# UMKC Doubles

## 1NC

### 1

#### Our interpretation is that the aff must defend an advocacy in the direction of the topic, which is an increase in statutory and/or judicial restrictions on the war powers authority of the President.

#### Increase means to make greater

Dictionary.com No Date Given <http://dictionary.reference.com/browse/increase?s=ts> increase - Show IPA verb, in·creased, in·creas·ing, noun verb (used with object)

to make greater, as in number, size, strength, or quality; augment; add to: “to increase taxes.”

#### Restriction on war power authority must be a limit that controls the president

Fisher, 97 **–** (Louis, Senior Specialist in Separation of Powers, Congressional Research Service, The Library of Congress, “Presidential Independence and the Power of the Purse,” U.C. Davis J. Int'l L. & Pol'y 107, Lexis)

A legal analysis by Walter Dellinger, at that time Assistant Attorney General for the Office of Legal Counsel, draws a bold definition of presidential war power but appears to concede that if Congress gets its act together to enact a statutory restriction, the legislative limit controls the President: "By establishing and funding a military force capable of being sent around the globe, and declining in the War Powers Resolution or elsewhere to forbid the President's use of his statutory and constitutional powers to deploy troops into situations of risk such as Haiti, Congress left the President both the authority and the means to take such initiatives." n131

#### First is Limits – resolutional limits encourage aff innovation, predictive research on a designated topic, and clash—a precursor to productive education. The inherent value of arguments within limits is greater, which link turns education arguments

#### Second is Fair ground – the resolution is the only neutral site of stasis for controversy – changing this allows them to define the debate in ways that make it impossible for us to compete and really easy for them to win

#### Third is decision-making – only maintaining a limited topic of discussion and a clear stasis for both teams provides the necessary and requisite foundation for decision-making and advocacy skills – even if they are contestable, that is different from being valuably debatable

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Debate is a means of settling differences, so there must be a difference of opinion or a conflict of interest before there can be a debate. If everyone is in agreement on a tact or value or policy,there is no need for debate: *the matter can be settled by unanimous consent*. Thus, for example, it would be pointless to attempt to debate "Resolved: That two plus two equals four," because there is simply no controversy about this statement. (Controversy is an essential prerequisite of debate. Where there is no clash of ideas, proposals, interests, or expressed positions on issues, there is no debate. In addition, debate cannot produce effective decisions without clear identification of a question or questions to be answered. For example, general argument may occur about the broad topic of *illegal* immigration. How many illegal immigrants are in the United States? What is the impact of illegal immigration and immigrants on our economy? What is their impact on our communities? Do they commit crimes? Do they take jobs from American workers? Do they pay taxes? Do they require social services? Is it a problem that some do not speak English? Is it the responsibility of employers to discourage illegal immigration by not hiring undocumented workers? Should they have the opportunity- to gain citizenship? Docs illegal immigration pose a security threat to our country? Do illegal immigrants do work that American workers are unwilling to do? Are their rights as workers and as human beings at risk due to their status? Are they abused by employers, law enforcement, housing, and businesses? I low are their families impacted by their status? What is the moral and philosophical obligation of a nation state to maintain its borders? Should we build a wall on the Mexican border, establish a national identification can!, or enforce existing laws against employers? Should we invite immigrants to become U.S. citizens? Surely you can think of many more concernsto be addressed by a conversation about the topic area of illegal immigration. Participation in this "debate" is likely to be emotional and intense. However, it is not likely to be productive or useful without focus on a particular question and identification of a line demarcating sides in the controversy. To be discussed and resolved effectively, controversies must be stated clearly. Vague understanding results in unfocused deliberation and poor decisions, frustration, and emotional distress, as evidenced by the failure of the United States. Congress to make progress on the immigration debate *during the summer of 2007*. Someone disturbed by the problem of the growing underclass of poorly educated, socially disenfranchised youths might observe, "Public schools are doing a terrible job! They are overcrowded, and many teachers are poorly qualified in their subject areas. Even the best teachers can do little more than struggle to maintain order in their classrooms." That same concerned citizen, facing a complex range of issues, might arrive at an unhelpful decision, such as "We ought to do something about this" or. worse. "It's too complicated a problem to deal with." Groups of concerned citizens worried about the state of public education could join together to express their frustrations, anger, disillusionment, and emotions regarding the schools, but without a focus for their discussions, they could easily agree about the sorry state of education without finding points of clarity or potential solutions. A gripe session would follow. But if a precise question is posed—such as "What can be done to improve public education?"—then a more profitable area of discussion is opened upsimply by placing a focus on the search for a concrete solution step. One or more judgments can be phrased in the form of debate propositions, motions for parliamentary debate, or bills for legislative assemblies. The statements "Resolved: That the federal government should implement a program of charter schools in at-risk communities" and "Resolved: That the state of Florida should adopt a school voucher program" more clearly identify specific ways of dealing with educational problems in a manageable form, suitable for debate¶ . They provide specific policies to be investigated and aid discussants in identifying points of difference. To have a productive debate, which facilitates effective decision making by directing and placing limits on the decision to be made, the basis for argument should be clearly defined. If we merely talk about "homelessness" or "abortion" or "crime'\* or "global warming" we are likely to have an interesting discussion but not to establish profitable basis for argument. For example, the statement "Resolved: That the pen is mightier than the sword" is debatable, yet fails to provide *much* basis for clear argumentation. If we take this statement to mean that the written word is more effective than physical force for some purposes, we can identify a problem area: the comparative effectiveness of writing or physical force for a specific purpose.¶ Although we now have a general subject, we have not yet stated a problem. It is still too broad, too loosely worded to promote well-organized argument. What sort of writing are we concerned with—poems, novels, government documents, website development, advertising, or what? What does "effectiveness" mean in this context? What kind of physical force is being compared—fists, dueling swords, bazookas, nuclear weapons, or what? A more specific question might be. "Would a mutual defense treaty or a visit by our fleet be more effective in assuring Liurania of our support in a certain crisis?" The basis for argument could be phrased in a debate proposition such as "Resolved: That the United States should enter into a mutual defense treatv with Laurania." Negative advocates might oppose this proposition by arguing that fleet maneuvers would be a better solution. This is not to say that debates should completely avoid creative interpretation of the controversy by advocates, or that good debates cannot occur over competing interpretations of the controversy; in fact, these sorts of debates may be very engaging. The point is that debate is best facilitated by the guidance provided by focus on a particular point of difference, which will be outlined in the following discussion.

#### Effective decision-making is the lynchpin to solve all social and political problems --- this is an impact to limits, role-playing and decision-making that turns case

Lundberg ‘10 **–** (Christian Lundberg, Professor of Communications @ University of North Carolina, Chapel Hill, “Tradition of Debate in North Carolina” in Navigating Opportunity: Policy Debate in the 21st Century By Allan D. Louden, p311)

The second major problem with the critique that identifies a naivety in articulating debate and democracy is that it presumes that the primary pedagogical outcome of debate is speech capacities. But the democratic capacities built by debate are not limited to speech—as indicated earlier, debate builds capacity forcritical thinking, analysis of public claims, informeddecision making, and better public judgment. If the picture ofmodem political life that underwrites this critique of debateis a pessimistic view of increasingly labyrinthine and bureaucratic administrative politics, rapid scientific and technological change outpacing the capacities of the citizenry to comprehend them, and ever-expanding insular special-interest- and money-driven politics, it is a puzzling solution**,** at best, to argue that these conditions warrant giving up on debate. If democracy is open to rearticulation, it is open to rearticulation precisely because as the challenges of modern political life proliferate, the citizenry's capacities can change, which is one of the primary reasons that theorists of democracy such as Ocwey in The Public awl Its Problems place such a high premium on education (Dewey 1988,63, 154). Debate provides an indispensible form of education in the modem articulation of democracy because it builds precisely the skills that allow the citizenryto research and be informed about policy decisions that impact them, to son rhroueh and evaluate the evidence for and relative merits of arguments for and against a policy in an increasingly infonnation-rich environment, and to prioritize their time and political energies toward policies that matter the most to them. The merits of debate as a tool for building democratic capacity-building take on a special significance in the context of information literacy. John Larkin (2005, HO) argues that one of the primary failings of modern colleges and universities is that they have not changed curriculum to match with the challenges of a new information environment. This is a problem for the course of academic study in our current context, but perhaps more important, argues Larkin, for the future of a citizenry that will need to make evaluative choices against an increasingly complex and multimediatcd information environment (ibid-). Larkin's study tested the benefits of debate participation on information-literacy skills and concluded that in-class debate participants reported significantly higher self-efficacy ratings of their ability to navigate academic search databases and to effectively search and use other Web resources: To analyze the self-report ratings of the instructional and control group students, we first conducted a multivariate analysis of variance on all of the ratings, looking jointly at the effect of instmction/no instruction and debate topic . . . that it did not matter which topic students had been assigned . . . students in the Instnictional [debate) group were significantly more confident in their ability to access information and less likely to feel that they needed help to do so----These findings clearly indicate greater self-efficacy for online searching among students who participated in (debate).... These results constitute strong support for the effectiveness of the project on students' self-efficacy for online searching in the academic databases. There was an unintended effect, however: After doing ... the project, instructional group students also felt more confident than the other students in their ability to get good information from Yahoo and Google. It may be that the library research experience increased self-efficacy for any searching, not just in academic databases. (Larkin 2005, 144) Larkin's study substantiates Thomas Worthcn and Gaylcn Pack's (1992, 3) claim that debate in the college classroom plays a critical role in fostering the kind of problem-solving skills demanded by the increasingly rich media and information environment of modernity. Though their essay was written in 1992 on the cusp of the eventual explosion of the Internet as a medium, Worthcn and Pack's framing of the issue was prescient: the primary question facing today's student has changed from how to best research a topic to the crucial question of learning how to best evaluate which arguments to cite and rely upon from an easily accessible and veritable cornucopia of materials. There are, without a doubt, a number of important criticisms of employing debate as a model for democratic deliberation. But cumulatively, the evidence presented here warrants strong supportfor expanding debate practice in the classroom as a technology for enhancing democratic deliberativecapacities. The unique combination of critical thinking skills**,** researchand information processingskills, oral communicationskills, and capacities for listening and thoughtful, open engagement with hotly contested issues argues for debate as a crucial component of a rich and vital democratic life. In-class debate practice both aids students in achieving the best goals of college and university education, and serves as an unmatched practice for creating thoughtful, engaged, open-minded and self-critical students who are open to the possibilities of **meaningful political engagement** and new articulations of democratic life**.** Expanding this practice is crucial, if only because the more we produce citizens that can actively and effectively engage the political process, the more likely we are to **produce** revisions **of** democratic life that are necessary if democracy is not only to survive, but to thrive. Democracy faces a myriad of challenges, including: domestic and international issues of class**,** gender**, and** racial justice; wholesale environmental destruction and the potential for rapid climate change; emerging threats to international stability in the form of terrorism, intervention and new possibilities for great power conflict; andincreasing challenges of rapid globalization including an increasingly volatile global economic structure. More than any specific policy or proposal, an informed and active citizenrythat deliberateswith greater skill and sensitivity provides one of the best hopes for responsive and effective democratic governance, and by extension, one of the last best hopes for dealing with the existential challenges to democracy [in an] increasingly complex world.

#### Discussions of specific policy-questions is crucial for skills development – we control uniqueness: students already have dogmatic notions about the world – government policy discussions is vital to force engagement with competing perspective to improve social outcomes and break down pre-conceived barriers of what is right – this turns case

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These government or quasi-government think tank simulations often provide very similar lessons for high-level players as are learned by students in educational simulations. Government participants learn about the importance of understanding foreign perspectives, the need to practice internal coordination, and the necessity to compromise and coordinate with other governments in negotiations and crises. During the Cold War, political scientist Robert Mandel noted how crisis exercises and war games forced government officials to overcome ‘‘bureaucratic myopia,’’ moving beyond their normal organizational roles and thinking more creatively about how others might react in a crisis or conflict.6 The skills of imagination and the subsequent ability topredict foreign interests and reactions remain critical for real-world foreign policy makers. For example,simulations of the Iranian nuclear crisis \*held in 2009 and 2010 at the Brookings Institution’s Saban Center and at Harvard University’s Belfer Center, and involving former US senior officials and regional experts\*highlighted the dangers of misunderstanding foreign governments’ preferences and misinterpreting their subsequent behavior. In both simulations, the primary criticism of the US negotiating team lay in a failure to predict accurately how other states, both allies and adversaries, would behave in response to US policy initiatives.7 By university age, students often have a pre-defined view of international affairs, and the literature on simulations in education has long emphasized how such exercises force students to challenge their assumptions about how other governments behave and how their*own*government works.8 Since simulations became more common as a teaching tool in the late 1950s, educational literature has expounded on their benefits, from encouraging engagement by breaking from the typical lecture format, to improving communication skills, to promoting teamwork.9 More broadly, simulations can deepen understanding by asking students to link fact and theory, providing a context for facts while *bringing theory into the realm of practice*.10 These exercises are particularly valuable in teaching international affairs for many of the same reasons they are useful for policy makers: they force participants to ‘‘grapple with the issues arising from a world in flux.’’11 Simulations have been used successfully to teach students about such disparate topics as European politics, the Kashmir crisis, and US response to the mass killings in Darfur.12 Role-playing exercises certainly encourage students to learn political and technical facts\* but they learn them in a more active style. Rather than sitting in a classroom and merely receiving knowledge, students actively research*‘‘*their’’government’s positions and actively argue, brief, and negotiate with others.13 Facts can change quickly; simulations teach students how to contextualize and act on information.14

#### **Our goal as rhetorical scholars should be the exploration and production of inventional resources suitable for the larger public,** otherwise we get lost in too-easy assurances that what we are doing here in the debate space is necessary and sufficient

Welsh 12 Scott Department of Communication Appalachian State University (“Coming to Terms with the Antagonism between Rhetorical Reflection and Political Agency”, *Philosophy and Rhetoric,* Vol. 45, No. 1, 2012, Jstor)

The challenge is to resist synthetically resolving these antagonisms, whether in confirming or disconfirming ways. Rather, as Žižek might suggest, the aim should be to “come to terms” with these antagonisms by articulating academic identities less invested in reparative fantasies that imagine a material resolution of them (1989, 3, 5, 133; 2005, 242–43). Accounts that fail to come to terms with the impossibility of closure and continue to invest in such fantasies yield either indignant calls for activism or too-easy assurance of the potential consequence of one’s work, neither of which is well suited to scholar-citizen engagement. Coming to terms with these antagonisms, I ultimately argue, is aided by a reconsideration of a number of Jürgen Habermas’s (1973, 1970) early works on the relationship between theory and practice and C. Wright Mills’s (2000) account of the relationship between scholarly reflection and political agency in The Sociological Imagination. Turning to Giambattista Vico, Habermas shows us how to keep the antagonisms clearly in view, even though he does not suggest a vision of scholarship that might allow academics to deliberately respond to the antagonism between scholarship and political agency. It is Mills, rather, through his concept of academics working in support of the sociological imagination, who suggests how academics might do just that. Directly and indirectly returning, in a sense, to classical rhetorical roots, each challenges rhetoric scholars to emphasize, as the aim of rhetoric scholarship, the exploration and production of inventional resources suitable for appropriation by citizen-actors. Such a construction of the relationship between academics and politics locates political agency and the situated pursuit of practical wisdom in democratic publics without absolving scholars of responsibility to them.

