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## Court Capital DA

#### The Court will maintain Affirmative Action in the Schuette decision now

Scott Lemieux, Poly Sci Prof @ St. Rose, 7-9-2013, “Affirmative Action's Ominous Future,” Prospect, <http://prospect.org/article/affirmative-actions-ominous-future>

In fact, it's hard to imagine an existing program in higher education the current Court majority would vote to uphold as constitutional—just as it is nearly impossible to imagine a preclearance formula for the Voting Rights Act that this Court would approve—even if Kennedy is unwilling to hold affirmative action unconstitutional writ large. It's even possible that Kennedy will ultimately be willing to take the next step. One reason for the Court deciding to write a minimalist opinion in Fisher after sitting on the case for the better part of a year is that the facts of Fisher were not very favorable to opponents of affirmative action. Abigail Fisher, the plaintiff, probably would not have been admitted to U.T. Austin even under entirely race-neutral admissions criteria, making her a less-than-ideal vehicle for demonstrating the alleged injustices of affirmative action. Given a different set of facts, the Roberts Court may well be willing to go further.¶ However, the upcoming case, Schuette v. Coalition to Defend Affirmative Action, concerns the constitutionality of bans on affirmative action, rather than focusing on the constitutionality of affirmative-action programs. It's unlikely to overturn Grutter since the Court declined to do so in Fisher. In 2006, Michigan voters passed Proposal 2, which banned all affirmative-action programs by state agency. In November of last year, a badly divided Sixth Circuit ruled that Proposal 2 violated the equal protection clause of the Fourteenth Amendment. According to the majority opinion, Proposal 2 was unconstitutional because it "reallocates political power or reorders the decision-making process in a way that places special burdens on a minority group's ability to achieve its goals through that process."¶ This decision's odds of being upheld by the Supreme Court are near to nil. In all candor, it might be an uphill struggle for the opinion to get even one vote. I strongly believe that most affirmative-action programs are constitutional and deplore Proposal 2 as a policy matter, but it's a stretch to argue that Michigan is required to have affirmative-action programs. However, this case presents very different conceptual issues than Fisher did. Since it would be entirely possible to overrule the Sixth Circuit without saying anything about the constitutionality of affirmative action, it is very unlikely that the Court will use the case as a way to resolve the issues Fisher didn't. And so the can will likely be kicked down the road once more, hopefully awaiting a more favorable Court majority in the near future.

#### Executive is key – perception of Executive reaction weighs heavily on the Court’s decisions.

Barry Friedman, December 2005, “The Politics of Judicial Review,” Texas Law Review, 84 Tex. L. Rev. 257, December 2005, Lexis

Even a quick glance at history, however, suggests that there is something to the constitutional separation-of-powers game. Although amending the Constitution is difficult, the political branches retain a broad arsenal of weapons to use against a troublesome judiciary. Judges may be impeached, jurisdiction may be stripped, courts may be packed, and judicial [\*314] budgets may be cut. 313 It is not as if the other players have no moves in response to constitutional decisions they dislike. 314 It is true that the other branches rarely deploy these weapons against the judiciary - at least in recent memory - but the doctrine of anticipated reaction holds that the political branches can both keep the powder dry and the judiciary in check. History is certainly replete with instances in which these measures have been employed. 315 A candid view of that history, as well as some empirical study, compel the conclusion that judicial change in constitutional doctrine is correlated with utilization of these court-disciplining measures, or the threat to do so. Under threat of judicial impeachments, John Marshall offered to give up the judiciary's last word on constitutional questions. 316 Jurisdiction was stripped in a manner that prevented the Supreme Court from ruling on the constitutionality of Reconstruction at a critical moment, and the Court acquiesced. 317 The Court's size was changed at several points during the Civil War and Reconstruction and, in at least one famous instance, this had an immediate and substantial impact. 318 Roosevelt's Court-packing plan did not succeed in changing the size of the Court, but the doctrine itself changed quickly enough [\*315] thereafter. 319 Congress threatened to strip jurisdiction after Red Monday and the Court moderated its views. 320 To this day, Justices demonstrate an awareness of these historical events as a nod toward the Court's relatively fragile position. 321 The game need not be one of all sticks and no carrots. The Court has more at stake than avoiding attack. Preserving institutional integrity and power requires judges to ensure that their orders are implemented by the other branches. 322 The Supreme Court can bluster all it wants about its place as ultimate interpreter of the Constitution, but implementation is not guaranteed, and the Court is unlikely to go ordering a lot of things that are just not going to happen. 323 Andrew Jackson's apocryphal quip, "John Marshall has made his order, now let him enforce it," captures the sentiment, as did Georgia's hanging of Corn Tassels after Marshall's Court ordered it not to. 324 In recent memory, the Court was careful to ensure that Richard Nixon would comply with its order compelling the production of the tapes before issuing it. 325 As with the sticks, there is evidence that implementing the carrot has its influence on the Court. 326 [\*316] There are reasons to believe the separation-of-powers game actually is easier to play in the constitutional than in the statutory area. William Eskridge and Phillip Frickey explain the importance of "signals" to the interbranch game. 327 Signals by the players permit the other players to calculate what the response to a given decision might be. In the constitutional area the issues are often quite salient, so the Court receives lots of information about what reaction to anticipate. 328 This is particularly the case if one takes account of the President's role in the separation-of-powers game, which much of the positive literature does not. The President not only fills an essential institutional role with regard to implementation of judicial orders and challenges to judicial authority, but he also has the bully pulpit and plays a clear leadership role. 329 The President also has an agent - the Solicitor General - who appears regularly before the Court and whose influence there is demonstrable. 330 Thus, in constitutional cases the Justices have plenty of leads to follow, enough so it would seem that they could coordinate their behavior tacitly. 3. The Constrained Court. - It should come as little surprise, then, to learn that scholars are increasingly finding evidence that the Supreme Court faces constraint in constitutional cases. Empirical work demonstrates the relationship between judicial activism and court-curbing measures - overly activist Justices call such measures down upon themselves and then back away in response. 331 One study shows that the Court moderates its views in [\*317] constitutional cases in accord with presidential preferences. 332 And a recent study shows that the most current binge of judicial activism toward congressional enactments - the subject of profound academic complaint - is a perfectly predictable outcome of the separation-of-powers game. 333 That binge began in 1994, the year that Republicans took both houses of Congress, making it unlikely that there would be much movement to curb judicial activity - especially when one recognizes that most of what the Court was striking at the time were enactments of an earlier (more liberal, Democratic) Congress.

#### Ruling on the aff trades off with the court’s willingness to anger the same constituency – they’d issue a make up call on Aff Action

Peretti 1 - Terri Jennings Peretti, Professor of Political Science at Santa Clara University, 2001, In Defense of a Political Court, p. 152-153

To the degree that a justice cares deeply about her policy goals, she will be quite attentive to the degree of support and opposition among interest groups and political leaders for those goals. she will be aware of the re­sources (e.g., commitment, wealth, legitimacy) that the relevant interest groups possess who bear the burden of both carrying forward the appropri­ate litigation necessary for policy success and for pressuring the other branches for full and effective implementation. Only the policy-motivated justice will care about the willingness of other government officials to comply with the Court’s decisions or carry them out effectively. And only the policy-motivated justice will care about avoiding the application of political sanc­tions against the Court that might foreclose all future policy options.

The school desegregation cases illustrate these points quite nicely. The Court could not pursue the goal of racial integration and racial equality until there was an organized and highly regarded interest group such as the Na­tional Association for the Advancement of Colored People willing and able to help. The Court further was required to protect that group from political attack, as it did in NAACP v. Alabama’03 and NAACP v. Button.’04 Avoidance of other decisions that might harm its desegregation efforts was also deemed necessary. Thus, the Court had legal doctrine available to void anti discrimination statutes, but refused to do so on two occasions.’05 (Murphy notes that one justice was said to remark upon leaving the conference discussion, “One bombshell at a time is enough.”’06) The Court additionally softened the blow by adopting its “deliberate speed” implementation formula. Even so, the Court still needed the active cooperation of a broad range of government officials, in all branches and at all levels of government, in order to carry out its decisions effectively. Thus, significant progress in racial integration in the southern schools did not in fact occur until Congress and the Department of Health, Education, and Welfare decided to act. The Court further had to consider whether the political opposition that it knew would ensue would be sufficient to result in sanctions against the Court, such as withdrawal of jurisdiction or impeachment.. These considerations arose only in the process of caring deeply about the policy goal at hand—racial equality in public education. They were not a by-product of caring only about the logical or precedential consistency of an opinion or of worrying only about deriving a decision from the Framers' intentions.

#### Affirmative action is crucial to military readiness

Julie W. Becton Jr, Lt. Gen., 2-19-2003, “Amicus Curiae Brief,” http://www.vpcomm.umich.edu/admissions/legal/gru\_amicus-ussc/um/MilitaryL-both.pdf

The modern American military candidly acknowledges the critical link between minority officers and military readiness and effectiveness. "[T]he current leadership views complete racial integration as a military necessity – that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenge of diversity is [-18-] critical to national security." President’s Report § 7.1. The military’s continuing, race-conscious efforts to increase the percentage of minority officers have achieved some results, but this progress must continue. See Dep’t of Def., Population Representation in the Military Services 4-8 (Nov. 1998). Accordingly, the armed forces strive to identify and train the best qualified minority candidates to serve as officers. Infra at 18-27. As we show, these efforts include \*race-conscious recruiting, preparatory, and admissions policies\* at the service academies and in ROTC programs – efforts that underscore the military’s resolve to do what is necessary and effective to integrate the officer corps.

#### Readiness solves nuclear war

Robert Kagan, senior fellow @ Carnegie, 7-19-2007, “End of Dreams, Return of History,” <http://www.hoover.org/publications/policyreview/8552512.html>

The jostling for status and influence among these ambitious nations and would-be nations is a second defining feature of the new post-Cold War international system. Nationalism in all its forms is back, if it ever went away, and so is international competition for power, influence, honor, and status. American predominance prevents these rivalries from intensifying — its regional as well as its global predominance. Were the United States to diminish its influence in the regions where it is currently the strongest power, the other nations would settle disputes as great and lesser powers have done in the past: sometimes through diplomacy and accommodation but often through confrontation and wars of varying scope, intensity, and destructiveness. One novel aspect of such a multipolar world is that most of these powers would possess nuclear weapons. That could make wars between them less likely, or it could simply make them more catastrophic.

## T

#### Restrictions are prohibitions on action --- the aff is oversight

Jean Schiedler-Brown 12, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.pdf

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation.

Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as;

A limitation often imposed in a deed or lease respecting the use to which the property may be put. The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as; To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment.

Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

#### Restrictions on authority are distinct from conditions

William Conner 78, former federal judge for the United States District Court for the Southern District of New York United States District Court, S. D. New York, CORPORACION VENEZOLANA de FOMENTO v. VINTERO SALES, http://www.leagle.com/decision/19781560452FSupp1108\_11379

Plaintiff next contends that Merban was charged with notice of the restrictions on the authority of plaintiff's officers to execute the guarantees. Properly interpreted, the "conditions" that had been imposed by plaintiff's Board of Directors and by the Venezuelan Cabinet were not "restrictions" or "limitations" upon the authority of plaintiff's agents but rather conditions precedent to the granting of authority. Essentially, then, plaintiff's argument is that Merban should have known that plaintiff's officers were not authorized to act except upon the fulfillment of the specified conditions.

#### Vote neg---

#### Neg ground---only prohibitions on particular actions guarantee links to every core argument like flexibility and deference

#### Precision---only our interpretation defines “restrictions on authority”---that’s key to adequate preparation and policy analysis

#### Limits---there are an infinite number of small hoops they could require the president to jump through---overstretches our research burden

## Deference DA

#### all federal courts are either siding with the executive’s terror policies through narrow rulings or declining to even hear the cases---past rulings are being distinguished

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive's position, it generally has done so on relatively narrow grounds.¶ Consider the Espionage Act cases that arose during World War I. Schenck v. United States, n63 which is best known for Justice Holmes's [\*452] announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant's having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." n64 The circumstances in which the speech took place affected the scope of First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." n65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort n66 and of Eugene Debs for a speech denouncing the war. n67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, n68 but only Justice Brandeis agreed with his position. n69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes's opinions for the Court in the earlier cases. n70¶ Similarly, the Supreme Court rejected challenges to the government's war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs. n71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts. n72 In addition, the Court upheld the validity of the Japanese internment program. n73 Of course, the Court did limit the scope of the [\*453] program by holding that it did not apply to "concededly loyal" citizens. n74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. n75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees. n76¶ The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. n77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, n78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. n79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges. n80¶ The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch's position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld n81 held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O'Connor's plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force n82 and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S. [\*454] citizens. n83 Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, n84 which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi's detention was unlawful and that he should be released on habeas corpus, n85 whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. n86 This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government's detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality's remand order. n87¶ Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In Hamdan v. Rumsfeld, n88 the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. n89 A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case. n90¶ Congress responded to that suggestion by enacting the Military Commissions Act of 2006, n91 which sought to endorse the executive's detainee policies and to restrict judicial review of detainee cases. In Boumediene v. Bush, n92 the Supreme Court again rejected the government's position. First, the statute did not suspend the writ of [\*455] habeas corpus. n93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. n94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive branch in dealing with the dangers of terrorism n95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. n96¶ Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post-Boumediene detainee case in which review was sought. n97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. n98 About a month after this symposium took place, in Hamdan v. United States n99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. n100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. n101 It remains to be seen how broadly the decision will apply. [\*456] ¶ Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case. n109

#### Court interference decks the Executive flexibility necessary to solve prolif, terror, and the rise of hostile powers---link threshold is low

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16

The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22

 [\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation

Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations.

(1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27

(2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28

(3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30

(4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32

(5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34

 [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39

Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

#### terror causes extinction---equivalent to full-scale nuclear war

Owen B. Toon 7, chair of the Department of Atmospheric and Oceanic Sciences at CU-Boulder, et al., April 19, 2007, “Atmospheric effects and societal consequences of regional scale nuclear conflicts and acts of individual nuclear terrorism,” online: http://climate.envsci.rutgers.edu/pdf/acp-7-1973-2007.pdf

To an increasing extent, people are congregating in the world’s great urban centers, creating megacities with populations exceeding 10 million individuals. At the same time, advanced technology has designed nuclear explosives of such small size they can be easily transported in a car, small plane or boat to the heart of a city. We demonstrate here that a single detonation in the 15 kiloton range can produce urban fatalities approaching one million in some cases, and casualties exceeding one million. Thousands of small weapons still exist in the arsenals of the U.S. and Russia, and there are at least six other countries with substantial nuclear weapons inventories. In all, thirty-three countries control sufficient amounts of highly enriched uranium or plutonium to assemble nuclear explosives. A conflict between any of these countries involving 50-100 weapons with yields of 15 kt has the potential to create fatalities rivaling those of the Second World War. Moreover, even a single surface nuclear explosion, or an air burst in rainy conditions, in a city center is likely to cause the entire metropolitan area to be abandoned at least for decades owing to infrastructure damage and radioactive contamination. As the aftermath of hurricane Katrina in Louisiana suggests, the economic consequences of even a localized nuclear catastrophe would most likely have severe national and international economic consequences. Striking effects result even from relatively small nuclear attacks because low yield detonations are most effective against city centers where business and social activity as well as population are concentrated. Rogue nations and terrorists would be most likely to strike there. Accordingly, an organized attack on the U.S. by a small nuclear state, or terrorists supported by such a state, could generate casualties comparable to those once predicted for a full-scale nuclear “counterforce” exchange in a superpower conflict. Remarkably, the estimated quantities of smoke generated by attacks totaling about one megaton of nuclear explosives could lead to significant global climate perturbations (Robock et al., 2007). While we did not extend our casualty and damage predictions to include potential medical, social or economic impacts following the initial explosions, such analyses have been performed in the past for large-scale nuclear war scenarios (Harwell and Hutchinson, 1985). Such a study should be carried out as well for the present scenarios and physical outcomes.

