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### Allied Cooperation

#### Advantage 1 is Allied Cooperation –

#### U.S. drone policy is more important than the spying and data scandal to European partners – it threatens the trans-atlantic relationship

Dworkin 7/17/13 (Anthony, Senior Policy Fellow at the European Council on Foreign Relations, “Actually, drones worry Europe more than spying” <http://globalpublicsquare.blogs.cnn.com/2013/07/17/actually-drones-worry-europe-more-than-spying/>)

Relations between the United States and Europe hit a low point following revelations that Washington was spying on European Union buildings and harvesting foreign email messages. Behind the scenes, though, it is not data protection and surveillance that produces the most complications for the transatlantic intelligence relationship, but rather America's use of armed drones to kill terrorist suspects away from the battlefield. Incidents such as the recent killing of at least 17 people in Pakistan are therefore only likely to heighten European unease. In public, European governments have displayed a curiously passive approach to American drone strikes, even as their number has escalated under Barack Obama’s presidency. Many Europeans believe that the majority of these strikes are unlawful, but their governments have maintained an uneasy silence on the issue. This is partly because of the uncomfortable fact that information provided by European intelligence services may have been used to identify some targets. It is also because of a reluctance to accuse a close ally of having violated international law. And it is partly because European countries have not worked out exactly what they think about the use of drones and how far they agree within the European Union on the question. Now, however, Europe’s muted stance on drone strikes looks likely to change. Why? For one thing, many European countries are now trying to acquire armed drones themselves, and this gives them an incentive to spell out clearer rules for their use. More importantly, perhaps, Europeans have noticed that drones are proliferating rapidly, and that countries like China, Russia and Saudi Arabia are soon likely to possess them. There is a clear European interest in trying to establish some restrictive standards on drone use before it is too late. For all these reasons, many European countries are now conducting internal reviews of their policy on drones, and discussions are also likely to start at a pan-European level. But as Europeans begin to articulate their policy on the use of drones, a bigger question looms. Can Europe and the United States come together to agree on when drone strikes are permissible? Until now, that would have seemed impossible. Since the September 11 attacks, the United States has based its counterterrorism operations on the claim that it is engaged in a worldwide armed conflict with al Qaeda and associated forces — an idea that President Obama inherited from President George W. Bush and has been kept as the basis for an expanded drone strike campaign. European countries have generally rejected this claim. However, the changes to American policy that President Obama announced in May could open the way to at least the possibility of a dialogue. Obama suggested that he anticipated a time in the not-too-distant future when the armed conflict against al Qaeda might come to an end. More substantially, he made clear that his administration was in the process of switching its policy so that, outside zones of hostilities, it would only use drone strikes against individuals who posed a continuing and imminent threat to the U.S. That is a more restrictive standard than the claim that any member of al Qaeda or an associated force could lawfully be killed with a drone strike at any time. European countries might be more willing to accept an approach based on this kind of “self-defense” idea. However, there remain some big stumbling blocks. First, a good deal about Obama’s new standards is still unclear. How does he define a “zone of hostilities,” where the new rules will not apply? And what is his understanding of an “imminent” threat? European countries are likely to interpret these key terms in a much narrower way than the United States. Second, Obama’s new approach only applies as a policy choice. His more expansive legal claims remain in the background so that he is free to return to them if he wishes. But if the United States is serious about working toward international standards on drone strikes, as Obama and his officials have sometimes suggested, then Europe is the obvious place to start. And there are a number of steps the administration could take to make an agreement with European countries more likely. For a start, it should cut back the number of drone strikes and be much more open about the reasons for the attacks it conducts and the process for reviewing them after the fact. It should also elaborate its criteria for determining who poses an imminent threat in a way that keeps attacks within tight limits. And, as U.S. forces prepare to withdraw from Afghanistan in 2014, it should keep in mind the possibility of declaring the war against al Qaeda to be over. All this said, Europe also has some tough decisions to make, and it is unclear whether European countries are ready to take a hard look at their views about drone strikes, addressing any weaknesses or inconsistencies in their own position. If they are, the next few years could offer a breakthrough in developing international standards for the use of this new kind of weapon, before the regular use of drones spreads across the globe.

#### Accountability over standards of imminence are impossible from executive internal measures – no one trusts Obama on drones – only the plans court action solves

Goldsmith 13 (Jack Goldsmith teaches at Harvard Law School and is a member of the Hoover Institution Task Force on National Security and Law, “How Obama Undermined the War on Terror,” http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism)

For official secrecy abroad to work, the secrets must be kept at home as well. In speeches, interviews, and leaks, Obama's team has tried to explain why its operations abroad are lawful and prudent. But to comply with rules of classified information and covert action, the explanations are conveyed in limited, abstract, and often awkward terms. They usually raise more questions than they answer—and secrecy rules often preclude the administration from responding to follow-up questions, criticisms, and charges. ¶ As a result, much of what the administration says about its secret war—about civilian casualties, or the validity of its legal analysis, or the quality of its internal deliberations—seems incomplete, self-serving, and ultimately non-credible. These trust-destroying tendencies are exacerbated by its persistent resistance to transparency demands from Congress, from the press, and from organizations such as the aclu that have sought to know more about the way of the knife through Freedom of Information Act requests.¶ A related sin is the Obama administration's surprising failure to secure formal congressional support. Nearly every element of Obama's secret war rests on laws—especially the congressional authorization of force (2001) and the covert action statute (1991)—designed for different tasks. The administration could have worked with Congress to update these laws, thereby forcing members of Congress to accept responsibility and take a stand, and putting the secret war on a firmer political and legal foundation. But doing so would have required extended political efforts, public argument, and the possibility that Congress might not give the president precisely what he wants.¶ The administration that embraced the way of the knife in order to lower the political costs of counterterrorism abroad found it easier to avoid political costs at home as well. But this choice deprived it of the many benefits of public argumentation and congressional support. What Donald Rumsfeld said self-critically of Bush-era unilateralism applies to Obama's unilateralism as well: it fails to "take fully into account the broader picture—the complete set of strategic considerations of a president fighting a protracted, unprecedented and unfamiliar war for which he would need sustained domestic and international support." ¶ Instead of seeking contemporary congressional support, the administration has relied mostly on government lawyers' secret interpretive extensions of the old laws to authorize new operations against new enemies in more and more countries. The administration has great self-confidence in the quality of its stealth legal judgments. But as the Bush administration learned, secret legal interpretations are invariably more persuasive within the dark circle of executive branch secrecy than when exposed to public sunlight. On issues ranging from proper targeting standards, to the legality of killing American citizens, to what counts as an "imminent" attack warranting self-defensive measures, these secret legal interpretations—so reminiscent of the Bushian sin of unilateral legalism—have been less convincing in public, further contributing to presidential mistrust.¶ Feeling the heat from these developments, President Obama promised in his recent State of the Union address "to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world." So far, this promise, like similar previous ones, remains unfulfilled. ¶ The administration has floated the idea of "[shifting] the CIA's lethal targeting program to the Defense Department," as The Daily Beast reported last month. Among other potential virtues, this move might allow greater public transparency about the way of the knife to the extent that it would eliminate the covert action bar to public discussion. But JSOC's non-covert targeted killing program is no less secretive than the CIA's, and its congressional oversight is, if anything, less robust. ¶ A bigger problem with this proposed fix is that it contemplates executive branch reorganization followed, in a best-case scenario, by more executive branch speeches and testimony about what it is doing in its stealth war. The proposal fails to grapple altogether with the growing mistrust of the administration's oblique representations about secret war. The president cannot establish trust in the way of the knife through internal moves and more words. Rather, he must take advantage of the separation of powers. Military detention, military commissions, and warrantless surveillance became more legitimate and less controversial during the Bush era because adversarial branches of government assessed the president's policies before altering and then approving them. President Obama should ask Congress to do the same with the way of the knife, even if it means that secret war abroad is harder to conduct.

#### Unrestrained drone policy results in collapse of NATO

Parker 9/17/12 (Tom, former policy director for Terrorism, Counterterrorism and Human Rights at Amnesty International USA. He is also a former officer in the British Security Service (MI5), “U.S. Tactics Threaten NATO” <http://nationalinterest.org/commentary/us-tactics-threaten-nato-7461?page=1>)

A growing chasm in operational practice is opening up between the United States and its allies in NATO. This rift is putting the Atlantic alliance at risk. Yet no one in Washington seems to be paying attention. The escalating use of unmanned aerial vehicles to strike terrorist suspects in an increasing number of operational environments from the Arabian Peninsula to Southeast Asia, coupled with the continued use of military commissions and indefinite detention, is driving a wedge between the United States and its allies. Attitudes across the Atlantic are hardening fast. This isn’t knee-jerk, man-on-the-street anti-Americanism. European governments that have tried to turn a blind eye to U.S. counterterrorism practices over the past decade are now forced to pay attention by their own courts, which will restrict cooperation in the future. As recently as last month, the German federal prosecutor’s office opened a probe into the October 2010 killing of a German national identified only as “Buenyamin E.” in a U.S. drone strike in Pakistan. There are at least four other similar cases involving German nationals and several reported strikes involving legal residents of the United Kingdom. In March, Polish prosecutors charged the former head of Polish intelligence, Zbigniew Siemiatkowski, with “unlawfully depriving prisoners of the their liberty” because of the alleged role he played in helping to establish a CIA secret prison in northeastern Poland in 2002–2003. Last December, British Special Forces ran afoul of the UK courts for informally transferring two Al Qaeda suspects detained in Iraq, Yunus Rahmatullah and Amanatullah Ali, to U.S. forces. The British government has been instructed to recover the men from U.S. custody or face legal sanctions that could result in two senior ministers being sent to prison. Perhaps the most dramatic example illustrating the gap that has opened up between the United States and its European allies concerns the 2009 in absentia conviction of twenty-three U.S. agents in an Italian court for the role they played in the extraordinary rendition of radical Imam Hassan Mustafa Osama Nasr from Milan to Cairo. Britain, Poland, Italy and Germany are among America’s closest military partners. Troops from all four countries are currently serving alongside U.S. forces in Afghanistan, but they are now operating within a very different set of constraints than their U.S. counterparts. The European Court of Human Rights established its jurisdiction over stabilization operations in Iraq, and by implication its writ extends to Afghanistan as well. The British government has lost a series of cases before the court relating to its operations in southern Iraq. This means that concepts such as the right to life, protection from arbitrary punishment, remedy and due process apply in areas under the effective control of European forces. Furthermore, the possibility that intelligence provided by any of America’s European allies could be used to target a terrorism suspect in Somalia or the Philippines for a lethal drone strike now raises serious criminal liability issues for the Europeans. The United States conducts such operations under the legal theory that it is in an international armed conflict with Al Qaeda and its affiliates that can be pursued anywhere on the globe where armed force may be required. But not one other member of NATO shares this legal analysis, which flies in the face of established international legal norms. The United States may have taken issue with the traditional idea that wars are fought between states and not between states and criminal gangs, but its allies have not. The heads of Britain’s foreign and domestic intelligence services have been surprisingly open about the “inhibitions” that this growing divergence has caused the transatlantic special relationship, telling Parliament that it has become an obstacle to intelligence sharing. European attitudes are not going to change—the European Court of Human Rights is now deeply embedded in European life, and individual European governments cannot escape its oversight no matter how well disposed they are to assist the United States. The United States has bet heavily on the efficacy of a new array of counterterrorism powers as the answer to Al Qaeda. In doing so it has evolved a concept of operations that has much more in common with the approach to terrorist threats taken by Israel and Russia than by its European partners. There has been little consideration of the wider strategic cost of these tactics, even as the Obama administration doubles down and extends their use. Meanwhile, some of America’s oldest and closest allies are beginning to place more and more constraints on working with U.S. forces. NATO cannot conduct military operations under two competing legal regimes for long. Something has to give—and it may just be the Atlantic alliance.

#### NATO prevents global nuclear war

Zbigniew Brzezinski 9, former U.S. National Security Adviser, Sept/Oct 2009, “An Agenda for NATO,” Foreign Affairs, 88.5, EBSCO

NATO's potential is not primarily military. Although NATO is a collective-security alliance, its actual military power comes predominantly from the United States, and that reality is not likely to change anytime soon. NATO's real power derives from the fact that it combines the United States' military capabilities and economic power with Europe's collective political and economic weight (and occasionally some limited European military forces). Together, that combination makes NATO globally significant. It must therefore remain sensitive to the importance of safeguarding the geopolitical bond between the United States and Europe as it addresses new tasks. The basic challenge that NATO now confronts is that there are historically unprecedented risks to global security. Today's world is threatened neither by the militant fanaticism of a territorially rapacious nationalist state nor by the coercive aspiration of a globally pretentious ideology embraced by an expansive imperial power. The paradox of our time is that the world, increasingly connected and economically interdependent for the first time in its entire history, is experiencing intensifying popular unrest made all the more menacing by the growing accessibility of weapons of mass destruction -- not just to states but also, potentially, to extremist religious and political movements. Yet there is no effective global security mechanism for coping with the growing threat of violent political chaos stemming from humanity's recent political awakening. The three great political contests of the twentieth century (the two world wars and the Cold War) accelerated the political awakening of mankind, which was initially unleashed in Europe by the French Revolution. Within a century of that revolution, spontaneous populist political activism had spread from Europe to East Asia. On their return home after World Wars I and II, the South Asians and the North Africans who had been conscripted by the British and French imperial armies propagated a new awareness of anticolonial nationalist and religious political identity among hitherto passive and pliant populations. The spread of literacy during the twentieth century and the wide-ranging impact of radio, television, and the Internet accelerated and intensified this mass global political awakening. In its early stages, such new political awareness tends to be expressed as a fanatical embrace of the most extreme ethnic or fundamentalist religious passions, with beliefs and resentments universalized in Manichaean categories. Unfortunately, in significant parts of the developing world, bitter memories of European colonialism and of more recent U.S. intrusion have given such newly aroused passions a distinctively anti-Western cast. Today, the most acute example of this phenomenon is found in an area that stretches from Egypt to India. This area, inhabited by more than 500 million politically and religiously aroused peoples, is where NATO is becoming more deeply embroiled. Additionally complicating is the fact that the dramatic rise of China and India and the quick recovery of Japan within the last 50 years have signaled that the global center of political and economic gravity is shifting away from the North Atlantic toward Asia and the Pacific. And of the currently leading global powers -- the United States, the EU, China, Japan, Russia, and India -- at least two, or perhaps even three, are revisionist in their orientation. Whether they are "rising peacefully" (a self-confident China), truculently (an imperially nostalgic Russia) or boastfully (an assertive India, despite its internal multiethnic and religious vulnerabilities), they all desire a change in the global pecking order. The future conduct of and relationship among these three still relatively cautious revisionist powers will further intensify the strategic uncertainty. Visible on the horizon but not as powerful are the emerging regional rebels, with some of them defiantly reaching for nuclear weapons. North Korea has openly flouted the international community by producing (apparently successfully) its own nuclear weapons -- and also by profiting from their dissemination. At some point, its unpredictability could precipitate the first use of nuclear weapons in anger since 1945. Iran, in contrast, has proclaimed that its nuclear program is entirely for peaceful purposes but so far has been unwilling to consider consensual arrangements with the international community that would provide credible assurances regarding these intentions. In nuclear-armed Pakistan, an extremist anti-Western religious movement is threatening the country's political stability. These changes together reflect the waning of the post-World War II global hierarchy and the simultaneous dispersal of global power. Unfortunately, U.S. leadership in recent years unintentionally, but most unwisely, contributed to the currently threatening state of affairs. The combination of Washington's arrogant unilateralism in Iraq and its demagogic Islamophobic sloganeering weakened the unity of NATO and focused aroused Muslim resentments on the United States and the West more generally.

**Deterrence is epistemologically verifiable**

Frederick **Kroon 96**, Associate Professor of Philosophy at the University of Auckland, “Deterrence and the Fragility of Rationality”, Ethics, Vol. 106, No. 2 (Jan., 1996), pp. 350-377, JSTOR

I take it that from the point of view of the early proponents of nuclear deterrence this would not be a concession of any worth. They didn't just think that nuclear deterrers were doing something that happened to be rational (and even moral); they thought that in the specified circumstances nuclear **deterrers were acting the part of properly rational agents**, that **nuclear deterrers were doing what a fully rational agent would be doing if put in the same difficult situation, despite the monstrousness of what was threatened.** Call this kind of position **an "agent-rationalist" view of nuclear deterrence**. More precisely, agent-rationalists about nuclear deterrence are those who think that **it is not only the act of threatening retaliation-**in the sense of conditionally intending it-**that is fully rational in the specified circumstances; the agent who threatens retaliation** in these **circumstances can also be fully rational, despite the fact that what she threatens to do is irrational.** The contrary position held by Kavka I call an "agent-irrationalist" view of nuclear deterrence. On such a view, deterrers must be irrational in some way, perhaps through having undergone a process of corruption that gives them irrational goals or makes them unable to understand the full implications of what they propose.9 (Although I am mainly interested in nuclear deterrence, the issues, of course, are wider. Thus agent-rationalism and agentirrationalism can also be understood more broadly as views concerning the rationality of agents who face "Special Deterrent Situations" in roughly Kavka's sense; these situations include our nuclear scenarios but also many other possible situations of conflict between agents. While the argument of this article may be general enough to extend to all such situations, I shall continue to focus on the nuclear case.)10 In the same way, we may talk of "agent-moralism" and "agentimmoralism." ¶ Thus agent-immoralism about nuclear deterrence holds that because of the immorality of the retaliatory act, and despite the moral desirability of the threat, no morally good agent can seriously threaten retaliation in the nuclear scenarios described.11 Any agent able to threaten retaliation must have undergone a process of moral corruption, or be affected in some other way by an element of moral imperfection in her nature. (This is again Kavka's view, but versions of the view are held by many others; David Lewis, for example.) ¶ These various positions are not, of course, exhaustive. Take rationality again. Some theorists think that there can be no situation in which threatening nuclear retaliation is rational.12 If so, no fully rational agent could be a nuclear deterrer. And in the mid-1980s (but no longer) David Gauthier held that because threatening retaliation is sometimes clearly rational, it would ipso facto be rational in those cases for a deterrer to act on her retaliatory threats should deterrence fail. If so, agent-irrationalist arguments can't get a toehold, and we can no longer deny full rationality to nuclear deterrers**.** While I reject these various positions, they are not the direct concern of this article. 13 ¶ The debate I am presently interested in is between agent-rationalists and agent-irrationalists, agent-moralists and agent-immoralists: **philosophical opponents who all accept that threatening (nuclear) retaliation** can be rational and moral **where acting on the threats is not.** ¶ In this article I am mainly concerned to defend agent-rationalism about nuclear deterrence against its irrationalist critics. That is, my main goal is to show that we can coherently regard both of the following rationality claims as true: **not only is the act of forming and maintaining deterrent conditional intentions** perfectly rational **in the nuclear circumstances envisaged, but in addition forming and maintaining such intentions is something that rational agents are** fully capable of, **despite their knowing that such intentions, conditionally enjoin an irrational act**. **I thereby take myself to be defending nuclear deterrence against an important and persuasive** philosophical attack on the character of those running the policy.¶By implication, however, I will also be defending an agent-moralist view of nuclear deterrence and hence defending deterrence against another kind of attack on the character of those running the policy. For the moral case turns out to be similar and in some ways easier. ¶ Although there are conclusive reasons of a moral kind against applying a nuclear sanction should deterrence fail, I claim that broadly the same kind of argument can be used to show that a **rational and moral agent is** nonetheless **able to form and have the relevant conditional intention to apply such a sanction**. **And nothing**, as far as I can see, **would restrict this conclusion very strongly to certain favored accounts of morality, such as some version of consequentialism**. While agentmoralism is not the focus of this article, I hope to say enough to justify these claims. ¶ **Why suppose** for a moment that **rational agents cannot** form and **sustain such deterrent intentions**? I can think of five more or less seductive **arguments** to this effect, some reconstructed from the literature on the topic, others independently plausible. All **are based** directly or indirectly-**on the content of the conditional intentions contemplated and on the implications for a rational agent who contemplates such intentions**. Recall the problem**.** Because of what any such intention enjoins, we allegedly have a circumstance where an agent satisfies the following conditions**:** P: PI, the agent is (fully) rational; P2, she conditionally intends to do something E if a certain event C happens; P3, it is clear to her that if C should happen it would be irrational to do E. ¶ This triad of conditions appears inconsistent, however, which suggests that **no rational agent can have such a conditional intention in full knowledge of what it involves.** But then neither, it seems, can a rational agent form such an intention in full knowledge of what it involves; deterrence can't even get started unless the deterring agent first becomes irrational**.** ¶ Different agent-irrationalist arguments provide different ways of showing how the tension inherent in (P) argues for agent-irrationality. But before I begin my survey of these arguments, let me say a bit more about the idea of agent-rationality itself. The substance of my critique will be that, one way or another, **agent-irrationalist arguments variously mislocate or misdescribe aspects of this idea.** ¶What follows is supposed to be uncontentious. **To describe an agent as rational is to characterize the agent as** epistemically responsible: **such an agent** responds to evidence **in the right sort of way,** believing propositions when the evidence supports them (**but at any rate not when it is cognitively unsafe to adopt such beliefs) and deciding how to act by taking proper account of her desires and beliefs** regarding the likely outcome of actions. This is clearly a dispositional notion, for **someone is correctly described as rational to the extent that she is disposed to function in this way, not just that perchance she always does function in this way**. But note that **the disposition is characterized in terms of** a more **local rationality: options open to a person have the property of being rational if they are supported by her evidence in the right sort of way or if they reflect her beliefs and desires in the right sort of way.**

### Imminence

#### Advantage 2- Imminence:

#### Executive control over the definition of “imminence” makes its scope totally unlimited- makes drone overuse and abuse inevitable.

Greenwald 13 (Glenn, J.D. from NYU, award-winning journalist, February 5th, 2013, "Chilling legal memo from Obama DOJ justifies assassination of US citizens," www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo)

4. Expanding the concept of "imminence" beyond recognition The memo claims that the president's assassination power applies to a senior al-Qaida member who "poses an imminent threat of violent attack against the United States". That is designed to convince citizens to accept this power by leading them to believe it's similar to common and familiar domestic uses of lethal force on US soil: if, for instance, an armed criminal is in the process of robbing a bank or is about to shoot hostages, then the "imminence" of the threat he poses justifies the use of lethal force against him by the police. But this rhetorical tactic is totally misleading. The memo is authorizing assassinations against citizens in circumstances far beyond this understanding of "imminence". Indeed, the memo expressly states that it is inventing "a broader concept of imminence" than is typically used in domestic law. Specifically, the president's assassination power "does not require that the US have clear evidence that a specific attack . . . will take place in the immediate future". The US routinely assassinates its targets not when they are engaged in or plotting attacks but when they are at home, with family members, riding in a car, at work, at funerals, rescuing other drone victims, etc. Many of the early objections to this new memo have focused on this warped and incredibly broad definition of "imminence". The ACLU's Jameel Jaffer told Isikoff that the memo "redefines the word imminence in a way that deprives the word of its ordinary meaning". Law Professor Kevin Jon Heller called Jaffer's objection "an understatement", noting that the memo's understanding of "imminence" is "wildly overbroad" under international law. Crucially, Heller points out what I noted above: once you accept the memo's reasoning - that the US is engaged in a global war, that the world is a battlefield, and the president has the power to assassinate any member of al-Qaida or associated forces - then there is no way coherent way to limit this power to places where capture is infeasible or to persons posing an "imminent" threat. The legal framework adopted by the memo means the president can kill anyone he claims is a member of al-Qaida regardless of where they are found or what they are doing. The only reason to add these limitations of "imminence" and "feasibility of capture" is, as Heller said, purely political: to make the theories more politically palatable. But the definitions for these terms are so vague and broad that they provide no real limits on the president's assassination power. As the ACLU's Jaffer says: "This is a chilling document" because "it argues that the government has the right to carry out the extrajudicial killing of an American citizen" and the purported limits "are elastic and vaguely defined, and it's easy to see how they could be manipulated."

