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Entering Unprecedented Terrain: Charting a Method To Reduce Madness in Post-9/11 Power and Rights Conflicts

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PROLOGUE (TO THE PAST)

This project was originally conceived at what we believed to be a unique moment in our nation's history: After September 11, in what we perceived as a period of temporary emergency, we were confronted with a series of governmental actions—primarily executive in nature—that resulted in citizens and noncitizens, persons within the United States and those on battlefields, being designated as enemy combatants and being subjected to various kinds of detentions and trials. Given the dearth of judicial opinions that existed to guide the path of executive and (to a lesser extent) congressional action, in these post-September 11 matters, we described these circumstances as “unprecedented terrain.”¹

In response to this state of domestic affairs, we initially sought to compose a methodology for examining the tradeoff between power and individual rights inherent in the aforementioned executive actions and the cases that challenged them. We first began to compose this method in 2004, before the U.S. Supreme Court issued a series of opinions that provided some answers as to the contours of acceptable executive decisionmaking² in what has now become, perhaps, a semipermanent state of emergency.³

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1. This part of the title speaks both to the lack of judicial guidance that existed immediately after September 11 and what seemed to be an extremely aggressive posture with regard to the President's actions in response to the tragedy. See *infra* note 17, 25 and accompanying text.

2. We first presented our thoughts on this matter at the 2004 Law and Society Annual Meeting in Chicago while the decisions were pending at the U.S. Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004) (which was decided with *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003)), *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Together with *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), we refer to these cases as the first wave of challenges to post-September 11 designations, detentions, and trials.

3. For a comment that we are now engaged in a state of permanent or normalized

While the first wave of cases has come and gone, questions remain related to the scope of the detentions, the justifications for providing various terrorist suspects different forms of designations and trials, and the proper balance between executive power and individual rights. The Court's initial set of opinions has turned out to be prescriptive, but not reconciliatory, on questions central to our inquiry and method. So, more than six years after September 11, and three years after our initial formulations, we find that we are still confronted with post-September 11 questions and pending cases that cry out for a balanced approach for their resolution.

Below, we introduce our project by explaining why and how it was first conceived and by describing the method we developed to organize the various rule options available to resolve issues presented by the terrorism and detention cases. Here, we both assess which of various rule alternatives we have identified actually shaped the opinions in the first wave of cases and consider (anew) the possibility our "unified approach" presents for resolving the issues that remain in the emerging wave of new cases.

I. INTRODUCTION

Although the trends of globalization and the spread of capitalism are not new, the twentieth century's revolutionary advances in communication and transportation sparked an unprecedented intensification and acceleration of these trends,⁴ resulting in a growing westernization of the world. Westernization, which has not been universally embraced, has contributed to intense and sometimes violent cultural clashes.⁵ At the same time, globalization and the spread of capitalism have produced an intertwined world in which local and small-scale acts of terrorism have exerted significant influences on the policies of the world's most power-

emergency, see Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 839-41 (2006); see also Mark Danner, *Taking Stock of the Forever War*, N.Y. TIMES, Sept. 11, 2005, § 6 (Magazine), at 45.

4. See Jeffrey Sachs, Galen L. Stone Professor of Int'l Trade, Harvard Univ., Remarks at Yale Law School Alumni Weekend: Globalization and the Rule of Law (Oct. 16, 1998), in YALE LAW SCHOOL OCCASIONAL PAPERS 3-5 (1998), available at <http://lsr.nellco.org/yale/ylsop/papers/2>.

5. See SAMUEL P. HUNTINGTON, CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996); Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22-23 (tracing the evolution of violent conflict in the modern world from contests between princes to nation states to ideologies to cultural groupings); Bernard Lewis, *The Roots of Muslim Rage*, THEATLANTIC.COM, Sept. 1990, <http://www.theatlantic.com/doc/199009/muslim-rage> ("[W]e are facing a mood and a movement far transcending the level of issues and policies and the governments that pursue them. This is no less than a clash of civilizations—the perhaps irrational but surely historic reaction of an ancient rival against our Judeo-Christian heritage, our secular present, and the world-wide expansion of both.").

ful nations, much as small forces are magnified and fluidly transmitted in a hydraulic system.⁶

It is the demonstrated hydraulic force of local attacks and the impingement of Western values upon the Muslim world that seem to have fostered increased investment in terrorism and growth in its employment as a policy-shaping tool against the “far enemy,” the United States.⁷ Since 1992, al Qaeda has used terrorism to further a far more ambitious goal than previously attempted: to end U.S. influence in the world generally.⁸ This broader agenda has led to the implementation and pursuit of far more ruthless tactics than previously observed, and the agenda climaxed with the devastating attacks of September 11.⁹

The September 11 attacks altered, perhaps permanently, the U.S. security paradigm,¹⁰ and brought to light the nation’s many continuing vulnerabilities. The attacks’ notorious successes in destroying important

6. We are mindful that in a different context, Mr. Justice Douglas used a similar metaphor to describe the presence of “powerful hydraulic pressures” arising out of contemporary problems, serving as the impetus to “water down constitutional guarantees.” See *Terry v. Ohio*, 392 U.S. 1 (1968) (Douglas, J., dissenting).

7. See DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR* 118 (2002) (explaining that one of the characteristics that distinguishes al Qaeda from other terrorist groups is its focus on the United States, as the “ultimate fountain of corruption on earth”).

8. See *id.* at 119 (“But it is ultimately not a single American policy, such as stationing troops in Lebanon, or even in Saudi Arabia, that is the issue. Instead, it is America’s very presence in the world, the fundamentals of its relationship with dozens of Muslim countries *and* its relationship with Israel, which arouses the ire of al-Qaeda. America itself, and the essentials of the world order it supports, are what must be attacked.”).

9. As others have previously argued:

The combination of terrorists and weapons of mass destruction is the stuff of countless movies and television shows. The reality is otherwise: very, very few groups have ever seriously tried to acquire such weapons. Almost all of those that have—the Japanese cult Aum Shinrikyo is the most notable exception—have sought them primarily for purposes of blackmail. Reading history backward, it is clear that extortion is not part of al-Qaeda’s inventory of tactics. Its forays into procuring unconventional arms are an unmistakable sign that al-Qaeda is prepared to cross a threshold never before approached and kill in a way unlike that of any earlier terrorists. The period of this activity roughly coincides with that of the group’s decision to focus on waging war against the United States, and it is hard to imagine that the two matters were not linked.

Id. at 129.

10. As then Assistant Attorney General Viet Dinh stated:

This is the enemy we face: a criminal whose objective is not crime but fear; a mass murderer who kills only as a means to a greater end; a predator whose victims are all innocent civilians; a warrior who exploits the rule of war; a war criminal who recognizes no boundaries and who reaches all corners of the world.

To confront this threat, the Department of Justice needed a fundamentally new paradigm, different from the way we approached the traditional task of law enforcement. Unlike traditional soldiers, terrorists waged war dressed not in camouflage, but in the colors of street clothing. Unlike traditional criminals, terrorists are willing to sacrifice their own lives in order to take the lives of innocents.

American symbols will likely lead to future attempts.¹¹ Although the Bush administration's priorities before September 11 have been the subject of much criticism and conjecture,¹² it is clear that after September 11, the administration, as well as Congress, understood that future attempts to attack the United States were inevitable and that new measures would be required to prevent or minimize the effect of such future attacks.

A number of initiatives have been undertaken in the effort to reconstitute domestic security including: (a) permitting criminal investigators and intelligence officials far greater freedom to share information and cooperate on investigations;¹³ (b) providing for more flexible surveillance rules;¹⁴ and (c) more aggressively pursuing the removal of aliens suspected of terrorist activity.¹⁵ In addition, one of the most significant policy changes after September 11 has been the Department of Defense's decision to detain "enemy combatants" captured in the prosecution of the global War on Terror.¹⁶ This policy has given rise to a series of additional executive decisions that have sought to claim a right

Stephen R. McAllister, Viet Dinh, Erwin Chemerinsky, Christopher Stone & Jeffrey Rosen, *Life After 9/11: Issues Affecting the Courts and the Nation*, 51 U. KAN. L. REV. 219, 222–23 (2003).

11. See BENJAMIN & SIMON, *supra* note 7, at 118–19.

12. See, e.g., RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* (2004).

13. See *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. No. 107-56, tit. IX, §§ 901–908, 115 Stat. 272, 387–91 (codified as amended in scattered sections of 28 and 50 U.S.C.).

14. See U.S. DEP'T OF JUSTICE, *LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT* (2006), available at <http://www.epic.org/privacy/terrorism/fisa/doj11906wp.pdf> [hereinafter U.S. DEP'T OF JUSTICE, *LEGAL AUTHORITIES*]. Finding this to be another arena where the President was asserting unprecedented authority, the warrantless surveillance program was originally struck down by Judge Anna Diggs Taylor in *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006). That decision, however, was overturned due to a lack of standing after the plaintiffs could not prove that they had been targeted by the challenged searches. See *ACLU v. NSA*, 493 F.3d 644, 648 (6th Cir. 2007).

15. See USA PATRIOT Act §§ 401–418, 115 Stat. at 342–56.

16. Several hundred enemy combatants are being held at the U.S. Naval Base in Guantánamo Bay, Cuba. For a history of the number of persons detained and released since 2002, see Global Security.org, *Guantánamo Bay Detainees*, http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm (last visited Sept. 23, 2007). The enemy-combatant designation pertains to individuals who engage in war-fighting activities, without belonging to an armed force of a recognized foreign State. See U.S. DEP'T OF DEFENSE, *GUANTÁNAMO DETAINEES*, available at <http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf> (last visited Feb. 26, 2008); U.S. DEP'T OF DEFENSE, *COMBATANT STATUS REVIEW TRIBUNALS*, available at <http://www.defenselink.mil/news/Jul2007/CSRT%20Fact%20Sheet.pdf> (last visited Feb. 26, 2008) (indicating that between July 2004 and March 2005, the Department of Defense conducted 558 combatant-status reviews at Guantánamo Bay, which determined 520 detainees were enemy combatants); see also *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (applying the enemy-combatant designation to detained German saboteurs, who the Court held were not entitled to habeas relief and could be tried by presidentially appointed military commissions). For an argument that *Quirin* should be viewed

for the President to define the terms of these detentions, the types of trials extended to those detained, and the scope of any appeal to the detentions or trials.¹⁷

Not surprisingly, these new security initiatives have been the subject of intense and polarized debate. The administration's detention and trial of enemy combatants has taken a central role in that debate, as representative of controversial aspects that critics have charged underlie a number of the new security measures—extremely broad executive power,¹⁸ limitation of the role of the judiciary,¹⁹ secrecy, injection of an express “us–them” categorization, and an apparent rejection of the international human-rights norms that might have been followed. Unlike many of the other factors at play in the debate—such as globalization, the growing recognition of international human-rights norms, and the recent judicial trend eroding the distinction between aliens and citizens—the U.S. government's continuing effort to reconstitute domestic security is a unique, post–September 11 challenge.

A number of scholars have supported the government's actions,²⁰ or at least judicial deference to them in a time of crisis.²¹ Such a position would sanction the military's power to detain, indefinitely without trial or access to legal counsel, anyone who has taken up arms in furtherance of a terrorist plan against the United States. In the case of designated alien-enemy combatants captured and detained abroad, such as onboard the U.S. Naval Base in Guantánamo Bay, we are now in the process of evaluating what will be a second wave of legal challenges. In 2004 our initial questions pertained to whether such detentions were beyond the U.S. courts' jurisdiction to consider.²² Essentially, the ques-

within the historical context of the development of habeas corpus jurisprudence and should not be applied today, see A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309.

17. The latter two issues have recently been defined by legislation. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 of U.S.C.). The President first sought to limit these matters through an Executive Order, but the Supreme Court struck it down in *Hamdan v. United States*, 126 S. Ct. 2749 (2006).

18. See Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 4, 7–19 (2006) (criticizing the Executive exercising broad and mostly unchecked power in the areas of detentions, eavesdropping, and torture).

19. See Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 *passim* (2007).

20. See, e.g., JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

21. See, e.g., RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*].

22. See *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (affirming the district

tions related to whether the Executive would be permitted to continue such practices with no judicial review of individual cases and whether the petitioners would be forced to resort to diplomatic efforts to obtain concessions from the U.S. government.²³ Moreover, we were concerned about the administration's signaled intent to create a system of military commissions and to charge some of the aliens detained at Guantánamo with crimes.²⁴

In the case of U.S. citizens, whether captured on the battlefield abroad or unarmed within the United States, the administration argued the judiciary's role was limited to ensuring that the Executive relied on "some evidence" in designating the citizen an enemy combatant,²⁵ and whether that designation could justify citizens being held indefinitely in military confinement with no ability to challenge that detention.²⁶

court's finding of no jurisdiction and permitting the continued detention of petitioners, enemy combatants, held at Guantánamo Bay); *Rasul v. Bush*, 215 F. Supp. 2d 55, 73 (D.D.C. 2002) (dismissing habeas petition for lack of jurisdiction), *rev'd*, 103 F. App'x 676 (D.C. Cir. 2004).

23. Diplomatic negotiations seem to have, in fact, shaped the U.S. detention policies. *See, e.g.*, Press Release No. 180-04, U.S. Dep't of Def., Transfer of Afghani and Pakistani Detainees Complete (Mar. 15, 2004), <http://www.defenselink.mil/releases/release.aspx?releaseid=7133>; Press Release No. 155-04, Dep't of Def., Transfer of British Detainees Complete (Mar. 9, 2004), <http://www.defenselink.mil/releases/release.aspx?releaseid=8154>; Press Release No. 127-04, Dep't of Def., Transfer of Detainee Complete (Feb. 25, 2004), <http://www.defenselink.mil/releases/release.aspx?releaseid=7090> (announcing transfer of Danish national); Press Release No. 105-04, Dep't of Def., Transfer of Detainee Complete (Feb. 13, 2004), <http://www.defenselink.mil/releases/release.aspx?releaseid=7077> (announcing transfer of Spanish detainee); Press Release No. 136-04, Dep't of Def., Transfer of Detainees Complete (Mar. 1, 2004), <http://www.defenselink.mil/releases/release.aspx?releaseid=7100> (announcing transfer of Russian detainees); Press Release No. 892-03, Dep't of Def., U.S. and Australia Announce Agreements on Guantanamo Detainees (Nov. 25, 2003), <http://www.defenselink.mil/releases/release.aspx?releaseid=5818>.

24. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) (announcing the intention to subject noncitizen detainees to military commissions).

25. At the district court level, Judge Doumar described Hamdi's situation as follows:

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer.

Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002) (ordering the government to produce documents, which supplied the basis for Hamdi being labeled an enemy combatant); *see also* *Padilla v. Rumsfeld*, 352 F.3d 695, 699, 712-16 (2d Cir. 2003) (finding the President lacked authority to detain a U.S. citizen without express congressional authorization and remanding the case directing the district court to issue a writ of habeas corpus and free the petitioner from military detention). *But see* *Hamdi v. Rumsfeld*, 316 F.3d 450, 477 (4th Cir. 2003) (upholding Hamdi's detention based upon evidence submitted by the government without a chance for rebuttal); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 608 (S.D.N.Y. 2002) (ordering that Padilla be permitted access to counsel and opportunity to rebut the government's evidence but announcing that the detention would be reviewed under deferential "some evidence" standard).

26. At the time, this also described the condition of Jose Padilla, who was designated as an enemy combatant for his alleged role in a terrorist plot. Padilla was held for over three years in a naval brig in South Carolina. His initial challenge to his detention was reviewed by the U.S.

Decisions in the first detention cases answered initial queries regarding the quality of process to be afforded those wishing to challenge their enemy-combatant status and whether the U.S. courts are open to challenges from aliens detained outside the United States. The Supreme Court even unearthed a modern era *Youngstown Sheet and Tube Co. v. Sawyer*²⁷ analysis to place limits on the power of the Executive to create the aforementioned commissions.²⁸ These answers, however, did not fully address the expansive set of questions related to designations, detentions, and trials in terrorism-related matters.

New questions have emerged regarding the propriety of congressionally authorized military commissions,²⁹ whether the Military Commissions Act ("MCA") authorizes the government to summarily detain noncitizens within the United States without criminal charging,³⁰ what limits are imposed by statute and international law on crimes tried in such courts, and the effects of statutory provisions stripping habeas corpus jurisdiction from federal appellate courts.³¹ There are also burgeoning questions as to whether habeas relief must be afforded U.S. citi-

Supreme Court but dismissed because it incorrectly named the U.S. Secretary of Defense rather than the commanding officer of the naval brig as the respondent, and it was incorrectly filed in New York rather than in South Carolina. For the Supreme Court's rendition of these facts, see *Rumsfeld v. Padilla*, 542 U.S. 426, 426 (2004). Subsequently, in January 2006, Mr. Padilla was moved to Miami and faced a federal criminal indictment. See *United States v. Padilla*, No. 04-60001-CR, 2007 WL 1079090, at *1 (S.D. Fla. Apr. 9, 2007) (denying Padilla's motion to dismiss). Padilla, and codefendants, Adham Hassoun and Kifa Jayyousi, were convicted of conspiracy to murder, kidnap, and maim overseas; conspiracy to provide material support to terrorists; and providing material support for terrorists. See Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1.