#### Proliferation causes nuclear war

Matthew Kroenig 12, Assistant Professor of Government, Georgetown University and Stanton Nuclear Security Fellow, Council on Foreign Relations, “The History of Proliferation Optimism: Does It Have A Future?” Prepared for the Nonproliferation Policy Education Center, May 26, 2012, <http://www.npolicy.org/article.php?aid=1182&tid=30>

Further proliferation. Nuclear proliferation poses an additional threat to international peace and security because it causes further proliferation. As former Secretary of State George Schultz once said, “proliferation begets proliferation.”[69] When one country acquires nuclear weapons, its regional adversaries, feeling threatened by its neighbor’s new nuclear capabilities, are more likely to attempt to acquire nuclear weapons in response. Indeed, the history of nuclear proliferation can be read as a chain reaction of proliferation. The United States acquired nuclear weapons in response to Nazi Germany’s crash nuclear program. The Soviet Union and China acquired nuclear weapons to counter the U.S. nuclear arsenal. The United Kingdom and France went nuclear to protect themselves from the Soviet Union. India’s bomb was meant to counter China and it, in turn, spurred Pakistan to join the nuclear club. Today, we worry that, if Iran acquires nuclear weapons, other Middle Eastern countries, such as Egypt, Iraq, Turkey, and Saudi Arabia, might desire nuclear capabilities, triggering an arms race in a strategically important and volatile region.¶ Of course, reactive proliferation does not always occur. In the early 1960s, for example, U.S. officials worried that a nuclear-armed China would cause Taiwan, Japan, India, Pakistan, and other states to acquire nuclear weapons.[70] In hindsight, we now know that they were correct in some cases, but wrong in others. Using statistical analysis, Philipp Bleek has shown that reactive proliferation is not automatic, but that rather, states are more likely to proliferate in response to neighbors when three conditions are met 1) there is an intense security rivalry between the two countries, 2) the potential proliferant state does not have a security guarantee from a nuclear-armed patron 3) and the potential proliferant state has the industrial and technical capacity to launch an indigenous nuclear program.[71] In other words, reactive proliferation is real, but it is also conditional. If Iran enters the nuclear club, therefore, it is likely that some, but not all, of the countries that we currently worry about will eventually follow suit and become nuclear powers.¶ We should worry about the spread of nuclear weapons in every case, therefore, because the problem will likely extend beyond that specific case. As Wohlstetter cautioned decades ago, proliferation is not an N problem, but an N+1 problem. Further nuclear proliferation is not necessarily a problem, of course, if the spread of nuclear weapons is irrelevant or even good for international politics as obsessionists and optimists protest. But, as the above discussion makes clear, nuclear proliferation, and the further nuclear proliferation it causes, increases the risk of nuclear war and nuclear terrorism, emboldens nuclear-armed states to be more aggressive, threatens regional stability, constrains U.S. freedom of action, and weakens America’s alliance relationships, giving us all good reason to fear the spread of nuclear weapons.

## RoL K

#### The plan identifies the non-Western world as a space devoid of the rule of law---that sets the stage for aggressive intervention and colonial plunder, which locks in neoliberal structural violence---and their ev is based on distorted representations of the rule of law that have no relationship to reality

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Within this framework, Western law has constantly enjoyed a dominant position during the past centuries and today, thus being in the position to shape and bend the evolution of other legal systems worldwide. During the colonial era, continental-European powers have systematically exported their own legal systems to the colonized lands. During the past decades and today, the United States have been dominating the international arena as the most powerful economic power, exporting their own legal system to the ‘periphery’, both by itself and through a set of international institutions, behaving as a neo-colonialist within the ideology known as neoliberalism.

Western countries identify themselves as law-abiding and civilized no matter what their actual history reveals. Such identification is acquired by false knowledge and false comparison with other peoples, those who were said to ‘lack’ the rule of law, such as China, Japan, India, and the Islamic world more generally. In a similar fashion today, according to some leading economists, Third World developing countries ‘lack’ the minimal institutional systems necessary for the unfolding of a market economy.

The theory of ‘lack’ and the rhetoric of the rule of law have justified aggressive interventions from Western countries into non-Western ones. The policy of corporatization and open markets, supported today globally by the so-called Washington consensus3, was used by Western bankers and the business community in Latin America as the main vehicle to ‘open the veins’ of the continent—to borrow Eduardo Galeano’s metaphor4—with no solution of continuity between colonial and post-colonial times. Similar policy was used in Africa to facilitate the forced transfer of slaves to America, and today to facilitate the extraction of agricultural products, oil, minerals, ideas and cultural artefacts in the same countries. The policy of opening markets for free trade, used today in Afghanistan and Iraq, was used in China during the nineteenth century Opium War, in which free trade was interpreted as an obligation to buy drugs from British dealers. The policy of forcing local industries to compete on open markets was used by the British empire in Bengal, as it is today by the WTO in Asia, Africa, and Latin America.

Foreign-imposed privatization laws that facilitate unconscionable bargains at the expense of the people have been vehicles of plunder, not of legality. In all these settings the tragic human suffering produced by such plunder is simply ignored. In this context law played a major role in legalizing such practices of powerful actors against the powerless.5 Yet, this use of power is scarcely explored in the study of Western law.

The exportation of Western legal institutions from the West to the ‘rest’ has systematically been justified through the ideological use of the extremely politically strong and technically weak concept of ‘rule of law’. The notion of ‘rule of law’ is an extremely ambiguous one. Notwithstanding, within any public discussion its positive connotations have always been taken for granted. The dominant image of the rule of law is false both historically and in the present, because it does not fully acknowledge its dark side. The false representation starts from the idea that good law (which others ‘lack’) is autonomous, separate from society and its institutions, technical, non-political, non-distributive and reactive rather than proactive: more succinctly, a technological framework for an ‘efficient’ market.

The rule of law has a bright and a dark side, with the latter progressively conquering new ground whenever the former is not empowered by a political soul. In the absence of such political life, the rule of law becomes a cold technology. Moreover, when large corporate actors dominate states (affected by a declining regulatory role), law becomes a product of the economy, and economy governs the law rather than being governed by it.

#### Notions of US legal prestige and modeling solidify global inequality by replacing political violence with legal violence---turns the case because it subordinates effective domestic systems to predatory rule of law models

Ugo Mattei 3, Alfred and Hanna Fromm Professor of International and Comparative Law, ¶ U.C. Hastings; Professore Ordinario di Diritto Civile, Università di Torino A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance, ic.ucsc.edu/~rlipsch/pol160A/Mattei.pdf

This essay attempts to develop a theory of imperial law that is able to explain postCold War changes in the general process of Americanization in legal thinking. My claim is that “imperial law” is now a dominant layer of world-wide legal systems.1 Imperial law is produced, in the interest of international capital, by a variety of both public and private institutions, all sharing a gap in legitimacy, sometimes called the “democratic deficit.” Imperial law is shaped by a spectacular process of exaggeration, aimed at building consent for the purpose of hegemonic domination. Imperial law subordinates local legal arrangements world-wide, reproducing on the global scale the same phenomenon of legal dualism that thus far has characterized the law of developing countries. Predatory economic globalization is the vehicle, the all-mighty ally, and the beneficiary of imperial law. Ironically, despite its absolute lack of democratic legitimacy, imperial law imposes as a natural necessity, by means of discursive practices branded “democracy and the rule of law,” a reactive legal philosophy that outlaws redistribution of wealth based on social solidarity.2 At the core of imperial law there is U.S. law, as transformed and adapted after the Reagan-Thatcher revolution, in the process of infiltrating the huge periphery left open after the end of the Cold War. A study of imperial law requires a careful discussion of the factors of penetration of U.S. legal consciousness world-wide, as well as a careful distinction between the context of production and the context of reception3 of the variety of institutional arrangements that make imperial law. Factors of resistance need to be fully appreciated as well.

I. AMERICAN LAW: FROM LEADERSHIP TO DOMINANCE The years following the Second World War have shown a dramatic change in the pattern of world hegemony in the law. Leading legal ideas, once produced in Continental Civilian Europe and exported through the periphery of the world, are now for the first time produced in a common law jurisdiction: the United States.4 There is little question that the present world dominance of the United States has been economic, military, and political first, and legal only in a more recent moment, so that a ready explanation of legal hegemony can be found with a simple Marxist explanation of law as a superstructure of the economy.5 Nevertheless, the question of the relationship between legal, political, and economic hegemony is not likely to be correctly addressed within a cause-and-effect paradigm.6 Ultimately, addressing this question is a very important area of basic jurisprudential research because it reveals some general aspects about the nature of law as a device of global governance.

Observing historical patterns of legal hegemony allows us to critique the distinction between two main patterns of governance through the law (and of legal transplants).7 Scholars of legal transplants have traditionally distinguished two patterns. The first is law as dominance without hegemony, in which the legal system is ultimately a coercive apparatus asserting political and economic power without consent. This area of inquiry and this model have been used to explain the relationship between the legal system of the motherland and that of the colonies within imperialistic colonial enterprises. The opposing pattern, telling a story of consensual voluntary reception by an admiring periphery of legal models developed and provided for at the center, is usually considered the most important pattern of legal transplants. It is described by stressing on the idea of consent within a notion of “prestige.”8

Little effort is necessary to challenge the sufficiency of this basic taxonomy in introducing legal transplants. Law is a detailed and complex machinery of social control that cannot function with any degree of effectiveness without some cooperation from a variety of individuals staffing legal institutions. These individuals usually consist of a professional elite which either already exists or is created by the hegemonic power. Such an elite provides the degree of consent to the reception of foreign legal ideas that is necessary for any legal transplant to occur. Hence, the distinction between imperialistic and non-imperialistic transplants is a matter only of degree and not of structure. In order to understand the nature of present legal hegemony, it is necessary to capture the way in which the law functions to build a degree of consent to the present pattern of international economic and political dominance.9

In this essay I suggest that a fundamental cultural construct of presumed consent is the rhetoric of democracy and the rule of law utilized by the imperial model of governance, 10 triumphant worldwide together with the neo-American model of capitalism developed by the Reagan and Thatcher revolution early in the 1980s. I argue that the last twenty years have produced the triumph in global governance of reactive, politically irresponsible institutions, such as the courts of law, over proactive politically accountable institutions such as direct administrative apparatuses of the State.11

This essay attempts to open a radical revision of some accepted modes of thought about the law as they appear today, at what has been called “the end of history.”12 Its aim is to discuss some ways in which global legality has been created in the present stage of world-wide legal development. It will show how democracy and the rule of law, in the present legal landscape, are just another rhetoric of legitimization of a given international dynamic of power. It will also denounce the present unconscious state in which the law is produced and developed by professional “consent building” elites. The consequences of such unconsciousness are creating a legal landscape in which the law is “naturally” giving up its role of constraining opportunistic behavior of market actors. This process results in the development of faked rules and institutions that are functional to the interests of the great capital and that dramatically enlarge inequality within society. I predict that such a legal environment is unable to avoid tragic results on a global scale such as those outlined in the well-known parable of the tragedy of the commons.13

My object of observation is a legal landscape in transition. I wish to analyze this path of transition from one political setting (the local state) to another political setting (world governance) in which American-framed reactive institutions are asserting themselves as legitimate and legitimating governing bodies, which I call imperial law. Imperial law is the product of a renowned alliance between state and economic institutions, a cooperative game in which a very limited number of powerful players are at play.14 While in the ages of colonialism such political battles for international hegemony were mostly carried on with an open use of force and political violence (in such a way that final extensive conflict between superpowers was unavoidable), in the age of globalization and of economic Empire political violence has been transformed into legal violence.

#### Our alternative is to reject their emphasis on Western-models of law in favor of a fundamental rethink of democracy from the bottom-up

Ugo Mattei 9, Professor at Hastings College of the Law & University of Turin; and Marco de Morpurgo, M.Sc. Candidate, International University College of Turin, LL.M. Candidate, Harvard Law School, 2009, “GLOBAL LAW & PLUNDER: THE DARK SIDE OF THE RULE OF LAW,” online: <http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=bocconi_legal_papers>

In the complex spectrum of global law, both throughout the era of colonialism and neo-liberal US-led Western imperialism within a pattern of continuity, the rule of law, together with the theory of ‘lack’ and other powerful rhetorical arguments, has been used in order to legitimize political interventions and plunder in the ‘emerging’ economies. The sacred concept of rule of law, whose positive connotations are ‘naturally’ assumed, has been portrayed as the embodiment of a professional and neutral technology, thus being capable of substituting the lack of democratic legitimacy of the institutions that are protagonist in the creation of global law. But its dark side has never been shown or discussed. An imperial rule of law is now a dominant layer for the worldwide legal systems. It is produced, in the interest of international capital, by a variety of institutions, both public and private, all sharing a gap in political legitimacy sometimes referred to as ‘democratic deficit’.31 At the same time, law has been constructively turned into a technology and a mere component of an economic system of capitalism, thus hiding its intrinsic political nature, and annulling the relevance of local political systems, now impotent in front of the dynamics of global law. The ‘dry technology’ of the rule of law penetrates worldwide legal systems without any political discussion at the local level, attempting to create the conditions for the development of market economies, often without success, and causing serious consequences for the less powerful.

Under the technology of the rule of law, in its imperial version capable of producing plunder, the essence of the United States’ law hides. In the aftermath of World War II, there was a dramatic change in the pattern of Western legal development. Leading legal ideas once produced in continental Europe and exported through the colonized world are now, for the first time, produced in a common law jurisdiction: the United States. Clearly, the present world dominance of the United States has been economic, military and political first, and only recently legal, so that a ready explanation of legal hegemony can be found within a simple conception of law as a product of the economy.32 Furthermore, US law has been capable of expanding worldwide thanks to its prestige, the high level of professionalization of its attorneys and a series of procedural institutions, that benefit plaintiffs, that allow US courts to have a certain capacity to attract jurisdiction, while showing themselves as courts for universal justice.33

The general attitude of the United States has been a very ethnocentric one, and precisely that of showing itself as the guardian of a universal legality, which it is legitimized to export through its courts of law, scholarly production, military and political intervention, and through a set of US-centric international institutions. In recent times, in particular after September 11th 2001 and the declaration of the ‘war on terror’, the US rule of law has come under attack 34, so that once admiring crowds of lawyers and intellectuals worldwide are now beginning to look upon the United States as an uncivilized old West from the perspective of legal culture, despite the professional prestige still enjoyed by the giant New York law firms and by the US academy.

Notwithstanding, there has been no decline in the rhetoric of the rule of law when it comes to foreign relations. Bringing democracy and the rule of law is still used as a justification to keep intruding in foreign affairs. The same can be said for the international financial institutions and their innumerable ‘development’ projects that come packaged with the prestigious wrapping of the rule of law.

A rethinking of the very idea of global law is necessary and it must derive from a revaluation of the local dimension, which is currently ignored by the neo-liberal model of development. The production of global law should change its direction, and follow a bottom-up approach, rather than a top-down one, thus being sensitive to the local particularities and complexities. Western spectacular ideas of democracy and the rule of law should be rethought. On this planet, resources are scarce, but there would be more than enough for all to live well. Nobody would admire and respect someone who, at a lunch buffet for seven, ate 90 percent of the food, leaving the other guests to share an amount insufficient for one. In a world history of capitalism in which the rule of law has reproduced this precise ‘buffet’ arrangement on the large scale, admiring the instruments used to secure such an unfair arrangement seems indeed paradoxical. People have to be free to build their own economies.

There is nothing inevitable about the present arrangements and their dominant and taken-for granted certainties. Indeed, it may be that the present legal and political hegemonies suffer from lack: the lack of world culture and of global political realism.

## CP

#### Counterplan text:

The United States Congress should restrict indefinite detention by applying a clear statement principle to the statutorily defined indefinite detention war powers authority of the President of the United States.

## Afghanistan Adv

#### No one models US courts

Mila Versteeg 13, Associate Professor at the University of Virginia School of Law. Model, Resource, or Outlier? What Effect Has the U.S. Constitution Had on the Recently Adopted Constitutions of Other Nations?, 29 May 2013, www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations

Unsurprisingly, attempting to gauge one constitution’s “influence” on another involves various conceptual and methodological challenges. To illustrate, a highly generic constitution may be generic because others have followed its lead, because it has modeled others, or simply by coincidence. That said, if two constitutions are becoming increasingly dissimilar, by definition, one cannot be following the other. That is, neither is exerting influence on the other (at least not in a positive way).

This is the phenomenon we observed in comparing the U.S. Constitution to the rest of the world; based on the rights index, the U.S. has become less similar to the world since 1946 and, with a current index of 0.30, is less similar now than at any point during the studied period. This phenomenon has occurred even among current American allies; among countries in regions with close cultural and historic ties to the U.S. (namely, Latin America and Western Europe); and among democracies. Only among common law countries is constitutional similarity higher than it was after World War II, but even that similarity has decreased since the 1960s.