#### This broad definition of imminence has increased the frequency of attacks and the scope of who can be targeted

Hudson 11 (Leila Hudson is associate professor of anthropology and history in the School of Middle Eastern & North African Studies at the University of Arizona and director of the Southwest Initiative for the Study of Middle East Conflicts, “Drone Warfare: Blowback From the New American Way of War,” Middle East Policy, <http://www.mepc.org/journal/middle-east-policy-archives/drone-warfare-blowback-new-american-way-war>)

The Bush administration's increased reliance on the program started in 2008; however, it is with the Obama administration that we see the most rapid proliferation of attacks. The final phase of the drone program is characterized by an even greater increase in attack frequency and an expansion of the target list to include targets of opportunity and unidentified militants of dubious rank — and funerals.12 As of May 2011, the CIA under the Obama administration has conducted nearly 200 drone strikes. This suggests that the drone target list now includes targets of opportunity, likely including some selected in consultation with the Pakistani authorities in order to facilitate the increasingly unpopular program. This development, in turn, has now decreased the effectiveness of the program when assessed in terms of the ratio of high-value to accidental kills. As Figure 2 shows, the steady increase in drone attacks conducted in Pakistan between 2004 and 2010 has resulted in a far higher number of deaths overall, but a lower rate of successful killings of high-value militant leaders who command, control and inspire organizations. If we define a high-value target as an organizational leader known to intelligence sources and the international media prior to attack and not someone whose death is justified with a posthumous militant status, we see fewer and fewer such hits — the alleged killing of al-Qaeda commander Ilyas al-Kashmiri in 2009 and again in June 2011 notwithstanding.13 Data analysis shows that at the beginning of the drone program (2002-04), five or six people were killed for each defined high-value target. As part of that high-value target's immediate entourage, they were much more likely to be militants than civilians. By 2010, one high-value target was killed per 147 total deaths. The increased lethality of each attack is due to larger payloads, broader target sets such as funeral processions, and probable new targeting guidelines (including targets of opportunity).14 Over time, these more deadly drone attacks have failed to effectively decapitate the leadership of anti-U.S. organizations but have killed hundreds of other people subsequently alleged to be militants; many were civilians.15 The rapidly growing population of survivors and witnesses of these brutal attacks have emotional and social needs and incentives to join the ranks of groups that access and attack U.S. targets in Afghanistan across the porous border. Drone attacks themselves deliver a politically satisfying short-term "bang for the buck" for U.S. constituencies ignorant of and indifferent to those affected by drone warfare or the phenomenon of blowback. In the Pakistani and Afghan contexts, they inflame the populations and destabilize the institutions that drive regional development. In addition to taking on an unacceptable and extrajudicial toll in human life, the drone strikes in unintended ways complicate the U.S. strategic mission in Afghanistan, as well as the fragile relationship with Pakistan. As a result, the U.S. military's counterinsurgency project in Afghanistan becomes a victim of the first two forms of blowback.

#### This overuse of drones causes massive blowback in Pakistan-this is the consensus of research and assumes unique Pakistani cultural traits

**Dengler, US Secret service Assistant to the Special Agent in Charge, 2013**

(Judson, “An examination of the collateral psychological and political damage of drone warfare in the FATA region of Pakistan”, September, <http://calhoun.nps.edu/public/bitstream/handle/10945/37611/13Sep_Dengler_Judson.pdf?sequence=1>, ldg)

University of Arizona researchers Hudson, Owens, and Flannes state there are five distinct, yet overlapping, forms of blowback from the use of drones in counter-terror operations: the purposeful retaliation against the United States, the creation of new insurgents, complications in the Afghan-Pakistan theatre, further destabilization of Pakistan and the deterioration of U.S. and Pakistani relations.45 The authors, who are members of the Southwest Initiative for the Study of Middle East Conflicts (SISMEC), capture the main arguments against drone warfare. Most of the literature I reviewed seems to fall into one of the five categories listed above. There is an abundance of scholarly sources which support the findings of these researchers. Definitive statistical support of the negative aspects of drone warfare is difficult to assess due to intervening factors in this volatile region. Many factors can influence the criteria established by Hudson, Owens, and Flannes. In his discussion about the history of the CIA’s covert drone warfare program, University of Massachusetts—Dartmouth history faculty member Brian Glyn Williams adds to the case against drone warfare. He finds the collateral damage of drone strikes gives the media and religious leaders an opportunity to rally anti-American sentiment in Pakistan and the Islamic world in general.46 This article highlights the ability of radicals to easily use drone strikes, regardless if successful or not, to their advantage to manipulate the views of the local population. This view was supported by multiple other materials I reviewed. Writing for the German based Institute for the Study of Labor (IZA), Jaeger and Siddique discuss an example of retaliation by the Taliban which is attributed to drone strikes.47 This is typical of many examples of the Taliban or al-Qaeda directly stating their attack against the local government or U.S. was in response to drone policy in the region. In his Georgetown University Master’s thesis, Luke Olney evaluates the long term effectiveness of drone warfare. He supports the previously mentioned findings with particular emphasis on drones inspiring further radicalization, increased recruitment opportunities and further destabilization of local governments. However, he does note that drones may have some short-term success in disrupting militant groups.48 This seems to be a reoccurring theme in much of the readings I have conducted. Most researchers support the short-term advantage of drone strikes because they eliminate the target but drones have only been used extensively over the last ten years and questions exist about their effectiveness over time. The elimination of the militant is positive. But at what point does this victory become outweighed by the long-term effects of the killing? Support of the argument that drones have a negative political and diplomatic impact is made by Anne L. Oblinger in her 2011 Georgetown University thesis depicting the moral, legal, and diplomatic implications of drone warfare. Her thesis discusses the cultural and religious motivations behind terrorist activities which will be useful in a socio-cultural examination of this topic. She notes that despite their precision, drones still create many diplomatic hurdles for the U.S.49 This is another example of research which states that despite their tactical success, negative consequences still exist when leveraging drones. The majority of the literature indicates that there is a strong possibility of drone strikes having a negative overall influence in the FATA. Researchers from the University of Massachusetts, Dartmouth, Plaw, Fricker, and Williams, find that civilian casualties, real or perceived, will be the primary instigator. No matter how precise drone strikes are executed or how much technology improves, Pakistani press and society will be prone to believe that high percentages of civilians are being targeted. While the U.S. keeps details of the program somewhat secure, this practice allows the targeted groups to report the details of drone strikes to their advantage.50 There are numerous examples available of the collateral damage and devastation that drones inflict on the local community. Even if the strike successfully hits the intended target, statistics can be manipulated by the Taliban or Pakistani government. Investigative journalist Porter Gareth criticizes drone strikes because they are based on “scant evidence” in his article for The Washington Report for Middle East Affairs. He finds that the U.S. is targeting militant groups rather than al-Qaeda planning global terrorism.51 This was one of the few pieces of information which discussed who was being targeted by drone strikes and I found it particularly valuable. There should be more such information available, or forthcoming, because who is being targeted is critical to evaluating drone warfare. Ken Dilanian, of the Los Angeles Times, finds that the U.S. drone program has killed dozens of al-Qaeda operatives and hundreds of low-level militants but is has also infuriated many Pakistanis. Some officials in the State Department and National Security Council say these strikes are counterproductive because they only kill easily replaceable militants and the civilian casualties, which the U.S. disputes, destabilize the government of President Asif Ali Zardari of Pakistan. The number of drone strikes has grown since 2008 and now includes targeting of individuals based on a “pattern of life” that suggests involvement with insurgents. A former senior U.S. intelligence official stated that the CIA maintains a list of the top 20 targets and has at times had difficulty finding high value militants to add to the list. Are lower-level militants being targeted just to fill the list? This official is among those urging the CIA to reconsider its approach because the agency cannot kill all Islamic militants and drones alone will not solve challenge presented in the region. One former senior State Department official stated that drone strikes probably give motivation to those that fight us. Dilanian offers that it is impossible to independently assess the accuracy or effectiveness of the strikes because the program is classified, the Obama administration refuses to release information about the program and Pakistan has barred access to FATA from Western journalists or humanitarian agencies.52 This is one of Dilanian’s many pieces documenting drone warfare in Pakistan. Considering the sources of information he uses for this article, it appears that many in the military and intelligence community are beginning to realize the potential negative aspects of this tactic. He also identifies why it is so difficult to accurately and independently report on the impact of drone strikes and how data can be easily manipulated by the U.S., Pakistan, and militants. The New America Foundation database reflects the aggregation of credible news reports about U.S. drone strikes in Pakistan. The media outlets that New America relies upon are the three major international wire services (Associated Press, Reuters, Agence France Presse), the leading Pakistani newspapers (Dawn, Express Times, The News, The Daily Times), leading South Asian and Middle Eastern TV networks (Geo TV and Al Jazeera), and Western media outlets with extensive reporting capabilities in Pakistan (CNN, New York Times, Washington Post, LA Times, BBC, The Guardian, Telegraph). The New America Foundation makes no independent claims about the veracity of casualty reports provided by these organizations. The purpose of this database is to provide as much information as possible about the covert U.S. drone program in Pakistan. The Obama administration dramatically increased the frequency of the drone strikes, in comparison to the Bush Administration, with the peak number of drone attacks occurring in 2010, but the ratio of civilians killed in drone strikes fell to just over two percent. Despite the record 122 strikes in 2010, an average of 0.3 civilians were killed per strike, the lowest civilian death rate per strike until 2012, which saw only 0.1 civilians killed per attack in the first eight months of the year. According to data collected as of the summer of 2011, only one out of every seven drone strikes killed a militant leader. Under President Bush, about one-third of the militants killed were identified as leaders, but under President Obama, just 13 percent have been militant leaders. Drone strikes dropped sharply in 2011, as the relationship between the United States and Pakistan deteriorated. During the first half of 2012, the rate of strikes continued to fall and the civilian death ratio was close to zero. Since the U.S. drone campaign in Pakistan began in 2004, 84 to 85 percent of those killed were reported to be militants; six to eight percent were reported to be civilians and seven to nine percent remain “unknown.”53 The New America Foundation and Terror Free Tomorrow conducted the first comprehensive public opinion survey covering sensitive political issues in FATA. This survey was conducted from June 30 to July 20, 2010, and consisted of face-to-face interviews of 1,000 FATA residents age 18 or older across 120 villages or sampling points in all seven tribal Agencies of FATA. The respondents were 99 percent Pashtun, and 87 percent Sunni. Among their findings were that nearly nine out of ten opposed the U.S. following al-Qaeda and the Taliban into FATA and most would prefer that the Pakistani military fight these forces in FATA. Seventy-six percent are opposed to U.S. drone strikes, 16 percent believe they accurately target militants and just under half believed that drones predominantly kill civilians. The majority of FATA residents reject the presence of the Taliban or al-Qaeda in their region. Their top priorities included lack of jobs which was closely followed by lack of schools, good roads and security, poor health care and corruption of local official officials.54 Avner uses psychoanalysis, psychology, psychiatry, sociology, anthropology, and Islamic studies to understand Islamic terror. His research discusses the religion and culture of Islam, the psychology of Islam, the Muslim family and Muslim society from which many terrorists originate. Avner finds that terror can originate with emotions such as rage, hatred, fear and surprisingly, love and longing.56 Shame is an excessively painful feeling and is prevalent in Muslim culture. Shame, loss of honor, loss of face, and humiliation are unbearable feelings. Hamady found that shame was the worst and most painful feeling for an Arab. Preserving one’s honor and the honor of their tribe or clan is crucial. Any injury, real or imagined, causes unbearable shame that must be repaired through acts of revenge against those that damaged your honor.57 The importance of pride, honor and dignity is critical in Muslim culture. “Everything must be done to erase one’s humiliations and to regain one’s honor.”58 For Muslims who feel they have been shamed or humiliated, the only way to repair these feelings is by humiliating those that inflicted shame and humiliation on them.59 Avner’s research identifies multiple psychological factors which may explain the existing anger within segments of the Muslim community. Honor and shame is a tremendous motivator in Islam and may provide a solid predisposition for action against the offending party to regain one’s honor. Maintaining your honor or the honor of your tribe is of high importance to the Pashtun tribesmen of FATA. Once this has been violated, retaliation is obligated against those that have humiliated you. Stern reveals that the real or perceived national humiliation of the Palestinian people by Israeli policies gives rise to desperation and uncontrollable rage. Citing Mark Jurgensmeyer, Stern notes that suicide bombers are attempting to “dehumiliate” the deeply humiliated and traumatized. Through their actions, suicide bombers belittle their enemies and provide themselves with a sense of power. Repeated, small humiliations add up to a feeling of nearly unbearable despair and frustration, which can result in atrocities being committed in the belief that attacking the oppressor restores dignity.60 A skilled terrorist leader can strengthen and utilize feelings of betrayal and the desire for revenge.61 Stern shows the extent to which a Muslim will go to in order to restore their honor after being humiliated. The uncontrollable rage may not be proportionate when measured by Western standards. Even small humiliations will build to the point of suicide attacks to repair the loss of dignity. The hopelessness and aggravation many may feel in FATA should not be overlooked or diminished. Charismatic militant leaders can manipulate shame to motivate groups to action against whom they perceive has wronged their group. The most important psychoanalytic idea for understanding terrorism, according to Avner, is Heinz Kohut’s notion of narcissistic rage, “The need for revenge, for righting a wrong, for undoing a hurt by whatever means, and a deeply anchored, unrelenting compulsion in the pursuit of all these aims, which gives no rest to those that have suffered a narcissistic injury. These are the characteristic features of narcissistic rage in all its forms and which set it apart from other kinds of aggression.” This boundless rage, together with unconscious factors and the traditional Muslim family dynamic may explain Islamic terrorism, including suicidal versions.62 Kohut’s finding that narcissistic rage is the most important psychoanalytic factor for understanding is significant. The narcissistic aspect depicts how personal the hostility is and rage shows the intensity of the emotion which drives terrorists. Narcissistic rage allows the militant to pursue those that they perceive have wronged them by using extreme measures to regain their honor.

#### Overuse of drones in Pakistan empowers militants and destabilizes the government

Michael J Boyle 13, Assistant Professor of Political Science at La Salle University, former Lecturer in International Relations and Research Fellow at the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, PhD from Cambridge University, January 2013, “The costs and consequences of drone warfare,” International Affairs 89: 1 (2013) 1–29, <http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2013/89_1/89_1Boyle.pdf>

The escalation of drone strikes in Pakistan to its current tempo—one every few days—directly contradicts the long-term American strategic goal of boosting the capacity and legitimacy of the government in Islamabad. Drone attacks are more than just temporary incidents that erase all traces of an enemy. They have lasting political effects that can weaken existing governments, undermine their legitimacy and add to the ranks of their enemies. These political effects come about because drones provide a powerful signal to the population of a targeted state that the perpetrator considers the sovereignty of their government to be negligible. The popular perception that a government is powerless to stop drone attacks on its territory can be crippling to the incumbent regime, and can embolden its domestic rivals to challenge it through violence. Such continual violations of the territorial integrity of a state also have direct consequences for the legitimacy of its government. Following a meeting with General David Petraeus, Pakistani President Asif Ali Zardari described the political costs of drones succinctly, saying that ‘continuing drone attacks on our country, which result in loss of precious lives or property, are counterproductive and difficult to explain by a democratically elected government. It is creating a credibility gap.’75 Similarly, the Pakistani High Commissioner to London Wajid Shamsul Hasan said in August 2012 that¶ what has been the whole outcome of these drone attacks is that you have directly or indirectly contributed to destabilizing or undermining the democratic government. Because people really make fun of the democratic government—when you pass a resolution against drone attacks in the parliament and nothing happens. The Americans don’t listen to you, and they continue to violate your territory.76¶ The appearance of powerlessness in the face of drones is corrosive to the appearance of competence and legitimacy of the Pakistani government. The growing perception that the Pakistani civilian government is unable to stop drone attacks is particularly dangerous in a context where 87 per cent of all Pakistanis are dissatisfied with the direction of the country and where the military, which has launched coups before, remains a popular force.77

#### Pakistan collapse risks war with India and loose nukes

Twining 13 (Daniel Twining is Senior Fellow for Asia at the German Marshall Fund, Pakistan and the Nuclear Nightmare, Sept 4, http://shadow.foreignpolicy.com/posts/2013/09/04/pakistan\_and\_the\_nuclear\_nightmare)

The Washington Post has revealed the intense concern of the U.S. intelligence community about Pakistan's nuclear weapons program. In addition to gaps in U.S. information about nuclear weapons storage and safeguards, American analysts are worried about the risk of terrorist attacks against nuclear facilities in Pakistan as well as the risk that individual Pakistani nuclear weapons handlers could go rogue in ways that endanger unified national control over these weapons of mass destruction. These concerns raise a wider question for a U.S. national security establishment whose worst nightmares include the collapse of the Pakistani state -- with all its implications for empowerment of terrorists, a regional explosion of violent extremism, war with India, and loss of control over the country's nuclear weapons. That larger question is: Does Pakistan's nuclear arsenal promote the country's unity or its disaggregation? This is a complicated puzzle, in part because nuclear war in South Asia may be more likely as long as nuclear weapons help hold Pakistan together and embolden its military leaders to pursue foreign adventures under the nuclear umbrella. So if we argue that nuclear weapons help maintain Pakistan's integrity as a state -- by empowering and cohering the Pakistani Army -- they may at the same time undermine regional stability and security by making regional war more likely. As South Asia scholar Christine Fair of Georgetown University has argued, the Pakistani military's sponsorship of "jihad under the nuclear umbrella" has gravely undermined the security of Pakistan's neighborhood -- making possible war with India over Kargil in 1999, the terrorist attack on the Indian Parliament in 2001, the terrorist attack on Mumbai in 2008, and Pakistan's ongoing support for the Afghan Taliban, the Haqqani network, Lashkar-e-Taiba, and other violent extremists. Moreover, Pakistan's proliferation of nuclear technologies has seeded extra-regional instability by boosting "rogue state" nuclear weapons programs as far afield as North Korea, Libya, Iran, and Syria. Worryingly, rather than pursuing a policy of minimal deterrence along Indian lines, Pakistan's military leaders are banking on the future benefits of nuclear weapons by overseeing the proportionately biggest nuclear buildup of any power, developing tactical (battlefield) nuclear weapons, and dispersing the nuclear arsenal to ensure its survivability in the event of attack by either the United States or India. (Note that most Pakistanis identify the United States, not India, as their country's primary adversary, despite an alliance dating to 1954 and nearly $30 billion in American assistance since 2001.) The nuclear arsenal sustains Pakistan's unbalanced internal power structure, underwriting Army dominance over elected politicians and neutering civilian control of national security policy; civilian leaders have no practical authority over Pakistan's nuclear weapons program. Whether one believes the arsenal's governance implications generate stability or instability within Pakistan depends on whether one believes that Army domination of the country is a stabilizing or destabilizing factor. A similarly split opinion derives from whether one deems the Pakistan Army the country's most competent institution and therefore the best steward of weapons whose fall into the wrong hands could lead to global crisis -- or whether one views the Army's history of reckless risk-taking, from sponsoring terrorist attacks against the United States and India to launching multiple wars against India that it had no hope of winning, as a flashing "DANGER" sign suggesting that nuclear weapons are far more likely to be used "rationally" by the armed forces in pursuit of Pakistan's traditional policies of keeping its neighbors off balance. There is no question that the seizure of power by a radicalized group of generals with a revolutionary anti-Indian, anti-American, and social-transformation agenda within Pakistan becomes a far more dangerous scenario in the context of nuclear weapons. Similarly, the geographical dispersal of the country's nuclear arsenal and the relatively low level of authority a battlefield commander would require to employ tactical nuclear weapons raise the risk of their use outside the chain of command. This also raises the risk that the Pakistani Taliban, even if it cannot seize the commanding heights of state institutions, could seize either by force or through infiltration a nuclear warhead at an individual installation and use it to hold the country -- and the world -- to ransom. American intelligence analysts covering Pakistan will continue to lose sleep for a long time to come.

#### Miscalculation means this could escalate to nuclear winter and extinction- this answers their defense

Hundley 12 (TOM HUNDLEY, Senior Editor-Pulitzer Center, “Pakistan and India: Race to the End,” http://pulitzercenter.org/reporting/pakistan-nuclear-weapons-battlefield-india-arms-race-energy-cold-war)

Nevertheless, military analysts from both countries still say that a nuclear exchange triggered by miscalculation, miscommunication, or panic is far more likely than terrorists stealing a weapon -- and, significantly, that the odds of such an exchange increase with the deployment of battlefield nukes. As these ready-to-use weapons are maneuvered closer to enemy lines, the chain of command and control would be stretched and more authority necessarily delegated to field officers. And, if they have weapons designed to repel a conventional attack, there is obviously a reasonable chance they will use them for that purpose. "It lowers the threshold," said Hoodbhoy. "The idea that tactical nukes could be used against Indian tanks on Pakistan's territory creates the kind of atmosphere that greatly shortens the distance to apocalypse." Both sides speak of the possibility of a limited nuclear war. But even those who speak in these terms seem to understand that this is fantasy -- that once started, a nuclear exchange would be almost impossible to limit or contain. "The only move that you have control over is your first move; you have no control over the nth move in a nuclear exchange," said Carnegie's Tellis. The first launch would create hysteria; communication lines would break down, and events would rapidly cascade out of control. Some of the world's most densely populated cities could find themselves under nuclear attack, and an estimated 20 million people could die almost immediately. What's more, the resulting firestorms would put 5 million to 7 million metric tons of smoke into the upper atmosphere, according to a new model developed by climate scientists at Rutgers University and the University of Colorado. Within weeks, skies around the world would be permanently overcast, and the condition vividly described by Carl Sagan as "nuclear winter" would be upon us. The darkness would likely last about a decade. The Earth's temperature would drop, agriculture around the globe would collapse, and a billion or more humans who already live on the margins of subsistence could starve. This is the real nuclear threat that is festering in South Asia. It is a threat to all countries, including the United States, not just India and Pakistan. Both sides acknowledge it, but neither seems able to slow their dangerous race to annihilation.

