much pollution.¶ The case has now made its way to the U.S. Supreme Court, which will hear an extended 90-minute session of oral arguments on Tuesday. Here are 4 reasons why the Supreme Court very well might reverse the D.C. Circuit’s ruling — and why it matters.¶ Air Pollution Worsens Economic Inequality¶ In some downwind states like Delaware, Connecticut, and Maryland, more than 80 percent of the air pollution can come from outside the state, according to Howard Fox of Earthjustice, who is representing the American Lung Association in the case.¶ “There’s economic inequality of having a downwind business spend money to control their pollution when upwind businesses are able to pollute and not spend as much,” Fox told ThinkProgress. “That creates a competitive disadvantage.”¶ Delaware governor Jack Markell told Reuters that removing pollution in his state would cost between $10,000 and $40,000, but that it would only cost $200 to $500 per tonne in upwind states, “where even some basic control technologies have not been installed.”¶ Human Health Suffers As Air Pollution Kills Thousands¶ In a brief filed with the Supreme Court, a consortium of energy industry players including Entergy Corp. Luminant Energy, and United Mine Workers of America said the EPA’s cross-state pollution rules were a prime example of “overcontrol.” But briefs filed by both The American Thoracic Society (ATS) and the EPA disagreed, citing some jarring statistics about the real health effects of air pollution.¶ “When air pollution levels are high, deaths can occur immediately, or within months, by inducing heart attacks or strokes,” the ATS brief said. The EPA cited that one out of 20, or 5 percent, of deaths in the country can be attributed to lasting effects of air pollution. Children, senior citizens, pregnant women, and people with asthma, cardiovascular issues, and diabetes are the most at-risk, the brief said.¶ Even under current pollution rules, the ATS said, the country will see an estimated 2,550 to 6,560 more premature deaths due to air pollution than would occur under the new cross-state rules.¶ Pollution From Coal Plants Causes Climate Change¶ Though it does not seem to be a crucial part of the EPA’s case, reductions in emissions from coal and other fossil fuel plants will be crucial in the fight against climate change in the United States.¶ According the Union of Concerned Scientists, coal plants are the nation’s top source of carbon dioxide emissions, which are the primary cause of global warming. Utility coal plants in the United States emitted a total of 1.7 billion tons of CO2 in 2011, even with clean coal technologies.¶ The UCS also cites burning coal as a leading cause of smog, acid rain, and toxic air pollution.¶ This Is Why The U.S. Constitution Exists¶ “Inter-state air pollution is right at the core of why the federal government created the constitution in the first place,” Tom Donnelly, counsel at the progressive think tank Constitutional Accountability Center (CAC), told ThinkProgress. CAC also filed a brief with the Supreme Court in this case, which outlines the Constitution’s support for the EPA’s authority.¶ “The text, history and structure of the Constitution all strongly support Congress’s power to enact laws that address genuinely national problems like instate air pollution,” the brief said, citing Resolution VI, which declares that Congress has authority “to legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent.” That resolution was translated into Article I, which affords the federal government the ability to provide national solutions to national problems.¶ “When Congress and the Executive Branch are acting to address such a problem [as pollution], their efforts are entitled to great deference from the judiciary,” Donnelly said. “This case has everything to do with making sure that the federal government has the flexibility it needs to address genuinely national problems.”

#### Warming causes extinction and structural violence

Oliver Tickell (Climate Researcher) August 11 2008 “On a planet 4C hotter, all we can prepare for is extinction”, <http://www.guardian.co.uk/commentisfree/2008/aug/11/climatechange>)

We need to get prepared for four degrees of global warming, Bob Watson told the Guardian last week. At first sight this looks like wise counsel from the climate science adviser to Defra. But the idea that we could adapt to a 4C rise is absurd and dangerous. Global warming on this scale would be a catastrophe that would mean, in the immortal words that Chief Seattle probably never spoke, "the end of living and the beginning of survival" for humankind. Or perhaps the beginning of our extinction. The collapse of the polar ice caps would become inevitable, bringing long-term sea level rises of 70-80 metres. All the world's coastal plains would be lost, complete with ports, cities, transport and industrial infrastructure, and much of the world's most productive farmland. The world's geography would be transformed much as it was at the end of the last ice age, when sea levels rose by about 120 metres to create the Channel, the North Sea and Cardigan Bay out of dry land. Weather would become extreme and unpredictable, with more frequent and severe droughts, floods and hurricanes. The Earth's carrying capacity would be hugely reduced. Billions would undoubtedly die. Watson's call was supported by the government's former chief scientific adviser, Sir David King, who warned that "if we get to a four-degree rise it is quite possible that we would begin to see a runaway increase". This is a remarkable understatement. The climate system is already experiencing significant feedbacks, notably the summer melting of the Arctic sea ice. The more the ice melts, the more sunshine is absorbed by the sea, and the more the Arctic warms. And as the Arctic warms, the release of billions of tonnes of methane – a greenhouse gas 70 times stronger than carbon dioxide over 20 years – captured under melting permafrost is already under way. To see how far this process could go, look 55.5m years to the Palaeocene-Eocene Thermal Maximum, when a global temperature increase of 6C coincided with the release of about 5,000 gigatonnes of carbon into the atmosphere, both as CO2 and as methane from bogs and seabed sediments. Lush subtropical forests grew in polar regions, and sea levels rose to 100m higher than today. It appears that an initial warming pulse triggered other warming processes. Many scientists warn that this historical event may be analogous to the present: the warming caused by human emissions could propel us towards a similar hothouse Earth.

### 6

**The United States Congress should pass legislation restricting War Powers Authority in the area of indefinite detention by restricting denials of the writ of habeas corpus via invasive body searches in cases where the searches constitute a denial of a prisoner’s ability to effectively challenge their detention.**

**The Congress should exercise its authority under Article III to eliminate the jurisdiction of any federal court to hear challenges to the constitutionality of this legislation or to the authority of Congressional interpretation of the above. Congress should publicize the stories of the detainees.**

**The Court has taken control of Constitutional interpretation---the counterplan creates a “constitutional moment” to restore democratic decision-making by placing it in the hands of congress and the people**

West 1994(Robin, Prof. Law @ Georgetown U, “Progressive Constitutionalism,” p. 218-220)

The concluding section of this chapter argues that even in the short term, and certainly in the long term, there are good reasons for developing an alternative, non- or postliberal, and explicitly progressive paradigm of constitutional interpretation, even if it is clear, as it seems to be, that the present conservative Supreme Court will not embrace it. It also argues, however, that for both strategic and theoretical reasons, the proper audi­ence for the development of a progressive interpretation of the Constitution is Congress rather than the courts. The progressive Constitution should be meant for, and therefore must be aimed toward, legislative rather than adjudicative change. The strategic reasons for this proposed reorientation of progressive con­stitutional discourse should be self-evident. Although the progressive Con­stitution is arguably consistent with some aspects of the liberal-legalist paradigm of the middle of this century, it is utterly incompatible with the conservative paradigm now dominating constitutional adjudication. It does not follow, however, that the progressive Constitution is incompatible with all constitutional decision making: both legislatures and citizens have constitutional obligations, engage in constitutional discourse, and can be moved, presumably, to bring electoral politics in line with the progressive mandates of the Constitution, as those mandates have been understood and interpreted by progressive constitutional lawyers and theorists. I also argue, however, that for theoretical and strategic reasons, the long-range success, the sense, and even more modestly the relevance of the progressive interpretation of the Constitution depend not only on the merits of its interpretive claims but also, and perhaps more fundamentally, on a federal Congress reenlivened to its constitutional obligations. First, of course, it is Congress, not the Supreme Court, that is specifically mandated under the Fourteenth Amendment to take positive action to ensure equal protection and due process rights—the core constitutional tools for attack­ing illegitimate social and private power. If Congress is ever to fulfill this obligation, it will need the guidance of interpretive theories of the mean­ing of equal protection, due process, equality, and liberty that are aimed explicitly toward the context of legislative action and are not constrained by the possibilities and limits of adjudicative law. But more fundamentally, the progressive Constitution, I argue, will never achieve its full meaning—and worse, will remain riddled with paradox and contradiction—so long as it remains in an adjudicative forum. This is not only because of the probable political composition of the Court over the next few decades, but also because of the philosophical and political meanings of adjudi­cative law itself: the possibilities of adjudicative law are constrained by precisely the same profoundly conservative attitudes toward social power that underlie conservative constitutionalism. By acquiescing in a definition of the Constitution as a source of adjudicative law, progressives seriously undermine its progressive potential. Only by reconceptualizing the Consti­tution as a source of inspiration and guidance for legislation, rather than a superstructural constraint on adjudication, can we make good on its richly progressive promise. The