27. 343 U.S. 579 (1952).

28. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); see also Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1381-82 (2007) (providing a comparative analysis of *Hamdan* and *Youngstown*); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 934-35, 960-63 (2007) (analyzing *Hamdan* as a modern-day *Youngstown*).

29. This question exists largely as a function of Congress enacting the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 of U.S.C.), which is substantially similar to the executive order the U.S. Supreme Court struck down for want of congressional authorization in *Hamdan*, 126 S. Ct. at 2774-75, but whose substantive provisions remain largely unanalyzed by the Court.

30. Ali Saleh Kahlah Al-Marri, a citizen of Qatar, was picked up in the Illinois in 2001 and since has been detained as an enemy combatant. He is presently being held at the U.S. Navy brig in South Carolina, where he has been interrogated but not charged. See Adam Liptak, *Court Says Military Cannot Hold 'Enemy Combatant.'* N.Y. TIMES, June 11, 2007, at A1. Recently, the Fourth Circuit Court of Appeals held that the MCA does not authorize this variety of unbounded stateside detention and that Mr. Al Marri must either be charged with a crime or deported. See *Al Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007). The case is currently awaiting an en banc rehearing.

31. The MCA eliminates habeas corpus jurisdiction for detainees determined to be enemy combatants. Military Commissions Act § 950j(b), 120 Stat. at 2623-24. For claims that this jurisdiction-stripping provision is unconstitutional, see Richard H. Fallon, Jr. & Daniel J. Meltzer,

zens detained abroad as enemy combatants.³² While the Executive is no longer acting alone, the courts having joined the conversation, the challenge remains to construct a juridical process that will effectively balance the space between governmental power and individual rights.

Essentially, the actions of the Bush administration, recently endorsed in part by Congress,³³ remain at the center of an intense and polarized, if largely superficial, debate over the application of U.S. constitutional protections and the role of the judiciary and Congress in the detention and trials of enemy combatants at Guantánamo and within the United States.³⁴ The debate itself has proceeded on largely divergent

Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 HARV. L. REV. 2029, 2061–64 (2007). See generally Calabresi & Lawson, *supra* note 19.

32. The U.S. Supreme Court is considering this question in the consolidated cases of *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007), *cert. granted sub nom.*, *Geren v. Omar*, 128 S. Ct. 741 (2007) and *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007), *cert. granted*, 128 S. Ct. 741 (2007). The cases, which were argued on March 25, 2008, involve citizens detained abroad in Iraq who have been denied access to habeas, either based upon their being held by the Multi-National Force or being convicted by an Iraqi court. See David G. Savage, *Iraq Is New Front in Detainee Battle: Clash Over Habeas Corpus Rights Moves from Guantanamo to Baghdad*, A.B.A.J., Mar. 2008, at 20–22. Separate panels of the U.S. Court of Appeals for the D.C. Circuit split on the issue of the availability of habeas. One panel determined that jurisdiction existed in federal court for Omar's habeas claim. *Harvey*, 479 F.3d at 5–6. A different panel held that due to his conviction by the Iraqi court, there was no habeas jurisdiction in Munaf's case. *Munaf*, 482 F.3d at 583. This distinction may be moot given reporting that Munaf's Iraqi conviction has been overturned. See Posting of Kevin Jon Heller to *Opinio Juris*, <http://www.opiniojuris.org/posts/1204451414.shtml> (Mar. 2, 2008, 4:50 EST).

33. Initially, the Executive claimed that many of its post-September 11 actions were endorsed by Congress through a joint congressional resolution adopted on September 28, 2001. See Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541). The Supreme Court, in *Hamdi*, found the AUMF language instructing the President to use "all necessary and appropriate force" to be explicit authorization for post-September 11 detentions. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). The MCA is an express adoption of many of the procedures endorsed by the President in the order he issued on November 13, 2001. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Since the passage of the MCA, the Executive has also issued the Manual for Military Commissions. U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS: EXECUTIVE SUMMARY (2007), <http://www.defenselink.mil/news/d20070118MCM.pdf>.

34. For a broadly negative critique of the exercise of executive power after September 11, see DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2d ed. 2002). Compare JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007) (criticizing as well as defending, post-September 11 presidential decisions from the perspective of a former head counsel in the Department of Justice), with Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002) (providing an extremely positive critique of the post-September 11 executive orders), and Kenneth Anderson, *What To Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 45 HARV. J.L. & PUB. POL'Y 591, 609–10 (2002) (arguing in favor of the use of the military tribunals outlined in the Executive Order, and noting that "[t]he perpetrators of September 11 and other terrorist attacks are not morally and legally analogous to the perpetrators of domestic crime in a settled domestic society").

and mostly political paths, with little substantive engagement.³⁵ This seems to be at least partly attributable to the multiple legal paradigms at work—paradigms that extend beyond any single traditional practice group or scholarly area of expertise. But this dynamic of insular scholarly comment with little helpful substantive exchange also illustrates a broader trend in legal scholarship in which diverse schools of thought fail to engage in a common discourse.³⁶

Scholars have observed that the two principal schools of legal scholarship that have succeeded the legal formalism school,³⁷ law and economics (“L&E”)³⁸ and critical theories—a general term to describe

35. Compare Ruth Wedgwood, *The Rule of Law and the War On Terror*, N.Y. TIMES, Dec. 23, 2003, at A27 (referring to terrorism as a type of warfare that criminal prosecution cannot necessarily root out and arguing the legitimacy of the executive power to detain citizens as a part of the “war” effort from the perspective of a professor and former federal prosecutor), with Kenneth Roth, *The Law of War in the War On Terror*, FOREIGNAFFAIRS.ORG, Jan./Feb. 2004, <http://www.foreignaffairs.org/20040101facomment83101/kenneth-roth/the-law-of-war-in-the-war-on-terror.html> (questioning the legitimacy of detentions, why domestic criminal jurisdiction is not appropriate, and whether the current conflict is “war,” from the perspective of the Executive Director of Human Rights Watch). While their positions remain hardened and opposed, more recently commentators have at least begun to engage each other. See, e.g., Ruth Wedgwood & Kenneth Roth, *Combatants or Criminals? How Washington Should Handle Terrorists*, FOREIGN AFFAIRS.ORG, May/June 2004, <http://www.foreignaffairs.org/20040501faresponse83312/ruth-wedgwood-kenneth-roth/combatants-or-criminals-how-washington-should-handle-terrorists.html>.

36. See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) [hereinafter Rubin, *The New Legal Process*]. Notably, there have been contentious exchanges between proponents and detractors of critical-race theory (“CRT”) methodology. See Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (criticizing CRT methodology) [hereinafter Farber & Sherry, *Telling Stories*]; cf. Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993) (commenting on the commendable but ultimately flawed effort of Farber and Sherry); see also DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) [hereinafter *BEYOND ALL REASON*]; Anne Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1281–82 (1995) (criticizing the CRT use of narrative and autobiography); cf. John O. Calmore, *Random Notes of an Integration Warrior—Part 2: A Critical Response to the Hegemonic “Truth” of Daniel Farber and Suzanna Sherry*, 83 MINN. L. REV. 1589 (1999); Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1999) [hereinafter Culp, *To the Bone*]; Jerome McCristal Culp, Jr., *Telling a Black Legal Story: Privilege, Authenticity, “Blunders,” and Transformation in Outsider Narratives*, 82 VA. L. REV. 69 (1996) [Culp, *Telling a Black Legal Story*]; Robert L. Hayman, Jr., *Race and Reason: The Assault on Critical Race Theory and the Truth About Inequality*, 16 NAT’L BLACK L.J. 1 (1998–99). For a critique of Farber and Sherry by a non-critical-race theory scholar, see Edward L. Rubin, *Jews, Truth and Critical Race Theory*, 93 NW. U. L. REV. 525 (1999) [hereinafter Rubin, *Jews, Truth and Critical Race Theory*].

37. See Guido Calabresi, *An Introduction To Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2118 n.20 (2003) (describing Critical Legal Studies and Law and Economics as “two prominent academic movements of the past 30 years” that have taken up the antiformalist revolt, first started by the legal realists).

38. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); Bruce A. Ackerman, Foreword, *Talking and Trading*, 85 COLUM. L. REV. 899 (1985); Guido Calabresi, *The*

the range of theories and movements emanating from Critical Legal Studies (“CLS”)³⁹—might be combined to form a new unified approach to legal analysis.⁴⁰ Notably, Edward Rubin has sketched the broad parameters of such a unified approach with a methodology consisting of the comparative microanalysis of institutions that examines tradeoffs of social justice and efficiency and inhere in assigning responsibilities to competing institutions.⁴¹ In short, Rubin envisioned the possibility that legal scholarship might benefit from analyzing together the tradeoffs in the norms central to two schools of legal scholarship applied within this article—L&E (efficiency) and CLS/CRT (social justice/antisubordination). Rubin convincingly explained the complex theoretical underpinnings of his belief that such an approach is possible and invited others to apply such a technique to particular legal issues. Other scholars have recently undertaken this task in myriad contexts.⁴²

New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?, 68 PROC. BRIT. ACAD. 85 (1982).

39. See generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Mark V. Tushnet, *Perspectives on Critical Legal Studies: Introduction*, 52 GEO. WASH. L. REV. 239 (1984). More recently, the CLS tradition has been succeeded by other progressive movements such as feminist legal theory, CRT, and Latina/o Critical Theory (“LATCRIT”). On the emergence of CRT from CLS, see RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3–5 (2001) (noting CRT’s link to CLS and defining the aim of CRT as “studying and transforming the relationship among race, racism, and power”); Charles R. Lawrence III, *Foreword to CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY* at XII–XIV (Francisco Valdes et al. eds., 2002) [*hereinafter* A NEW CRITICAL RACE THEORY]; Kimberle Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* 49 UCLA L. REV. 1343, 1354–64 (2002); Adrien Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 719–21 (2003). It is primarily the tenets and methodologies of CRT, rather than CLS more generally, that will be applied in this article.

40. See Rubin, *The New Legal Process*, *supra* note 36, at 1411–13; see also Devon W. Carbado & Mitu Gulati, *Book Review, The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003). Robert Ellickson laid the foundation for such an approach by arguing that the predictive powers of L&E might be sharpened by incorporating the insights of psychology and sociology into the one-dimensional rational actor model. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989).

41. See generally Rubin, *The New Legal Process*, *supra* note 36. Rubin also sets forth a related alternative formulation in which the unified scholar might employ competing norms and proceed to analyze marginal changes in justice and efficiency under competing normative regimes. See *id.* at 1432–33.

42. Devon Carbado and Mitu Gulati have explored the application of the two disciplines within the context of employment discrimination. See Carbado & Gulati, *supra* note 40; see also Clark Freshman, *Prevention Perspectives on “Different” Kinds of Discrimination: From Attacking Different “Isms” to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2304–06 (2003) (suggesting that L&E methods complement CRT approaches to identifying discrimination across a number of subject areas while simultaneously reviewing separate CRT and L&E books on discrimination); Daria Roithmayr, *Guerrillas in Our Midst: The Assault on Radicals in American Law*, 96 MICH.

We believe that the security measures adopted by the United States after September 11 are particularly well suited to such a unified analysis. The characteristics underlying these measures—broad assertions of executive power, limitation of the role of the judiciary, secrecy, and an apparent rejection of international human-rights norms—present fundamental questions about the allocation of responsibilities among the three branches of government in the face of a normative regime that contains an express “us–them” dialectic.⁴³ In addition, the claimed unilateral authority of the government to choose among a number of legal regimes for the treatment of these cases has prompted scrutiny as to the basis of these decisions.⁴⁴ Specifically, commentators initially called for the government to charge or release the detainees, by which such commentators presumably sought to divest the Executive of sole decision-making responsibility and vest such authority in the judiciary.⁴⁵ These commentators previously pointed to the cases of John Walker Lindh and Zacarias Moussaoui, and now Jose Padilla and his co-conspirators, as evidence that suspected terrorists can and should be prosecuted as

L. REV. 1658, 1682–83 (1998) (encouraging CRT scholars to strategically employ other schools of legal scholarship to advance their own ideology).

43. Here, the “us” refers not to a simple citizen–alien distinction, but instead is a reference to those considered as belonging to the U.S. body politic as opposed to those who are not. For instance, in the wake of September 11, scholars have argued that even U.S. citizens of Arab descent have not been viewed as a part of the “us.” Leti Volpp has made this claim with regard to the racial profiling of Middle Easterners:

The shift in perceptions of racial profiling is clearly grounded in the fact that those individuals who are being profiled are not considered to be part of “us.” Many of those racially profiled in the sense of being the targets of hate violence or being thrown off airplanes are formally citizens of the United States, through birth or naturalization. But they are not considered citizens as a matter of identity, in that they in no way represent the nation.

Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1592 (2002); see also Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 299 (2002).

44. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1032–37 (2004) (finding neither the regime of war nor crime suitable for addressing terrorism); Steven W. Becker, *“Mirror, Mirror on the Wall . . .”: Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 572–80 (2003) (criticizing the government’s movement between domestic criminal law and the law of war for enemy combatants, as an attempt to “have its cake and eat it too”); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 954 (2002) (noting the double standard inherent in John Walker Lindh being tried while the Guantánamo detainees receive no due process).

45. This charge was ultimately somewhat settled by the MCA, but not entirely. While the MCA provides process, it neither fully provides the constitutional protections U.S. citizens receive in criminal courts nor the protections that prisoners of war receive when tried for war crimes by regularly constituted military tribunals like courts-martial. See, e.g., Geoffrey S. Corn, *Questioning the Jurisdictional Moorings of the Military Commissions Act*, 43 TEX. INT’L L.J. 29, 32 (2007) (noting that use of coerced self-incriminating statements are permitted); *id.* at 36–38 (describing overreaching in establishing regulatory definitions of substantive offenses and contrasting with analogous offenses under the Uniform Code of Military Justice).

criminals, with all attendant rights due a criminal defendant, especially where the suspected terrorist is a U.S. citizen.⁴⁶

The “us–them” dialectic plays a prominent role in these measures as well. The Executive chose to expressly promote such a regime when it excluded U.S. citizens from the jurisdiction of the military commissions as contemplated by presidential order.⁴⁷ It is also clear that, at times, the Executive has treated citizen-enemy combatants differently. Yaser Hamdi, for example, was transferred from Guantánamo to a detention facility in the United States when evidence surfaced that he was actually born in Louisiana and is therefore presumptively a U.S. citizen.⁴⁸

Because the new security measures deal so directly with the allocation of fundamental emergency powers among the three branches of government and involve an express “us–them” categorization, they are uniquely suited for the type of unified analysis that Professor Rubin advanced. Focusing on the government’s detention and trial of enemy combatants, we aim to conduct such a unified analysis to identify common principles and clarify disagreements in the entrenched positions now held by scholars from competing schools of thought.

Below in Part II.A, we introduce alternative rules concerning judicial review of post–September 11 actions of the Executive and Congress, especially with regard to noncitizens held abroad. In Part II.B, we examine which of these rules have been given effect by the Court and legislature to date. In Parts III.A and III.B, respectively, we introduce and define our unified approach. In Part III.C, we review and analyze, from a unified perspective, the judicial and legislative pronouncements to date and the choices facing the Court in the next wave of cases. In Part IV, we question the limitations involved in joining theoretical per-

46. See Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Responses to the Government's War on Terror*, 13 *IND. INT'L & COMP. L. REV.* 787, 821 (2003). See generally Becker, *supra* note 44; David Luban, *The War on Terrorism and the End of Human Rights*, 22 *PHIL. & PUB. POL'Y Q.* 9 (2002).

47. See Cole, *supra* note 44, at 954–55. This choice certainly was not mandated by law. See *id.* The military commissions reviewed by the Supreme Court in *Quirin*, for example, included a defendant who was a U.S. citizen. See *Ex parte Quirin*, 317 U.S. 1, 20 (1942). There, the Court determined that even U.S. citizens could be subjected to military tribunals if they were found to be enemy combatants. See *id.* at 37–38.

48. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004). Also, separate from the question of how the U.S. treats citizens designated as enemy combatants is the fact that the government continues to provide trials to other citizens accused of terrorist activity. See Jennifer Medina, *Sailor Started E-Mail on Terror, U.S. Says*, *N.Y. TIMES*, Mar. 9, 2007, at A18 (discussing the arrest and federal charging of Hassan Abujihad, a former U.S. Navy sailor accused of turning over information related to the movement of his vessel to terrorist groups via e-mail); see also John Christoffersen, *Navy's Vulnerability Comes Out at Spy Trial*, *MIAMI HERALD*, Mar. 3, 2008, at A5 (same).

spectives to undertake this type of inquiry, prior to providing our concluding thoughts in Part V.

