### 2AC Nixon

#### We should prioritize probable systemic impacts over possibilistic spectacular impacts—the 9/11 focus on big unlikely impacts means we ignore violence that ends up causing the most deaths

Nixon ‘11

(Rob, Rachel Carson Professor of English, University of Wisconsin-Madison, Slow Violence and the Environmentalism of the Poor, pgs. 12-14)

Over the past two decades, this high-speed planetary modification has been accompanied (at least for those increasing billions who have access to the Internet) by rapid modifications to the human cortex. It is difficult, but necessary, to consider simultaneously a geologically-paced plasticity, however relatively rapid, and the plasticity of brain circuits reprogrammed by a digital world that threatens to "info-whelm" us into a state of perpetual distraction. If an awareness of the Great Acceleration is (to put it mildly) unevenly distributed, the experience of accelerated connectivity (and the paradoxical disconnects that can accompany it) is increasingly widespread. In an age of degraded attention spans it becomes doubly difficult yet increasingly urgent that we focus on the toll exacted, over time, by the slow violence of ecological degradation. We live, writes Cory Doctorow, in an era when the electronic screen has become an "ecosystem of interruption technologies.''" Or as former Microsoft executive Linda Stone puts it, we now live in an age of "continuous partial attention.?" Fast is faster than it used to be, and story units have become concomitantly shorter. In this cultural milieu of digitally speeded up time, and foreshortened narrative, the intergenerational aftermath becomes a harder sell. So to render slow violence visible entails, among other things, redefining speed: we see such efforts in talk of accelerated species loss, rapid climate change, and in attempts to recast "glacial"-once a dead metaphor for "slow-as a rousing, iconic image of unacceptably fast loss. Efforts to make forms of slow violence more urgently visible suffered a setback in the United States in the aftermath of 9/11, which reinforced a spectacular, immediately sensational, and instantly hyper-visible image of what constitutes a violent threat. The fiery spectacle of the collapsing towers was burned into the national psyche as the definitive image of violence, setting back by years attempts to rally public sentiment against climate change, a threat that is incremental, exponential, and far less sensationally visible. Condoleezza Rice's strategic fantasy of a mushroom cloud looming over America if the United States failed to invade Iraq gave further visual definition to cataclysmic violence as something explosive and instantaneous, a recognizably cinematic, immediately sensational, pyrotechnic event. The representational bias against slow violence has, furthermore, a critically dangerous impact on what counts as a casualty in the first place. Casualties of slow violence-human and environmental-are the casualties most likely not to be seen, not to be counted. Casualties of slow violence become light-weight, disposable casualties, with dire consequences for the ways wars are remembered, which in turn has dire consequences for the projected casualties from future wars. We can observe this bias at work in the way wars, whose lethal repercussions spread across space and time, are tidily bookended in the historical record. Thus, for instance, a 2003 New York Times editorial on Vietnam declared that" during our dozen years there, the U.S. killed and helped kill at least 1.5 million people.'?' But that simple phrase "during our dozen years there" shrinks the toll, foreshortening the ongoing slow-motion slaughter: hundreds of thousands survived the official war years, only to slowly lose their lives later to Agent Orange. In a 2002 study, the environmental scientist Arnold Schecter recorded dioxin levels in the bloodstreams of Bien Hoa residents at '35 times the levels of Hanoi's inhabitants, who lived far north of the spraying." The afflicted include thousands of children born decades after the war's end. More than thirty years after the last spray run, Agent Orange continues to wreak havoc as, through biomagnification, dioxins build up in the fatty tissues of pivotal foods such as duck and fish and pass from the natural world into the cooking pot and from there to ensuing human generations. An Institute of Medicine committee has by now linked seventeen medical conditions to Agent Orange; indeed, as recently as 2009 it uncovered fresh evidence that exposure to the chemical increases the likelihood of developing Parkinson's disease and ischemic heart disease." Under such circumstances, wherein long-term risks continue to emerge, to bookend a war's casualties with the phrase "during our dozen years there" is misleading: that small, seemingly innocent phrase is a powerful reminder of how our rhetorical conventions for bracketing violence routinely ignore ongoing, belated casualties.

### 2AC AT “Precautionary Principle”

#### Their math is wrong—at low enough of probabilities, there’s a risk to every action and inaction causing paralysis and meaning our decisions are made by cultural biases—uniquely true with national security risks

Friedman 8, Research Fellow and Affiliate at MIT

[Winter 2008, Benjamin H. Friedman is a research fellow in defense and homeland security studies. He is an affiliate of the Security Studies Program at the Massachusetts Institute of Technology, “The Terrible ‘Ifs’”, http://object.cato.org/sites/cato.org/files/serials/files/regulation/2007/12/v30n4-1.pdf]