refore, the concluding section of this chapter argues that, for struc­tural long-term as well as strategic short-term reasons, the progressive Constitution—the cluster of meanings found or implanted in constitu­tional guarantees by modern progressive scholars—should be addressed to the Congress and to the citizenry rather than to the courts. The goal of progressive constitutionalists, both in the academy and at the bar, over the coming decades should be to create what Bruce Ackerman has called in other contexts a "constitutional moment" 20 and what Owen Fiss might call more dramatically an "interpretive crisis.' Progressives need to cre­ate a world in which it is clear that a progressive Congress has embraced one set of constitutional meanings, and the conservative Court a contrast­ing and incompatible set. The Supreme Court does, and always has, as Fiss reminds us, read the Constitution so as to avoid crisis.22 The lesson to draw is surely that only when faced with such a constitutional moment will this conservative Court change paths.

#### A. Judicial review undermines political engagement—counterplan solves

Charlotte Twight, Professor, Economics, Boise State, “Constitutional Counterrevolution,” THE FREEMAN, The Independent Institute, 10-1-2K, www.independent.org/publications/article.asp?id=277

Mr. Madison—James, if I may—I am deeply saddened by the facts I must describe. You and your colleagues anticipated many things, and the product of your labors has made possible an unprecedented degree of freedom in this country for more than 200 years. But your work is now in jeopardy: liberty is being crowded out by an ever more intrusive central government. Although many others have tried to explain how this occurred, let me give you my own insight about it—admittedly only a partial explanation, but nonetheless one that identifies a key, and often overlooked, source of liberty’s increasing peril. As I see it, here is what happened. During the twentieth century, legislators, Supreme Court judges, and executive branch officials began to perfect techniques for deflecting and curtailing people’s resistance to actions that increased the power of the central government. You and your contemporaries wellunderstood the dangers of overreaching government and, through the Constitution, tried to limit its power. But living in a society so recently chafing under British rule, a young nation whose people yearned for freedom, it would have been difficult to imagine how America’s own elected and appointed officials—without triggering public censure and usually without amending the Constitution—might take systematic actions to erode the explicit constitutional limits on their power that you designed. Yet that is exactly what occurred. The techniques that emerged involved a bevy of government actions sharing one defining characteristic: they increased other people’s costs of resisting government expansion. In each case, government officials made it more difficult or costly for people to perceive, or take action to resist, federal power-expanding measures. It is what I call “political transaction-cost manipulation”: government officials’ deliberate alteration of people’s costs of undertaking collective political action in matters that affect the scope of government authority. [1] These federal actions have included misrepresenting the nature and consequences of government action, proceeding incrementally, concealing the cost of government actions, tying controversial measures to more popular legislative bills, hiding unpopular provisions in omnibus bills, concentrating the benefits and dispersing the costs of government action, changing the Constitution through the back door of the Supreme Court rather than by constitutional amendment, and myriad analogous strategies. As I’ll explain in a minute, diverse efforts in the twentieth century to expand the federal government’s power all have involved such strategies—implying that initial public acquiescence to new government institutions often did not reflect true public consensus. Once in place, however, institutions exercising new federal powers subsequently channeled ideological change, and nurtured special interests, in ways that supported the new regime. Consider a few examples. The first one is sure to infuriate you, James. Remember the care you took in providing for the constitutional amendment process? You wisely and deliberately made it very cumbersome, trying to assure that the Constitution’s provisions could not be altered without great effort and widespread agreement on the desirability of the changes. In short, you hoped to make it very costly for people to alter constitutionally established limits on the central government’s power. During the twentieth century, however, the U.S. Supreme Court often served to bypass the amendment process. Increasingly, Supreme Court decisions changed the Constitution’s long-established meaning without benefit of constitutional amendment, reinterpreting the document—sometimes literally changing the definition of its words—to broaden the central government’s powers far beyond what you and the other Founders envisioned. Confronted with such unilateral action by the Supreme Court, how could people then preserve their liberty? Of course, they themselves could seek a constitutional amendment to spell out more concretely the original meaning of the Constitution and thereby bind the Supreme Court. But the cumbersome amendment process, meant to constrain those who would change fundamental constitutional protections, then impeded those who desired to preserve the original meaning of the Constitution. In other words, the political transaction costs that you intended to be a barrier to those who desired to change the Constitution’s substance instead served as a barrier to those who desired to uphold the Constitution’s original substance. It is a classic type of political transaction-cost manipulation.

#### B. This is the key access point for every impact

Carl Boggs, Professor, Social Sciences and Film Studies, National University, Los Angeles, THE END OF POLITICS, 2K, p. 250-251.

But it is a very deceptive and misleading minimalism. While Oakeshott debunks political mechanisms and rational planning as either useless or dangerous, the actually existing power structure—replete with its own centralized state apparatus, institutional hierarchies, conscious designs, and, indeed, rational plans—remains fully intact, insulated from the minimalist critique. In other words, ideologies and plans are perfectly acceptable for elites who preside over established governing systems, but not for ordinary citizens or groups anxious to challenge the status quo. Such one-sided minimalism gives carte blanche to elites who naturally desire as much space to maneuver as possible. The flight from “abstract principles” rules out ethical attacks on injustices that may pervade the status quo (slavery or imperialist wars, for example) insofar as those injustices might be seen as too deeply embedded in the social and institutional matrix of the time to be the target of oppositional political action. If politics is reduced to nothing other than a process of everyday muddling-through, then people are condemned to accept the harsh realities of an exploitative and authoritarian system, with no choice but to yield to the dictates of “conventional wisdom.” Systematic attempts to ameliorate oppressive conditions would, in Oakeshott’s view, turn into a political nightmare. A belief that totalitarianism might result from extreme attempts to put society in order is one thing; to argue that all politicized efforts to change the world are necessarily doomed either to impotence or totalitarianism requires a completely different (and indefensible) set of premises. Oakeshott’s minimalism poses yet another, but still related, range of problems: the shrinkage of politics hardly suggests that corporate colonization, social hierarchies, or centralized state and military institutions will magically disappear from people’s lives. Far from it: the public space vacated by ordinary citizens, well informed and ready to fight for their interests, simply gives elites more room to consolidate their own power and privilege. Beyond that, the fragmentation and chaos of a Hobbesian civil society, not too far removed from the excessive individualism, social Darwinism, and urban violence of the American landscape, could open the door to a modern Leviathan intent on restoring order and unity in the face of social disintegration. Viewed in this light, the contemporary drift toward antipolitics might set the stage for a reassertion of politics in more authoritarian and reactionary guise—or it could simply end up reinforcing the dominant state-corporate system. In either case, the state would probably become what Hobbes anticipated: the embodiment of those universal, collective interests that had vanished from civil society.’6 And either outcome would run counter to the facile antirationalism of Oakeshott’s Burkean muddling-though theories.

## Case

### framing

**Calculation is good, inevitable and ethical**

Richard L. Revesz, Professor, Law, NYU and Michael A. **Livermore**, Executive Director, Institute for Policy Integrity, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH, 20**08**, p. 1-4.