#### Prefer our evidence because it is more specific to the debate context. Game spaces like debate are distinct from other forms of education and public speaking. There has to be a balance of ground or else one side claims the moral high ground and creates a de facto monologue

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Debate games are often based on pre-designed scenarios that include descriptions of issues to be debated, educational goals, game goals, roles, rules, time frames etc. In this way, debate games differ from textbooks and everyday classroom instruction as debate scenarios allow teachers and students to actively imagine, interact and communicate within a domain-specific game space. However, instead of mystifying debate games as a “magic circle” (Huizinga, 1950), I will try to overcome the epistemological dichotomy between “gaming” and “teaching” that tends to dominate discussions of educational games. In short, educational gaming is a form of teaching. As mentioned, education and games represent two different semiotic domains that both embody the three faces of knowledge: assertions, modes of representation and social forms of organisation (Gee, 2003; Barth, 2002; cf. chapter 2). In order to understand the interplay between these different domains and their interrelated knowledge forms, I will draw attention to a central assumption in Bakhtin’s dialogical philosophy. According to Bakhtin, all forms of communication and culture are subject to centripetal and centrifugal forces (Bakhtin, 1981). A centripetal force is the drive to impose one version of the truth, while a centrifugal force involves a range of possible truths and interpretations. This means that any form of expression involves a duality of centripetal and centrifugal forces: “Every concrete utterance of a speaking subject serves as a point where centrifugal as well as centripetal forces are brought to bear” (Bakhtin, 1981: 272). If we take teaching as an example, it is always affected by centripetal and centrifugal forces in the on-going negotiation of “truths” between teachers and students. In the words of Bakhtin: “Truth is not born nor is it to be found inside the head of an individual person, it is born between people collectively searching for truth, in the process of their dialogic interaction” (Bakhtin, 1984a: 110). Similarly, the dialogical space of debate games also embodies centrifugal and centripetal forces. Thus, the election scenario of The Power Game involves centripetal elements that are mainly determined by the rules and outcomes of the game, i.e. the election is based on a limited time frame and a fixed voting procedure. Similarly, the open-ended goals, roles and resources represent centrifugal elements and create virtually endless possibilities for researching, preparing, presenting, debating and evaluating a variety of key political issues. Consequently, the actual process of enacting a game scenario involves a complex negotiation between these centrifugal/centripetal forces that are inextricably linked with the teachers and students’ game activities. In this way, the enactment of The Power Game is a form of teaching that combines different pedagogical practices (i.e. group work, web quests, student presentations) and learning resources (i.e. websites, handouts, spoken language) within the interpretive frame of the election scenario. Obviously, tensions may arise if there is too much divergence between educational goals and game goals. This means that game facilitation requires a balance between focusing too narrowly on the rules or “facts” of a game (centripetal orientation) and a focusing too broadly on the contingent possibilities and interpretations of the game scenario (centrifugal orientation). For Bakhtin, the duality of centripetal/centrifugal forces often manifests itself as a dynamic between “monological” and “dialogical” forms of discourse. Bakhtin illustrates this point with the monological discourse of the Socrates/Plato dialogues in which the teacher never learns anything new from the students, despite Socrates’ ideological claims to the contrary (Bakhtin, 1984a). Thus, discourse becomes monologised when “someone who knows and possesses the truth instructs someone who is ignorant of it and in error”, where “a thought is either affirmed or repudiated” by the authority of the teacher (Bakhtin, 1984a: 81). In contrast to this, dialogical pedagogy fosters inclusive learning environments that are able to expand upon students’ existing knowledge and collaborative construction of “truths” (Dysthe, 1996). At this point, I should clarify that Bakhtin’s term “dialogic” is both a descriptive term (all utterances are per definition dialogic as they address other utterances as parts of a chain of communication) and a normative term as dialogue is an ideal to be worked for against the forces of “monologism” (Lillis, 2003: 197-8). In this project, I am mainly interested in describing the dialogical space of debate games. At the same time, I agree with Wegerif that “one of the goals of education, perhaps the most important goal, should be dialogue as an end in itself” (Wegerif, 2006: 61).

#### If our interpretation is net-beneficial it means there’s no reason to vote affirmative. If the case is true then it de-justifies the resolution. Teams are still signified by ‘AFF’ and ‘NEG’, so the resolution is a required measurement for ‘affirmation.’

### 2

#### Politics is Schmittian – congress and courts cannot effectively constrain the executive

Vermeule and Posner, 11 – Adrian Vermeule, prof of Law at Harvard University Law School, Eric A Posner., prof of Law at the University of Chicago Law School, Executive Unbound: After the Madisonian Republic, Oxford University Press 2011

Our thesis is that these modifications to liberal legalism fail. Either they do not go far enough to square with the facts, or they go so far as to effec­tively abandon the position they seek to defend. We live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity. As against liberal constitutional theorists like Janies Madison, Bruce Acker­man,1 and Richard Epstein,2 and liberal theorists of the rule of law like ..Albert Venn Dicey3 and David Dyzenhaus,4 we argue that in the modern administrative state the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis. Whereas Madison is an exemplar of liberal legalism, particularly in the domain of constitutional theory, we draw upon the thought of the Weimar legal theorist Carl Schmitt. We do not agree with all of Schmitt’s views, by any means. To the. extent Schmitt thought that democratic poli­tics do not constrain the executive, or thought that in the administrative state the executive is not only largely unconstrained by law but also uncon­strained tout court, we disagree. Indeed, to the extent that Schmitt thought this, he fell into a characteristic error of liberal legalism, which equates lack of legal constraint with unbounded power. But Schmitt’s critical arguments against liberal legalism seem to us basically correct, at least when demysti­fied and rendered into suitably pragmatic and institutional terms. A central theme in Schmitt s work, growing outof Weimar’s running economic and security crises in the 1920s and early 1930s, involves the relationship between the classical rule-of-law state, featuring legislative enactment of general rules enforced by courts, and the administrative state, featuring discretionary authority and ad hoc programs, administered by the executive, affecting particular individuals and firms. The nub of Schmitt s view is the idea that liberal lawmaking institutions frame, general norms that are essentially “oriented to the past,” whereas “the dictates of modern interventionist politics cry out for a legal system conducive to a present- and future-oriented ‘steering’ of complex, ever-changing eco­nomic scenarios.”3 Legislatures and courts, then, are continually behind the pace of events in the administrative state; they play an essentially reac­tive and marginal role, modifying and. occasionally blocking executive policy initiatives, but rarely taking the lead. And in crises, the executive governs nearly alone, at least so far as law is concerned. In our view, the major constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework defended by liberal legalists, but from politics and public opinion. Law and politics are hard to separate and lie on a continuum—elections, for example, are a complicated mix: of legal rules and political norms—but the poles are clear enough for our purposes, and the main constraints on the executive arise from the political end of the continuum. A central fallacy of liberal legalism, we argue, is the equation of a constrained executive with an executive constrained by law. The pressures of the administrative state loosen legal constraints, causing liberal legalists to develop tyrannophobia, or unjustified fear of dictatorship. They overlook the de facto political con­straints that have grown up and, to some degree, substituted for legal constraints on the executive.6 As the bonds of law have loosened, the bonds of politics have tightened their grip. The executive, “unbound” from the standpoint of liberal legalism, is in some ways more constrained than ever before. We do not claim that these political constraints necessarily cause the executive to pursue the public interest, however defined, or that they pro­duce optimal executive decision-making. We do claim that politics and public opinion at least block the most lurid forms of executive abuse, that courts and Congress can do no better, that liberal legalism goes wrong by assuming that a legally unconstrained executive is unconstrained overall, and that in any event there is no pragmatically feasible alternative to exec­utive government under current conditions. The last point has normative implications, because of the maxim “Ought implies can.” Executive gov­ernment is best in the thin sense that there is no feasible way to improve upon it, under the conditions of the administrative state.

#### The aff creates a façade of constraint that are ineffectual – that makes true restraints impossible and swells executive power – turns their biopower impact

Osborn 8 Timothy Kaufman is the Baker Ferguson Professor of Politics and Leadership at Whitman College; from 2002-06 as president of the American Civil Liberties of Washington; and he recently completed a term on the Executive Council of the American Political Science Association. Theory & Event > Volume 11, Issue 2

The examples cited in this section suggest not the formation of an utterly lawless regime, but, rather, within an order that continues to understand itself in terms of the categories provided by liberal contractarianism, the more insidious creation, multiplication, and institutionalization of what David Dyzenhaus calls "grey holes." Such holes are "spaces in which there are some legal constraints on executive action...but the constraints are so insubstantial that they pretty well permit government to do as it pleases."40 As such, they are more harmful to the rule of law than are outright dictatorial usurpations, first, because the provision of limited procedural protections masks the absence of any real constraint on executive power; and, second, because location of the authority to create such spaces within the Constitution implies that, in the last analysis, they bear ex ante authorization by the people. When created, in other words, they may receive but they do not require ratification, whether by Congress or by those whom its members are said to represent. What this means in effect is that the second Bush administration has dispensed with Jefferson's stipulation that extra-constitutional executive acts (or, rather, acts that Jefferson deemed to be outside those constitutionally permitted) require ex post facto ratification; and, in addition, that it has dispensed with Locke's contention that, however unlikely, at least in principle, specific exercises of extra-legal prerogative power (or, rather, acts that Locke deemed to be outside those legally permitted) are properly subject to revolutionary rejection. What one finds in the second Bush administration, then, is a denial of both models of accountability, combined with an aggressive commitment to the constitution of a security state that is liberal only in name. As it extends its reach, perfection of that state renders the prospect of popular repudiation of prerogative power ever more chimerical, and, indeed, renders recognition of the problematic character of its exercise ever less likely.

#### Reliance on the law naturalizes injustice and obviates the reasons why those injustices occur

Lobel, 7 **–** Assistant Professor of Law, University of San Diego, (Orly, Harvard Law Review, 120 Harv. L. Rev. 937)

Psychological cooptation is produced by the law precisely because law promises more than it can and will deliver. At the same time, law is unlike other sets of rules or systems in which we feel as though we have more choice about whether to participate. As described earlier, law presents itself simultaneously as the exclusive source of authority in a society and as the only engine for social change. It further presents itself as objective, situated outside and above politics. Thus, social actors who enter into formal channels of the state risk transformation into a particular hegemonic consciousness**.** Relying upon the language of law and legal rights to bring change legitimates an ideological system that masks inequality. [95](http://www.lexis.com/research/retrieve?_m=b7d531dcca7209b987833602ed6fbb4e&docnum=23&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAt&_md5=3f8bfd4662cb01d0d1bf9f28a63e1155&focBudTerms=lobel%20and%20harvard&focBudSel=all#n95) When social demands are fused into legal action and the outcomes are only moderate adjustments of existing social arrangements, the process in effect naturalizes systemic injustice. The legal process reinforces, rather than resists, the dominant ideologies, institutions, and social hierarchies of the time. For example, when a court decision declares the end of racial segregation but de facto segregation persists, individuals become blind to the root causes of injustice and begin to view continued inequalities as inevitable and irresolvable. Similarly, rights-based discourse has a legitimation effect, since rights mythically present themselves as outside and above politics**.** [96](http://www.lexis.com/research/retrieve?_m=b7d531dcca7209b987833602ed6fbb4e&docnum=23&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAt&_md5=3f8bfd4662cb01d0d1bf9f28a63e1155&focBudTerms=lobel%20and%20harvard&focBudSel=all#n96) Meanwhile, the legal framework allows the courts to implement a color blindness ideology and grant only symbolic victories rather than promote meaningful progress. [97](http://www.lexis.com/research/retrieve?_m=b7d531dcca7209b987833602ed6fbb4e&docnum=23&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAt&_md5=3f8bfd4662cb01d0d1bf9f28a63e1155&focBudTerms=lobel%20and%20harvard&focBudSel=all#n97) As such, the role of law is one that in fact ensures the [\*958] "continued subordination of racial and other minority interests," while pacifying the disadvantaged who rely on it**.** [98](http://www.lexis.com/research/retrieve?_m=b7d531dcca7209b987833602ed6fbb4e&docnum=23&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAt&_md5=3f8bfd4662cb01d0d1bf9f28a63e1155&focBudTerms=lobel%20and%20harvard&focBudSel=all#n98) Social movements seduced by the "myth of rights" assume a false sequence, namely "that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change."

#### The alt is to reject the aff in favor of building a culture of resilience to check the executive

Vermeule and Posner 11 Adrian Vermeule, prof of Law at Harvard University Law School, Eric A Posner., prof of Law at the University of Chicago Law School, *Executive Unbound: After the Madisonian Republic*, Oxford University Press 2011

