

ARTICLE

National Security Interest Convergence

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Abstract

Over a decade after the attacks of September 11, 2001, lawmakers, scholars, activists, and policy makers continue to confront the questions of whether and to what extent robust counterterrorism laws and policies should be reined in to protect against the abuse of civil rights and the marginalization of outsider groups. This Article uses political and critical race theory to identify areas of national security interest convergence in which political will can be marshaled to limit some national security policies.

Legislators act in their political self-interest—both in terms of responding to party forces and constituents—in casting votes that often give primacy to national security interests at the expense of civil liberties. Actions taken by legislators which are rights-protective in the national security context are largely predictable when understood as effects of both political realities and interest convergence theory. Lawmakers often will not act on the basis of civil liberties concerns, but will implement rights-protective measures only because those measures serve another interest more palatable to mainstream constituencies.

Although unmooring from deontological grounding creates numerous limitations as to how many rights-protective measures can be implemented on a long-term basis, interest convergence offers a limited opportunity for lawmakers and policy experts to leverage self-interest and create single-issue

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coalitions that can protect the rights of outsider groups abused by current national security policies.

Introduction

The terrorist attacks of September 11, 2001, have transformed the landscape of national security law and policy in the United States. Nations have stepped up their counterterrorism laws and policies, making the consequences of being labeled a terrorist by domestic governments more severe.¹ Over the past decade, lawmakers, scholars, activists and policymakers have routinely confronted the question of whether and to what extent robust counterterrorism laws and policies should be curtailed to protect against the abuse or potential abuse of civil rights and liberties.²

¹ See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (mandating that all UN member nations take proactive steps to combat terrorism, including increasing criminalization and implementing harsher sentencing for terrorist acts, freezing funds of those financing terrorist acts, sharing intelligence information with other member nations, and tightening border controls to prevent the migration of terrorists). See generally Kim Lane Scheppele, *Other People's Patriot Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89, 91–92, 97–98 (2004) (detailing UN Security Council Resolution 1373, which mandated that countries institute laws combating terrorism, and noting significant shifts in domestic counterterrorism laws as a result). Additional shifts in the law have been contemplated under the Obama administration as well. For example, in May 2010, U.S. Attorney General Eric Holder suggested that Congress consider legislation to expand and define the public safety exception articulated in *New York v. Quarles*, 467 U.S. 649 (1984) (holding that the obligation of law enforcement officers to inform arrestees of their right to counsel, among other rights as articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966), was subject to a public safety exception as the circumstances demanded it). See Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. TIMES, May 9, 2010, at A1, available at <http://www.nytimes.com/2010/05/10/us/politics/10holder.html?pagewanted=all>.

² By “rights protection,” I mean those actions taken to protect, improve or expand the civil and human rights of those most negatively impacted by the U.S. government’s post-September 11, 2001, counterterrorism policies. Although judges, scholars and lawyers can argue as to the efficacy and legality of such measures, within the United States, the disparate impact of post-September 11 counterterrorism laws and policies has been borne heavily by Muslims, Arabs, and people hailing from South Asia, the Middle East and North Africa. See, e.g., Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC’Y REV. 365 (2010); Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 101–02 (2005) (observing that “the sacrifice of racial minority interests for majoritarian gain appears to be an intrinsic feature of United States culture”); Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1073 (2005) (analyzing how “liberal democratic systems might evolve . . . to counter the socially and politically pernicious effects of . . . religiously-inflected, all-or-nothing-warfare”); Natsu Taylor Saito, *Beyond the Citizen-Alien Dichotomy: Liberty, Security and*

Ideological and political differences have obscured the possibility of using legislative coalitions to enhance protections of civil rights and liberties. This Article aims to identify potential convergence points for lawmakers seeking ways to build bipartisan and cross-ideological support for rights-protective legislation.