**Governmental decisions are** also **fundamentally different from personal decisions** in that **they** often **affect people in the aggregate**. In our individual lives, we come into contact with at least some of the consequences of our decisions. If we fail to consult a map, we pay the price: losing valuable time driving around in circles and listening to the complaints of our passengers. We are constantly confronted with the consequences of the choices that we have made. Not so for governments, however, which exercise authority by making decisions at a distance. Perhaps one of the most challenging aspects of governmental decisions is that they require a special kind of compassion—one that can seem, at first glance, cold and calculating, the antithesis of empathy. The aggregate and complex nature of governmental decisions does not address people as human beings, with concerns and interests, families and emotional relationships, secrets and sorrows. Rather, people are numbers stacked in a column or points on a graph, described not through their individual stories of triumph and despair, but by equations, functions, and dose-response curves. The language of **governmental decisionmaking can seem to**—and to a certain extent does—**ignore what makes individuals** unique and morally important. But, although the language of bureaucratic decisionmaking can be dehumanizing, **it is** also **a prerequisite for the** kind of **compassion** that is **needed** in contemporary society. Elaine Scarry has developed a comparison between individual compassion and statistical compassion.' Individual compassion is familiar—when we see a person suffering, or hear the story of some terrible tragedy, we are moved to take action. Statistical compassion seems foreign—we hear only a string of numbers but must comprehend "the concrete realities embedded there."' Individual compassion derives from our social nature, and may be hardwired directly into the human brain.' Statistical compassion calls on us to use our higher reasoning power to extend our natural compassion to the task of solving more abstract—but no less real—problems. Because compassion is not just about making us feel better—which we could do as easily by forgetting about a problem as by addressing it—we have a responsibility to make the best decisions that we can. This book argues that cost-benefit analysis, properly conducted, can improve environmental and public health policy. **Cost-benefit analysis**—the translation of human lives and acres of forest into the language of dollars and cents—**can seem harsh** and impersonal. **But such an approach is** also **necessary** to improve the quality of decisions that regulators make. **Saving the most lives**, and best protecting the quality of our environment and our health—in short, exercising our compassion most effectively—**requires us to step back** and use our best analytic tools. Sometimes, in order to save a life, we need to treat a person like a number. This is the challenge of statistical compassion. This book is about making good decisions. It focuses on the area of environmental, health and safety regulation. These regulations have been the source of numerous and hard-fought controversies over the past several decades, particularly at the federal level. Reaching the right decisions in the areas of environmental protection, increasing safety, and improving public health is clearly of high importance. Although it is admirable (and fashionable) for people to buy green or avoid products made in sweatshops, efforts taken at the individual level are not enough to address the pressing problems we face—there is a vital role for government in tackling these issues, and sound collective decisions concerning regulation are needed. There is a temptation to rely on gut-level decisionmaking in order to avoid economic analysis, which, to many, is a foreign language on top of seeming cold and unsympathetic. For government to make good decisions, however, it cannot abandon reasoned analysis. Because of the complex nature of governmental decisions, we have no choice but to deploy complex analytic tools in order to make the best choices possible**. Failing to use these tools**, which **amounts to abandoning our duties to one another,** is not a legitimate response. Rather, **we** must **exercise** statistical **compassion by recognizing** what **numbers** of lives saved **represent: living** and breathing **human beings,** unique, with rich inner lives and an interlocking web of emotional relationships. The acres of a forest can be tallied up in a chart, but that should not blind us to the beauty of a single stand of trees. We need to use complex tools to make good decisions while simultaneously remembering that we are not engaging in abstract exercises, but that we are having real effects on people and the environment. In our personal lives, it would be unwise not to shop around for the best price when making a major purchase, or to fail to think through our options when making a major life decision. It is equally foolish for government to fail to fully examine alternative policies when making regulatory decisions with life-or-death consequences. This reality has been recognized by four successive presidential administrations. Since 1981, the cost-benefit analysis of major regulations has been required by presidential order. Over the past twenty-five years, however, environmental and other progressive groups have declined to participate in the key governmental proceedings concerning the cost-benefit analysis of federal regulations, instead preferring to criticize the technique from the outside. The resulting asymmetry in political participation has had profound negative consequences, both for the state of federal regulation and for the technique of cost-benefit analysis itself. Ironically, this state of affairs has left progressives open to the charge of rejecting reason, when in fact strong environmental and public health pro-grams are often justified by cost-benefit analysis. It is time for progressive groups, as well as ordinary citizens, to retake the high ground by embracing and reforming cost-benefit analysis. The difference between being unthinking—failing to use the best tools to analyze policy—and unfeeling—making decisions without compassion—is unimportant: Both lead to bad policy. **Calamities** can **result from the failure to use** either emotion or **reason.** Our emotions provide us with the grounding for our principles, our innate interconnectedness, and our sense of obligation to others. We use our powers of reason to build on that emotional foundation, and act effectively to bring about a better world.

**Default to consequences—anything else is tautological and irrational**

Joshua **Greene**, Associate Professor, Harvard University, “The Secret Joke of Kant’s Soul,” 20**10**, www.fed.cuhk.edu.hk/~lchang/material/Evolutionary/Developmental/Greene-KantSoul.pdf

What turn-of-the-millennium **science is telling us** is that human **moral judgment is not** a pristine **rational** enterprise, that our moral judgments are driven by a hodgepodge of emotional dispositions, which themselves were shaped by a hodgepodge of evolutionary forces, both biological and cultural. **Because of this, it is exceedingly unlikely** that **there is any** rationally **coherent** normative moral **theory that can accommodate** our **moral intuitions**. Moreover, anyone who claims to have such a theory, or even part of one, almost certainly doesn't. Instead, what that person probably has is a moral rationalization. It seems then, that we have somehow crossed the infamous "is"-"ought" divide. How did this happen? Didn't Hume (Hume, 1978) and Moore (Moore, 1966) warn us against trying to derive an "ought" from and "is?" How did we go from descriptive scientific theories concerning moral psychology to skepticism about a whole class of normative moral theories? The answer is that we did not, as Hume and Moore anticipated, attempt to derive an "ought" from and "is." That is, our method has been inductive rather than deductive. We have inferred on the basis of the available evidence that the phenomenon of rationalist deontological philosophy is best explained as a rationalization of evolved emotional intuition (Harman, 1977). Missing the Deontological Point I suspect that rationalist deontologists will remain unmoved by the arguments presented here. Instead, I suspect, they will insist that I have simply misunderstood whatKant and like-minded deontologists are all about. **Deontology,** they will say, isn't about this intuition or that intuition. It's not defined by its normative differences with consequentialism. Rather, deontology **is about taking humanity seriously**. Above all else, it's about respect for persons. It's about treating others as fellow rational creatures rather than as mere objects, about acting for reasons rational beings can share. And so on (Korsgaard, 1996a; Korsgaard, 1996b).This is, no doubt, how many deontologists see deontology. **But this** insider's view, as I've suggested, may be misleading. The problem, more specifically, is that it **defines deontology in terms of values that are not distinctively** **deontological**, though they may appear to be from the inside. Consider the following analogy with religion. When one asks a religious person to explain the essence of his religion, one often gets an answer like this: "It's about love, really. It's about looking out for other people, looking beyond oneself. It's about community, being part of something larger than oneself." This sort of answer accurately captures the phenomenology of many people's religion, but it's nevertheless inadequate for distinguishing religion from other things. This is because many, if not most, non-religious people aspire to love deeply, look out for other people, avoid self-absorption, have a sense of a community, and be connected to things larger than themselves. In other words, secular humanists and atheists can assent to most of what many religious people think religion is all about. From a secular humanist's point of view, in contrast, what's distinctive about religion is its commitment to the existence of supernatural entities as well as formal religious institutions and doctrines. And they're right. These things really do distinguish religious from non-religious practices, though they may appear to be secondary to many people operating from within a religious point of view. In the same way, I believe that most of the standard deontological/Kantian self-characterizatons fail to distinguish deontology from other approaches to ethics. (See also Kagan (Kagan, 1997, pp. 70-78.) on the difficulty of defining deontology.) It seems to me that consequentialists, as much as anyone else, have respect for persons, are against treating people as mere objects, wish to act for reasons that rational creatures can share, etc. **A consequentialist respects other persons, and** **refrains from treating them as mere objects, by counting every person's well-being** in the decision-making process. Likewise, **a consequentialist** attempts to **act according to reasons that rational creatures can share** by acting according to principles **that give equal weight to everyone's interests**, i.e. that are impartial. This is not to say that consequentialists and deontologists don't differ. They do. It's just that the real differences may not be what deontologists often take them to be. What, then, distinguishes deontology from other kinds of moral thought? A good strategy for answering this question is to start with concrete disagreements between deontologists and others (such as consequentialists) and then work backward in search of deeper principles. This is what I've attempted to do with the trolley and footbridge cases, and other instances in which deontologists and consequentialists disagree. **If you ask** a deontologically-minded person **why it's wrong to push someone** in front of speeding trolley in order **to save five** others, you will getcharacteristically deontological **answers.** Some **will be tautological:** "Because it's murder!"Others will be more sophisticated: "The ends don't justify the means." "You have to respect people's rights." But, as we know, these answers don't really explain anything, because if you give the same people (on different occasions) the trolley case or the loop case (See above), they'll make the opposite judgment, even though their initial explanation concerning the footbridge case applies equally well to one or both of these cases. Talk about rights, respect for persons, and reasons we can share are natural attempts to explain, in "cognitive" terms, what we feel when we find ourselves having emotionally driven intuitions that are odds with the cold calculus of consequentialism. Although these explanations are inevitably incomplete, there seems to be "something deeply right" about them because they give voice to powerful moral emotions. But, as with many religious people's accounts of what's essential to religion, they don't really explain what's distinctive about the philosophy in question.