Rights provisions are not the only constitutional elements that have lost favor with the rest of the world; structural provisions pioneered by American constitutionalism—such as federalism, presidentialism, and judicial review—have also been losing their global appeal.

For instance, in the early 20th century, 22 percent of constitutions provided for federalistic systems, while today, just 12 percent do.

A similar trend has occurred for presidentialism, another American innovation. Since the end of World War II, the percentage of countries employing purely presidential systems has declined, mainly in favor of mixed systems, which were a favorite of former Soviet bloc countries.

Finally, though judicial review is not mentioned in the U.S. Constitution, it has proved the most popular American structural innovation. But though the popularity of judicial review in general has exploded over the past six decades, most countries have opted for the European style of review (which designates a single, constitutional court which alone has the power to nullify laws inconsistent with the constitution) over the American model (in which all courts are empowered to strike unconstitutional laws). In 1946, over 80 percent of countries exercised American-style constitutional review; today, fewer than half do.

Reasons for the Decline

It appears that several factors are driving the U.S. Constitution’s increasing atypicality. First, while in 2006 the average national constitutions contained 34 rights (of the 60 we identify), the U.S. Constitution contains relatively few—just 21—and the rights it does contain are often themselves atypical.

Just one-third of constitutions provide for church and state separation, as does the U.S. Establishment Clause, and only 2 percent of constitutions (including, e.g., Mexico and Guatemala) contain a “right to bear arms.” Conversely, the U.S. Constitution omits some of the most globally popular rights, such as women’s rights, the right to social security, the right to food, and the right to health care.

These peculiarities, together with the fact that the U.S. Constitution is both old and particularly hard to amend, have led some to characterize the Constitution as simply antiquated or obsolete.

#### Stability increasing

DoD July 2013, Department of Defense, July 2013, "Report on¶ Progress Toward Security and¶ Stability in Afghanistan," http://www.defense.gov/pubs/Section\_1230\_Report\_July\_2013.pdf¶

The conflict in Afghanistan has shifted into a fundamentally new phase. For the past 11 years, ¶ the United States and our coalition partners have led the fight against the Taliban, but now ¶ Afghan forces are conducting almost all combat operations. The progress made by the ¶ International Security Assistance Force (ISAF)-led surge over the past three years has put the ¶ Government of the Islamic Republic of Afghanistan (GIRoA) firmly in control of all of ¶ Afghanistan’s major cities and 34 provincial capitals and driven the insurgency into the ¶ countryside. ISAF’s primary focus has largely transitioned from directly fighting the insurgency ¶ to training, advising and assisting the Afghan National Security Forces (ANSF) in their efforts to ¶ hold and build upon these gains, enabling a U.S. force reduction of roughly 34,000 personnel—¶ half the current force in Afghanistan—by February 2014. ¶ As agreed by President Obama and President Karzai at their January 2013 meeting in ¶ Washington, D.C., and in line with commitments made at the Lisbon and Chicago NATO ¶ summits, "Milestone 2013" was announced on June 18, 2013, marking ISAF’s official transition ¶ to its new role. The ANSF has grown to approximately 96 percent of its authorized end-strength ¶ of 352,000 personnel and is conducting almost all operations independently. As a result, ISAF ¶ casualties are lower than they have been since 2008. The majority of ISAF bases has been ¶ transferred to the ANSF or closed (although most large ISAF bases remain), and construction of¶ most ANSF bases is complete. Afghanistan’s populated areas are increasingly secure; the ANSF ¶ has successfully maintained security gains in areas that have transitioned to Afghan lead ¶ responsibility. To contend with the continuing Taliban threat, particularly in rural areas, the ¶ ANSF will require training and key combat support from ISAF, including in extremis close air ¶ support, through the end of 2014.

#### Great power cooperation is far more likely --- they will also prevent a civil war

Hadar 11—former prof of IR at American U and Mount Vernon-College. PhD in IR from American U (1 July 2011, Leon, Saving U.S. Mideast Policy, http://nationalinterest.org/commentary/saving-us-policy-the-mideast-5556)

Indeed, contrary to the warning proponents of U.S. military intervention typically express, the withdrawal of American troops from Iraq and Afghanistan would not necessarily lead to more chaos and bloodshed in those countries. Russia, India and Iran—which supported the Northern Alliance that helped Washington topple the Taliban—and Pakistan (which once backed the Taliban) all have close ties to various ethnic and tribal groups in that country and now have a common interest in stabilizing Afghanistan and containing the rivalries.

## Abstention Adv

#### Increase arms sales are key to implement the Asia pivot.

Jonathan Caverley 12, Assistant Professor at Northwestern University, and Ethan B. Kapstein, Professor at the University of Texas at Austin, a Visiting Professor at Georgetown University, and a Senior Fellow at the Center for a New American Security, “Arms Away,” Foreign Affairs. Sep/Oct2012, Vol. 91 Issue 5, p. 125-132.

THE NEXT ARMS RACE¶ IF THE United States' sliding market share were just an economic matter, one might simply dismiss the issue by arguing that the country's defense industry, which must report to its shareholders, will soon be forced to face the consequences of its business strategy and retrench. But unlike other sectors, arms dealing has a geopolitical dimension, especially in Asia's booming export market, as well as an economic one.¶ When Washington inks a weapons deal, the partner country is unlikely to deploy those arms in a manner at odds with the United States' interests, which would threaten its access to those very weapons. So the more weapons Washington sells, the more control it has over security decisions made abroad. More specifically, Washington can exploit its market power to advance important foreign policy objectives. In 2005, for example, Washington suspended Israel's access to the F-35 program to force Jerusalem to stop selling unmanned aerial vehicle parts to China. The United States has used similar tactics to prevent Brazil and Spain from selling aircraft to Venezuela.¶ With Washington's interests turning toward Asia, arms sales make it possible for the United States to arm its Pacific allies and, at the same time, keep China isolated. This can be done in a direct manner, such as when the United States uses access to its domestic arms market to encourage European Union states to maintain the weapons embargo on China that dates back to the 1989 Tiananmen Square killings. But there is an indirect route, as well. By using its competitive advantage to shrink Russia's export market, the United States could make China's principal arms supplier less appealing.¶ In recent years, Russia has done a particularly good job servicing weapons needs across Asia. A firm such as Sukhoi, a major Russian aircraft manufacturer, knows it cannot rely on domestic orders alone for its survival. Over the last decade, it has succeeded in selling fairly inexpensive fighter jets to countries such as Indonesia and Malaysia. European producers, too, have ramped up production. Since 1990, firms across the continent have developed at least two new fighter jets in addition to France's Rafale. Sweden has sold its Gripen single-engine fighter to countries such as Hungary and Thailand; the Eurofighter, despite being inefficiently built on four separate assembly lines across the continent, has been sold to Austria and Saudi Arabia.¶ Meanwhile, signs of U.S. decline in the arms sphere in Asia abound. Pakistan's largest arms supplier is now China, Singapore is acquiring French naval vessels, and for the first time in its history, the Philippines is looking to non-American aircraft sources. These countries are less interested in the newest high-tech weaponry and more interested in medium-sized arms they can afford. Washington does not sell weapons to China or Russia, of course, and India purchases only a limited quantity. South Korea, a long-standing U.S. ally, has developed a growing domestic arms industry, producing, for example, diesel submarines that it exports to such countries as Indonesia. If Washington wants its "pivot" to Asia to stick, it needs to regain the ground in the arms market that it has lost.¶ All these shifts could prove destabilizing. As the United States risks losing its position as a principal arms supplier in the region, producers will proliferate, because small states entering the arms business have no choice but to be export-oriented to survive and grow. In essence, they need to produce as much as possible. U.S. firms, in contrast, can be more selective in their approach to exports, thanks to the large size of the United States' domestic market. Washington can withhold supplies, reducing the amount of advanced weaponry in the world. From a security and stability perspective, that is an advantage.

#### Key to prevent nuclear war.

Colby 11 – Elbridge Colby, research analyst at the Center for Naval Analyses, served as policy advisor to the Secretary of Defense’s Representative to the New START talks, expert advisor to the Congressional Strategic Posture Commission, August 10, 2011, “Why the U.S. Needs its Liberal Empire,” The Diplomat, online: http://the-diplomat.com/2011/08/10/why-us-needs-its-liberal-empire/2/?print=yes

But the pendulum shouldn’t be allowed to swing too far toward an incautious retrenchment. For our problem hasn’t been overseas commitments and interventions as such, but the kinds of interventions. The US alliance and partnership structure, what the late William Odom called the United States’ ‘liberal empire’ that includes a substantial military presence and a willingness to use it in the defence of US and allied interests, remains a vital component of US security and global stability and prosperity. This system of voluntary and consensual cooperation under US leadership, particularly in the security realm, constitutes a formidable bloc defending the liberal international order.¶ But, in part due to poor decision-making in Washington, this system is under strain, particularly in East Asia, where the security situation has become tenser even as the region continues to become the centre of the global economy.¶ A nuclear North Korea’s violent behaviour threatens South Korea and Japan, as well as US forces on the peninsula; Pyongyang’s development of a road mobile Intercontinental Ballistic Missile, moreover, brings into sight the day when North Korea could threaten the United States itself with nuclear attack, a prospect that will further imperil stability in the region.¶ More broadly, the rise of China – and especially its rapid and opaque military build-up – combined with its increasing assertiveness in regional disputes is troubling to the United States and its allies and partners across the region. Particularly relevant to the US military presence in the western Pacific is the development of Beijing’s anti-access and area denial capabilities, including the DF-21D anti-ship ballistic missile, more capable anti-ship cruise missiles, attack submarines, attack aircraft, smart mines, torpedoes, and other assets.¶ While Beijing remains a constructive contributor on a range of matters, these capabilities will give China the growing power to deny the United States the ability to operate effectively in the western Pacific, and thus the potential to undermine the US-guaranteed security substructure that has defined littoral East Asia since World War II. Even if China says today it won’t exploit this growing capability, who can tell what tomorrow or the next day will bring?¶ Naturally, US efforts to build up forces in the western Pacific in response to future Chinese force improvements must be coupled with efforts to engage Beijing as a responsible stakeholder; indeed, a strengthened but appropriately restrained military posture will enable rather than detract from such engagement. ¶ In short, the United States must increase its involvement in East Asia rather than decrease it. Simply maintaining the military balance in the western Pacific will, however, involve substantial investments to improve US capabilities. It will also require augmented contributions to the common defence by US allies that have long enjoyed low defence budgets under the US security umbrella. This won’t be cheap, for these requirements can’t be met simply by incremental additions to the existing posture, but will have to include advances in air, naval, space, cyber, and other expensive high-tech capabilities.¶ Yet such efforts are vital, for East Asia represents the economic future, and its strategic developments will determine which country or countries set the international rules that shape that economic future. Conversely, US interventions in the Middle East and, to a lesser degree, in south-eastern Europe have been driven by far more ambitious and aspirational conceptions of the national interest, encompassing the proposition that failing or illiberally governed peripheral states can contribute to an instability that nurtures terrorism and impedes economic growth. Regardless of whether this proposition is true, the effort is rightly seen by the new political tide not to be worth the benefits gained. Moreover, the United States can scale (and has scaled) back nation-building plans in Iraq, Afghanistan, and the Balkans without undermining its vital interests in ensuring the free flow of oil and in preventing terrorism.¶ The lesson to be drawn from recent years is not, then, that the United States should scale back or shun overseas commitments as such, but rather that we must be more discriminating in making and acting upon them. A total US unwillingness to intervene would pull the rug out from under the US-led structure, leaving the international system prey to disorder at the least, and at worst to chaos or dominance by others who could not be counted on to look out for US interests.¶ We need to focus on making the right interventions, not forswearing them completely. In practice, this means a more substantial focus on East Asia and the serious security challenges there, and less emphasis on the Middle East. ¶ This isn’t to say that the United States should be unwilling to intervene in the Middle East. Rather, it is to say that our interventions there should be more tightly connected to concrete objectives such as protecting the free flow of oil from the region, preventing terrorist attacks against the United States and its allies, and forestalling or, if necessary, containing nuclear proliferation as opposed to the more idealistic aspirations to transform the region’s societies. ¶ These more concrete objectives can be better met by the more judicious and economical use of our military power. More broadly, however, it means a shift in US emphasis away from the greater Middle East toward the Asia-Pacific region, which dwarfs the former in economic and military potential and in the dynamism of its societies. The Asia-Pacific region, with its hard-charging economies and growing presence on the global stage, is where the future of the international security and economic system will be set, and it is there that Washington needs to focus its attention, especially in light of rising regional security challenges. ¶ In light of US budgetary pressures, including the hundreds of billions in ‘security’ related money to be cut as part of the debt ceiling deal, it’s doubly important that US security dollars be allocated to the most pressing tasks – shoring up the US position in the most important region of the world, the Asia-Pacific. It will also require restraint in expenditure on those challenges and regions that don’t touch so directly on the future of US security and prosperity. ¶ As Americans debate the proper US global role in the wake of the 2008 financial crisis and Iraq and Afghanistan, they would do well to direct their ire not at overseas commitments and intervention as such, but rather at those not tied to core US interests and the sustainment and adaptation of the ‘liberal empire’ that we have constructed and maintained since World War II.¶ Defenders of our important overseas links and activities should clearly distinguish their cause from the hyperactive and barely restrained approach represented by those who, unsatisfied with seeing the United States tied down in three Middle Eastern countries, seek intervention in yet more, such as Syria. Indeed, those who refuse to scale back US interventions in the Middle East or call for still more are directly contributing to the weakening of US commitments in East Asia, given strategic developments in the region and a sharply constrained budgetary environment in Washington.¶ We can no longer afford, either strategically or financially, to squander our power in unnecessary and ill-advised interventions and nation-building efforts. The ability and will to intervene is too important to be so wasted.

#### No Russia war---no motive or capability

Betts 13 Richard is the Arnold A. Saltzman Professor of War and Peace Studies @ Columbia. “The Lost Logic of Deterrence,” Foreign Affairs, March/April, Vol. 92, Issue 2, Online

These continuities with the Cold War would make sense only between intense adversaries. Washington and Moscow remain in an adversarial relationship, but not an intense one. If the Cold War is really over, and the West really won, then continuing implicit deterrence does less to protect against a negligible threat from Russia than to feed suspicions that aggravate political friction. In contrast to during the Cold War, it is now hard to make the case that Russia is more a threat to NATO than the reverse. First, the East-West balance of military capabilities, which at the height of the Cold War was favorable to the Warsaw Pact or at best even, has not only shifted to NATO's advantage; it has become utterly lopsided. Russia is now a lonely fraction of what the old Warsaw Pact was. It not only lost its old eastern European allies; those allies are now arrayed on the other side, as members of NATO. By every significant measure of power -- military spending, men under arms, population, economic strength, control of territory -- NATO enjoys massive advantages over Russia. The only capability that keeps Russia militarily potent is its nuclear arsenal. There is no plausible way, however, that Moscow's nuclear weapons could be used for aggression, except as a backstop for a conventional offensive -- for which NATO's capabilities are now far greater.¶ Russia's intentions constitute no more of a threat than its capabilities. Although Moscow's ruling elites push distasteful policies, there is no plausible way they could think a military attack on the West would serve their interests. During the twentieth century, there were intense territorial conflicts between the two sides and a titanic struggle between them over whose ideology would dominate the world. Vladimir Putin's Russia is authoritarian, but unlike the Soviet Union, it is not the vanguard of a globe-spanning revolutionary ideal.

#### No war

Ryabikhin et al 9 [Dr. Leonid Ryabikhin, expert of the Russian Science Committee for Global Security, General (Ret.) Viktor Koltunov, Dr. Eugene Miasnikov, June 2009, “De-alerting: Decreasing the Operational Readiness of Strategic Nuclear Forces,” http://www.ewi.info/system/files/RyabikhinKoltunovMiasnikov.pdf]

The issue of the possibility of an “accidental” nuclear war itself is hypothetical. Both states have developed and implemented constructive organizational and technical measures that practically exclude launches resulting from unauthorized action of personnel or terrorists. Nuclear weapons are maintained under very strict system of control that excludes any accidental or unauthorized use and guarantees that these weapons can only be used provided that there is an appropriate authorization by the national leadership. Besides that it should be mentioned that even the Soviet Union and the United States had taken important bilateral steps toward decreasing the risk of accidental nuclear conflict. Direct emergency telephone “red line” has been established between the White House and the Kremlin in 1963. In 1971 the USSR and USA signed the Agreement on Measures to Reduce the Nuclear War Threat. This Agreement established the actions of each side in case of even a hypothetical accidental missile launch and it contains the requirements for the owner of the launched missile to deactivate and eliminate the missile. Both the Soviet Union and 5 the United States have developed proper measures to observe the agreed requirements.