II. THE TRADITIONAL APPROACHES

The United States government's post-September 11 detentions of aliens and citizens have sparked questions about the proper balance of liberty and security in times of emergency⁴⁹ and, in particular, the proper role of the courts in striking this balance. This section explores the tradeoff of liberty and security, alternatively using principles and values supplied through the more traditional analytical frameworks of L&E and CRT. Ultimately, we believe that these traditional arguments take place in isolated theoretical spaces because they concern incommensurate values that cannot be directly traded off against each other.⁵⁰ As a result, neither approach is successful in moving the debate forward by suggesting a common dialogue that might incorporate methods from each paradigm and spark a meaningful exchange of ideas on common ground. Part III presents a unified analysis that aims to do so.

A. *Alternative Rules for Judicial Review of Executive Actions Abroad*

Setting aside for the moment statutory and constitutional constraints, we hypothesized four alternative rules for judicial review of executive action in the detention cases. These alternative rules were largely derived from the commentary and arguments about the detention of aliens at Guantánamo. The first rule was set forth in *Johnson v. Eisentrager*⁵¹ and admits of no judicial role in reviewing the detention of aliens abroad. The *Eisentrager* rule correlates closely with the position taken by the government in litigation.⁵² The three remaining alternative rules, de facto sovereignty, statutory jurisdiction, and constitutional jurisdiction, would each allow for judicial review of detentions at Guantánamo but have significantly different legal bases

49. See *supra* Part I.

50. In a recent text, Professors Posner and Vermeule have labeled these opposing view points regarding our current state of emergency as the "deferential view" and the "civil libertarian view," where the former view requires courts to defer heavily to governmental acts and the latter concerns itself with the extent of encroachment on individual rights. POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 21, at 15–17.

51. 339 U.S. 763 (1950).

52. See *infra* notes 57–58. We are not the only commentators analyzing the terror cases by paying specific attention to the importance of alternative-rule structures. For instance, others have referred to what we call the *Eisentrager* rule as the "traditional approach." See Fallon, Jr. & Meltzer, *supra* note 31, at 2055–56 (claiming that this approach would have found that only Guantánamo detainees with sufficient contacts to the U.S. could assert a constitutional right to file a habeas petition).

and institutional consequences. Without strictly distinguishing among these three alternative rules, the petitioners in two detainee cases (*Rasul v. Bush*⁵³ and *Al Odah v. United States*⁵⁴) argued for elements of each. Most notably, the *Rasul* petitioners detailed the case for constitutional jurisdiction,⁵⁵ and the *Al Odah* petitioners focused on various forms of statutory jurisdiction (through the habeas corpus statute as well as the federal-question jurisdictional statute in conjunction with the Administrative Procedure Act).⁵⁶

Under the *Eisentrager* rule, the legal regime differentiates not only between alien and citizen, but it also further divides aliens into friends and enemies as well as residents and nonresidents. On this view, Congress has not conferred upon the courts the statutory authority to review U.S. detention of enemy aliens abroad, and neither does the Constitution require it. As a result, the courts lack jurisdiction altogether to review the detention of enemy aliens held outside United States sovereignty, including at Guantánamo. Moreover, under the *Eisentrager* rule, the quantum of de facto U.S. control is not relevant to the availability of judicial review—detention must occur within formal U.S. sovereign territory to fall within the jurisdiction of the courts.⁵⁷ As articulated in *Eisentrager*, this rule allows for the possibility that Congress might, through legislative amendment to the habeas corpus statute, provide for judicial review of such cases in the future.⁵⁸

Under the de facto sovereignty rule, the courts would be empowered, for the purpose of determining their own jurisdiction, to find de facto sovereignty when the United States exercises a quantum of control and jurisdiction over a geographic area.⁵⁹ As a result, under existing

53. 542 U.S. 466 (2004).

54. 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* *Rasul v. Bush*, 542 U.S. 466 (2004).

55. Petitioners' Brief on the Merits at 20–22, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) [hereinafter *Rasul* Petitioners' Brief].

56. Brief for Petitioners at 4, 13, 15, 21, *Al Odah v. United States*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) [hereinafter *Al Odah* Petitioners' Brief].

57. This is the rule advanced by the government in *Rasul* and *Al Odah*. See Brief for the Respondents at 11, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) [hereinafter *Rasul* Government Brief].

58. See *Johnson v. Eisentrager*, 339 U.S. 763, 778–79, 798 (1950). The *Rasul* Government Brief suggested that Congress's power in this regard is limited and must respect the President's commander-in-chief powers. *Rasul* Government Brief, *supra* note 57, at 42–46.

59. The petitioners in both *Rasul* and *Al Odah* argued for the availability of judicial review under three theories without separating those rules into their distinct components: de facto sovereignty, statutory jurisdiction, and constitutional jurisdiction. For the de facto sovereignty view, see *Rasul* Petitioners' Brief, *supra* note 55, at 24–26; *Al Odah* Petitioners' Brief, *supra* note 56, at 16–18. The historical roots of the de facto sovereignty rule were articulated by a group of professors of legal history:

The historical evidence set forth below suggests, however, that the common law writ of habeas corpus, known to the Framers and incorporated into the

statutory authority, the courts would acquire jurisdiction to review executive action against aliens in such locations.⁶⁰ The de facto sovereignty rule, like the *Eisentrager* rule, allocates exclusive responsibility for true extraterritorial detentions to the Executive. It differs in recognizing that U.S. control, and the consequent exclusion of other sources of law, should be recognized as sufficient to confer jurisdiction on U.S. courts. Whether jurisdiction over areas of de facto sovereignty is based in the Constitution or the habeas corpus statute, or both, would determine the sources of substantive norms available in reviewing the detention.

The third alternative we postulated is a regime under which judicial review of extraterritorial detention of aliens is never required by the Constitution, but that it is authorized, and indeed required, by the habeas statute enacted by Congress.⁶¹ Under this legislative or statutory jurisdiction rule, the scope of statutory habeas (or review under the Administrative Procedure Act) exceeds the reach of the Constitution. This means that, although aliens would be entitled to judicial review of their detention, they cannot prevail without identifying and establishing a violation of an applicable substantive norm outside the U.S. Constitution.⁶²

The fourth rule, constitutional jurisdiction, views the U.S. Constitution—through its Due Process and Suspension Clauses—as mandating judicial review of all detentions by the U.S. government regardless of the nationality of the detainee or location of the detention. The constitutional-jurisdiction rule views the U.S. Constitution as providing for “equal justice not for citizens alone, but for all persons coming within

Suspension Clause of the Constitution, would have been available to challenge the “enemy” status of individuals detained in a territory, like Guantanamo, that has been firmly under this country’s exclusive jurisdiction and control for over a century.

Brief Amici Curiae of Legal Historians Listed Herein in Support of the Petitioners at 3, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

60. This is similar to the approach taken in U.S. territories where residents are accorded fundamental constitutional rights. See *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922); *Dorr v. United States*, 195 U.S. 138, 149 (1904); *Hawaii v. Mankichi*, 190 U.S. 197, 215 (1903); *Downes v. Bidwell*, 182 U.S. 244, 283 (1901). These cases are collectively referred to as the “*Insular Cases*.” See *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 94, 137 & n.269 (1957).

61. See 28 U.S.C. § 2241 (2000); *Rasul v. Bush*, 542 U.S. 466, 483 (2004) (“No party questions the District Court’s jurisdiction over petitioners’ custodians. Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.”) (citation omitted). The Detainee Treatment Act of 2005, enacted subsequent to the *Rasul* decision, modified § 2241 to foreclose the statutory jurisdiction rule. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), div. A, tit. X, 119 Stat. 2739 (to be codified in scattered sections of 10, 28 & 42 U.S.C.).

62. Jordan J. Paust presents an optimistic view of the availability and applicability of international-law norms that courts might apply in reviewing such detentions. Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503 (2003).

the ambit of our power,"⁶³ such that "our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern."⁶⁴ Accordingly, the courts must have jurisdiction to review any detention under color of U.S. authority—whether or not Congress has sought to confer it upon the courts—and even if Congress has sought to abridge it.⁶⁵

Taken together, these four alternative rules—the *Eisentrager* rule, the de facto sovereignty rule, the statutory jurisdiction rule, and the constitutional-jurisdiction rule—represent the wide range of alternative rules for judicial involvement advanced by scholars in considering post-September 11 security measures. By analyzing these rules, first under the traditional approaches and then, in Part III, under the unified approach, we seek to move the debate in a new direction—one that shares common ground and is, we hope, more productive. The rules are first considered, however, in light of the previously identified competing schools of thought.

1. THE CASE FOR LIMITING JUDICIAL REVIEW OF EXECUTIVE ACTIONS ABROAD: EFFICIENT AND EFFECTIVE SECURITY

Law and economics scholars have traditionally approached comparative-institutional analysis by adopting the public-choice model of democratic institutions.⁶⁶ Thus, the political members of the executive and legislative branches are seen as self-interested reelection maximizers.⁶⁷ As a result, the policies developed by the political branches are seen as flowing from a legislative market of competing interest-group campaigns, rather than the product of reasoned debate seeking to maximize the public good.⁶⁸ Under certain idealized circumstances, this legislative market might produce beneficial policies, but, because the political branches are understood to be motivated by reelection rather than directly concerned with maximizing public welfare, law-and-economics scholars have chosen to turn their attention to judges.⁶⁹

63. *Johnson*, 339 U.S. at 791 (Black, J., dissenting).

64. *Id.* at 798.

65. The foundations of this view were relied upon by the *Rasul* petitioners and, to a lesser extent, by the *Al Odah* petitioners. See *Rasul* Petitioners' Brief, *supra* note 55, at 17–23 (arguing that a narrow interpretation of habeas jurisdiction would raise serious questions under both the Due Process and Suspension Clauses of the U.S. Constitution); *Al Odah* Petitioners' Brief, *supra* note 56, at 12.

66. See, e.g., NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 8–13, 28–30 (1997).

67. See THE NEXT TWENTY-FIVE YEARS OF PUBLIC CHOICE 4–7 (Charles K. Rowley et al. eds., 1993).

68. Rubin, *The New Legal Process*, *supra* note 36, at 1398–99.

69. *Id.* at 1400.

Judges, or at least federal judges, are seen by law and economics scholars as rational actors in the pursuit of public welfare because the judicial system removes most, if not all, possibility for a judge to gain personally from his or her substantive rulings.⁷⁰ As a result, only efficiency-driven principles remain as animating judges' decisions.⁷¹ Under this view, Congress and the Executive are democratically legitimate, if non-neutral, while judges are seen as neutral, if not democratically grounded. This public-choice view of political actors, however, may not be the best model for understanding actions of the Executive during emergencies.

The government's myriad post-September 11 security actions fit most comfortably within the "accommodation" view of the proper role of the Constitution during emergencies:

The accommodation view is that the Constitution should be relaxed or suspended during an emergency. . . . The reason for relaxing constitutional norms during emergencies is that the risks to civil liberties inherent in expansive executive power—the misuse of the power for political gain—are justified by the national security benefits.⁷²

In nonemergency situations, then, the U.S. Constitution strikes a particular balance in protecting individual liberties, even at the risk of lessened security, because the risk of misusing expansive executive power outweighs any benefit from the resulting marginal gains in security. This default bias against expansive executive power might be particularly well conceived in reaction to the problem of crime control where criminals, unlike terrorists, can be modeled as rational and self

70. *Id.* at 1399–1400; see also Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 1–7 (1993). Within economic theories, however, potential deficits are also assigned to judges as decisionmakers. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 154–55 (2006) (asserting that judges suffer problems related to uncertainty and bounded rationality—"limits on the information-process capacity of otherwise rational agents.").

71. Specifically, the original economic models take a demand-side approach. The supposed efficiency of the common law occurs because inefficient decisions create losses to one party that are higher than the gains to the other party, resulting in greater litigation pressure. For an overview, see Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 SUP. CT. ECON. REV. 19 (2005). More recently, this optimistic evolutionary account has been cast in doubt in a number of articles that point out the potential of interest groups to organize litigation efforts. See, e.g., Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEG. STUD. 807 (1994) (examining the role of trial lawyers in the expansion of tort law).

72. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 606–07 (2003) [hereinafter Posner & Vermeule, *Accommodating Emergencies*]. See also Ackerman, *supra* note 44, at 1037–45 (advocating the creation of an emergency constitution providing the government short-term crisis powers to respond to episodic terrorism). But see Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004) (criticizing the concept of the emergency constitution and analyzing the dangers of treating periods of emergency as subject to something other than ordinary constitutional law).

interested such that increased investment in security efforts can be anticipated to deter criminals' pursuit of illegal enterprises.⁷³ Under the accommodation view, however, the existence of a true emergency justifies the reversal of the traditional rule. Under emergency conditions, the security benefits to be gained by concentrating power in the Executive are presumed to outweigh the risk of misusing power.⁷⁴

The shift in this balance can be seen as reflecting two independent conditions present during emergencies: (1) a decreased likelihood of misusing power due to limitations on the scope of the emergency powers sought—for example, geographical or temporal limits;⁷⁵ and (2) a greatly increased benefit to marginal gains in security due to the presence of a grave and impending threat to national security.⁷⁶ In such a situation, it may be reasonable to dispense with public-choice theory's pessimistic account of executive action and presume that such actions, within prescribed limits, are taken for the common public good, such as protecting national security during the emergency. In fact, the term "emergency" might be theoretically defined (and bounded) as the set of conditions under which the danger to national security is sufficiently large and immediate that it overrides the traditional motivation of political officials (re-election) and substitutes in its place the necessity of protecting the nation from attack.⁷⁷

The government has argued the detention of enemy combatants at Guantánamo is justified by two well-established prerogatives of a nation during armed conflict: (1) disabling the enemy from returning to the battlefield while fighting persists;⁷⁸ and (2) gathering of critical intelli-

73. See Kenneth G. Dau-Schmidt, *Common Ground, Irreconcilable Differences, New Directions: Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389, 402, 414–15 (crediting Gary S. Becker with the earliest such analysis).

74. See Posner & Vermeule, *Accommodating Emergencies*, *supra* note 72, at 607 (discussing the accommodationist theory of emergency executive powers and stating its tenet that "[t]he reason for relaxing constitutional norms during emergencies is that the risks to civil liberties inherent in expansive executive power—the misuse of the power for political gain—are justified by the national security benefits"). Posner and Vermeule have more recently referred to this balancing of security and liberty as the "tradeoff thesis." POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 21, at 21.

75. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1021 (2003).

76. See *id.* at 1059 ("Constitutional limitations on governmental powers are not seen as fixed and immutable [under the model of accommodation], but rather as designed to minimize the sum of the costs of crime and the costs of crime prevention.").

77. Whether the attacks of September 11 created such a situation in the United States and, if so, the duration and geographical extent of the emergency, are difficult questions. Nevertheless, the theoretical construction of "emergency" in public-choice terminology is helpful.

78. This claim has been made by several executive actors including the then Secretary of Defense:

During the course of this war effort, the United States has detained several hundred

gence.⁷⁹ Under its view, the Supreme Court in *Eisentrager* properly ruled that U.S. courts lack jurisdiction to consider the detention of aliens outside the United States because neither the Fifth Amendment nor the habeas statute should be given extraterritorial application (except in the case of U.S. citizens subject to domestic detention).⁸⁰ In support of this reading of *Eisentrager*, the government has recently argued that judicial review of such detentions would undermine intelligence gathering; hamper the war effort; give comfort to our enemies; distract the military from its combat efforts; create a perverse incentive to hold detainees close to the hostilities to avoid judicial interference; contravene Congress's prerogative to set the subject-matter jurisdiction of the courts and fail to give proper effect to Congress's rejection of a proposed statutory override of the *Eisentrager* decision; expose the courts to an unmanageable flood of petitions; and ignore that such detentions are properly subject only to congressional oversight and diplomatic negotiation.⁸¹

The government's position constitutes what we described as the *Eisentrager* rule. Under the *Eisentrager* rule, judicial review of the detention of aliens abroad is not mandated by the Constitution and has not been provided for by Congress. The government's argument relies heavily on *Eisentrager* as binding precedent, but it is theoretically justifiable, assuming the existence of an emergency as defined above, because under such conditions, the Executive's motivations are consistent with those of the polity: to secure the nation against attack.