#### the disad isn’t linear causality- it’s sceanrio planning

Steven Bernstein 2k et al., “God Gave Physics the Easy Problems: Adapting Social Science to an Unpredictable World,” EJIR, 6, 43, 2000, p. 53-55

One useful alternative approach is the development of scenarios, or narratives with plot lines that map a set of causes and trends in future time. This forward reasoning strategy is based on a notion of contingent causal mechanisms, in opposition to the standard, neo-positivist focus on efficient causes, but with no clear parallel in evolutionary biology. It should not be confused with efforts by some to develop social scientific concepts directly analogous to evolutionary mechanisms (such as variation or selection) in biology to explain, for example, transformations in the international system or institutions, or conditions for optimum performance in the international political economy. Scenarios are not predictions; rather, they start with the assumption that the future is unpredictable and tell alternative stories of how the future may unfold. Scenarios are generally constructed by distinguishing what we believe is relatively certain from what we think is uncertain. The most important ‘’certainties’ are common to all scenarios that address the problem or trend, while the most important perceived uncertainties differentiate one scenario from another. The approach differs significantly from a forecasting tournament or competition, where advocates of different theoretical perspectives generate differential perspectives on a single outcome in the hope of subsequently identifying the ‘best’ or most accurate performer. Rather, by constructing scenarios, or plausible stories of paths to the future, we can identify the different driving forces (a term we prefer to independent variable, since it implies a force pushing in a certain direction rather than what is known on one side of an ‘equals’ sign) and then attempt to combine these forces in logical chains that generate a range of outcomes, rather than single futures. Scenarios make contingent claims rather than point predictions. They reinsert a sensible notion of contingency into theoretical arguments that would otherwise tend toward determinism. Scholars in international relations tend to privilege arguments that reach back into the past and parse out one or two causal variables that are then posited to be the major driving forces of past and future outcomes. The field also favors variables that are structural or otherwise parametric, thus downplaying the role of both agency and accident. Forward reasoning undercuts structural determinism by raising the possibility and plausibility of multiple futures. Scenarios are impressionistic pictures that build on different combinations of causal variables that may also take on different values in different scenarios. Thus it is possible to construct scenarios without pre-existing firm proof of theoretical claims that meet strict positivist standards. The foundation for scenarios is made up of provisional assumptions and causal claims. These become the subject of revision and updating more than testing. A set of scenarios often contains competing or at least contrasting assumptions. It is less important where people start, than it is where they end up through frequent revisions, and how they got there. A good scenario is an internally consistent hypothesis about how the future might unfold; it is a chain of logic that connects ‘drivers’ to outcomes (Rosell, 1999:126). Consider as an example one plausible scenario at the level of a ‘global future’ where power continues to shift away from the state and towards international institutions, transnational actors and local communities. The state lose its monopoly on the provision of security and basic characteristics of the Westphalian system as we have known it are fundamentally altered. In this setting, key decisions about security, economics and culture will be made by non-state actors. Security may become a commodity that can be bought like other commodities in the global marketplace. A detailed scenario about this transformation would specify the range of changes that are expected to occur and how they are connected to one another. It would also identify what kinds of evidence might support the scenario as these or other processes unfold over the next decade, and what kind of evidence would count against the scenario. This is simply a form of process tracing, or increasing the number of observable implications of an argument, in future rather than past time. Eventually, as in the heuristics of evolutionary biology, future history becomes data. But instead of thinking of data as something that can falsify any particular hypothesis, one should think of it as something capable of distinguishing or selecting the story that was from the stories that might have been.

#### Predictions work

**Chernoff 09** [Fred, Prof. IR and Dir. IR – Colgate U., European Journal of International Relations, “Conventionalism as an Adequate Basis for Policy-Relevant IR Theory”, 15:1, Sage]

For these and other reasons, many social theorists and social scientists have come to the conclusion that prediction is impossible. Well-known IR reflexivists like Rick Ashley, Robert Cox, Rob Walker and Alex Wendt have attacked naturalism by emphasizing the interpretive nature of social theory. Ashley is explicit in his critique of prediction, as is Cox, who says quite simply, ‘It is impossible to predict the future’ (Ashley, 1986: 283; Cox, 1987: 139, cf. also 1987: 393). More recently, HeikkiPatomäki has argued that ‘qualitative changes and emergence are possible, but predictions are not’ defective and that the latter two presuppose an unjustifiably narrow notion of ‘prediction’.14 A determined prediction sceptic may continue to hold that there is too great a degree of complexity of social relationships (which comprise ‘open systems’) to allow any prediction whatsoever. Two very simple examples may circumscribe and help to refute a radical variety of scepticism.First, we all make reliable social predictions and do so with great frequency. We can predict with high probability that a spouse, child or parent will react to certain well-known stimuli that we might supply, based on extensive past experience. More to the point of IR prediction – scepticism, we can imagine a young child in the UK who (perhaps at the cinema) (1) picks up a bit of 19th-century British imperial lore thus gaining a sense of the power of the crown, without knowing anything of current balances of power, (2) hears some stories about the US–UK invasion of Iraq in the context of the aim of advancing democracy, and (3) hears a bit about communist China and democratic Taiwan. Although the specific term ‘preventative strike’ might not enter into her lexicon, it is possible to imagine the child, whose knowledge is thus limited, thinking that if democratic Taiwan were threatened by China, the UK would (possibly or probably) launch a strike on China to protect it, much as the UK had done to help democracy in Iraq. In contrast to the child, readers of this journal and scholars who study the world more thoroughly have factual information (e.g. about the relative military and economic capabilities of the UK and China) and hold some cause-and-effect principles (such as that states do not usually initiate actions that leaders understand will have an extremely high probability of undercutting their power with almost no chances of success). Anyone who has adequate knowledge of world politics would predict that the UK will not launch a preventive attack against China. In the real world, China knows that for the next decade and well beyond the UK will not intervene militarily in its affairs. While Chinese leaders have to plan for many likely — and even a few somewhat unlikely — future possibilities, they do not have to plan for various implausible contingencies: they do not have to structure forces geared to defend against specifically UK forces and do not have to conduct diplomacy with the UK in a way that would be required if such an attack were a real possibility. Any rational decision-maker in China may use some cause-and-effect (probabilistic) principles along with knowledge of specific facts relating to the Sino-British relationship to predict (P2) that the UK will not land its forces on Chinese territory — even in the event of a war over Taiwan (that is, the probability is very close to zero). The statement P2 qualifies as a prediction based on DEF above and counts as knowledge for Chinese political and military decision-makers. A Chinese diplomat or military planner who would deny that theory-based prediction would have no basis to rule out extremely implausible predictions like P2 and would thus have to prepare for such unlikely contingencies as UK action against China. A reflexivist theorist sceptical of ‘prediction’ in IR might argue that the China example distorts the notion by using a trivial prediction and treating it as a meaningful one. But the critic’s temptation to dismiss its value stems precisely from the fact that it is so obviously true. The value to China of knowing that the UK is not a military threat is significant. The fact that, under current conditions, any plausible cause-and-effect understanding of IR that one might adopt would yield P2, that the ‘UK will not attack China’, does not diminish the value to China of knowing the UK does not pose a military threat. A critic might also argue that DEF and the China example allow non-scientific claims to count as predictions. But we note that while physics and chemistry offer precise ‘point predictions’, other natural sciences, such as seismology, genetics or meteorology, produce predictions that are often much less specific; that is, they describe the predicted ‘events’ in broader time frame and typically in probabilistic terms. We often find predictions about the probability, for example, of a seismic event in the form ‘some time in the next three years’ rather than ‘two years from next Monday at 11:17 am’. DEF includes approximate and probabilistic propositions as predictions and is thus able to catagorize as a prediction the former sort of statement, which is of a type that is often of great value to policy-makers. With the help of these ‘non-point predictions’ coming from the natural and the social sciences, leaders are able to choose the courses of action (e.g. more stringent earthquake-safety building codes, or procuring an additional carrier battle group) that are most likely to accomplish the leaders’ desired ends. So while ‘point predictions’ are not what political leaders require in most decision-making situations, critics of IR predictiveness often attack the predictive capacity of IR theory for its inability to deliver them. The critics thus commit the straw [person] man fallacy by requiring a sort of prediction in IR (1) that few, if any, theorists claim to be able to offer, (2) that are not required by policy-makers for theory-based predictions to be valuable, and (3) that are not possible even in some natural sciences.15 The range of theorists included in ‘reflexivists’ here is very wide and it is possible to dissent from some of the general descriptions. From the point of view of the central argument of this article, there are two important features that should be rendered accurately. One is that reflexivists reject explanation–prediction symmetry, which allows them to pursue causal (or constitutive) explanation without any commitment to prediction. The second is that almost all share clear opposition to predictive social science.16 Thereflexivist commitment to both of these conclusions should be evident from the foregoing discussion.