This Article draws on Professor Derrick Bell's theory of "interest convergence" to identify factors that must exist in terms of political will to enable Congress and the President to create additional rights-protective limitations on national security policies.³ Interest convergence is the process by which the divergent self-interests of different political groups overlap to the degree necessary to enable the formation of an issue-specific coalition powerful enough to effect serious policy change. Where Bell used interest convergence theory to analyze judicial and political decision-making during the African-American civil rights movements, this Article applies the same theoretical lens to the post-9/11 security context in which members of Muslim and Arab communities are often the targeted or disparately impacted groups.⁴ It aims to articulate a theory of "national security interest convergence" that could be used to understand the nature of post-9/11 decision making and identify potential bases on which legislative coalitions may form.

Part I considers the nature of legislative decision-making as it applies to questions of national security law-making. Legislative behavior demonstrates how legislators act in their political self-interest—in terms of responding to both party forces and constituents—in casting votes that give

the Exercise of Plenary Power, 14 TEMP. POL. & CIV. RTS. L. REV. 389, 391–92 (2005)

(defining otherness as based on race, national origin, ethnicity, and other factors apart from citizenship); David Cole, *Enemy Aliens*, 54 STAN L. REV. 953, 957 (2002) (couching the disparate treatment of counterterrorism policies as falling on "Arab non-citizens").

³ The need to create additional limitations on national security policies operates from the premise that such limitations are necessary. Many thoughtful scholars have argued that the current structures in place with regard to numerous security policies, such as detention authority, have achieved a positive, if not ideal, balance of individual rights and security imperatives. See, e.g., Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769 (2011); Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SEC. L. & POL'Y 1, 17–23 (2009).

⁴ Scholars recognized but did not focus on the potential application of interest convergence theory soon after September 11. See, e.g., Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1331–33 (2003).

primacy to national security interests at the expense of civil liberties, or arguably vice-versa.

Part II argues that actions taken by legislators that are rights-protective can be framed in terms of interest convergence theory. Out of personal conviction and/or the fear of being labeled as “soft on terror” by political opponents, lawmakers often will not support rights-protective legislation on the basis of civil liberties concerns alone. However, legislators may be able to implement such legislation if it is justified in terms that are more palatable to their constituents, such as curbing government spending (and thereby curbing intrusive and costly surveillance and monitoring programs), or protecting the gun ownership privileges of right-wing groups that may be negatively impacted by antiterrorism legislation. When those interests are sufficient to generate a political coalition with the requisite political power to enact rights-protective legislation, national security interest convergence can occur.

Part III argues that interest convergence offers an opportunity—albeit limited and highly imperfect—for lawmakers and policy experts interested in rights protection to leverage the self-interest of other political groups to create atypical coalitions. While these issue-specific coalitions can bring political pressure to bear to protect the rights of outsider groups and those marginalized or abused by national security policies, they require a rethinking of traditional political platforms and stances.

I. Political Theory and Counterterrorism Legislation

Realist political theory holds that elected politicians, by the very nature of their position, will generally act in their own political self-interest.⁵ In order to get re-elected, congressmen and senators must develop and maintain positions of influence within their party and satisfy influential constituents and interest groups. These political imperatives then subsequently compromise their ability to follow their ideological convictions.⁶ In the current political environment, in which being labeled as

⁵ JUDITH SHKLAR, *LEGALISM* 111 (1964) (describing politics as “the uncontrolled child of competing interests and ideologies”).

⁶ BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 244 (Harvard 1991) (“As a *politician*/statesman, each representative is interested in getting reelected. Subject to this constraint, they will try to use their influence on behalf of the ‘public good,’ as they

“soft on terrorism” can cause significant damage, politicians interested in rights protection must find ways to make such initiatives politically viable.

The manifestation of political self-interest will, naturally, differ from one politician to the next. To generalize broadly, for liberal politicians from reliably liberal districts, political self-interest in the post-9/11 context may have encouraged opposition to indefinite detention of suspected terrorists and support of greater civil liberties protections for outsider groups.⁷ For conservative politicians from reliably conservative districts, political self-interest may have encouraged the adoption of a more hawkish stance on national security that involves protections of defense spending, a more aggressive stance toward the detention and interrogation of detainees, and a more skeptical view of the legitimacy of the civil rights claims of outsider groups.⁸ Thus, in order to legislate greater rights protection, either

conscientiously define it. But they will be reluctant to play the role of politician/*statesman* when it seriously endangers their reelection chances.”)