#### Communications check

Ford 8 [Christopher, Senior Fellow at the Hudson Institute in Washington, D.C. former U.S. Special Representative for Nuclear Nonproliferation and former Principal Deputy Assistant Secretary of State for Verification, Compliance, and Implementation “Dilemmas of Nuclear Force ‘De-Alerting,’” <http://www.hudson.org/files/documents/De-Alerting%20FINAL2%20%282%29.pdf>]

The United States and Russia have also worked for years to improve communications, reduce misunderstandings, and develop ways to lessen the risk of inadvertent launch or other errors in their strategic relationship. Most readers will be familiar with the Direct Communications Link (the famous “hotline”) established in 1963. 27 In 1971, however, Washington and Moscow also signed an agreement establishing basic procedures to increase mutual consultation and notification regarding relatively innocent but potentially alarming activities – thereby reducing the risk of accidental nuclear war. 28 Since 1987, the two parties have also operated securely linked 24-hour communications centers – the U.S. node of which is the Nuclear Risk Reduction Center (NRRC) operated by the State Department 29 – which specialize in transmitting such things as the notifications required under arms control treaties. Pursuant to a 1988 memorandum, NRRC transmittals, which go directly to the Russian Ministry of Defense, include ballistic missile launch notifications. This link also proved useful to help prevent strategic tensions after the terrorist assault of September 11, 2001 – at which point U.S. officials used the NRRC to reassure their Russian counterparts that the sudden American security alert in the wake of the Manhattan and Pentagon attacks was not in any way an indication of impending U.S. belligerence vis-à-vis Russia.

#### The CCP knows war would collapse the regime---that’s comparatively their biggest fear

Twining 13—Senior Fellow for Asia at the German Marshall Fund of the United States. PhD in IR from Oxford (5/3/13, Dan, The dangerous domestic politics of U.S.-China relations, shadow.foreignpolicy.com/posts/2013/05/03/the\_dangerous\_domestic\_politics\_of\_us\_china\_relations)

There are, however, powerful countervailing factorsthat mitigate the likelihood of all-out conflict. These include the deep interdependence of the American and Chinese economies. Given its export dependency, shallow financial markets, and questionable domestic resiliency, any conflict would likely bankrupt China first.

Indeed, we have seen in China's own history how external conflicts have often led to internal rebellion and even revolution-- a prospect its rulers fear more than any other. Any actual decision by China's leaders to engage in direct military conflict with the United States would be very likely to lead to the downfall of the Communist regime that has governed the country since 1949. This link between the regime's external and internal insecurities is an Achilles' heel that gives the United States and other democracies facing military pressure from China -- Japan over the Senkakus, India over parts of Ladakh and Arunachal Pradesh -- a potentially decisive strategic advantage.

#### Economic interdependence prevents war

Ian Bremmer and David Gordon 12, president of Eurasia Group and author of ''Every Nation for Itself: Winners and Losers in a G-Zero World.'' AND head of research at Eurasia Group and former director of policy planning at the State Department, " Where Commerce and Politics Collide," October 15, China US Focus, www.chinausfocus.com/uncategorized/where-commerce-and-politics-collide/

Whatever happened to the reassuring view that expanding trade ties make for a safer and more prosperous world? This idea has been long present in U.S. strategies toward China, even before being concretized in Robert Zoellick’s notion of integrating China into the world financial and commercial systems as a way of promoting ''responsible stakeholdership.''¶ The Chinese had a parallel concept – that promoting economic interdependence with America would counter Washington’s natural tendency to block China’s rise as an alternative power.¶ But as President Obama and Governor Mitt Romney argue over who can be tougher on China and its trade practices, and as a wave of anti-American nationalism surges across China, the commercial partnership meant to bring Washington and Beijing closer together appears to be pushing the world’s two largest economies further apart. Are we headed for some new form of Cold War-style confrontation?¶ We don’t think so. Behind all the finger-pointing and fist-shaking on both sides is a powerful economic interdependence that constrains both countries and was totally missing from U.S.-Soviet relations during the Cold War. What’s bad for one economy is still bad for the other, and both Washington and Beijing know it.¶ With trillions invested in U.S. Treasuries, and the continuing sluggishness of American consumer spending, China has a huge stake in a more robust U.S. recovery. And the prospect of a rapidly growing consumer sector in China creates enormous opportunities for American agriculture and industry.¶ But macro-economic interdependence brings with it a whole range of tactical tensions – over exchange rates, intellectual property, investment rules and standard-setting. Yet there is also a more strategic downside to mutually assured economic destruction, because neither side has perfect control over events that might undermine the relationship, and because reduced risk of all-out conflict lets them feel freer to play with fire.¶ There are a growing number of security risks around the world. In Asia, an expanding U.S. security and commercial presence has China’s next generation of leaders on edge, and Beijing finds itself in various forms of direct conflict with many of its neighbors, some of whom are America’s strategic allies. In the Middle East, a variety of new actors with competing agendas are jostling to fill emerging power vacuums. In Europe, Germany has taken a leadership role in what is sure to emerge as a quite different continent. In Russia’s sphere of influence, a government that faces rising risks at home may well respond more aggressively abroad.¶ In the past, these sorts of tectonic geopolitical shifts and the uncertainty they create might well have provoked war. But today, the economic dimension is at least as important as military muscle in shaping the balance of power. That makes for more complicated international relationships.¶ Look more closely at the contradictions. A military rivalry is a zero-sum relationship; what’s good for one side is bad for the other. But economic security is good for both. America and China both need oil to flow smoothly from the Middle East and for peace to prevail in the South China Sea. Deepening trade relations give each side a stake in the other’s success.

#### No Middle East war and the aff can’t solve it

F. Gregory Gause ‘11, professor of political science at the University of Vermont, and was director of the University's Middle East Studies Program. PhD in pol sci from Harvard, 12/21/11, “Don't Just Do Something, Stand There!,” [www.foreignpolicy.com/articles/2011/12/21/america\_arab\_spring\_do\_nothing?page=0,0](http://www.foreignpolicy.com/articles/2011/12/21/america_arab_spring_do_nothing?page=0,0)

If we back away from the domestic politics of Arab states (as well as those of Afghanistan, Iran, and Pakistan) and look at the region in classic balance-of-power terms, we need not be so concerned about American regional interests. This is a multipolar region where balancing dynamics operate. Those balancing dynamics are complicated by the appeal of cross-border identities and ideologies, a factor that can be exploited by ambitious regional powers (as with Nasserist Arab nationalism in the 1950s and 1960s or Iran's ties with Islamist groups in the Arab world today). But the modern history of the region indicates that no local power can achieve a dominant position and thus put at risk American interests in oil access. If the United States, the most powerful country in the history of the world, could not impose its hegemony on the region, then it should not be too worried about Iran, even an Iran with a few nuclear weapons, doing so. In this case, system dynamics work in America's favor.¶ Those systemic dynamics are strengthened by the fact that the most powerful state in the region militarily, Israel, and the richest state in the region, Saudi Arabia, are opposed to regional hegemonic plays and are both allied with the United States. Each is an uncomfortable ally in its own way: Saudi Arabia for the obvious reasons and Israel, increasingly, because of its obstinacy regarding a two-state solution with the Palestinians. But their power helps to serve American geopolitical interests in the region during a period of enormous change and uncertainty. Turkey's re-entry as an active player into regional politics also works in America's favor. While the AKP government will occasionally cause headaches, particularly in its stance toward Israel, having another strong (both domestically and internationally) state playing the regional game makes it even more unlikely that Iran, or any other state, can achieve a position of regional hegemony.¶ Thus, the United States should approach regimes in the region, new and old, autocratic and democratic, with a minimalist agenda based on state-to-state interests. New democratic regimes will be as concerned about balancing dynamics as their old authoritarian predecessors. They will turn to Washington for help in their own balance-of-power games (to some extent, this is already happening on Syria). If one state chooses to adopt a hostile position toward the United States, its neighbors will probably seek out U.S. help. America can afford to take a less involved, less intense interest in the region and step in as needed to prevent the worst outcomes -- which can be done without a large U.S. land-based military presence in Iraq, Afghanistan, or anywhere else. The term of art in the international relations scholarship is "offshore balancing." That should be the overriding guide to American Middle East policy, not intense involvement in the domestic politics of regional states.¶ I am not advocating a complete U.S. political or military disengagement from the region. Maintaining U.S. bases in the small Gulf states is a relatively cost-effective way of sustaining a military capability in an important area. (Bahrain is becoming more problematic on this score; the United States has no interest in having bases in unstable countries and getting caught up in their domestic politics.) Washington should engage with all regional governments, even Iran, on a regular basis. It should encourage balancing dynamics, bolstering those threatened by America's regional enemies. If circumstances are propitious (though I think this will be rare in the immediate future), Washington should push for progress on the Arab-Israeli front.¶ But America should avoid plunging into the domestic affairs of Arab states, even when it thinks it has influence there. Egypt is the perfect example. America's $1.3 billion in annual aid to the Egyptian military certainly gives the United States some leverage over it. But America should not use that to try to micromanage what will inevitably be a complex and drawn-out process of negotiations among the Army, the newly empowered Islamists, other factions in the new parliament, and the body selected to write a new constitution about just what the relationship between the Army and new political order will be. The United States should simply make it clear that continued aid to the Egyptian military depends on Egyptian foreign-policy decisions toward America and on Egypt's peace treaty with Israel.¶ Of course, the ground rules of U.S. foreign policy have changed, even for an offshore balancer. The United States needs to communicate those ground rules to allied Arab governments and their publics: Washington cannot provide aid to militaries that brutally suppress nonviolent popular demonstrations as a matter of regular policy. Washington will issue statements in support of democratic reform and human rights across the board, affecting allies and adversaries equally. If allies do not like that, tough for them. But these minimal guidelines are far different from the interventionist programs being put forward by both neoconservatives and liberal internationalists in an effort to guide the politics of the Arab world.¶ The United States is well positioned to restrain itself in this period of flux in the Middle East. It needs only to make the choice to do so. U.S. vital interests are not threatened. America's power to prevent such threats is still significant. Regional balance-of-power dynamics work in America's favor. The United States can afford to let developments play out, not getting too exercised by the Islamist wave in the region but not encouraging it through active democracy promotion either. America can husband its resources rather than waste them in the pursuit of chimeras, like liberal democratic Arab states at peace with Israel and strongly allied with the United States. It can take the moral high ground in a way that neoconservatives and liberal interventionists do not appreciate, by not interfering in the domestic politics of Arab states. America can confidently stand aside and wait for regional states, driven by regional dynamics, to come to it for assistance and support. A decade of failed efforts to remake the politics of the region should be enough. Washington needs to learn the wisdom of the White Rabbit and just stand there in the Middle East.

#### No escalation- stability outweighs

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Making Department at the US Naval War College, “On the Consequences of Failure in Iraq,” Survival, 49(4), p. 83-98

Without the US presence, a second argument goes, nothing would prevent Sunni–Shia violence from sweeping into every country where the religious divide exists. A Sunni bloc with centres in Riyadh and Cairo might face a Shia bloc headquartered in Tehran, both of which would face enormous pressure from their own people to fight proxy wars across the region. In addition to intraMuslim civil war, cross-border warfare could not be ruled out. Jordan might be the first to send troops into Iraq to secure its own border; once the dam breaks, Iran, Turkey, Syria and Saudi Arabia might follow suit. The Middle East has no shortage of rivalries, any of which might descend into direct conflict after a destabilising US withdrawal. In the worst case, Iran might emerge as the regional hegemon, able to bully and blackmail its neighbours with its new nuclear arsenal. Saudi Arabia and Egypt would soon demand suitable deterrents of their own, and a nuclear arms race would envelop the region. Once again, however, none of these outcomes is particularly likely. Wider war No matter what the outcome in Iraq, the region is not likely to devolve into chaos. Although it might seem counter-intuitive, by most traditional measures the Middle East is very stable. Continuous, uninterrupted governance is the norm, not the exception; most Middle East regimes have been in power for decades. Its monarchies, from Morocco to Jordan to every Gulf state, have generally been in power since these countries gained independence. In Egypt Hosni Mubarak has ruled for almost three decades, and Muammar Gadhafi in Libya for almost four. The region’s autocrats have been more likely to die quiet, natural deaths than meet the hangman or post-coup firing squads. Saddam’s rather unpredictable regime, which attacked its neighbours twice, was one of the few exceptions to this pattern of stability, and he met an end unusual for the modern Middle East. Its regimes have survived potentially destabilising shocks before, and they would be likely to do so again. The region actually experiences very little cross-border warfare, and even less since the end of the Cold War. Saddam again provided an exception, as did the Israelis, with their adventures in Lebanon. Israel fought four wars with neighbouring states in the first 25 years of its existence, but none in the 34 years since. Vicious civil wars that once engulfed Lebanon and Algeria have gone quiet, and its ethnic conflicts do not make the region particularly unique. The biggest risk of an American withdrawal is intensified civil war in Iraq rather than regional conflagration. Iraq’s neighbours will likely not prove eager to fight each other to determine who gets to be the next country to spend itself into penury propping up an unpopular puppet regime next door. As much as the Saudis and Iranians may threaten to intervene on behalf of their coreligionists, they have shown no eagerness to replace the counter-insurgency role that American troops play today. If the United States, with its remarkable military and unlimited resources, could not bring about its desired solutions in Iraq, why would any other country think it could do so?17 Common interest, not the presence of the US military, provides the ultimate foundation for stability. All ruling regimes in the Middle East share a common (and understandable) fear of instability. It is the interest of every actor – the Iraqis, their neighbours and the rest of the world – to see a stable, functioning government emerge in Iraq. If the United States were to withdraw, increased regional cooperation to address that common interest is far more likely than outright warfare.

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## Deference DA

#### Nuclear terrorism is feasible---high risk of theft and attacks escalate

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Hundreds of scientific papers and reports have been published on nuclear terrorism. International conferences have been held on this threat with participation of Russian organizations, including IMEMO and the Institute of U.S. and Canadian Studies. Recommendations on how to combat the threat have been issued by the International Luxembourg Forum on Preventing Nuclear Catastrophe, Pugwash Conferences on Science and World Affairs, Russian-American Elbe Group, and other organizations. The UN General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism in 2005 and cooperation among intelligence services of leading states in this sphere is developing.¶ At the same time, these efforts fall short for a number of reasons, partly because various acts of nuclear terrorism are possible. Dispersal of radioactive material by detonation of conventional explosives (“dirty bombs”) is a method that is most accessible for terrorists. With the wide spread of radioactive sources, raw materials for such attacks have become much more accessible than weapons-useable nuclear material or nuclear weapons. The use of “dirty bombs” will not cause many immediate casualties, but it will result into long-term radioactive contamination, contributing to the spread of panic and socio-economic destabilization.¶ Severe **consequences can be caused by sabotaging nuclear power plants, research reactors, and radioactive materials storage facilities. Large cities are especially vulnerable to such attacks. A large city may host dozens of research reactors with a nuclear power plant or a couple of spent nuclear fuel storage facilities and dozens of large radioactive materials storage facilities located nearby.** The past few years have seen significant efforts made to enhance organizational and physical aspects of security at facilities, especially at nuclear power plants. Efforts have also been made to improve security culture. But these efforts do not preclude the possibility that well-trained terrorists may be able to penetrate nuclear facilities.¶ Some estimates show that sabotage of a research reactor in a metropolis may expose hundreds of thousands to high doses of radiation. A formidable part of the city would become uninhabitable for a long time.¶ Of all the scenarios, it is building an improvised nuclear device by terrorists that poses the maximum risk. **There are no engineering problems that cannot be solved if terrorists decide to build a simple “gun-type” nuclear device.** Information on the design of such devices, as well as implosion-type devices, is available in the public domain. It is the acquisition of weapons-grade uranium that presents the sole serious obstacle. Despite numerous preventive measures taken, we cannot rule out the possibility that such materials can be bought on the black market. Theft of weapons-grade uranium is also possible. Research reactor fuel is considered to be particularly vulnerable to theft, as it is scattered at sites in dozens of countries. There are about 100 research reactors in the world that run on weapons-grade uranium fuel, according to the International Atomic Energy Agency (IAEA).¶ A terrorist “gun-type” uranium bomb can have a yield of least 10-15 kt, which is comparable to the yield of the bomb dropped on Hiroshima. The explosion of such a bomb in a modern metropolis can kill and wound hundreds of thousands and cause serious economic damage. There will also be long-term sociopsychological and political consequences.¶ The vast majority of states have introduced unprecedented security and surveillance measures at transportation and other large-scale public facilities after the terrorist attacks in the United States, Great Britain, Italy, and other countries. These measures have proved burdensome for the countries’ populations, but the public has accepted them as necessary. A nuclear terrorist attack will make the public accept further measures meant to enhance control even if these measures significantly restrict the democratic liberties they are accustomed to. Authoritarian states could be expected to adopt even more restrictive measures.¶ If a nuclear terrorist act occurs, nations will delegate tens of thousands of their secret services’ best personnel to investigate and attribute the attack. Radical Islamist groups are among those capable of such an act. We can imagine what would happen if they do so, given the anti-Muslim sentiments and resentment that conventional terrorist attacks by Islamists have generated in developed democratic countries. Mass deportation of the non-indigenous population and severe sanctions would follow such an attack in what will cause **violent protests in the Muslim world**. **Series of armed clashing terrorist attacks may follow**. The prediction that Samuel Huntington has made in his book “The Clash of Civilizations and the Remaking of World Order” may come true. Huntington’s book clearly demonstrates that it is not Islamic extremists that are the cause of the Western world’s problems. Rather there is a deep, intractable conflict that is rooted in the fault lines that run between Islam and Christianity. This is especially dangerous for Russia because these fault lines run across its territory. To sum it up, the political leadership of Russia has every reason to revise its list of factors that could undermine strategic stability.  BMD does not deserve to be even last on that list because its effectiveness in repelling massive missile strikes will be extremely low. BMD systems can prove useful only if deployed to defend against launches of individual ballistic missiles or groups of such missiles. Prioritization of other destabilizing factors—that could affect global and regional stability—merits a separate study or studies. But even without them I can conclude that nuclear terrorism should be placed on top of the list. The threat of nuclear terrorism is real, and a successful nuclear terrorist attack would lead to a radical transformation of the global order.  All of the threats on the revised list must become a subject of thorough studies by experts. States need to work hard to forge a common understanding of these threats and develop a strategy to combat them.