As a result of the very real danger to national security that was only fully appreciated after September 11, the marginal security gained by holding suspected terrorists at Guantánamo is far greater than we might have previously understood. Moreover, if the Executive's asserted powers are limited in scope, although whether this is possible is the subject of much debate,⁸² the potential for misuse of those powers is minimized.

enemy combatants. As has been the case in previous wars, the country that takes prisoners generally decides that they would prefer them not to go back to the battlefield. They detain those enemy combatants for the duration of the conflict. They do so for the very simple reason, which I would have thought is obvious—namely to keep them from going right back and in this case killing more Americans and conducting more terrorist acts.

Sec'y of Defense Donald Rumsfeld, Statement at Dep't of Defense News Briefing (Mar. 28, 2002), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3380>.

79. See JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 21–22 (2006) (describing the mosaic theory of intelligence, which requires numerous alleged terrorists held in long-term detention to be interviewed repeatedly in order to succeed.)

80. *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950).

81. *Rasul* Government Brief, *supra* note 57, at 42–47.

82. See, e.g., Gross, *supra* note 75, at 1089. Gross states the following:

The belief in our ability to separate emergency from normalcy, counterterrorism measures from the ordinary set of legal norms, is misguided and

These two dynamics alter the cost-benefit balance in favor of concentrating power in the Executive, including the power to detain and try suspected alien enemy combatants without judicial interference.

Such arguments have been criticized from at least two perspectives: first, that “executive action is more likely to be worse during emergencies than during normal times,”⁸³ and second, that such powers are likely to spill beyond their purported limitations to noncitizens held abroad and entrench themselves for long periods of time.⁸⁴ Eric A. Posner and Adrian Vermeule have attempted to expose the unproven, and sometimes inaccurate, assumptions that underlie these criticisms of the accommodation view generally.⁸⁵ They argue that the libertarian critiques of expansive executive powers rely on two sets of assumptions—one institutional and one psychological. The institutional assumption is that emergencies work like “ratchets” in that constitutional protections are not properly restored after each emergency, ultimately resulting in too much security and too little liberty.⁸⁶ The psychological assumptions collectively hold that executive and legislative decisionmakers are unable to make rational decisions during emergencies and, therefore, judges, who somehow can maintain their neutrality, are best suited to balance liberty and security during emergencies.⁸⁷ But Posner and Vermeule argue that these libertarian assumptions simply do not support the conclusion that judges are necessarily better suited to make such judgments, either because they are subject to similar psychological phenomena (and potentially disadvantaged by a lack of information and processing ability upon which to base decisions),⁸⁸ and because the exis-

dangerous. It undermines our vigilance against excessive transgressions of human rights and civil liberties. It focuses our attention on the immediate effects of counterterrorism measures, while hiding from view their long-term costs. When added to the inherent problems that times of crisis pose in striking an appropriate balance between individual rights and national security needs, this militates against our ability to make accurate calculations of the relevant costs and benefits with respect to governmental emergency powers.

Id. (citation omitted).

83. Posner & Vermeule, *Accommodating Emergencies*, *supra* note 72, at 609; *see also* Gross, *supra* note 75, at 1038–42, 1058–96 (finding that psychological phenomena such as the availability heuristic, prospect theory, and myopic perspectives and the tendency to concentrate the cost of new security measures on outsiders combine to cause the government to seek too much security at the cost of liberty during emergencies); Tribe & Gudrige, *supra* note 72, at 1834–35 (criticizing reliance upon a unitary Executive during a time of crisis and describing as “the hard-learned lesson of our past” our understanding that “[p]recisely when our peril seems greatest, we dare not entrust our fate to the judgment of any one individual, even though that individual be elected by the whole People of the United States.”).

84. *See* Gross, *supra* note 75, at 1073–96.

85. *See generally* Posner & Vermeule, *Accommodating Emergencies*, *supra* note 72.

86. *Id.* at 609.

87. *Id.* at 609–10.

88. *See id.* at 626–44.

tence of institutional ratchets that disfavor liberty have not been empirically established.⁸⁹ In fact, they argue, it is plausible that ratchets work the opposite way—resulting in too much liberty at the expense of security.⁹⁰

As a result, the *Eisentrager* rule, which represents an extreme version of judicial deference under the accommodation model, should be evaluated as to whether the increased security it provides justifies its cost in curtailed liberty. The other three alternatives—de facto sovereignty, statutory jurisdiction, and constitutional jurisdiction—would each provide for judicial review of the detention of enemy combatants at Guantánamo. The cost of judicial review under those rules includes loss of intelligence due to disruption of interrogation, distraction of military commanders from combat operations, and undermining of ongoing diplomatic negotiations. In addition, tremendous institutional costs would be incurred if the judiciary were to erroneously order release of an al Qaeda member—far more than what might be involved in releasing a mere criminal.⁹¹

Balanced against these costs, the increased liberty gained through judicial review might be seen as negligible from the perspective of the U.S. citizen. First, the detentions at Guantánamo are restricted to noncitizens captured outside the United States. This means that no citizen will be denied habeas review under the *Eisentrager* rule. In addition, a resident alien detained within the United States would also be accorded review. The impact of the *Eisentrager* rule is limited to those who have not assumed the obligations of citizenship and have little connection to the United States, except perhaps in their common desire to attack it. Moreover, the government has demonstrated that such detentions are far from arbitrary. The military has a robust review process that has already resulted in the screening out of thousands, and diplomatic negotiations

89. *Id.* at 610–22.

90. *Id.* at 622–26.

91. In fact, such a mistake could be devastating for the institutional legitimacy of the judiciary should it come to pass that a judicially released detainee later participates in a large-scale attack within the United States. Unlike the executive or legislative branches, which can be held politically accountable for such mistakes, the judiciary cannot. (Indeed, it is the judiciary's insulation from political accountability that makes it suitable for such counter-majoritarian roles.) But without political accountability, there is no "release valve" for public disagreement and anger. This might be particularly acute in the case of the erroneous release of a terrorist because such an action is qualitatively different than the erroneous release of a criminal—a concept that has gained popular acceptance as the price of liberty. The increased costs of an erroneous release of a terrorist, such as a mass casualty on the scale of the September 11 attacks, might create a popular backlash that could, in the long run, result in greater damage to the judiciary than that which critics argue might result from the *Eisentrager* rule's limitation on judicial review. In short, the release of suspected terrorists might be properly classified as a political act that the judiciary is simply ill-suited to undertake.

have resulted in the release of hundreds.⁹²

Finally, the *Eisentrager* rule respects Congress's role in providing for the subject-matter jurisdiction of the federal courts. After *Eisentrager* was decided, a legislative proposal was introduced that was intended to override *Eisentrager* with an amendment to the habeas statute providing jurisdiction over the petitions of any person held by the United States (or under color of U.S. authority) anywhere in the world, alien or citizen alike.⁹³ The amendment was not passed into law;⁹⁴ however, the option for legislative override remains, such that the *Eisentrager* rule does not exclude Congress from the conversation.

2. THE CASE FOR EXTENDING JUDICIAL REVIEW TO ALL DETENTIONS BY THE U.S. GOVERNMENT: PROMOTING LEGITIMACY BY PROVIDING A FORUM TO VOICE SOCIAL-JUSTICE CONCERNS IN INDIVIDUAL CASES

Pursuing equality is, for many of us, among the most noble and important endeavors of a modern government and society. This endeavor faces, however, a series of theoretical and practical challenges. The theoretical challenges reflect deep philosophical disagreements about what sort of equality should be pursued, and for whom.⁹⁵ The practical challenges revolve around questions about which legal and political institutions are the most appropriate for providing egalitarian

92. See *Rasul* Government Brief, *supra* note 57, at 7. The government argued that [t]he Guantanamo detentions already have been the subject of extensive diplomatic discussions between the Executive and officials of the foreign governments of detainees' home countries. To date, more than 90 detainees have been released (or designated for release) from Guantanamo to foreign governments.

Id. For more up-to-date detainee adjudication numbers, see U.S. DEP'T OF DEFENSE, DEFENSELINK NEWS TRANSCRIPT: ANNUAL ADMINISTRATIVE REVIEW BOARDS FOR ENEMY COMBATANTS HELD AT GUANTÁNAMO ATTRIBUTABLE TO SENIOR DEFENSE OFFICIALS (2007), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902>. As of March 6, 2007, for the 328 detainees given hearings before Administrative Review Boards ("ARBs") in 2006, fifty-five had been transferred. *Id.* In 2005, there were 463 detainees who were given hearings before ARBs, with fourteen being released and 119 being transferred. *Id.*

93. See H.R. 2812, 82d Cong. (1951).

94. See *Rasul*, Government Brief, *supra* note 57.

95. The proof of this claim and the U.S. Supreme Court's peripatetic approach to resolving what measure of equality is to be guaranteed has produced widely disparate results throughout the nation's history. For example, the Court's upholding the concept of "separate but equal" in *Plessy v. Ferguson*, 163 U.S. 537 (1896), was premised upon providing "political" rather than "social" equality. Not until *Brown v. Board of Education*, 347 U.S. 483 (1954), did the Court fully step away from this stifled notion of equality. In between these two cases, the Court decided that classifications premised upon race and national origin would be subject to strict scrutiny, but found that such an analysis did not prevent the government from detaining U.S. citizens of Japanese descent. See *Korematsu v. United States*, 323 U.S. 214 (1944).

justice,⁹⁶ and how to implement effectively egalitarian social policy.⁹⁷

CRT methodology is grounded upon an understanding that equality and justice are not universally applied concepts. As three of the discipline's most prominent scholars have opined, law's claims to neutrality and objectivity "are harmful fictions that obscure the normative supremacy of whiteness in American law and society."⁹⁸ Essentially, CRT scholars realize a large chasm often exists between the principles of formal equality and the lived experience of outsiders.⁹⁹ The expanse of that chasm has been demonstrated in governmental decisions on who to detain or prosecute after September 11. Although perhaps unintended, in practice, the decisions certainly have implicated questions about which persons should be protected from governmental coercion and what branch of government should define the form and limits of the coercive experience.

Placing to one side claims of deliberate malfeasance by government actors, L&E doctrine suggests a world where governmental actions are conceived and carried out by rational individuals who hold the concept of the rule of law in high regard and attempt to use the most efficient means to achieve government-directed goals. Or, as the public-choice model infers, a world inhabited by legislative and executive actors who are reelection maximizers—so while actions may be informed by political ideology, they must still consider how a decision will be received by the polity.¹⁰⁰ The problem is that the method works largely through a cost-benefit analysis where equality and antisubordination never quite measure up to the concerns against which they are being measured. On this point Professor David Cole is instructive. In his critique of Judge

96. While it is the province of the U.S. Supreme Court to ensure the constitutionality of our laws, at times, justices have acknowledged that the Court's decisions are still bound by its prescribed role within a representative form of government. The following passage is instructive: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore dependable, within narrow limits. Their essential quality is detachment, founded on independence." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

97. LESLEY A. JACOBS, *PURSUING EQUAL OPPORTUNITIES: THE THEORY AND PRACTICE OF EGALITARIAN JUSTICE* 3 (2004).

98. The scholars are Francisco Valdes, Jerome McCristal Culp, Jr., and Angela Harris. See *A NEW CRITICAL RACE THEORY*, *supra* note 39, at 1.

99. By "outsider," we refer to the CRT concept of those invested with less social and political capital than persons occupying dominant or majority groups. For instance, the phrase would apply to those who are aliens versus citizens, persons of color versus white persons, female instead of male, and members of the underclass rather than financially well-off. For a discussion of how one's unacknowledged outsider status can be harmful see, e.g., JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997); STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

100. See generally *THE NEXT TWENTY-FIVE YEARS OF PUBLIC CHOICE*, *supra* note 67.

Posner's L&E approach to executive decisions in the War on Terror, he finds that when one sets the cost as a catastrophic terrorist attack, "constitutional rights and civil liberties are almost inevitably outweighed."¹⁰¹

The CRT approach does not mandate a finding of deliberate malfeasance on the part of government actors. The approach, however, does require close scrutiny in situations where ostensibly neutral governmental decisions result in the socially disenfranchised bearing the greatest burden of those decisions. The post-September 11 government flight from civil liberties has certainly involved such a situation.¹⁰²

The detention cases raise a number of chilling and disparate equality concerns. For instance, the government has labeled the Guantánamo detainees captured on the battlefield as unlawful enemy combatants and detained them outside of the United States. By these acts, the government has sought to effectively place these persons in a law-free space, outside of both domestic constitutional review and the customary and statutory international laws applying to prisoners of war. Moreover, the government initially afforded federal criminal process to a citizen labeled an unlawful enemy combatant and captured abroad,¹⁰³ but not others. At first, this decision seemed to signal the government's intent to treat citizens different from noncitizens—or the legal significance of nationality. That significance, however, was undermined by an earlier decision to afford criminal process to a noncitizen captured in the United States¹⁰⁴ and subsequent ones to deny it to citizens.¹⁰⁵

101. David Cole, Book Review, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11: Not a Suicide Pact: The Constitution in a Time of National Emergency*, 59 STAN. L. REV. 1735, 1737 (2007); see also MICHAEL E. TIGAR, THINKING ABOUT TERRORISM: THE THREAT TO CIVIL LIBERTIES IN TIMES OF NATIONAL EMERGENCY 164 (2007) (claiming that Posner suggests that in times of emergency the courts should afford almost limitless power to the Executive).

102. See, e.g., Asli Ü. Bâli, *Scapagoating the Vulnerable: Preventive Detention of Immigrants in America's "War on Terror,"* 38 STUDIES IN LAW, POLITICS, AND SOCIETY 25 (2006) (criticizing the United States' expanded use of civil immigration detentions, after September 11, as a means of denying due process to mostly Arab and Muslim detainees); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 482–83 (discussing the mistreatment of immigrants post-September 11 and suggesting an approach to the problem that integrates the values of democracy and security.)

103. See *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (sentencing John Walker Lindh, the "American Taliban").

104. At the time, this pertained to the case of Zacarias Moussaoui, alleged to have participated in the September 11 terrorist attack. Ultimately, Moussaoui pleaded guilty to all charges, even though he claimed not to have conspired with the other September 11 hijackers. Neil A. Lewis, *Moussaoui's Move To Recant Guilty Plea Is Denied*, N.Y. TIMES, May 9, 2006, at A19. He was sentenced to life in prison on May 3, 2006. Neil A. Lewis, *Moussaoui Given Life Term by Jury Over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1.

105. Mr. Hamdi and Mr. Padilla are both U.S. citizens who were detained as enemy combatants within the United States, and for whom the government maintained there should be no judicial review of their cases. See *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004); *Hamdi v.*

As others have noted, there may be rational explanations for these varied decisions. For instance, one scholar has opined that Hamdi and Padilla were not initially afforded criminal process because the Walker Lindh and Moussaoui cases revealed that criminal prosecution could inordinately sap federal resources and endanger intelligence collection.¹⁰⁶ At bottom, this is a efficiency argument—a claim that the government “simply can not or will not undertake the tremendous effort to mount full scale prosecutions and discovery efforts in each of these cases and the many more that are likely to occur.”¹⁰⁷ Another explanation would be that the government took some time to arrive at its ultimate opinion—that regardless of citizenship status or where one was arrested, any persons attempting to commit terrorist acts who also fit the definition of unlawful enemy combatants would be detained;¹⁰⁸ further, that detention could be for an unspecified period and would not be subject to judicial review.¹⁰⁹

As a discipline, CRT requires that we remain skeptical of the ways that identity may inform the treatment and outcomes for outsiders subject to legal processes. Within the context of post-September 11 governmental decisions, there have been a number of identity categories in play related to national origin, religion, alienage, and race. While the government actors have not acknowledged the significance of these categories, their cases certainly reflect citizens typically receiving different treatment than aliens. Superimposed over this obvious distinction is the more problematic and subtle concern that perhaps persons perceived as non-Arab and non-Muslim have also received different and preferential treatment.

From the CRT perspective, the detention and prosecution decisions reflect some overt concerns and some that are not as apparent. First, there is the obvious issue of Walker Lindh, a white U.S. citizen promptly receiving a trial, without a significant period of stateside

Rumsfeld, 542 U.S. 507, 509–10 (2004); see also *supra* note 32 and accompanying text (discussing the cases of Munaf and Omar, citizens being held and prosecuted as enemy combatants abroad).

106. Kelly, *supra* note 46, at 788.

107. *Id.* at 798.

108. According to one scholar, the government’s decisions with regard to detention and trial are part of a still developing “new criminal process.” See John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 766 (2007) (“[T]he ‘war on terror’ has accelerated the development of a new criminal process and that this new process has increasingly displaced traditional methods of investigating, prosecuting, and punishing people who have engaged in conduct that is subject to criminal penalties—whether or not that conduct is considered ‘terrorism.’”). Parry further asserts, “indefinite detention and trial by military commission of suspected terrorists as emblematic (but not exhaustive) of the new criminal process.” *Id.* at 767.