### Plan

#### Plan:  The United States Federal Judiciary should conduct judicial ex post review of United States’ targeted killing operations, with liability falling on the government for any constitutional violation, on the grounds that the political question doctrine should not bar justiciability of cases against the military.

### Political Question Doctrine

#### Invocation of the political question doctrine in national security contexts unravels attempts to apply civilian justice to the military—line drawing fails, only a clear signal solves

Vladeck 12 (Stephen, Professor of Law and Associate Dean for Scholarship, American University,

Washington College of Law, “THE NEW NATIONAL SECURITY CANON,” June 14, http://www.aulawreview.org/pdfs/61/61-5/Vladeck.website.pdf)

But if what in fact has taken place over the last decade is a testament to a longer-term pattern, one that neither the political branches nor the Supreme Court disrupt in the near future, then we must confront a more alarming possibility: that as these “national security”-based exceptions increasingly become the rule in contemporary civil litigation against government officers—whether with regard to new “special factors” under Bivens, new bases for contractor preemption under Boyle, proliferation of the political question doctrine, or even more expansive reliance upon the qualified immunity defense—the line between the unique national security justifications giving rise to these cases and ordinary civil litigation will increasingly blur. Thus, wherever one comes down on the virtues and vices of this new national security canon, perhaps the most important point to take away is the need to carefully cabin its scope. Otherwise, exceptions articulated in the guise of such unique fact patternss could serve more generally to prevent civil liability for government misconduct and to thereby dilute the effectiveness of judicial review as a deterrent for any and all unlawful government action—not just those actions undertaken in ostensibly in defense of the nation.

#### And, the plan’s repudiation of the PQD will not be limited to targeted killing—judges will be able to apply that rationale in future cases

Tokaji 12 (Daniel, Professor in Law at The Ohio State University Michael E. Moritz College of Law, with Owen Wolfe†, BAKER, BUSH, AND BALLOT BOARDS: THE FEDERALIZATION OF ELECTION ADMINISTRATION, <http://law.case.edu/journals/lawreview/documents/62CaseWResLRev4.3.Tokaji.pdf>)

Bush can be understood as the new Baker, in the sense that it opened the federal courts to election administration litigation, just as its predecessor opened the federal courts to districting litigation. So as to avoid any misunderstanding, let us first state two qualifications to this claim. First, we are not talking about citation counts. Baker has been cited many times by the Supreme Court and the lower courts in subsequent years.49 By contrast, the Supreme Court has been exceedingly reluctant to cite Bush v. Gore, and there are not a huge number of lower court cases that have cited the case either.50 Second, we are not talking about the intent of the Supreme Court, which was quite different in these two sets of cases. The Baker Court was quite conscious of the fact that it was opening the door, if not the floodgates, to litigation over legislative districts.51 The Bush Court, by contrast, seemed intent on shutting the door behind it, by limiting the principle upon which it sought to rely. This is most clearly evident in the Court’s statement that: Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.52 Some commentators have criticized these sentences for being unprincipled, in the sense of declaring a rule of law good for one day only.53 We disagree. What the Court did instead was to (1) assert an equal protection principle established by cases like Baker and Reynolds, variously characterized as “equal weight” to each vote and “equal dignity” to each voter and as valuing one person’s vote over another by "arbitrary and disparate treatment";54 (2) apply this principle to a new context, namely the recounting of punch card ballots in the State of Florida;55 and (3) conclude that this process contravened this basic equal protection principle, without clearly specifying its precise boundaries.56 In other words, the Court applied an established principle to a new area of law without specifying the precise legal test or how it will apply to future cases.57 The wording may be different, but the mode of analysis is not that unusual. In this respect. Bush bears comparison to what the Court did when it decided Baker and later Reynolds. The Court was certainly aware that it was entering the political thicket in Baker.58 It may have had a general rule of law in mind, but it did not specify its precise boundaries. And while Reynolds (like Bush) relies on a vaguely stated principle of law, variously defined as "one person, one vote"59 and an "equally effective voice in the election of members of [the] state legislature,"60 it too does not define the exact boundaries of this principle. The Court in Reynolds was aware that it was entering a new area without precisely specifying the bounds of the new equal protection rule it articulated. This is evident in Chief Justice Earl Warren's notes on the case. These notes, in the Chiefs handwriting, include thirty- four numbered, single sentence points on seven sheets of paper.61 The first reads: "There can be no formula for determining whether equal protection has been afforded."62 Another note, number twenty, reads: "Cannot set out all possibilities in any given case."63 In other words, the Court that decided Baker and Reynolds—like the Court that decided Bush—rested on a somewhat imprecisely stated principle, allowing for refinement in future cases presenting different facts. This also shows up in Chief Justice Warren’s opinion for the Reynolds majority, which declines to say exactly how close to numerical equality districts much be: For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. . . . Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.64 And later: We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions.65 The similarity to Bush’s language is striking—and given that Reynolds is one of just four equal protection cases cited in Bush, 66 one wonders whether it was conscious. The Court stated a broad principle, declined to state precisely the test it was applying, and bracketed other cases presenting different circumstances, reserving them for another day. Of course, the Reynolds Court did provide some clarity in the one person, one vote cases that followed. So far, the current Court has failed to provide comparable clarity for election administration cases since Bush. And, in fact, in the most prominent election administration case to have arisen since then, Crawford v. Marion County Election Board, 67 the Court did not cite Bush at all. Again, we are not arguing that there is an exact parallel between Baker and Bush. Our claim is more modest: that there is an important similarity between the two cases in that both set the stage for an increased federal role in their respective realms, redistricting and election administration. While the Supreme Court has avoided Bush v. Gore like the plague—as others have noted, it has become the Voldemort of Supreme Court cases, “the case that must not be named”68—that does not mean the case has been without an impact. Indeed, the Supreme Court’s clear distrust of state institutions in Bush69 (which is also implicit in Baker) has apparently trickled down to the rest of the federal courts, who are now taking a more active role in state election disputes. As Professor Samuel Issacharoff has put it, Bush v. Gore declared that “federal courts were open for business when it came to adjudicating election administration claims.”70 Lower courts “relaxed rules regarding standing, ripeness, and . . . justiciability”71 in order to hear more election disputes. They allowed these cases to go to the front of the queue, often deciding them on an expedited basis in the weeks preceding an election. In some areas, like voting technology, election litigation led to changes in how elections are run, even in the absence of a binding decision on the merits.72

#### And, The political question doctrine is killing climate litigation now

Koshofer 10/1/13 (Warren A., partner in the law firm of Michelman & Robinson, LLP and a member of the firm’s commercial and business litigation department, “Defending Climate Change Liability” <http://www.rmmagazine.com/2013/10/01/defending-climate-change-liability/>)

For almost a decade now, plaintiffs have tried to sue various industries for damages resulting from greenhouse gas emissions and climate change. In staving off such claims, defendants have employed two formidable primary defenses rooted in the doctrines of standing and political question. Through use of these and other defenses, defendants have been able to prevail time and again in climate change liability-related litigation. Flowing from Article III of the U.S. Constitution, the doctrine of standing limits the jurisdiction of federal courts to cases that, by necessity, must include: 1) an injury in fact to the plaintiff, 2) that was caused by the defendant, and 3) that is capable of being redressed by the court. If any of the conditions are not present, the plaintiff does not have standing to sue the defendant. The doctrine of standing thus focuses on whether there is a proper plaintiff before the court. The focus of the political question doctrine is different; it addresses whether a plaintiff presents a claim that can be adjudicated by the court without interfering with the business of any other branch or department of the U.S. government. Setting the stage for a defense rooted in the political question doctrine in climate change-related litigation was the 2007 U.S. Supreme Court decision in Massachusetts v. EPA. In that case, the Supreme Court ruled that the Environmental Protection Agency (EPA) is authorized to regulate greenhouse gas emissions through the Clean Air Act. Consequently, courts have since used the political question doctrine to bar plaintiff’s liability claims for damages allegedly resulting from climate change. For example, in 2011, the Supreme Court held in American Electric Power v. Connecticut that corporations cannot be sued for damages allegedly resulting from greenhouse gas emissions because, among other reasons, the Clean Air Act delegates the management of carbon dioxide and other greenhouse gas emissions to the EPA. Among the more noteworthy of the climate change litigation cases is Comer v. Murphy Oil. Brought by plaintiffs in the aftermath of Hurricane Katrina, Mississippi Gulf residents sued numerous energy companies alleging that their emissions of greenhouse gases exacerbated the severity of the hurricane. The district court dismissed the case, finding that the plaintiffs had no standing to bring the claims, which ranged from public and private nuisance to trespass and negligence to fraudulent misrepresentation and conspiracy. The plaintiffs tried to re-file the case, but it was dismissed by the U.S. Court of Appeals for the Fifth Circuit in May. The Supreme Court is currently considering a petition to review the case, but it is widely believed that there is little likelihood of the petition being granted. Part of this belief is rooted in the Supreme Court’s treatment of a another climate change litigation case. In Native Village of Kivalina v. ExxonMobil Corp., the Alaskan shore village of Kivalina sued a group of energy companies operating in the region, alleging that their greenhouse gas emissions were causing polar ice to melt, sea levels to rise and the shoreline land of the village to erode at a rapid pace. Similar to the Comer decision in 2012, a district court held that the plaintiffs lacked standing because they could not demonstrate that any of their alleged injuries could be traced back to the defendants’ actions. The U.S. Court of Appeals for the Ninth Circuit agreed, and also addressed the political question doctrine defense, ruling that, based on the Supreme Court precedent set in American Electric Power v. Connecticut, “We need not engage in complex issue and fact-specific analysis in this case, because we have direct Supreme Court guidance that has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.” By all accounts, then, it seems the defendants in climate change litigation will continue to prevail in court. The bad news for defendants, however, is that climate change-related litigation still exists, and it is expensive to defend. Once named in climate change-related litigation, a defendant often turns to its commercial general liability insurer for defense and indemnification. The trouble is that the allegations made in climate change-related litigation do not always trigger an insurer’s defense and indemnification duties.

#### Climate change litigation is key to solving global warming – 3 warrants

Flynn 13 (James, J.D. Candidate, 2013, Georgia State University College of Law; Assistant Legislation Editor, Georgia State University Law Review; Visiting Student, Florida State University College of Law, “CLIMATE OF CONFUSION: CLIMATE CHANGE LITIGATION IN THE WAKE OF AMERICAN ELECTRIC POWER V. CONNECTICUT”, lexis, accessed 1/5/2014)

2. Turning Up the Heat on Congress: Litigating to Legislate The only solution to anthropogenic global warming is a concerted global effort. 264 Such an effort cannot succeed without the leadership, or at least support, of the United States. 265 Real change in the United States requires comprehensive legislation that covers all facets of global warming: greenhouse gas emissions, land use, efficiency, and sustainable growth. In addition to maximizing time until the EPA either issues regulations or is prevented from doing so by Congress, litigation advances the goal of such comprehensive legislation in three ways. First, litigation keeps the pressure on fossil fuel companies and other large emitters. Comprehensive legislation is a near impossibility as long as the largest contributors to global greenhouse gas emissions are able to exert powerful control over the nation's [\*862] energy policy and the climate change discussion. 266 While the companies have the financial resources to battle in court, it is imperative that advocates and states make them do so. One need only look at the tobacco litigation of the 1960s through the 1990s to understand that success against a major industry is possible. 267 Here, though, the stakes are even higher. The chances of obtaining a largescale settlement from the fossil fuel industry is likely smaller now that the Court has ruled that some federal common law nuisance claims are displaced, because lower courts may hold that nuisance claims for money damages are also displaced. 268 However, advocates of climate change legislation should keep trying to obtain such a settlement through other tort remedies. A substantially damaging settlement may encourage fossil fuel companies to reposition their assets into more sustainable technologies to avoid more settlements, thus minimizing future emissions. Alternatively, if the fossil fuel companies feel threatened enough, they may begin to use their clout to persuade Congress to pass comprehensive legislation to protect their industry from such wide-ranging suits. 269 Second, litigation keeps the issue in the public consciousness during a time when the media is failing at its responsibilities to the public. 270 The media's coverage of climate change has been both inadequate and misleading. 271 Indeed, some polls suggest Americans [\*863] believe less in climate change now than just a few years ago. 272 Litigation, especially high-profile litigation, forces the issue into the public sphere, even though it may receive a negative connotation in the media. The more the public hears about the issue, the greater chance that people will demand their local and state politicians take action. Finally, litigation sends a clear message to Congress that simple appeasements will not suffice. 273 Comprehensive legislation is needed--legislation that mandates consistently declining emissions levels while simultaneously propping up replacement sources of energy. 274 Fill-in measures, like the EPA's authority to regulate emissions from power plants, are not sufficient. Humans need energy, and there can be no doubt that we must strike a balance between energy needs and risks to the environment. Catastrophic climate change, however, is simply a risk that we cannot take; it overwhelms the short-term benefits we receive from the burning of fossil fuels. 275 Advocates and states must demonstrate to Congress [\*864] through continuing litigation that the issue is critical and that plaintiffs like those in Kivalina and Comer are suffering genuine losses that demand redress that current statutes do not currently provide. CONCLUSION American Electric proved less important for the precedent it set than for the questions it left unanswered. While courts wrestled over standing, the political question doctrine, and displacement in climate change nuisance cases in the years preceding American Electric, the Supreme Court relied only on the clear displacement path illuminated by its earlier decision in Massachusetts. While the decision in American Electric narrowed the litigation options that climate change advocates have at their disposal, it subtly sent a message to Congress that greater federal action is needed. In writing such a narrow ruling, Justice Ginsburg also sent a message to states and advocates--whether intentionally or not--that climate change litigation is not dead. Until Congress enacts comprehensive climate change legislation, global warming lawsuits will, and must, continue.

#### And climate litigation solves internationally – produces international norms and cooperation

Long 8 (Andrew Long, Professor of Law @ Florida Coastal School of Law “International Consensus and U.S. Climate Change Litigation,” 33 Wm. & Mary Envtl. L. & Pol'y Rev. 177)

1. Enhancing U.S. International Leadership In a time of unfavorable global opinion toward the United States, explicit judicial involvement with international norms will move the United States **closer to the international community** by acknowledging the relevance of international environmental norms for our legal system. As in other contexts, explicit **judicial internalization of climate change norms would "build**[ ] **U.S. 'soft power,**' [enhance] its moral authority, and strengthen[ ] U.S. capacity for global leadership"2 °3 on climate change, and other global issues. More specifically, domestic judicial consideration of the global climate regime would reaffirm that although the United States has rejected Kyoto, we take the obligation to respect the global commons seriously by recognizing that obligation as a facet of the domestic legal system. U.S. courts' overall failure to interact with the international climate regime, as in other issue areas, has "serious consequences for their roles in international norm creation."2" As judicial understandings of climate change law converge, the early and consistent contributors to the transnational judicial dialogue will likely play the strongest role in shaping the emerging international normative consensus.2"' As Justice L'Heureux- Dube of the Canadian Supreme Court noted in an article describing the decline of the U.S. Supreme Court's global influence, "[decisions which look only inward ... have less relevance to those outside that jurisdiction." °6 Thus, if U.S. courts hope to participate in shaping the normative position on climate change adopted by judiciaries throughout the world, explicit recognition of the relationship between domestic and international law is vital. With climate change in particular, norm development through domestic application should be an important aspect of global learning. The problem requires a global solution beyond the scope of any prior multilateral environmental agreements. This provides a situation in which U.S. judicial reasoning in applying aspects of climate regime thinking to concrete problems will fall into fertile international policy soil. Accordingly, the recognition of international norms in **domestic climate change litigation may play a strengthening role in the perception of U.S. leadership**, encourage U.S. development and exportation of effective domestic climate strategies, and promote international agreements that will enhance consistency with such approaches. In short, explicit judicial discussion of international climate change norms as harmonious with U.S. law can **enhance U.S. ability to regain** a **global leadership** position on the issue and, thereby, more significantly shape the future of the international climate regime. 2. Promoting the Effectiveness of the International Response Along with promoting U.S. interests and standing in the international community, climate change litigation has a direct role to play in developing the international regime if courts directly engage that regime." 7 Just as the United States as an actor may benefit from acknowledging and applying international norms, the regime in which the actions occur will benefit through application and acceptance. Indeed, a case such as Massachusetts v. EPA that directly engages only domestic law can nonetheless be understood to impact international lawmaking by considering its actors."' More important, however, will be cases in which the domestic judiciary gives life to international agreements through direct engagement-a "role [that] is particularly important as a check on the delegitimization of international legal rules that are not enforced."" 9 Assuming, as we must in the arena of climate change, that international law can only effect significant changes in behavior through penetration of the domestic sphere, domestic litigation that employs international law not only provides an instance in which the international appears effective but, more importantly, molds it into a shape that will enable further use in domestic cases or suggest necessary changes internationally. By engaging the international, domestic cases can also provide articulation for the norms that have emerged. The precise meaning of the UNFCCC obligation that nations take measures must be hammered out on the ground. In the United States, if Congress has not acted, it is appropriate for the courts to begin this process by measuring particular actions against the standard. 3. Encouraging Consistency in Domestic Law and Policy In the absence of national climate change law and policy, explicit discussion of international sources and norms in litigation will provide a well-developed baseline for a uniform judicial approach in the domestic realm. This could occur both within and beyond the United States. Within the United States, bringing international environmental law into the mix of judicial reasoning would provide common grounding that unifies the decisions and begins to construct a more systematic preference for development of an effective legal response to international threats. Specifically, if an international climate change norm is found relevant to interpretation of a domestic statute, reference will be appropriate to that norm when future questions of interpretation of the domestic statute arise.210 Thus, to the extent that climate change cases rely upon consensus concerning the scientific evidence of climate change, future cases should use that consensus as a measuring stick for claims of scientific uncertainty.2n The same can occur with norm development. For example, had the Court in Massachusetts tied its jurisdictional or substantive holding to an identifiable norm, the opinion would have greater clarity and value as a precedent in other contexts within the United States. Outside the United States, this approach would provide value to other, more transnationally oriented domestic courts.212 This would serve a norm entrepreneurship function and likely increase agreement among domestic courts on how to approach climate change issues raised under statutes designed for other purposes. 4. Enabling a Check at the Domestic-International Interface Finally, climate change litigation has something to offer for the growth of administrative law at the interface of domestic and international law. At least two points are noteworthy. First, U.S. courts can serve a unique function of providing legal accountability for U.S. failure to honor its UNFCCC commitments.213 Although this might be achieved implicitly, arguably the approach of Massachusetts, doing so explicitly would provide a check of a different magnitude. An explicit check here would serve the purposes identified above, as well as offering the practical benefit of increasing compliance. The dualist tradition, and perhaps concerns of domestic political backlash, weigh against grounding a decision solely in the UNFCC. However, looking to it as a major point in a narrative defining the development of a partly domestic obligation to take national action for the redress of climate change would serve the same beneficial purpose. This approach has the advantage of building a significant bridge over the dualist divide between domestic and international law without ripping the Court's analysis from traditional, dualist moorings. Pg. 212-216

#### Warming causes extinction

Don Flournoy 12, Citing Feng Hsu, PhD NASA Scientist @ the Goddard Space Flight Center and Don is a PhD and MA from UT, former Dean of the University College @ Ohio University, former Associate Dean at SUNY and Case Institute of Technology, Former Manager for University/Industry Experiments for the NASA ACTS Satellite, currently Professor of Telecommunications @ Scripps College of Communications, Ohio University, “Solar Power Satellites,” January 2012, Springer Briefs in Space Development, p. 10-11

In the Online Journal of Space Communication , Dr. Feng Hsu, a  NASA scientist at Goddard Space Flight Center, a research center in the forefront of science of space and Earth, writes, “The evidence of global warming is alarming,” noting the potential for a catastrophic planetary climate change is real and troubling (Hsu 2010 ) . Hsu and his NASA colleagues were engaged in monitoring and analyzing climate changes on a global scale, through which they received first-hand scientific information and data relating to global warming issues, including the dynamics of polar ice cap melting. After discussing this research with colleagues who were world experts on the subject, he wrote: I now have no doubt global temperatures are rising, and that global warming is a serious problem confronting all of humanity. No matter whether these trends are due to human interference or to the cosmic cycling of our solar system, there are two basic facts that are crystal clear: (a) there is overwhelming scientific evidence showing positive correlations between the level of CO2 concentrations in Earth’s atmosphere with respect to the historical fluctuations of global temperature changes; and (b) the overwhelming majority of theworld’s scientific community is in agreement about the risks of a potential catastrophic global climate change. That is, if we humans continue to ignore this problem and do nothing, if we continue dumping huge quantities of greenhouse gases into Earth’s biosphere, humanity will be at dire risk (Hsu 2010 ) . As a technology risk assessment expert, Hsu says he can show with some confidence that the planet will face more risk doing nothing to curb its fossil-based energy addictions than it will in making a fundamental shift in its energy supply. “This,” he writes, “is because the risks of a catastrophic anthropogenic climate change can be potentially the extinction of human species, a risk that is simply too high for us to take any chances” (Hsu 2010).

#### Warming is real and anthropogenic, need to cut emissions adaptation can’t solve. Our science is watertight and theirs is garbage.