#### Prez flex key to quick action and intel

Glenn Sulmasy 9, law faculty of the United States Coast Guard Academy, , Anniversary Contributions: Use of Force: Executive Power: the Last Thirty Years, 30 U. Pa. J. Int'l L. 1355

Since the attacks of 9/11, the original concerns noted by Hamilton, Jay, and Madison have been heightened. Never before in the young history of the United States has the need for an energetic executive been more vital to its national security. The need for quick action in this arena requires an executive response - particularly when fighting a shadowy enemy like al Qaeda - not the deliberative bodies opining on what and how to conduct warfare or determining how and when to respond. The threats from non-state actors, such as al Qaeda, make the need for dispatch and rapid response even greater. Jefferson's concerns about the slow and deliberative institution of Congress being prone to informational leaks are even more relevant in the twenty-first century. The advent of the twenty-four hour media only leads to an increased need for retaining enhanced levels of executive [\*1362] control of foreign policy. This is particularly true in modern warfare. In the war on international terror, intelligence is vital to ongoing operations and successful prevention of attacks. Al Qaeda now has both the will and the ability to strike with the equivalent force and might of a nation's armed forces. The need to identify these individuals before they can operationalize an attack is vital. Often international terror cells consist of only a small number of individuals - making intelligence that much more difficult to obtain and even more vital than in previous conflicts. The normal movements of tanks, ships, and aircrafts that, in traditional armed conflict are indicia of a pending attack are not the case in the current "fourth generation" war. Thus, the need for intelligence becomes an even greater concern for the commanders in the field as well as the Commander-in-Chief.¶ Supporting a strong executive in foreign affairs does not necessarily mean the legislature has no role at all. In fact, their dominance in domestic affairs remains strong. Additionally, besides the traditional roles identified in the Constitution for the legislature in foreign affairs - declaring war, ratifying treaties, overseeing appointments of ambassadors, etc. - this growth of executive power now, more than ever, necessitates an enhanced, professional, and apolitical oversight of the executive. An active, aggressive oversight of foreign affairs, and warfare in particular, by the legislature is now critical. Unfortunately, the United States - particularly over the past decade - has witnessed a legislature unable to muster the political will necessary to adequately oversee, let alone check, the executive branch's growing power. Examples are abundant: lack of enforcement of the War Powers Resolution abound the executive's unchecked invasions of Grenada, Panama, and Kosovo, and such assertions as the Authorization for the Use of Military Force, the USA Patriot Act, military commissions, and the updated Foreign Intelligence Surveillance Act ("FISA"). There have been numerous grand-standing complaints registered in the media and hearings over most, if not all, of these issues. However, in each case, the legislature has all but abdicated their constitutionally mandated role and allowed the judicial branch to serve as the only real check on alleged excesses of the executive branch. This deference is particularly dangerous and, in the current environment of foreign affairs and warfare, tends to unintentionally politicize the Court.¶ The Founders clearly intended the political branches to best serve the citizenry by functioning as the dominant forces in [\*1363] guiding the nation's foreign affairs. They had anticipated the political branches to struggle over who has primacy in this arena. In doing so, they had hoped neither branch would become too strong. The common theme articulated by Madison, ambition counters ambition, n17 intended foreign affairs to be a "give and take" between the executive and legislative branches. However, inaction by the legislative branch on myriad policy and legal issues surrounding the "war on terror" has forced the judiciary to fulfill the function of questioning, disagreeing, and "checking" the executive in areas such as wartime policy, detentions at Guantanamo Bay, and tactics and strategy of intelligence collection. The unique nature of the conflict against international terror creates many areas where law and policy are mixed. The actions by the Bush administration, in particular, led to outcries from many on the left about his intentions and desire to unconstitutionally increase the power of the Presidency. Yet, the Congress never firmly exercised the "check" on the executive in any formal manner whatsoever.¶ For example, many policymakers disagreed with the power given to the President within the Authorization to Use Military Force ("AUMF"). n18 Arguably, this legislation was broad in scope, and potentially granted sweeping powers to the President to wage the "war on terror." However, Congress could have amended or withdrawn significant portions of the powers it gave to the executive branch. This lack of withdrawal or amendment may have been understandable when Republicans controlled Congress, but as of November 2006, the Democrats gained control of both houses of the Congress. Still, other than arguing strongly against the President, the legislature did not necessarily or aggressively act on its concerns. Presumably this inaction was out of concern for being labeled "soft on terror" or "weak on national security" and thereby potentially suffering at the ballot box. This virtual paralysis is understandable but again, the political branches were, and remain, the truest voice of the people and provide the means to best represent the country's beliefs, interests, and national will in the arena of foreign affairs. It has been this way in the past but the more recent (certainly over the past thirty years and even more so in the past decade) intrusions of the judicial branch into what [\*1364] was intended to be a "tug and pull" between the political branches can properly be labeled as an unintended consequence of the lack of any real legislative oversight of the executive branch.¶ Unfortunately, now nine unelected, life-tenured justices are deeply involved in wartime policy decision making. Examples of judicial policy involvement in foreign affairs are abundant including Rasul v. Bush; n19 Hamdi v. Rumsfeld; n20 Hamdan v. Rumsfeld; n21 as well as last June's Boumediene v. Bush n22 decision by the Supreme Court, all impacting war policy and interpretation of U. S. treaty obligations. Simply, judges should not presumptively impact warfare operations or policies nor should this become acceptable practice. Without question, over the past thirty years, this is the most dramatic change in executive power. It is not necessarily the strength of the Presidency that is the change we should be concerned about - the institutional search for enhanced power was anticipated by the Founders - but they intended for Congress to check this executive tendency whenever appropriate. Unfortunately, this simply is not occurring in twenty-first century politics. Thus, the danger does not necessarily lie with the natural desire for Presidents to increase their power. The real danger is the judicial branch being forced, or compelled, to fulfill the constitutionally mandated role of the Congress in checking the executive.¶ 4. PRESIDENT OBAMA AND EXECUTIVE POWER¶ The Bush presidency was, and continues to be, criticized for having a standing agenda of increasing the power of the executive branch during its eight-year tenure. Numerous articles and books have been dedicated to discussing these allegations. n23 However, as argued earlier, the reality is that it is a natural bureaucratic tendency, and one of the Founders presciently anticipated, that each branch would seek greater powers whenever and wherever possible. As the world becomes increasingly interdependent, technology and armament become more sophisticated, and with [\*1365] the rise of twenty-first century non-state actors, the need for strong executive power is not only preferred, but also necessary. Executive power in the current world dynamic is something, regardless of policy preference or political persuasions, that the new President must maintain in order to best fulfill his constitutional role of providing for the nation's security. This is simply part of the reality of executive power in the twenty-first century. n24

#### SQ rulings haven’t clarified the legal debate---the plan does

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

To be sure, the Supreme Court has decided some well-known national security cases. Among them are the Steel Seizure case, Youngstown Sheet & Tube Co. v. Sawyer; n2 the Pentagon Papers case, New York Times Co. v. United States; n3 the Iranian hostage case, Dames & Moore v. Regan; n4 and some notable First Amendment cases arising out of World War I, such as Schenck v. United States n5 and Abrams v. United States. n6 Then there are the Japanese internment decisions during World War II, notably Korematsu v. United States, n7 as well as Ex parte Quirin, n8 which upheld the use of military commissions to try German agents who landed in the United States as part of a sabotage mission. Most recently, the Supreme Court has addressed questions arising from the government's response to the attacks of September 11, 2001, in such cases as Hamdi v. Rumsfeld, n9 Hamdan v. Rumsfeld, n10 and Boumediene v. Bush. n11 These cases do matter, but they have not clearly resolved the constitutional and other legal issues that pervade the debate about presidential power and foreign affairs.

Beyond the limitations of the Supreme Court rulings, the judiciary probably will not contribute very much to the debate. Various procedural and jurisdictional obstacles make it difficult for courts to address the merits of disputes about war powers and foreign affairs. Even if those obstacles can be surmounted, those who decry what they view as presidential excess should note that the judiciary typically has taken a deferential role in reviewing challenges to executive action.

#### Deference stable now---restricting President’s war powers sets the stage for escalating judicial intervention

John O’Connor 7, Former officer in the Marine Corp and Judge Advocate; JD, U Maryland Law School. Statistics and the Military Deference Doctrine: a Response to Professor Lichtman, 66 Md. L. Rev. 668, Lexis

As I have written elsewhere, one of the most important aspects of the military deference doctrine, and one that many commentators misunderstand,176 is that the military deference doctrine is not a venerable doctrine that has existed since the early days of the Republic. 177 Indeed, a review of the Court’s military deference jurisprudence could lead one to the conclusion that the doctrine was more or less the brainchild of Chief Justice Rehnquist, who wrote virtually every important military deference decision that the Court has issued.178 While notions of stare decisis may militate against a retreat from the military deference doctrine by the Court, the fact remains that the doctrine is one of fairly recent vintage, which was developed and perpetuated mainly through judicial opinions written by a Justice who is no longer on the Court. Moreover, while stare decisis is a nice concept in the abstract, that doctrine did not prevent the Court from radically changing its approach to constitutional challenges to military practices twice before. Therefore, **it is not out of the realm of possibility that the military deference doctrine could recede in importance** with personnel changes on the Court. This could occur through an express overruling of the doctrine, through decisions narrowing the doctrine’s application, or through a moresubtle process whereby the Court continues to pay lip service to its need to defer to political branch judgments but nevertheless **accords little or no actual deference to the policy determinations of Congress and the President.**

But early indications from the Roberts Court, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O’Connor, respectively, provide reason to believe that the military deference doctrine will continue to be a robust feature of the Court’s military jurisprudence, at least in the near term. In FAIR, the first “military” case decided by the Roberts Court, the Court upheld the Solomon Amendment against a constitutional challenge and, in so doing, began its constitutional analysis by extolling the virtues of the military deference doctrine when Congress legislates pursuant to its constitutional power to raise and support armies:

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Congress’ power in this area “is broad and sweeping,” and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in Rostker, “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.179

While it is always dangerous to draw conclusions from a single case, all participating members of the Court—Justice Alito did not participate—joined Chief Justice Roberts’s opinion, which invoked the military deference doctrine as its first step in constitutional analysis once the Court resolved what the statute in fact provided.180 Moreover, this is a case that could have been decided on a number of grounds, such as a pure Spending Clause or First Amendment basis, 181 without invoking the military deference doctrine, and the Court’s prominent reliance on the military deference doctrine to support its decision suggests that there is no move afoot to eradicate the doctrine, explicitly or through subtle narrowing. For his part, Justice Alito noted prominently in his confirmation hearing that he had joined a conservative Princeton alumni group because, as an alumnus who attended Princeton on an ROTC scholarship, he was unhappy that the school had decided to abolish the campus ROTC program.182 While, again, predicting judicial attitudes based on personal history is always a risky proposition, Justice Alito’s background makes him seem like an unlikely candidate to take up the sword against the military deference doctrine, particularly when every other member of the Court joined an opinion applying it in FAIR.

V. Conclusion

This Article is by no means an attempt to catalogue every military deference case decided by the Court, or to discuss every nuance in its application. n183 It is important, however, that the doctrine be understood, both in terms of the facts surrounding its development and the limited scope of the doctrine as evidenced by the framework in which it is applied. Professor Lichtman's article on the military deference doctrine is thought provoking in that it challenges the orthodoxy by which the military deference doctrine is viewed - through the lens of time rather than through the lens of subject matter irrespective of time. n184 Ultimately, however, I have come to the conclusion that Professor Lichtman's analysis of the military deference doctrine is flawed in several important respects, all of which result in a fundamental misunderstanding [\*706] of the doctrine. In my estimation, the principal flaws in Professor Lichtman's analysis include: focusing on "win-loss" records rather than on the analytical framework in which those wins and losses occurred; failing to perceive that the military deference doctrine should - and does - apply only to a narrow category of "military" cases; incorrectly casting the military deference doctrine as a longstanding and relatively stable doctrine that has only subtly evolved since the early twentieth century; determining that subject matter, rather than timing, is the proper variable around which to organize an analysis of military deference decisions; and concluding that the military deference doctrine does not - and should not - apply to statutes and regulations burdening civilians instead of military personnel.

The military deference doctrine is, at once, both historically immature and limited, yet potent when applicable. After the disruption that occurred in the course of the Court's prior rejection of the doctrine of noninterference, the Court ultimately landed on the military deference doctrine as an appropriate analytical framework, where applicable, in the mid-1970s, and the Court has largely remained in the same place with its military jurisprudence ever since. The Court's rejection of its noninterference policy beginning in the mid-1950s likely came about as a result of what the Court perceived as overreaching by the political branches in subjecting persons - military and civilian - to courts-martial in a willy-nilly fashion. If the military deference doctrine were to recede in importance in the future, it would be a good bet that it happens because some collection of Supreme Court Justices perceives that Congress and the President are overreaching in the exercise of their constitutional powers to raise armies and regulate the armed forces. At present, though, there is no sign that such an upheaval is anywhere on the horizon.

## Afghanistan Adv

#### No modeling---their evidence is delusional

Eric Black 12, former reporter for the Star Tribune and Twin Cities blogger, Some ideas to limit the ‘supremacy’ of the U.S. Supreme Court, 11/27/12, www.minnpost.com/eric-black-ink/2012/11/some-ideas-limit-supremacy-us-supreme-court

It seems to be part of our national DNA. We see ourselves as so unlike the rest of the world that we have developed a semi-religious belief in what we call “American exceptionalism.” Maybe the upside is some kind of boost to our collective self-esteem. But one of the downsides is a reluctance to look around the world and see if anyone (especially not France) has a good idea from which we might benefit.

Especially on democracy. We see ourselves as the world’s model for democracy and the “rule of law.” We expect others to copy us, although they have long since stopped doing so with reference to the specifics of how to design a government. We grumble a good deal about the breakdowns in our system, but we are not much open to ideas for improving it.

University of Minnesota political scientist Lisa Hilbink, whose specialties include comparative constitutional systems around the world, said that basically, since the end of World War II, most of the world outside of Latin America came to the conclusion that the U.S. system was “pretty crazy.”