**Cognitive bias against existential risk – err neg**

Nick **Bostrom**, Professor, Oxford and Director, Future of Humanity Institute, “We’re Underestimating the Risk of Human Extinction,” Interviewed by Ross Andersen, THE ATLANTIC, 3—6—**12,**

[www.theatlantic.com/technology/archive/2012/03/were-underestimating-the-risk-of-human-extinction/253821/](http://www.theatlantic.com/technology/archive/2012/03/were-underestimating-the-risk-of-human-extinction/253821/)

You have argued that **we underrate existential risks because of** a particular kind of bias called **observation selection effect**. Can you explain a bit more about that? Bostrom: The idea of an observation selection effect is maybe best explained by first considering the simpler concept of a selection effect. Let's say you're trying to estimate how large the largest fish in a given pond is, and you use a net to catch a hundred fish and the biggest fish you find is three inches long. You might be tempted to infer that the biggest fish in this pond is not much bigger than three inches, because you've caught a hundred of them and none of them are bigger than three inches. But if it turns out that your net could only catch fish up to a certain length, then the measuring instrument that you used would introduce a selection effect: it would only select from a subset of the domain you were trying to sample. Now that's a kind of standard fact of statistics, and there are methods for trying to correct for it and you obviously have to take that into account when considering the fish distribution in your pond. An observation selection effect is a selection effect introduced not by limitations in our measurement instrument, but rather by the fact that all observations require the existence of an observer. This becomes important, for instance, in evolutionary biology. For instance, we know that intelligent life evolved on Earth. Naively, one might think that this piece of evidence suggests that life is likely to evolve on most Earth-like planets. But that would be to overlook an observation selection effect. For no matter how small the proportion of all Earth-like planets that evolve intelligent life, we will find ourselves on a planet that did. Our data point-that intelligent life arose on our planet-is predicted equally well by the hypothesis that intelligent life is very improbable even on Earth-like planets as by the hypothesis that intelligent life is highly probable on Earth-like planets. **When it comes to human extinction and existential risk, there are** certain controversial **ways** that **observation selection effects might be relevant**. How so? Bostrom: Well, one principle for how to reason when there are these observation selection effects is called the self-sampling assumption, which says roughly that you should think of yourself as if you were a randomly selected observer of some larger reference class of observers. **This assumption has a particular application to thinking about the future through the doomsday argument, which attempts to show that we have systematically underestimated the probability that the human species will perish relatively soon.** The b

asic idea involves comparing two different hypotheses about how long the human species will last in terms of how many total people have existed and will come to exist. You could for instance have two hypothesis: to pick an easy example imagine that one hypothesis is that a total of 200 billion humans will have ever existed at the end of time, and the other hypothesis is that 200 trillion humans will have ever existed. Let's say that initially you think that each of these hypotheses is equally likely, you then have to take into account the self-sampling assumption and your own birth rank, your position in the sequence of people who have lived and who will ever live. We estimate currently that there have, to date, been 100 billion humans. Taking that into account, you then get a probability shift in favor of the smaller hypothesis, the hypothesis that only 200 billion humans will ever have existed. That's because you have to reason that if you are a random sample of all the people who will ever have existed, the chance that you will come up with a birth rank of 100 billion is much larger if there are only 200 billion in total than if there are 200 trillion in total. If there are going to be 200 billion total human beings, then as the 100 billionth of those human beings, I am somewhere in the middle, which is not so surprising. But if there are going to be 200 trillion people eventually, then you might think that it's sort of surprising that you're among the earliest 0.05% of the people who will ever exist. So you can see how reasoning with an observation selection effect can have these surprising and counterintuitive results. Now I want to emphasize that I'm not at all sure this kind of argument is valid; there are some deep methodological questions about this argument that haven't been resolved, questions that I have written a lot about. See I had understood observation selection effects in this context to work somewhat differently. I had thought that it had more to do with trying to observe the kinds of events that might cause extinction level events, things that by their nature would not be the sort of things that you could have observed before, because you'd cease to exist after the initial observation. Is there a line of thinking to that effect? Bostrom: Well, there's another line of thinking that's very similar to what you're describing that speaks to how much weight we should give to our track record of survival. Human beings have been around for roughly a hundred thousand years on this planet, so how much should that count in determining whether we're going to be around another hundred thousand years? Now there are a number of different factors that come into that discussion, **the most important of which is whether there are going to be new kinds of risks that haven't existed to this point in human history---in particular risks of our own making,** new technologies that we might develop this century, those that might give us the means to create new kinds of weapons or new kinds of accidents. The fact that we've been around for a hundred thousand years wouldn't give us much confidence with respect to those risks. But, to the extent that one were focusing on risks from nature, from asteroid attacks or risks from say vacuum decay in space itself, or something like that, one might ask what we can infer from this long track record of survival. And one might think that any species anywhere will think of themselves as having survived up to the current time because of this observation selection effect. You don't observe yourself after you've gone extinct, and so that complicates the analysis for certain kinds of risks.