109. This would explain the government’s position in the *Al Marri* case discussed in *supra* note 30 and accompanying text.

detention premised upon an enemy-combatant designation, and the full measure of due process attendant in federal criminal cases, while many other mostly Arab noncitizen detainees have not. A simple analysis of race and citizenship, however, does not explain the difference. As we have previously stated, other citizens have not been initially provided the same option,¹¹⁰ while one Middle Eastern alien, Mr. Moussaoui, has.

The unrecognized significance of Mr. Walker Lindh's race perhaps is that it provided majority society the ability to view him as a sympathetic criminal defendant. Part of the project of CRT has been to expose race as a socially constructed idea¹¹¹ and to identify the privileges whiteness bestows.¹¹² CRT would caution that there is both a social and legal significance to Walker Lindh's identity. Socially, whiteness, unlike other identity categories, does not carry the stereotypical societal stigma that other racial categories face.¹¹³ Quite to the contrary, race works in Walker Lindh's favor, encouraging majority society to be more open to his explanation of how he was involved and how he regretted his involvement because he represents a familiar archetype. His race then gives him a foothold, which facilitates airing the remainder of his narrative—that he was the product of a broken home, and he was led astray while seeking spiritual enlightenment.¹¹⁴ Essentially, even though he is

110. See *supra* notes 25–26, 105 and accompanying text.

111. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) (noting that race, a category of no biological import, permeates every facet of our lives within American society and “is constructed along cultural, political, and economic lines”); Angela Harris, Foreword, *The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL’Y REP. 207, 214–17 (1995) (observing that society treats race as an observable fact, which it relies upon even where the physical and cultural significance of race is weak).

112. See *supra* note 98–99 and accompanying text; see also Cheryl Harris, *Whiteness as Property*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 276, 287 (Kimberlé Crenshaw et al. eds., 1995).

113. See K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 62–65 (Robert Post et al. eds., 2001) (claiming traits and behaviors are ascribed to certain minority groups where all group members are assumed to have the assigned characteristics, and then must reckon with false beliefs leading to societal discrimination); see also Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1203 (1995) (asserting that once they are used to explain societal differences, stereotypes become an engrained part of cognitive processes); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (noting that “a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”).

114. Katherine Q. Seelye, *Threats and Responses: The American in the Taliban; Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. TIMES, Oct. 5, 2002, at A1 (describing Walker Lindh's fourteen-minute statement before his sentencing where he repudiates terrorism and indicates he went abroad for religious studies and to end the suffering of Afghans, not to fight against America); Philip Shenon, *A Nation Challenged: The American Prisoner; U.S. Taliban Soldier Says He Was Disillusioned but Feared Reprisals*, N.Y. TIMES, Mar. 16, 2002, at A9.

an accused traitor, in a significant way he is familiar and therefore capable of engendering sympathy. His lawyer's and family's pleas for his life in the media then resonate with a certain there-but-for-the-grace-of-God-go-we (or-our-children) quality.¹¹⁵ If he is stripped of due process, there is a greater concern that others like him could be too. Socially, majority society then has a stake in his being treated fairly by the legal system. So even though "we" are all affected by the fear terrorism creates, "we" are most comfortable externalizing the costs of security to "them."¹¹⁶

Legally, race also matters because as CRT scholars have indicated, judges and courts are not blind to the ways in which society constructs and relies upon identity.¹¹⁷ While not necessarily by design, courts also rely upon race and other identity factors within legal proceedings.¹¹⁸

While Mr. Lindh's identity arguably provides an unacknowledged advantage, the identities of other detainees may similarly operate to disadvantage them. After September 11, there has been a societal backlash against those perceived as Arabic or Islamic.¹¹⁹ Like other minority

115. See William Glaberson, *A Nation Challenged: The American Prisoner; Defending, and Recasting, an Unloved Client*, N.Y. TIMES, Dec. 19, 2001, at A1 (recounting how Walker Lindh's defense counsel released childhood photos of the accused and comments from his parents asking America not to prejudice their son); see also Evelyn Nieves, *A Nation Challenged: The American; U.S. Detainee Sends Letter to Parents*, N.Y. TIMES, Dec. 12, 2001, at B8 (discussing the letter that Walker Lindh wrote to his parents apologizing for causing them grief).

116. See Cole, *supra* note 101, at 1735 ("History suggests that when democracies are captured by fear, they react in predictably troubling ways, in particular by targeting the most vulnerable for selective sacrifices that the majority would not likely be willing to endure if the sacrifices were evenly distributed."). But cf. Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1115 (2006) [hereinafter Posner & Vermeule, *Democratic Failure*] ("But the concern that self-interested majorities will impose excessive costs on targeted minorities is itself ambiguous. Virtually all laws, taken in isolation, harm a minority of the population . . .").

117. Anthony G. Amsterdam & Jerome Bruner, *Race, the Court, and America's Dialectic: From Plessy Through Brown to Pitts and Jenkins*, in MINDING THE LAW 246, 247 (2000) (asserting that the construct of race serves the hegemonic purpose of empowering the in-group and disempowering the constructed "other"); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 112 (1996); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 439-41 (1993) (arguing that race "is an incoherent fiction," which courts give effect to for the purpose of representing minorities as "the 'Other'").

118. See Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1845 (1994) (terming courts' use of stereotypical beliefs about identity as unintentional reliance upon "pre-understanding"); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking and Misremembering*, 57 DUKE L.J. 345 (2007) (reporting the findings of the author's empirical study, which found that "[j]udges and jurors may unintentionally and automatically 'misremember' facts in racially biased ways during all facets of the legal decisionmaking process"). One of us has also made this point elsewhere. See Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 958-62 (2006).

119. Akram & Johnson, *supra* note 43, at 299-300; Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265-67 (2004)

groups before them, Arabs and Muslims have been subject to racial profiling¹²⁰ and severely draconian immigration regulations.¹²¹ These governmental actions work in concert with social attitudes,¹²² which presently have served to negatively define the identity of people perceived as Arabs. Worse still, beliefs related to perceived race (Arab/Asian), nationality (alien), and religion (Muslim), have been conflated into one extremely loaded, overarching identity—that of the terrorist.¹²³ As one scholar has noted: “Just as Asian Americans have been ‘raced’ as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have been ‘raced’ as ‘terrorists’: foreign, disloyal, and imminently threatening.”¹²⁴ This conflation means that even Arabs or Muslims who are citizens and loyal will be perceived as “other.”

In much the same way that Walker Lindh’s identity makes him familiar, the identities of Arabs and Muslims render them foreign—

(arguing that after September 11, Arabs, Muslims, and South Asians have been presumed to be foreign and disloyal); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2002) (“In the wake of the terrorist attacks of September 11, 2001, Arab, South Asian, and Muslim Americans have borne the brunt of the presumptions of foreignness and disloyalty.”).

120. See Stephen J. Ellmann, *Changes in the Law Since 9/11: Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675 (2002–2003) (noting that, prior to September 11, progress had been made in eliminating the use of racial profiling against African Americans in the criminal context, but since September 11 the tactic has been employed against Arab-looking individuals suspected of terrorism); see also Liam Braber, *Korematsu’s Ghost: A Post–September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 452 (2002) (“Based on the theory that Arabs and people of Middle Eastern ethnicity are disproportionately involved in the current terrorist threat, investigations using racial classifications subject these groups to more intense scrutiny than other ethnicities when they travel.”) (citation omitted); Wing, *supra* note 39, at 718 (arguing that post–September 11, in many contexts, Arabs and Muslims have been subjected to racial profiling, much like Blacks within the context of traffic stops).

121. See Bâli, *supra* note 102; Cole, *supra* note 44, 959–65 (detailing the government’s secret detainment of many Arab immigrants without hearings after September 11). See generally Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153 (2002) (linking the social construction of Arab immigrants after September 11 to concerns for illegal aliens from Latin America).

122. For an analysis about governmental actions and individual attitudes working together to define limitations on citizenship of Middle Easterners after September 11, see Volpp, *supra* note 43, at 1593–95; see also Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 443 (2002).

123. See Wing, *supra* note 39, at 722 (“The pan-ethnicity term ‘Arab’ and the religious signifier ‘Muslim’ have been socially constructed as a synonymous ‘race’ in the United States.”). It is arguable that a similar type of conflation took place with regard to the concept of race, nationality, and disloyalty, for Japanese internees during World War II. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding a military decision to segregate and exclude potentially disloyal citizens of Japanese ancestry from the military area during World War II). Bizarrely, the Supreme Court found the detentions were not premised upon race, but on the detainees belonging to a group the military determined were a war-time danger. *Id.*

124. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 12 (2001) (citation omitted).

whether they are, in fact, citizens or not.¹²⁵ In this way, the detainees at Guantánamo are not different from Mr. Hamdi in the eyes of the majority.¹²⁶ With regard to suspects in the War on Terror, there appear to be only the two normative categories of “them” and “us,”¹²⁷ where racialized suspects are clearly not a part of “us.” Societal attitudes such as these serve as silent support for the government’s policies, which disproportionately affect the socially marginalized.¹²⁸ This combination of harmful legal impact and social ostracism also undermines the credibility of the government’s actions by discouraging the likelihood that “we” might undertake the role of ensuring fairness for “them.” Given this social and legal environment, a grave legitimacy concern arises. If gov-

125. See Hing, *supra* note 122, at 442–43. Hing argues that,

[i]n contemplating this targeting of Muslim, Middle Eastern, and South Asian Americans by private individuals and official government policies after September 11, a clear theme emerges. In spite of the fact that these people have been part of the fabric of our country for some time, in the eyes of many, those among us of Muslim, Middle Eastern, and South Asian background are not real Americans.

Id.

126. Hamdi, although a U.S. citizen due to his birth in Louisiana, is quite clearly of Arabic descent, as are many of those detained at Guantánamo. In essence, the negative social significance of his perceived race negates the sense of community that his actual citizenship should provide. This type of assessment of the effects race and citizenship is even more complicated for Mr. Padilla. While his U.S. citizenship is clear, his otherness is defined by his alleged connection to foreign terrorists and perceptions that he may be an ethnic or racial minority who is not of Middle Eastern descent. It is not clear that Mr. Padilla identifies as such, but his name will suggest to some that he is Hispanic or Latino. To the extent he is even perceived as belonging to a racial minority group with its own history of debilitating stereotypes, this may further or differentially affect his ability to be regarded as sympathetic. For a discussion of how names and accent can be used as proxies for minority group status that trigger negative treatment, see Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 Wis. L. Rev. 1283 (making this claim within the context of employment discrimination).

127. Others have noted the danger in this dichotomy:

First, there is the danger that extraordinary measures that are employed at present against “them” will be turned against “us” in the future. This may happen for several reasons. First, with time there may be a redefinition of the boundaries of the relevant groups. Some who are today an integral part of the “us” group may find themselves outside the redefined group tomorrow, leaving within its circumference a smaller number of people. . . .

A second and closely linked danger in relying on the us-versus-them discourse relates to the possibility that the growing schism between “us” and “them” will result not only in the alienation of different groups in the population, but in the dehumanization of the outsider or consideration of him or her as inferior.

Gross, *supra* note 75, at 1085 (citation omitted).

128. Well-established law, however, has concluded that such a disparate impact, alone, does not amount to discrimination that violates the Constitution. See *generally* *Washington v. Davis*, 426 U.S. 229, 242–47 (1976) (holding, in a variety of contexts, that a facially neutral law may only be found unconstitutional when one proves a discriminatory purpose on the part of lawmakers); see also *McCleskey v. Kemp*, 481 U.S. 279, 279–81 (1987) (holding that empirical proof of discriminatory impact in the administration of the Georgia death penalty did not render the practice unconstitutional without proof of discriminatory intent by state actors).

ernmental regulations disproportionately and severely infringe upon the rights of a small group of individuals, whose interests are deemed neither akin to, nor worthy of protection by the majority, can this minority group be treated fairly?¹²⁹ Certainly, the government could opt for actions and policies that provide more, rather than less, equality,¹³⁰ but what is its incentive to do so?

Given the unacknowledged manner that identity categories have been both all over, yet absent, from the discussion of the government's detention and prosecution decisions, the CRT approach would perhaps caution that no branch of government is particularly well suited for truly addressing the attendant equality concerns. Certainly, the *Eisenrager* rule fails because it requires deference based on somewhat arbitrary factors related to citizenship and location. While this is arguably the preexisting status of the law,¹³¹ would anyone argue that the rule is fair by CRT's tenets, which embrace the provision of substantive, rather than formal, equality to outsiders?

Essentially, the *Eisenrager* rule violates the notion that protection of our common human rights should inform policy choices and that fundamental fairness, transparency of process, and respect of dignity are universal principles that should extend to most suspects in all but the most unique or extreme of cases.¹³² The Court's perceived deference is

129. Some might suggest yes, but for the following ironic reason: "Whatever sense one attaches to the idea, it is dubious that scapegoating increases during emergencies. Minorities undoubtedly are scapegoated during emergencies, but they are during normal times as well, albeit in less visible ways." Posner & Vermeule, *Democratic Failure*, *supra* note 116, at 1122.

130. Robert L. Hayman and Nancy Levit explain how the attitudes of lawmakers and society work in concert to deprive equality for some:

This doctrinal critique is tied to a political and structural critique of the legal system. The legislative arena will not cure racism. The American public, enchanted with the notion of equality of opportunity, is willing to avert its gaze from the inequality of results. Thus, the conservative stronghold in state legislatures has been able to champion procedural equality while rolling back measures that move toward real, substantive equality.

Robert L. Hayman, Jr. & Nancy Levit, *Thinking Critically About Equality: Government Can Make Us Equal*, 4 HARV. LATINO L. REV. 67, 71-72 (2000).

131. See *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 763-64 (2003). In *El-Shifa*, the U.S. Court of Federal Claims decided a dispute involving U.S. missile strikes on an alleged chemical-weapons plant in Sudan by ruling that *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953), provided for the extraterritorial application of the Fifth Amendment's Takings Clause to property located abroad and owned by a noncitizen, but the *El-Shifa* court dismissed the case on military-necessity grounds. See *El-Shifa*, 55 Fed. Cl. at 763-64, 774.

132. Applying such principles in an even-handed manner after September 11, which ignores detainee citizenship and location would implicate the progressive political perspective economist Julianne Malveaux has described as "shared status"—our understanding that across race, class, and nation, "a life is a life is a life." THE PARADOX OF LOYALTY: AN AFRICAN AMERICAN RESPONSE TO THE WAR ON TERRORISM 186 (Julianne Malveaux & Regina Green eds., 2002). See also Mario L. Barnes, *But Some of [Them] Are Brave: Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. AND POL'Y 693, 712-13 (2007)

all the more startling given the nature and severity of the detentions. If the *Eisenrager* rule were to apply unmodified in such circumstances, the government would always have incentive to place detainees outside of the United States for the purpose of avoiding judicial review.¹³³

While the de facto sovereignty and legislative-jurisdiction rules present better options than complete judicial deference from a CRT perspective, each also presents problems. The CRT concerns with the legislative-jurisdiction rule will be more thoroughly covered later.¹³⁴ The option, however, is facially problematic in its failure to identify—absent the availability of the U.S. Constitution—which (or whose) legal norms will give substance to the rule. The de facto sovereignty rule is somewhat palatable because it recognizes that government should not be given a pass on the review of extremely restrictive detentions because of the status (alien) or location of the detainees. The rule, however, presents two concerns. First, what is the amount of control the government must exercise for the rule to attach? As conceived, the rule would leave it to courts to decide, which could result in an uneven application. Second, there is some potential for courts to be affected by two unrecognized phenomena: (1) sympathy for the government's challenges to ensure national security after September 11; and (2) the societal disdain for the particular "outsider" group members being detained. In other words, depending on the sympathy of jurists to the post-September 11 world, in effect, the de facto sovereignty rule could become the *Eisenrager* rule.

In accordance with CRT principles, addressing the types of social-justice concerns raised by the detentions would require an acknowledgment of how the social construction of race, ethnicity, religion, and citizenship has bolstered the government's ostensibly neutral decisions.¹³⁵ Even without such an acknowledgment, however, CRT proponents seek to ensure substantive equality for the socially disempowered, and they seek to interject the lived experiences or narratives of those most affected into any debate. While this section has primarily focused on detainees rights, there have been other casualties tied to the post-September 11 detention and trial decisions. Once the second wave of cases is decided, perhaps there will be space to speak of the other

(discussing Malveaux's concept of shared status within the context of the military's treatment of minorities and asserting that when we ignore the concept, courts are empowered to reflect back to society a position condoning the discrimination of marginalized populations).

133. For an analysis of why the government chose to locate detainees at Guantánamo Bay, see Daniel F. McCallum, *Why GTMO?* (2003) (unpublished paper, on file with author).