We do not yet live under a plebiscitary presidency. In such a system, the president has unchecked legal powers except for the obligation to submit to periodic elections. In our system, Congress retains the formal power to make law. It has subjected presidential lawmaking to complex procedures and bureaucratic checks,1 and it has created independent agencies over which the president in theory has limited control. The fed­eral courts can expect the executive to submit to their orders, and the Supreme Court retains certain quasi-lawmaking powers, which it exercises by striking down statutes and blocking executive actions. The federal system is still in place. State legal institutions retain considerable power over their populations. But these legal checks on executive authority (aside from the electoral constraint) have eroded considerably over the last two hundred years. Congress has delegated extensive powers to the executive. For new initia­tives, the executive leads and Congress follows. Congress can certainly slow down policymaking, and block bills proposed by the executive; but it cannot set the agenda. It is hard to quantify the extent of congressional control over regulatory agencies, but it is fair to say that congressional intervention is episodic and limited, while presidential control over both the executive and independent agencies is strong and growing stronger. The states increasingly exercise authority at the sufferance of the national government and hence the president. The federal courts have not tried to stop the erosion of congressional power and state power. Some commentators argue that the federal courts have taken over Con­gress’s role as an institutional check. It is true that the Supreme Court has shown little compunction about striking down statutes (although usually state statutes), and that it rejected some of the legal theories that the Bush administration used to justify its counterterrorism policies. However, the Court remains a marginal player. The Court ducked any legal rulings on counterterror policies until the 2004 Hamdi decision, and even after the Boumediene decision in 2008, no detainee has been released by final judicial order, from Guantanamo or elsewhere, except in cases where the government chose not to appeal the order of a district judge. The vast majority of detainees have received merely another round of legal process. Some speculate that judicial threats to release detainees have caused the administration to release them preemptively. Yet the judges would incur large political costs for actual orders to release suspected terrorists, and the government knows this, so it is unclear that the government sees the judi­cial threats as credible or takes them very seriously. The government, of course, has many administrative and political reasons to release detainees, quite apart from anything the courts do. So the executive submits to judi­cial orders in part because the courts are careful not to give orders that the executive will resist. In general, judicial opposition to the Bush administration’s counterter­rorism policies took the form of incremental rulings handed down at a gla­cial pace, none of which actually stopped any of the major counterterrorism tactics of that administration, including the application of military power against Al Qaeda, the indefinite detention of members of Al Qaeda, tar­geted assassinations, the immigration sweeps, even coercive interrogation. The (limited) modifications of those tactics that have occurred resulted not from legal interventions but from policy adjustments driven by changed circumstances and public opinion, and by electoral victory of the Obama administration. However, the Obama administration has mostly confirmed and in some areas even expanded the counterterrorism policies of the Bush administration. Strong executive government is bipartisan. The 9/11 attack provided a reminder of just how extensive the presi­dent’s power is. The executive claimed the constitutional authority to, in effect, use emergency powers. Because Congress provided redundant stat­utory authority, and the Supreme Court has steadfastly refused to address the ultimate merits of the executives constitutional claims, these claims were never tested in a legal or public forum. But it is worth trying to ima­gine what would have happened if Congress had refused to pass the Autho­rization for Use of Military Force and the Supreme Court had ordered the executive to release detainees in a contested case. We think that the execu­tive, backed up as it was by popular opinion, would have refused to obey. And, indeed, for just that reason, Congress would, never have refused its imprimatur and the Supreme Court would never have stood in the execu­tive’s way. The major check on the executives power to declare an emer­gency and to use emergency powers is—political. The financial crisis of 2008-2009 also revealed the extent of executive power. Acting together, the Fed, the Treasury, and other executive agencies spent hundreds of billions of dollars, virtually nationalizing parts of the financial system. Congress put up a fuss, but it could not make policy and indeed hardly even influenced policy. Congress initially refused to supply a blank check, then in world-record time changed its mind and gave the blank check, then watched helplessly as the administration adopted pol­icies different from those for which it said the legislation would be needed. Courts played no role in the crisis except to ratify executive actions in tension with the law.2 What, then, prevents the executive from declaring spurious emergencies and using the occasion to consolidate its power—or for that matter, consolidating its power during real emergencies so that it retains that power even after normal times return? In many countries, notably in Latin America, presidents have done just that. Citing an economic crisis, or a military threat, or congressional gridlock, executives have shut down independent media, replaced judges with their cronies, suppressed political opposition, and ruled by dictate. Could this happen in the United States? The answer is, very probably, no. The political check on the executive is real. Declarations of emergency not justified by publicly visible events would be met with skepticism. Actions said, to be justified by emergency would not be approved if the justification were not plausible. Separation of powers may be suffering through an enfeebled old age, but electoral democracy is alive and well. We have suggested that the historical developments that have under­mined separation of powers have strengthened democracy. Consider, for example, the communications revolution, which has culminated (so far) in the Internet Age. As communication costs decrease, the size of markets expand, and hence the scale of regulatory activity must increase. Localities and states lose their ability to regulate markets, and the national govern­ment takes over. Meanwhile, reduced communication costs increase the relative value of administration (monitoring firms and ordering them to change their behavior) and reduce the relative value of legislation (issuing broad-gauged rules), favoring the executive over Congress. At the same time, reduced communication costs make it easier for the public to mon­itor the executive. Today, whistleblowers can easily find an audience on the Internet,; people can put together groups that focus on a tiny aspect of the government s behavior; gigabytes of government data are uploaded onto the Internet and downloaded by researchers who can subject them to rigorous statistical analysis. It need not have worked out this way. Govern­ments can also use technology to monitor citizens for the purpose of suppressing political opposition. But this has not, so far, happened in the United States. Nixon fell in part because his monitoring of political enemies caused an overwhelming political backlash, and although the Bush administration monitored suspected terrorists, no reputable critic suggested that it targeted domestic political opponents. Our main argument has been methodological and programmatic: researchers should no longer view American political life through the Madisonian prism, while normative theorists should cease bemoaning the decline of Madisonianism and instead make their peace with the new political order. The center of gravity has shifted to the executive, which both makes policy and administers it, subject to weak constraints imposed by Congress, the judiciary, and the states. It is pointless to bewail these developments, and futile to argue that Madisonian structures should be reinvigorated. Instead, attention should shift to the political constraints on the president and the institutions through, which those political con­straints operate—chief among them elections, parties, bureaucracy, and the media. As long as the public informs itself and maintains a skeptical attitude toward the motivations of government officials, the executive can operate effectively only by proving over and over that it deserves the public s trust. The irony of the new political order is that the executive, freed from the bonds of law, inspires more distrust than in the past, and thus must enter ad hoc partnerships with political rivals in order to persuade people that it means well. But the new system is more fluid, allowing the executive to form those partnerships when they are needed to advance its goals, and not otherwise. Certain types of partnership have become recurrent pat­terns—for example, inviting a member of the opposite party to join the president’s cabinet. Others are likely in the future. In the place of the clockwork mechanism bequeathed to us by the Enlightenment thinking of the founders, there has emerged a more organic system of power sharing and power constraint that depends on shifting political alliances, currents of public opinion, and the particular exigencies that demand government action. It might seem that such a system requires more attention from the public than can reasonably be expected, but the old system of checks and balances always depended on public opinion as well. The centuries-old British parliamentary system, which operated in. just this way, should provide reason, for optimism. The British record on executive abuses, although hardly perfect, is no worse than the American record and arguably better, despite the lack of a Madisonian separation of legislative and executive powers

#### We solve your roll of the ballot better: we need non-institutional struggle first if legal solutions will have any chance of success

Nagin 5, Visiting Associate Professor, University of Virginia School of Law,

(Tomiko Brown, “ELITES, SOCIAL MOVEMENTS, AND THE LAW: THE CASE OF AFFIRMATIVE ACTION,” Columbia Law Review, 105 Colum. L. Rev. 1436)

Those seeking to have an impact on the political and legal orders should not root a mass movement in the courts;instead, affirmative litigation about constitutional rights should be anchored upon and preceded by a mass movement.Efforts to achieve fundamental change shouldbegin with the target constituency and be waged initially outside of the confines of institutionalized politics.Law should be understood as a tactic in an ongoing political struggle, where the struggle is the main event and favorable legal outcomes are its byproducts. There is a crucially important temporal component to this view. Legal claims can be tactically useful in a political strategy for achieving change - butonly after social movements lay the groundworkfor legal change. Social movements **must** first create political pressure that frames issues in a favorable manner, creates cultural norm shifts, and affects public opinion; these norm shifts then increase the likelihood that courts will reach outcomes favored by lawyers. [437](http://www.lexis.com/research/retrieve?_m=b1b76c3bff33e7c7527182cc42568c87&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAl&_md5=b4841fe459fa752b47486b13d84385b6&focBudTerms=milliken%20w/150%20hispanic%20or%20latino&focBudSel=all#n437) Again, my claims find support in the history of the mid-twentieth-century civil rights movement. This narrative posits an intimate relationship between the sociopolitical dynamics within black client communities and the success (or failure) of civil rights lawyers' litigation campaigns for rights. The postwar civil rights movement confirms that the moral suasion of participatory democratic groups of nonlawyers, and typically nonelites, was integral to law's movement from a Jim Crow regime to a [\*1523] constitutional order in which formal equality was the norm. During the past three decades, historians who have analyzed social change have discovered that small groups of inexpert individuals can be the leading edge of a social movement, especially when they work in coalition with those who traditionally wield influence in society. [438](http://www.lexis.com/research/retrieve?_m=b1b76c3bff33e7c7527182cc42568c87&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAl&_md5=b4841fe459fa752b47486b13d84385b6&focBudTerms=milliken%20w/150%20hispanic%20or%20latino&focBudSel=all#n438)Through their commitment to a social cause, ordinary people with no insider knowledge of the technical aspects of the broad issue on which they are mobilizing can create circumstances in which those with actual power (political, economic, and, ultimately, legal power) are persuaded to act in their favor.

### 3

#### The United States Congress should create a statutory cause of action for damages for those unlawfully injured by targeted killing operations or their heirs that overrides the state secrets and official immunity doctrine and replaces them with carefully considered procedures for balancing the secrecy concerns.

#### The plan overcomes current legal barriers to judicial review.

Vladeck 13 Steve Vladeck 02/10/13 (Professor of Law and the Associate Dean for Scholarship at American University Washington College of Law. His teaching and research focus on federal jurisdiction, constitutional law, national security law, and international criminal law. “Why a “Drone Court” Won’t Work–But (Nominal) Damages Might...”, LawFare, from a conference hosted by Columbia Law School on targeted killings.)

At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I actually think virtually all of these concerns could be mitigated. For starters, retrospective review doesn’t raise anywhere near the same concerns with regard to adversity or judicial competence. Re: adversity, presumably those who are targeted in an individual strike could be represented as plaintiffs in a post-hoc proceeding, whether through their next friend or their heirs. And as long as they could state a viable claim for relief (more on that below), it’s hard to see any pure Article III problem with such a suit for retrospective relief. As for competence, judges routinely review whether government officers acted in lawful self-defense under exigent circumstances (this is exactly what Tennessee v. Garner contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda orone of its affiliates), but to do so using highly classified information in a manner that balances–albeit not always ideally–the government’s interest in secrecy with the detainee’s ability to contest the evidence against him. Just as Guantánamo detainees are represented in their habeas proceedings by security-cleared counsel who must comply with court-imposed protective orders and security procedures, so too, the subjects of targeted killing operations could have their estates represented by security-cleared counsel, who would be in a far better position to challenge the government’s evidence and to offer potentially exculpatory evidence / arguments of their own. More to the point, it should also follow that courts would be far more able to review the questions that will necessary be at the core of these cases after the fact. Although the pure membership question can probably be decided in the abstract, it should stand to reason that the imminence and infeasibility-of-capture issues will be much easier to assess in hindsight–removed from the pressures of the moment and with the benefit of the dispassionate distance on which judicial review must rely. To similar effect, whether the government used excessive force in relation to the object of the attack is also something that can only reasonably be assessed post hoc. And in addition to the substantive questions, it will also be much easier for courts to review the government’s own procedures after they are employed, especially if the government itself is already conducting after-action reviews that could be made part of the (classified) record in such cases. Indeed, the government’s own analysis could, in many cases, go along way toward proving the lawfulness vel non of an individual strike... To be sure, there are a host of legal doctrines that would get in the way of such suits–foremost among them, the present judicial hostility to causes of action under Bivens; the state secrets privilege; and official immunity doctrine. But I am a firm believer that, except where the President himself is concerned (where there’s a stronger argument that immunity is constitutionally grounded), each of these concerns can be overcome by statute–so long as Congress creates an express cause of action for nominal damages, and so long as the statute both (1) expressly overrides state secrets and official immunity doctrine; and (2) replaces them with carefully considered procedures for balancing the secrecy concerns that would arise in many–if not most–of these cases, these legal issues would be overcome.

#### Bivens innovations spillover – executives will try to demonstrate that they’re making improvements in other areas

Margulies 10 \* Peter, Professor of Law, Roger Williams University. Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law, 96 IOWA L. REV. 195

A carefully crafted damages remedy restrains official myopia and thereby curbs this counterproductive cycle. Viewed in that light, judicial solicitude for free speech is not only an expression of constitutional principle; it is also an institutional mechanism for safely containing the sometimes volatile "experiment" of popular governance. n16 Hindsight bias's role in the promotion of volatility compounds the challenges that judicial review must confront. Theorists have observed that subjects of regulation who fear regulators' hindsight bias become alienated [\*201] from the entire legal regime. n17 They view the status quo as intolerable and take unwise risks that undermine compliance. Since defendants in Bivens actions are subject to regulation by judges and juries, fear of hindsight bias can make them unduly risk-prone. Officials who fear future retaliation may cling stubbornly to power, doubling down on repressive measures because they view the status quo as trending in the wrong direction. n18 This risk-prone behavior exacerbates the cycling that the Boumediene v. Bush Court sought to curb. To reduce cycling and enhance deliberation, courts must strive for an equilibrium that corrects for both myopia and hindsight bias. Unfortunately, recent judicial decisions have abandoned this search for an equilibrium and embraced categorical deference or intervention. In Ashcroft v. Iqbal n19 and Arar v. Ashcroft, n20 categorical deference carried the day. Viewing qualified immunity as insufficient to protect against hindsight bias, Iqbal dismissed claims that senior officials turned a blind eye to the mistreatment of post-9/11 detainees. Arar precluded claims that defendants aided an "extraordinary rendition" to Syria. Neither decision discussed whether official myopia might have led to the brutal treatment that the plaintiffs alleged. Instead, these decisions viewed responses to risk as binary, requiring that officials choose between abusing detainees and abdication in the face of terror. n21 [\*202] The categorical-deference approach has an interventionist counterpart. n22 In al-Kidd v. Ashcroft n23 and Padilla v. Yoo, n24 courts evaluated officials' decisions from the cozy recliner of retrospect. Padilla, involving a formerly detained alleged enemy combatant's claim for damages, asked only whether the plaintiff's rights were violated. The court collapsed qualified immunity's core distinction between the present legal status of the plaintiff's rights and their status at the time of the official defendant's decision. The court in al-Kidd, a case involving a former material witness's claim that he was wrongly detained, insisted on a distinction between witness and target that would deprive officials of needed flexibility in transnational terrorism cases. Ironically, the interventionist decisions posit the same binary choice as the categorical-deference model: overreaching or abdication. Categorical deference and intervention thus undermine hopes for equilibrium between presentist and hindsight biases. To salvage that equilibrium, this Article proposes an innovation-eliciting approach to Bivens remedies in national security cases. Utilizing insights from literature on remedying cognitive biases n25 and regulatory failure, n26 it gives officials a stake in the development of a broader repertoire of national security strategies. Officials must show that in other cases they implemented alternatives to the conduct alleged in the lawsuit. When the alternative dispositions are congruent, proportional, and proximate in time to the actions at issue, the court rewards the official by dismissing the lawsuit prior to the qualified immunity phase. Put simply, the approach exchanges [\*203] officials' liability in a specific case for an overall increase in the cultivation of alternatives. Over time, the innovation-eliciting approach will yield an equilibrium between myopia and hindsight bias, limiting the "pendular swings" in policy that Justice Kennedy identified in Boumediene as a central threat to constitutionalism.

### 4

#### The focus on non-lethality empirically gave rise to extraordinary rendition, torture and indefinite detention

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It might be a reasonable requirement to demand that targeted individuals should not be killed whenever it is possible to avoid it. However, the public reasoning of the US government has been that drone strikes are only used when capture is not feasible – for example, when local authorities are unable or unwilling to help, and an attempt by outside forces to capture would put soldiers at great risk. On the other hand, if it is generally possible to find a specific individual around the world, it should not be beyond the capacity of well-equipped and professional Special Operations Forces to capture that individual, especially since a whole range of less-than-lethal weapons have been developed which can incapacitate adversaries without having to kill them. There is no doubt that capture is much more burdensome and riskier than killing somebody with a missile over thousands of miles, but it is much more humane. Former elite soldier George Crawford advocates making manhunting part of the American national security strategy, but he also emphasizes that ‘[o]nly at the very extreme end of the manhunting spectrum would a nation take action to employ force, and only on rare occasions would this force be lethal’.90 There are also other downsides that need to be considered. The systematic preference of non-lethality can potentially invite a range of morally bad approaches, as was seen in the CIA’s extraordinary rendition programme, which resulted in the torture and indefinite detention of terrorism suspects, some of whom were clearly innocent.91

#### The impact is authoritarianism and state sanctioned torture- historically regimes have used US terror and detention policies to justify atrocities.