#### Countries don't model the US for multiple reasons that the aff doesn't deal with---every region has different models to look to

Andrew Moravcsik 5, Professor of Politics at Princeton, Newsweek, p. Lexis

The truth is that Americans are living in a dream world. Not only do others not share America's self-regard, they no longer aspire to emulate the country's social and economic achievements. The loss of faith in the American Dream goes beyond this swaggering administration and its war in Iraq. A President Kerry would have had to confront a similar disaffection, for it grows from the success of something America holds dear: the spread of democracy, free markets and international institutions--globalization, in a word. Countries today have dozens of political, economic and social models to choose from. Anti-Americanism is especially virulent in Europe and Latin America, where countries have established their own distinctive ways--none made in America. Futurologist Jeremy Rifkin, in his recent book "The European Dream," hails an emerging European Union based on generous social welfare, cultural diversity and respect for international law--a model that's caught on quickly across the former nations of Eastern Europe and the Baltics. In Asia, the rise of autocratic capitalism in China or Singapore is as much a "model" for development as America's scandal-ridden corporate culture. "First we emulate," one Chinese businessman recently told the board of one U.S. multinational, "then we overtake." Many are tempted to write off the new anti-Americanism as a temporary perturbation, or mere resentment. Blinded by its own myth, America has grown incapable of recognizing its flaws. For there is much about the American Dream to fault. If the rest of the world has lost faith in the American model--political, economic, diplomatic--it's partly for the very good reason that it doesn't work as well anymore. AMERICAN DEMOCRACY: Once upon a time, the U.S. Constitution was a revolutionary document, full of epochal innovations--free elections, judicial review, checks and balances, federalism and, perhaps most important, a Bill of Rights. In the 19th and 20th centuries, countries around the world copied the document, not least in Latin America. So did Germany and Japan after World War II. Today? When nations write a new constitution, as dozens have in the past two decades, they seldom look to the American model. When the soviets withdrew from Central Europe, U.S. constitutional experts rushed in. They got a polite hearing, and were sent home. Jiri Pehe, adviser to former president Vaclav Havel, recalls the Czechs' firm decision to adopt a European-style parliamentary system with strict limits on campaigning. "For Europeans, money talks too much in American democracy. It's very prone to certain kinds of corruption, or at least influence from powerful lobbies," he says. "Europeans would not want to follow that route." They also sought to limit the dominance of television, unlike in American campaigns where, Pehe says, "TV debates and photogenic looks govern election victories." So it is elsewhere. After American planes and bombs freed the country, Kosovo opted for a European constitution. Drafting a post-apartheid constitution, South Africa rejected American-style federalism in favor of a German model, which leaders deemed appropriate for the social-welfare state they hoped to construct. Now fledgling African democracies look to South Africa as their inspiration, says John Stremlau, a former U.S. State Department official who currently heads the international relations department at the University of Witwatersrand in Johannesburg: "We can't rely on the Americans." The new democracies are looking for a constitution written in modern times and reflecting their progressive concerns about racial and social equality, he explains. "To borrow Lincoln's phrase, South Africa is now Africa's 'last great hope'." Much in American law and society troubles the world these days. Nearly all countries reject the United States' right to bear arms as a quirky and dangerous anachronism. They abhor the death penalty and demand broader privacy protections. Above all, once most foreign systems reach a reasonable level of affluence, they follow the Europeans in treating the provision of adequate social welfare is a basic right. All this, says Bruce Ackerman at Yale University Law School, contributes to the growing sense that American law, once the world standard, has become "provincial." The United States' refusal to apply the Geneva Conventions to certain terrorist suspects, to ratify global human-rights treaties such as the innocuous Convention on the Rights of the Child or to endorse the International Criminal Court (coupled with the abuses at Abu Ghraib and Guantanamo) only reinforces the conviction that America's Constitution and legal system are out of step with the rest of the world.

#### Afghanistan is stabilizing

Fite et al 12 (Brandon Fite, Varun Vira, Erin Fitzgerald, a report of the csis burke chair in strategy, “Competition in Afghanistan, Central Asia, and Pakistan”, 3/13, http://csis.org/files/publication/120312\_Iran\_Chapter\_X\_AfPakCentAsia\_AHC.pdf)

There are some positive signs, ISAF has achieved tactical successes in the south, clearing and holding much of the former Taliban heartland – and they are unlikely to lose this territory in the near term. By 2014 it is probable that much of the country outside of Kabul will still have nonexistent, inefficient, or corrupt governance – but a number of good programs are in place working on this, and progress is being made. The Afghan economy, while deeply troubled, is also making progress. Perhaps for reasons such as this, the Afghan government decided to reject a Memorandum of Understanding on military cooperation proposed by Iran.

#### China will get countries on board to stabilize the region

Reuters 12 (Myra MacDonald, “Amid Afghan gloom, a glimmer of hope on regional front”, 3/12, http://blogs.reuters.com/pakistan/2012/03/03/amid-afghan-gloom-a-glimmer-of-hope-on-regional-front/)

China, whose help has long been sought by the administration of President Barack Obama to stabilise Afghanistan and Pakistan, hosted a meeting in Beijing at the end of last month in which the three countries pledged to support an Afghan-led process of reconciliation and to work together to accommodate each others’ concerns, a foreign ministry statement quoted by the China Daily said. “Analysts spoke highly of the significance of the dialogue,” the China Daily added, “which marked the beginning of new process for countries in the region to tackle problems by themselves.” Given Pakistan’s own near-reverence for China, Beijing is in a strong position to encourage Islamabad/Rawalpindi to play a positive role. It has significant economic stakes in Afghanistan and Pakistan; it has shown impatience in the past if its own interests are threatened by militants, but does not have the same ideological opposition to Islamists abroad, maintained, at least until recently, by the United States, prioritising stability above all. That makes it a potentially strong and pragmatic partner in helping to shepherd a political settlement.

#### Regional politics have changed – cooperation is more likely than proxy war

Reuters 12 (Myra MacDonald, “Amid Afghan gloom, a glimmer of hope on regional front”, 3/12, http://blogs.reuters.com/pakistan/2012/03/03/amid-afghan-gloom-a-glimmer-of-hope-on-regional-front/)

ISTANBUL PROCESS Of the other regional powers with a stake in Afghanistan, Russia has been working on building up the role of the Shanghai Cooperation Organization (SCO) — which also includes China and Central Asia states. While supporting full membership for Pakistan of the SCO, Russia also has also been able to draw in India, with which it has ties which long predate their more recent association as BRIC economies. It was during an SCO meeting in Yekaterinburg, Russia in 2009that the leaders of India and Pakistan held their first talks since the November 2008 attack on Mumbai by Pakistan-based militants. And Iran, which has the potential to act as a spoiler to U.S. plans in Afghanistan if there is any spillover of its nuclear dispute, held its own trilateral meeting with Afghanistan and Pakistan in Islamabad last month. Foreign ministers from countries involved in Afghanistan, including those with troops there and regional powers, will also meet in Kabul in June to follow up on the so-called Istanbul Process – a commitment to regional cooperation launched at an international conference in Turkey last year. In short, the faultlines which led to Russia, Iran and India backing the then Northern Alliance in Afghanistan in a proxy war with Pakistan in the 1990s, are far more fluid today than they were then. And while the often tedious business of international diplomacy rarely makes headlines, it has some hope for success if nothing else but because all countries involved have an interest in Afghan stability.

## Abstention Adv

#### Zero risk of war

David E. Hoffman 10/22/12, contributing editor to Foreign Policy and the author of The Dead Hand: The Untold Story of the Cold War Arms Race and Its Dangerous Legacy, which won the 2010 Pulitzer Prize for general non-fiction, "Hey, Big Spender," Foreign Policy, www.foreignpolicy.com/articles/2012/10/22/hey\_big\_spender?page=full

Despite tensions that flare up, the United States and Russia are no longer enemies; the chance of nuclear war or surprise attack is nearly zero. We trade in each other's equity markets. Russia has the largest audience of Facebook users in Europe, and is open to the world in a way the Soviet Union never was.

#### Accidental launches won’t happen and wouldn’t escalate

Quinlan 9 [Michael Quinlan, former British Permanent Under Secretary of State for Defence, former Director of the Ditchley Foundation, Visiting Professor at King's College London, “Thinking About Nuclear Weapons: Principles, Problems, Prospects,” Oxford University Press, p. 69]

It was occasionally conjectured that nuclear war might be triggered by the real but accidental or unauthorized launch of a strategic nuclear-weapon delivery system in the direction of a potential adversary. No such launch is known to have occurred in over sixty years. The probability of it is therefore very low. But even if it did happen, the further hypothesis of its initiating a general nuclear exchange is far-fetched. It fails to consider the real situation of decision-makers, as pages 63–4 have brought out. The notion that cosmic holocaust might be mistakenly precipitated in this way belongs to science fiction.

#### Even a US-Russia nuclear exchange would de-escalate

Quinlan 9 [Michael Quinlan, former British Permanent Under Secretary of State for Defence, former Director of the Ditchley Foundation, Visiting Professor at King's College London, “Thinking About Nuclear Weapons: Principles, Problems, Prospects,” Oxford University Press, p. 63-4]

Even if initial nuclear use did not quickly end the fighting, the supposition of inexorable momentum in a developing exchange, with each side rushing to overreaction amid confusion and uncertainty, is implausible. It fails to consider what the situation of the decisionmakers would really be. Neither side could want escalation. Both would be appalled at what was going on. Both would be desperately looking for signs that the other was ready to call a halt. Both, given the capacity for evasion or concealment which modern delivery platforms and vehicles can possess, could have in reserve significant forces invulnerable enough not to entail use-or-lose pressures. (It may be more open to question, as noted earlier, whether newer nuclear weapon possessors can be immediately in that position; but it is within reach of any substantial state with advanced technological capabilities, and attaining it is certain to be a high priority in the development of forces.) As a result, neither side can have any predisposition to suppose, in an ambiguous situation of fearful risk, that the right course when in doubt is to go on copiously launching weapons. And none of this analysis rests on any presumption of highly subtle or pre-concerted rationality. The rationality required is plain.

#### Best prediction model

Christopher J. Fettweis ‘7 Assistant Professor of National Security Affairs in the National Security Decision

Making Department at the US Naval War College, “On the Consequences of Failure in Iraq,” Survival, 49(4), p. 83-98

Firstly, and perhaps most obviously, policymakers should keep in mind that the unprecedented is also unlikely .Outliers in international behaviour do exist, but in general the past is the best guide to the future. Since the geopolitical catastrophes that pessimists expect will follow US withdrawal are all virtually without precedent, common sense should tell policymakers they are probably also unlikely to occur. Five years ago, US leaders should have realised that their implicit prediction for the aftermath of invasion - positive, creative instability in the Middle East that would set off a string of democratic dominoes - was without precedent. The policy was based more on the president's unshakeable faith in the redemptive power of democracy than on a coherent understanding of international relations. Like all faith-based policies, success would have required a miracle; in international politics, miracles are unfortunately rare. Faith is once again driving predictions of post-withdrawal Iraq, but this time it is faith in chaos and worst-case scenarios.

Secondly, imagined consequences are usually worse than what reality delivers .Human beings tend to focus on the most frightening scenarios at the expense of the most likely, and anticipate outcomes far worse than those that usually occur. This is especially true in the United States, which for a variety of reasons has consistently overestimated the dangers lurking in the international system.3 Pre-war Iraq was no exception; post-war Iraq is not likely to be either.

#### No middle east war---all players in the region are pragmatic and will balance accordingly

Hadar 11/2/11—former prof of IR at American U and Mount Vernon-College. PhD in IR from American U (Leon, Overhauling U.S. Policy in the Middle East, http://nationalinterest.org/commentary/overhauling-us-policy-the-middle-east-6087)

But the changes emerging from the so-called Arab Spring go beyond a clash between pro-Western movements and Islamist groups. The shifting balance of power in the Middle East—triggered in part by eroding American influence in the region—is bringing to the fore realpolitik concerns that likely will overcome ideological considerations in the new Middle East. The Israel-Hamas prisoner exchange, the U.S. role in Libya’s civil war and the end of the U.S. military presence in Iraq all point in that direction.

Let’s begin with the prisoner exchange. The interesting thing about the exchange of one Israeli soldier for more than 1,000 jailed Palestinians was not that it happened, but that it happened now, when Islamist influence seems to be on the rise in Egypt.

Israeli leaders, with the support of most of the public and the elites, have been negotiating a deal along these lines for the last five years with Egyptian security officials playing the main role as mediator.

But following the fall of Hosni Mubarak’s pro-American in Egypt, the conventional wisdom in Cairo and Jerusalem was that the Israeli-Hamas negotiations would collapse. Pundits were predicting that the fall of a pro-American leader committed to the peace accords between Israel and Egypt would make it difficult for any new government to embrace policies perceived as beneficial to Israel.

In fact, anti-Israel rhetoric and demonstrations emanating from Tahrir Square and elsewhere—coupled with the growing diplomatic strains between the ruling Israeli Likud government and Islamist Turkish leaders and the continuing military tensions between the Jewish state and the Ayatollahs in Tehran—seemed to play directly into Israeli fears of being surrounded by a hostile Muslim entity.

Yet this nightmare scenario assumed that the Muslims in the Middle East—Egyptians, Turks, Iranians and Saudis as well as multiple tribes, sects and ethic groups—were going to form a unified political and military front to confront Israel. This scenario is based in part on real fears about the policies of Iran and Turkey and the rhetoric emanating from the Arab Street. But such fears have been amplified by Israeli ultra-nationalists and American neoconservatives with an agenda: They want to resist any serious challenge to the Israeli-Palestinian status quo and mobilize Israelis and their Washington supporters into new confrontations in the Middle East.

That the current Egyptian military leaders have decided to help the Israelis gain the release of Sergeant Noam Shalit was clearly not a reflection of dormant pro-Israeli inclinations in Cairo. Neither was the freedom of the Palestinian prisoners a reflection of any support for the Palestinian cause. Like Anwar Sadat and Mubarak, these leaders operate based on what they consider Egyptian national interests. And those interests include preserving the peace agreement with Israel and avoiding a military conflict with that country for the foreseeable future.

Indeed, contrary to what some Americans seem to believe, it is not the Egyptian-Israeli treaty agreement of 1979 or the billions of dollars in U.S. economic and military assistance to Egypt that have induced the Egyptians to refrain from going to war with Israel. The 1979 accord reflected the reality that the evolving power balance led both Israel and Egypt to conclude that a war between them would be too costly and detrimental to their interests.

The global and regional developments since 1979 have strengthened the determination of both sides to maintain peace. Egypt, economically bankrupt and unable to feed and educate its own people, is certainly not positioned to pursue military confrontation with Israel.

Moreover, the rise in power and influence of Egypt’s Muslim Brotherhood makes it more likely that future governments in in Cairo will have an interest in co-opting Gaza Strip Hamas leaders, whose movement is a political offshoot of the Islamist party founded in Egypt in 1928.

In a way, Hamas may be evolving into a client (mini)state of a more Islamist-oriented Egypt. In that context, Egypt’s interest would be in providing Hamas with enough support to prevent it from coming under the influence of the more radical players in the region, such as Iran. At the same time, driven by the kind of calculus that affects any relationship between leading powers and client states, Cairo would need to ensure that Hamas’s policies would not draw Egypt into a military conflict with Israel. Helping negotiate the Hamas-Israel deal fits nicely into such a strategy. It encourages Hamas to start reorienting its foreign policy from Syria, and by extension Iran, and more towards Egypt. That could create conditions for more pragmatic deals between Israel and Hamas, negotiated with Egyptian assistance. These wouldn’t likely bring about a peace accord between the two sides but might allow the ministate in the Gaza Strip to become an Egyptian protectorate of sorts that could coexist with Israel for some time to come.

That Turkey has also played an active role in negotiating the Israel-Hamas prisoner exchange is also an encouraging sign, notwithstanding the stresses in the relationship between Ankara and Jerusalem. The Turks have no interest in exacerbating tensions between Israel and its Arab neighbors because that could destabilize the Middle East, Turkey’s new diplomatic and economic frontier.

It’s probably not realistic to expect the emergence of a diplomatic and military axis between Egypt and Turkey that would join with Saudi Arabia and the other Persian Gulf oil sheikdoms to counter the influence of Iran and its satellites in Iraq and Lebanon and to manage the power transition in Syria. Turkey and Iran, after all, share common interests in curbing Kurdish irredentism inside their borders. Unlike the Saudis and the Israelis, Turkey wants to avoid a military confrontation between the United States and Iran.