Students of regulatory policy know of the precautionary principle, an idea about risk favored by advocates of various health and environmental regulations. The concept can be stated as follows: Whenever some activity poses a possible risk to health, safety, or the environment, the government should take preventive action. Government intervention is warranted even if the evidence that the activity is harmful is uncertain and the cost of preventive action is high. In Laws of the Fear, University of Chicago law professor Cass Sunstein demonstrates that the precautionary principle is incoherent. The principle fails to acknowledge that decisions about risk, whether they regulate health hazards or arm against a state, cannot deal with one risk alone. Because resources are always limited, efforts to head off a particular danger take resources away from other government programs and from private investment that also reduce risk. Also, because of unintended consequences, actions that prevent one danger can create new ones. If we took the precautionary principle seriously, we would have to be cautious about all the dangers a particular decision touches. That includes the danger of doing nothing. Taken literally, the principle prevents all action and inaction, making it useless. States often ignore this logical failure and apply the precautionary principle to particular hazards. Sunstein argues that in many of those cases, precautionary action will be more harmful to society than running the risk. Those are cases where the danger is small and the cost of prevention is large. The use of asbestos as building insulation is an example. When contained in walls, asbestos is harmless. If the materials containing it deteriorate, however, the asbestos might be inhaled or ingested and, in very rare cases, could cause respiratory diseases including lung cancer. The precautionary principle can be evoked by those demanding the material’s removal. But removal creates new cancer risks and its cost is enormous. Whoever bears it, that cost will take money away from other risk-reducing uses, be it savings, health care, or education. Removal harms society more than leaving the asbestos in place. Another example is genetically modified foods. European regulators argue that the uncertain risks of genetically modified crops justify limiting trade flows and the resulting higher prices on consumers. They exchange an uncertain risk for a sure one. The illogic of the precautionary principle does not mean that states should not regulate against uncertain dangers. The point is that dangers should be evaluated by cost-benefit analysis. This means that decisions about risk should consider the cost that preventive action would avert, the likelihood that preventive action will work, and the action’s cost. Decisionmakers should also consider, as Sunstein notes, not just total costs and benefits, but the equity of their distribution. The problem with cost-benefit analysis is that it relies on unavailable information about the magnitude and likelihood of the harm. Everyone would agree to head off disaster at low cost and to avoid costly defenses against tiny dangers. Everyone agrees that research is helpful to getting policy right. But some degree of uncertainty is hard to extinguish. You never know, some will say, what the true cost is of asbestos as insulation . If science is never complete, cost-benefit analysis is impossible. The problem with this critique of cost-benefit analysis is that its virtue does not depend on getting rid of uncertainty. Analysts use cost-benefit analysis to get all the potential costs into the debate and force recognition of choice. They show that the pursuit of perfect safety, of chasing a danger out of existence, creates other dangers. This point shows why debate about the precautionary principle is often phony. Inherent uncertainty means that the decisions about risk are likely to be made by some criteria other than a principle about risk. That criterion will be a prior political preference — in the case of genetically modified foods, probably protection of domestic producers. Critics of the precautionary principle charge that it is a justification for regulation, not its cause — that the principle’s defenders care more about the environment than other public goods. Defenders of the principle claim that cost-benefit analysis serves corporate bottom lines. They are both part right. Fights about regulating risks are about which risks to confront and which to accept, not about how much risk to accept. All government policies ultimately reduce one risk or another. Politics is competition between risk preferences. Societies are not consistent in their approach to dangers. They are precautionary about certain risks and acceptant of others. Americans are less fearful — less precautionary — than Europeans about global warming and genetically modified foods. We are more cautious about secondhand smoke, drug approval, and nuclear proliferation. The differences cannot be justified by objective appeals to science. Scholars offer various explanations for the origins of those preferences. In Risk and Culture, Mary Douglas and Aaron Wildavsky argued that culture causes risk perception. They claimed that groups are organized by preferences about what dangers ought to be confronted collectively and that the rise of new political coalitions brings new priorities about danger. University of Oregon psychologist Paul Slovic points to people’s psychological tendencies to react to certain risks — such as those that are novel or involve a perceived loss of control — and the way those perceptions spread by social interaction and media. mit’s Harvey Sapolsky argues that risk perception results from the balance of the various special interests that benefit from society either confronting or running the risk. The groups compete to guide public opinion about danger. The variance in the balance of interest groups’ power across countries explains their variant reaction to risks. Whatever their origin, political preferences drive demand for regulation of risks. Statements about the certainty or uncertainty of science are often disguises for those preferences. This discussion about the precautionary principle applies to national security dangers in two ways. First, American national security policy is explicitly precautionary and is thus subject to the same problems as the application of the precautionary principle in other policy areas. Second, the precautionary reasoning advanced to defend our security policies hides political motives. As with the regulatory arena, cost-benefit analysis can help expose choices among risks that advocates of precaution shroud with claims of uncertainty. Some will argue that security dangers are so distinct from health and safety risks that the comparison is useless. Certainly the two sorts of risk are different. Politics produces national security dangers, making them more uncertain than environmental risks that result from physical phenomena. Moreover, national security dangers — conquest, mass death, economic devastation — are generally catastrophic and sudden. Some health and safety risks share that quality, but in most cases they exact a creeping toll. The unique attributes of security dangers do not remove the danger of precautionary reasoning. True, uncertain dangers of potentially great and irreversible consequence merit extensive preventive efforts. That is why states have traditionally devoted large portions of their budgets to defense. But high uncertainty and potential consequences do not mean that states can ignore the costs of defenses. Moreover, national security dangers are not always as uncertain and dangerous as we hear.

### 2AC Ban T

#### We meet—indefinite detention with a right to habeas corpus isn’t indefinite detention

#### Restriction includes a limitation

STATE OF ARIZONA, Appellee, v. JEREMY RAY WAGNER, April 10, 2008, Filed, Appellant., 1 CA-CR 06-0167, 2008 Ariz. App. Unpub. LEXIS 613, opinion by Judge G. MURRAY SNOW

P10 The term "restriction" is not defined by the Legislature for the purposes of the DUI statutes. See generally A.R.S. § 28-1301 (2004) (providing the "[d]efinitions" section of the DUI statutes). In the absence of a statutory definition of a term, we look to ordinary dictionary definitions and do not construe the word as being a term of art. Lee v. State, 215 Ariz. 540, 544, ¶ 15, 161 P.3d 583, 587 (App. 2007) ("When a statutory term is not explicitly defined, we assume, unless otherwise stated, that the Legislature intended to accord the word its natural and obvious meaning, which may be discerned from its dictionary definition.").

P11 The dictionary definition of "restriction" is "[a] limitation or qualification." Black's Law Dictionary 1341 (8th ed. 1999). In fact, "limited" and "restricted" are considered synonyms. See Webster's II New Collegiate Dictionary 946 (2001). Under these commonly accepted definitions, Wagner's driving privileges were "restrict[ed]" when they were "limited" by the ignition interlock requirement. Wagner was not only [\*7] statutorily required to install an ignition interlock device on all of the vehicles he operated, A.R.S. § 28-1461(A)(1)(b), but he was also prohibited from driving any vehicle that was not equipped with such a device, regardless whether he owned the vehicle or was under the influence of intoxicants, A.R.S. § 28-1464(H). These limitations constituted a restriction on Wagner's privilege to drive, for he was unable to drive in circumstances which were otherwise available to the general driving population. Thus, the rules of statutory construction dictate that the term "restriction" includes the ignition interlock device limitation.