Pariseault, 2005 (John is a JD Candidate at the university of California, Hastings College of the Law. “Applying the Rule of Law in the War on Terror: An Examination of Guantanamo Bya Through the Lens of the US Constitution and the Geneva Congentions” Spring 2005. 28 Hastings Int’l & Comp. L. Rev. 481)

Yet even as American officials condemn other nations for¶ detaining people indefinitely without access to a court or¶ tribunal, authoritarian regimes elsewhere are pointing to U.S.¶ treatment of the Guantanamo prisoners as justification for such¶ actions. Eritrea’s Ambassador to the United States defended¶ his own government’s roundup of journalists by claiming that¶ their detention without charge was consistent with the United¶ States’ detention of material witnesses and aliens suspected by¶ the United States of terrorist activities. Fred Hiatt, Truth-¶ Tellers in a Time of Terror, WASH. POST, Nov. 25, 2002, at¶ A15. See also Shehu Sani, U.S. Actions Send a Bad Signal to¶ Africa: Inspiring Intolerance, INT’L HERALD TRIB., Sept. 15,¶ 2003, at 6 (“indefinite detention in Guantanamo Bay helps justify Egypt’s move to detain human rights campaigners¶ as threats to national security, and does the same for similar¶ measures by the governments of Ivory Coast, Cameroon and¶ Burkina Faso”).¶ If American detention of the Guantanamo prisoners¶ —indefinite confinement without any type of review by a court¶ or tribunal—is regarded as precedent for similar actions by¶ countries with which we are at peace, it is obvious that it may¶ be similarly regarded by enemies who capture American¶ soldiers in an existing or future conflict. As a result, the lives¶ of captured American military forces may well be endangered¶ by the United States’ failure to grant foreign prisoners in its¶ custody the same rights that the United States insists be¶ accorded to American prisoners held by foreigners.

### Case

#### Rejecting predictions mean we rely on outdated status quo predictions, causing worse policy – the current bias is against predicting catastrophe, not bias towards it\*\*\*

Oppenheimer, Professor Global Affairs NYU, ’12 (Michael, Winter/Spring, “From Prediction to Recognition: Using Alternate Scenarios to Improve Foreign Policy Decisions” SAIS Review, Vol 32 No 1, ProjectMuse)

We, in America, could reduce uncertainty by excluding much of this complexity from our definition of U.S. policy interests. (Another approach to reducing uncertainty, “creating our own reality,” produces its own surprises.) For example, we could choose to view globalization as self-sustaining despite clear evidence to the contrary; much of the developing world as too ill-governed, resistant to our influence, or peripheral to our interests to be worth our attention; issues of the global commons as amenable to market-based solutions; rising powers as more threatening to—and thus contained by—immediate neighbors, therefore less threatening to us; and the risk of terrorism as low, and the cost-effectiveness of improved homeland security vastly greater than regime change and state building. Neo-isolationism would, over the short term, reduce the knowledge requirements of U.S. policy. At the same time, it would increase the likelihood that U.S. actions in the world would have somewhat more predictable effects and enable intelligence to focus on “known unknowns,” thus improving the accuracy and foresightedness of U.S. policy. Doing only what we have the knowledge to do well is an important criterion to be weighed in making policy choices. But aligning U.S. policy with current knowledge would expose the country to great harm, invite adversaries to fill the gaps left by America’s retrenchment, and guarantee unpleasant surprises from outside the restrictively defined perimeter of our interests. This approach, popular among some neo-realist observers, has been rejected by administrations from both parties over seventy years of Cold War and post Cold War history. The temptation [End Page 20] to engage actively in the global system, and thus to encounter all the sources of uncertainty, complexity, surprise, and risk discussed above, appears irresistible. Therefore, getting better at decision making in these contexts, as we deepen our knowledge about the world, is an unavoidable necessity. Sources of Surprise Surprise does not necessarily produce bad policy if decision makers are prepared to modify outdated assumptions given new information and are ready cognitively and strategically for a changed environment. Few of the surprises noted above appeared without leading indicators or even a few prescient observers. They were the result of the interaction of underlying trends unseen by experts. They were in part self-inflicted, representing a failure to recognize or properly weigh new information. They were the consequences of unchallenged mindsets, of an excess of certainty confronting a dynamic world. Acute observation was lacking, not foresight. Furthermore, our subsequent reactions to surprise have often demonstrated more stubbornness than agility, thus magnifying the inherent limitations of foresight. As U.S. Treasury Secretary Timothy Geithner said in describing the New York Fed’s reaction to the financial crisis, “Policy was always behind the curve, always chasing the escalating crisis.”1 Mirror imaging, wishful thinking, entrenched policy positions, bureaucratic inertia, and lack of imagination have all played a part in the “intelligence failures” and policy missteps of the last twenty years. They have been on public display most recently in our extemporaneous response to the Arab Spring and Europe’s too little, too late reaction to its sovereign debt crisis. These are the types of surprises that improved process can mitigate. Policymakers often bring unrecognized or unarticulated assumptions about the future into policy debates.2 These assumptions are derived from recent experience (which can produce misleading historical analogies or trend extrapolations), value preferences, time pressure (rewarding assumptions that are “good enough” to permit closure), mindsets based on theoretical or cultural biases, group-think, the political risks of dissent and demands of building a case for change (which create strong incentives to wring the greatest possible value out of current policy). Foreign policy debates proceed within a context of insecurity and uncertainty, which often encourages threat inflation and actions that produce self-fulfilling negative prophecies. U.S. policymakers are particularly susceptible to these tendencies, given multiple U.S. interests and the consequent thinning of intelligence and increased uncertainty. The magnitude of relative U.S. power in the world—which multiplies perceived threats—can blind us to the interests and perspectives of others and, when deployed carelessly, can produce massive unintended consequences. Ideas, theories, hypotheses, and historical analogies are all essential intellectual equipment for making sense of the stream of events. Policymakers cannot be agnostic about the way the world works. They must look for patterns, try to explain causation, separate relevant from peripheral information, [End Page 21] reach conclusions, and make decisions—all in a timeframe imposed by events and often at odds with the deliberate processes of data gathering and hypothesis testing of academic and intelligence analysts. However, these mindsets can be disabling in the presence of rapid change and thus must be continuously reexamined in light of new data.3 The Surprising Arab Spring Embedded mindsets are a particular risk in the current international system, characterized as it is by intense internal and external pressures on all governments and intergovernmental institutions. The combination of globalization and extended economic crisis has tested systems premised on prosperity and interdependence, and some have proven too fragile to survive. The longer this period of austerity and economic insecurity lasts, the greater are the chances of further disintegration, particularly among states—both democratic and otherwise—with limited popular legitimacy and high ex-declining demand. We will have to deconstruct much of what we have learned about political economies during periods of economic growth and liberal hegemony, if we are to anticipate and respond successfully to further unraveling. Our experience at the Center for Global Affairs (CGA) at New York University (NYU), through several scenario workshops on pivotal countries, sponsored by the Carnegie Corporation, is that experts tend to underestimate the degree of future variability in the domestic politics of seemingly stable states.4 They tend to dismiss signs of current tension, minimizing the capacity and ambition of regime opponents and exaggerating the resilience of existing authority. This is the case across the Middle East, as it was with the Soviet Union and now Putin’s Russia. The point is not that experts should be able to predict revolutionary events, rather that they often resist even a serious consideration of such possibilities, thus artificially narrowing the conversation, depriving policymakers of the combination of expertise and open-mindedness essential to early warning, and limiting the opportunity to test policies in the presence of such changes. This is remarkable given the centrality of the Middle East to U.S. interests, the sheer amount of government [End Page 22] and academic attention devoted to watching it, and the potential costs of being unprepared for big changes. The Arab Spring has prompted some soul searching among Middle East experts. Gregory Gause, a widely respected academic specialist on the Arab world, observed in the July–August 2011 issue of Foreign Affairs that “the vast majority of academic specialists on the Arab world were as surprised as everyone else by the upheavals that toppled two Arab leaders last summer and now threaten several others.”5 His explanation, broadly, is that the long period of authoritarian rule focused experts’ attention on explaining the persistence of these regimes, rather than on their vulnerability, and generated policy advice to bet on their continued survival. In emphasizing the strength of the military-security complex and state control over the economy, they missed the growing professionalism of some Arab armies (in Egypt and Tunisia) and the rising influence of a new business class, benefiting from economic reforms and globalization and thus less dependent on regime patronage. As a result, experts “underestimated the popular revulsion to the corruption and crony privatization that accompanied the reforms.”6 They also missed the power of cross-border Arab identity, thus failing to anticipate the contagion that was, and continues to be, a remarkable attribute of the ongoing revolution in the Arab world. Gause concludes that, while explaining stability was an important task, “it led some of us to underestimate the forces for change that were bubbling below, and at times above, the surface of Arab politics.”7 He calls not for precise predictions—a guarantee of being wrong—but for greater humility, a thorough and open re-examination of assumptions on key drivers of Arab politics like the role of the military, the effects of economic change, and the importance of Arab identity. We should not presume to control these forces for change, because they originate “in indigenous economic, political and social factors whose dynamics were extremely hard to forecast.” Gause’s self-criticism is refreshing, useful, and rare. But beyond the misestimation of particular shifts in the domestic politics of Egypt lies the broader question of why experts working in an area so important to American security should have so thoroughly focused on regime stability. And, if this is a tendency associated with experts generally, how can we reduce the chances of being blindsided because of assumptions of stability that are suddenly proven wrong by events on the ground? Taleb and Blyth,8 writing in the May–June issue of Foreign Affairs, suggest that the events in Egypt are a classic example of a “Black Swan,” an event (or series of events) both inevitable and unpredictable: inevitable, because systems operating in dynamic environments that prohibit incremental adjustments to change guarantee themselves some form of shock; unpredictable, because such shocks can be precipitated by an infinite variety of events, some seemingly trivial. Since these conditions are not confined to Egypt or to the Middle East, the suggestion is to expect and prepare for the unexpected, not by predicting the inherently unpredictable, but by imagining such events (within the bounds of plausibility) and then looking for evidence that they may be forthcoming. [End Page 23] The emphasis on explaining continuity, referred to by Gause, raises another possibility, namely a preference for stability among policy-oriented Middle East experts. The reasons are obvious: a well-justified fear among policymakers of the consequences of revolutionary change, with the resulting opportunities for Islamists and for Iran; and a level of comfort with Arab dictators amenable to U.S. influence, prepared to deal with Israel, and seemingly able to maintain effective control over their territory. These policy preferences shape the incentive structure for experts eager to influence the debate. They establish a range of acceptable analyses that brilliantly argue the case for continued stability but often miss the tipping points. It is always safer to extrapolate, and, most of the time, more accurate as well. Imagining discontinuous change is intellectually challenging and can be professionally risky—better to be correct most of the time, and, when spectacularly wrong, to have lots of company. Finally, there is a disconnect between assessments of stability at the state level and the global political economy. The world faces an enlarged supply of economic and political stress resulting from globalization and its mismanagement, and regimes that are unable to adjust to these stresses are especially vulnerable to sudden political change. With all the growth benefits of globalization, we have tended to ignore its disruptive effects and failed to connect these effects with individual states already suffering from homegrown problems, including youth unemployment, income inequality, government corruption, and concentration of political power—especially in the Middle East. Volatility, economic insecurity, and rapid shifts in competitiveness are conditions of the market-driven globalization to which all states are subject. Badly governed states can often ride out these storms but are more vulnerable when the global economy suffers from extended weakness. Expectations of upheaval are not as far-fetched as long-running stability and global prosperity make them appear, an observation that applies to the Middle East as well as to the latest list of global winners, the so-called BRICs (Brazil, Russia, India, and China). Mysterious Russia The impact of globalization on authoritarian and autarchic political economies in the process of liberalization is a story not confined to Egypt. The [End Page 24] extraordinary, spontaneous protests among mostly middle class urbanities in Russia—in response to fraudulent parliamentary elections—appears to be a “protest vote” against Putin’s presidential run and suggests growing impatience with top-down governance, particularly when concentrated power produces highly unequal economic gains and flagrant corruption. The capacity to organize and sustain such leaderless movements, largely through social networking, has been amply demonstrated in Egypt, and now possibly in Russia. The mobilization of the Russian middle class is likely to continue at least through the presidential elections in March, and has the potential to fundamentally alter Russian politics. The contagious effects of protests in one country, especially when they reveal the fragility of previously unchallengeable power, is also a product of globalization, as is the vulnerability of authoritarian governments of partially globalized states to economic sanctions, should they respond to popular protests with violence. There remains much skepticism among experts about political change “from below” in Russia, as there was in Egypt. From Peter the Great to “the vanguard of the proletariat” to perestroika and glasnost, change in Russia has been a top-down process. When the CGA ran the alternate scenario conference on Russia in February 2010, the many experts around the table were generally dismissive of the possibility of political change through popular revolt, though the group did develop one plausible future scenario that anticipated an elite led economic liberalization motivated by growing concern, especially in the regions, over Russia’s resource-dependent, inefficient, and globally uncompetitive economy: A struggle for dominance between reformist and conservative elements results in a stalemate, reducing the government’s ability to address economic challenges. Fueled by the dynamism of a new generation of entrepreneurs and capital from Moscow, new enterprises emerge in a number of Russia’s regions, symbolizing Russia’s economic rebirth and the beginning of political pluralism.9 Recent events suggest that this economically driven, regionally centered, incremental reform scenario may be too conservative. The global system is experiencing a growth in populism, a response to increasing inequalities within states, falling incomes resulting from continuing economic stagnation, and arbitrary political authority. States, rich and poor, democratic [End Page 25] and authoritarian, have felt the sting of increased political activism, and, after a long hiatus, economic justice is back in the debate. Putinism, facing a newly self-empowered middle class with its suddenly shaky legitimacy, may turn out to be one more in a series of transient Russian experiments on the way towards genuine economic and political modernization. Alternate Scenarios and the Reduction of Surprise Multiple scenarios10 are designed to challenge the mindsets policymakers bring into debates by presenting alternate narratives that capture less conventional but plausible views of the future. They are not predictive. Quite the contrary, they are intended to deconstruct predictions that force-fit analysis to preferences or other forms of bias. In doing so, they can reveal dubious assumptions, conveniently overlooked policy trade-offs, and future “wild card” events or trends that can invalidate current policies and pose new challenges. They can open up alternate ways of interpreting available intelligence, retarget intelligence to clarify new uncertainties, and make decision makers more receptive to early warning signs of new trends.11 Multiple scenarios are constructed with the goals of insight and improved recognition, not replacement of the prevailing paradigm with a new conventional wisdom equally subject to degradation. Witness the event-driven and transitory character of post-Cold War intellectual commentary: the decade of the nineties, variously described as threat-less, flat, global, the end of history; the following half-decade, as pervasively insecure, a perfect storm of terror, proliferation of weapons of mass destruction (WMD), rogue states; and the more recent emphasis on declining relative American power. This most recent contender for intellectual primacy spans observers as disparate as Robert Kagan,12 Fareed Zakaria,13 John Ikenberry (“In the decades to come, America’s unipolar power will give way to a more bipolar, multipolar, or decentralized distribution of power”14), and the National Intelligence Council (NIC).15 This consensus now confronts the global economic crisis, which, in the dominant view, accelerates the erosion of unipolarity.16 However, the crisis can easily cut in the opposite direction, undermining [End Page 26] governance and power in “rising” states and regional institutions now experiencing dramatic reductions in growth, while reinforcing states with strong and diversified economies, robust civil society, and legitimate political institutions capable of innovative and pragmatic responses to economic stress. Alternate scenarios are designed as believable narratives describing how very different futures could emerge from current circumstances, with markedly different consequences for U.S. interests and policies. They thus serve to expose the alternate paths already discernible in the present, sharpen debate about prevailing trends, and reveal the limit of extant conventional wisdom about the future and our place in it. With the plausibility of distinctive futures established, they can serve as alternate platforms for evaluating the sustainability of current policies and testing the effectiveness of new approaches. The principle objective then is to improve observation of a rapidly changing and complex reality and to encourage early recognition of emerging trends that may shift the ground under current policies.17 The scenario conversation is informed by theory but not committed to a single paradigm. Indeed, it is consciously designed as a dialogue across theoretical boundaries, disciplines and cultures. Participants are encouraged to step back from their assumptions, exercise their imaginations to envision new trends from fragmentary data, and invent “wild card” events that combine plausibility with impact. The process avoids the extremes of groundless speculation and categorical theory-driven pronouncements about the future. By leveraging knowledge (not everything is uncertain)18 without exaggerating our foresight, we can hope to narrow uncertainty, reduce surprise, eliminate implausible futures, identify policies that “work” across a range of future conditions, and help policymakers manage risk. Scenario Process The scenario construction process should be interactive; in effect, a structured “brainstorm” among experts and policymakers of diverse professional backgrounds, nationalities, and skill sets. This diversity reflects the fact that major, unanticipated change is often a product of trends and events from different domains of activity intersecting in unpredictable ways. A dialogue limited to international relations experts and policymakers may be circumscribed by traditional international relations theory, which places many forces for change outside of the dominant models (technology, ideational change, economic variables, demographics, climate change.) A dialogue among Americans of diverse skill sets may still fall short on local knowledge, particularly for countries historically peripheral to U.S. interests. A special contemporary liability of our vast power is indifference toward the views and interests of others, often manifested in America-centric assumptions of how others behave (“mirror imaging”). Broadly, two approaches exist for scenario generation. “Bottom-up” approaches begin with research on drivers of change, an assessment of their importance, the extent of future variability, and their sensitivity to interaction [End Page 27] with other drivers. The process proceeds to general discussion of potential futures arising from the interaction of important drivers (such as population, resources, environment, governance, growth, poverty, internal dynamics, and cross-border conflicts). These scenario fragments are fleshed out in conversation, and then assessed for significance, lack of redundancy, and plausibility (with the last criterion very loosely applied). The goal is to arrive at scenario concepts that are judged sufficiently important, believable, and different as to warrant further examination. The group then proceeds to create narratives for each concept, beginning with present circumstances and including discrete events, trend developments, policy decisions, and their consequences, working toward a convincing case for the scenario’s end point. The author has used this bottom-up approach in his work for the U.S. intelligence community, which has the very difficult job of producing analyses relevant to policy without being explicit about the policy contributions to, and consequences of, potential futures. It is also the approach in our current project on alternate futures for pivotal countries. Longer time-frames may call for such an approach, given expanded indeterminacy and widened policy choice. The approach may still miss future developments relevant to current policy but is more likely to capture potential structural change and policy-forcing developments. “Top-down” approaches target policy impacts and choices more directly. Here, the process may begin with an examination of the assumptions underlying current policies that fail to explain unfolding events and then test those assumptions against alternate, plausible futures. It may select potential scenarios that are overlooked, or willfully ignored, by current policy as politically incorrect or too challenging to contemplate. Such an approach lends itself to extemporaneous exercises occasioned by new information or policy reviews and may succeed in producing results more directly relevant to current policy, though less likely to capture longer-term, structural changes. Individual country scenario exercises allow for specification of the policy problem and thus lend themselves to this approach.19 An example would be a scenario exercise the author organized at CGA in 2007 on the future of Iraq after U.S withdrawal,20 which we assumed at that time would occur around 2010. The central policy question was, and remains, how lasting an effect would our presence have, and if transitory, what plausible configurations might emerge for Iraq and the region? Three scenarios resulted from the discussions: National Unity Dictatorship: A nationalist leader emerges from the chaos of Iraq, a leader who is sufficiently independent of external players—the U.S., Iran, al-Qaeda, Arab governments—to establish credibility as a unifying figure. Contained Mess: As Iraq disintegrates into all-out civil war, neighboring countries—understanding the potential for contagion, radicalization, and the threat to their regimes—manage to act collectively to avoid the worst case even as they pursue proxy war on Iraqi territory. [End Page 28] Contagion: Iraq’s civil war spreads to adjoining states through refugee flows, growing radicalization of Arab populations, escalating terrorism, and the deliberate efforts of regional rivals to destabilize other governments. Rereading this study in light of recent sectarian strife in Iraq prompts several conclusions. There is a good chance that democracy and stability in Iraq are incompatible, and that continued insistence on democracy in this divided, still traumatized state contributes to disintegration. It suggests the importance of thinking about U.S. policy going forward without the favorable assumptions that animated the original invasion, a very difficult thing to do given our ten-year investment in the policy. It also suggests the vital importance of planning now for the strong possibility that our choices will fall between accepting, if not encouraging, a national unity dictatorship, hopefully of a more benign nature than the previous one, or trying to assemble a regional containment coalition (“contained mess”), understanding that this has been rendered less plausible by the Arab Spring and new governments more attuned to, or preoccupied with resisting, popular opinion. These choices, unpalatable as they seem, gain in appeal as we contemplate the damage of scenario three, “contagion.” Given the contingent and uncertain shape of emergent reality and the goal of creating value for policymakers, the durability of any particular set of alternate scenarios will be limited. Large, formal scenario studies have their place, especially those focused on the more distant future—the NIC reports are examples. But, by and large, the scenarios will begin to lose their direct relevance to policy unless they are embedded in an ongoing process of hypothesis testing and policy re-evaluation against incoming information and analysis. New data and insight may broadly confirm one scenario, invalidate another, suggest new scenarios to consider, reveal the impacts—intended or not—of previous policy decisions, call for additional research or data collection to clarify uncertainties, and alter the mix of policy options. In the best of circumstances, this way of thinking about policy occurs spontaneously; the formal scenario process provides greater discipline and structure to policy debates, thus increasing the likelihood that such thinking will be employed. Scenario development should ideally be sited in the policy agencies themselves and at the NIC, with extensive “outside” participation. The National Security Council, the National Economic Council, Policy Planning at the Department of State could all assemble the appropriate mix of expertise, imagination, and policy savvy needed to do this well. With the support of the Carnegie Corporation, the CGA has done five such exercises on pivotal countries, including China, Russia, Turkey, Ukraine, and Pakistan. Earlier studies covered Iran and Iraq. Critical to success in these exercises was assembling the right mix of skill sets, points of view, and nationality. The idea is to organize a conversation on the key interactions that can precipitate change. In the case of the Middle East, these intersections might include the effects of global financial volatility and economic stagnation on employment and income, population growth and youth unemployment on political mobilization, political change in one country on changes in others, and economic reform and the emergence of [End Page 29] new elites on regime legitimacy and resilience. Out of such a process one could imagine at least three plausible alternate scenarios emerging for the Arab world: moderate Islamic democracies, consciously modeled on Turkey; authoritarian coalitions of Islam and the military; and internal and regional sectarian fragmentation. Conclusion This paper has argued that alternate scenarios can be of great value to policymakers confronting rapid change, uncertainty, and high risk. Alternate scenarios present plausible and distinctive futures that challenge embedded mindsets, suggest different paths by which events may unfold, and improve early recognition of emerging trends. By engaging the future, they avoid the equally hazardous extremes of infinite uncertainty (which can produce paralysis or willful disregard for what we do know) and excessive certainty (with the attendant risks of ill-conceived actions and unintended consequences). Promoting a continuous process of scenario construction and deconstruction and embedding such a process in policy formulation would improve the quality of foreign policy decisions taken, inevitably, in uncertainty.