But the reemergence of new cooperative and competing centers of power in the Middle East—Egypt, Turkey, Iran, Saudi Arabia—provide the United States, the European Union (EU) and Israel with new strategic opportunities. Instead of wasting time and resources on fantastical freedom agendas and countering the imaginary or real influence of political Islam, a more effective policy would be to hedge one’s strategic bets by forming ad hoc partnerships with these players to advance concrete interests.

Hence, in the aftermath of the agreement with Hamas, Israel could improve its relationship with Cairo and Ankara and perhaps even create the conditions for some sort of coexistence with Hamas-ruled Gaza. This could, not coincidentally, put more diplomatic pressure on the Palestinian Authority in the West Bank.

Indeed, the Israeli-Egyptian-Turkish collaboration that led to the prisoner exchange is one example of such a creative strategic approach that seeks new opportunities rather than fixating on old threats.

What this suggests for the United States is that there may be cost-effective ways of securing American interests in the Middle East at a time of political change there and of diminishing American military and economic resources. Libya offers a better approach than Iraq. Rather than pursuing hegemonic and ideologically driven policies, the United States could provide incentives for other players to handle some of the heavy lifting.

Indeed, the Iraq War could provide a case study of how not to pursue U.S. interest in the Middle East. President George W. Bush and his neoconservative advisers disregarded the ethnic and sectarian realities in Iraq and the balance of power in the Persian Gulf. Thus they helped shift power in Iraq from the Arab-Sunnis to the Arab-Shiites, all the while strengthening Iran.

That policy only harmed U.S. interests while failing to advance democratic values in Iraq, and it antagonized regional partners (Saudi Arabia; Turkey) as well as global players with interests to protect. The EU, for example, might have provided military and financial support to a more modest project aimed at containing Saddam Hussein’s Iraq.

In Libya, on the other hand, it was the European powers that took the military lead in bringing about regime change. America encouraged Britain and France to do so while it accepted a supporting military role.

The Obama administration’s policy in Libya, coupled with the announcement on withdrawing U.S. troops from Iraq by year’s end, may not signal that Washington is about to embrace a grand new strategy for the Middle East. But it is does suggest it is beginning to adapt its policies to the changing balance of power in the region.

# 1NR

#### turns Middle East

Brzezinski 12 (Zbigniew, US National Security Advisor to Jimmy Carter, Professor of American Foreign Policy at Johns Hopkins University School of Advanced International Studies, scholar at CSIS, Jan/Feb 2012, "8 Geopolitically Endangered Species," www.foreignpolicy.com/articles/2012/01/03/8\_geopolitically\_endangered\_species?page=0,7)

8. ISRAEL and the GREATER MIDDLE EAST America's decline would set in motion tectonic shifts undermining the political stability of the entire Middle East. All states in the region remain vulnerable to varying degrees of internal populist pressures, social unrest, and religious fundamentalism, as seen by the events of early 2011. If America's decline were to occur with the Israeli-Palestinian conflict still unresolved, the failure to implement a mutually acceptable two-state solution would further inflame the region's political atmosphere. Regional hostility to Israel would then intensify. Perceived American weakness would at some point tempt the more powerful states in the region, notably Iran or Israel, to preempt anticipated dangers. And jockeying for tactical advantage could precipitate eruptions by Hamas or Hezbollah, which could then escalate into wider and bloodier military encounters. Weak entities such as Lebanon and Palestine would pay an especially high price in civilian deaths. Even worse, such conflicts could rise to truly horrific levels through strikes and counterstrikes between Iran and Israel. At stake: Direct Israeli or U.S. confrontation with Iran; a rising tide of Islamic radicalism and extremism; a worldwide energy crisis; vulnerability of America's Persian Gulf allies.

#### Heg solves Afghanistan instability

Brzezinski 12 (Zbigniew, US National Security Advisor to Jimmy Carter, Professor of American Foreign Policy at Johns Hopkins University School of Advanced International Studies, scholar at CSIS, Jan/Feb 2012, "8 Geopolitically Endangered Species," www.foreignpolicy.com/articles/2012/01/03/8\_geopolitically\_endangered\_species?page=0,7)

6. AFGHANISTAN Devastated by nine years of brutal warfare waged by the Soviet Union, ignored by the West for a decade after the Soviet withdrawal, mismanaged by the medieval Taliban, and let down by 10 years of halfhearted U.S. military operations and sporadic economic assistance, Afghanistan is in shambles. With 40 percent unemployment and ranking 215th globally in per capita GDP, it has little economic output beyond its illegal narcotics trade. A rapid U.S. troop disengagement brought on by war fatigue or the early effects of American decline would most likely result in internal disintegration and an external power play among nearby states for influence in Afghanistan. In the absence of an effective, stable government in Kabul, the country would be dominated by rival warlords. Pakistan and India would more assertively compete for influence in Afghanistan -- with Iran also probably involved. At stake: The re-emergence of the Taliban; a proxy war between India and Pakistan; a haven for international terrorism.

#### Schuette decision is key to all affirmative action

Scott Lemieux, Poly Sci Prof @ St. Rose, 7-9-2013, “Affirmative Action's Ominous Future,” Prospect, <http://prospect.org/article/affirmative-actions-ominous-future>

One thing the three most anticipated cases of the recently completed Supreme Court had in common: They left the big questions unanswered. Hollingsworth v. Perry, by ducking the question on jurisdictional grounds, left the constitutional status of state bans on same-sex marriage unresolved. Shelby County v. Holder theoretically permitted Congress to update the preclearance formula to put the teeth back into the Voting Rights Act. However, the Court gave lower courts and future Supreme Courts no useful guideline for how Congress could proceed. (Admittedly, the answer for how Congress can constitutionally proceed, at least for the Roberts Court, is almost certainly "it can't.") The term's clearest passing of the buck was the decision in the affirmative-action case, Fisher v. University of Texas. While many people (including me) expected the Court to use the case as a vehicle to declare virtually all affirmative action in public higher education unconstitutional, in the eight long months between the oral arguments and the decision this June, the Justices decided to tread lightly, issuing a brief opinion sending the issue back to the lower courts. However, the next case on affirmative action the Court plans to hear next term, Schuette v. Coalition to Defend Affirmative Action, may prove to be the big stick that finally dismantles the system.

#### U.S. hegemonic decline causes global great-power war, collapses trade and spreads economic nationalism and protectionism

Zhang & Shi 11 – Yuhan Zhang, researcher at the Carnegie Endowment for International Peace; Lin Shi, Columbia University, independent consultant for the Eurasia Group and consultant for the World Bank, January 22, 2011, “America’s decline: A harbinger of conflict and rivalry,” East Asia Forum, online: http://www.eastasiaforum.org/2011/01/22/americas-decline-a-harbinger-of-conflict-and-rivalry/

Over the past two decades, no other state has had the ability to seriously challenge the US military. Under these circumstances, motivated by both opportunity and fear, many actors have bandwagoned with US hegemony and accepted a subordinate role. Canada, most of Western Europe, India, Japan, South Korea, Australia, Singapore and the Philippines have all joined the US, creating a status quo that has tended to mute great power conflicts.

However, as the hegemony that drew these powers together withers, so will the pulling power behind the US alliance. The result will be an international order where power is more diffuse, American interests and influence can be more readily challenged, and conflicts or wars may be harder to avoid.

As history attests, power decline and redistribution result in military confrontation. For example, in the late 19th century America’s emergence as a regional power saw it launch its first overseas war of conquest towards Spain. By the turn of the 20th century, accompanying the increase in US power and waning of British power, the American Navy had begun to challenge the notion that Britain ‘rules the waves.’ Such a notion would eventually see the US attain the status of sole guardians of the Western Hemisphere’s security to become the order-creating Leviathan shaping the international system with democracy and rule of law.

Defining this US-centred system are three key characteristics: enforcement of property rights, constraints on the actions of powerful individuals and groups and some degree of equal opportunities for broad segments of society. As a result of such political stability, free markets, liberal trade and flexible financial mechanisms have appeared. And, with this, many countries have sought opportunities to enter this system, proliferating stable and cooperative relations.

However, what will happen to these advances as America’s influence declines? Given that America’s authority, although sullied at times, has benefited people across much of Latin America, Central and Eastern Europe, the Balkans, as well as parts of Africa and, quite extensively, Asia, the answer to this question could affect global society in a profoundly detrimental way.

Public imagination and academia have anticipated that a post-hegemonic world would return to the problems of the 1930s: regional blocs, trade conflicts and strategic rivalry. Furthermore, multilateral institutions such as the IMF, the World Bank or the WTO might give way to regional organisations.

For example, Europe and East Asia would each step forward to fill the vacuum left by Washington’s withering leadership to pursue their own visions of regional political and economic orders. Free markets would become more politicised — and, well, less free — and major powers would compete for supremacy.

Additionally, such power plays have historically possessed a zero-sum element. In the late 1960s and 1970s, US economic power declined relative to the rise of the Japanese and Western European economies, with the US dollar also becoming less attractive. And, as American power eroded, so did international regimes (such as the Bretton Woods System in 1973).

A world without American hegemony is one where great power wars re-emerge, the liberal international system is supplanted by an authoritarian one, and trade protectionism devolves into restrictive, anti-globalisation barriers. This, at least, is one possibility we can forecast in a future that will inevitably be devoid of unrivalled US primacy.

#### Justices make decisions according to a zero-sum model of political capital – They think aggressive rulings trade off---and they don’t think that issuing several decisions can build capital, so no risk of a turn

Young 99 – Ernest A. Young, Assistant Professor at the University of Texas School of Law, 1999, “ARTICLE: State Sovereign Immunity and the Future of Federalism,” Supreme Court Review, 1999 Sup. Ct. Rev. 1, p. lexis

1. The opportunity cost of immunity rulings. The first reason, and the simplest, is that the Court has limited political capital. n261 As Dean Choper has argued, "the federal judiciary's ability to persuade the populace and public leaders that it is right and they are wrong is determined by the number and frequency of its attempts [\*59] to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions." n262 There is thus likely to be, at some point, a limit on the Court's ability to continue striking down federal statutes in the name of states' rights. n263 To the extent that this limit exists, then the Court's extended adventure in aggressive enforcement of state sovereign immunity will trade off with its ability to develop a meaningful jurisprudence of process or power federalism. If protecting state authority to regulate private conduct is the key to a viable state/federal balance, then a considered reaffirmation, explanation, or extension of Lopez may do more good than another expansion of Seminole Tribe.

"Political capital," of course, is a pretty vague concept. It might be that the Court's ability to enforce federalism limits is more like muscles than money: it atrophies unless it is exercised regularly. n264 The National League of Cities story arguably illustrates this phenomenon, in that the Court's failure to apply the doctrine to check federal power in a series of subsequent cases may have helped lead to the outright rejection of the doctrine in Garcia. n265 The important point, however, is that the Justices who matter most on these issues tend to think in terms of limited capital and worry about judicial actions that may draw down the reserves. n266 Political capital [\*60] is thus likely to function as an internal constraint on the Court's willingness repeatedly to confront Congress.

#### Best political science studies vote neg

Grosskopf & Mondak 98 – Anke Grosskopf, Professor of Political Science at the University of Pittsburgh, and Jeffrey Mondak, Professor of Political Science at the University of Illinois, September 1998, Political Research Quarterly, Vol. 51, No. 3, p. 635

The existence of a strong link between basic values and diffuse support does not necessarily preclude a role for specific decisions, particularly when we seek to understand how support comes to change over time (e.g., Caldeira and Gibson 1992: 658-61). We believe that any claim that the Supreme Court is fully immune to backlash against controversial decisions can be rejected on a prima facie level. First, consider the extreme case. Were the Supreme Court to make its occasional blockbusters-Brown v. Board of Education, Roe v. Wade, Texas v. Johnson, etc.-the norm by routinely ruling on the thorniest social questions, we see it as implausible that such actions would bring no cumulative impact on how people view the Court. Second, the Supreme Court's typical mode of operation suggests that justices themselves view institutional support as an expendable political capital (Choper 1980). That is, the Court recognizes its own political limitations, and thus justices pick their spots carefully when approaching potentially controversial cases. From this perspective, the apparent dominance of democratic values as a determinant of institutional support (e.g., Caldeira and Gibson 1992) means not that the Court is insulated from backlash, but that strategic justices tread cautiously so as to keep backlash to a minimum. Consequently, how and where we examine whether public response to Supreme Court decisions affects institutional support may shape what answer we find.

#### Justices will switch their votes based on perceived loss of capital – justices often flip their votes in conference after the case is heard

Baker 4 – Thomas E. Baker, Professor at the Florida International University College of Law, 2004, “A Primer on Supreme Court Procedures,” online: http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_scprimer.authcheckdam.pdf

All documents and briefs are matters of public record. Oral arguments, conversational debates between the lawyers for the parties and the justices, are conducted in public. The decisions are announced in open court and then published. The only secret procedures are the justices’ conference— when the nine meet without any others present to discuss and vote on cases—and their confidential individual work in chambers. The justices are aided by their law clerks in the arduous task of preparing opinions: researching the law, checking the lower court record, studying briefs and legal authorities, and exchanging memoranda with each other to argue points of law and to suggest changes in drafts. Not infrequently, these back-and-forth discussions and negotiations can be extensive and can result in one or more of the justices rethinking an earlier vote, thus shifting the ultimate outcome 180 degrees in a closely decided case.

Vote-switching is driven by political capital concerns---even if it looks like the Court will rule one way after oral arguments, loss of capital can flip it---also proves uniqueness can’t overwhelm the link

Cole 99 [David Cole, Prof of Law @ Georgetown, 1999 (17 Cardozo Arts & Ent LJ 705)]

However, the majority disagreed with our characterization of the statute as viewpoint discriminatory. n69 They managed to avoid that characterization by interpreting the statute to be essentially meaningless. They called it merely "hortatory." n70 That is why Jus tice Scalia said that the Court gutted the statute in saving it. What was most frustrating to me in litigating the case was the disingenuity of that position. As both Justices Souter and Scalia make clear in their separate opinions, it was abundantly clear to everyone that this statute was designed to discriminate against art that expressed disrespectful and indecent points of view. At oral argument, the Court ridiculed the Solicitor General's argument that the statute was meaningless. Yet in the end, the majority adopted the very interpretation it had ridiculed. Now the question is, why were they so disingenuous? I think that there are two things going on. One is that the Court was simply unwilling to expend the political capital that it would take to announce to the public that the Supreme Court has declared that "arts funding decisions cannot be based on decency." That would have been a difficult proposition for the public to swallow. The Court was simply not willing to expend the political capital to attain that result, even if it was the right result under the First Amendment. The government gave the Court a way out, by interpreting the statute as meaningless, which allowed the majority to avoid confronting the constitutional question.

#### Political science data confirms---the Court’s perception of losing capital substantially reduces the chances of more controversial decisions in the same area

Mondak 91 – Jeffrey Mondak, the James M. Benson Chair in Public Issues and Civic Leadership in the Department of Political Science at the University of Illinois, April 1991, “Substantive and Procedural Aspects of Supreme Court decisions as Determinants of Institutional Approval,” American Politics Quarterly, Vol. 19, No. 2, p. 185

The impact of the content of Supreme Court rulings has important ramifications for the future credibility of the Court. Because unpopular decisions exert negative influence on institutional approval, the Supreme Court would seem to be master of its own institutional fate. As Choper (1980) explains:

The Court’s prestige and authority is of a broad institutional nature, and when the Court expends its store of capital it tends to do so in a cumulative fashion... [I]f one or another of the Court’s rulings sparks a markedly hostile reaction, then the likelihood that subsequent judgements will be rejected is greatly increased. (P. 156)

The substance of a majority of Court decisions does mirror the policy preferences of the American public (Marshall 1988,1989), suggesting that the Court has been able to preserve its institutional credibility, whether deliberately or coincidentally, by minimizing rulings likely to prompt hostile public reaction.