#### Substantial Means “Large”

**O**xford **E**nglish **D**ictionary, 2nd Ed, **1989**

[substantial:] Of ample or considerable amount, quantity, or dimensions. More recently also in a somewhat weakened sense, esp. ‘fairly large.’

#### Their interpretation overlimits to only one aff in each topic area—aff flex ensures innovative topics encouraging research skills and in depth discussions

#### Our interpretation is more precise by citing a court case—that means our limit is predictable and better reflects the topic

#### Default to reasonability—competing interpretations leads to a race to limit out affs at the expense of substance—affs need to know they’re topical

### 2AC K

#### Perm do both

#### Permutation—do the plan and the alternative—the starting point of military detention allows an interrogation of us notions of punishment

Brown 5

[Michelle Brown, “"Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad”, American Quarterly 57.3 (2005) 973-997, <http://muse.jhu.edu/journals/american_quarterly/v057/57.3brown.html>]

As a site of unseemly conjunctures between various kinds of competing law, Abu Ghraib is an unusually complex instance of American imprisonment. Its gates mark encounters with United States, Islamic, military, criminal, and international human rights law. Its walls mark not simply the contours of sovereignty and the boundaries of the nation/state but, more significantly, their violation as an immense superpower engages in a preemptive strike, invasion, occupation, and torture. Within this configuration of power, transnational exportations of punishment materialize in a variety of manifestations: (1) in the sociopolitical contexts that define the lives of the primary actors caught up in the prison/military-industrial complex and its increasingly global economies; (2) through the international implementation of U.S. penal technologies with unprecedented exclusionary capabilities, epitomized in President Bush's desire to raze Abu Ghraib and build a "state of the art" supermax prison in its place; and (3) in the unregulated use of force outside of the boundaries of law, a violence juxtaposed and conflated with the memory and backdrop of penal horror under the regime of Saddam Hussein. Abu Ghraib, then, is the kind of place always caught in a double gesture. Regimes and governments attempt to deny and erase the prison's existence. Yet we are simultaneously unable to turn away from its grotesqueness, a site that demands investigation and thus constitutes, as ordered by military judicial ruling, "the scene of the crime."6 Prisons have long served as liminal spaces both inside and outside the boundaries of constitutional law, belonging to (in fact, invented by) but not of the United States. The birth of the penitentiary, a form of punishment defined [End Page 974] entirely upon the denial of freedom, is culturally grounded in democratic values. As historian David Rothman points out, incarceration emerged "at the very moment when Americans began to pride themselves on the openness of their society, when the boundless frontier became the symbol of opportunity and equality . . . as principles of freedom became more celebrated in the outside society."7 Sociolegal scholar David Garland depicts the penitentiary as a regime constructed upon notably American value systems, including "the targeting of 'liberty' as the object of punishment" and the "intensive focusing upon the individual in prison cells."8 However, as an institution fundamentally constructed through the inverse of these values, the American penitentiary rests upon a crucial cultural contradiction, the removal of liberty in a nation that would seek to preserve it, the use of violence to counter violence. As Michael Ignatieff writes: "Outside was a scrambling and competitive egalitarianism; inside, an unprecedented carceral totalitarianism."9 The prison is built upon an interior secret, a union of antithetical ideas and values. Its invocation always risks disclosing the weakness not simply of the sovereign state but of American democracy, founded in distinctly penal terms, including genocide and slavery. Prisons, then, are strategic research sites, from which we may always uncover the contradictions of American power. For these reasons, special attention must be given to how recent assertions of sovereignty by the United States, coded in penal terms, set the conditions for what Judith Butler refers to as the "new war prison," where "the current configuration of state power, in relation both to the management of populations (the hallmark of governmentality) and the exercise of sovereignty in the acts that suspend and limit the jurisdiction of law itself, are reconfigured," a context rife with possibilities for the violation of human rights.10 This corruptibility is, in part, an intrinsic property of punishment. To borrow Ignatieff's terminology, prisons are inherently "lesser evil" institutions. Even as democratic defense, such institutions always risk, in any invocation, the violation of foundational commitments to democracy. Even when applied in the context of legislative deliberation, judicial review, and adversarial constraint, they remain necessarily tragic and ultimately evil.11 However, events at Abu Ghraib and other contemporary domestic and war prisons prove most disconcerting not simply because of the absence of open, adversarial justification, but because of the larger absence of any perceived need for justification. As evidence emerges that Abu Ghraib was simply one site of detainee abuse among many in the war against terror,12 we realize the fear, as expressed by Amy Kaplan in her 2003 presidential address to the American Studies Association, that Guantánamo would become a story of our future, a world where "this floating [End Page 975] colony will become the norm rather than an anomaly, that homeland security will increasingly depend on proliferating these mobile, ambiguous spaces between the domestic and foreign."13 Abu Ghraib is, consequently, the kind of "unanticipated event," dramatic, poignant, and ugly all at once, in which the "normality of the abnormal is shown for what it is"—terror as usual. For these reasons, it also marks a critical site from which to consider how what it means to do American studies is irrevocably bound up with the practice and conjugation of U.S. punishment, not simply at home but abroad, and especially in those "mobile, ambiguous spaces" lost somewhere in between in a time of empire.

### 2AC XO CP

#### The executive CP is a voting issue—

#### a. Avoids the resolutional question—executive skirts debates over whether the executive should be restricted by artificially imagining the need for executive restrictions doesn’t exist—this skirts topic debates over how to restrict the executive—especially true when the advantage is based off the type of decisionmakng of the executive

#### b. Opportunity Cost—the CP is the logic of deference by shifting responsibility from action to the executive—whether or not the executive shouldn’t be racist doesn’t change the judicial and statutory obligation to act— the CP inculcates a culture of responsibility shifting that makes us inactive agents who let atrocities happen

#### Perms

#### Self restraint mechanism fails—executive can’t internalize costs to future actions—ensures racism

Gott 5, Professor of International Studies

[01/01/05, Gil Gott is a Professor of International Studies at DePaul University, “The Devil We Know: Racial Subordination and National Security Law” Villanova Law Review, Vol. 50, Iss. 4, p. 1075-1076, http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1235&context=vlr]