**Extinction first—existence before essence**

Paul **Wapner**, Associate Professor and Director, Global Environmental Policy Program, American University, “Leftist Criticism of ‘Nature’: Environmental Protection in a Postmodern Age,” DISSENT, Winter 20**03**, [www.dissentmagazine.org/menutest/archives/2003/wi03/wapner.htm](http://www.dissentmagazine.org/menutest/archives/2003/wi03/wapner.htm)

All attempts to listen to nature are social constructions-except one. Even the most radical postmodernist must **acknowledge the distinction between** physical **existence and non-existence**. As I have said, postmodernists accept that **there is a physical substratum to the phenomenal world even if they argue about the** different **meanings we ascribe** to **it.** This acknowledgment of physical existence is crucial. **We can't ascribe meaning to that which doesn't appear.**

What doesn't exist can manifest no character. Put differently, yes, the postmodernist should rightly worry about interpreting nature's expressions. And all of us should be wary of those who claim to speak on nature's behalf (including environmentalists who do that). But we need not doubt the simple idea that **a prerequisite of expression is existence.** This in turn suggests that preserving the nonhuman world-in all its diverse embodiments-must be seen by eco-critics as a fundamental good. Eco-critics must be supporters, in some fashion, of environmental preservation. Postmodernists reject the idea of a universal good. They rightly acknowledge the difficulty of identifying a common value given the multiple contexts of our value-producing activity. In fact, if there is one thing they vehemently scorn, it is the idea that there can be a value that stands above the individual contexts of human experience. Such a value would present itself as a metanarrative and, as Jean-François Lyotard has explained, postmodernism is characterized fundamentally by its "incredulity toward meta-narratives." Nonetheless, I can't see how postmodern critics can do otherwise than accept **the value of preserving the** nonhuman **world**. The nonhuman **is the extreme "other**"; it stands in contradistinction to humans as a species. In understanding **the** constructed **quality of human experience and** the dangers of reification, postmodernism inherently advances an ethic of **respecting the "other**." At the very least, respect **must involve ensuring** that **the "other**" actually **continues to exist**. In our day and age, **this requires us to take responsibility for protecting** the actuality of the nonhuman. Instead, however, we are running roughshod over **the earth**'s diversity of plants, animals, and ecosystems. Postmodern critics should find this particularly disturbing. If they don't, they deny their own intellectual insights and compromise their fundamental moral commitment.

## 2NC

### T

types of torture alone at guantanamo are ridiculous

waterboarding

stress positions

hooding

Mukul **Sharma**, "Bagram, the Other Guantanamo," THE HINDU, 1--6--**10**, http://beta.thehindu.com/opinion/op-ed/article76282.ece, accessed 8-15-13.

As at Guantanamo, in the absence of judicial oversight the detentions in Bagram have been marked by torture and other kinds of ill-treatment of detenus. Agents of the Federal Bureau of Investigation (FBI) deployed in Afghanistan between late-2001 and the end of 2004 reported personally having observed military interrogators in Bagram and elsewhere employing stripping , sleep deprivation, threats of death or pain, threats against detenus’ family members, prolonged use of shackles, stress positions, hooding and blindfolding other than for transportation, use of loud music, use of strobe lights or darkness, extended isolation, forced cell extractions, use of and threats of use of dogs to induce fear, forcible shaving of hair for the purpose of humiliating detenus, holding detenus in an unregistered manner, sending them to other countries for “more aggressive” interrogation and threatening to take such action.

#### Of” means the whole category

CJS 78 (Corpus Juris Secundum, 67, p. 200)

Of: The word "of" is a preposition. It is a word of different meanings, and susceptible of numerous different connotations. It may be used in its possessive sense to denote possession or ownership. It may also be used as a word of identification and relation, rather than as a word of proprietorship or possession. "Of" may denote source, origin, existence, descent, or location, or it may denote that from which something issues, proceeds, or is derived. The term may indicate the **aggregate** or **whole of** which the limited word or words denote a part, or of which a part is referred to, thought of, affected, etc.

#### “Substantially” means the plan must be across the board

Anderson et al, 2005[Brian Anderson, Becky Collins, Barbara Van Haren & Nissan Bar-Lev, WCASS Research / Special Projects Committee\* Report on: A Conceptual Framework for Developing a 504 School District Policy, http://www.specialed.us/issues-504policy/504.htm]

A substantial limitation is a significant restriction as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.¶ The 504 regulation does not define substantial limitation, and the regulation gives discretion to schools to decide what substantial limitation is. The key here is to be consistent internally and to be consistent with pertinent court decisions.¶ The issue “Does it substantially limit the major life activity?” was clarified by the US Supreme Court decision on January 8th, 2002 , “Toyota v. Williams”. In this labor related case, the Supreme Court noted that to meet the “substantially limit” definition, the disability must occur across the board in multiple environments, not only in one environment or one setting. The implications for school related 504 eligibility decisions are clear: The disability in question must be manifested in all facets of the student’s life, not only in school.

### A2 “Perm”—NB

**Doesn’t solve –**

**A. It’s a weak congressional challenge—Congress is seen as interpreting independently and gets overwhelmed by judicial authority.**

Lipkin 2006 (Robert J., Prof. Law @ Widener U School of Law, 28 Cardozo L. Rev. 1055)

A congressional override provides a safety net while at the same time permitting the benefits of judicial review to continue. Two conceptions of a congressional override exist: a weak version and a strong version. The weak version permits Congress to override a Supreme Court decision by passing the appropriate legislation, which the Court may then strike down. The strong version makes Congress the final arbiter. The weak version provides a cooperative inter-branch relationship within a modified form of judicial supremacy. In essence, the weak override requires the Court to defer to Congress whenever possible, and strike down an override only as a last resort. There is some value to a weak congressional override. Such an override is at [\*1113] least an improvement over our current form of judicial supremacy for two reasons. First, it makes Congress a partner - albeit a junior partner - in determining constitutional meaning. In short, it explicitly rejects the notion that courts have an exclusive role in constitutional interpretation. Second, this partnership may be enhanced by Congress publicly explaining its reasons for overriding the Court's decision. Then, if the Court strikes down that override, it in turn must explicitly reply to Congress's rationale and analysis. Accordingly, an explicit, dynamic constitutional dialogue between Congress and the Court is formally created. A Court acknowledging Congress' authority to weakly override its decisions might decline reviewing a challenge to an override by publicly requesting the electorate to chasten the legislators who enacted the override. If this fails, the Court has a choice to defer to the electorate or to strike down the override in an appropriate case. Though this is an improvement over our present system, in all probability it would be insufficient. The Court remains the final arbiter of constitutional meaning. The benefit, however, would be requiring the Court to respond analytically to serious objections from a co-equal branch of government. [172](https://www.lexis.com/research/retrieve?_m=b00d8e40303bbd2f1abee242874ec95d&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=7a15214eaa1deb8f698148329bfaa541#n172) In the end, however, congressional overrides should be made of sterner stuff. [173](https://www.lexis.com/research/retrieve?_m=b00d8e40303bbd2f1abee242874ec95d&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAb&_md5=7a15214eaa1deb8f698148329bfaa541#n173)

**3. Links to the net benefit –**

**A. Modeling – weak review eventually recovers and restores judicial review**

Tushnet 2003 (Mark, 53 Univ. of Toronto L.J. 89)

Professor Roach's important examination of the extensive experience Canada has had in operating the world's leading weak-form system of judicial review shows that we should be cautious about endorsing weak-form judicial review as an alternative to strong-form judicial review. The materials he presents suggest that Canada's weak-form review has become strong-form judicial review, in part because of a lack of political will and in part because of structural obstacles to the legislature's actual ability to respond to Court decisions. The fact that in-your-face statutes are enacted will continue to place on the Canadian constitutional agenda the question of judicial restraint, as such statutes force us to consider whether weak-form systems require that courts exercise restraint when faced with constitutional interpretations with which the judges disagree but which they cannot fairly describe as unreasonable. In the end, then, the invention of weak-form judicial review may not displace the long-standing controversy in strong-form systems over judicial activism and restraint.

#### 1. Still links to the internal net ben: Congress needs to have sole power over war powers to prevent an elite takeover and extinction. Joint action fails

YOUNGSTOWN SHEET & TUBE CO. ET AL. v. SAWYER. The opinion of the Court, written by Black, J. No. 744. SUPREME COURT OF THE UNITED STATES 343 U.S. 579; 72 S. Ct. 863; 96 L. Ed. 1153; 1952 U.S. LEXIS 2625; 21 Lab. Cas. (CCH) P67,008; 1952 Trade Cas. (CCH) P67,293; 62 Ohio L. Abs. 417; 47 Ohio Op. 430; 26 A.L.R.2d 1378; 30 L.R.R.M. 2172 May 12-13, 1952, Argued June 2, 1952, Decided (The Court held that the presidential order directing the government to take possession of the plants was not within the President's constitutional authority.)