#### Loss of capital means the Court will switch its vote even on legally similar rulings---they won’t challenge the government twice

Young 4 – Ernest A. Young, the Judge Benjamin Harrison Powell Professor of Law at the University of Texas, Austin, November 2004, “The Rehnquist Court’s Two Federalisms,” Texas Law Review, 83 Tex. L. Rev. 1, p. lexis

Many of these observations support the notion that the federal courts in general - and the Supreme Court in particular - have limited "institutional capital." Whether or not the national political branches are in fact inclined to keep the Court on a short leash after 1937, the Court seems to have drawn from that decade the lesson that it should exercise self-restraint (in at least some contexts) rather than confront the political branches. Moreover, at least some of the mechanisms Congress and the President can use to check the Court capitalize on the Court's limited resources. The McNollgast model of political checks, for example, emphasizes the political branches' ability to expand the number of potentially noncomplying lower court judges or decrease the Supreme Court's resources for reviewing lower court decisions as a means of forcing the Court to tolerate deviations from doctrines that the political branches oppose. n480 Those sorts of checks, in essence, force the Court to pick its battles more carefully.

Finite institutional capital - and limits on judicial efficacy more generally - is important to a study of judicial doctrine for two reasons. First, it suggests that courts must at least sometimes make choices between different lines of doctrinal development even if those lines are not inconsistent in principle; the necessity of choice arises simply from courts' inability to pursue too many avenues at once. I have argued in subpart II(A) that an autonomy-based model of federalism doctrine will generally be superior to a sovereignty-based model, but that discussion identified [\*101] relatively few respects in which both models could not peacefully coexist. To the extent that judicial institutional capital is limited, however, coexistence in principle may give way to tradeoffs in practice. If the Court wishes - as it should - to pursue an autonomy-based strategy, it may need to back off on state sovereignty. n481

#### Court capital’s finite---it’s about the number of decisions that the Justices think risk their capital

Heise 2K – Michael Heise, Professor of Law, Case Western Reserve University, 2000, “SYMPOSIUM: EDUCATION AND THE CONSTITUTION: SHAPING EACH OTHER AND THE NEXTCENTURY: Preliminary Thoughts on the Virtues of Passive Dialogue,” Akron Law Review, 34 Akron L. Rev. 73, p. lexis

Professor Paul Tractenberg, long active in the New Jersey school finance litigation, n81 identifies institutional credibility as an important practical concern for courts. Tractenberg is acutely aware of the institutional stakes involved in active judicial participation, particularly within the school finance setting. On the one hand he reasons that an active judicial posture might provide political cover for reluctant legislators. After all, politically accountable legislators could point to the state supreme court and suggest that the justices left them with little choice but to increase school spending. n82 Such a calculation, Professor Tractenberg correctly notes, risks [\*87] depleting the court's limited and valuable "political capital." n83 He goes on to note that:

There are only so many times that the court [the New Jersey Supreme Court] can be portrayed as the dictatorial villain forcing the State to do, in the name of a constitutional mandate, what a majority of its citizens disfavor before judicial credibility is undermined. n84

#### Judges make decisions strategically---they don’t just decide the facts of each case in isolation

Friedman 5 – Barry Friedman, the Jacob D. Fuchsberg Professor of Law, New York University School of Law, December 2005, “Article: The Politics of Judicial Review,” Texas Law Review, 84 Tex. L. Rev. 257, p. lexis

1. The Attitudinal Model. - The central tenet of the attitudinal model is that the primary determinant of much judicial decisionmaking is the judge's own values. n75 Judges come onto the bench with a set of ideological dispositions and apply them in resolving cases. As the most notable proponents of the attitudinal model, Jeffrey Segal and Harold Spaeth, explain: "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal." n76 Although methodologies vary, attitudinalists typically use a measure of judicial ideology and then rely on it to predict judicial votes. n77 Often, they also try to control for other factors that might influence [\*273] the vote: everything from personal characteristics of the judge (such as race, gender, and prior occupation) n78 to law itself.

Attitudinalists claim an enormous degree of success in their predictive endeavor, especially with regard to the Supreme Court. n79 "There is now surpassing empirical evidence in support of [the attitudinal model] of judicial decisionmaking." n80 Segal and Spaeth are able to predict over 70% of Supreme Court Justices' votes based on ideology, and sometimes they do quite a bit better. n81 "For Rehnquist, Blackmun, Brennan and Marshall, simply knowing that a case involves search and seizure would lead to correct predictions of votes between 78% and 90% of the time." n82 Even in the lower courts, ideology turns out to be a significant determinant of judicial behavior. n83

Virtually all positive scholars agree with attitudinalists that ideology plays an important role in the decision of cases, n84 though many positive [\*274] scholars believe that ideological behavior is constrained by other institutional forces. According to these "strategic institutionalists," "It is quite evident that the Justices do not operate simply in a world of their own making, and therefore the contours of judicial institutions must be recognized and they must be situated within [a] larger political environment." n85 Strategic institutionalists believe that judges would like to impose their own policy preferences but that they also must take account of the preferences of "presidents, legislatures, interest groups, and lower courts." n86 "Strategic judges must calculate what others will do and adjust their behavior accordingly." n87

#### We are definitely right

Mashaw 5 - Jerry, Professor of Law @ Yale, 2005, 55 Univ. of Toronto L.J. 497

Similarly, one might be unconvinced that the canon counselling courts to construe statutes in ways that avoid constitutional questions has any firm basis in the separation of powers. But it is surely the case that judicial political capital is not infinite. Courts that routinely strike down legislative enactments might quickly lose favour with the body politic, not just with the legislature. A prudent court should conserve judicial political capital, as Alex Bickel famously argued. n48

#### No aff link offense – Negative reactions to Court decisions are far more intense---nobody gets fired up over good decisions

Friedman 5 – Barry Friedman, the Jacob D. Fuchsberg Professor of Law, New York University School of Law, December 2005, “Article: The Politics of Judicial Review,” Texas Law Review, 84 Tex. L. Rev. 257, p. lexis

The critical question thus becomes how deep the Court's diffuse support among the general public is; for if theory holds, this is the leash on which the Court operates. Actually, a bungee cord might be a better analogy; for, in operation, the diffuse support hypothesis suggests that the judiciary can stray a certain distance from public opinion but that ultimately it will be snapped back into line. n393 Testing the length and flexibility of the cord is hard to do, however. It may be that there is greater tolerance for judicial deviation in some directions, such as with regard to the First Amendment. n394

Although the Court's degree of freedom of movement around public opinion may not be certain, positive scholars are fairly confident that one major determinant is information. The dynamics here are complex, but some generalities may be possible. Both negative and positive reactions to the Court influence public opinion, but negative reactions seem to be more intense and have a shorter half-life. n395 Perhaps it is for this reason that the [\*328] less people hear about the Court, the better for it. n396 As time passes, people develop a store of good feelings about the Supreme Court, reflected in the Court's relatively strong performance in public mood indicators. n397 Commentators who have studied public opinion and the Court regularly advise it to keep a low profile. n398

#### Abrupt nature of the plan guarantees the link

Marshall 2 [William Marshall, prof of law @ UNC, Fall 2002 (73 U. Colo. L. Rev. 1217)]

It might also be argued that the judicial activism question is misguided because judicial activism is not inherently wrong. Rather, the proper inquiry should simply be whether a case was correctly decided - not whether it was activist. Although I agree that a determination of activism is not the same as a determination of merit (an activist decision is not necessarily wrong, a non-activist decision is not necessarily correct), the activism inquiry can shed light on the merits issue. A decision that overturns a federal law while ignoring precedent, text, history, and jurisdictional limitations would appropriately be subject to an activist critique regardless of result. In addition, one need not be completely in the camps of Alexander Bickel, Robert Nagel, Mark Tushnet, and others to recognize that there is value in judicial restraint. Court overreaching may negatively affect the political capital of the judiciary. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962). Abrupt judicial action invalidating politically achieved results may undermine long-term support for the principles the decision was designed to achieve. Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review (1989). Courts may well be less receptive to progressive social and economic action than are the political branches. Mark Tushnet, Taking the Constitution Away from the Courts (1999). Finally, the activism critique is important in that it sets rhetorical constraints on actions that might otherwise appear unbounded. The legitimacy of a particular decision cannot be completely appraised without evaluating the deciding court's methodology. Activism is a part of that inquiry.

#### Politically controversial decisions are zero-sum

Frank B. Cross, Law Prof @ Duke, Dec. 1998, 48 Duke L. J. 511, “The Justices of Strategy,” p ln

More persuasive is Epstein and Knight's discussion of the Justices' amorphous concern for the Court's reputation and legitimacy among the general public and the other branches. Given the authors' belief that the Court is concerned only with public policy, one might question why the Justices do not issue advisory opinions or other dictates regarding such policy. Epstein and Knight's answer is that doing so would destroy respect for the Court and undermine its influence. 95 Walter Murphy similarly suggested that people "are more ready to accept unpleasant decisions which appear to be the ineluctable result of rigorously logical deductions." 96 Justices therefore must be able to maintain an illusion of adherence to legal principle. This in turn surely requires that they in fact adhere to that principle with some frequency. The Justices' concerns about public perception seem to affect other strategic decisions by the Court, including some decisions that may formally violate the law. For example, at the end of the tenure of [\*531] Justice Douglas, the Court held over cases in which Douglas was in a 5-4 majority, due to the fear that a conservative replacement for the Justice might result in "half a dozen major decisions being reversed in a year's time." 97 The Court has entirely avoided some highly political controversies, such as the legality of the Vietnam conflict. 98 Moreover, in their dealings with the press, the Justices have assiduously portrayed themselves as being above mere politics. 99 Both the critics and defenders of Roe v. Wade 100 believed that the Justices considered public reaction in making their decision. 101 Finally, concern for public acceptance may have enormous practical importance, as suggested by the Warren Court's decision to uphold the death penalty; some have suggested that this decision was motivated by a fear that the Court had already "spread its political capital too thin." 102 If the Court is indeed influenced by its public standing, it may follow that public pressure has a measurable influence on Supreme Court strategy.

#### The court perceives the risk – the plan trades off with other judicial decisions

Ernest A. Young, Prof of Law at UT Austin, November 2004, “The Rehnquist Court's Two Federalisms,” 83 Tex. L. Rev. 1, ln

Whether or not Alexander Hamilton was right to call the judiciary the "least dangerous branch," n451 both contemporary theory and historical experience suggest that courts' ability to defy the national political branches is not unlimited. Those limits bear on federalism doctrine in at least three respects. First, they support, at least to some extent, the notion that the judiciary has limited institutional capital. If that is true, then courts may not be able to pursue all possible doctrinal avenues at once and may, in consequence, have to choose among them. Second, these limits suggest that courts should pursue certain kinds of doctrine. In particular, they support doctrine that advances the goal of state autonomy without forcing direct confrontations by invalidating political branch actions. Finally, the limits on the judiciary's ability to confront the political branches ought to temper our expectations (or fears) of what judicial federalism doctrine can accomplish.

#### Court doesn’t want to rule on SOP or war powers issues – too politically charged

James M. Lindsay, 4-5-2011, "The Water's Edge: Is Operation Odyssey Dawn Constitutional? Part V," Council on Foreign Relations - The Water's Edge, http://blogs.cfr.org/lindsay/2011/04/05/is-operation-odyssey-dawn-constitutional-part-v/

Most Americans think of the Supreme Court as the legal equivalent of a baseball umpire. In their view, the Court’s job is to call legal balls and strikes, and thereby tell us what the law is. So why then is the question of whether presidents can initiate military hostilities so hotly debated?

 It turns out that the Supreme Court does not see its job as most Americans do, enforcing the dividing line between the executive and legislative branches. The Court sometimes sidesteps separation-of-powers issues, especially when it comes to foreign policy. The Court has good reason to bite its tongue. However, when it comes to the war power, its silence alters the basic constitutional structure that the Framers created. The Supreme Court hasn’t always shied away from refereeing separation-of-powers questions on foreign policy. In Little v. Barreme (1804), for example, the Court protected Congress’s war power from executive encroachment. The case arose when a U.S. naval ship seized a vessel sailing from a French port during the Quasi-War of 1798 with France. The problem was that Congress had specifically directed the U.S. Navy to seize ships heading to French ports. The captain of the U.S. ship defended his actions on the grounds that the secretary of the Navy had ordered him to seize ships regardless of whether they were bound to or from French ports. The Supreme Court rejected the captain’s defense. It ruled that the executive branch could not change Congress’s instructions, even if doing so would have been a more effective way of achieving the military goals Congress sought. Noticeably absent in the Court’s decision was any reference to the powers the president might have as the nation’s commander in chief. The modern Supreme Court, however, generally shies away from wading into war powers cases. The Court offers several reasons for its reluctance. One reason is the courts’ preference to hear only lawsuits brought by someone who has legal standing, which is defined as having suffered concrete personal harm. Traditionally, the courts have held that neither Congress nor the president suffers concrete personal injury when the other branch tries to usurp its authority. So it is generally (though not always) the case, as the late great legal scholar Louis Henkin put it, that “the president himself cannot bring a judicial proceeding to challenge alleged usurpation of his authority by Congress, nor can Congress (or members of Congress) sue to enjoin an alleged usurpation by the president.” For example, when twenty-six members of the House of Representatives sued Bill Clinton in 1999 for ordering the bombing of Serbia without congressional authorization, the lower federal courts dismissed the lawsuit on the grounds that the legislators did not have legal standing. The Supreme Court refused to hear the appeal. A second reason the courts may sidestep separation-of-powers questions is the principle of ripeness. Courts are not debating societies for thrashing out hypothetical issues. They are places for assessing allegations of real or imminent harm. So courts generally take only cases that meet these criteria. For example, 110 members of Congress sued President George H.W. Bush in the fall of 1990, arguing that he could not use U.S. troops to liberate Kuwait unless he first had congressional authorization. The judge in Dellums v. Bush granted the members standing, but then dismissed the case because it was not ripe for judicial review. He argued that the case would be ripe only if “the plaintiffs in an action of this kind be or represent the majority of the members of Congress.” In short, if Congress did not formally stop Bush from acting, the courts would not bail it out. The third reason the courts might pass on a separation of powers issue is the doctrine of political questions. The idea here is that it is the courts’ job to rule on the legality of what the government has done and not on the wisdom of its decision. The Supreme Court takes a broad view of what constitutes a political question in foreign affairs. For instance, in 1979 President Jimmy Carter unilaterally terminated the Mutual Defense Treaty with Taiwan. Sen. Barry Goldwater (R-Ariz.) and more than a dozen of his colleagues filed suit alleging that Carter had exceeded his constitutional authority. To all of us who did not go to law school, Goldwater v. Carter seems to have raised a straightforward legal question: which branch of government has the authority to terminate a treaty? But four Supreme Court justices argued that the question was “‘political’ and therefore nonjusticiable because it involves the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.” (A fifth justice argued that the case was not ripe for trial because the Senate had taken no formal steps to stop Carter.) Why have the courts in recent decades shied away from policing the boundaries of the separation of powers? Two practical motives stand out. One is that the courts want to limit their workload. If anyone could sue, regardless of whether he or she had been personally harmed, the courts would be swamped. The same would be true if the courts agreed to hear cases about legal “what-ifs” or if they took on the task of passing judgment on the wisdom rather than the legality of what the government does. The second practical reason for the rules on justiciability is specific to the separation-of-powers issue. If lawmakers know they can toss tough problems into the courts’ lap, that’s precisely what they will do. Why cast a politically tough vote if you can dump the matter on justices who don’t have to face the voters? This would undermine the democratic idea that the two political branches—Congress and the president—should decide the country’s future course.

#### War powers debates are seen as contentious – court doesn’t want to get involved

Robert McMahon, ed. Council on Foreign Relations, 6-20-2011, "Balance of War Powers: The U.S. President and Congress," http://www.cfr.org/united-states/balance-war-powers-us-president-congress/p13092

The U.S. Constitution gives Congress and the president different responsibilities in waging wars, but there have long been disputes about where one's war powers begin and the other's ends. The Obama administration's dispute with Congress over its decision to participate in the military intervention in Libya in March 2011 revives a showdown over war powers last seen in spring 2007 when a Democratic-controlled Congress sought to expedite troop pullouts from Iraq in defiance of a Republican president. In the case of the Libyan mission, a Democratic president faces concerns from lawmakers of both parties over his decision to act without congressional approval. The administration delivered a report on June 15 stating that the military operations in Libya are too limited to require Congress to authorize them under the War Powers Resolution. House Speaker John Boehner said the White House letter "just doesn't pass the straight-face test in my view that we're not in the midst of hostilities." Aside from constitutional questions, many scholars point to the growing assertion of presidential war powers since the end of World War II. CFR Senior Vice President James Lindsay writes that "the war power gravitates to the White House, in practice if not in law." He notes the Supreme Court's reluctance in recent years to insert itself in war powers cases and the burden on Congress to change presidential action.