134. See *infra* Part III.C.

135. See Hayman & Levit, *supra* note 130, at 71 ("A principal doctrinal critique offered by Critical Race Theory is its challenge to the objectivity of purportedly neutral legal rules.").

injuries to persons and process that have been left in the wake of broad exercises of executive power.¹³⁶

Of the rule options, only the constitutional rule promises the opportunity for real and uniformly applied equality. It is the only rule that acknowledges that due process provisions should attach to detentions and MCA-authorized tribunals.¹³⁷ Also, one of the popular CRT methods of empowering the legally marginalized is through using narrative methodology to expose discrimination and illuminate how law often fails to hear their voices.¹³⁸ Presently, through governmental decisions and judicial deference, the stories of the detainees have been largely

136. These casualties are myriad. One group that has been injured through an abuse of process has been persons wrongly detained as “material witnesses” since September 11. See Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 694 (2005) (discussing the dubious constitutionality of the government holding individuals as “material witnesses” and asserting after September 11). Professor Bascuas argues: “Because the government used the material witness statute to arrest individuals against whom it had little or no real evidence of wrongdoing, it is no surprise that the vast majority of the ‘material witness’ detainees turned out to have no knowledge of terrorist activity whatsoever.” *Id.* Another group of affected individuals are those who challenged the actions of the executive branch as unlawful or overreaching, through lawful but sacrificial means. See *Navy JAG Resigns Over Torture Issue*, MILITARY.COM, Dec. 27, 2007, <http://www.military.com/NewsContent/0,13319,158983,00.html> (describing the story of Andrew Williams, a former naval officer in the Judge Advocate General’s Corps who resigned in response to waterboarding being used against al Qaeda operatives); see also Tim Golden, *Senior Lawyer at Pentagon Broke Ranks on Detainees*, N.Y. TIMES, Feb. 20, 2006, at A8 (reporting that Alberto Mora, the former Navy General Counsel, resigned after repeatedly challenging the executive branch’s position on coercive interrogation). Others might be described as persons whose concern for treatment of the detainees caused them to engage in unwise or unlawful acts. See, e.g., Tim Golden, *Naming Names at GITMO*, N.Y. TIMES, Oct. 21, 2007, § 6 (Magazine), at 78 (describing the case of Navy Lieutenant Commander Matthew Diaz, who was court-martialed and convicted on charges related to releasing the then classified list of names of Guantánamo Bay detainees to a progressive advocacy group). Finally, claims that executive actions after September 11 have thwarted the rule of law are not new. With regard to the detainees, there have been new claims related to a continuing lack of transparency around detentions and the politicization of military commission decisions. See Carol Rosenberg, *‘Platinum’ Captives in Off-Limits Camp*, MIAMI HERALD, Feb. 7, 2008, at A3 (discussing a special unit at Guantánamo Bay that is off limits to the media and houses high-value prisoners, who have been requested but not authorized to testify in the trial of Salim Hamdan); Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, WASH. POST, Oct. 20, 2007, at A03 (discussing the claims of a former Air Force Officer who resigned based on this belief that senior officials were directing that due to their “strategic political value,” prominent detainees receive trials before cases that were more solid). For a particularly interesting account of how the trope of “enemy combatant” has been used to destabilize any notion that just process is due, see Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL’Y 299, 303–05 (2007).

137. See Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 11 YALE L.J. 1259, 1298 (2002) (contending that distinctions made between alien and citizen detainees violate the constitutional principles of equality and due process).

138. For an overview of the varied uses of narratives within feminist and CRT scholarship, see DELGADO & STEFANCIC, *supra* note 39, at 38; Barnes, *supra* note 118, at 951–58; Hayman & Levit, *supra* note 130, at 70 (discussing the work of seminal CRT scholar Richard Delgado and noting that he “champion[ed] the value of narrative scholarship as a means of challenging

silenced.¹³⁹ Essentially, there is an absence of a counter-narrative about the experience of being detained; of having a severely limited access to counsel; and of receiving little to no due process. Certainly, of the options of available to the detainees, only meaningful judicial review holds promise for giving voice to their experiences.

B. *The First Wave of Detention Cases: Analyzing Which Rules Informed the Decisions*

The four potential rule structures we identified were originally conceived to consider the challenges of Guantánamo detainees.¹⁴⁰ Interestingly, each rule, was implicated by the Supreme Court's analysis in these cases, although the analysis did not expressly consider the animating factors that are the subject of this article. In *Rasul v. Bush*,¹⁴¹ the Court explicitly rejected the extreme option presented by the *Eisen-trager* rule.¹⁴² Even though it indicated that foreign nationals held abroad might enjoy some constitutional protections under certain circumstances,¹⁴³ the Court determined that the question of constitutional jurisdiction was foreclosed.¹⁴⁴ However, with regard to our other rule choices, the Court viewed the other rules as jointly operative rather than oppositional. According to the Court, the lower courts, which applied *Eisen-trager* to deny jurisdiction over habeas petitions filed by aliens held abroad, ignored the relevant nature of the custody and ignored the

received wisdom") (citation omitted); Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2378–81 (2003).

139. One scholar has described judicial deference as "the dominant narrative" in the post-September 11 cases. Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 384 (2004) (noting that "[t]he dominant narrative of deference, however, has both normative and descriptive flaws").

140. The cases of Jose Padilla and Yasir Hamdi were also pending when we developed this project. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the father of a U.S. citizen who had been detained as an enemy combatant after being captured in Afghanistan challenged the President's ability to detain his son. See *id.* at 507. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) involved a similar challenge of an enemy-combatant detention by a citizen, with the major difference being that he was arrested within the United States. *Id.* at 456. These cases are not discussed within this section because although they involved issues related to the extent of executive power available to prosecute the War on Terror, they did not implicate the precise tradeoffs involved in cases where the petitioners were noncitizens and detained abroad. Still, the governmental actions within these cases are discussed below, where we consider our unified approach and its concerns for providing citizen and noncitizen enemy combatants varying forms of process and access to courts. See *infra* Part III.A–B.

141. 542 U.S. 466 (2004).

142. *Id.* at 484–85.

143. *Id.* at 484 n.15 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (Kennedy J., concurring)).

144. *Id.* at 478 (stating that after *Eisen-trager*, Congress created the habeas statute, which meant that "any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review").

considerations we identify as arising from statutory jurisdiction and to a lesser extent, de facto sovereignty.¹⁴⁵

With regard to statutory jurisdiction, the Court found that Congress had granted jurisdiction to federal courts to hear applications of habeas corpus by “any person” who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States.”¹⁴⁶ The Court also recognized that Congress had not strictly limited application of the habeas statute to citizens within the United States.¹⁴⁷ Ultimately, the Court endorsed a version of the statutory rule by recognizing the limits of *Eisentrager* and considerations related to de facto control.¹⁴⁸ After identifying the general applicability of the habeas statute, the Court determined that the decisions in *Eisentrager* and its progeny, which gave little attention to the statutory question, were limited to their facts and history.¹⁴⁹ Further, the Court found that whatever the traditionally understood limits on extraterritorial jurisdiction, given the level of control exercised by the U.S. government over the Guantánamo detentions, neither a geographical nor a citizenship limit made sense.¹⁵⁰ The Court located the availability of expansive habeas relief within the common law, where habeas extended not only to citizens, but also to “claims of persons detained in the so-called ‘exempt jurisdictions.’”¹⁵¹ In essence, by balancing statutory and de facto sovereignty or control concerns, the Court determined that it was the custodian and the nature of the custody, rather than the location and status of the detained, that mattered.¹⁵²

Although *Hamdan v. Rumsfeld*¹⁵³ was not pending before the Court when we initiated this project, the issues in *Hamdan* pertain to what recourse would be available to challenge executive decisions about the rights of noncitizen enemy combatants held abroad. Specifically, the plaintiff in *Hamdan* challenged the President’s power to order noncitizens designated as enemy combatants to be tried by military tribunals, subject to a set of rules and procedures created by the Executive.¹⁵⁴

145. *See id.* at 476.

146. *Id.* at 473 (citing 28 U.S.C. § 2241(a), (c)(3) (2000)).

147. *See id.* at 479.

148. *See id.* at 479–84.

149. *Id.* at 484 (“*Eisentrager* itself erects no bar to the exercise of federal-court jurisdiction over the petitioners’ habeas corpus claims.”).

150. *See id.* at 468.

151. *Id.* at 481–82. *Cf.* Fallon & Meltzer, *supra* note 31, at 2058–59 (suggesting that reliance upon this common-law model had left open the question whether statutory habeas jurisdiction would be open to extraterritorial aliens other than those being detained at Guantánamo).

152. *Rasul*, 542 U.S. at 483–84.

153. 126 S. Ct. 2749 (2006).

154. Specifically, the Court concerned itself with the rules governing commissions that were convened “incident to the conduct of war.” *Id.* at 2776 (quoting *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942)).

While the detainee cases principally examined whether the Court had jurisdiction to hear habeas challenges; that question is not the central inquiry in *Hamdan*. Instead, *Hamdan* concerns whether the military commissions that the President created had jurisdiction to try him. Still, our various rule choices are germane to *Hamdan*.

Given that *Hamdan* was decided after *Rasul*, it would seem logical that the Court would no longer need to address whether *Eisentrager* prevented the petitioner from reaching the Court. In place of a jurisprudential limit, however, Congress had passed the Detainee Treatment Act (“DTA”),¹⁵⁵ which contained a provision that stripped federal courts of jurisdiction over detainee matters.¹⁵⁶ Rather than determine the general constitutionality of the DTA, the Court held that the statute could not be used to strip jurisdiction from a case that was already pending when the statute was enacted.¹⁵⁷

To answer the substance of *Hamdan*’s claim, the Court again appeared to rely upon a combination of the types of rules we suggested were available. With regard to a statutory analysis, the Court looked¹⁵⁸ to U.S. obligations under the Geneva Conventions¹⁵⁹ and the Uniformed Code of Military Justice (“UCMJ”).¹⁶⁰ The UCMJ presented problems for the Executive because it proscribed conditions for the use of military commissions, which included compliance with the rest of the UCMJ, the laws of war, and the Geneva Conventions.¹⁶¹ The Court found that Common Article 3 of the Geneva Convention required that detainees be tried by “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁶² Moreover, the specific crime *Hamdan* was charged with, conspiracy, did not appear in any of the major treaties on the law of war.¹⁶³ Given these anomalies of the Executive-directed commissions, the *Hamdan* plurality found that the military commission convened to try him lacked jurisdiction.¹⁶⁴

155. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified in scattered sections of 10, 28 & 42 U.S.C.).

156. *See id.* § 1005(e).

157. *Hamdan*, 126 S. Ct. at 2764.

158. *See id.* at 2786.

159. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

160. 10 U.S.C. §§ 801–946 (2000).

161. *See Hamdan*, 126 S. Ct. at 2786.

162. *Id.* at 2795 (citing Geneva Conventions, *supra* note 159, art.3, § 1(d)) (internal quotation marks omitted).

163. *Id.* at 2780–81. This was critical because jurisdiction for military tribunals created incident to the conduct of war was limited to “offenses cognizable during time of war.” *Id.* at 2776.

164. *Id.*

Although statutory analysis was most prominent in its approach, the Court also considered the constitutionally distinct duties and the separation of power between the branches.¹⁶⁵ This analysis did not directly implicate our constitutional-jurisdiction model because it did not locate within the Constitution a right for Mr. Hamdan to receive the same treatment or process as U.S. citizens charged in the War on Terror. It did, however, examine whether the President's commission order intrudes upon power belonging to the Congress. Hence, the UCMJ discussion above implicates *Youngstown Sheet & Tube Co. v. Sawyer*¹⁶⁶ because commissions that fail to comply with limits set by statutes thwart congressional authority. Additionally, given that the Court found that the AUMF was not a specific authorization for the President's commissions, it used the decision in *Ex parte Quirin*¹⁶⁷ to determine that the President did not possess the robust power to direct commissions when and how he saw fit.¹⁶⁸ Rather, the Court found that the power remained with Congress and had to be specifically provided to the President.¹⁶⁹ Again, to the extent that this analysis forecloses jurisdiction for commissions unless they respect limits on the Executive's power to legislate, it can be arguably described as a form of a constitutional rule, albeit less so than a rule premised upon equal application of constitutional protections.

In some ways the first wave of detainee rights cases did precisely what we expected they would do: They chose from among various possible rule formations to settle some questions about the limits of executive action. What they did not do is articulate a preferred method for managing concerns that arise at the intersection of power and individual-rights conflicts.¹⁷⁰ Certainly, they neither announced a preferred rule in terms of balancing efficiency concerns against social justice, nor did they more generally reach the merits about precisely when constitutional protections should be available to noncitizens held abroad.¹⁷¹ In the next part, we propose both how such a method would work generally,

165. See Fallon & Meltzer, *supra* note 31, at 2049 (making the same claim about Justice Stevens' opinion).

166. 343 U.S. 579 (1952).

167. 317 U.S. 1 (1942).

168. See *Hamdan*, 126 S. Ct. at 2774–75.

169. See *id.* at 2775, 2786.

170. Only the *Hamdi* decision came close to such an analysis when it suggested that under *Mathews v. Eldridge*, 424 U.S. 319 (1976), Hamdi was entitled to a process that balanced the government's interest against the potential deprivation of a constitutional right. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004). The problem with the detainee cases of extraterritorial aliens is that the Court never considered in depth whether those constitutional protections extended to such aliens.

171. Fallon & Meltzer, *supra* note 31, at 2048 (“[T]he Court left unclear whether its jurisdictional ruling extended more broadly to detentions of aliens throughout the world. Nor did the Court determine what substantive rights the Guantanamo petitioners might possess.”).

and we specifically apply this method to the pending detainee cases after *Hamdan*.

III. THE UNIFIED APPROACH

A. *Theoretical Underpinnings of a Unified Approach*

Legal scholars have historically explored the consequential effects of a particular legal rule on subsequent behavior. Through this inquiry, they have sought to discover or create rules that lead to behavior reflective of their preferred values: efficiency for law and economics scholars, and social justice or antisubordination for CRT scholars. Each school has focused overwhelmingly on the role of the judiciary in fostering their preferred norms. Moreover, the two schools have rarely engaged in a constructive interchange of ideas.¹⁷² Although undertaking complex analysis of alternate rules within the context of law, this scholarship has largely ignored the subtle differences among those who are to be subjected to their notional rules: individual actors.¹⁷³

172. Quite to the contrary, there have been significant attacks and responses between the camps. L&E proponents have been particularly critical of CRT scholars and methodology. See generally Farber & Sherry, *Telling Stories supra* note 36. Prior to taking on CRT scholarship, Daniel Farber had written in L&E. See Daniel A. Farber, *Contract Law and Modern Economic Theory*, 78 NW. U. L. REV. 303 (1983). For additional commentary, see RICHARD A. POSNER, *OVERCOMING LAW* 368–84 (1995) (criticizing proponents of the CRT and narrative methodology, most notably Patricia Williams); Alex Kozinski, *Bending the Law: Are Radical Multiculturalists Poisoning Young Legal Minds?*, N.Y. TIMES, Nov. 2, 1997, at 46 (praising the Farber and Sherry critique of CRT); Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40 (accusing CRT of having an “ugly streak” and claiming that rather than employing logical arguments or empirical data, “critical race theorists tell stories”). For responses, see Culp, *To the Bone, supra* note 36, at 1659–61 (taking Posner to task for his critique of CRT and alleging that his conduct in the debate can be perceived as racist); Clark Freshman, Book Review, *Were Patricia Williams and Ronald Dworkin Separated at Birth? Overcoming Law*, 95 COLUM. L. REV. 1568 (1995) (raising concerns with Posner’s critique of the work of feminist and CRT scholars); Nancy Levit, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795, 796 (1999) (“[C]ritiques of critical theories . . . share . . . a tendency to caricature feminist, gay, and critical race theory, and to preempt the possibility of public dialogue. These critiques—the methods of criticism—suggest a breakdown in the civility of academic discourse and an extraordinary tolerance of intolerance.”); David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 STAN. L. REV. 1001 (1996) (severely criticizing Richard Posner’s *OVERCOMING LAW* and his analysis of CLS, CRT, and narrative).

173. Only in the recent emergence of CRT and socio-legal scholarship have we seen more particular attention being given to the legally disempowered and the constitutive process inherent in legal procedures. See, e.g., KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988) (analyzing the impact of civil-rights law on victims of discrimination); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998) (analyzing the manner in which subjects behave in legal settings and import legal concepts into everyday life); Kimberle Crenshaw, *Mapping the Margin: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (arguing law and legal processes have ignored how diversity within identity categories matters to human experiences).