Tushnet's social learning hypothesis posits a public awareness that the government has exaggerated the existence of threats in the past and has dealt ineffectively with real threats that existed. The public is thus less inclined to trust governmental claims regarding threats, and governmental actors who know of this social learning will limit the scope of their responses to such perceived threats. 22 Tushnet, however, also asserts a qualified defense of policymakers who he sees as facing ex ante decision contexts wherein exaggerations and overreactions are "entirely rational and ought not be criticized in retrospect."23 He admonishes those who would constrain policy-makers in such contexts, warning that "we should be careful not to constrain them because of our hindsight wisdom-unless we are confident that the constraints we put in place really do respond only to tendencies to exaggerate uncertain threats or to develop ineffective policy responses to real ones."24 Tushnet, however, fails to consider how racism informs the "rational" exaggerations and overreactions of policy makers that he views as beyond critique. In the end, Tushnet's social learning-based model promises little, if any, protection or remedy for demonized Others. Tushnet counsels too much caution for civil society actors who would otherwise presumably embody and operationalize social learning in their deployment of "hindsight wisdom" to challenge repressive security policies. Absent the use of such wisdom, however, it is hard to imagine how civil rights can be championed in the face of ex ante state monopoly over relevant information. 25 Moreover, Tushnet's reliance on the Whig version of social learning allows him to remove the judiciary from an active, let alone robust, role in overseeing security state actors. What we are left with is a historically unsupported faith that state actors will themselves have sufficiently internalized social learning to prevent abuses of the Other. In other words, Tushnet's offer to demonized groups amounts to little more than a form of political decisionism cloaked in the hope that social learning (among state actors) can stanch the negative synergy of hysteria and racism. Deploying the notion of social learning from a critical race perspective, we might be able to take a more complete account of the subordinationist problem in state security power exercises and provide effective racial remedies. As opposed to a white-normative deployment of social learning, a critical race perspective would reject a Whig narrative that presents the internment as something that has been transcended, as a symbol of a redeemed/enlightened national identity. The concept of social learning, in this sense, would have to be refined substantially to focus on the more critical problem of "racial learning." What exactly has white America learned from the internment? To what extent have the state's culturally and demographically white security institutions and policy-makers actually internalized critical race perspectives on group subordination, racial injury and racial remedy? Indeed, to what extent has the legal academy and the judiciary internalized these perspectives?

### 2AC Amendment CP

#### a. Decisionmaking—the CP fiats away the largest barriers to constitutional amendments by supposing as if a process that never happens does—this is a form of possibilistic thinking that shifts our focus away from probable concerns

Baker 10

[Director of the Con Law Center at Drake, 10 Widener J. Pub. L. 1]

There is a reason that there have been only 27 amendments over more than 200 years: Constitutional amendments must have the sustained and one-sided support of great majorities in the Congress and across the states. Very few issues ever garner such importance and support.

#### And, this actively trades off with effective policy analysis—the CP traps us into debates over structuring basic institutions instead of substance

Dixon 11, Prof at U Chicago Law School

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When it comes to processes of democratic self-government, Stephen Holmes likens constitutional amendment rules to rules of grammar in relation to processes of linguistic communication or exchange. ‘Far from simply handcuffing people’, Holmes suggests, ‘linguistic rules allow interlocutors to do many things they would not otherwise have been able to do or even thought of doing’, and constitutions perform much the same function (Holmes 1995). As Christopher Eisgruber notes, they ‘define pathways for action’ in a democracy, without which a polity may be ‘unable to formulate policy about foreign affairs, the economy, the environment’ and all manner of other critically important issues of social and economic policy (Eisgruber 2001: 13). From this perspective, the danger of overly flexible processes of constitutional amendment is that they may lead to ‘a polity [to be] consumed with endless debates about how to structure its basic political institutions’ in a way that undermines the ability of a democracy to engage in this kind of collective action (Eisgruber 2001: 13; Elster 2003: 1759). This is particularly so when one considers that, if constitutional amendments are sufficiently frequent, this tends to suggest not only frequent debate about specific constitutional issues, but also a greater likelihood of wholescale constitutional replacement (see Lutz 1995; Elkins et al. 2009).

#### The CP causes delay for years—causes wrongful detention and torture as well as massive scapegoating and profiling for that time

Joyce, Prof of Public Administration at George Washington, 98

“The Rescissions Process After the Line Item Veto: Tools for Controlling Spending”

<http://www.rules.house.gov/archives/rules_joyc07.htm>

In the final analysis, there is no clear fallback position for supporters of the Line Item Veto Act. The Supreme Court, in its majority opinion, stated flatly that a different role for the President in the lawmaking process could only "come through the Article V amendment procedures". Deciding the issue through amending the Constitution, however, has two substantial drawbacks. The first is that Constitutional amendments are notoriously difficult to adopt. Even if a Constitutional amendment were adopted, it would likely not take effect for a number of years. The second is more substantive. A constitutionally provided line item veto would only allow the President to veto items that were specifically provided for in appropriation bills. Most federal "line items", however, are found not in statute, but in report language accompanying statutes.

#### The CP is the equivalent of a declaration of national holiday—only statutes or decisions can force changes in opinion