⁷ See, e.g., Alex Katz, *Frank Repeats Call for Defense Spending Cuts*, Political Intelligence (Oct. 5, 2011), <http://www.bostonglobe.com/2011/10/05/frank-repeats-call-for-defense-spending-cuts/64Na8nDSaryDxfXG9e8D9O/story.html> (discussing Rep. Barney Frank’s belief that the military budget should be cut by more than \$200 billion per year to decrease the federal deficit); Press Release, Congressman John Campbell, Bipartisan Group of Reps. Urges Super Committee to Curb Defense Spending – Project on Government Oversight (Oct. 3, 2011),

http://campbell.house.gov/index.php?option=com_content&view=article&id=3081:bipartisan-group-of-reps-urges-super-committee-to-curb-defense-spending-project-on-government-oversight&catid=16&Itemid=300031 (discussing a bipartisan group of representatives who support cutting the military defense budget by a significant amount to reduce the federal deficit over the course of the next decade); Press Release, Congressional Progressive Caucus, Progressives Vow to Oppose Immunity in FISA Legislation: Congresswomen Barbara Lee, Lynn Woolsey & Progressives Target Bush Spying Program with Telecomm (Feb. 8, 2008), <http://www.commondreams.org/cgi-bin/print.cgi?file=/news2008/0208-02.htm>. See also Press Release, Congressman J. Kucinich, Kucinich Asks Tough Questions about FBI Investigation of Anti-War Groups (July 25, 2011),

<http://kucinich.house.gov/News/DocumentSingle.aspx?DocumentID=253479> (announcing that Rep. Kucinich wrote to Attorney General Holder with concerns regarding the FBI’s investigation of small pacifist groups).

⁸ Press Release, Statement by Senators McCain, Lieberman, Graham on Iraq (Sept. 6, 2011),

http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=40c66dfa-a5a0-fe0a-3ff7-ac3184038d50&Region_id=&Issue_id=1bd7f3a7-a52b-4ad0-a338-646c6a780d65 (discussing their disagreement with President Obama’s decision to decrease the number of U.S. troops in Iraq); Will Inboden, *The Bright Side of GOP Midterm Victories for the Obama Team*, Foreign Policy, Sept. 15, 2010,

lawmakers who believe in such protection and who hail from politically “safe” districts must constitute a legislative majority, or, more realistically, coalition building must occur.

Political interest convergence occurs when the divergent self-interests of different political groups aggregate to form an issue-specific coalition that is large enough to effect serious policy change.⁹ The moral imperative to make a political decision does not generally serve as the primary motivation for a politician to cast a vote in favor of a rights-protective choice that is unpopular but protects politically powerless groups. Even if legislators want to support rights-protective legislation for moral reasons, they cannot simply follow their own ideological convictions. Casting the vote may require that the choice be politically advantageous, as well as moral.¹⁰ If enough

http://shadow.foreignpolicy.com/posts/2010/09/15/the_brightside_of_gop_midterm_victories_for_the_obama_team (noting the benefits of having more Republicans in the legislature due to their stance on national security and preference for cutting domestic programs instead of military spending); Brian Montopoli, *GOP Candidate Dan Fanelli Backs Racial Profiling in Ad*, CBS News, May 5, 2010, http://www.cbsnews.com/8301-503544_162-20004214-503544.html (discussing the references made in Dan Fanelli’s campaign ad which suggest that he supports the use of racial profiling to fight terrorism).