More recently, legal scholars have recognized that law's influences cannot be accurately predicted absent an understanding of the individual. Although many scholars have debated the merits of efficiency as an ultimate normative goal, a more basic component of this critique counsels that an individual's social and cultural identities might derail the effort to predict consequential effects in the first instance.¹⁷⁴ Accordingly, some members of subordinated populations who are subject to legal processes find themselves fighting the process as well as the debilitating social condition, which affects them.¹⁷⁵

Law enjoys a similarly complex, although largely ignored, relationship with institutional behavior, particularly governmental action. Lawyers and legal norms have been elevated to exalted positions within institutions of government. As a result, legal norms often shape governmental actions in ways that are entirely outside the sphere of the courts. In turn, the path of governmental action further influences judicial decisionmaking. In a sense, governmental action and some personal behavior enjoy an inverse relationship to law and legal consciousness. Although the influence is not always apparent, interpretation and manipulation of the rule of law largely support governmental decisions.¹⁷⁶ For individuals, especially marginalized individuals, legal rules may be clear, but how law is understood, internalized, and used to modify

174. See Ellickson, *supra* note 40 (arguing that L&E could be enhanced by including doctrinal tools from sociology and psychology); see also Dau-Schmidt, *supra* note 73, at 389. As one critical legal scholar has opined:

Critical scholars and practitioners are now engaged in a search for alternative theoretical and practical approaches to working for and with clients whose different perspectives, needs, and values do not fit neatly into traditional conceptions of legal process and doctrine. Critical theory questions the authority of definitional limits that are revealed by the context of real experience, a context often rendered invisible by the bounds of legal discourse.

Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 864 (1992); see also Naomi Mezey, *Out of the Ordinary: Law, Power, Culture and the Commonplace*, 26 LAW & SOC. INQUIRY 145 (2001); Austin Sarat & Jonathon Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 25 (2001).

175. See JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 13 (2001); see also Austin Sarat, ". . . The Law Is All Over": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 350-51 (1990) (analyzing the power law wields in the lives of the welfare poor). See generally Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (expressing the imposing and unwelcome influence the law exerts in the life of a woman on welfare).

176. Recently, at least one theorist has cogently posed the question of whether the judiciary has become an instrumentalist organism or body captured by ideology and wielding the rule of law as a means to an end. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 172-85 (2006).

behavior is anything but clear.¹⁷⁷

It is within this legal landscape that we wish to explore a set of alternative rules governing extraterritorial governmental action against noncitizens. Using varied disciplines but Rubin's unified approach, we attempt to flesh out the following issues: What responsibilities should be assigned the three branches of government for overseeing such practices? What are the relative competencies of each institution in fostering the norms of efficiency and social justice? Which institutions are best able to adapt its practices for future cases? How do the institutions interact when responsibility is assigned to another? What factors animate the choice between imposing the burden of legislative inertia on a disenfranchised and disempowered group as opposed to the President or the military?¹⁷⁸ What is the institutional-individual relationship that has given rise to this choice of governmental action? Has law unwittingly relied upon stereotypes and misguided notions of identity to shape this governmental action? Are other rules available that would foster a more attractive efficiency-social justice tradeoff?

B. *Applying a Unified Approach: Trading off Alternative Rules' Responsiveness to Efficiency and Social-Justice Concerns*

In Part II, we presented two methodologies for approaching alternative rules pertaining to judicial review of extraterritorial governmental action against aliens. The two analyses, however, did not engage each other. They took place in different theoretical spaces and were grounded in incommensurate values, efficiency, and social justice. The first analysis, grounded in law and economics, suggested that, during emergencies, a rule eliminating judicial review of executive actions taken against aliens abroad might be justified by a cost-benefit analysis of security and civil liberty. The second analysis, grounded in CRT, suggested that, absent a constitutional guarantee of judicial review, any rule might be unable to deliver an acceptable level of social justice and therefore, lack legitimacy. Moreover, although we located the genesis of these various rules in the arguments of the first wave of cases, in deciding those cases, the Court gave us limited insight into why one rule was preferred over another.

In this part, we seek to apply the unified approach developed by Rubin and, in doing so, develop a theoretical space in which the com-

177. See EWICK & SILBEY, *supra* note 173, at 45-49 (analyzing the myriad ways that legal norms are internalized and how individuals evince a shifting and multifaceted legal consciousness that moves between submitting to, gaming, and resisting legal processes).

178. This balancing equation is not new. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218-19 (1944) (deciding that Japanese internees, rather than the military and government, should bear the burden of societal concerns about loyalty).

posite functions of efficiency and social justice under alternative rules might be compared directly. Our aim is to demonstrate that such a unified approach might permit a productive exchange of discourse between the two divergent approaches to these issues.

Rubin suggested that a unified approach should extend beyond examining the best rule for fostering efficiency¹⁷⁹ or social justice.¹⁸⁰ Moreover, it should seek to identify rules that assign responsibilities to institutions that can best adapt their practices to foster these values in future cases with an awareness of how institutions react when responsibilities are assigned to each other.¹⁸¹ In this regard, the four alternative rules can be seen in a new light: How adaptive is each to future developments, and how does each perform in relation to coordinate institutions?

The *Eisentrager* rule is grounded in the idea that neither the Constitution nor any legislative enactment provides judicial review over aliens held abroad. Under the *Eisentrager* rule, in which the detentions at Guantánamo are entirely within the Executive's prerogative, the judiciary is completely removed from the conversation regarding legality of extraterritorial executive action involving aliens. The *Eisentrager* rule, however, allows for the possibility of legislative overrule. In other words, Congress could bring the judiciary back into the conversation by amending the habeas corpus statute.¹⁸²

The de facto sovereignty rule invites the judiciary into the conversation but does so in a way that is more final: Congress could not easily undo a finding by the Court that Guantánamo was effectively within the United States. This approach also suffers from being an unclear rule. Future cases would likely involve fact-based determinations about the

179. See *supra* Part II.A.1.

180. See *supra* Part II.A.2.

181. See Rubin, *The New Legal Process*, *supra* note 36, at 1429–31.

182. Justice Scalia at oral argument in *Rasul*, suggested that such a rule is preferable to the judicial extension of the habeas statute because Congress is better suited than the judiciary at weighing the various policy considerations involved in the exercise of jurisdiction over such cases:

Can we hold hearings to determine the problems that are bothering you? I mean, we have to take your word for what the problems are. We can't call witnesses and see what the real problems are, can we, in creating this new substantive rule that we are going to let the courts create. Congress could do all that, though, couldn't it?

....

If [Congress] wanted to change the Habeas Statute, it could make all sorts of refined modifications.

....

About issues that we know nothing whatever about, because we have only lawyers before us. We have no witnesses. We have no cross-examination, we have no investigative staff. And we should be the ones, Justice Breyer suggests, to draw up this reticulated system to preserve our military from intervention by the courts.

Transcript of Oral Argument at 45–46, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

nature and extent of U.S. control over various military bases around the world and would beg the question under what other circumstances might the courts similarly find that the U.S. exercises de facto sovereignty? Such a regime is unlikely to satisfy either the proponent of more security or more freedom. The proponent of more security recognizes that government lawyers, conservative by nature, will likely treat all locations under the worst-case scenario: that the courts might declare that de facto sovereignty exists. Thus, for the government lawyer, the de facto sovereignty rule might reduce, in practice, to the equivalent of the statutory habeas rule (or perhaps even the constitutional rule, if the courts later decide to extend the de facto sovereignty concept to the applicability of the Fifth Amendment). This is an example in which the Executive's conservative implementation of an unclear rule could supplant the courts' role in future cases.

As explained above,¹⁸³ the libertarian (or CRT scholar) might view the de facto sovereignty rule as no better than the *Eisentrager* rule and abridge judicial review in most places, given the possibility that the future courts will allow the "otherness" of the petitioners to spill over into their evaluation of the jurisdictional question. Moreover, there is the possibility that the government will simply continue searching for the right place that is truly beyond the reach of the courts and, once found, concentrate future detentions there. Thus, both groups, for different reasons, might reject the de facto sovereignty rule for its lack of clarity and uncertain application in future cases.

The legislative or statutory-jurisdiction rule is grounded in the idea that the current habeas statute has conferred such jurisdiction on the courts.¹⁸⁴ Like the *Eisentrager* rule, the statutory-jurisdiction rule has

183. See *supra* Part II.A.2.

184. This idea is plausible but has a complicated history. In short, as Justice Stevens pointedly noted during oral argument in *Rasul v. Bush*, *Eisentrager* was decided at a time when the law was different. See Transcript of Oral Argument, *Rasul*, 542 U.S. 466 (03-334, 03-343), available at http://www.oyez.org/cases/2000-2009/2003/2003_03_334/argument ("No, but *Ahrens v. Clark* was the law at the time of that decision, and it was subsequently overruled. So that that case was decided when the legal climate was different than has been since *Ahrens* against *Clark* was overruled."). The Court's decision in *Ahrens v. Clark*, 335 U.S. 188 (1948) permitted habeas jurisdiction only when the petitioner was detained within the territorial jurisdiction of the court hearing the petition. *Id.* at 190. But, according to Justice Stevens, the Court later overruled that decision in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973). As a result, in Justice Stevens's eyes, the statutory-jurisdiction rule is at least as plausible as the *Eisentrager* rule. Moreover, such a reading would comport with the fact that the courts have routinely exercised jurisdiction over petitions brought by U.S. citizens held outside the United States. Under *Eisentrager*, those cases can only be explained as the exercise of jurisdiction directly under the Constitution, an explanation that assumes Congress drafted the habeas statute in an unconstitutionally narrow manner.

Justice Stevens' involvement in this issue dates back decades to his clerkship for Justice Rutledge during the term in which the Court decided *Ahrens*. See Joseph T. Thai, *The Law Clerk*

the virtue of flexibility in institutional discourse and leaves open the possibility of adaptation to future value judgments. Congress enjoys the ability to legislatively overrule the statutory-jurisdiction rule, if it deemed such action necessary. The two rules differ dramatically, however, in that they place the burden of legislative inaction on different institutional actors. Under the *Eisentrager* rule, the default is no jurisdiction, whereas under the statutory-jurisdiction rule the default position is that jurisdiction exists. As a result, under the first rule, congressional inaction is a barrier to review, and under the latter it would entrench judicial review. Thus, from this perspective, the *Eisentrager* and statutory-jurisdiction rules are equally adaptable, but vary in how they allocate the burden of legislative inaction. Both rules permit Congress to weigh the policy considerations and provide a different solution, although Justice Scalia appeared to ascribe this virtue only to the *Eisentrager* rule. Also, in contrast to the de facto sovereignty rule, both rules clearly permit the government to develop concrete plans in reliance on the rule and permit libertarians to accurately assess the danger to social justice. Because both are rules of statutory interpretation, they permit further debate and analysis within a coordinate branch of government.

The two rules differ dramatically, however, in their anticipated adaptability to future efficiency and social-justice concerns. In this regard, the statutory-jurisdiction rule seems to invite legislative consideration whereas reaction to the *Eisentrager* rule is far less likely to mobilize legislative action. This observation, taken alone, is not necessarily helpful. For it is also likely that an extremely poor decision by the

Who Wrote Rasul v. Bush: John Paul Stevens' Influence from World War II to the War on Terror, 92 VA. L. REV. 501, 504–06 (2006). The *Ahrens* Court (in an opinion authored by Justice Douglas) rejected Justice Rutledge's competing view of the statute, articulated in his dissent, that habeas jurisdiction turned on the presence in the Court's territorial jurisdiction a respondent with authority to release the petitioner. *Id.* at 203–04 (Rutledge, J., dissenting). The district court in *Eisentrager* summarily dismissed, in reliance on *Ahrens*, because the petitioners, who were held in Germany, were outside the territorial jurisdiction of the U.S. District Court for the District of Columbia. See *Johnson v. Eisentrager*, 339 U.S. 763, 767, 790 (1950). The Court of Appeals reversed, noting that the Supreme Court in *Ahrens* had purported to reserve judgment on the case at bar, in which the petitioner was held outside the country, and therefore, beyond the territorial jurisdiction of any U.S. court. See *id.* The Court of Appeals, relying on Justice Rutledge's rationale, which was rejected in *Eisentrager*, found that the Constitution demanded the availability of habeas review and, as a result, the statute should be construed to permit it. See *Eisentrager v. Forrestal*, 174 F.2d 961, 965–67 (D.C. Cir. 1949). The Supreme Court reversed. *Eisentrager*, 339 U.S. at 790. The Court first purported to adhere to the *Ahrens* rationale—that habeas jurisdiction is unavailable because the petitioners were held outside the United States—but the Court then proceeded to address the merits and conclude that the writ should not issue. See *id.* Finally, in 1973, in an opinion joined by Justice Douglas, author of *Ahrens*, the Court adopted the rationale for habeas jurisdiction that was espoused in Justice Rutledge's dissent in *Ahrens*, relied upon by the D.C. Circuit in *Eisentrager*, and reversed by the Supreme Court in *Eisentrager*. See *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

Court—one that misinterpreted Congress's clear intent or resulted in large social costs—would be likely to mobilize legislative action. We do not mean to suggest that courts should make bad decisions with the intent of sparking public interest or mobilizing the legislative process. But here we are assuming two rules that, as discussed previously,¹⁸⁵ are both viable interpretations of congressional intent.

Our analysis here runs deeper. Assuming a polity equally divided on the issue, we posit that the executive branch might be in a better position to initiate legislative action in reaction to the statutory-jurisdiction rule than the alien detainees and their sympathizers. In other words, the two competing rules present alternative options for assigning the burden of legislative inertia in relation to the habeas corpus statute.

Consider again the *Eisentrager* rule: no jurisdiction over aliens detained abroad unless Congress acts. This rule is clear, not intrusive, and, as a result, extremely efficient vis-à-vis executive action. But is the *Eisentrager* rule adaptable to social-justice concerns?

Keep in mind the political position of those most affected—aliens detained abroad by the United States. It is highly unlikely that such people could mobilize political support within the United States to effect a change in the *Eisentrager* rule. Indeed, aliens detained abroad might be the most extreme case imaginable of a “discrete and insular minority,”¹⁸⁶ one that is diffuse and remote and, therefore, unlikely to mobilize as a powerful interest group.¹⁸⁷

Consider on other hand, the statutory-jurisdiction rule, which establishes the default rule in favor of jurisdiction. As the *Eisentrager* rule represented the most efficient rule, the statutory-jurisdiction rule appears to be most adaptive to social-justice concerns. The judiciary is uniquely suited to review individual cases and guard against the potential of the development of a tyranny of the majority in a democracy.¹⁸⁸ The specter of judicial review of all U.S. detentions abroad, and particularly military detentions, suggests that efficiency will suffer.¹⁸⁹ But is the statutory-jurisdiction rule responsive to such efficiency concerns? It would appear so. Congress has demonstrated that it is very responsive to the military concerns of the President. It seems uncontroversial to suggest that the military is better suited at effecting congressional enact-

185. See *supra* Part II.A.

186. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

187. See Gross, *supra* note 75, at 1019–23.

188. In this period just past the fiftieth anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954), it is worth noting that that Supreme Court decision preceded, by at least ten years, civil-rights legislative action by Congress and the society's preparedness for integration.

189. It should be noted that there is no principled way to distinguish, within the language of the habeas statute, battlefield detentions from those taking place in more remote times and locations.

ments to protect the efficiency of its operations than aliens detained abroad might be in obtaining legislation responsive to their social-justice concerns.¹⁹⁰ As such, the statutory-jurisdiction rule, in addition to closely correlating to the actual statutory language, is most responsive in that it appears to be most likely at initiating a responsive dialogue among the three branches of government to arrive at the optimal solution.

The constitutional-jurisdiction rule is very similar to the statutory-jurisdiction rule, but would be rigid and inflexible in its insistence that the Constitution mandates such jurisdiction. Congress would then be deprived of the ability to enter the dialogue in the future, except through the unwieldy process of constitutional amendment. Moreover, this view would seem to run against the trend of Supreme Court cases over the last fifty years in refusing to apply constitutional provisions extraterritorially and would likely, therefore, have significant unanticipated, and perhaps unintended, consequences.

The statutory-jurisdiction rule would shift the normative framework applicable to U.S. actions abroad and open a number of important questions to be addressed in the future, including what substantive norms would apply under such circumstances. Under the statutory-jurisdiction rule, the Fifth Amendment does not apply extraterritorially (except in the case of citizens).¹⁹¹ As a result, it is not clear what substantive law the detainees will have available on the merits of their petition. Several possibilities include the Geneva Conventions,¹⁹² the Administrative Procedure Act,¹⁹³ the Alien Tort Statute,¹⁹⁴ enforcement of military regulations concerning detainees, and any future substantive enactments of Congress dealing with detainee treatment. Thus, even without opening the Fifth Amendment to extraterritorial application, these sources of substantive norms promise the possibility that the federal judiciary might, through such habeas detentions, fulfill the grand vision of Justice Black that the exercise of U.S. power throughout the world would recognize

190. Although arising in a different context, one of the earliest articulations of such an approach to statutory interpretation was undertaken by Judge Guido Calabresi, a founder of the L&E movement. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Judge Calabresi argues that courts should be given, or should assume, the power to update obsolete statutes by ruling in ways that shift the statutory "burden of inertia" to force the legislature to act if it wishes to keep irrational laws. *See id.*

191. *See supra* note 169. The case of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), made the same determinations with regard to the applicability of the 4th Amendment to citizens abroad. Both of these determinations may have to be revisited in the *Munaf* and *Omar* cases, discussed in *supra* note 32.