Strauss, Law Prof at Chicago, 01

114 Harv. L. Rev. 1457

One final implication is the most practical of all. If amendments are in fact a sidelight, then it will usually be a mistake for people concerned about an issue to try to address it by amending the Constitution. Their resources are generally better spent on legislation, litigation, or private-sector activities. It is true that the effort to obtain a constitutional amendment may serve very effectively as a rallying point for political activity. A constitutional amendment may be an especially powerful symbol, and it may be worthwhile for a group to seek an amendment for just that reason. But in this respect constitutional amendments are comparable to congressional resolutions, presidential proclamations, or declarations of national holidays. If they bring about change, they do so because of their symbolic value, not because of their operative legal effect. The claim that constitutional amendments under Article V are not a principal means of constitutional change is a claim about the relationship between supermajoritarian amendments and fundamental, constitutional change. It should not be confused with the very different claim that judicial decisions cannot make significant changes without help from Congress or the President; n25 and it certainly should not be confused with a global skepticism about the efficacy of political activity generally. The point is that changes of constitutional magnitude - changes in the small-"c" constitution - are not brought about by discrete, supermajoritarian political acts like Article V amendments. It may also be true that such fundamental change is always the product of an evolutionary process and cannot be brought about by any discrete political act - by a single statute, judicial decision, or executive action, or (at the state level) by a constitutional amendment, whether adopted by majoritarian referendum or by some other means. What is true of Article V amendments may be equally true of these other acts: either they will ratify (while possibly contributing to) changes that have already taken place, or they will be ineffective until society catches up with the aspirations of the statute or decision. Alternatively, it may be that majoritarian acts (or judicial decisions), precisely because they do not require that the ground be prepared so thoroughly, can force the pace of change in a way that supermajoritarian acts cannot. A coalition sufficient to enact legislation might be assembled - or a judicial decision rendered - at a point when a society for the most part has not changed, but the legislation, once enacted (or the decision, once made), might be an important factor in bringing about more comprehensive change. The difference between majoritarian legislation and a supermajoritarian constitutional amendment is that the latter is far more likely to occur only after the change has, for all practical purposes, already taken place. Whatever one thinks of these broader speculations, however, they certainly do not entail a general skepticism about whether political activity matters at all. On the contrary, legislation and judicial decisions - as well as activity in the private realm that may not even be explicitly political - can accumulate to bring about fundamental and lasting changes that are then, sometimes, ratified in a textual amendment. Sustained political and nonpolitical activity of that kind is precisely what does bring about changes of constitutional magnitude. My claim is that such changes seldom come about, in a mature democracy, as the result of a formal amendment adopted by a supermajority.

#### Overwhelming historic analysis proves amendments don’t shift public consciousness and get subverted—only branch action solves—the impact is our Joo evidence about the importance of the law in producing racist myths in public discourse

Strauss 10, Gerald Ratner Distinguished Service Professor of Law

[2010, David A. Strauss is the Gerald Ratner Distinguished Service Professor of Law, graduated from Harvard College summa cum laude in 1973. He then spent two years at Magdalen College, Oxford, on Marshall Scholarship and received a B.Phil. in politics from Oxford in 1975. In 1978, he graduated magna cum laude from Harvard Law School, where he was Developments Editor of the Law Review. Before joining the faculty, he worked as an Attorney-Adviser in the Office of Legal Counsel of the U.S. Department of Justice and as an Assistant to the Solicitor General of the United States. Mr. Strauss joined the faculty in 1985. He has published articles on a variety of subjects, principally in constitutional law and related areas, and recently published The Living Constitution (Oxford University Press, 2010). He is, with Geoffrey Stone and Dennis Hutchinson, editor of the Supreme Court Review. He has been a visiting professor at Harvard and Georgetown. He is a Fellow of the American Academy of Arts and Sciences. Mr. Strauss has argued eighteen cases before the United States Supreme Court. In 1990, he served as Special Counsel to the Committee on the Judiciary of the United States Senate. He is a member of the national Board of Directors of the American Constitution Society. He has also served Chair of the Board of Trustees of the University of Chicago Laboratory Schools and as a member of the Board of Governors of the Chicago Council of Lawyers. In addition to his current teaching interests--Constitutional Law, Federal Jurisdiction, Elements of the Law, and Administrative Law--he has taught Civil Procedure and Torts. “The Living Constitution”, pg. 126-132]