Harvey 2013

Fiona, Guardian Environment Reporter, IPCC climate report: human impact is 'unequivocal', September 27 2013, http://www.theguardian.com/environment/2013/sep/27/ipcc-climate-report-un-secretary-general

World leaders must now respond to an "unequivocal" message from climate scientists and act with policies to cut greenhouse gas emissions, the United Nations secretary-general urged on Friday. Introducing a major report from a high level UN panel of climate scientists, Ban Ki-moon said, "The heat is on. We must act." The world's leading climate scientists, who have been meeting in all-night sessions this week in the Swedish capital, said there was no longer room for doubt that climate change was occurring, and the dominant cause has been human actions in pouring greenhouse gases into the atmosphere. In their starkest warning yet, following nearly seven years of new research on the climate, the Intergovernmental Panel on Climate Change (IPCC) said it was "unequivocal" and that even if the world begins to moderate greenhouse gas emissions, warming is likely to cross the critical threshold of 2C by the end of this century. That would have serious consequences, including sea level rises, heatwaves and changes to rainfall meaning dry regions get less and already wet areas receive more. In response to the report, the US secretary of state, John Kerry, said in a statement: "This is yet another wakeup call: those who deny the science or choose excuses over action are playing with fire." "Once again, the science grows clearer, the case grows more compelling, and the costs of inaction grow beyond anything that anyone with conscience or commonsense should be willing to even contemplate," he said. He said that livelihoods around the world would be impacted. "With those stakes, the response must be all hands on deck. It's not about one country making a demand of another. It's the science itself, demanding action from all of us. The United States is deeply committed to leading on climate change." In a crucial reinforcement of their message – included starkly in this report for the first time – the IPCC warned that the world cannot afford to keep emitting carbon dioxide as it has been doing in recent years. To avoid dangerous levels of climate change, beyond 2C, the world can only emit a total of between 800 and 880 gigatonnes of carbon. Of this, about 530 gigatonnes had already been emitted by 2011. That has a clear implication for our fossil fuel consumption, meaning that humans cannot burn all of the coal, oil and gas reserves that countries and companies possess. As the former UN commissioner Mary Robinson told the Guardian last week, that will have "huge implications for social and economic development." It will also be difficult for business interests to accept. The central estimate is that warming is likely to exceed 2C, the threshold beyond which scientists think global warming will start to wreak serious changes to the planet. That threshold is likely to be reached even if we begin to cut global greenhouse gas emissions, which so far has not happened, according to the report. Other key points from the report are: • Atmospheric concentrations of carbon dioxide, methane and nitrous oxide are now at levels "unprecedented in at least the last 800,000 years." • Since the 1950's it's "extremely likely" that human activities have been the dominant cause of the temperature rise. • Concentrations of CO2 and other greenhouse gases in the atmosphere have increased to levels that are unprecedented in at least 800,000 years. The burning of fossil fuels is the main reason behind a 40% increase in C02 concentrations since the industrial revolution. • Global temperatures are likely to rise by 0.3C to 4.8C, by the end of the century depending on how much governments control carbon emissions. • Sea levels are expected to rise a further 26-82cm by the end of the century. • The oceans have acidified as they have absorbed about a third of the carbon dioxide emitted. Thomas Stocker, co-chair of the working group on physical science, said the message that greenhouse gases must be reduced was clear. "We give very relevant guidance on the total amount of carbon that can't be emitted to stay to 1.5 or 2C. We are not on the path that would lead us to respect that warming target [which has been agreed by world governments]." He said: "Continued emissions of greenhouse gases will cause further warming and changes in all components of the climate system. Limiting climate change will require substantial and sustained reductions of greenhouse gas emissions." Though governments around the world have agreed to curb emissions, and at numerous international meetings have reaffirmed their commitment to holding warming to below 2C by the end of the century, greenhouse gas concentrations are still rising at record rates. Rajendra Pachauri, chair of the IPCC, said it was for governments to take action based on the science produced by the panel, consisting of thousands of pages of detail, drawing on the work of more than 800 scientists and hundreds of scientific papers. The scientists also put paid to claims that global warming has "stopped" because global temperatures in the past 15 years have not continued the strong upward march of the preceding years, which is a key argument put forward by sceptics to cast doubt on climate science. But the IPCC said the longer term trends were clear: "Each of the last three decades has been successively warmer at the Earth's surface than any preceding decade since 1850 in the northern hemisphere [the earliest date for reliable temperature records for the whole hemisphere]." The past 15 years were not such an unusual case, said Stocker. "People always pick 1998 but [that was] a very special year, because a strong El Niño made it unusually hot, and since then there have been some medium-sized volcanic eruptions that have cooled the climate." But he said that further research was needed on the role of the oceans, which are thought to have absorbed more than 90% of the warming so far. The scientists have faced sustained attacks from so-called sceptics, often funded by "vested interests" according to the UN, who try to pick holes in each item of evidence for climate change. The experts have always known they must make their work watertight against such an onslaught, and every conclusion made by the IPCC must pass scrutiny by all of the world's governments before it can be published. Their warning on Friday was sent out to governments around the globe, who convene and fund the IPCC. It was 1988 when scientists were first convened for this task, and in the five landmark reports since then the research has become ever clearer. Now, scientists say they are certain that "warming in the climate system is unequivocal and since 1950 many changes have been observed throughout the climate system that are unprecedented over decades to millennia." That warning, from such a sober body, hemmed in by the need to submit every statement to extraordinary levels of scrutiny, is the starkest yet. "Heatwaves are very likely to occur more frequently and last longer. As the earth warms, we expect to see currently wet regions receiving more rainfall, and dry regions receiving less, although there will be exceptions," Stocker said. Qin Dahe, also co-chair of the working group, said: "As the ocean warm, and glaciers and ice sheets reduce, global mean sea level will continue to rise, but at a faster rate than we have experienced over the past 40 years." Prof David Mackay, chief scientific adviser to the Department of Energy and Climate Change, said: "The far-reaching consequences of this warming are becoming understood, although some uncertainties remain. The most significant uncertainty, however, is how much carbon humanity will choose to put into the atmosphere in the future. It is the total sum of all our carbon emissions that will determine the impacts. We need to take action now, to maximise our chances of being faced with impacts that we, and our children, can deal with. Waiting a decade or two before taking climate change action will certainly lead to greater harm than acting now."

#### Only politically imposed solutions can stop warming

Shearman & Smith 2007

David, Emeritus professor of medicine at Adelaide University, Secretary of Doctors for the Environment Australia, and an Independent Assessor on the IPCC, Joseph Wayne, lawyer and philosopher with a research interest in environmentalism. He is the author of Global Meltdown (Praeger, 1998) and Healing in a Wounded World (Praeger, 1997), THE CLIMATE CHANGE CHALLENGE AND THE FAILURE OF DEMOCRACY, pg 71-72

In chapter 8 we ask whether authoritarian technocratic rule, by imposing necessary solutions, could arrest the earth’s ecological decline. In history there are examples of environmental decline that threatened the very nature of civilization, being reversed by determined authoritarian rule. In his analysis of societies that fail or survive, Jared Diamond38 describes the reversal of destructive deforestation in Japan by determined authoritarian rulers. In the mid-seventeenth century, Japan became peaceful, prosperous, and self-suffi cient after decades of civil war. The population and the economy exploded, greatly accelerating the cutting of timber used to build houses, castles, and ships, as a fuel for homes and industry, and as mulch for crops. The hereditary rulers, the shoguns, recognized the environmental consequences of erosion and the need to arrest the decline of a rapidly diminishing resource. They saw a threat to the very fabric of their civilization and promulgated a series of complex measures of reforestation in Japan over the subsequent 200 years. Elaborate systems of woodland management were introduced and policed by magistrates and armed guards. Forests became a commons system sustainably managed for the benefi t of each village community by issuing separate leases for each household. Guard posts on highways inspected transported timber to ensure observation of rules, and all timber was graded and allocated for specific purposes to avoid waste. The science of silviculture was born and was facilitated by uniform institutions and methods over the entire county. All this was achieved by authoritarian rule in a peaceful society. It is tempting to contrast these events with those in some liberal democracies, for example Tasmania, where all the stakeholders in the natural forests, government, industry, and workers, have united to pillage the forests against the long-term interests of the world community. What lessons can we learn from the reforestation in Japan? As Diamond points out, these visionary actions were carried out in a society that became destructive to environments outside Japan, so it was not that Confucianism influenced them. Perhaps because there was a recognition of self-interest, for timber was recognized as being of vital importance and also because the hereditary rulers recognized the importance of protecting the needs of future rulers, their offspring. This is not to say that leaders recognizing long-term stakes do not succumb to short-term profits, this having become a hallmark of the democratic leader. But it raises the question as to whether Japan’s recovery could be accomplished today under liberal democracy. Perhaps the really big decisions that are vital to the future of humanity are best imposed, and we need to look toward a form of governance that can do this. Hence our assertion that climate change will determine the future of liberal democracy. This is not to deny that bottom-up democratic management of environmental resources is unimportant in some circumstances, and Diamond cites numerous examples that have developed over time and are in use today. Interestingly they encompass microcosms of governance in small rural communities in Swiss alpine villages and in Spain and the Philippines.

#### The advantage turns the K and not the other way around- their hippy shit is impossible if we are all dead, but uniting against ecological destruction makes it more likely we can all get along later

Sherman 2007

David, Emeritus professor of medicine at Adelaide University, Secretary of Doctors for the Environment Australia, and an Independent Assessor on the IPCC; and Joseph Wayne Smith, lawyer and philosopher with a research interest in environmentalism, 2007, The Climate Change Challenge and the Failure of Democracy, p. 85-86

Our position differs from Wolff and other anarchists also insofar as we reject the principle of autonomy, the foundation belief of liberalism. It is the argument of this work that liberalism has essentially overdosed on freedom and liberty. It is true that freedom and liberty are important values, but such values are by no means fundamental or ultimate values. These values are far down the list of what we believe to be core values based upon an ecological philosophy of humanity: survival and the integrity of ecological systems. Without such values, values such as freedom and autonomy make no sense at all. If one is not living, one cannot be free. Indeed liberal freedom essentially presupposes the idea of a sustainable life for otherwise the only freedom that the liberal social world would have would be to perish in a polluted environment. The issue of values calls into question the Western view of the world or perhaps more specifically the viewpoint that originates from Anglo Saxon development. It is significant that the “clash of civilizations” thinking espoused by Samuel Huntington, a precursor of the neoconservatives, has generated much debate and support. Huntington’s analysis involves potential conflict between “Western universalism, Muslim militancy and Chinese assertion.”18 The divisions are based on cultural inheritance. It is a world in which enemies are essential for peoples seeking identity and where the most severe conflicts lie at the points where the major civilizations of the world clash. Hopefully this viewpoint will be superseded, for humanity no longer has time for the indulgence of irrational hates. The important clash will not be of civilizations but of values. The fault line cuts across all civilizations. It is a clash of values between the conservatives and the consumers. The latter are well described in this book. They rule the world economically, and their thinking excludes true care for the future of the world. The conservatives at present are a powerless polyglot of scientists, environmentalists, farming and subsistence communities, and peoples of various religious faiths, including a minority of right-wing creationists who think that God wishes the world to be cared for. They recognize the environmental perils and place their banishment as the preeminent task of humanity. The fight for minds, not liberal democracy, will determine the future of the world’s population. If conservative thought prevails it may unite humanity in common cause and heal the cultural fault lines.

### K Preempts

#### Literal implications of plan implementation are also key to create effective frameworks for solving conflict

Leahy 10 (Mary-Kate Leahy, Colonel, US military, “KEEPING UP WITH THE DRONES: IS JUST WAR THEORY OBSOLETE?,” http://www.dtic.mil/dtic/tr/fulltext/u2/a526187.pdf)

Failure to examine whether the laws of war remain relevant or should be modified is dangerous. If we delay or indefinitely defer this discussion the risks associated with this procrastination will continue to accumulate. Without broad agreement on the fundamental issue of who is a legal combatant, ordinary civilians who develop this technology and elected leaders who approve its employment potentially become targets at home and abroad. As the operators of weapon systems become more distant from the physical battlefield, the killing process is “sanitized”; UAS operators‟ exemption from physical danger creates a scenario in which “virtueless” war becomes the norm. In such an environment, the warrior ethos is potentially forever altered – and not for the good. Another risk we face if employment of this technology proceeds unchecked and its moral implications unexamined, is the arrival of the day when a “human in the loop” in UAS employment becomes unnecessary. If that day arrives, the principle of proportionality is irrelevant – because human assessment of the cost versus benefit decision regarding a military strike will have been eliminated. These are just a few of the eventualities which await us if we fail to adequately address how UAS changes the conduct of modern warfare. The seriousness of these issues makes this an issue of strategic importance for the United States, as well as both our friends and our adversaries around the globe.

#### Legal restraints work---exception theory is self-serving and wrong

William E. Scheuerman 6, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: Schmitt occasionally wants to define “political” conflicts as those irresolvable by legal or juridical devices in order then to argue against legal or juridical solutions to them. The claim also suffers from a certain vagueness and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, legal devices have undoubtedly played a positive role in taming or at least minimizing the potential dangers of harsh political antagonisms. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22¶ Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.¶ This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, it is by no means self-evident that trying to give coherent legal form to a transitional political and social moment is always doomed to fail. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, the general trend towards extending basic protections to non-state actors is plausibly interpreted in a more positive – and by no means incoherent – light.24¶ Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).¶ As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet one possible resolution of the dilemma he describes would be to figure how to reform the process whereby rules of war are adapted to novel changes in military affairs in order to minimize the danger of anachronistic or out-of-date law. Instead, Schmitt simply employs the dilemma of legal obsolescence as a battering ram against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

#### Executive officials admit that Judicial review can effectively restrain them

Jaffer, Director-ACLU Center for Democracy, 13 (Jameel Jaffer, Director of the ACLU's Center for Democracy, “Judicial Review of Targeted Killings,” 126 Harv. L. Rev. F. 185 (2013), 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.

#### Epistemology is irrelevant; empirical reasoning is inevitable and explanatory; evaluate the substance of the plan vs alt

Houghton 6 (David, Professor of Political Science, University of Central Florida, “Positivism "'Versus" Postmodernism: Does Epsitemology Make a Difference?,” http://citation.allacademic.com//meta/p\_mla\_apa\_research\_citation/0/6/9/1/1/pages69111/p69111-1.php)

As noted earlier, James Der Derian believes that positivists have sought to create “a transcendental, privileged space to make truth-claims about international relations” and Ashley and Walker talk of the same group “pretend[ing] to project an originary word of truth and power beyond doubt” (Der Derian, 1990, 297; Ashley and Walker, 1990, 265- 266). And yet mainstream theorists do not “check their brains at the door” when they think about international relations; it is very hard to find a published statement by any contemporary scholar of IR that he or she has 'discovered objective truth', and no postmodernist has yet provided a concrete quote from a major theorist of international relations that would support their claims to the contrary. In fact, it is rather doubtful whether such a quote can be found, since as Kal Holsti notes “the limitations of the strict positivist position have been acknowledged” by contemporary scholars (Holsti, 1989, 260). Perceptions of reality are inevitable going to be subjective to some degree. Nowadays, even the most arrogant international relations scholars – and there are surely many in the field, as there are in all walks of life – only ever claim to have arrived at a viewpoint which they personally believe to be correct and in accordance with the available empirical evidence. Hence postmodernists set up a straw man when they claim to be arguing against a dominant orthodoxy of ‘objective truth knowers’. No such orthodoxy exists, not least because doubt and contingency play too central a role in politics for anyone sane to think in such a way. No doubt all mainstream theorists who take a strong position in the realist-liberal debate, for instance, believe (in some cases quite forcefully) in their own theories, but it is hard to think of any major figure in the field who takes the position that he has ‘found objective truth’, not least because IR scholars have yet to find any convincing empirical mechanism for demonstrating the accuracy of their theories beyond reasonable doubt. In this respect, the mainstream scholars do not differ markedly from postmodernists: both make claims about the world which they personally believe to be true and think that they can convince others are true, but at the same time they recognize the contingency of their positions. James Der Derian is in this sense indistinguishable from Kenneth Waltz, David Campbell from Robert Keohane.

It would be wrong to claim that all postmodernists are nothing more than positivists in disguise; they begin from different philosophical assumptions and study phenomena in which mainstream theorists have usually expressed only a fleeting interest. But as soon as one begins to make statements about how the world is, or how we think it is, we are engaging in an empirical (if not empiricist) exercise and making claims which are effectively identical in kind (though not usually in substance) to those made by mainstream scholars. What we can say is that postmodernists sometimes make their empirical and epistemological claims with more recognition of their subjectivity and contingency, or aspire to do this. But even if one concedes the argument that postmodernists ‘believe in’ their arguments less strongly than do positivists, it is rather questionable what difference this makes. Were Robert Keohane to declare himself a postmodernist tomorrow and hedge his arguments about the significance of international institutions around with great tentativity and reservations, would he not be making the same substantive argument? Or supposing that James Der Derian became a positivist overnight and asserted that his claims about the significance of simulation in world politics can be demonstrated more or less objectively, would this alter their content? Even if these two miracle counterfactuals were in fact to come to fruition, there is good reason to doubt whether the substantive theoretical debate between different paradigms would be altered in any significant way.

Discussions of the role of subjectivity by postmodernists in our understanding of the world do not significantly advance us beyond a point we have already reached. To return to the threefold definition of positivism given at the outset, postmodernist research makes anti- objectivist, anti-naturalist and anti-empiricist claims, but cannot avoid using empirical evidence to illustrate explanatory truth claims - and hence being explanatory in nature. Empiricism is the central and most important feature of positivism; indeed, the two terms are so closely related that they are often used interchangeably. While postmodernist research in international relations has been post-positivist in aspiration – disputing objectivism, empiricism and naturalism as principles – in practice it has not managed to escape the empirical focus of mainstream, positivist IR. In this sense, one might doubt whether there exists such a thing as a genuinely ‘postpositivist’ argument.

There is a growing recognition of this in mainstream IR. Responding to Roxanne Doty’s critique of his book Social Theory of International Politics, Alexander Wendt makes the following comments “Having been a classmate of hers in graduate school I am not surprised that Roxanne Doty believes her cats exist … To my knowledge not even the most hardened postmodernists have explicitly denied that objects of everyday existence exist. Given this agreement on at least a ‘commonsense realism’, however, it is instructive to consider how Doty knows her cats exist” (Wendt, 2000, 172)

Wendt speculates that Doty knows this because she believes the evidence of her own eyes and her own experience: “this reasoning reproduces, in a lay science context, exactly what a positivist would say about professional science: she has used empirical observations and instrumental success to test the correspondence, the truth, of her theory of cats against the world” (Wendt, 2000, 173). Although most mainstream IR scholars would if pushed describe themselves as positivist or at least empiricist, conventional IR theory has long been content to live with a variety of vague and abstract concepts which cannot be directly observed or measured, such as ‘the state’, the ‘international system’, ‘international structures’, ‘interdependence’, ‘globalization’, the ‘balance of power’, the ‘national interest’ and so on. As Michael Nicholson suggests, IR theory has always been characterized by a kind of relaxed and non-dogmatic version of positivism, since there was never any real alternative to this (Nicholson, 1996). It remains for postmodernists to clearly articulate what a genuinely postpositivist epistemology would or should look like.

As long ago as 1981, Yale Ferguson and Richard Mansbach effectively laid the influence of the dogmatic behaviouralism of the 1960s to rest in their book The Elusive Quest, signaling the profound disillusionment of mainstream IR with the idea that a cumulative science of international relations would ever be possible (Ferguson and Mansbach, 1988). The popularity of the ‘naïve’ form of positivism, wed to a view of inexorable scientific progress and supposedly practiced by wide-eyed scholars during the 1960s, has long been a thing of the past. Postmodernists hence do the discipline something of an injustice when they continue to attack the overly optimistic and dogmatic form of positivism as if it still represented a dominant orthodoxy which must somehow be overthrown.

Equally, supporters of the contemporary or 'neo-' version of positivism perform a similar disservice when they fail to articulate their epistemological assumptions clearly or at all. Indeed, the first error is greatly encouraged by the second, since by failing to state what they stand for, neo-positivists have allowed postmodernists to fashion a series of straw men which burn rapidly at the slightest touch. Articulating a full list of these assumptions lies beyond the scope of this article, but contemporary neo-positivists are, I would suggest, committed to the following five assumptions, none of which are especially radical or hard to defend: (1) that explaining and/or understanding the social and political world ought to be our central objective; (2) that - subjective though our perceptions of the world may be - many features of the political world are at least potentially explainable. What remains is a conviction that there are at least some empirical propositions which can be demonstrably shown to be ‘true’ or ‘false’, some underlying regularities which clearly give shape to international relations (such as the proposition that democracies do not fight one another); (3) that careful use of appropriate methodological techniques can establish what patterns exist in the political world, even if these patterns are ultimately transitory and historically contingent; (4) that positive and normative questions, though related, are ultimately separable, though both constitute valid and interesting forms of enquiry. There is also a general conviction (5) that careful use of research design may help researchers avoid logical pitfalls in their work. Doubtless, there are some who would not wish to use the term 'positivism' as an umbrella term for these five assumptions, in which case we probably require a new term to cover them. But to the extent that there exists an 'orthodoxy' in the field of International Relations today, this is surely it.

Writing in 1989, Thomas Biersteker noted that “the vast majority of scholarship in international relations (and the social sciences for that matter) proceeds without conscious reflection on its philosophical bases or premises. In professional meetings, lectures, seminars and the design of curricula, we do not often engage in serious reflection on the philosophical bases or implications of our activity. Too often, consideration of these core issues is reserved for (and largely forgotten after) the introductory weeks of required concepts and methods courses, as we socialize students into the profession” (Biersteker, 1989). This observation – while accurate at the time – would surely be deemed incorrect were it to be made today. Even some scholars who profess regret at the philosophically self-regarding nature of contemporary of IR theory nevertheless feel compelled to devote huge chunks of their work to epistemological issues before getting to more substantive matters (see for instance Wendt, 1999). The recent emphasis on epistemology has helped to push IR as a discipline further and further away from the concerns of those who actually practice international relations. The consequent decline in the policy relevance of what we do, and our retreat into philosophical self-doubt, is ironic given the roots of the field in very practical political concerns (most notably, how to avoid war).

What I am suggesting is not that international relations scholars should ignore philosophical questions, or that such ‘navel gazing’ is always unproductive, for questions of epistemology surely undergird every vision of international relations that ever existed. Rather, I would suggest that the existing debate is sterile and unproductive in the sense that the various schools of thought have much more in common than they suppose; stated more specifically, postpositivists have much more in common than they would like to think with the positivists they seek to condemn. Consequently, to the extent that there is a meaningful dialogue going on with regard to epistemological questions, it has no real impact on what we do as scholars when we look at the world ‘out there’. Rather than focusing on epistemology, it is inevitably going to be more fruitful to subject the substantive or ontological claims made by positivists (of all metatheoretical stripes) and postpositivists to the cold light of day. Substantive theoretical and empirical claims, rather than ultimately unresolvable disputes about the foundations of knowledge, ought to be what divide the community of international relations scholars today.

#### General claims don’t take out our specifics---put policy before their prior questions to avoid paralysis

Owen 2002

David Owen, Reader of Political Theory at the Univ. of Southampton, Millennium Vol 31 No 3 2002 p. 655-7

Commenting on the ‘philosophical turn’ in IR, Wæver remarks that ‘[a] frenzy for words like “epistemology” and “ontology” often signals this philosophical turn’, although he goes on to comment that these terms are often used loosely.4 However, loosely deployed or not, it is clear that debates concerning ontology and epistemology play a central role in the contemporary IR theory wars. In one respect, this is unsurprising since it is a characteristic feature of the social sciences that periods of disciplinary disorientation involve recourse to reflection on the philosophical commitments of different theoretical approaches, and there is no doubt that such reflection can play a valuable role in making explicit the commitments that characterise (and help individuate) diverse theoretical positions. Yet, such a philosophical turn is not without its dangers and I will briefly mention three before turning to consider a confusion that has, I will suggest, helped to promote the IR theory wars by motivating this philosophical turn. The first danger with the philosophical turn is that it has an inbuilt tendency to prioritise issues of ontology and epistemology over explanatory and/or interpretive power as if the latter two were merely a simple function of the former. But while the explanatory and/or interpretive power of a theoretical account is not wholly independent of its ontological and/or epistemological commitments (otherwise criticism of these features would not be a criticism that had any value), it is by no means clear that it is, in contrast, wholly dependent on these philosophical commitments. Thus, for example, one need not be sympathetic to rational choice theory to recognise that it can provide powerful accounts of certain kinds of problems, such as the tragedy of the commons in which dilemmas of collective action are foregrounded. It may, of course, be the case that the advocates of rational choice theory cannot give a good account of why this type of theory is powerful in accounting for this class of problems (i.e., how it is that the relevant actors come to exhibit features in these circumstances that approximate the assumptions of rational choice theory) and, if this is the case, it is a philosophical weakness—but this does not undermine the point that, for a certain class of problems, rational choice theory may provide the best account available to us. In other words, while the critical judgement of theoretical accounts in terms of their ontological and/or epistemological sophistication is one kind of critical judgement, it is not the only or even necessarily the most important kind. The second danger run by the philosophical turn is that because prioritisation of ontology and epistemology promotes theory-construction from philosophical first principles, it cultivates a theory-driven rather than problem-driven approach to IR. Paraphrasing Ian Shapiro, the point can be put like this: since it is the case that there is always a plurality of possible true descriptions of a given action, event or phenomenon, the challenge is to decide which is the most apt in terms of getting a perspicuous grip on the action, event or phenomenon in question given the purposes of the inquiry; yet, from this standpoint, ‘theory-driven work is part of a reductionist program’ in that it ‘dictates always opting for the description that calls for the explanation that flows from the preferred model or theory’.5 The justification offered for this strategy rests on the mistaken belief that it is necessary for social science because general explanations are required to characterise the classes of phenomena studied in similar terms. However, as Shapiro points out, this is to misunderstand the enterprise of science since ‘whether there are general explanations for classes of phenomena is a question for social-scientific inquiry, not to be prejudged before conducting that inquiry’.6 Moreover, this strategy easily slips into the promotion of the pursuit of generality over that of empirical validity. The third danger is that the preceding two combine to encourage the formation of a particular image of disciplinary debate in IR—what might be called (only slightly tongue in cheek) ‘the Highlander view’—namely, an image of warring theoretical approaches with each, despite occasional temporary tactical alliances, dedicated to the strategic achievement of sovereignty over the disciplinary field. It encourages this view because the turn to, and prioritisation of, ontology and epistemology stimulates the idea that there can only be one theoretical approach which gets things right, namely, the theoretical approach that gets its ontology and epistemology right. This image feeds back into IR exacerbating the first and second dangers, and so a potentially vicious circle arises.