⁹ However, some political philosophers have questioned whether the law or the mere exercise of brute political power is even an appropriate mechanism to achieve the policy goals of security, democracy, and human rights. See, e.g., Jürgen Habermas, *Does the Constitutionalization of International Law Still Have a Chance?*, in *THE DIVIDED WEST* 115, 116 (2007). Nonetheless, the effect of legal realist thinking among the legislative and executive branches with regard to national security is that legal comfort and structures serve as the architecture for any number of rights-denigrating policies, the brunt of which have been borne by outsider groups. See Sudha Setty, *No More Secret Laws: How Disclosure of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 *Kan. L. Rev.* 579, 580–81 (2009) (arguing that Bush administration policies regarding detainee treatment would not exist without legal comfort offered by Justice Department lawyers). Therefore, considering the nature of how political power is aggregated becomes an important aspect of determining potential means to curb overreaching policies.

¹⁰ Likewise, commentators have noted that political competition reliably involves accusations that a political opponent’s claims of acting to further a just cause are, in reality, simply a political ploy to garner support from certain constituents. See Nancy L. Rosenblum, *‘Extremism’ and Anti-Extremism in American Party Politics*, 12 *J. CONTEMP. LEGAL ISSUES*, 843, 877 (2002). Cf. REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 9, 58–59, 164 (2006) (arguing that Congress has acted in rights-protective ways as a matter of principle, such as the passage of post-Civil War legislation like the Civil Rights Act of 1866).

politicians are so persuaded, Congress's potential to flex its power in shaping rights-protective laws can be fulfilled.¹¹

The pursuit of political self-interest lies at the heart of the realist theory of legislative action,¹² which predicts political behavior based upon two main factors: the legal and constitutional constraints that apply to government actors, and the reaction of government actors to the actions of others such that the self-interest of the government actor prevails.¹³ The national security landscape encompasses numerous specific issues that give rise to different types of political self-interest, not all of which are easily predictable through political party platforms or traditional left-right political divides. As such, identifying the specific type of self-interest at play is key to understanding where potential political interest convergence may lie.

The remainder of this Section examines the nature of legislative decision-making, party politics, and the political discourse around counterterrorism legislation. In that context, I consider the limited role of moral imperatives as a means to identify areas of interest convergence in the context of national security and rights protection.

A. Legislative Decision-Making

Predicting and managing the dynamic of legislators acting in their own self-interest is a long-standing issue in American politics.¹⁴ James

¹¹ Rebecca Zietlow considers this kind of legislation to protect “rights of belonging,” which she describes as “those rights that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that community.” ZIETLOW, *supra* note 10, at 6.

¹² See generally Anthony Downs, AN ECONOMIC THEORY OF DEMOCRACY (1957) (laying out a framework for public choice theory predicting the actions of legislators). Certainly contemporary political philosophers have echoed this sentiment. Habermas notes that the authority of government “consists in the exercise of political power through the administration of binding law.” Habermas, *supra* note 9, at 130 (citing Kantian social contract theory as the undergirding conceptual framework for this view of the relationship between political power and the law).

¹³ See Tonja Jacobi, *The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 100 NW. U. L. REV. 259, 266 (2006).

¹⁴ For a discussion of the theories underpinning legislative decision making, see LIVING LEGISLATION: DURABILITY, CHANGE & THE POLITICS OF AMERICAN LAWMAKING (Jeffrey A. Jenkins & Eric M. Patashnik eds., 2012). The framers of the Constitution bore in mind the lessons of social contract theory and positivist political theory in developing the

Madison¹⁵ opined that while the moral or religious compass of a politician ought to guide them to make decisions in favor of justice and fairness,¹⁶ in reality such considerations might not be politically beneficial and, therefore, could not be relied upon.¹⁷ In Madison's view, since political self-interest would not often serve to protect the rights of the politically powerless, structural protections such as the separation of powers, the expansiveness and diversity of the nation, and federalism would protect minorities from overreaching by majority groups.¹⁸

Realist political theory assumes that the political process is governed by the politician's pursuit of self-interest in order to ensure his political survival.¹⁹ Under this theory of political behavior, the interests of minority groups can be furthered only to the extent that those interests are co-extensive with the self-interest of the legislator²⁰ or, relatedly, to the extent

separation of powers, even with regard to national security matters. See Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, at 1426.