Even if the living Constitution can, in effect, adopt a constitutional amendment that was not formally ratifi ed—or even one that was rejected—that does not prove the broader claim that the living Constitution is the primary way in which the Constitution changes in practice. Offhand, for example, it seems impossible to deny the signifi cance of the Civil War amendments: the Thirteenth Amendment, which abolished slavery; the Fourteenth Amendment, which provides for national citizenship and contains the Due Process, Equal Protection, and Privileges or Immunities Clauses; and the Fifteenth Amendment, which forbids discrimination in voting on the basis of race or previous condition of servitude. In fact, these amendments changed things much less than you might think. The changes in race relations have been the result of other forces—including the living Constitution—much more than the formal amendments. The Civil War, of course, worked enormous changes. And ultimately the nation changed in many of the ways envisioned by the Civil War amendments; today, racial minorities can vote, for example. But it was not the amendments that changed things. The amendments made relatively little difference when they were adopted; the changes they prescribed came about only when society itself changed. The most conspicuous thing about the Civil War amendments is how little they meant in the fi rst century after they were ratified. The practical effect of the Thirteenth Amendment, for example, was, at most, to abolish slavery only in the four border states (Delaware, Maryland, Kentucky, and Missouri) that had not joined the Confederacy. The Emancipation Proclamation (which applied to states and portions of states “then . . . in rebellion against the United States”)—and, more to the point, the Union army—had already emancipated the slaves elsewhere. As one Union army offi cer said in 1863: “Slavery is dead; that is the fi rst thing. That is what we all begin with here, who know the state of affairs.” In this sense, the Thirteenth Amendment is an example of an amendment that suppressed outliers before they otherwise would have been suppressed. The most that can be said for the Thirteenth Amendment is that it brought about the end of slavery in a few border states a few years before it otherwise would have ended. That is not trivial, but it is a far cry from viewing the formal amendment as the principal means of constitutional change. The Fourteenth and Fifteenth Amendments present a somewhat different story from the Thirteenth. They did not address slavery, which was no longer an important ongoing institution by the time the Civil War ended. The Fourteenth and Fifteenth Amendments addressed matters of great importance to the post–Civil War South. But they were ahead of their time, and consequently ended up having little lasting effect until their time fi nally came, in the midtwentieth century. The Fifteenth Amendment, barring discrimination in voting against African Americans and former slaves, presents the more dramatic case. The Fifteenth Amendment was not nullifi ed at once. It had important effects in the South until the end of the nineteenth century. In addition, the Fifteenth Amendment helped blacks gain the franchise in the North. But for the most part the Fifteenth Amendment is the inverse of the Equal Rights Amendment: an amendment that was added to the Constitution’s text but that did not become part of the Constitution in operation. The Fifteenth Amendment was ratifi ed in 1870. By the late 1880s, it was being blatantly subverted in much of the South. The subversion usually did not take the form of outright defi ance. Rather, southern states adopted a variety of devices, such as literacy tests and poll taxes, that did not explicitly deny blacks the vote but were deliberately designed to disenfranchise them. Where such ostensibly legal means did not work well enough, southern whites used intimidation, subtle or otherwise, and outright violence. By the turn of the twentieth century, African Americans were effectively disenfranchised throughout almost the entire region. The amendment continued to be nullifi ed on a large scale until the middle of the twentieth century. If you read the Constitution and took the amendments at face value, you’d conclude that the Fifteenth Amendment permanently enfranchised African Americans. It did not. To a limited degree, the Union army, and political changes imposed on the South in the aftermath of its occupation, did; but when those effects faded, the Fifteenth Amendment might as well not have been part of the Constitution. Then, a hundred years later, the Voting Rights Act—itself the product of long-term social and economic forces—enfranchised blacks. The Constitution, in practice, did not change with the formal amendment. It changed only when society’s institutions and traditions changed. The Fourteenth Amendment is a less dramatic case, but in many ways it presents the same pattern as the Fifteenth. The Fourteenth Amendment had one immediate legal effect: it outlawed the Black Codes, laws that had been adopted throughout the South that, by imposing various restrictions and disabilities on African Americans, more or less sought to reinstitute slavery. But massive denials of equality for African Americans, of a kind that the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment were intended to prohibit, persisted until the 1950s and ’60s and the civil rights revolution, of which Brown v. Board of Education, of course, was an important part. The noteworthy thing about the Fourteenth Amendment is that, if post–Civil War events had been only slightly different, it might not have been adopted. Congress believed that it had the power to abolish the Black Codes without the Fourteenth Amendment, and the Reconstruction Congress enacted the Civil Rights Act of 1866, which was directed at the Black Codes, before the Fourteenth Amendment was adopted. (President Andrew Johnson vetoed the bill that became the 1866 act, and his veto was overridden.) The Fourteenth Amendment was designed to ensure the constitutionality of the Civil Rights Act of 1866. But had the Supreme Court agreed with Congress about the constitutionality of the act, the Fourteenth Amendment would not have been necessary even to abolish the Black Codes. Many Republicans at the time believed that “the amendment was simply declaratory of existing constitutional law, properly understood.” By “existing constitutional law,” some of the members of Congress meant other provisions of the written Constitution, but some took the position that secession and civil war created their “own logic and imperatives”—a version of living constitutionalism. Although the real change that the Fourteenth Amendment was supposed to achieve did not happen until the mid-twentieth century, still, it might be said, when the civil rights revolution did occur, it was important that the Fourteenth Amendment supplied a textual provision that the Supreme Court in Brown, and other advocates for civil rights, could invoke. But even this limited effect cannot be attributed to the Fourteenth Amendment without qualifi cation. When the Supreme Court declared in Brown that state-sponsored racial segregation was unconstitutional, the Court also ruled, in Bolling v. Sharpe, that the Constitution barred the federal government from segregating the schools of the District of Columbia. The principle that the federal government may not discriminate is one that neither the text of the Constitution nor the original understandings can support: the Equal Protection Clause applies only to the states, not to the federal government, and the Due Process Clause of the Fifth Amendment, on which Bolling relied, was adopted at a time when slavery was legal in half the United States and the slave trade was protected by the Constitution. The Supreme Court’s willingness to decide Bolling without a secure (or, many would say, even a plausible) textual basis in the Constitution suggests that events in the 1950s and 1960s would not have taken a dramatically different course if the victors of the Civil War had not added the language of the Fourteenth Amendment to the Constitution. It is diffi cult to believe that the Supreme Court would have ruled in favor of the school board in Brown v. Board of Education if the Fourteenth Amendment had not been adopted—if, for example, there had been a consensus after the Civil War that the Civil Rights Act of 1866 was constitutional even without the amendment, and the Reconstruction Congress had turned its attention elsewhere instead of proposing an amendment. It seems more likely that the Court would have identifi ed some other text in the Constitution as the formal basis for its conclusion that racial apartheid is unconstitutional. (The clause requiring the United States to “guarantee to every state in this Union a republican form of government” would be one candidate.) What all of this suggests is that, despite the appearance of the post–Civil War amendments in the Constitution, the enormous changes in American race relations are the result of other forces, including the evolutionary developments of the living Constitution. The most conspicuous Civil War non-amendment supports this conjecture. Before the Civil War, the question whether the Constitution permits a state to secede from the union was a subject of lively debate. In the decades leading up to the Civil War, respected political and legal fi gures advanced serious legal arguments, claiming descent from Jefferson’s Kentucky Resolutions, in support of the right to secede. No amendment adopted after the Civil War settled this question, expressly or by any reasonably direct implication. Yet the question has, without doubt, been settled. The person on the street would say that it was settled by the Civil War, and that person would be right. It was settled by the Civil War, even though no formal amendment was added to the Constitution. The Civil War settled the question of the constitutionality of slavery in the same way, and it settled, or, more accurately, began the process of settling, the question of racial equality. The Secession Amendment, by its absence, makes it diffi cult to argue that the Thirteenth, Fourteenth, or Fifteenth Amendments made as much difference as one might think. AMENDMENTS THAT RATIFIED CHANGES There is another category of amendments that seem to have changed things more than they actually did. These are amendments that were formally added to the Constitution only after things had already changed. The change produced the amendment, rather than vice versa. These amendments illustrate, again, how the living Constitution is often the real mechanism of change; changes in the text of the Constitution follow along later.