192. *See* Geneva Convention, *supra* note 159.

193. Pub. L. No. 110-131, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521).

194. 28 U.S.C. § 1350 (2000).

the common dignity of humankind and afford equal treatment under the laws to all.¹⁹⁵

C. *Looking Ahead Through a Unified Lens*

More than three years after we began this project, the Court is faced once again with fundamental questions about the role of the judiciary in reviewing military detentions and the source and scope of substantive norms to be applied. To fully appreciate the importance of the cases to be decided this term, it is helpful to review the path that has returned these questions to the Court.

In *Rasul*, the Court reversed the U.S. Court of Appeals for the District of Columbia and distinguished its own fifty-year-old precedent in determining that federal courts have jurisdiction to review habeas petitions filed by aliens detained by the U.S. military at Guantánamo Bay, Cuba.¹⁹⁶ As discussed above,¹⁹⁷ the Court had several options for deciding the case: It could have found or denied jurisdiction on statutory grounds; it could have required jurisdiction on constitutional grounds; it could have found jurisdiction on quasi-constitutional grounds of de facto sovereignty. Viewed from our unified perspective, the path chosen—that jurisdiction exists as a matter of statute—has both positive and negative effects. On the negative side, the statutory basis of the decision provided no source of substantive norms for federal courts to apply in conducting such a review.¹⁹⁸ Positive characteristics include that it invited the political branches to engage in an important public dialogue about the rights of such detainees and the roles of the branches of government in protecting them, including the proper role of the federal courts. The *Rasul* decision also laid down a very clear rule concerning the role of the federal judiciary: Jurisdiction exists over petitions filed by any person held by a U.S. official and does not rely on any fuzzy standards such as the degree of U.S. control over the territory.¹⁹⁹

But affirmance of *Eisentrager* would have also laid down a clear and predictable rule flexible enough to permit subsequent amendment by the political branches. The unified perspective distinguishes these rules by examining the allocation of the burden of legislative inertia. The *Rasul* decision placed the burden squarely on the government rather than the detainees as would have been the case had the Court affirmed on *Eisentrager* grounds. As a result of the government's greater power to

195. See *Johnson v. Eisentrager*, 339 U.S. 763, 791–98 (1950) (Black, J., dissenting).

196. See *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

197. See *supra* notes 141–52 and accompanying text.

198. For a discussion about this aspect of *Rasul* by the U.S. Court of Appeals for the D.C. Circuit, see *Boumediene v. Bush*, 476 F.3d 981, 984–85 (D.C. Cir. 2007).

199. See *Rasul*, 542 U.S. at 478–84.

initiate legislative action and mobilize legislative discourse, we predicted a greater likelihood of fulsome debate and public discourse on the matter.

A vigorous debate ensued after the *Rasul* decision. The Executive proposed to amend the habeas statute to reverse the Supreme Court's expansive interpretation of federal jurisdiction resulting in the Detainee Treatment Act of 2005 ("DTA"), which became law on December 30, 2005.²⁰⁰ The DTA was the product of a compromise within and among the political branches. On the one hand, spearheaded by Republican Senator and former prisoner of war John McCain, the DTA went further in protecting detainees than the Supreme Court in *Rasul* by establishing uniform standards for the interrogation of persons detained by the U.S. military and establishing minimum standards for the treatment of detainees of any U.S. agency.²⁰¹ According to the DTA, "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."²⁰² But at the same time, the DTA severely restricted the role of the judiciary in enforcing the norms it established: "Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider" habeas petitions filed by aliens "detained by the Department of Defense at Guantanamo Bay, Cuba" or "any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba."²⁰³ The Act permits only the D.C. Circuit to review the detention of accused combatants at Guantánamo, and even then, only within certain narrow constraints.²⁰⁴

The Court in *Hamdan* was faced with two weighty issues: (1) whether Congress had effectively stripped it of jurisdiction to hear the case; and (2) whether the military commissions established by the President were lawful.²⁰⁵ The Court avoided deciding either question on constitutional grounds, ruling on both issues instead on narrower statutory grounds, as it had done in *Rasul* before. Doing so once again left the door open to and encouraged further action and debate by the political

200. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739-40 (to be codified at 42 U.S.C. § 2000dd).

201. See *id.* § 1002(a), 119 Stat. at 2739 (requiring that all officials from the U.S. Department of Defense who conduct interrogations comply with the U.S. Army Field Manual on Intelligence Interrogation).

202. *Id.* § 1003(a), 119 Stat. at 2739.

203. *Id.* § 1005(e)(1)-(2), 119 Stat. 2742.

204. See *id.* § 1005(e)(2)(B), 119 Stat. 2742.

205. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2745, 2755, 2764 (2004).

branches because the burden of legislative inertia was placed squarely upon the government: The President was required to seek congressional authorization to proceed with military commissions as he had conceived them. But once again, the Court did not establish any clear norms. Rights afforded to defendants at courts-martial and to detainees during wartime seem to be incorporated through existing statutes rather than through independent sources. As such, the Court left on the table for further legislative consideration the role of the judiciary in this process and the norms to be applied. The *Hamdan* decision, while more dramatic than *Rasul* insofar as it invalidated the military commissions procedures, returned the matter to the political branches in a very similar posture as *Rasul*.

Legislative action was again swift, and even more dramatic. The MCA was enacted October 17, 2006.²⁰⁶ Its sponsors intended that it (1) overrule *Hamdan* by authorizing military commissions to proceed;²⁰⁷ (2) remove the judiciary from the dialogue;²⁰⁸ and (3) remove the law of Geneva as an enforceable norm governing such detentions.²⁰⁹ Although it has been vigorously criticized by human-rights advocates, the MCA did not go as far as it might have. While *Hamdan* left open the possibility that Congress could simply endorse the very procedures the Court disapproved (for lack of legislative authority), the MCA instead declared itself to be in compliance with the norms articulated by the Court,²¹⁰

206. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 of U.S.C.).

207. See, e.g., 152 CONG. REC. S10414 (daily ed. Sept. 28, 2006) (statement of Sen. McCain) (“[S]ome would prefer that Congress simply ignore the *Hamdan* decision and pass no legislation at all. That, I suggest to my colleagues, would be a travesty.”).

208. 28 U.S.C. § 2241(e)(1) (2000) (“No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”).

209. MCA § 5(a), 120 Stat. at 2631 (“No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.”).

210. See *id.* § 948b(f), 120 Stat. at 2602 (“A military commission established under this chapter is a regularly constituted court, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”) (internal quotation marks omitted). Still, the President achieved through the Act much of what he sought to achieve through his executive order and the value of *Hamdan* may be limited to its disapproval of a domestically legislating Executive. See Patrick O. Gudridge, *An Anti-Authoritarian Constitution? Four Notes*, 91 MINN. L. REV. 1473, 1497 (2006) (“If the Act [MCA] grants executive officials authority to proceed in much the same way that the Executive Order at issue in *Hamdan* envisioned, now free from meaningful judicial review, the Supreme Court’s exercise may remain a notable reiteration of the constitutional understanding, however explained, that unilateral presidential lawmaking is almost always dubious in principle.”).

while at the same time removing the judiciary's role in determining such compliance.²¹¹ The MCA also expressly distinguishes the treatment of aliens and citizens abroad; the former forfeiting far more rights if determined to be an unlawful combatant.

After initially denying certiorari, the Supreme Court ultimately decided to hear a set of cases challenging the lawfulness of the MCA. The Court is now faced (again) with determining whether to apply *Eisentrager* (this time as to whether the Fifth Amendment guarantees habeas jurisdiction); the related question of whether the MCA runs afoul of the Suspension Clause; and whether de facto sovereignty exists over Guantánamo such that aliens held there are entitled to fundamental constitutional rights. The difference is that Congress has now spoken (twice) and articulated quite clearly its position. Our unified approach asks whether there is a path remaining for the Court that will (1) maximize participation by the three branches of government; (2) provide clear and predictable rules; (3) identify substantive norms to guide governmental action or judicial review or both; and (4) allocate the burden of legislative inaction on the party best positioned to overcome it. It would appear that the Court's options are narrowing. Because Congress has now spoken clearly and repeatedly, the door to creative statutory interpretation is closing (if not closed). In deciding this latest set of cases, the Court might (1) uphold the recent legislation by finding that Congress was empowered to remove the judiciary's role in reviewing detention and trial of aliens held abroad as unlawful combatants; (2) decide on quasi-constitutional grounds that the extensive dominion and control over Guantánamo amounts to de facto sovereignty and that aliens held there are therefore entitled to fundamental constitutional rights including habeas; or (3) decide on constitutional grounds that the writ of habeas corpus shall extend to all persons detained by the government, wherever they are held.²¹²

The first and third options would result in the exclusion of one or more branches (the judiciary and political branches respectively) but provide a clear legal rule with definite substantive norms (although not

211. See MCA § 948b(g), 120 Stat. at 2602 ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."). In addition, the MCA recognizes that lawful enemy combatants are to be afforded all the rights of court-martial defendants under the UCMJ. See *id.* § 948d(b), (c), 120 Stat. at 2603.

212. The choice of applying a constitutional rule will not be limited to aliens. In *Munaf and Omar*, the Court will need to decide how U.S. citizens being held by a multi-national force or foreign government may pursue claims to 4th and 5th Amendment protections. See *supra* note 32. The grounds for such a rule may be the history of the availability of filing habeas petitions. According to one scholar, the recent detention cases have overwhelmingly proceeded on a theory of individual rights where historically, habeas has concerned itself only with the authority of the jailer. See Jason A. Goldstein, *Habeas Without Rights*, 2007 Wis. L. REV. 1165, 1180-97.

judicially enforceable in the case of option one). In both cases, legislative overrule would require constitutional amendment. In the first case, the burden would fall to the detainees; in the third, to the government. From the unified perspective, the choice between the first and third options is analogous to the choice between the statutory and *Eisentrager* rules presented in *Rasul*, the difference being that the legislative action required is constitutional amendment. As explained above, the unified perspective favors placing the burden of legislative inaction on the government under such conditions, weighing in favor of the third option. The second option—de facto sovereignty—has the virtue of not excluding the political branches from the conversation and providing a clear set of norms (i.e., fundamental constitutional rights). But, as explained above, de facto sovereignty is a fuzzy rule that is unattractive from both efficiency and social-justice perspectives. First, it runs the risk of having the same effect on governmental action as the third option while making it less likely, due to its fuzziness, to lead to legislative action. From the social-justice perspective, such a fuzzy rule might lead the government to continue searching for the right locus of detention such that justice in the form of judicial review is never guaranteed. Thus, the choice among these options, from the unified perspective, compares the benefit of preserving participation of the political branches (option 2) against the advantages of a clear rule (option 3).

Because these features cannot be quantified, the utility of this approach as a normative tool (or as a predictive one) is limited. What we hope, however, is that it offers insights that might have been missed in an analysis bounded by the parameters of one of the two schools of legal thought presently occupying significant space within the legal academy.

IV. SOME NOTES ON (STILL) AGREEING TO DISAGREE

As the above argument suggests, the unified approach provides tools for analyzing which of the competing options for solving a problem serve certain purposes of disparate legal paradigms. Even though it is possible to structure a conversation across disciplines about which rule best serves the goals of efficiency and social justice, it is still important to stress principles from our individual methods that are instructive.

For CRT proponents, even if the statutory-jurisdiction rule ensures both a measure of efficient process and protection for the disenfranchised, it is dangerous. With the exception of detained citizens within the United States, who will likely receive constitutional protections, it is not clear what substantive law would be controlling. Whatever its limitations, the Constitution's equal-protection doctrine

does contain a set of ready-made substantive norms that courts are familiar with applying.²¹³ Other than the right to have their cases reviewed, what measure of substantive legal protections would aliens be provided? The positive hope would be that noncitizens receive a similar (although not constitutionally mandated) measure of protection through either domestic statute or the application of an international standard. Although a promising idea to ponder, we have no idea what international standard courts would apply. Worse yet, since the other alternative would be statutorily created rights, the rights of outsiders would be subject to political whim. This rule then has the potential for inculcating an equality disparity.

The problem with the statutory rule, like many rules based in L&E, is one of process. Under the rule, all detainees would have hearings; aliens, however, would be guaranteed nothing more than an opportunity for formal equality. For L&E proponents, little attention appears to be paid to the difference that exists between formal versus actual equality. Perhaps the unassailable difference between the methodologies is in the meaning given to process. L&E largely evaluates the administration of justice through procedures and regulations, or what one scholar has termed as the measures of “procedural fairness.”²¹⁴ CRT, on the other hand, can be said to be more concerned with what the same scholar has termed “background fairness” and “stakes fairness.”²¹⁵ These additional measures of fairness accurately capture the concerns in the detention cases—that all detainees are not treated the same in law and society, and that no matter which rule is applied, Arab aliens may have the most to lose.

For believers in CRT then, the L&E supporters’ strong commitment to measures of procedural fairness and rational choice ensure that the discipline operates in a manner that does not take context into account sufficiently—failing to acknowledge how theoretical principles actually operate.²¹⁶ Another scholar, Daria Roithmayr, has illustrated this claim in the context of the operation of markets.²¹⁷ According to economic theory, racism, which should naturally be eliminated from

213. See Katyal, *supra* note 28, at 1368–70.

214. JACOBS, *supra* note 97, at 4.

215. See *id.* at 4 (referring to background fairness as those factors that ensure a “level playing field,” and referring to stakes fairness as what is at stake and for whom in the competition).

216. A similar claim has been made with regard to L&E reliance upon the rationality principle. See RATIONAL CHOICE (Jon Elster ed., 1986) (describing the legal overinvestment in the rationality principle as a type of irrationality).

217. Daria Roithmayr, *Barriers To Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000).

markets because it is inefficient, often persists.²¹⁸ Based on the historical significance of racial exclusion, Roithmayr proposes a “lock-in model” of discrimination where markets remain affected by the behavior over long periods of time.²¹⁹

While cross-disciplinary approaches provide multiple and varied bases to arrive at sometimes mutually acceptable conclusions, such alliances may not always be possible or preferred.²²⁰ For example, in a different project, it may not be possible to question the merits of process theory, while also using it as a basis to reach a decision. Projects such as this one, however, may result in those future moments of disagreement being less acrimonious and still involving an engaged discourse.

V. CONCLUSION

The government’s post–September 11 security measures have sparked intense debate among scholars, politicians, and members of the public. The public debate has been polarized and largely resistant to the substantive exchange of ideas as has, in many respects, the scholarly debate. This characteristic of the scholarly debate has roots that run far deeper than the discussion of post–September 11 security measures: It derives from the uncompromising nature of different (and mostly oppositional) schools of legal scholarship prioritizing incommensurate values, such as CRT’s commitment to social justice versus L&E’s efficiency concerns.

We sought to apply a unified approach to this debate, using Edward L. Rubin’s theoretical framework to review post–September 11 governmental detentions. This subject matter is timely because the Supreme Court is currently considering several new detainee and terrorism cases. As with the first wave of cases, upon the Court’s ruling we will be able to see which rule preferences and normative values were found to be persuasive. Our goal, however, was not to predict the Court’s decision(s) or to settle the security–liberty schism, but rather to apply a methodology that might lead to a more fruitful debate by bringing to bear the features of different scholarly paradigms. Using L&E and CRT principles, we compared alternative rules and evaluated each for responsiveness to efficiency and social-justice concerns, but also considered the adaptability of each alternative rule and the effects of allocation of

218. *See id.* at 730–31. The model suggests “that racial disparities persist because communities of color do not enjoy true equal opportunity to compete.” *Id.* at 734.

219. *Id.*

220. Howard Erlanger et al., Foreword, *Is It Time for a New Legal Realism?*, 2005 Wis. L. Rev. 335, 336 (identifying the danger attendant in interdisciplinary studies); *see also* Barnes, *supra* note 118, at 981–84 (asserting that CRT/feminist scholars should be careful to ensure compatibility when partnering with other disciplines and approaches).

responsibility among institutional components of our government. In doing so, we discovered some common ground and points of disagreement that we must continue to address—together and within our varied discourses. Similarities and differences aside, we hope to have also laid the groundwork for a more meaningful exchange of ideas in the future among scholars across seemingly incompatible disciplines.