¹⁵ James Madison, long heralded as the founding generation's champion of separation of powers to corral the self-interest of the different branches of the federal government, dwelt at length on the dangers that self-interest posed. Madison opined that although "justice is the end of government" and of civil society, and that when majorities of citizens push their representatives to act without regard for the rights of a minority, societies can be thought to have entered into a state of anarchy. THE FEDERALIST NO. 51. (James Madison).

¹⁶ Madison, on the eve of the 1787 Constitutional Convention, wrote that politicians can be motivated by political interest, ambition, and public good, but are largely motivated by the interest and ambition, not by moral imperatives. James Madison, Vices of the Political System of the United States, ¶ 11 (Apr. 1787), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html>. Madison noted that ordinary citizens were even more prone to act without regard to the greater good. He suggested that although individuals motivated by the good of the community, character, and religious conviction would be ideal, in reality none of these factors would likely prevail over acting in one's self-interest. *Id.*

¹⁷ See THE FEDERALIST NO. 10 (James Madison) (noting that "we well know that neither moral nor religious motives can be relied on as an adequate control" on political interests).

¹⁸ See THE FEDERALIST NOS. 10, 51 (James Madison).

¹⁹ Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649–650 (1998).

²⁰ Legal philosopher John Austin observed that "[t]he matter of jurisprudence is positive law: law strictly and simply so called, or law set by political superiors to political inferiors." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1 (1832). In the twentieth century, such thinking gave rise to a "more positive, rational jurisprudence [with] an emphasis on policy [and] instrumental aims." See William J. Novak, *Making the Modern American Legislative State*, in LIVING LEGISLATION, *supra* note 14, at 28. Modern examples of this dynamic abound. See, e.g., Michael T. Heaney, *Brokering Health Policy: Coalitions, Parties, and Interest Group Influence*, 31 J. HEALTH POL. POL'Y & L. 887, 888 (2006) (discussing the

that the overarching values of a society demand that legislators act to protect and increase tolerance of minority rights.²¹ Consequently, if minority groups are so politically powerless that majority groups can ignore their interests without suffering a political detriment,²² then the realist vision predicts a lack of protection for minority groups beyond what is societally accepted as a bare minimum.²³

need for politicians to find “political cover” to support legislation that may be viewed unfavorably by a majority of voters). Heaney offers supporting examples of how conservative politicians needed political cover in the form of conservative interest group support for a health care measure that provided broader coverage to needy individuals in order to justify their support of the measure. With such cover in place, the potentially unpopular legislation could be billed as consistent with the interests of skeptical voters. *Id.*

²¹ Constitutional values of tolerance constrain decision making at the extreme, even if legislators do not ideologically embrace them. AMARTYA SEN, *THE IDEA OF JUSTICE* 352–54 (2009) (noting that without a strong inculcation of tolerant values in government, democratic forces in India would lead to extreme marginalization of religious minorities). Kim Lane Scheppelle observes that in many democratic nations, the preservation of these tolerant values depends on institutions other than the legislature, such as constitutional courts and central banks. *See* Kim Lane Scheppelle, *Parliamentary Supplements (Or Why Democracies Need More Than Parliaments)*, 89 B.U. L. REV. 795, 810–812 (2009) (noting that such institutions are necessary to avoid rash legislative decision-making governed only by immediate electoral pressure).

²² The structural predicate for assuming that minority interests will be protected is that powerful political interests rely on the support of the relatively powerless minority groups. Such a political dynamic is not limited to the United States. Heaney, *supra* note 20, at 923. *See* James Manor, *Parties and the Party System*, in *PARTIES AND PARTY POLITICS IN INDIA* 436 (Zoya Hasan, ed. 2011). Manor argues that at least some of the political dominance of the Congress party in the post-Independence period stemmed from the Congress Party’s politically popular and pragmatic defense of democratic ideals and the rule of law, combined with its responsive patronage of influential and outspoken minority groups. *Id.* Likewise, extremist minority groups were moderated by the allocation of power and privilege within the structure of Congress Party dominance. *Id.* at 439.