### 2AC Bond DA

#### Second—the use of multi-chain internal link and scenarios eclipse reality by obscuring the actual likelihood of the impact—the conjunctive fallacy dictates that they’re less likely

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[2008, Eliezer Yudkowsky is a Research Fellow at theMachine Intelligence Research Institute “Cognitive Biases Potentially Aﬀecting Judgment of Global Risks.”, In Global Catastrophic Risks, edited by Nick Bostrom and Milan M. Ćirković, 91–119]

The conjunction fallacy similarly applies to futurological forecasts. Two independent sets of professional analysts at the Second International Congress on Forecasting were asked to rate, respectively, the probability of “A complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983” or “A Russian invasion of Poland, and a complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983.” The second set of analysts responded with significantly higher probabilities (Tversky and Kahneman 1983). In Johnson et al. (1993), MBA students at Wharton were scheduled to travel to Bangkok as part of their degree program. Several groups of students were asked how much they were willing to pay for terrorism insurance. One group of subjects was asked how much they were willing to pay for terrorism insurance covering the flight from Thailand to the US. A second group of subjects was asked how much they were willing to pay for terrorism insurance covering the round-trip flight. A third group was asked how much they were willing to pay for terrorism insurance that covered the complete trip to Thailand. These three groups responded with average willingness to pay of $17.19, $13.90, and $7.44 respectively. According to probability theory, adding additional detail onto a story must render the story less probable. It is less probable that Linda is a feminist bank teller than that she is a bank teller, since all feminist bank tellers are necessarily bank tellers. Yet human psychology seems to follow the rule that adding an additional detail can make the story more plausible. People might pay more for international diplomacy intended to prevent nanotechnological warfare by China, than for an engineering project to defend against nanotechnological attack from any source. The second threat scenario is less vivid and alarming, but the defense is more useful because it is more vague. More valuable still would be strategies which make humanity harder to extinguish without being specific to nanotechnologic threats—such as colonizing space, or see Yudkowsky (2008) on AI. Security expert Bruce Schneier observed (both before and after the 2005 hurricane in New Orleans) that the U.S. government was guarding specific domestic targets against “movie-plot scenarios” of terrorism, at the cost of taking away resources from emergency-response capabilities that could respond to any disaster (Schneier 2005). Overly detailed reassurances can also create false perceptions of safety: “X is not an existential risk and you don’t need to worry about it, because A, B, C, D, and E”; where the failure of any one of propositions A, B, C, D, or E potentially extinguishes the human species. “We don’t need to worry about nanotechnologic war, because a UN commission will initially develop the technology and prevent its proliferation until such time as an active shield is developed, capable of defending against all accidental and malicious outbreaks that contemporary nanotechnology is capable of producing, and this condition will persist indefinitely.” Vivid, specific scenarios can inflate our probability estimates of security, as well as misdirecting defensive investments into needlessly narrow or implausibly detailed risk scenarios. More generally, people tend to overestimate conjunctive probabilities and underestimate disjunctive probabilities (Tversky and Kahneman 1974). That is, people tend to overestimate the probability that, e.g., seven events of 90% probability will all occur. Conversely, people tend to underestimate the probability that at least one of seven events of 10% probability will occur. Someone judging whether to, e.g., incorporate a new startup, must evaluate the probability that many individual events will all go right (there will be sufficient funding, competent employees, customers will want the product) while also considering the likelihood that at least one critical failure will occur (the bank refuses a loan, the biggest project fails, the lead scientist dies). This may help explain why only 44% of entrepreneurial ventures2 survive after 4 years (Knaup 2005). Dawes (1988, 133) observes: “In their summations lawyers avoid arguing from disjunctions (‘either this or that or the other could have occurred, all of which would lead to the same conclusion’) in favor of conjunctions. Rationally, of course, disjunctions are much more probable than are conjunctions.” The scenario of humanity going extinct in the next century is a disjunctive event. It could happen as a result of any of the existential risks we already know about—or some other cause which none of us foresaw. Yet for a futurist, disjunctions make for an awkward and unpoetic-sounding prophecy.

#### No circumvention and the courts are effective—the executive will consent

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[2012, Saikrishna B. Prakash is a David Lurton Massee, Jr. Professor of Law and Sullivan and Cromwell Professor of Law, University of Virginia School of Law., and Michael D. Ramsey is a Professor of Law, University of San Diego School of Law; “The Goldilocks Executive”, Review of THE EXECUTIVE UNBOUND:AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner & Adrian Vermeule, 90 Texas L. Rev. 973, <http://www.texaslrev.com/wp-content/uploads/Prakash-Ramsey-90-TLR-973.pdf>]

The Courts.—The courts constrain the Executive, both because courts are necessary to the Executive imposing punishments and because courts can enforce the Constitution and laws against the Executive. It is true, as Posner and Vermeule say, that courts often operate ex post and that they may defer to executive determinations, especially in sensitive areas such as national security. But these qualifications do not render the courts meaningless as a Madisonian constraint. First, to impose punishment, the Executive must bring a criminal case before a court. If the court, either via jury or by judge, finds for the defendant, the Executive does not suppose that it can nonetheless impose punishment (or even, except in the most extraordinary cases, continue detention). This is so even if the Executive is certain that the court is mistaken and that failure to punish will lead to bad results. As a result, the Executive’s ability to impose its policies upon unwilling actors is sharply limited by the need to secure the cooperation of a constitutionally independent branch, one that many suppose has a built-in dedication to the rule of law.84 And one can hardly say, in the ordinary course, that trials and convictions in court are a mere rubber stamp of Executive Branch conclusions. Second, courts issue injunctions that bar executive action. Although it is not clear whether the President can be enjoined,85 the rest of his branch surely can and thus can be forced to cease actions that judges conclude violate federal law or the Constitution.86 As a practical matter, while courts issue such injunctions infrequently, injunctions would be issued more often if an administration repeatedly ignored the law. Third, courts’ judgments sometimes force the Executive to take action, such as adhering to a court’s reading of a statute in areas related to benefits, administrative process, and even commission delivery. Though the claim in Marbury v. Madison87 that courts could issue writs of mandamus to executive officers was dicta,88 it was subsequently confirmed in Kendall v. United States ex rel. Stokes, 89 a case where a court ordered one executive officer to pay another.90 Finally, there is the extraordinary practice of the Executive enforcing essentially all judgments. The occasions in which the Executive has refused to enforce judgments are so few and far between that they are the stuff of legend. To this day, we do not know whether Andrew Jackson said, “John Marshall has made his decision, now let him enforce it.”91 Lincoln’s disobedience of Chief Justice Taney’s writ of habeas corpus is so familiar because it was so singular. Yet to focus on actual court cases and judgments is to miss the broader influence of the courts. Judicial review of executive action matters because the knowledge of such review affects what the Executive will do. Executives typically do not wish to be sued, meaning that they often will take measures designed to stave off such suits and avoid actions that raise the risk of litigation. The ever-present threat that someone will take a case to court and defeat the Executive acts as a powerful check on executive decision making. The Executive must take account of law, including law defined as what a court will likely order.