The fear of sovereignty encourages passivity and prevents bottom-up resistance

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(Michael and Thomas, "Sovereignty, Multitudes, Absolute Democracy: A Discussion between Michael Hardt and Thomas Dumm about Hardt and Negri's Empire,” Harvard University Press, 2000, Theory & Event, Volume 4, Issue 3, Project Muse)

The pinnacle and full realization of modern sovereignty thus becomes the Nazi concentration camp: the zone of exclusion and exception is the heart of modern sovereignty and grounds the rule of law. My hesitation with this view is that by posing the extreme case of the concentration camp as the heart of sovereignty it tends to obscure the daily violence of modern sovereignty in all its forms. It implies, in other words, that if we could do away with the camp then all the violence of sovereignty would also disappear. The most significant difference between our projects, though, is that Agamben dwells on modern sovereignty whereas we claim that modern sovereignty has now come to an end and transformed into a new kind of sovereignty, what we call imperial sovereignty. Imperial sovereignty has nothing to do with the concentration camp. It no longer takes the form of a dialectic between Self and Other and does not function through any such absolute exclusion, but rules rather through mechanisms of differential inclusion, making hierarchies of hybrid identities. This description may not immediately give you the same sense of horror that you get from Auschwitz and the Nazi Lager, but imperial sovereignty is certainly just as brutal as modern sovereignty was, and it has its own subtle and not so subtle horrors. But still none of that addresses the passivity you refer to. For that we have to look instead at Agamben's notions of life and biopower. Agamben uses the term "naked life" to name that limit of humanity, the bare minimum of existence that is exposed in the concentration camp. In the final analysis, he explains, modern sovereignty rules over naked life and biopower is this power to rule over life itself. What results from this analysis is not so much passivity, I would say, but powerlessness. There is no figure that can challenge and contest sovereignty. Our critique of Agamben's (and also Foucault's) notion of biopower is that it is conceived only from above and we attempt to formulate instead a notion of biopower from below, that is, a power by which the multitude itself rules over life. (In this sense, the notion of biopower one finds in some veins of ecofeminism such as the work of Vandana Shiva, although cast on a very different register, is closer to our notion of a biopower from below.) What we are interested in finally is a new biopolitics that reveals the struggles over forms of life.

FOUCAULT’S CONCEPTION OF POWER IS TOO PESSIMISTIC – we shouldn’t understand all power to be equally problematic – it prevents redistribution of power back to people

Bookchin 95, Institute for Social Ecology, (Murray, *From Urbanization to Cities*)

The problem of dealing with the growing power of nation-states and of centralized corporations, property ownership, production, and the like is precisely a question of power--that is to say, who shall have it or who shall be denied any power at all. Michel Foucault has done our age no service by making power an evil as such. Foucauldian postmodernist views notwithstanding, the broad mass of people in the world today lack what they need most--the power to challenge the nation-state and arrest the centralization of economic resources, lest future generations see all the gains of humanity dissipated and freedom disappear from social discourse. Minimally, if power is to be socially redistributed so that the ordinary people who do the real work of the world can **effectively speak back** to those run social and economic affairs, a movement is vitally needed to educate, mobilize, and, using the wisdom of ordinary and extraordinary people alike, initiate local steps to regain power in its most popular and democratic forms. Power of this kind must be collected, if we are to take democracy seriously, in newly developed institutions such as assemblies that allow for the direct participation of citizens in public affairs. Without a movement to work toward such a democratic end, including educators who are prepared, in turn, to be educated, and intellectually sophisticated people who can develop and popularize this project, efforts to challenge power as it is now constituted will simply sputter out in escapades, riots, adventures, and protests. . . .

#### -The state of exception is rhetorical. Your link arguments ignore that it takes work to justify states of exception

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Theories of the exception are not hospitable to rhetoric. The most sophisticated theorists of the exception, Carl Schmitt and Giorgio Agamben, have at once both overlooked and understated its fundamentally rhetorical character. In so doing, they have mystified the exception as super-linguistic and resistant to rhetorical critique. For his part, Schmitt acknowledges that the sovereign must repeatedly and spectacularly exercise his decisive powers in public in order to maintain total power (1985). Similarly, Agamben gestures to the rhetorical nature of the exception when he notes that the exception is the product of subjective sovereign judgment: "obviously the only circumstances that are necessary and objective are those that are declared to be so" (2005, 30). Neither theorist, however, offers a substantive meditation on the role of language in sustaining and advancing the exceptional decision. Critics are left to declaim sovereign power as something transcendent, an "effective though fictional" space resistant to immanent critique (87). In contradistinction to Schmitt and Agamben, I argue that the state of exception is rhetorical in nature—and that the declaration of a state of [End Page 77] exception, in turn, mobilizes and embeds the executive bureaucracy as purely a power instrument for the charismatic leader. One aspect of the state of exception, as defined by Schmitt, is that it is clearly defined in time—it cannot be perpetual, or it is no longer by definition exceptional. For Schmitt, there are rules for what a sovereign can and cannot do during a state of exception, which is declared in a moment of constitutional or political crisis. The task of the exceptional ruler is to uphold the constitution, not to change it. What is most interesting about our post-modern state of exception is that it is at once both perpetual and constitutive—the state of exception is not bound by time, and it has become the excuse for changing the constitution in important ways and also expanding what many have called the "national security state." Both charisma as the force of history and charisma as embodied presence supplement theories of the exception in useful ways. With the former, the sovereign decision is situated in its sociohistorical context. It will thus matter when the exception is spoken. With the latter, the figure of the sovereign is reframed as the figure of the charismatic rhetor. Thus, it will matter who speaks the exception, and how successful they are at doing so. Together, these conceptions of charisma open space for critique of both the sovereign and her claims to the exception. In effect, the charismatic leader must be capable of absorbing the historical exception, of becoming the image of a new history, in order to sustain any kind of enduring rule in the state of exception. That is, the would-be charismatic leader cannot be overtaken by the force of history; she must become the force of history. With that power in hand, she is free to make any sort of extraordinary decree she likes (within the bounds of history; here the empowering force is also the limit point of charismatic-sovereign power). In Weberian terms, the sovereign must also routinize the exception, must translate the exception into a permanent "state of exception" through the "depersonalization," or transfer of charisma.