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for [\*\*880] emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

## 1NR

### Extinction 1NR

**They’re wrong—we under-fear ‘new’ and big risks**

Eliezer **Yudkowsky**, Singularity Institute for Artificial Intelligence, “Cognitive Biases Potentially Affecting Judgment of Global Risks,” forthcoming in Catastrophic Risks 8—31—**06**, <http://singinst.org/upload/cognitive-biases.pdf>

Biases implicit in the availability heuristic affect estimates of risk. A pioneering study by Lichtenstein et. al. (1978) examined absolute and relative probability judgments of risk. People know in general terms which risks cause large numbers of deaths and which cause few deaths. However, asked to quantify risks more precisely, people severely overestimate the frequency of rare causes of death, and severely underestimate the frequency of common causes of death. Other repeated errors were also apparent: Accidents were judged to cause as many deaths as disease. (Diseases cause about 16 times as many deaths as accidents.) Homicide was incorrectly judged a more frequent cause of death than diabetes, or stomach cancer. A followup study by Combs and Slovic (1979) tallied reporting of deaths in two newspapers, and found that errors in probability judgments correlated strongly (.85 and .89) with selective reporting in newspapers. People refuse to buy flood insurance even when it is heavily subsidized and priced far below an actuarially fair value. Kunreuther et. al. (1993) suggests **underreaction to threats of flooding may arise from "the inability of individuals to conceptualize floods that have never occurred**... Men on flood plains appear to be very much prisoners of their experience... Recently experienced floods appear to set an upward bound to the size of loss with which managers believe they ought to be concerned." Burton et. al. (1978) report that when dams and levees are built, they reduce the frequency of floods, and thus apparently create a false sense of security, leading to reduced precautions. While building dams decreases the frequency of floods, damage per flood is so much greater afterward that the average yearly damage increases. It seems that **people do not extrapolate from experienced small hazards to a possibility of large risks;** rather, **the past experience of small hazards sets a perceived upper bound on risks. A society well-protected against minor hazards will take no action against major risks** (building on flood plains once the regular minor floods are eliminated). A society subject to regular minor hazards will treat those minor hazards as an upper bound on the size of the risks (guarding against regular minor floods but not occasional major floods). **Risks of human extinction may tend to be underestimated since, obviously, humanity has never yet encountered an extinction event.**

**Extinction outweighs all other impacts**—future generations

Nick **Bostrom**, Professor, Oxford and Director, Future of Humanity Institute, “We’re Underestimating the Risk of Human Extinction,” Interviewed by Ross Andersen, THE ATLANTIC, 3—6—**12,**

[www.theatlantic.com/technology/archive/2012/03/were-underestimating-the-risk-of-human-extinction/253821/](http://www.theatlantic.com/technology/archive/2012/03/were-underestimating-the-risk-of-human-extinction/253821/)

Bostrom, who directs Oxford's Future of Humanity Institute, has argued over the course of several papers that human **extinction risks are** poorly understood and, worse still, **severely underestimated by society.** Some of these existential risks are fairly well known, especially the natural ones. But others are obscure or even exotic. Most worrying to Bostrom is the subset of existential risks that arise from human technology, a subset that he expects to grow in number and potency over the next century. Despite his concerns about the risks posed to humans by technological progress, Bostrom is no luddite. In fact, he is a longtime advocate of transhumanism---the effort to improve the human condition, and even human nature itself, through technological means. In the long run he sees technology as a bridge, a bridge we humans must cross with great care, in order to reach new and better modes of being. In his work, Bostrom uses the tools of philosophy and mathematics, in particular probability theory, to try and determine how we as a species might achieve this safe passage. What follows is my conversation with Bostrom about some of the most interesting and worrying existential risks that humanity might encounter in the decades and centuries to come, and about what we can do to make sure we outlast them. Some have argued that we ought to be directing our resources toward humanity's existing problems, rather than future existential risks, because many of the latter are highly improbable. You have responded by suggesting that **existential risk mitigation may** in fact **be a dominant moral priority over the alleviation of present suffering**. Can you explain why? Bostrom: Well suppose you have a moral view that counts future people as being worth as much as present people. You might say that fundamentally it doesn't matter whether someone exists at the current time or at some future time, just as many people think that from a fundamental moral point of view, it doesn't matter where somebody is spatially---somebody isn't automatically worth less because you move them to the moon or to Africa or something. **A** human **life is a** human **life. If** you have that moral point of view that **future generations matter in proportion to their** population **numbers, then** you get this very stark implication that **existential risk mitigation has a much higher utility than** pretty much **anything else** that you could do. **There are so many people that could come into existence in the future if humanity survives** this critical period of time---**we might live for billions of years, our descendants might colonize billions of solar systems, and there could be billions** and billions **times more people than exist currently**. Therefore, **even a very small reduction in the probability of realizing this enormous good will** tend to **outweigh** even **immense benefits like eliminating poverty or curing malaria**, which would be tremendous und

### Invisible Threshold

#### invisible threshold means every reduction in CO2 is key

Nuccitelli 8/31/12(Dana, environmental scientist at a private environmental consulting firm, Bachelor's Degree in astrophysics from the University of California at Berkeley, and a Master's Degree in physics from the University of California at Davis, “Realistically What Might the Future Climate Look Like?,” <http://www.skepticalscience.com/realistically-what-might-future-climate-look-like.html>, AM)

We're not yet committed to surpassing 2°C global warming, but as Watson noted, we are quickly running out of time to realistically give ourselves a chance to stay below that 'danger limit'. However, 2°C is not a do-or-die threshold. Every bit of CO2 emissions we can reduce means that much avoided future warming, which means that much avoided climate change impacts. As Lonnie Thompson noted, the more global warming we manage to mitigate, the less adaption and suffering we will be forced to cope with in the future. Realistically, based on the current political climate (which we will explore in another post next week), limiting global warming to 2°C is probably the best we can do. However, there is a big difference between 2°C and 3°C, between 3°C and 4°C, and anything greater than 4°C can probably accurately be described as catastrophic, since various tipping points are expected to be triggered at this level. Right now, we are on track for the catastrophic consequences (widespread coral mortality, mass extinctions, hundreds of millions of people adversely impacted by droughts, floods, heat waves, etc.). But we're not stuck on that track just yet, and we need to move ourselves as far off of it as possible by reducing our greenhouse gas emissions as soon and as much as possible.

### Pollution Ruling Saves Lives

#### ruling in favor of the EPA saves thousands

By Tom Donnelly 12-6-13 Tom Donnelly is the Constitutional Accountability Center’s Message Director and Counsel. Prior to joining CAC, Tom served as a Climenko Fellow and Lecturer on Law at Harvard Law School.¶ “Six reasons why EME Homer is a case worth watching” http://blog.constitutioncenter.org/2013/12/six-reasons-why-eme-homer-is-a-case-worth-watching/

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Lives Hang in the Balance: As lawyers, we often get stuck in a morass of legalisms like “Chevron deference,” “stare decisis,” and “administrative exhaustion.” However, in cases like EME Homer, it’s also important to step back and consider the human stakes. Simply put, if the government wins, fewer people in downwind states will get sick and die from air pollution – especially children and the elderly. Both the EPA and the American Thoracic Society peg the number of saved lives per year in the thousands – to say nothing of the non-fatal hearts attacks, respiratory ailments, and missed days of work and school also prevented by reducing air pollution in downwind states.¶ 2) Case #1 in an Environmental Double-Header: This Supreme Court Term is shaping up to be the biggest one for the environment since the Roberts Court decided Massachusetts v. EPA in 2007. The Court is slated to decide not just EME Homer this Term, but also a challenge to the EPA’s recent efforts to regulate greenhouse gas emissions (Utility Air Regulatory Group v. EPA). As a reminder, Mass. v. EPA was a huge victory for the environment, with the Court clearing the way for the EPA to begin regulating greenhouse gas emissions under the Clean Air Act. The decisive vote was cast by Justice Kennedy. With the Obama Administration pressing ahead with new regulations, this Term may offer important clues as to where the Roberts Court – and especially Justice Kennedy – will stand in key environmental cases, moving forward.