### 2AC Terror DA

#### Blum silly

#### Their focus on WMD terrorism trades off with effective terrorism policymaking—worst case thinking ignores the vast majority of real non-existential terrorist threats

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The increased work being focused on suicide terrorism is arguably both¶ overdue and useful. However, increased research is also being focused on other¶ aspects of terrorism which are less obviously of growing importance. Of particular¶ concern was the rapid growth in research investigating the (potential) use of¶ Chemical, Biological, Radiological, and Nuclear weapons (CBRN) – also often¶ referred to as weapons of mass destruction (WMD) – by terrorists. Figure 2.7¶ shows that the amount of research focused on CBRN terrorism more than¶ doubled in the first three years after 9/11.¶ Yetwhy did this happen? After all, 9/11 was not a CBRN attack. Nearly¶ 3,000 people may have been killed, but the hijackers did not use a nuclear bomb¶ to cause the carnage, they did not spray poisonous chemicals into the atmosphere¶ or release deadly viruses. They used box-cutters. Nevertheless, CBRN¶ research experienced major growth in the aftermath.¶ Arguably,CBRN research has always been over-subscribed. Prior to 9/11,¶nearly six times more research was being conducted on CBRN terrorist tactics than on suicide tactics. Indeed, no other terrorist tactic (car-bombings, hijackings,¶assassinations, and the like) received anywhere near as much research¶ attention in the run-up to 9/11 as CBRN. If the relatively low amount of research¶ attention which was given to al-Qaeda is judged to be the most serious failing of¶ terrorism research in the years prior to 9/11, the relatively high amount of¶ research focused on the terrorist use of CBRN must inevitably be seen as the¶ next biggest blunder.¶ To date, in the few cases where terrorists have attempted to develop CBRN¶ weapons, they have almost always failed. In the handful of instances where they¶ have actually managed to develop and use such weapons, the highest number of¶ individuals they have ever been able to kill is twelve people. In the list of the¶ 300 most destructive terrorist attacks of the past twenty years, not a single one¶ involved the use of CBRN weapons. Yet somehow, one impact of the 9/11¶ attacks was that CBRN research – already the most studied terrorist tactic during¶ the 1990s – actually managed to attract even more research attention and¶ funding, doubling the proportion of articles focused on CBRN in the journals.¶ A degree of research looking at CBRN terrorism is justified. Instances such as¶ the 1995 Tokyo subway attack and the post-9/11 anthrax letters show that CBRN¶ attacks can happen (albeit only rarely). Such attacks have never caused mass¶ fatalities however, and the popular acronym of Weapons of Mass Destruction¶ (WMD) in describing CBRN weapons is desperately misleading. Despite the¶ rarity – and the extreme unlikelihood of terrorists being able to accomplish a¶ truly devastating attack using these weapons – CBRN remains a popular topic¶ for government and funding bodies. They will award research grants for work on¶ this topic when other far more common and consistently far more deadly terrorist¶ tactics are ignored. This popularity with funding sources partly helps to explain¶ the continuing high profile of CBRN in the literature. It has to be acknowledged,¶ however, that some articles on the subject in the core journals are actually¶ arguing that the issue is blown out of proportion and does not warrant the¶ research funding it has and continues to receive (see Claridge, 1999; Leitenberg,¶ 1999).¶ Those who had hoped that 9/11 – a stunning example of how non-CBRN¶ weapons can be used to kill thousands of people – might then have heralded at¶ least a modest shift away from CBRN research, would have been disappointed¶ by the initial reaction. Thankfully, the 2005–7 period shows an improvement¶ and the level of research on CBRN dropped notably, though it is still receiving¶ more attention than prior to 9/11 (and still remains the most heavily researched¶ terrorist tactic after suicide attacks).

#### Judicial review key to detention restraint—avoids false leads

O’Neil 11 [Winter, 2011, Robin O'Neil, “THE PRICE OF PURITY: WEAKENING THE EXECUTIVE MODEL OF THE UNITED STATES' COUNTER-TERROR LEGAL SYSTEM”, 47 Hous. L. Rev. 1421]

While providing for judicial review may not make sense in every anti-terror context, absent limitation, the executive may offend the Constitution in any number of ways, leaving those affected no recourse. n152 Further, the lack of judicial review compromises counter-terror activities by not requiring the President to provide plausible reasons for and explanations of his actions; n153 for example, "by failing to provide even perfunctory individualized hearings [to detainees at Guantanamo Bay], ... the U.S. government ... misspent our scarce interrogation capacities on individuals of minimal or no intelligence value." n154 Had the President's orders been subject to [\*1445] judicial oversight, he would have had to explain how the unilaterally implemented deprivations of due process were narrowly tailored to effect an important purpose, prompting a more thorough analysis of what was to be gained by the President's detention policies. n155 The weak form of the executive model gives the President limited flexibility in exigent circumstances to move forward without congressional authorization, while retaining a strong preference for specifically authorized executive action and the judicial recourse it usually provides. n156 The fact that both Congress and the Bush Administration made a concerted effort to cut the courts out of the counter-terrorism legal scheme altogether supports the proposition that the anti-terrorism legal system developed during the Bush Administration has brought the U.S. executive model perilously close to operating in its pure form, notwithstanding the broad legislative mandates enacted in support of the President's unilateral activities. n157 President Obama should heed the Boumediene Court's admonitions regarding the centrality of judicial review to the preservation of American democracy and press Congress to lift what barriers to judicial recourse the MCA continues to impose on War on Terror detainees. n158 In those rare circumstances in which legislative authorization is not practicable, the President should provide for meaningful judicial recourse by his own order. n159