# \*\*\*2AC

## \*\*\*Case

### 2AC A2: budget Cuts

#### NATO solving budget cuts now with smart defense and connected forces programs

Eide 2/11/13 (Barth, defense minister of Norway, “Closing the gap: Keeping NATO strong in an era of austerity” <http://www.nato.int/cps/en/SID-21281BCB-2C102202/natolive/opinions_98350.htm?selectedLocale=en>)

The good news is that we already have a solid conceptual basis for keeping NATO strong. At our Summit in Lisbon two and a half years ago, we adopted a new Strategic Concept for our Alliance. It describes the risks and threats that we are up against. And it highlights three essential core tasks to meet the Allies’ individual and shared interests – collective defence, crisis management, and cooperative security. But in order to carry out these tasks successfully, we need the right forces and the right capabilities. And at a time of financial difficulties for many of our nations, acquiring those forces and capabilities has become a formidable challenge. At our most recent NATO Summit in Chicago last May, our Heads of State and Government set the goal of “NATO Forces 2020”: modern, tightly connected forces that are equipped, trained, exercised and commanded so that they can operate, together with other allies – and with partners – in any environment. To help us reach this goal, we also agreed at Chicago to pursue two separate initiatives: Connected Forces and Smart Defence. Smart Defence is meant to be a new guiding principle for capability development. The aim here is to encourage multinational solutions to both maintaining and acquiring defence capabilities – in other words, nations working together to deliver capabilities that they cannot afford alone. Connected Forces has garnered fewer headlines, but it’s just as important as Smart Defence. Its objective is to maintain and strengthen the readiness and interoperability of our forces, even as our operations draw down. We will place a greater emphasis on NATO-led training and exercises, taking into account the specific regional knowledge and expertise of countries, including that of Norway and its Nordic neighbours. We also want to make better use of computer-assisted training and simulation. And we will take advantage of the U.S. offer to rotate elements of a U.S.-based combat brigade to Europe on an annual basis for exercises that can help turn the NATO Response Force into an effective, deployable capability, one that has experience operating in different environments and addressing different scenarios. (In this regard, I applaud Norway’s efforts to focus NATO’s military command structure on the unique strategic challenges in this and other regions of the Alliance, rather than taking a one-size-fits-all approach.) We are off to a good start in implementing both Smart Defence and the Connected Forces Initiative. But it is vital that we maintain the momentum. Our Libya operation two years ago demonstrated that European Allies and Canada can take the lead in NATO-led combat operations – and Norway’s air force performed brilliantly. But Libya also confirmed the Alliance’s over-reliance on some critical U.S. capabilities, especially strategic enablers like Intelligence, Surveillance and Reconnaissance, and air-to-air refuelling. This transatlantic capability gap is simply not sustainable in the long term. First, the fiscal crisis has hit the United States as well, and it will be cutting defence expenditure in the coming years (although hopefully avoiding the meat-axe cuts required by “sequestration”). The U.S. also has a revised defence strategy that shifts the emphasis of its force posture from Europe to the Middle East and the Asia-Pacific region.

### 2AC A2: PQD Doesn’t Exist

Goldstein 9/18/13

Samantha Goldstein, JD from Harvard, National Security Law Review, September 18, 2013, Vol. 2, Issue 2, "The Real Meaning of Zivotofsky", http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2327411

d. Nevertheless, Post-Zivotofsky, Lower Courts Are Unlikely to Ignore the Prudential Approach to the Political Question Doctrine.

Zivotofsky’s relatively weak pro-justiciability signal is unlikely to tangibly affect the lower federal courts’ approach to the political question doctrine, where most political question cases are decided.106 On the one hand, the case seems to be having a modest impact: at least some litigants and lower courts have begun citing only the first two, classical factors from Baker.107 Lower courts more zealously apply the political question doctrine – that is, they are more likely to find cases non-justiciable – than is the Supreme Court.108 And, the political question doctrine has “become an increasingly prominent defense in post-September 11 national security cases.”109 Viewed against that backdrop, one might understand Zivotofsky as sending a responsive signal to the lower courts that they should resolve skirmishes between the political branches, even in the context of foreign affairs.110

Yet, given the prevalence of the doctrine in the lower courts, it seems more likely that the relatively weak signal in Zivotofsky will not have that much of an impact there after all. Certainly, there is reason to be skeptical about the likely impact of Zivotofsky. One district court asserted that the case in no way altered existing doctrine.111 And another cited Justice Breyer’s Zivotofsky dissent for the proposition that the political branches have indefatigable primacy over the judiciary in matters relating to foreign affairs.112 Moreover, several district court cases and appellate briefs have cited Justice Sotomayor’s concurrence (which emphasizes the need to apply all six Baker factors), rather than the majority’s opinion (which only references Baker’s two classical factors).113 Other district court cases exhibit even more confusion about the scope of the political question doctrine in the wake of Zivotofsky, namely by citing Zivotofsky’s majority opinion to support the two Baker factors it mentioned, yet then applying all six Baker factors.114 Litigants – though perhaps (if not most likely) doing so opportunistically – have asserted confusion in the doctrine too.115

### 2AC A2: Pakistan

#### U.S paternalism won’t escalate

**Gray 7**—Director of the Centre for Strategic Studies and Professor of International Relations and Strategic Studies at the University of Reading, graduate of the Universities of Manchester and Oxford, Founder and Senior Associate to the National Institute for Public Policy, formerly with the International Institute for Strategic Studies and the Hudson Institute (Colin, July, “The Implications of Preemptive and Preventive War Doctrines: A Reconsideration”, <http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf>)

7. A policy that favors preventive warfare expresses a futile quest for absolute security. It could do so. Most controversial policies contain within them the possibility of misuse. In the hands of a paranoid or boundlessly ambitious political leader, prevention could be a policy for endless warfare. However, the American political system, with its checks and balances, was designed explicitly for the purpose of constraining the executive from excessive folly. Both the Vietnam and the contemporary Iraqi experiences reveal clearly that although the conduct of war is an executive prerogative, in practice that authority is disciplined by public attitudes. Clausewitz made this point superbly with his designation of the passion, the sentiments, of the people as a vital component of his trinitarian theory of war. 51 It is true to claim that power can be, and indeed is often, abused, both personally and nationally. It is possible that a state could acquire a taste for the apparent swift decisiveness of preventive warfare and overuse the option. One might argue that the easy success achieved against Taliban Afghanistan in 2001, provided fuel for the urge to seek a similarly rapid success against Saddam Hussein’s Iraq. In other words, the delights of military success can be habit forming. On balance, claim seven is not persuasive, though it certainly contains a germ of truth. A country with unmatched wealth and power, unused to physical insecurity at home—notwithstanding 42 years of nuclear danger, and a high level of gun crime—is vulnerable to demands for policies that supposedly can restore security. But we ought not to endorse the argument that the United States should eschew the preventive war option because it could lead to a futile, endless search for absolute security. One might as well argue that the United States should adopt a defense policy and develop capabilities shaped strictly for homeland security approached in a narrowly geographical sense. Since a president might misuse a military instrument that had a global reach, why not deny the White House even the possibility of such misuse? In other words, constrain policy ends by limiting policy’s military means. This argument has circulated for many decades and, it must be admitted, it does have a certain elementary logic. It is the opinion of this enquiry, however, that the claim that a policy which includes the preventive option might lead to a search for total security is **not at all convincing**. Of course, folly in high places is always possible, which is one of the many reasons why popular democracy is the superior form of government. It would be absurd to permit the fear of a futile and dangerous quest for absolute security to preclude prevention as a policy option. Despite its absurdity, this rhetorical charge against prevention is a stock favorite among prevention’s critics. It should be recognized and dismissed for what it is, a debating point with little pragmatic merit. And strategy, though not always policy, **must be nothing if not pragmatic**.

## \*\*\*Offcase

### 2AC Kritik

#### The debate should center on literal implementation of technical solutions – only way to resolve conflicts that are facilitated by manipulation of legal codes – that’s Leahy – it’s also key to fairness because it checks infinite negative frameworks and is grounded in the mandates of the resolution which is the most predictable.

#### Epistemological considerations are irrelevant – 1AC Houghton says that explanations of truth claims are relativistic and although nothing is perfect, specificity in explanation can help determine scenarios and solutions for issues in international relations

#### political engagement key

Hoffman, 86 [Stanley, Center for European Studies at Harvard, “On the Political Psychology of Peace and War: A Critique and an Agenda,” Political Psychology 7.1 JSTOR]

The traditionalists, even when, in their own work, they try scrupulous-ly to transcend national prejudices and to seek scientific truth, believe that it is unrealistic to expect statesmen to stand above the fray: By definition, the statesmen are there to worry not only about planetary survival, but — first of all—about national survival and safety. To be sure, they ought to be able to see how certain policies, aimed at enhancing security, actually increase in-security all around. But there are sharp limits to how far they can go in their mutual empathy or in their acts (unlike intellectuals in their advice), as long as the states' antagonisms persist, as long as uncertainty about each other's intentions prevails, and as long as there is reason to fear that one side's wise restraint, or unilateral moves toward "sanity," will be met, not by the rival's similar restraint or moves, but either by swift or skillful political or military exploitation of the opportunity created for unilateral gain, or by a for-midable domestic backlash if national self-restraint appears to result in ex-ternal losses, humiliations or perceptions of weakness. There is little point in saying that the state of affairs which imposes such limits is "anachronistic" or "unrational." To traditionalists, the radicals' stance — condemnation from the top of Mount Olympus — can only impede understanding of the limits and possibilities of reform. To be sure, the fragmentation of mankind is a formidable obstacle to the solution of many problems that cannot be handled well in a national framework, and a deadly peril insofar as the use of force, the very distinctive feature of world politics, now entails the risk of nuclear war. But one can hardly call anachronistic a phenomenon—the assertion of national identity — that, to the bulk of [HU]mankind, appears not only as a necessity but also as a positive good, since humanity's fragmentation results from the very aspiration to self-determination. Many people have only recently emerged from foreign mastery, and have reason to fear that the alternative to national self-mastery is not a world government of assured fairness and efficiency, but alien domination. As for "unrationality," the drama lies in the contrast between the ra-tionality of the whole, which scholars are concerned about—the greatest good of the greatest number, in utilitarian terms — and the rationality or greatest good of the part, which is what statesmen worry about and are responsible for. What the radicals denounce as irrational and irresponsible from the viewpoint of mankind is what Weber called the statesman's ethic of responsibility. What keeps ordinary "competitive conflict processes" (Deutsch, 1983)— the very stuff of society — from becoming "unrational" or destructive, isprecisely what the nature of world politics excludes: the restraint of the partners either because of the ties of affection or responsibility that mitigate the conflict, or because of the existence of an outsider — marriage counselor, arbitrator, judge, policeman or legislator— capable of inducing or imposing restraints. Here we come to a third point of difference. The very absence of such safeguards of rationality, the obvious discrepancy between what each part intends, and what it (and the whole world) ends with, the crudeness of some of the psychological mechanisms at work in international affairs—as one can see from the statements of leaders, or from the media, or from inflamed publics—have led many radicals, especially among those whose training or profession is in psychoanalysis or mental health, to treat the age-old contests of states in terms, not of the psychology of politics, but of individual psychology and pathology. There are two manifestations of this. One is the tendency to look at nations or states as individuals writ large, stuck at an early stage of development (similarly, John Mack (1985) in a recent paper talks of political ideologies as carrying "forward the dichotomized structures of childhood"). One of my predecessors writes about "the correspondence between development of the individual self and that of the group or nation," and concludes "that intergroup or international conflict contains the basic elements of the conflict each individual experiences psychologically" (Volkan, 1985). Robert Holt, from the viewpoint of cognitive psychology, finds "the largest part of the American public" immature, in a "phase of development below the Conscientious" (Holt, 1984). The second related aspect is the tendency to look at the notions statesmen or publics have of "the enemy," not only as residues of childhood or adolescent phases of development, but as images that express "disavowed aspects of the self" (Stein, 1985), reveal truths about our own fears and hatreds, and amount to masks we put on the "enemy," because of our own psychological needs. Here is where the clash between traditionalists and radicals is strongest. Traditionalists do not accept a view of group life derived from the study of individual development or family relations, or a view of modern society derived from the simplistic Freudian model of regressed followers identifying with a leader. They don't see in ideologies just irra-tional constructs, but often rationally selected maps allowing individuals to cope with reality. They don't see national identification as pathological, as an appeal to the people's baser instincts, more aggressive impulses or un-sophisticated mental defenses; it is, as Jean-Jacques Rousseau so well understood, the competition of sovereign states that frequently pushes people from "sane" patriotism to "insane" nationalism (Rousseau's way of preventing the former from veering into the latter was, to say the least, im-practical: to remain poor in isolation). Nor do they see anything "primitive" in the nation's concern for survival: It is a moral and structural requirement. Traditionalists also believe that the "intra-psychic" approach distorts reality. Enemies are not mere projections of negative identities; they are often quite real. To be sure, the Nazis' view of the Jews fits the metaphor of the mask put on the enemy for one's own needs. But were, in return, those Jews who understood what enemies they had in the Nazis, doing the same? Is the Soviet domination of Eastern Europe, is the Soviet regime's treatment of dissidents, was the Gulag merely a convenient projection of our intrapsychic battles? Clichés such as the one about how our enemy "understands only force" may tell us a great deal about ourselves; but sometimes they contain half-truths about him, and not just revelations about us. Our fears flow not only from our private fantasies but also from concrete realities and from the fantasies which the international state of nature generates. In other words, the psychology of politics which traditionalists deem adequate is not derived from theories of psychic development and health; it is derived from the logic of the international milieu, which breeds the kind of vocabulary found in the historians and theorists of the state of nature: fear and power, pride and honor, survival and security, self-interest and reputation, distrust and misunderstanding, commitment and credibility. It is also derived from the social psychology of small or large groups, which resorts to the standard psychological vocabulary that describes mental mechanisms or maneuvers and cognitive processes: denial, projection, guilt, repression, closure, rigidity, etc.... But using this vocabulary does not imply that a group whose style of politics is paranoid is therefore composed of people who, as private individuals, are paranoid. Nor does it relieve us of the duty to look at the objective reasons and functions of these mental moves, and of the duty to make explicit our assumptions about what constitutes a "healthy," wise, or proper social process. Altogether, traditionalists find the mental health approach to world affairs unhelpful. Decisions about war and peace are usually taken by small groups of people; the temptation of analyzing their behavior either, literal-ly, in terms of their personalities, or, metaphysically, in terms borrowed from the study of human development, rather than in those of group dynamics or principles of international politics is understandable. But it is misleading. What is pathological in couples, or in a well-ordered community, is, alas, frequent, indeed normal, among states, or in a troubled state. What is malignant or crazy is usually not the actors or the social process in which they are engaged: it is the possible results. The grammar of motives which the mental health approach brands as primitive or immature is actually rational for the actors. to the substitution of labels for explanations, to bad analysis and fanciful prescriptions. Bad analysis: the tendency to see in group coherence a regressive response to a threat, whereas it often is a rational response to the "existential" threats entailed by the very nature of the international milieu. Or the tendency to see in the effacement or minimization of individual differences in a group a release of unconscious instincts, rather than a phenomenon that can be perfectly adaptive—in response to stress or threats—or result from governmental manipulation or originate in the code of conduct inculcated by the educational system, etc.. . The habit of comparing the state, or modern society, with the Church or the army, and to analyze human relations in these institutions in ways that stress the libidinal more than the cognitive and superego factors, or equate libidinal bonds and the desire for a leader. The view that enemies are above all products of mental drives, rather than inevitable concomitants of social strife at every level. Or the view that the contest with the rival fulfills inter-nal needs, which may be true, but requires careful examination of the nature of these needs (psychological? bureaucratic? economic?), obscures the objective reasons of the contest, and risks confusing cause and function. Indeed, such analysis is particularly misleading in dealing with the pre-sent scene. The radicals are so (justifiably) concerned with the nuclear peril that the traditional ways in which statesmen and publics behave seem to vindicate the pathological approach. But this, in turn, incites radicals to overlook the fundamental ambiguity of contemporary world politics. On the one hand, there is a nuclear revolution—the capacity for total destruction. On the other hand, many states, without nuclear weapons, find that the use of force remains rational (in terms of a rationality of means) and beneficial at home or abroad—ask the Vietnamese, or the Egyptians after October 1973, or Mrs. Thatcher after the Falklands, or Ronald Reagan after Grenada. The superpowers themselves, whose contest has not been abolished by the nuclear revolution (it is the stakes, the costs of failure that have, of course, been transformed), find that much of their rivalry can be conducted in traditional ways — including limited uses of force —below the level of nuclear alarm. They also find that nuclear weapons, while—perhapsunusable rationally, can usefully strengthen the very process that has been so faulty in the prenuclear ages: deterrence (this is one of the reasons for nuclear proliferation). The pathological approach interprets deterrence as expressing the deterrer's belief that his country is good, the enemy's is bad. This is often the case, but it need not be; it can also reflect the conviction that one's country has interests that are not mere figments of the imagination, and need to be protected both because of the material costs of losing them, and because of the values embedded in them. As for war planning, it is not a case of "psychological denial of unwelcome reality" (Montville, 1985). but a — perhaps futile, perhaps dangerous—necessity in a world where deterrence may once more fail. The prescriptions that result from the radicals' psychological approach also run into traditionalist objections. Even if one accepts the metaphors of collective disease or pathology, one must understand that the "cure" can only be provided by politics. All too often, the radicals' cures consist of perfectly sensible recommendations for lowering tensions, but fail to tell us how to get them carried out —they only tell us how much better the world would be, if only "such rules could be established" (Deutsch, 1983). Sometimes, they express generous aspirations — for common or mutual security—without much awareness of the obstacles which conflict-ing interests, fears about allies or clients, and the nature of the weapons themselves, continue to erect. Sometimes, they too neglect the ambiguity of life in a nuclear world: The much lamented redundancy of weapons, a calamity if nuclear deterrence fails, can also be a cushion against failure. Finally, many of the remedies offered are based on an admirable liberal model of personality and politics: the ideal of the mature, well-adjusted, open-minded person (produced by liberal education and healthy family relations) transposed on the political level, and thus accompanied by the triumph of democracy in the community, by the elimination of militarism and the spread of functional cooperation abroad. But three obstacles remain unconquered: first, a major part of the world rejects this ideal and keeps itself closed to it (many of the radicals seem to deny it, or to ignore it, or to believe it doesn't matter). Second, the record shows that real democracies, in their behavior toward non-democratic or less "advanced" societies, do not conform to the happy model (think of the US in Central America). Third, the task of reform, both of the publics and of the statesmen, through consciousness raising and education is hopelessly huge, incapable of being pursued equally in all the important states, and — indeed — too slow if one accepts the idea of a mortal nuclear peril. These, then, are the dimensions of a split that should not be minimized or denied

#### Fear of death prevents extinction --- Recognition of life’s finitude generates value and a self-reflexive anxiety that precludes the blind policymaking described by their turns.

Beres 1996

Louis Rene, PhD Princeton, “No Fear, No Trembling Israel, Death and the Meaning of Anxiety,” www.freeman.org/m\_online/feb96/beresn.htm

Fear of death, the ultimate source of anxiety, is essential to human survival. This is true not only for individuals, but also for states. Without such fear, states will exhibit an incapacity to confront nonbeing that can hasten their disappearance. So it is today with the State of Israel. Israel suffers acutely from insufficient existential dread. Refusing to tremble before the growing prospect of collective disintegration - a forseeable prospect connected with both genocide and war - this state is now unable to take the necessary steps toward collective survival. What is more, because death is the one fact of life which is not relative but absolute, Israel's blithe unawareness of its national mortality deprives its still living days of essential absoluteness and growth. For states, just as for individuals, confronting death can give the most positive reality to life itself. In this respect, a cultivated awareness of nonbeing is central to each state's pattern of potentialities as well as to its very existence. When a state chooses to block off such an awareness, a choice currently made by the State of Israel, it loses, possibly forever, the altogether critical benefits of "anxiety." There is, of course, a distinctly ironic resonance to this argument. Anxiety, after all, is generally taken as a negative, as a liability that cripples rather than enhances life. But anxiety is not something we "have." It is something we (states and individuals) "are." It is true, to be sure, that anxiety, at the onset of psychosis, can lead individuals to experience literally the threat of self-dissolution, but this is, by definition, not a problem for states. Anxiety stems from the awareness that existence can actually be destroyed, that one can actually become nothing. An ontological characteristic, it has been commonly called Angst, a word related to anguish (which comes from the Latin angustus, "narrow," which in turn comes from angere, "to choke.") Herein lies the relevant idea of birth trauma as the prototype of all anxiety, as "pain in narrows" through the "choking" straits of birth. Kierkegaard identified anxiety as "the dizziness of freedom," adding: "Anxiety is the reality of freedom as a potentiality before this freedom has materialized." This brings us back to Israel. Both individuals and states may surrender freedom in the hope of ridding themselves of an unbearable anxiety. Regarding states, such surrender can lead to a rampant and delirious collectivism which stamps out all political opposition. It can also lead to a national self-delusion which augments enemy power and hastens catastrophic war. For the Jewish State, a lack of pertinent anxiety, of the positive aspect of Angst, has already led its people to what is likely an irreversible rendezvous with extinction.