### A2 “Ruling Thumps”

**SG is carefully planning battles to preserve finite capital- assumes your thumpers**

specific to EPA

By Leland E. **Beck 1-13-14** Federal Administrative Law – Litigation – Government Relations¶ Washington D.C. Metro Area ¶ Law Practice on January 13th, 2014 Source: Federal Regulations Advisor, http://www.fedregsadvisor.com/2014/01/13/1129/

**The beginning of a new year raises several process questions for regulatory practitioners. The** Environmental Protection Agency (**EPA) published a new proposed rule to limit emissions from new electric power generators –** a rule EPA released several months ago, but only published last week. The National Labor Relations Board (NLRB) threw in the towel on its vacated employee rights posting rule, but still must take a final administrative step or hopefully explain why it does not. The Department of Health and Human Services (HHS) announced that additional preventive care requirements would be included in minimum essential coverage under Obamacare, but did so in a blog post, not a regulation. Ending (perhaps) a decade-long and difficult rulemaking, the Department of Homeland Security (DHS) Transportation Security Administration (TSA) established security requirements for foreign and domestic aircraft repair stations. Finally, in case you missed it, many agencies published their Unified Agenda of Federal Regulatory and Deregulatory Actions last Tuesday.¶ Electric Generating Emissions**: The EPA finally withdrew its 2012 proposed rule to set emission standards for some coal and other fossil fuel electric generating units and published a new proposed rule based on different analyses and including “significantly” different requirements**. EPA released a draft of the proposed rule on September 20, 2013, but the publication of the withdrawal and new proposed rule has lagged for over three months. The withdrawal of the prior proposal may not have been a necessary step in **issuing a new proposed rule and may reflect EPA’s intention to limit the administrative record for the new rule to exclude all that which led EPA to conclude that the new rule was needed** – such as the 2.5 million public comments on the prior proposal. The new proposal reflects a hypothetical approach to baseline costing:¶ **The EPA believes this rule will have no notable compliance costs associated with it over a range of likely sensitivity conditions because electric power companies would choose to build new EGUs that comply with the regulatory requirements** of this proposal even in the absence of the proposal, because of existing and expected market conditions.¶ ► **This proposed rule** – affecting the choice of original fuel for conversion to electricity **requires a careful review** because it is by no means certain that EPA is correct in its baseline assumption. The notion that “existing and expected” market conditions will reduce the impact of the rule to insignificance calls into question the very need for the rule.¶ Demise of the NLRB Posting Rule: **The NLRB “has decided not to seek” a petition for certiorari in the United States Supreme Court (SCOTUS) to review United States Court of Appeals for the District of Columbia Circuit and Fourth Circuit orders vacating the NLRB Posting Rule**. The Posting Rule would have required most employers to affirmatively post the NLRB’s ledger-size poster (11” x 17”) interpretation of employee rights under the National Labor Relations Act. Putting the best possible face on the issue, the NLRB declared it would continue its outreach and education programs.¶ ► Perhaps **the** Department of Justice (**DOJ)’s Solicitor General declined to file a petition,** but those privileged discussions must await history and sunshine. **The final decision not to proceed comes after the Solicitor General twice asked SCOTUS to extend the time to file a petition. The chance of success for a petition to review multiple lower court decisions vacating a regulation was slim and the Solicitor General often guards his reputation and ability to seek review of better issues.**

### A2 “Pollution Impact Turn”

**Management is the only way to save the environment**

**Soule 95** - Professor of Environmental Studies - Michael E., Professor and Chair of Environmental Studies, UC-Santa Cruz, REINVITING NATURE? RESPONSES TO POSTMODERN DECONSTRUCTION, Eds: Michael E. Soule and Gary Lease, p. 159-160

Should We Actively Manage Wildlands and Wild Waters? The decision has already been made in most places. **Some** of the **ecological myths** discussed here **contain**, either explicitly or implicitly, **the idea that nature is self-regulating and capable of caring for itself. This notion leads to** the theory of management known as **benign neglect – nature will do fine, thank you, if human beings just leave it alone. Indeed, a century ago, a hands-off policy was the best policy. Now it is not. Given natures`s current fragmented and stressed condition, neglect will result in an accelerating spiral of deterioration. Once people create large gaps in forests, isolate and disturb habitats, pollute, overexploit,** and introduce species from other continents, **the viability of many ecosystems** and native species **is compromised, resiliency dissipates, and diversity can collapse**. When artificial disturbance reaches a certain threshold, even small changes can produce large effects, and these will be compounded by climate change. For example, a storm that would be considered normal and beneficial may, following widespread clearcutting, cause disastrous blow-downs, landslides, and erosion. If global warming occurs, tropical storms are predicted to have greater force than now. **Homeostasis, balance, and Gaia are dangerous models when applied at the wrong spatial and temporal scales.** Even fifty years ago, neglect might have been the best medicine, but that was a world with a lot more big, unhumanized, connected spaces, a world with one-third the number of people, and a world largely unaffected by chain saws, bulldozers, pesticides, and exotic, weedy species. **The alternative to neglect is** active **caring** – in today`s parlance, **an affirmative approach** to wildlands: **to maintain and restore** them, **to become stewards,** accepting all the domineering baggage that word carries. Until humans are able to control their numbers and their technologies, **management is the only viable alternative to massive attrition of living nature**. But management activities are variable in intensity, something that antimanagement purists ignore. In general, the greater the disturbance and the smaller the habitat remnant, the more intense the management must be. So if we must manage, where do we look for ethical guidance?

**Management is inevitable—it’s only a question of what kind of intervention is used**

**Levy 99** - PhD @ Centre for Critical Theory at Monash - Neil, “Discourses of the Environment,” ed: Eric Darier, p. 215

If the ‘technological fix’ is unlikely to be more successful than strategies of limitation of our use of resources, **we are,** nevertheless **unable simply to leave the environment as it is. There is a real and pressing need for space, and more accurate, technical and scientific information about the non-human world. For we are faced with a situation in which the processes we have already set in train will continue to impact upon that world, and therefore us for centuries. It is therefore necessary, not only to stop cutting down the rain forests, but to develop real, concrete proposals for action, to reverse or at least limit the effects of our previous interventions**. Moreover, there is another reason why **our behavior towards the non-human cannot simply be a matter of leaving it as it is**, at least in so far as our goals are not only environmental but also involve social justice. **For if we simply preserve what remains** to us of wilderness, of the countryside and of park land, **we also preserve patterns of very unequal access to their resources and their consolations** (Soper 1995: 207).**in fact, we risk exacerbating these inequalities. It is not us, but the poor** of Brazil, **who will bear the brunt of the misery** which would result from a strictly enforced policy of leaving the Amazonian rain forest untouched, **in the absence of alternative means of providing** for their livelihood. **It is the development of policies** to provide such ecologically sustainable alternatives which **we require, as well as the development of technical means for replacing our current greenhouse gas-emitting sources of energy.** Such policies and proposals for **concrete action must be formulated by** ecologists, environmentalists, **people with expertise** concerning the functioning of ecosystems and the impact which our actions have upon them. Such proposals are, therefore, very much the province of Foucault’s specific intellectual, the one who works ‘within specific sectors, at the precise points where their own conditions of life or work situate them’ (Foucault 1980g: 126). For who could be more fittingly described as ‘the strategists of life and death’ than these environmentalists? After the end of the Cold War, it is in this sphere, more than any other, that man’s ‘politics places his existence as a living being in question’ (Foucault 1976: 143). **For it is in facing the consequences of our intervention in the non-human world that the hate of our species, and of those with whom we share this planet, will be decided?**