-Agamben’s criticisms of sovereign power are too theoretical. He points out that sovereigns have the power to create exceptions but he doesn’t prove that they will

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Ong asserts that **there is always room for resistance to the forms of sovereign power** described by Agamben—as illustrated by the numerous immigrant rights mobilizations that have taken shape on the global stage (as well as the massive groundswell of support for the U.S. immigrant protests of 2006 and the resistance to “illegal immigrant” laws among many U.S. towns, cities, and states). Agamben provides a useful explanation of the defining tendencies and components of a particular kind of sovereign power, but this is best understood as an **ideal-type theorization and** not a literal account of how relations between the sovereign and subjected always play out in “reality.”

-You have to prove that the executive will manufacture a new emergency, something akin to a 9-11. Even the Boston bombings proves that the sovereign can resist the temptation to turn a bombing into a new national emergency that justifies the sacrificing of the law

-Reductionism. Pre-determining that all liberal constraints fail – trades-off with a better form of analysis and ignores contestation.

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The issue is not whether relying on Schmitt's theories will "produce another Hitler." 543 Rather it is whether Schmitt's diagnosis of the inevitability of liberal legal paralysis in the face of crisis necessarily leads to the conclusion that efforts to legally regulate "exceptional" measures (such as military operations) are futile and must leave almost everything to the discretion of the executive. It is well known that Schmitt maintained deep theoretical and political objections to parliamentary democracy and liberalism, and his highly stylized claims about the inherent tendency of these normative political commitments reflected a desire to discredit them. As Ulrich Preuss has shrewdly observed, Schmitt's rhetorical technique results is a heightened sense of opposition between ideas and institutions, in which ideas never get a second chance. 544 In focusing on the indeterminacy of law, Schmitt was in accord with a diverse range of thinkers, including realists and others. But, unlike them, Schmitt drew from this the message that the source or apex of the normative chain retained not only a special power to infuse the chain with meaning but also, just because it was not beholden to any higher normative authority, an extraordinary power to dispense with or opt out of the normative chain entirely. 545 Schmitt's sovereign was thus in a position both to fix meaning inside the command of the law and, as sovereign, to fix and stand outside the boundaries of legal meaning. His theory thus starts from the exception and envisages "the complete destruction of the normal by the exception." 546 To accept a moment of discretion inherent in the application of any norm need not lead to the conclusion that the line between the normal and the exceptional cannot be drawn, or that any measure classified as "exceptional" cannot be scrutinized against principled criteria. Of course, the question remains, who should decide the application of these criteria? But to assert, a priori, that only the executive can and should do so, is simply [\*427] to beg the question of whether and why the values of transparency, legality, and publicity should be regarded as always and necessarily incompatible with effective responses to emergencies. 547 Indeed, the opposite may well be true--that an executive not effectively constrained and supervise d during an emergency becomes reckless and thus endangers the state further. 548 The point is simply that we know in advance what Schmitt's conclusions may be on this question, but his sharp-eyed diagnosis of the difficulties of liberal states facing emergencies does not necessarily compel the conclusion that the absolute exclusion of liberal legalist principles is the answer. 549 But a too-ready acceptance of this conclusion merely excuses us from careful contextual analysis of what the exigencies of the situation really require. As Dyzenhaus points out, we might well acknowledge the validity of Schmitt's paradox without retreating from the position that liberal legalism is capable of meeting the challenge. When judges call the executive to account for excesses such as those undertaken post 9/11 they are: making creative, interpretive decisions about how best to understand their mandate. These decisions are not determined by law, if what one means by that phrase is that the officials simply transmit the determinate content of settled law to those subject to it. But in a looser sense of determination--one that requires all the reasons for a decision to be legal ones, and these reasons to be marshaled so as to display the best account available of the decision's legality--the decisions are as determined as any normative decision can be. Such decisions are contested, for example, by those who have positivistic inclinations, and by those who reject liberal legalism. But that contest takes place within a political and legal space that . . . Schmitt did not acknowledge. . . . . [\*428] [I]n making that critique from inside the legal-political space of liberal-democratic politics, it is important to keep in mind that our engagement with "law" is not only with the content of positive laws, but also with the idea and practice of legality. 550

#### -Lazy methods: Believing in inevitable states of exception are a form of lazy fatalism – their arguments rely on empirical assertions and ignore that courts do push back

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There is no doubt that Schmitt was an astute critic of the vulnerabilities of liberalism, but his "preferred cure turned out to be infinitely worse than the disease." 557 So too does Vermeule's theory of grey holes. The second problem with Vermeule's approach is the extent to which it blurs empirical conclusions with normative arguments. While he never actually states that black or grey holes are normatively desirable, he simply concludes that they are "inevitable" or "unavoidable", and that "decrying their existence is pointless." 558 He situates himself as a realist who is merely observing the reluctance of judges and legislators to scrutinize executive responses to emergencies. The legislators, he says, are "best [\*430] understood as Schmittian lawmakers," 559 while the judges are prudent in not being prepared to shoulder the responsibility of extending the rule of law to emergency situations, even those very broadly defined. 560 Scholars, it seems, are also realists, or at least are equally pusillanimous, since only a handful of them "takes seriously a model of 'global due process.'" 561. But it is done with an air of resignation and pragmatism rather than arguing, as Schmitt would, that it is both inevitable and normatively desirable for the sovereign to enjoy unfettered, dictatorial, powers. It is important to note that the empirical foundation upon which Vermeule bases his analysis is not only rather slight, but also ignores or downplays important examples of cases in which the courts have in fact pushed back significantly against the executive in relation to conditions of detention and the use of torture. 562 The results are far from perfect, but they hardly justify the conclusion that black and grey holes are necessarily inevitable. Vermeule seeks to buttress his reliance on this empirical fatalism and his dismissal of "the aspiration to extend legality everywhere . . . [as] hopelessly utopian," 563 by asserting that there is unanimous support among the legal and political elites in the United States that the executive must be able to act illegally: There are too many domains affecting national security in which official opinion holds unanimously, across institutions and partisan lines and throughout the modern era, that executive action must proceed untrammeled by even the threat of legal regulation and judicial review . . . . 564 This amounts to a normative argument, but because it is intertwined so carefully with the empirical argument he avoids tackling it head on. Thus, Dyzenhaus's argument for both the importance and feasibility of a common law constitutionalism that upholds the rule of law in the thick sense of vindicating fundamental constitutive principles is never really engaged with directly. Instead, claims of principle are refuted on the basis [\*431] of pragmatic arguments in favor of "hypocritical lip-service" which enables a "veil of decency" 565 to conceal the violations of the law that are being perpetrated and subsequently either overlooked or upheld by the courts. Vermeule concedes that judges could insist upon compliance with the rule of law, but asserts that it is "institutionally impossible for them to do so." 566 While Vermeule assiduously avoids any reference to or engagement with either international or foreign law, he invites such engagement when he argues that legal black and grey holes are not a peculiarly American response to the post-9/11 emergency, but rather are "integral to the administrative state," and hence "no legal order governing a massive and massively diverse administrative state can hope to dispense with them." 567 In other words, the United States should not be considered exceptional in this regard. The reality, however, is that almost all of the principal common law jurisdictions with which the United States can be reasonably be compared (such as Canada, the United Kingdom, and Australia) have, within reasonable limits, respected the rule of law in emergency situations.

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#### The aff is an outgrowth of a very particular Americanized version of liberal subjectivity. These liberal illusions have coalesced to form a new liberal subjectivity which legitimizes wars for democracy and doctrines of pre-emption as a ‘new internationalism’

Motha 8 \*Stewart, Senior Lecturer, Kent Law School, University of Kent, Canterbury, Kent, Journal of Law, Culture, and Humanities Forthcoming 2008, Liberal Cults, Suicide Bombers, and other Theological Dilemmas

A universalist liberal ideology has been re-asserted. It is not only neo-con hawks or Blairite opportunists that now legitimise wars for democracy. Alarmingly, it is a generation of political thinkers who opposed the Nixonian logic of war (wars to show that a country can ‘credibly’ fight a war to protect its interests1), and those humbled by the anticolonial struggles of liberation from previous incarnations of European superiority that are renewing spurious civilizational discourses. This ‘muscular liberalism’ has found its voice at the moment of a global political debate about the legality and effectiveness of ‘just wars’ – so called ‘wars for democracy’ or ‘humanitarian war’. The new political alignment of the liberal left emerged in the context of discussions about the ‘use of force’ irrespective of UN Security Council endorsement or the sovereign state’s territorial integrity, such as in Kosovo – but gained rapid momentum in response to attacks in New York City and Washington on September 11, 2001. Parts of the liberal left have now aligned themselves with neoconservative foreign policies, and have joined what they believe is a new anti-totalitarian global struggle – the ‘war on terror’ or the battle against Islamist fundamentalism. One task of this essay, then, is to identify this new formation of the liberal left. Much horror and suffering has been unleashed on the world in the name of the liberal society which must endure. However, when suicide bombing and state-terror are compared, the retort is that there is no moral equivalence between the two. Talal Asad in his evocative book, On Suicide Bombing, has probed the horror that is felt about suicide bombing in contrast to state violence and terror.2 What affective associations are formed in the reaction to suicide bombing? What does horror about suicide bombing tell us about the constitution of inter-subjective relations? In this essay I begin to probe these questions about the relation between death, subjectivity, and politics. I want to excavate below the surface oppositions of good deaths and bad, justifiable killing and barbarism, which have been so central to left liberal arguments. As so much is riding on the difference between ‘our good war’ and ‘their cult of death’, it seems apt to examine and undo the opposition. The muscular liberal left projects itself as embodying the values of the ‘West’, a geo-political convergence that is regularly opposed to the ‘East’, ‘Muslims’, or the ‘Islamic World’. I undo this opposition, arguing that thanatopolitics, a convergence of death, sacrifice, martyrdom and politics, is common to left liberal and Islamist political formations. How does death become political for left liberals and Islamist suicide bombers? In the case of the latter, what is most immediately apparent is how little is known about the politics and politicization of suicide bombers. Suicide bombers are represented as a near perfect contrast to the free, autonomous, self-legislating liberal subject – a person overdetermined by her backward culture, oppressive setting, and yet also empty of content, and whose death can have no temporal political purchase. The ‘suicide bomber’ tends to be treated by the liberal left as a trans-historical ‘figure’, usually represented as the ‘Islamo-fascist’ or the ‘irrational’ Muslim.3 The causes of suicide bombing are often implicitly placed on Islam itself – a religion that is represented as devoid of ‘scepticism, doubt, or rebellion’ and thus seen as a favourable setting for totalitarianism.4 The account of the suicide bomber as neo-fascist assassin supplements a lack – that is, that the association of suicide bombing with Islam explains very little. The suicide bomber is thus made completely familiar as totalitarian fascist, or wholly other as “[a] completely new kind of enemy, one for whom death is not death”.5 So much that is written about the suicide bomber glosses over the unknown with political subjectivities, figures, and paradigms (such as fascism) which are familiar enough to be vociferously opposed. By drawing the suicide bomber into a familiar moral register of ‘evil’, political and historical relations between victim and perpetrator are erased.6 In the place of ethnographically informed research the ‘theorist’ or ‘public intellectual’ erases the contingency of the suicide bomber and reduces her death to pure annihilation, or nothingness. The discussion concludes by undoing the notion of the ‘West’, the very ground that the liberal left assert they stand for. The ‘West’ is no longer a viable representation of a geo-political convergence, if it ever was. Liberal discourse has regarded itself as the projection of the ‘West’ and its enlightenment. But this ignores important continuities between Islam, Christianity, and contemporary secular formations. The current ‘clash of monotheisms’, I argue after J-L Nancy, reveals a crisis of sense, authority, and meaning which is inherent to the monotheistic form. An increasingly globalised world is made up of political communities and juridical orders that have been ‘emptied’ of authority and certainty. This crisis of sense conditions the horror felt by the supposedly rational liberal in the face of Islamist terrorism. Horror at terrorism is then the affective bond that sustains a grouping that otherwise suffers the loss of a political project with a definite end. The general objective of this essay is to challenge the unexamined assumptions about politics and death that circulate in liberal left denunciations of Islamic fascism. The horror and fascination with the figure of the suicide bomber reveals an unacknowledged affective bond that constitutes the muscular liberal left as a political formation. This relies on disavowing the sacrificial and theological underpinnings of political liberalism itself – and ignores the continuities between what is called the ‘West’ and the theologico-political enterprise of monotheism. Monotheism is not the preserve of something called the ‘West’, but rather an enterprise that is common to all three Religions of the Book. The article concludes by describing how the writings of Jean-Luc Nancy on monotheism offer liberal left thinkers insights for rethinking the crisis of value that resulted from the collapse of grand emancipatory enterprises as well as the fragmentation of politics resulting from a focus on political identification through difference. I opened with a reference to the ‘liberal left’. Of course the ‘liberal left’ signifies a vast and varied range of political thinking and activism – so I must clarify how I am deploying this term. In this essay the terms ‘liberal left’ or ‘muscular liberal’ are used interchangeably. Paul Berman and Nick Cohen, whose writing I will shortly refer to, are exemplars of the new political alignment who self-identify as ‘democrats and progressives’, but whose writings feature bellicose assertions about the superiority of western models of democracy, and universal human rights.7 Among this liberal left, democracy and freedom become hemispheric and come to stand for the West. More generally, now, the ‘liberal left’ can be distinguished from political movements and thinkers who draw inspiration from a Marxist tradition of thought with a socialist horizon. The liberal left I am referring to would view the Marxist tradition as undervaluing democratic freedoms and human rights. Left liberals also tend to dismiss the so called post-Marxist turn in European continental philosophy as ‘postmodern relativism’.8 PostMarxists confronted the problem of the ‘collective’ – addressing the problem of masses and classes as the universal category or agent of historical transformation. This was a necessary correction to all the disasters visited on the masses in the name of a universal working class. The liberal state exploited these divisions on the left. It is true that a left fragmented through identity politics or the politics of difference were reduced to group based claims on the state. However, liberal multiculturalism was critiqued by anti-racist and feminist thinkers as early as the 1970s for ignoring the structural problems of class or as yet another nation-building device. The new formation of the muscular liberal left have only just discovered the defects of multiculturalism. The dismissal of liberal multiculturalism is now code for ‘too much tolerance’ of ‘all that difference’. The liberal left, or muscular liberal, as I use these terms, should not be conflated with the way ‘liberal’ is generally used in North America to denote ‘progressive’, ‘pro-choice’, open to a multiplicity of forms of sexual expression, generally ‘tolerant’, or ‘left wing’ (meaning socialist). It might be objected that it is not the liberal left, but ‘right wing crazies’ driven by Christian evangelical zeal combined with neo-liberal economic strategies that have usurped a post-9/11 crime and security agenda to mount a global hegemonic enterprise in the name of a ‘war on terror’. It might also be said that this is nothing new – global expansionist enterprises such as 18th and 19th century colonialism mobilised religion, science, and theories of economic development to secure resources and justify extreme violence where necessary. Global domination, it might be argued, has always been a thanatopolitical enterprise. So what’s different now? What is crucial, now, is that the entire spectrum of liberalism, including the ‘rational centre’, is engaged in the kind of mindset whereby a destructive and deadly war is justified in the name of protecting or establishing democracy, the rule of law, and human rights. It might then be retorted that this ‘rational centre’ of liberalism have ‘always’ been oriented in this way. That is partly true, but it is worth recalling that the liberal left I have in mind is the generation that came of age with opposition to the war in Vietnam, other Indo-Chinese conflagrations, and the undoing of empire. This is a left that observed the Cold War conducted through various ‘hot wars’ in Africa, Central and Latin America, and South East Asia and thus at least hoped to build a ‘new world order’ of international law and multilateralism. This is a left that was resolved, by the 1970s, not to repeat the error of blindly following a scientific discourse that promised to produce a utopia – whether this was ‘actually existing socialism’ or the purity of ‘blood and soil’. But now, a deadly politics, a thanatopolitics, is drawn out of a liberal horror and struggle against a monolithically drawn enemy called Islamic fundamentalism. What is new is that Islam has replaced communism/fascism as the new ‘peril’ against which the full spectrum of liberalism is mobilized. Islamist terrorism and suicide bombers, a clash between an apparently Islamic ‘cult of death’ versus modern secular rationality has come to be a central preoccupation of the liberal left. In the process, as Talal Asad has eloquently pointed out, horror about terrorism has come to be revealed as one way in which liberal subjectivity and its relation to political community can be interrogated and understood.9 Moreover, the potential for liberal principles to be deployed in the service of legitimating a doctrine of pre-emption as the ‘new internationalism’ is significant. The first and second Gulf Wars, according to the liberal left, are then not wars to secure control over the supply of oil, or regional and global hegemony, as others on the left might argue, but anti-fascist, anti-totalitarian wars of liberation fought in the name of ‘democracy’. Backing ‘progressive wars’ for ‘freedom and democracy’, those who self-identify as a left which is reasserting liberal democratic principles start by asking questions such as: “Are western freedoms only for westerners?”.10 In the process, freedom becomes ‘western’, and its enemy an amorphous legion behind an unidentifiable line between ‘west’ and the rest (the ‘Muslim world’). The ‘war for democracy’ waged against ‘Islamist terrorism’ and Muslim fundamentalism is the crucible on which the new alignment of the liberal left is forged.