#### The plans reform matters---the alts dismissal is a pretext for more conservative national security policies

Cole 10 (David Cole is a professor at Georgetown University Law Center, “Breaking Away,” http://www.newrepublic.com/article/magazine/politics/79752/breaking-away-obama-bush-aclu-guantanamo-war-on-terror)

To dismiss the changes Obama has introduced as merely rhetorical, however, as Goldsmith and others have done, is to miss the critical difference between lawless and law-abiding exercises of state power. The Constitution, domestic law, and international law permit democracies to take aggressive action to defend themselves against attacks like the ones we suffered on September 11. But they insist that when the state employs coercion to achieve security, it must abide by rules designed to forestall government abuse and respect human rights. Bush blatantly disregarded this principle; Obama has embraced it. It is true that, by the end of his term, Bush had been compelled to curtail his most aggressive assertions of power. Waterboarding was out, many of the disappeared prisoners had been transferred to Guantánamo and identified, the military commissions had been improved, and courts were reviewing Guantánamo detentions. But Bush adopted these changes grudgingly, after losing before the courts, Congress, and public opinion. And as the declassified torture memos illustrate, his administration continued to obstinately reinterpret the laws against torture and cruel, inhuman, and degrading treatment in order to permit the CIA to do precisely what Congress, the courts, and international law had forbade. By contrast, Obama has willingly accepted the limits of law. Critics on all sides undermine their credibility if they fail to acknowledge the significant differences between Obama and Bush. Liberals risk sounding as if no national security policy short of ordinary criminal law enforcement will suffice, while conservatives and moderates appear tone-deaf to the difference that the rule of law makes to the legitimacy of state power. For both advocates of civil liberties and defenders of Bush, it is tempting to accuse the Obama administration of being no better than its predecessor. But if we fail to recognize the changes he has instituted, we run the risk of contributing to a misleading historical narrative that will support future presidents who might choose to repeat Bush’s errors. On issues of executive power, history can play an important role. Even if Obama himself is unlikely to unleash the tactics of the previous administration, a future president might justify doing so by pointing to the fact that observers from across the political spectrum agreed that both Bush and Obama had embraced the same policy. There are, however, two areas in which Obama has come up painfully short, and that is on issues of transparency and accountability. These failures threaten to undermine the good that Obama has otherwise done, because if U.S. counterterrorism policy is to succeed, it is critical to restore the trust that Bush’s policies so recklessly squandered.

#### Terrorists goals are ideological; not political; there is no negotiation---only regulated violence in a utilitarian framework can solve

Whitman 7 (Jeffery, Prof of Philosophy, Religion, and Classical Studies Susquehanna University, “Just War Theory and the War on Terrorism A Utilitarian Perspective,” http://www.mesharpe.com/PIN/05Whitman.pdf)

Nonetheless, there was something different about the 9/11 attacks that is troubling, and that difference is the nihilistic nature of the attackers. Most, but not all, terrorist activity has a political or religious goal of some sort as its aim—the liberation of a minority group, the establishment of a new state, the removal of a perceived oppressor. Al-Qaeda professes a political goal, but its actions belie its claims. It claims to be fighting for the cause of Palestinian freedom and for oppressed Muslims everywhere, but it has appropriated the Islamic religion and the concept of jihad in order to recruit suicide bombers with the promise of martyrdom and entry into Paradise. In so doing, the political goal, if it ever existed, has become subservient to eschatological concerns. Political failure has become an irrelevant distraction that is trumped by the reward of eternal life. As Michael Ignatieff notes concerning al-Qaeda, their goals are less political than apocalyptic, securing immortality for themselves while calling down a mighty malediction on the Great Satan. Goals that are political can be engaged politically. Apocalyptic goals, on the other hand, are impossible to negotiate with. They can only be fought by force of arms. (2004, 125–126) This version of Islamic fundamentalist terrorism, represented by such groups as Hamas, Hezbollah, and al-Qaeda, seems particularly intractable. These groups, especially insofar as they employ suicide-bomber tactics, have become death cults (Ignatieff 2004, 126–127). There can be no negotiated settlement, so the only solution seems to be a violent one aimed at the utter destruction of the terrorists. And yet, a purely violent and largely military response runs significant risks, both morally and pragmatically, for the counterterrorist forces. The risks are especially poignant for a liberal democracy like the United States, for the use of purely military means, particularly the brutal military means that may seem necessary to defeat terrorism, may run contrary to the very principles a liberal democracy represents (Ignatieff 2004, 133–136).6 Thus the terrorist threat represented by al-Qaeda–like groups presents a difficult and somewhat unique challenge for the United States. Nonetheless, I remain convinced that a utilitarian conceptualization of just war theory can help us to successfully navigate between the Scylla of losing the fight against terrorism and the Charybdis of abandoning the principles that define our liberal democracy.

**One speech act doesn’t cause securitization against the other**

**Ghughunishvili 10**

Securitization of Migration in the United States after 9/11: Constructing Muslims and Arabs as Enemies Submitted to Central European University Department of International Relations European Studies In partial fulfillment of the requirements for the degree of Master of Arts Supervisor: Professor Paul Roe <http://www.etd.ceu.hu/2010/ghughunishvili_irina.pdf>

As provided by the Copenhagen School securitization theory is comprised by speech act, acceptance of the audience and facilitating conditions or other non-securitizing actors contribute to a successful securitization. The causality or a one-way relationship between the speech act, the audience and securitizing actor, where politicians use the speech act first to justify exceptional measures, has been criticized by scholars, such as Balzacq. According to him, the one-directional relationship between the three factors, or some of them, is not the best approach. To fully grasp the dynamics, it will be more beneficial to “rather than looking for a one-directional relationship between some or all of the three factors highlighted, it could be profitable to focus on the degree of congruence between them. 26 Among other aspects of the Copenhagen School’s theoretical framework, which he criticizes, the thesis will rely on the criticism of the lack of context and the rejection of a ‘one-way causal’ relationship between the audience and the actor. The process of threat construction, according to him, can be clearer if external context, which stands independently from use of language, can be considered. 27 Balzacq opts for more context-oriented approach when it comes down to securitization through the speech act, where a single speech does not create the discourse, but it is created through a long process, where context is vital. 28 He indicates: In reality, the speech act itself, i.e. literally a single security articulation at a particular point in time, will at best only very rarely explain the entire social process that follows from it. In most cases a security scholar will rather be confronted with a process of articulations creating sequentially a threat text which turns sequentially into a securitization. 29 This type of approach seems more plausible in an empirical study, as it is more likely that a single speech will not be able to securitize an issue, but it is a lengthy process, where a the audience speaks the same language as the securitizing actors and can relate to their speeches.

#### The alt invites worse conflict

Dipert 6 (Randall, PhD, Professor of Philosophy, University at Buffalo, Buffalo, “Preventive War and the Epistemological Dimension of the Morality of War,” https://www.law.upenn.edu/live/files/1291-dipert-preventive-war)

One might think that this principle would give little guidance in recommending anticipatory wars. However, let us suppose that John Rawls, following Raymond Aron and others, is correct in claiming that democratic states (‘liberal constitutional democracies’) have very few except legitimate reasons to go to war, and consequently rarely do go to war for ‘bad’ reasons (Rawls 1999: 47).42 Some wars might still occur because of epistemic mistakes or from (legitimate) mutual fear and distrust trust\*/something Rawls seems not to consider. Let us further suppose that this general level of warfare in a region or in the world gradually decreases in those places where there exist nothing but constitutional democracies. Let us further suppose that democracy can be imposed, or the conditions for democracy can be created, by the correct application of military force. Then there are circumstances in which, if the conditions for the permissibility of preventive of war are met, then preventive war is further recommended by this second principle. There is an interesting question here, beyond philosophical considerations, about whether a nation should formulate and announce policies of exactly what conditions will, and what conditions will not, trigger preventive war. 43 But there is another and telling side of this coin: what if we should have and announce a policy of never engaging in any preemptive or preventive war? Here I think we are encouraging a hostile enemy to prepare an offensive, including weapons development, right up an actual attack. If there do exist, or can possibly exist, truly devastating weapons, this is to invite their development and one’s own annihilation. Even a small nuclear power with ballistic missiles (perhaps positioning missiles on ocean freighters on the high seas) would be free to inflict devastating attacks. While large, stable countries such as China and the former USSR, have historically been deterred by the policy of massive nuclear retaliation, it is unlikely that all nuclear nations with ballistic missiles (including terrorist organizations), will remain deterrable. I believe that such a policy of banning or foreswearing preventive war would almost certainly result in more, rather than fewer, wars and deaths, because it would embolden more state-like entities to believe that they could succeed in an unjust war, especially in ideological wars whose ‘success’ consists simply in inflicting harm on its enemy at all costs.44 To announce a policy of rejecting any preemptive or preventive war is thus almost certainly mistaken and violates my second principle insofar as it increases possible threats. The rare and careful use of restricted preemptive and preventive war, under unspecified conditions, in the world we are likely to have for centuries\*/without, for example, militarily dominant international organizations willing to punish with force the illegitimate use of force\*/is actually likely to make the world more safe. This is not a conclusion that I am especially happy with.45

#### Perm do the plan and non-mutually exclusive parts of the alternative---creates self-reflexivity which solves the link but avoids conservative cooption of LOAC

Margulies and Metcalf 11 (Joseph Margulies is a Clinical Professor, Northwestern University School of Law Hope Metcalf is a Lecturer, Yale Law School. Metcalf is co-counsel for the plaintiffs/petitioners in Padilla v. Rumsfeld, Padilla v. Yoo, Jeppesen v. Mohammed, and Maqaleh v. Obama, “Terrorizing Academia,” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf)

The foregoing is simply one attempt at a scholarship that goes beyond the “myth of rights” and takes account of the broader historical, social and political context for U.S. reactions to terrorism. But we note that other disciplines are ahead of the legal academy in this regard. Many scholars— notably in socio-legal studies, history and political science—have probed the causes and consequences of U.S. counterterrorism policies.138 Sociologists have explored various explanations for post-9/11 policies, from consumerism139 to media portrayals of crime140 to the politics of fear generally.141 As Jonathan Simon observed, from a socio-legal perspective, post-9/11 policies were not the exception but “only the latest effort to redefine the scope of the U.S. federal government’s power (and especially the executive branch) by invoking the metaphor of war.”142 Legal historians also noted continuities, especially with respect to the historic U.S. antipathy to prisoners’ dignity and humanity143 as well as the long-standing presence of terrorism on U.S. soil.144 Mary Dudziak has probed the foundations of the dominant emergency framing, arguing that “[i]deas about the temporality of war are embedded in American legal thought [which are] in tension with the experience of war in the twentieth century. The problem of time, in essence, clouds an understanding of the problem of war."1 And cultural critics have provided much needed context for U.S. torture policies'16 and reactions to "Islamic extremism.'11"

An emerging group of legal scholars—whom we might term "integrationists"— have examined the continuities between post-9/11 policies and American practices and attitudes toward crime, risk, security, and socially constructed "others."118 As argued by John Parry,'1\* Judith Rcsnik,'\*° and James Foreman,1\*' post-9/11 policies arc neither sui generis nor likely to disappear at the end of this "war," whenever that might be. The struggle against abusive treatment and confinement of terrorism suspects will undoubtedly persist over the long- term, and we arc best served by broadening our lens to consider how post-9/11 policies repeat, reflect, and inform broader U.S. policies towards marginalized people such as prisoners and non-citizens. Munccr Ahmad has begun the difficult task of questioning whether a rights-based strategy can possibly be effective in the political context of Guantanamo,\*1 and most fundamentally, we must heed the admonition of Richard Fallon, who recently and quite properly observed that "the Constitution is 'politically constructed\* by the tolerances of Congress and the president, as supported by public opinion.""'

From the vantage of 2010, it appears the interventionist position—our position—has failed. As we see it, it failed because it was premised upon a legalistic view of rights that simply cannot be squared with the reality of the American political experience. Yet the interventionist stance holds an undeniable attraction. Of all the positions advanced since 9/11, it holds out the best promise of preserving the pluralist ideals of a liberal democracy. The challenge going forward, therefore, is to re-imagine the interventionist intellectual endeavor. To retain relevance, we must translate the lessons of the social sciences into the language of the law, which likely requires that we knock law from its lofty perch. As a beginning, scholarship should be more attuned to the limitations of the judiciary, and mindful of the complicated tendency of narratives to generate backlash and counter-narratives.

But there is another tendency we must resist, and that is the impulse to nihilism—to throw up our hands in despair, with the lament that nothing works and repression is inevitable. Just how to integrate the political and the ideal is, of course, a problem that is at least as old as legal realism itself and one we do not purport to solve in this essay.'\*\* Still, we are heartened by the creative work undertaken in other arenas, ranging from poverty law to gay rights, that explores how, done properly, lawyering (and even litigation) can make real differences in the lives of marginalized people.'" We hope that the next decade of reflections on the policies undertaken in the name of national security will follow their lead in probing not just what the law should be, but how it functions and whom it serves.

#### Intellectual resistance fails

Antonio **Negri 5**, Italian Marxist philosopher, “postmodern global governance and the critical legal project”, Law and Critique (2005) 16: 27–46

(In parenthesis, at this point, we could ask ourselves: if there is no possibility of reconstructing a strong realist alternative starting from the margins of the legal system, is it still possible to consider these very margins, that is to say, the interstices of a world compacted by command (by society’s material subsumption by capital), as points of resistance, or simply as irresoluble ontological ‘folds’, or even as cues for escape strategies? Such an illusion has for long been maintained by intellectuals and law practitioners during the years in which reformism was in deep crisis, i.e. from Thatcher to Blair, Reagan to Clinton. In the years of the ‘pensiero debole’, **some**, having almost gone ‘underground’, **hoped** (like hackers inﬁltrating the net) that **individual** instances of **resistance could** still **produce general eﬀects** **of sabotage in the system** and that the gestures and the tactics of refusal could open up into alternative strategies. **None of this was realised**, at least not **in any visible way**. Even where the normative logics of the destruction of Welfarism and privatisation do not extend their reach, even where the restorative decisions of the courts do not openly triumph, a mechanism was set in motion whereby democratic legal proceedings were neutralised and the constituent powers of freedom suﬀocated – a mechanism which seemed and proved unstoppable. And yet…

And yet something did happen. It happened not because of the ‘resistants’ but because the phoenix-like return of the ﬂame from the furnace of the new totalitarian fusion has been unstoppable. The fact of the matter is that the more the postmodern process of law’s absorption into the privatistic command of capital got underway, and the new technologies of governance became effective in managing the particular and in leading it back into the system of command, the more one witnessed the onset, or at least the appearance, of a multiplicity of violent shifts, a plurality of interruptions, more or less capable of being clearly articulated and of producing subjectivity, yet always proliferating… For the proliferation of the interstice was ontological, not a matter of will. What we witnessed was a somewhat spontaneous overturning of the systemic interdependence of legal production points, so that, with respect to the central problematics of legal thought for instance, the theory of **interpretation became increasingly** undecided (and therefore potentially **open** to unforeseen and radically other possibilities), and, on the constitutional plane, the deﬁnition of subjects became increasingly fragmented, diﬀuse, and wide, bending the system’s unity into some sort of spontaneous federalism.

We cannot overestimate these phenomena. Taken in themselves, they are of utmost importance. They often make possible both the opening up of the discussion and, exceptionally, the bringing together of the critical process. Substantive interests and subjective rights – such as those of women, gays and lesbians, and other groups – would not have had the space to develop and mature outside these interstitial dispositives. Still though, **none of this is enough**. **The insistence of legal strategy on the** **interstice**, no matter how open this be to proliferating tensions, **cannot establish a new juridical horizon**. **Small**, albeit important, innovatory **moments are drawn into the abyss of the structures of command**. At which point, there is once more the void).

### 2AC Law

#### Our legal mechanisms solve –

#### A. Audience Costs – 1AC Jaffer says legitimacy crises from audience costs and public perception of court rulings undercut abuse of targeted killing policy – 1AC Greenwald and Goldsmith says resultant observer effects eliminate institutional strength for circumvention

#### B. Try or die – Schuerman says even if there is always the possibility of circumvention, the law is necessary to encapsulate political antagonisms that may rupture into violence because other transitional mechanisms are doomed to fail – the disruption of the rule of law is only facilitated by the continuation of outdated legal code

#### Their evidence doesn’t assume our specific mechanism – the plan reshapes institutional norms

Rathod 09 (Jason, Duke University School of Law, J.D, NOT PEACE, BUT A SWORD: NAVY V. EGAN AND THE CASE AGAINST JUDICIAL ABDICATION IN FOREIGN AFFAIRS, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1447&context=dlj)

Reopening a Bivens cause of action could also reshape agency norms. By making pronouncements on the rule of law and especially the Constitution, the judiciary wields influence through social norms. As Professor Richard Primus has said, “[J]udicial articulation of a system of constitutional values in which racial discrimination is reprehensible might shape the normative atmosphere in which government officials act, making them less likely to want to discriminate in the first place.”249 Thus, the prospect of censure by Article III judges could compel agency adjudicators to examine the motives underlying their determinations, to recalibrate those motives to accord with the Constitution, and to provide candidates from critical communities with fairer hearings.250 Even if individual adjudicators’ attitudes fail to change, judicial pronouncement of constitutional values could alert an adjudicator’s coworkers and superiors that a fundamental change in culture is needed, fostering agency attitudes and norms likely to serve as a deterrent for discriminatory actions.

#### Perm do both – judicial review solves and is co-constitutive with the alt

Borislavov 2005

Rad, Ph.D. Candidate at Syracuse, August 2005, Debatte, Vol. 13, No. 2, p. 181-183

I would like to take a step back and consider what Agamben has implicitly silenced in this overarching and totalizing genealogy of modernity. In a recent article in the Boston Review, Larry Kramer points to the falling fortunes of popular constitutionalism in the US. While the history of popular constitutionalism in the US is quite rich and complex it also allows us to glimpse at how liberal constitutionalism deals with the problem of sovereignty. The division of powers in the liberal state notwithstanding, in recent years it has become the rule that the Supreme Court has assumed the role of interpreting the constitution for everyone else. In Kramer’s words, ‘‘The president, Congress, the states, and ordinary citizens can all express opinions about the meaning of the Constitution. But the Justices decide whether those opinions are right or wrong, and the Justices’ judgments are supposed to settle matters for everyone’’ (14). The doctrine of judicial supremacy, which was historically opposed to the departmentalist view, summarizes this state of affairs, and might be usefully approximated to what Schmitt defined as the effective and only apparent emptying out of the political in liberal democracy while the need for eminently political decisions remains very much in force. The fundamental question is: Who interprets the constitution? Kramer points out that the debates about the relative advantages of departmentalism and judicial supremacy go back to the 1790s and only recently has judicial supremacy come to dominate interpretations of the constitution. If we assume that, barring Agamben’s fundamentally new ontology, sovereignty still plays an important role, then we need to attend to the difficulties associated with this predicament. The more mundane question would be who and how exercises power. Liberalism is certainly not toothless, nor is it incapable of decision (as US interventions amply show), it simply presents its intentions in the garb of universalism and good will but the problem of sovereignty is by no means wished away in the doctrine of the separation of powers. That no social order can sustain itself without a sovereign was clear enough to conservative thinkers since the Enlightenment. Thus, in an effort to put in perspective Agamben’s teleology and his apocalyptic messianic language, we might offer the following objection: ‘‘a liberal theory of sovereign power understands full well the paradoxical relation between law and fact, norm and exception; and, precisely in light of such an understanding constructs an institutional system that cannot resolve the paradox but nonetheless attempts to prevent it from reaching an intensified and catastrophic conclusion’’ (501). Agamben will insist, of course, as Nasser Hussain rightly observes, that we are stuck with the very same assumption with which we began: ‘‘the source of the problem is not the institutional operation of sovereign power, but its object—bare life—so too the solution is not a proliferation of institutional safeguards but a rethinking of that mode of being’’ (501). My argument so far has been informed by the assumption that we need to read Schmitt both selectively and against many of his assertions, and despite the efforts of critics like Heinrich Meier who have attempted to present an essentially religious Schmitt, Schmitt retains only a very attenuated form of theology in his conceptual framework. For the Schmitt of Political Theology and the Verfassungslehre, it is of utmost importance who makes the decision on the exception, and not the ontological structure of the decision that Agamben tries to explicate. The necessity for a strong sovereign in Schmitt is indeed buttressed on a theological reference that acts by analogy (the miracle as analogous to the sovereign decision) but the thrust of the argument is concerned with the prosaic and immediate effects of power. It is conceivable that the rulings of the Supreme Court, to the extent that they remain unchallenged, approximate the decisions of a sovereign, of the one who decides on the exception, behind the veil of a broadly determined consensus, or Schmitt’s favorite image of the bourgeoisie as the clasa discutidora, the class that endlessly discusses. Agamben himself would not be averse to such a view because the rulings certainly bring out the zone of indistinction between law and fact, as well as the groundlessness of decision making constitutive of modernity. The question, however, is what is to be done about it? In his zeal to reveal the essence of potentiality and the role of constituting power, to bare the origins of an ontology that has defined the experience of power in the West but also to work toward the coming of a new one, Agamben inadvertently casts himself in the role of a philosopher king. The paradoxical conclusion, given Agamben’s insistence on ontology (he complains about ‘‘the meager propensity of our time for ontology’’) (The Coming Community 89) and the equation of ontology with biopolitics, is that we must make the guardians philosophers after they have duly internalized Agamben’s delphic pronouncements. How else is one to move from the oppression of ubiquitous sovereignty to whatever singularity without invoking the compromised potentiality of constituting power as revolution? It is interesting, and again paradoxical, that Agamben’s philosopher appeals to a sovereign on behalf of his new ontology, that is, to the developed Western democracies. If power continues to be exercised sovereignly what difference would a new ontology really make? Isn’t that what Heidegger attempted to do in his Rectoral address, although of course with a completely different political purpose? But for Agamben, a thinker who has chosen to dwell in uncertainties and ambiguities, the proximity of a disastrous outcome authorized by a possible new ontology and a truly new beginning is what is most intellectually satisfying.

#### The state of exception can be contained---no impact

Jennifer Mitzen 11, PhD, University of Chicago, Associate Professor of Political Science at Ohio State University, Michael E. Newell, “Crisis Authority, the War on Terror and the Future of Constitutional Democracy,” PDF

But what Agamben has potentially overlooked is the conversation between the government, public and media concerning the state of exception. Waever’s desecuritization theory tells us that it is possible for continued debate and media coverage to desecuritize a threat in whole or in part (Waever, 1995). As the War on Terror progressed, more academics and government officials began to speak out against the usefulness of interrogations, the reality of the terrorist threat and the morality of the administration’s policies. Some critics suggested that the terrorist threat was not as imminent as the Administration made it appear, and that “…fears of the omnipotent terrorist…may have been overblown, the threat presented within the United States by al Qaeda greatly exaggerated” (Mueller, 2006). Indeed, as Mueller points out, there have been no terrorist attacks in the United States five years prior and five years after September 11th. The resignation of administration officials, such as Jack Goldsmith, who, it was later learned, sparred with the administration over Yoo’s torture memos, their wiretapping program and their trial of suspected terrorists also contributed to this shift in sentiment (Rosen, 2007). The use of the terms “torture,” and “prisoner abuse,” that began to surface in critical media coverage of the War on Terror framed policies as immoral. As the public gradually learned more from media coverage, academic discourse, and protests from government officials, the administration and its policies saw plummeting popularity in the polls. Two-thirds of the country did not approve of Bush’s handling of the War on Terror by the end of his presidency (Harris Poll) and as of February 2009 two-thirds of the country wanted some form of investigation into torture and wiretapping policies (USA Today Poll, 2009).¶ In November 2008 a Democratic President was elected and Democrats gained substantial ground in Congress partly on promises of changing the policies in the War on Terror. Republican presidential nominees, such as Mitt Romney, who argued for the continuance of many of the Bush administration’s policies in the War on Terror, did not see success at the polls. Indeed, this could be regarded as Waever’s “speech-act failure” which constitutes the moment of desecuritization (Waever, 1995). In this sense, Agamben’s warning of “pure de-facto rule” in the War on Terror rings hollow because of one single important fact: the Bush administration peacefully transferred power to their political rivals after the 2008 elections. The terrorist threat still lingers in the far reaches of the globe, and a strictly Agamben-centric analysis would suggest that the persistence of this threat would allow for the continuance of the state of exception. If Agamben was correct that the United States was under “pure de-facto rule” then arguably its rulers could decide to stay in office and to use the military to protect their position. Instead, Bush and his administration left, suggesting that popular sovereignty remained intact.

#### Legal restraints work---exception theory is self-serving and wrong

William E. Scheuerman 6, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: Schmitt occasionally wants to define “political” conflicts as those irresolvable by legal or juridical devices in order then to argue against legal or juridical solutions to them. The claim also suffers from a certain vagueness and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, legal devices have undoubtedly played a positive role in taming or at least minimizing the potential dangers of harsh political antagonisms. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22¶ Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.¶ This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, it is by no means self-evident that trying to give coherent legal form to a transitional political and social moment is always doomed to fail. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, the general trend towards extending basic protections to non-state actors is plausibly interpreted in a more positive – and by no means incoherent – light.24¶ Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).¶ As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet one possible resolution of the dilemma he describes would be to figure how to reform the process whereby rules of war are adapted to novel changes in military affairs in order to minimize the danger of anachronistic or out-of-date law. Instead, Schmitt simply employs the dilemma of legal obsolescence as a battering ram against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

#### No alternative to the law/legal system---other ideas bring more inequality and abuse

Jerold S. Auerbach 83, Professor of History at Wellesley, “Justice Without Law?”, 1983, p. 144-146

As cynicism about the legal system increases, so does enthusiasm for alternative dispute-settlement institutions. The search for alternatives accelerates, as Richard Abel has suggested, "when some fairly powerful interest is threatened by an increase in the number or magnitude of legal rights.\*'6 Alternatives are designed to provide a safety valve, to siphon discontent from courts. With the danger of political confrontation reduced, the ruling power of legal institutions is preserved, and the stability of the social system reinforced. Not incidentally, alternatives prevent the use of courts for redistributive purposes in the interest of equality, by consigning the rights of disadvantaged citizens to institutions with minimal power to enforce or protect them. It is, therefore, necessary to beware of the seductive appeal of alternative institutions. They may deflect energy from political organization by groups of people with common grievances; or discourage effective litigation strategies that could provide substantial benefits. They may, in the end, create a two-track justice system that dispenses informal "justice" to poor people with "small" claims and "minor" disputes, who cannot afford legal services, and who are denied access to courts. (Bar associations do not recommend that corporate law firms divert their clients to mediation, or that business deductions for legal expenses—a gigantic government subsidy for litigation—be eliminated.) Justice according to law will be reserved for the affluent, hardly a novel development in American history but one that needs little encouragement from the spread of alternative dispute-settlement institutions.¶ It is social context and political choice that determine whether courts, or alternative institutions, can render justice more or less accessible—and to whom. Both can be discretionary, arbitrary, domineering—and unjust. Law can symbolize justice, or conceal repression. It can reduce exploitation, or facilitate it. It can prohibit the abuse of power, or disguise abuse in procedural forms. It can promote equality, or sustain inequality. Despite the resiliency and power of law, it seems unable to eradicate the tension between legality and justice: even in a society of (legal) equals, some still remain more equal than others. But diversion from the legal system is likely to accentuate that inequality. Without legal power the imbalance between aggrieved individuals and corporations, or government agencies, cannot be redressed. In American society, as Laura Nader has observed, "disputing without the force of law ... [is| doomed to fail."7 Instructive examples document the deleterious effect of coerced informality (even if others demonstrate the creative possibilities of indigenous experimentation). Freed slaves after the Civil War and factory workers at the turn of the century, like inner-city poor people now, have all been assigned places in informal proceedings that offer substantially weaker safeguards than law can provide. Legal institutions may not provide equal justice under law, but in a society ruled by law it is their responsibility.¶ It is chimerical to believe that mediation or arbitration can now accomplish what law seems powerless to achieve. The American deification of individual rights requires an accessible legal system for their protection. Understandably, diminished faith in its capacities will encourage the yearning for alternatives. But the rhetoric of "community" and "justice" should not be permitted to conceal the deterioration of community life and the unraveling of substantive notions of justice that has accompanied its demise. There is every reason why the values that historically are associated with informal justice should remain compelling: especially the preference for trust, harmony, and reciprocity within a communal setting. These are not, however, the values that American society encourages or sustains; in their absence there is no effective alternative to legal institutions.¶ The quest for community may indeed be "timeless and universal."8 In this century, however, the communitarian search for justice without law has deteriorated beyond recognition into a stunted off-shoot of the legal system. The historical progression is clear: from community justice without formal legal institutions to the rule of law, all too often without justice. But injustice without law is an even worse possibility, which misguided enthusiasm for alternative dispute settlement now seems likely to encourage. Our legal culture too accurately expresses the individualistic and materialistic values that most Americans deeply cherish to inspire optimism about the imminent restoration of communitarian purpose. For law to be less conspicuous Americans would have to moderate their expansive freedom to compete, to acquire, and to possess, while simultaneously elevating shared responsibilities above individual rights. That is an unlikely prospect unless Americans become, in effect, un-American. Until then, the pursuit of justice without law does incalculable harm to the prospect of equal justice.

#### Rejecting sovereignty exacerbates inequalities and prevents emancipation

Tara McCormack 10, Lecturer in International Politics at the University of Leicester, PhD in IR from the University of Westminster, “Critique, Security and Power: The Political Limits to Emancipatory Approaches,” p139, google books

Critics of critical and emancipatory theory have raised pertinent problems in terms both of the idealism of critical approaches and their problematic relationship to contemporary liberal intervention. Critical theorists themselves are aware that their prescriptions seem to be hard to separate from contemporary discourses and practices of power, yet critical theorists do not seem to be able to offer any understanding of why this might be. However, the limitations to critical and emancipatory approaches cannot be overcome by distinguishing themselves from liberal internationalist policy. In fact a closer engagement with contemporary security policies and discourse would show the similarities with critical theory and that both suffer from the same limitations.¶ The limitations of critical and emancipatory approaches are to be found in critical prescriptions in the contemporary political context. Jahn is right to argue that critical theory is idealistic, but this needs to be explained why. Douzinas is right to argue that critical theory becomes a justification for power and this needs to be explained why. The reasons for this remain undertheorised. I argue here that critical and emancipatory approaches lack a fundamental understanding of what is at stake in the political realm. For critical theorists the state and sovereignty represent oppressive structures that work against human freedom. There is much merit to this critique of the inequities of the state system. However, the problem is that freedom or emancipation are not simply words that can breathe life into international affairs but in the material circumstances of the contemporary world must be linked to political constituencies, that is men and women who can give content to that freedom and make freedom a reality. ¶ Critical and emancipatory theorists fail to understand that there must be a political content to emancipation and new forms of social organisation. Critical theorists seek emancipation and argue for new forms of political community above and beyond the state, yet there is nothing at the moment beyond the state that can give real content to those wishes. There is no democratic world government and it is simply nonsensical to argue that the UN, for example, is a step towards global democracy. Major international institutions are essentially controlled by powerful states. To welcome challenges to sovereignty in the present political context cannot hasten any kind of more just world order in which people really matter (to paraphrase Lynch). Whatever the limitations of the state, and there are many, at the moment the state represents the only framework in which people might have a chance to have some meaningful control over their lives.

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#### Breaking the PQD is key – it creates a regulatory dialogue that encourages a comprehensive regulatory regime to check emissions

Osofsky 12 (Hari M., Associate Professor, University of Minnesota Law School; Associate Director of Law, Geography & Environment, Consortium on Law and Values in Health, Environment & the Life Sciences; Affiliated Faculty, Geography and Conservation Biology, “LITIGATION'S ROLE IN THE PATH OF U.S. FEDERAL CLIMATE CHANGE REGULATION: IMPLICATIONS OF AEP V. CONNECTICUT”, lexis, accessed 1/5/2014)

II. THE U.S. SUPREME COURT'S ROLE IN SHAPING THE FEDERAL REGULATORY PATH The U.S. Supreme Court has entered this federal-level regulatory dialogue through lawsuits attempting to force agency regulation under federal environmental statutes and to change corporate behavior directly through federal common law. In the United States, which has struggled to develop a coherent federal policy, Massachusetts and AEP powerfully shape U.S. federal-level efforts to regulate climate change due to Congress' failure to pass comprehensive climate change legislation, which could have supplanted both cases. This Section explores the ways in which AEP builds on Massachusetts to reinforce the current federal regulatory pathway. The Supreme Court's approach to climate change litigation in AEP flows from its analysis of both threshold and substantive issues in Massachusetts. The most important jurisprudential issues raised in the AEP appeal are standing (whether petitioners have the particularized interest in the case that allows them to bring the action) and the political question doctrine (whether the case raises a nonjusticiable political question). A four justice plurality in AEP found standing based on Massachusetts' reasoning, while four justices opposed standing. 17 Assuming that Justice Sotomayor, who did not participate in AEP because she had heard the case while sitting on the Second Circuit, either joins the group supporting standing or abstains from the issue--which seems far more likely than her joining the group in opposition--AEP reinforces that the Court will continue to view governmental petitioners [\*452] as having the particularized interest necessary to make regulatory challenges and thus continue to influence the path of federal regulation. However, the plurality's affirmation of Massachusetts's approach to standing, which focuses heavily on the governmental status of some of the petitioners, does not resolve the question of whether it would find standing in a suit with only nongovernmental petitioners. This issue is currently being litigated in challenges to projects that have a large carbon footprint, such as coal-fired power plants. Some of these cases involve federal law and, in the months following the AEP decision, lower courts have split on this issue. The U.S. District Court for the District of New Mexico found that six citizen environmental groups lacked standing in a challenge to oil and gas leases based on climate change, 18 while the U.S. District Court for the District of Colorado held that nongovernmental organization, WildEarth Guardians, had standing to challenge leases that allow the venting of methane from a coal mine, including on climate change grounds. 19 Although these district courts' opinions only have precedential weight within their own districts, they will influence the ongoing dialogue about whether standing is appropriate in cases without governmental petitioners, cases that currently serve as one of the few ways in which citizens can attempt to shape the energy choices of major corporations. In contrast to its explicit language on standing, the Supreme Court's cursory treatment of the political question doctrine challenges provides no guidance regarding whether and when such concerns could arise. The decisions in the lower courts in AEP and in other climate change federal common law public nuisance cases include extensive discussion of whether a public nuisance claim would require an initial policy determination that would be more appropriate for the political branches to make. 20 However, the words "political question" do not appear explicitly in the Supreme Court's opinion in AEP. Four justices held "that no other threshold obstacle bars review," and the other four justices, who were opposed to finding standing, did not address additional prudential issues, which leaves ambiguity about their position on the political question doctrine. 21 This lack of analysis of a threshold issue at the core of the lower court decisions is curious, but seems [\*453] unlikely to impact the course of federal statutorily-based regulation significantly. Cases challenging regulatory policy do not involve political question problems since they are brought through a statutory regime and administrative law; therefore, this issue will continue to arise, mostly, in common law challenges not precluded by AEP. The core of the AEP decision focuses on the relationship between federal regulatory authority under the Clean Air Act and common law public nuisance. The Supreme Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." 22 AEP bases its unanimous displacement decision on Massachusetts's finding that carbon dioxide emissions qualify as air pollution under the Clean Air Act. 23 AEP interprets that finding as establishing Congress's delegation to the EPA of "whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law." 24 In the process of explaining its displacement holding, the Court in AEP makes two interrelated points that will shape the path of efforts to address climate change at the federal level in the United States. First, it precludes federal common law nuisance actions as a mechanism for challenging the EPA's approach to climate change regulation--even if the EPA declines to regulate--so long as the EPA has regulatory authority. 25 Second, the Court simultaneously reinforces the appropriateness of regulatory suits challenging the EPA: "If the plaintiffs in this case are dissatisfied with the outcome of the EPA's forthcoming rulemaking, their recourse under federal law is to seek [c]ourt of [a]ppeals review, and, ultimately, to petition for certiorari in this Court." 26 This combination suggests that the Court remains open to climate change litigation's continuing role in determining the course of federal regulation, so long as that litigation has a statutory focus. In addition to reinforcing the appropriateness of litigation over federal regulatory approaches, AEP puts pressure on Congress to leave the current regime under the Clean Air Act in place. The opinion explicitly does not reach whether a federal common law nuisance action would be allowed if Congress decided that the EPA could no longer regulate greenhouse gas emissions. The opinion thus limits federal [\*454] common law as a "parallel track" for challenging the EPA's regulatory decisions, but leaves that track potentially open if Congress passes legislation that overrides Massachusetts. 27 Finally, AEP continues an ongoing conversation about the role of federal courts in assessing climate change science. Professors Kysar and Burkett have raised concerns regarding the Court's increasing skepticism about the science in AEP, especially as compared to the discussion of science in Massachusetts. 28 This shift parallels the public opinion shift described above. However, AEP does not simply focus on the substance of climate science, but also explicitly claims that the EPA is better situated than courts to assess climate change science. The Court explains that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order" and then elaborates on specific mechanisms that agencies have, but courts lack. 29 This discussion reinforces both Justice Scalia's statement during the Massachusetts oral argument that he is "not a scientist," 30 and the Court's emphasis throughout AEP of the dominance of an agency rulemaking, rather than a common law, approach to federal action in this area. The decision in AEP, then, represents another step in a path that the Supreme Court began in Massachusetts. In the process of focusing in on one particular type of action--federal common law public nuisance claims that include governmental petitioners--the Court presents a vision of its future role as an arbiter of regulatory disputes, rather than as a forum for debating climate change science or for directly addressing harms to the victims of climate change outside of a legislative framework. III. CLIMATE CHANGE LITIGATION IN THE AFTERMATH OF AEP These Supreme Court cases represent only a small fraction of the cases involving climate change in U.S. courts and other tribunals around the world. Parties have brought cases in state and national courts and international tribunals under a wide range of legal theories. While most cases--including Massachusetts--focus on forcing or limiting government regulation of major emitters, other cases--such as AEP--attempt to [\*455] change corporate behavior through tort or rights theories. As discussed in my previous scholarship, these cases impact efforts to regulate climate change directly by altering the regulatory landscape both in terms of who can regulate and what regulation they engage in, and also more indirectly by putting pressure on the government and corporations and raising public awareness of the problem. 31 The Supreme Court's recent decision in AEP evinces an understanding of that broader litigation context by how it frames its decision and in what it declines to decide. It leaves alone most pending litigation except for the limited set of cases claiming federal common law nuisance, and even then, it indicates that its ruling depends on the current context of the EPA's authority. 32 The Court does not decide whether state court nuisance cases are preempted and does not even mention the many state court regulatory actions regarding coal-fired power plants and other carbon-intensive projects (cases well beyond the direct scope of AEP). 33 The Court's view of climate change litigation in AEP ensures that courts will remain an important regulatory battleground in the United States. The Court not only endorses the appropriateness of suits over the EPA's approach to regulating greenhouse gases under the Clean Air Act, but also allows this exploding area of litigation to continue--for the most part--along its current trajectory. The increasing investment by law firms, governmental entities, and nongovernmental organizations in climate change litigation practice likely will proceed apace after AEP. In my view, this aspect of the outcome is good news. As displayed in Massachusetts, AEP, and the myriad of cases before lower courts, litigation provides a way for key stakeholders to address conflicts over how to move forward. 34

#### Warming agreements are failing in the status quo – U.S. leadership is key to jumpstart negotiations and lead to a grand bargain

Taylor 12

[Lenore, The Age (Melbourne, Australia), Earth summit revisited: is the movement doomed to be an endless talkfest? 6/16/12, l/n]

\*Professor Stephen Howes is the Director of the Development Policy Centre at the Australian National University

The meeting will seek to agree to start talks on a set of "sustainable development goals" - targets for rich and poor countries alike to take effect in 2015 when the "millennium goals" announced in 2000 reach their expiry date. Sustainable development goals sound pretty waffly, but according to Professor Stephen Howes, of the Australian National University's Crawford School, the millennium goals were at least useful in holding governments to account on promises such as levels of spending on overseas aid - and sustainable development goals could serve a similar purpose. But even an agreement to try to reach an agreement on such goals could founder on the perennial north-south divide. According to The Hindu newspaper, the Indian government's strategy for the Rio summit is to "prevent any attempt to pin down specific goals or targets regarding sustainable development". Indian Prime Minister Manmohan Singh will reportedly oppose even a decision on what "themes" any goals might cover. At the first Rio meeting, the gap between developed and developing countries was recognised in the climate change convention, which effectively promised that rich countries would act first, and when poor countries did do something, the rich countries would pay. It is a principle that has gridlocked climate talks for decades, and to which the developing world remains wedded despite huge geopolitical shifts over the past two decades. And at this meeting the developing countries will also have greater numbers and clout. George Bush senior attended last time as the US president, but President Barack Obama is sending Secretary of State Hillary Clinton to lead the American team. Deeply mired in Europe's financial woes, neither British Prime Minister David Cameron nor German Chancellor Angela Merkel is going either. But the leaders of India, Russia, China and, of course, host nation Brazil are all going to be there. Professor Howes says part of the reason multilateral decision-making is at such a low point is that in this era of global political transition there is no superpower to take the lead. "For most environmental problems that have been successfully tackled, the United States played a leading role, for example on ozone. Now we don't get a lot of US leadership on environmental problems and we have China emerging as the world's largest emitter. They are starting to take the problem more seriously but are unwilling to take the lead," he says. "It is symptomatic of the geopolitical transition. You have a once dominant superpower being challenged and an emerging superpower that is not willing to take on a global leadership role." In such a situation, grand legally binding deals become impossible. Messy "bottom up" pacts on goals or targets or unilateral pledges that taken together might add up to something are the best negotiators can hope for, and even they are difficult to achieve. Which might be why another objective of the Rio Summit is to reform the bodies through which the United Nations makes decisions on the environment, institutions that frequently end up mired in endless talkfests, in part because they require complete consensus to act on anything.

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#### We win if we prove the instrumental implementation of the plan is good---leahy says failure to engage LOAC and drones just causes other contries to lock in expansive frameworks, you can’t wish away institutions.

#### Their impact is wrong – debate over even the most technical issues improves decision-making and advocacy-this is also an impact turn to their link arguments-proves progress is possible within technocracy

Orna **Ben-Naftali**, Head of the International Law Division and of the Law and Culture Division, The Law School, The College of Management Academic Studies, Spring 200**3**, ARTICLE: 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int'l L.J. 233

Our analysis concludes that while a specific act of preemptive killing may be legal if it meets the above-specified requirements, the policy of state targeted preemptive killings is not. Furthermore, some specific acts of targeted killings may generate state responsibility, while others may constitute a war crime entailing criminal accountability. These conclusions, emanating from the reading of the three legal texts applicable to the context, and informed by a sensibility that coheres them, do not rest on a negation of the importance of the national interest in security. On the contrary, these conclusions incorporate and express the way it should be balanced with a minimum standard of humanity and against the relevant context.

This delicate, ever precarious balance is at the heart of the democratic discourse. A democratic state is not a meek state. True, it is fighting with "one hand tied behind its back,"n342 as soberly observed by Chief Justice Barak of the Israeli Supreme Court, but democratic sensibilities internalize this limitation on State power, not as a source of weakness but as a sign of strength. Democracies require a public discourse forever alert to the importance of human rights, suspicious of the way power is used, and committed to the rule of law. The legal culture, in turn, while not a substitute for this public discourse, is never absent from it and indeed serves as a catalyst for its development.

We therefore reject the notion that the policy of targeted killings, designed by Israel as a way to combat terrorist attacks, is beyond the purview of the rule of law.n343 We also deny the purist position suggesting that the legalistic nitty-gritty preoccupation with details entailed in the above discussion is likely to obscure and legitimize a harrowing policy; n344 one that, on principle, should be condemned. n345 This position in fact maintains that the legality or illegality of targeted state killings is not a legitimate issue of discussion; that while an emergency situation may exceptionally necessitate the deed, it should never be elevated to the sphere of the Word. n346 We appreciate the sensibility of this position, but, alas, do not find it sensible. Indeed, nor would the people who consider themselves victims of the policy of targeted killings, and appeal to the courts to intervene. n347 Purity belongs to the Platonic world of ideas; it is a necessary ideal to strive for, even if forever unachievable in this all too fallible City of Man. n348 In the best of all possible worlds law would be superfluous; in this world, it is a necessary, albeit insufficient means to achieve some possible betterment. This article hopes to contribute to this modest goal.