### A2 Utopia

#### Status quo resistance is solving better than your aff – 15 reasons

Benjamin & Mir ‘ 13, Huffington Post Medea Benjamin is author of Drone Warfare: Killing by Remote Control. Noor Mir is the Drone Campaign Coordinator at CODEPINK. ”Finally, the Backlash Against Drones Takes Flight” March 2013 http://www.huffingtonpost.com/medea-benjamin/finally-the-backlash-against-drones\_b\_2950601.html

Rand Paul's marathon 13-hour filibuster was not the end of the conversation on drones. Suddenly, drones are everywhere, and so is the backlash. Efforts to counter drones at home and abroad are growing in the courts, at places of worship, outside air force bases, inside the UN, at state legislatures, inside Congress -- and having an effect on policy. 1. April marks the national month of uprising against drone warfare. Activists in upstate New York are converging on the Hancock Air National Guard Base where Predator drones are operated. In San Diego, they will take on Predator-maker General Atomics at both its headquarters and the home of the CEO. In D.C., a coalition of national and local organizations are coming together to say no to drones at the White House. And all across the nation -- including New York City, New Paltz, Chicago, Tucson and Dayton -- activists are planning picket lines, workshops and sit-ins to protest the covert wars. The word has even spread to Islamabad, Pakistan, where activists are planning a vigil to honor victims. 2. There has been an unprecedented surge of activity in cities, counties and state legislatures across the country aimed at regulating domestic surveillance drones. After a raucous city council hearing in Seattle in February, the mayor agreed to terminate its drones program and return the city's two drones to the manufacturer. Also in February, the city of Charlottesville, Va., passed a two-year moratorium and other restrictions on drone use, and other local bills are pending in cities from Buffalo to Ft. Wayne. Simultaneously, bills have been proliferating on the state level. In Florida, a pending bill will require the police to get a warrant to use drones in an investigation; a Virginia statewide moratorium on drones passed both houses and awaits the governor's signature, and similar legislation in pending in at least 13 other state legislatures. 3. Responding to the international outcry against drone warfare, the United Nations' special rapporteur on counterterrorism and human rights, Ben Emmerson, is conducting an in-depth investigation of 25 drone attacks and will release his report in the spring. Meanwhile, on March 15, having returned from a visit to Pakistan to meet drone victims and government officials, Emmerson condemned the U.S. drone program in Pakistan, as "it involves the use of force on the territory of another State without its consent and is therefore a violation of Pakistan's sovereignty." 4. Leaders in the faith-based community broke their silence and began mobilizing against the nomination of John Brennan, with more than 100 leaders urging the Senate to reject Brennan. And in an astounding development, The National Black Church Initiative (NBCI), a faith-based coalition of 34,000 churches comprised of 15 denominations and 15.7 million African Americans, issued a scathing statement about Obama's drone policy, calling it "evil," "monstrous" and "immoral." The group's president, Rev. Anthony Evans, exhorted other black leaders to speak out, saying, "If the church does not speak against this immoral policy we will lose our moral voice, our soul, and our right to represent and preach the gospel of Jesus Christ." 5. In the past four years the congressional committees that are supposed to exercise oversight over the drones have been mum. Finally, in February and March, the House Judiciary Committee and the Senate Judiciary Committee held their first public hearings, and the Constitution Subcommittee will hold a hearing on April 16 on the "constitutional and statutory authority for targeted killings, the scope of the battlefield and who can be targeted as a combatant." Too little, too late, but at least Congress is feeling some pressure to exercise its authority. 6. The specter of tens of thousands of drones here at home when the FAA opens up U.S. airspace to drones by 2015 has spurred new left/right alliances. Liberal Democratic Senator Ron Wyden joined the tea party's Rand Paul during his filibuster. The first bipartisan national legislation was introduced by Rep. Ted Poe, R-Texas, and Rep. Zoe Lofgren, D-Calif., saying drones used by law enforcement must be focused exclusively on criminal wrongdoing and subject to judicial approval, and prohibiting the arming of drones. Similar left-right coalitions have formed at the local level. And speaking of strange bedfellows, NRA president David Keene joined The Nation's legal affairs correspondent David Cole in an op-ed lambasting the administration for the cloak of secrecy that undermines the system of checks and balances. 7. While trying to get redress in the courts for the killing of American citizens by drones in Yemen, the ACLU has been stymied by the Orwellian U.S. government refusal to even acknowledge that the drone program exists. But on March 15, in an important victory for transparency, the D.C. Court of Appeals rejected the CIA's absurd claims that it "cannot confirm or deny" possessing information about the government's use of drones for targeted killing, and sent the case back to a federal judge. 8. Most Democrats have been all too willing to let President Obama carry on with his lethal drones, but on March 11, Congresswoman Barbara Lee and seven colleagues issued a letter to President Obama calling on him to publicly disclose the legal basis for drone killings, echoing a call that emerged in the Senate during the John Brennan hearing. The letter also requested a report to Congress with details about limiting civilian casualties by signature drone strikes, compensating innocent victims, and restructuring the drone program "within the framework of international law." 9. There have even been signs of discontent within the military. Former Defense Secretary Leon Panetta had approved a ludicrous high-level military medal that honored military personnel far from the battlefield, like drone pilots, due to their "extraordinary direct impacts on combat operations." Moreover, it ranked above the Bronze Star, a medal awarded to troops for heroic acts performed in combat. Following intense backlash from the military and veteran community, as well as a push from a group of bipartisan senators, new Defense Secretary Senator Chuck Hagel decided to review the criteria for this new "Distinguished Warfare" medal. 10. Remote-control warfare is bad enough, but what is being developed is warfare by "killer robots" that don't even have a human in the loop. A campaign against fully autonomous warfare will be launched this April at the UK's House of Commons by human rights organizations, Nobel laureates and academics, many of whom were involved in the successful campaign to ban landmines. The goal of the campaign is to ban killer robots before they are used in battle. Throughout the U.S. -- and the world -- people are beginning to wake up to the danger of spy and killer drones. Their actions are already having an impact in forcing the administration to share memos with Congress, reduce the number of strikes and begin a process of taking drones out of the hands of the CIA.

### Link

#### These normalize the targeted killing process and making it legal

Jaffer 13, Director of the ACLU's Center for Democracy, Jameel, Judicial Review of Targeted Killings, Harvard Law Review, http://www.harvardlawreview.org/issues/126/april13/forum\_1002.php

Since 9/11, the CIA and Joint Special Operations Command (JSOC) have used armed drones to kill thousands of people in places far removed from conventional battlefields. Legislators, legal scholars, and human rights advocates have raised concerns about civilian casualties, the legal basis for the strikes, the process by which the executive selects its targets, and the actual or contemplated deployment of armed drones into additional countries. Some have proposed that Congress establish a court to approve (or disapprove) strikes before the government carries them out. While judicial engagement with the targeted killing program is long overdue, those aiming to bring the program in line with our legal traditions and moral intuitions should think carefully before embracing this proposal. Creating a new court to issue death warrants is more likely to normalize the targeted killing program than to restrain it. The argument for some form of judicial review is compelling, not least because such review would clarify the scope of the government’s authority to use lethal force. The targeted killing program is predicated on sweeping constructions of the 2001 Authorization for Use of Military Force (AUMF) and the President’s authority to use military force in national self-defense. The government contends, for example, that the AUMF authorizes it to use lethal force against groups that had nothing to do with the 9/11 attacks and that did not even exist when those attacks were carried out. It contends that the AUMF gives it authority to use lethal force against individuals located far from conventional battlefields. As the Justice Department’s recently leaked white paper makes clear, the government also contends that the President has authority to use lethal force against those deemed to present “continuing” rather than truly imminent threats. These claims are controversial. They have been rejected or questioned by human rights groups, legal scholars, federal judges, and U.N. special rapporteurs. Even enthusiasts of the drone program have become anxious about its legal soundness. (“People in Washington need to wake up and realize the legal foundations are crumbling by the day,” Professor Bobby Chesney, a supporter of the program, recently said.) Judicial review could clarify the limits on the government’s legal authority and supply a degree of legitimacy to actions taken within those limits. It could also encourage executive officials to observe these limits. Executive officials would be less likely to exceed or abuse their authority if they were required to defend their conduct to federal judges. Even Jeh Johnson, the Defense Department’s former general counsel and a vocal defender of the targeted killing program, acknowledged in a recent speech that judicial review could add “rigor” to the executive’s decisionmaking process. In explaining the function of the Foreign Intelligence Surveillance Court, which oversees government surveillance in certain national security investigations, executive officials have often said that even the mere prospect of judicial review deters error and abuse. But to recognize that judicial review is indispensible in this context is not to say that Congress should establish a specialized court, still less that it should establish such a court to review contemplated killings before they are carried out. First, the establishment of such a court would almost certainly entrench the notion that the government has authority, even far away from conflict zones, to use lethal force against individuals who do not present imminent threats. When a threat is truly imminent, after all, the government will not have time to apply to a court for permission to carry out a strike. Exigency will make prior judicial review infeasible. To propose that a court should review contemplated strikes before they are carried out is to accept that the government should be contemplating strikes against people who do not present imminent threats. This is why the establishment of a specialized court would more likely institutionalize the existing program, with its elision of the imminence requirement, than narrow it.

### 2NC Permutation

#### 1. permutation still links and doesn’t make sense---the alt rejects the aff for its faith in legal structures and the idea that it can create change---this isn’t true and turns solvency because it depletes public activism

Gordon**, 87 –** (Robert. Prof Law @ Stanford Univ. “Unfreezing Legal Reality: Critical Approaches to Law” Florida State University Law Review, Vol 15 No 3. 1987, lexis)

Now a central tenet of CLS work has been that the ordinary discourses of law -- debates over legislation, legal arguments, administrative and court decisions, lawyers' discussions with clients, legal commentary and scholarship, etc. -- all contribute to cementing this feeling, at once despairing and complacent, **that** things must be the way they are **and that major changes could only make them worse. Legal discourse accomplishes this in many ways. First by endlessly repeating the claim that law and the other policy sciences have perfected a set of rational techniques and institutions that have come about as close as we are ever likely to get to solving the problem of domination in civil society**. Put another way, **legal discourse paints an** idealized fantasy of order according to which legal rules **and procedures have so structured relations among people that such** relations may primarily be understood as instituted by their consent**, their free and rational choices. Such coercion as apparently remains may be explained as the result of necessity -- either natural** necessities (such as scarcity or the limited human capacity for altruism) **or social** necessities. For example, in a number of the prevailing discourses, the ordinary hierarchies of workplace domination and subordination are explained: (1) by reference to the contractual agreement of the parties and to their relative preferences for responsibility versus leisure, or risk taking versus security; (2) by the natural distribution of differential talents and skills (Larry Bird earns more as a basketball player because he is better); and (3) by the demands of efficiency in production, which are said to require extensive hierarchy for the purposes of supervision and monitoring, centralization of investment decisions, and so forth. **There are always some residues of clearly unhappy [\*199] conditions -- undeserved deprivation, exploitation, suffering -- that cannot be explained in any of these ways. The discourses of law are perhaps most resourceful in dealing with these residues, treating them as, on the whole, readily reformable within the prevailing political options for adjusting the structures of ordinary practices -- one need merely fine tune the scheme of regulation**, or deregulation, **to correct them**. But the prevailing discourse has its cynical and worldly side, and its tragic moments, to offset the general mood of complacency. In this mood it resignedly acknowledges that beyond the necessary minimum and the reformable residues of coercion and misery there is an irreducible, intractable remainder -- due to inherent limits on our capacity for achieving social knowledge, or for changing society through deliberate intervention, or for taking collective action against evil without suffering the greater evil of despotic power. These discourses of legal and technical rationality, of rights, consent, necessity, efficiency, and tragic limitation, are of course discourses of power -- not only for the obvious reasons that law's commands are backed by force and its operations can inflict enormous pain, but because to have access to these discourses, to be able to use them or pay others to use them on your behalf, is a large part of what it means to possess power. Further, they are discourses that -- although often partially constructed, or extracted as concessions, through the pressure of relatively less powerful groups struggling from below -- **in habitual practice** tend to express the interests and the perspectives of the powerful people who use them. The discourses have some of the power they do because some of their claims sound very plausible, though many do not. The claim, for example, that workers in health-destroying factories voluntarily "choose," in any practical sense of the term, the risks of the workplace in return for a wage premium, is probably not believed by anyone save those few expensively trained out of the capacity to recognize what is going on around them. In addition, both the plausible and implausible claims are backed up in the cases of law and of economics and the policy sciences by a quite formidable-seeming technocratic apparatus of rational justification -- suggesting that the miscellany of social practices we happen to have been born into in this historical moment is much more than a contingent miscellany. It has an order, even if sometimes an invisible one; it makes sense. The array of legal norms, institutions, procedures, and doctrines in force, can be rationally derived from the principles of regard for individual autonomy, utilitarian [\*200] efficiency or wealth creation, the functional needs of social order or economic prosperity, or the moral consensus and historical traditions of the community. There are several general points CLS people have wanted to assert against these discourses of power. First, the discourses have helped to structure our ordinary perceptions of reality so as to systematically exclude or repress alternative visions of social life, both as it is and as it might be. One of the aims of CLS methods is to try to dredge up and give content to these suppressed alternative visions. Second, the discourses fail even on their own terms to sustain the case for their relentlessly apologetic conclusions. Carefully understood, they could all just as well be invoked to support a politics of social transformation instead. n3 Generally speaking, the CLS claims under this heading are **that the rationalizing criteria appealed to (of autonomy, functional utility, efficiency, history, etc.) are far too indeterminate to justify any conclusions about the inevitability or desirability of particular current practices;** such claims, when unpacked, again and again turn out to rest on some illegitimate rhetorical move or dubious intermediate premise or empirical assumption. Further, the categories, abstractions, conventional rhetorics, reasoning modes and empirical statements of our ordinary discourses in any case so often misdescribe social experience as not to present any defensible pictures of the practices that they attempt to justify. Not to say of course that there could be such a thing as a single correct way of truthfully rendering social life as people live it, or that CLS writers could claim to have discovered it. But the commonplace legal discourses often produce such seriously distorted representations of social life that their categories regularly filter out complexity, variety, irrationality, unpredictability, disorder, cruelty, coercion, violence, suffering, solidarity and self-sacrifice. n4 [\*201] Summing up: The purpose of CLS as an intellectual enterprise is to try to thaw out, or at least to hammer some tiny dents on, the frozen mind sets induced by habitual exposure to legal practices -- by trying to show how normal legal discourses contribute to freezing, and to demonstrate how problematic these discourses are.