#### Simulated national security law debates preserve agency and enhance decision-making---avoids cooption

Laura K. Donohue 13, Associate Professor of Law, Georgetown Law, 4/11, “National Security Law Pedagogy and the Role of Simulations”, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.164 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education and integrates the experience through a multi-day simulation. In 2009, I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations. The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.165 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material. The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos. The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.166 A. Course Design The central idea in structuring the NSL Sim 2.0 course was to bridge the gap between theory and practice by conveying doctrinal material and creating an alternative reality in which students would be forced to act upon legal concerns.167 The exercise itself is a form of problem-based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (directed and focused on certain areas of the law and legal education) and flexible (responsive to student input and decisionmaking). Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.168 Additionally, while authenticity matters, it is worth noting that at some level the fact that the incident does not take place in a real-world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes – without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting. NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux. A key aspect of the course design is that it retains both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. A certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise. In order to capture problems related to adaptation and evolution, addressing goal [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.169 It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage of helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.170 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0. The twin goals of adaptation and evolution require that students be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, four attorneys from practice, a media expert, six to eight former simulation students, and a number of technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of shifting national security law authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional responsibility. The attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law. Throughout the simulation, the Control Team is constantly reacting to student choices. When unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media). A total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple alterations of the situation, relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers. The simulation itself is problem-based, giving players agency in driving the evolution of the experience – thus addressing goal [2(c)]. This requires a realtime response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to emphasize different areas of the law and the students’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed. The written and oral components of the simulation conform to the fourth pedagogical goal – the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication, such as legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. These oral components are paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas for NSLs. In addition, students are required to prepare a paper outlining their legal authorities prior to the simulation – and to deliver a 90 second oral briefing after the session. To replicate the high-stakes political environment at issue in goals (1) and (5), students are divided into political and legal roles and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state offices, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of many different considerations that decisionmakers take into account in the national security domain. Scenarios are selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further alterations to the simulation provide for the broader political context – for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component helps to emphasize the broader political context within which national security law is practiced. Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous interjections from both the Control Team and the participants in the simulation itself. As aforementioned, professors on the Control Team, and practicing attorneys who have previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, determining the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals. Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection – for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient. The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and the issues that arose in the course of the simulation, develop frameworks for analyzing uncertainty, tension with colleagues, mistakes, and successes in the future. B. Substantive Areas: Interstices and Threats As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on specific authorities that may be brought to bear in the course of a crisis. The decision of which areas to explore is made well in advance of the course. It is particularly helpful here to think about national security authorities on a continuum, as a way to impress upon students that there are shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might address the intersection of pandemic disease and biological weapons. A third could examine cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal portion of the course and the simulation follows from this decision. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out which authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided according to the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course. The simulation itself is based on five to six storylines reflecting the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student responses. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life. For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to stress the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (for example, by someone who has traveled from overseas), but then for the storyline to move into the second realm (awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of introducing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise – with the storyline designed to raise these questions. A third storyline might simply be well developed noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, about containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might become the focus. The sixth storyline could be further noise in the system – loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like. The five to six storylines, prepared by the Control Team in consultation with experts, become the basis for the preparation of scenario “injects:” i.e., newspaper articles, VNN broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression. C. How It Works As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often occur at inconvenient times and may well involve limited sleep and competing demands.171 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play. Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material – both general and SCI – has been provided to the relevant student teams. The Control Team has access to the complete site. For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings between the players), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis. The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication. As the storylines unfold, the Control Team takes on a variety of roles, such as that of the President, Vice President, President’s chief of staff, governor of a state, public health officials, and foreign dignitaries. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities. At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges and formal observers then offer reflections on the simulation and determine which teams performed most effectively. Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness of their – and other students’ – performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then formally ends.172 Learning, however, continues beyond the temporal confines of the semester. Students who perform well and who would like to continue to participate in the simulations are invited back as members of the control team, giving them a chance to deepen their understanding of national security law. Following graduation, a few students who go in to the field are then invited to continue their affiliation as National Security Law fellows, becoming increasingly involved in the evolution of the exercise itself. This system of vertical integration helps to build a mentoring environment for the students while they are enrolled in law school and to create opportunities for learning and mentorship post-graduation. It helps to keep the exercise current and reflective of emerging national security concerns. And it builds a strong community of individuals with common interests. CONCLUSION The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same. The one-size fits all approach currently dominating the conversation in legal education, however, appears ill-suited to address the concerns raised in the current conversation. Instead of looking at law across the board, greater insight can be gleaned by looking at the specific demands of the different fields themselves. This does not mean that the goals identified will be exclusive to, for instance, national security law, but it does suggest there will be greater nuance in the discussion of the adequacy of the current pedagogical approach. With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified – (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, to ensure that they will be most effective when they enter the field. The problem with the current structures in legal education is that they fall short, in important ways, from helping students to meet these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises. These are important classroom devices. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more holistic approach to national security law which will allow for the maximum conveyance of required skills. Total immersion simulations, which have not yet been addressed in the secondary literature for civilian education in national security law, may provide an important way forward. Such simulations also cure shortcomings in other areas of experiential education, such as clinics and moot court. It is in an effort to address these concerns that I developed the simulation model above. NSL Sim 2.0 certainly is not the only solution, but it does provide a starting point for moving forward. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within a course. It makes use of technology and physical space to engage students in a multi-day exercise, in which they are given agency and responsibility for their decision making, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.

### Psycho wrong

#### ---Lacanian psychoanalysis is an incoherent tautology --- It has no explanatory value and can’t form the basis of ethics.

Robinson 2005

Andrew, PhD in political theory at the University of Nottingham, Theory & Event 8.1

As Barthes shows, myth offers the psychological benefits of empiricism without the epistemological costs.  Tautology, for instance, is 'a minor ethical salvation, the satisfaction of having militated in favour of a truth... without having to assume the risks which any somewhat positive search for truth inevitably involves'[61](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn61).  It dispenses with the need to have ideas, while treating this release as a stern morality.  Tautology is a rationality which simultaneously denies itself, in which 'the accidental failure of language is magically identified with what one decides is a natural resistance of the object'[62](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn62). This passage could almost have been written with the "Lacanian Real" in mind.  The characteristic of the Real is precisely that one can invoke it without defining it (since it is "beyond symbolization"), and that the accidental failure of language, or indeed a contingent failure in social praxis, is identified with an ontological resistance to symbolization projected into Being itself.  For instance, Žižek's classification of the Nation as a Thing rests on the claim that 'the only way we can determine it is by... empty tautology', and that it is a 'semantic void'[63](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn63).  Similarly, he claims that 'the tautological gesture of the Master-Signifier', an empty performative which retroactively turns presuppositions into conclusions, is necessary, and also that tautology is the only way historical change can occur[64](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn64).  He even declares constitutive lack (in this case, termed the "death drive") to be a tautology[65](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn65). Lacanian references to "the Real" or "antagonism" as the cause of a contingent failure are reminiscent of Robert Teflon's definition of God: 'an explanation which means "I have no explanation"'[66](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn66).  An "ethics of the Real" is a minor ethical salvation which says very little in positive terms, but which can pose in macho terms as a "hard" acceptance of terrifying realities.  It authorizes truth-claims - in Laclau's language, a 'reality' which is 'before our eyes[67](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn67)', or in Newman's, a 'harsh reality' hidden beneath a protective veil[68](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn68) - without the attendant risks.  Some Lacanian theorists also show indications of a commitment based on the particular kind of "euphoric" enjoyment Barthes associates with myths.  Laclau in particular emphasizes his belief in the 'exhilarating' significance of the present[69](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn69), hinting that he is committed to euphoric investments generated through the repetition of the same.

#### ---Psychoanalysis is wrong --- They falsely equate individual psyches with societal structure which makes them underestimate the system’s ability to change and self correct.

Robinson 2005

Andrew, PhD in political theory at the University of Nottingham, Theory & Event 8.1

The operation of the logic of projection is predictable.  According to Lacanians, there is a basic structure (sometimes called a 'ground' or 'matrix') from which all social phenomena arise, and this structure, which remains unchanged in all eventualities, is the reference-point from which particular cases are viewed.  The "fit" between theory and evidence is constructed monologically by the reduction of the latter to the former, or by selectivity in inclusion and reading of examples.  At its simplest, the Lacanian myth functions by a short-circuit between a particular instance and statements containing words such as "all", "always", "never", "necessity" and so on.  A contingent example or a generic reference to "experience" is used, misleadingly, to found a claim with supposed universal validity.  For instance, Stavrakakis uses the fact that existing belief-systems are based on exclusions as a basis to claim that all belief-systems are necessarily based on exclusions[58](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn58), and claims that particular traumas express an 'ultimate impossibility'[59](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn59).  Similarly, Laclau and Mouffe use the fact that a particular antagonism can disrupt a particular fixed identity to claim that the social as such is penetrated and constituted by antagonism as such[60](http://muse.jhu.edu/journals/theory_and_event/v008/8.1robinson.html#_edn60).  Phenomena are often analysed as outgrowths of something exterior to the situation in question.  For instance, Žižek's concept of the "social symptom" depends on a reduction of the acts of one particular series of people (the "socially excluded", "fundamentalists", Serbian paramilitaries, etc.) to a psychological function in the psyche of a different group (westerners).  The "real" is a supposedly self-identical principle which is used to reduce any and all qualitative differences between situations to a relation of formal equivalence.  This shows how mythical characteristics can be projected from the outside, although it also raises different problems: the under-conceptualization of the relationship between individual psyches and collective phenomena in Lacanian theory, and a related tendency for psychological concepts to acquire an ersatz agency similar to that of a Marxian fetish.  "The Real" or "antagonism" occurs in phrases which have it doing or causing something.

#### ---Rational actor theory is good --- Nobel prize winning economics concludes it’s empirically true and the markets will self correct around even random decisions.

Caldwell 2004

Bruce, Ph.D., Professor of Economics at University of North Carolina, Greensboro - *Hayek’s Challenge: an Intellectual Biography of F.A. Hayek* University of Chicago Press p. 330

Robbins's precise claim was that assumptions like maximizing behavior and perfect foresight are expository devices whose role is to make tractable the "analytic constructions" or formal models of economists. They are different from the basic postulates that underlie (what I labeled) basic economic reasoning. In the first edition of his book, these postulates referred to supply-and-demand analysis. In the second, they were such "facts of everyday experience" as the notions that the existence of scarcity requires us to choose and that choosing agents can order their preferences and choose purposefully.3 These postulates imply that agents generally respond to perceived changes in prices and incomes (or to perceived changes in constraints) by substituting "in the right direction," that is, away from more costly resources or goods. Like Robbins, I will not deal here with the thorny philosophical question of the status of the basic postulates. I simply note that, if Robbins's argument is accepted, it is a vitally important one, for it vitiates the claims of critics who argue that assumptions like those of rationality and perfect foresight drive all the results of economics. If the results of economics do not depend on these unrealistic assumptions, then any confidence that we might have in the results of basic economic reasoning has a much stronger justification. On the other hand, if one focuses, not on basic economic reasoning, but on the "analytic constructions" of economics, on *formal economic theory*. it is equally clear that the "unrealistic" assumptions have had a much more crucial role to play. And, contrary to Robbins's claim, these "first approximations" decidedly did not disappear once the arguments of economic theory were "in their full development." For many years after Robbins wrote his Essay, the dominant approach to choice theory (or, more broadly, decision theory) sometimes modified but rarely abandoned the twin notions of consistency in choice and optimizing behavior. Indeed, since rationality itself was typically defined as consistency in choice over a well-defined preference ordering, even Robbins's "fact of everyday experience" that people are generally able to order their preferences was integrated into the formal apparatus of economics. There were modifications in assumptions about information and expectations, but even these nods toward reality usually made strong assumptions about what decisionmakers could know.4 Robbins made his argument when formal modeling in economics was in its infancy. In the intervening years, modeling became the (often sole) accepted means of discourse among economists. At the same time, positivist rhetoric (i.e., an emphasis on testing and prediction) hit its high-water mark within the discipline. This required that protagonists on each side of the homo economicus debate change their arguments. Defenders of the use of unrealistic assumptions typically took on board the arguments provided by Milton Friedman in "The Methodology of Positive Economics" (Friedman 1953). Friedman argued that the realism of a theory's assumptions did not matter; all that mattered was how well a theory predicted. Prediction in this case meant "market-level predictions." In a sense, what Friedman was saying was: Economic theory works at the market level, let's not worry about why. Critics of homo economicus also called for testing and prediction, but their focus was on the prediction of individual choice behavior. As such, although Mitchell's dream that behaviorism would provide a new foundation for economics was never realized, Hutchison's dream of more empirical studies of choice behavior was, at least belatedly. Scores of psychological studies of choice behavior were eventually undertaken. It was found that, in experimental settings, people were generally able to order preferences but were not always transitive in their orderings. Households exhibited varying amounts of consistency in choice over time. Experimental subjects might tend toward rationality, but none was perfectly rational.5 In short, these studies established that real, choosing people are not always perfectly consistent in arranging their preferences and, more strongly, that, under certain conditions (especially in situations involving decisions under risk), real, choosing people repeatedly make similar types of mistakes. The psychological literature on choice behavior—from critical studies of preference reversal to more posi live contributions like prospect theory and the theory of regret—has established robust results, not only about when systematic and persistent errors in decisionmaking might occur, but also about how they might be explained. Austrians, then, take a position that may be viewed as a third way. While they do not follow the mainstream in its enthusiasm for highly formal economic theory, they do believe that the simple (although unrealistic) models used for basic economic reasoning allow economists to do pretty well at making market-level predictions. On the other hand, they agree with critics like the behavioral economists that real people often make errors in decision making. They do not think, however, that this fact alters their conclusion about the validity of basic economic reasoning. Are the Austrians right? Or do the results of basic economic reasoning in fact depend on the "unrealistic assumptions" that economists have long made in their models? As it turns out, there are both theoretical arguments and empirical studies (some of them undertaken quite some time ago) that suggest that many of the results of basic economic reasoning in fact do not depend on the standard assumptions that agents have full information and always choose consistently. Thus, Gary Becker (1962) demonstrated that even habitual or random behavior on the part of individual agents will yield reductions in expenditure at the market level in response to an increase in the price of a good. This result is due to the fact that a rise in price causes a restriction in the size of the opportunity set available to all the agents in the market. Werner Hildenbrand (1994) showed that the law of demand depends more on the heterogeneity of households that are aggregated in a market than on the rationality of the de-cisionmakers. Using evolutionary arguments, Armen Alchian ([1950] 1977) showed that all sorts of firm behaviors are consistent with the usual predictions about aggregate market outcomes. One way to explain some of these findings is to invoke Richard Langlois's distinction between situational constraints and system constraints. Situa-tional constraints dictate that certain actions are "reasonable." (The rationality assumption is, therefore, a paradigmatic situational constraint.) But, in addition to situational constraints, there may exist in a given choice problem system constraints, which add another layer of constraints to the setting. When such system constraints are operative (something that occurs, e.g., in competitive market situations), they, rather than any assumptions about the reasonableness of the agent, carry most of the explanatory weight (Langlois i986b; Langlois and Csontos 1993). Langloiss distinction has much in common with Satz and Ferejohn's (1994) discussion of "highly scaffolded" choice situations, those in which the structure of the environment favors actions that are the predictions of neoclassical theory.8 These theoretical results also find empirical support in the field of exper imental economics. Some of the most dramatic evidence showed that all sorts of experimental subjects, from rats to female psychotics, often responded in the "right" direction to changes in prices and incomes. Experimental econo mists like Vernon Smith, the other Nobel Prize winner in 2002, who focus on market experiments rather than on individual choice, have reached equally startling results: "In many experimental markets, poorly informed, error prone, and uncomprehending human agents interact through the trading rules to produce social algorithms which demonstrably approximate the wealth maximizing outcomes traditionally thought to require complete information and cognitively rational actors" (Smith 1994,118). When taken together, these diverse arguments seem to me to lend support to Robbins's contention that economic reasoning does not depend on real agents having perfect foresight or being able to exhibit perfect rationality. They support his idea that these assumptions are expository devices used in simple models, not fundamental assumptions. Their usage allows the models to capture the results of certain constraints that operate in a world of scarcity and that allow (typically market-level) predictions to be made.9

### AT: Fear=Miscalc

#### Nope.

Eric A. **Posner and** Adrian **Vermeule 3**, law profs at Chicago and Harvard, Accommodating Emergencies, September, <http://www.law.uchicago.edu/files/files/48.eap-av.emergency.pdf>

Against the view that panicked government officials overreact to an emergency, and unnecessarily curtail civil liberties, we suggest a more constructive theory of the role of fear. Before the emergency, government officials are complacent. They do not think clearly or vigorously about the potential threats faced by the nation. After the terrorist attack or military intervention, their complacency is replaced by fear. Fear stimulates them to action. Action may be based on good decisions or bad: fear might cause officials to exaggerate future threats, but it also might arouse them to threats that they would otherwise not perceive. **It is impossible to say in the abstract whether decisions and actions provoked by fear are likely to be better than decisions and actions made in a state of calm**. But our limited point is that there is no reason to think that the fear-inspired decisions are likely to be worse. For that reason, the existence of fear during emergencies does not support the antiaccommodation theory that the Constitution should be enforced as strictly during emergencies as during non-emergencies.

C. The Influence of Fear during Emergencies

Suppose now that the simple view of fear is correct, and that it is an unambiguously negative influence on government decisionmaking. Critics of accommodation argue that this negative influence of fear justifies skepticism about emergency policies and strict enforcement of the Constitution. However, this argument is implausible. It is doubtful that fear, so understood, has more influence on decisionmaking during emergencies than decisionmaking during non-emergencies.

The panic thesis, implicit in much scholarship though rarely discussed in detail, holds that citizens and officials respond to terrorism and war in the same way that an individual in the jungle responds to a tiger or snake. The national response to emergency, because it is a standard fear response, is characterized by the same circumvention of ordinary deliberative processes: thus, (i) the response is instinctive rather than reasoned, and thus subject to error; and (ii) the error will be biased in the direction of overreaction. While the flight reaction was a good evolutionary strategy on the savannah, in a complex modern society the flight response is not suitable and can only interfere with judgment. Its advantage—speed—has minimal value for social decisionmaking. No national emergency requires an immediate reaction—except by trained professionals who execute policies established earlier—but instead over days, months, or years people make complex judgments about the appropriate institutional response. And the asymmetrical nature of fear guarantees that people will, during a national emergency, overweight the threat and underweight other things that people value, such as civil liberties.

But if decisionmakers rarely act immediately, then the tiger story cannot bear the metaphoric weight that is placed on it. Indeed, the flight response has nothing to do with the political response to the bombing of Pearl Harbor or the attack on September 11. The people who were there—the citizens and soldiers beneath the bombs, the office workers in the World Trade Center—no doubt felt fear, and most of them probably responded in the classic way. They experienced the standard physiological effects, and (with the exception of trained soldiers and security officials) fled without stopping to think. It is also true that in the days and weeks after the attacks, many people felt fear, although not the sort that produces a irresistible urge to flee. **But this kind of fear is not the kind in which cognition shuts down**. (Some people did have more severe mental reactions and, for example, shut themselves in their houses, but these reactions were rare.) The fear is probably better described as a general anxiety or jumpiness, an anxiety that was probably shared by government officials as well as ordinary citizens.53

While, as we have noted, there is psychological research suggesting that normal cognition partly shuts down in response to an immediate threat, we are aware of no research suggesting that people who feel anxious about a non-immediate threat are incapable of thinking, or thinking properly, or systematically overweight the threat relative to other values. Indeed, it would be surprising to find research that clearly distinguished “anxious thinking” and “calm thinking,” given that anxiety is a pervasive aspect of life. People are anxious about their children; about their health; about their job prospects; about their vacation arrangements; about walking home at night. No one argues that people’s anxiety about their health causes them to take too many precautions—to get too much exercise, to diet too aggressively, to go to the doctor too frequently—and to undervalue other things like leisure. So it is hard to see why anxiety about more remote threats, from terrorists or unfriendly countries with nuclear weapons, should cause the public, or elected officials, to place more emphasis on security than is justified, and to sacrifice civil liberties.

Fear generated by immediate threats, then, causes instinctive responses that are not rational in the cognitive sense, not always desirable, and not a good basis for public policy, but it is not this kind of fear that leads to restrictions of civil liberties during wartime. The internment of Japanese Americans during World War II may have been due to racial animus, or to a mistaken assessment of the risks; it was not the direct result of panic; indeed there was a delay of weeks before the policy was seriously considered.54 Post-9/11 curtailments of civil liberties, aside from immediate detentions, came after a significant delay and much deliberation. The civil libertarians’ argument that fear produces bad policy trades on the ambiguity of the word “panic,” which refers both to real fear that undermines rationality, and to collectively harmful outcomes that are driven by rational decisions, such as a bank run, where it is rational for all depositors to withdraw funds if they believe that enough other depositors are withdrawing funds. Once we eliminate the false concern about fear, it becomes clear that the panic thesis is indistinguishable from the argument that during an emergency people are likely to make mistakes. But if the only concern is that during emergencies people make mistakes, there would be no reason for demanding that the constitution be enforced normally during emergencies. Political errors occur during emergencies and nonemergencies, but the stakes are higher during emergencies, and that is the conventional reason why constitutional constraints should be relaxed.

### Rejection Fails

#### Rejecting the Rule of Law does nothing— you can’t wish away legal thought

Balkin 05(Jack, Professor of Constitutional Law and the First Amendment, Yale Law School, DERRIDA/AMERICA: THE PRESENT STATE OF AMERICA'S EUROPE: LAW: DECONSTRUCTION'S LEGAL CAREER, Cardozo Law Review, November, 27 Cardozo L. Rev. 719)

Second, the antihumanist assumptions of deconstruction tended to undermine the notion of "false necessity" implicit in CLS scholarship. Social structures and legal doctrines might be "contingent" in the sense that they did not have to take any particular form, but once they were in place they would not melt away simply by an act of will. Moreover, changes and reforms would have to be implemented using the social meanings and social structures already in place. Individuals who had been socially conditioned to see existing social structures and legal categories as normal and natural would not easily be able to transcend the limits of their perspectives. Moreover, it might be difficult to change conventional social meanings and practices that were grounded in the interlocking expectations and actions of vast numbers of people. Even if conventions were "conventional" rather than necessary, that did not mean that they were not also durable and powerful, offering considerable resistance to attempts to alter or overthrow them. Deconstruction did suggest that legal and social structures had unstable and flexible boundaries, but it did not imply that these structures could easily be transformed through individual thought or effort. Even if legal concepts had multiple meanings, it did not follow that individuals would be able to manipulate and change the shared social meanings of these concepts in any way they liked; moreover, their social construction suggested that they would not even desire to change shared meanings in some of these ways. 23 Third, using deconstruction to demonstrate the incoherence of the categories and distinctions of legal orthodoxy proved entirely too much. If the concepts and categories used by the status quo were deconstructible, so too would be any concepts and categories offered by Critical Legal Scholars. If deconstructibility meant incoherence, then it also meant the incoherence of any positive progressive program for Critical Legal Studies and any radical alternatives to mainstream legal thought.

#### Rejecting legal rights is worse for marginalized groups- its their only outlet for political advancement

Rovner 04 (Laura, law prof at U of ND Law Disability, Equality, and Identity, Summer, 2004, 55 Ala. L. Rev. 1043)

Yet the reaction to Wald's point is instructive. As Linda Hamilton Krieger described it, "this notion provoked a great deal of discussion--and no small measure of consternation--among disability activists who rejoined that the right to assert a legal claim to access had transformed their individual and collective self-conceptions and their relationship to society." 228 She summarizes: "Law, in this view, had brought the movement a long, long way." 229 It is for exactly this reason that many critical race 230 and critical feminist scholars 231 have rejected the Critical Legal Studies (CLS) position that a [\*1085] "rights" construct hampers, rather than furthers, the political advancement of traditionally marginalized groups. 232 The critical race and critical feminist theorists (and some disability theorists as well) take the position that the CLS critique of rights "seems to discount entirely the voice and the experiences of [racial minorities] in this country, for whom politically effective action has occurred mainly in connection with asserting or extending rights." 233 Particularly for the disability advocacy movement, which has only obtained meaningful legal rights relatively recently, Patricia Williams' words may resonate quite strongly: For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one's status from human body to social being. For blacks, then, the attainment of rights signifies the due, the respectful behavior, the collective responsibility properly owed by a society to one of its own. 234