### A2 Zizek

#### Our demand for due process is more destabilizing to law than simple radical negation. Absent engaging the law all forms of oppression become whitewashed.

**Zizek 1998** (Slavoj, was born, writes books, and will die, Law and the Postmodern Mind, “Why Does the Law need an Obscene Supplement?” Pg 91-94)

Finally, the point about inherent transgression is not that every opposition, every attempt at subversion, is automatically "coopted." On the contrary, the very fear of being coopted that makes us search for more and more "radical," "pure" attitudes, is the supreme strategy of suspension or marginalization. The point is rather that true subversion is not always where it seems to be. Sometimes, **a small distance is much more explosive for the system than an ineffective radical rejection**. In religion, a small heresy can be more threatening than an outright atheism or passage to another religion; **for a** hard-line **Stalinist, a Trotskyite is infinitely more threatening than a bourgeois liberal** or social democrat. As le Carre put it, one true revisionist in the Central Committee is worth more than thousand dissidents outside it. It was easy to dismiss Gorbachev for aiming only at improving the system, making it more efficient-he nonetheless set in motion its disintegration. So one should also bear in mind the obverse of the inherent transgression: one is tempted to paraphrase Freud's claim from The Ego and the Id that man is not only much more immoral than he believes, but also much more moral than he knows-**the System is not only infinitely more resistant and invulnerable than it may appear (it can coopt apparently subversive strategies, they can serve as its support), it is also infinitely more vulnerable (a small revision etc, can have large unforeseen catastrophic consequences**). Or, to put it in another way: **the paradoxical role of the unwritten superego injunction is that, with regard to the explicit, public Law, it is simultaneously transgressive (superego suspends, violates, the explicit social rules) and more coercive (superego consists of additional rules that restrain the field of choice by way of prohibiting the possibilities allowed for, guaranteed even, by the public Law)**. From my personal history, I recall the moment of the referendum for the independence of Slovenia as the exemplary case of such a forced choice: the whole point, of course, was to have a truly free choice-but nonetheless, in the pro-independence euphoria, every argumentation for remaining within Yugoslavia was immediately denounced as treacherous and disloyal. This example is especially suitable since Slovenes were deciding about a matter that was literally "transgressive" (to break from Yugoslavia with its constitutional order), which is why the Belgrade authorities denounced Slovene referendum as unconstitutional-one was thus ordered to transgress the Law ... The obverse of the omnipotence of the unwritten is thus that, if one ignores them, they simply cease to exist, in contrast to the written law that exists (functions) **whether one is aware of it or not**-or, as the priest in Kafka's The Trial put it, law **does not want anything from you, it** only bothers you if you yourself acknowledge it and address yourself to it with a demand ... **When**, in the late eighteenth century, universal human rights were proclaimed, this universality, of course, concealed the fact that they privilege white, men of property; however, this limitation was not openly admitted**, it was coded in** apparently tautological supplementary qualifications like "**all humans have rights, insofar as they truly are. rational and free," " which then implicitly excludes the mentally ill, "savages," criminals, children, women.'**. . So, if, in this situation, **a poor black woman disregards this unwritten, implicit, qualification and demands human rights, also for herself, she just takes the letter of the discourse of rights "more literally than it was meant" (and thereby redefines its universality, inscribing it into a different hegemonic chain).** "**Fantasy" designates** precisely this unwritten framework that tells us **how are we to understand the letter of Law**. The lesson of this is that-sometimes, at least-the truly subversivething is not to disregard the explicit letter of Law on behalf of the underlying fantasies, but to stick to this letter against the fantasy that sustains it. Is-at a certain level, at least-this not the outcome of the long conversation between Josepf K. and the priest that follows the priest's narrative on the Door of the Law in The Trial?-the uncanny effect of this conversation does not reside in the fact that the reader is at a loss insofar as he lacks the unwritten interpretive code or frame of reference that would enable him to discern the hidden Meaning, but, on the contrary, in that the priest's interpretation of the parable on the Door of the Law disregards all standard frames of unwritten rules and reads the text in an "absolutely literal" way. One could also approach this deadlock via. Lacan's notion of the specifically symbolic mode of deception: **ideology "cheats precisely by letting us know that its propositions** (say, on universal human rights)' **are not to be read a la lettre, but against the background of a set of unwritten rules.** Sometimes, at least, **the most effective anti-ideological subversion of the official discourse of human rights consists in reading it in an excessively "literal" way, disregarding the set of underlying unwritten rules. The need for unwritten rules thus bears witness to, confirms, this vulnerability**: the system is compelled to allow for possibilities of choices that must never actually take place since they would disintegrate the system, and the function of the unwritten rules is precisely to prevent the actualization of these choices formally allowed by the system. One can see how unwritten rules are correlative to, the obverse of, the empty symbolic gesture and/or the forced choice: **unwritten rules prevent the subject from effectively accepting what is offered in the empty gesture, from taking the choice literally and choosing the impossible, that the choice of which destroys the system. In the Soviet Union** of the 1930s and 1940s, to take the most extreme example, it **was not only prohibited to criticize Stalin**, it was perhaps even more prohibited to enounce publicly this prohibition, i.e., **too state that one is prohibited to criticize Stalin-the system needed to maintain the appearance that one is allowed to criticize Stalin**, i.e., that the absence of this criticism (and the fact that there is no opposition party or movement, that **the Party got 99.99% of the votes at elections) simply demonstrates that Stalin is effectively the best and (almost) always right. In Hegelese, this appearance qua appearance was essential.** This **dialectical** tension between the vulnerability and invulnerability of the System also enables us to denounce the ultimate racist and/or sexist trick, that of "two birds in the bush instead of a bird in hand": **when women demand' simple equality**, quasi-"feminists" often pretend to offer them "much more" (the role of the warm and wise "conscience of society," elevated above the vulgar everyday competition and struggle for domination ...)-**the only proper answer to this offer, of course, is "No, thanks!** Better is the enemy of the Good! **We do not want more, just equality!**" Here, at least, the last lines in Now Voyager ("Why reach for the moon, when we can have the stars?") are wrong. **It is homologous with the native American who wants to become integrated into the predominant "white" society, and a politically correct progressive liberal endeavors to convince him that, he is thereby renouncing his very unique prerogative, the authentic native culture and tradition-no thanks, simple equality is enough**, I also wouldn't mind my part of consumerist alienation! ... A modest demand of the excluded group for the full participation at the society's universal rights is much more threatening for the system than the apparently much more "radical" rejection of the predominant "social values" **and the assertion of the superiority of one's own culture. For a true feminist**, Otto Weininger's assertion that, although **women are "ontologically false," lacking the proper ethical stature, they should be acknowledged the same rights as men in public life, is infinitely more acceptable than the false elevation of women that makes them "too good" for the banality of men's rights.**

### 2NC Framework

#### it misconceives the idea of authority and where it comes from---they believe that it emanates from the legal norms butthe state has been coopted by specialized interests--the focus on debate should be how culture elements can create change to combat normalization of violence caused by the military-industrial-state

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In addition, as the state is hijacked by the financial-military-industrial complex, the “most crucial decisions regarding national policy are not made by representatives, but by the financial and military elites.”53 Such massive inequality and the suffering and political corruption it produces point to the need for critical analysis in which the separation of power and politics can be understood. This means developing terms that clarify how power becomes global even as politics continues to function largely at the national level, with the effect of reducing the state primarily to custodial, policing, and punishing functions—at least for those populations considered disposable. The state exercises its slavish role in the form of lowering taxes for the rich, deregulating corporations, funding wars for the benefit of the defense industries, and devising other welfare services for the ultra-rich. There is no escaping the global politics of finance capital and the global network of violence it has produced. Resistance must be mobilized globally and politics restored to a level where it can make a difference in fulfilling the promises of a global democracy. But such a challenge can only take place if the political is made more pedagogical and matters of education take center stage in the struggle for desires, subjectivities, and social relations that refuse the normalizing of violence as a source of gratification, entertainment, identity, and honor. War in its expanded incarnation works in tandem with a state organized around the production of widespread violence. Such a state is necessarily divorced from public values and the formative cultures that make a democracy possible. The result is a weakened civic culture that allows violence and punishment to circulate as part of a culture of commodification, entertainment, distraction, and exclusion. In opposing the emergence of the United States as both a warfare and a punishing state, I am not appealing to a form of left moralism meant simply to mobilize outrage and condemnation. These are not unimportant registers, but they do not constitute an adequate form of resistance .What is needed are modes of analysis that do the hard work of uncovering the effects of the merging of institutions of capital, wealth, and power, and how this merger has extended the reach of a military-industrial-carceral and academic complex, especially since the 1980s. This complex of ideological and institutional elements designed for the production of violence must be addressed by making visible its vast national and global interests and militarized networks, as indicated by the fact that the United States has over 1,000 military bases abroad.54 Equally important is the need to highlight how this military-industrial-carceral and academic complex uses punishment as a structuring force to shape national policy and everyday life. Challenging the warfare state also has an important educational component. C. Wright Mills was right in arguing that it is impossible to separate the violence of an authoritarian social order from the cultural apparatuses that nourish it. As Mills put it, the major cultural apparatuses not only “guide experience, they also expropriate the very chance to have an experience rightly called ‘our own.’”55 This narrowing of experience shorn of public values locks people into private interests and the hyper-individualized orbits in which they live. Experience itself is now privatized, instrumentalized, commodified, and increasingly militarized. Social responsibility gives way to organized infantilization and a flight from responsibility. Crucial here is the need to develop new cultural and political vocabularies that can foster an engaged mode of citizenship capable of naming the corporate and academic interests that support the warfare state and its apparatuses of violence, while simultaneously mobilizing social movements to challenge and dismantle its vast networks of power. One central pedagogical and political task in dismantling the warfare state is, therefore, the challenge of creating the cultural conditions and public spheres that would enable the U.S. public to move from being spectators of war and everyday violence to being informed and engaged citizens.Unfortunately, major cultural apparatuses like public and higher education, which have been historically responsible for educating the public, are becoming little more than market-driven and militarized knowledge factories. In this particularly insidious role, educational institutions deprive students of the capacities that would enable them not only to assume public responsibilities, but also to actively participate in the process of governing. Without the public spheres for creating a formative culture equipped to challenge the educational, military, market, and religious fundamentalisms that dominate U.S. society, it will be virtually impossible to resist the normalization of war as a matter of domestic and foreign policy. Any viable notion of resistance to the current authoritarian order must also address the issue of what it means pedagogically to imagine a more democratically oriented notion of knowledge, subjectivity, and agency and what it might mean to bring such notions into the public sphere. This is more than what Bernard Harcourt calls “a new grammar of political disobedience.”56 It is a reconfiguring of the nature and substance of the political so that matters of pedagogy become central to the very definition of what constitutes the political and the practices that make it meaningful. Critical understanding motivates transformative action, and the affective investments it demands can only be brought about by breaking into the hardwired forms of common sense that give war and state-supported violence their legitimacy. War does not have to be a permanent social relation, nor the primary organizing principle of everyday life, society, and foreign policy. The war of all-against-all and the social Darwinian imperative to respond positively only to one’s own self-interest represent the death of politics, civic responsibility, and ethics, and set the stage for a dysfunctional democracy, if not an emergent authoritarianism. The existing neoliberal social order produces individuals who have no commitment, except to profit, disdain social responsibility, and loosen all ties to any viable notion of the public good. This regime of punishment and privatization is organized around the structuring forces of violence and militarization, which produce a surplus of fear, insecurity, and a weakened culture of civic engagement—one in which there is little room for reasoned debate, critical dialogue, and informed intellectual exchange. Patricia Clough and Craig Willse are right in arguing that we live in a society “in which the production and circulation of death functions as political and economic recovery.”57 The United States understood as a warfare state prompts a new urgency for a collective politics and a social movement capable of negating the current regimes of political and economic power, while imagining a different and more democratic social order. Until the ideological and structural foundations of violence that are pushing U.S. society over the abyss are addressed, the current warfare state will be transformed into a full-blown authoritarian state that will shut down any vestige of democratic values, social relations, and public spheres. At the very least, the U.S. public owes it to its children and future generations, if not the future of democracy itself, to make visible and dismantle this machinery of violence while also reclaiming the spirit of a future that works for life rather than death—the future of the current authoritarianism, however dressed up they appear in the spectacles of consumerism and celebrity culture. It is time for educators, unions, young people, liberals, religious organizations, and other groups to connect the dots, educate themselves, and develop powerful social movements that can restructure the fundamental values and social relations of democracy while establishing the institutions and formative cultures that make it possible. Stanley Aronowitz is right in arguing that: the system survives on the eclipse of the radical imagination, the absence of a viable political opposition with roots in the general population, and the conformity of its intellectuals who, to a large extent, are subjugated by their secure berths in the academy [and though] we can take some solace in 2011, the year of the protester…it would be premature to predict that decades of retreat, defeat and silence can be reversed overnight without a commitment to what may be termed “a long march” through the institutions, the workplaces and the streets of the capitalist metropoles.58 The current protests among young people, workers, the unemployed, students, and others are making clear that this is not—indeed, cannot be—only a short-term project for reform, but must constitute a political and social movement of sustained growth, accompanied by the reclaiming of public spaces, the progressive use of digital technologies, the development of democratic public spheres, new modes of education, and the safeguarding of places where democratic expression, new identities, and collective hope can be nurtured and mobilized. Without broad political and social movements standing behind and uniting the call on the part of young people for democratic transformations, any attempt at radical change will more than likely be cosmetic.

## 1NR

#### No prep, no cards ZOMG!