²³ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 724 (2000) (noting that “[b]ecause democratic politicians are interested in winning elections, they will be the first to notice that the victims of ignorance, poverty, and prejudice generally have a hard time mobilizing themselves for effective political action.”). *See also* Cameron ‘Playing Politics’ on Control Orders - Ed Balls, BBC NEWS (Jan. 6, 2011), <http://www.bbc.co.uk/news/uk-politics-12127325> (showing that only after the Liberal Democrats were able to secure a significant amount of votes in the 2010 election to form a coalition with the Conservatives, were they able to influence national security issues); Gurpreet Mahajan, *Multiculturalism in the Age of Terror: Confronting the Challenges*, 5 POL. STUD. REV. 317, 325 (2007) (arguing that minorities must constitute a certain percentage of the population in order for their interests to be advanced since only then will they be able to “tilt the balance in favour of or against a political party”). Amartya Sen argues that many lawmakers will disregard the interests of those who are politically irrelevant, but a society’s “tolerant values” will protect the

1. Political Parties and Legislative Motives

The Madisonian vision of minority protection is complicated by the extent to which political parties govern law and policy making.²⁴ To some degree, the role of political parties in defining political discourse and priorities was not lost on thinkers of the early republic. Madison acknowledged that political parties (or “factions”²⁵) made it particularly difficult for lawmakers to follow their own ideological convictions²⁶ in that they created another master to whom politicians must answer—not only must a politician act in his or her own self-interest to ensure re-election, but he or she must also act in the interest of the faction.²⁷

Of course, in the political climate that developed soon after ratification,²⁸ and in the ensuing two centuries, political parties have come to define the behavior of most political actors in most circumstances, even

politically powerless from complete marginalization and abandonment by society. AMARTYA SEN, *THE IDEA OF JUSTICE* 352 (2009). Some sense of the tolerant values of a nation can be found in the constitutional boundaries of what must be provided or what rights cannot be abrogated. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (striking down a state statute denying a public education to undocumented immigrant children).

²⁴ Political parties are powerful influences on legislative decision-making, but other forces, such as outside interest groups, are significant as well. *See, e.g.,* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 *TEX. L. REV.* 15, 19–21 (2010); *see generally* Amitai Etzioni, *The Capture Theory of Regulations-Revisited*, 46 *SOC'Y* 319 (2009); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 1991 *106 Q.J. ECON.* 1089 (1991).

²⁵ Although Madison did not define a “faction” as a political party, his description of a faction as “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” can be viewed as analogous to parties and their political platforms. *THE FEDERALIST NO. 10* (James Madison).

²⁶ In this Article, I sometimes refer to following personal convictions toward a more inclusive and rights-protective vision of a republic as following one’s “moral compass.”

²⁷ *THE FEDERALIST NO. 10* (James Madison) (noting concerns that “the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”).

²⁸ Daryl Levinson and Richard Pildes convincingly argue that Madison’s vision was to be short-lived given the interest of some politicians in developing party alliances in the early republic. Madison himself was (admittedly unhappily) involved in the rise of the Federalist and Republican parties. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2320 (2006).

when a politician's personal convictions may dictate different legislative decision-making.²⁹

In terms of rights protection and the broadening national security state, the interests of the party must be met as a predicate for consideration of curbing national security measures. If party imperatives counsel toward maintaining the status quo—not necessarily because of a genuine belief of the politicians that the status quo is just or fair, but because of a fear of political repercussions—then rights protection will not be achieved through adherence to party platforms and pressures as the basis for making voting decisions.³⁰ Political parties have a profound effect on U.S. policy-making, but their influence is even more pronounced in parliamentary democracies such as the United Kingdom and India where party control is more firmly established.³¹ Indeed, in the case of India, the ruling Congress Party is considered to be more influential than the structures of government itself.³²

Occasionally, issues split voters (and therefore politicians) in ways that defy liberal or conservative orthodoxy.³³ In such cases, political parties

²⁹ *Id.* at 2321–22 (discussing the stabilization of party structure and the party imperative of winning and keeping political power as the ultimate goal of each party); *id.* at 2324–25 (discussing the strong correlation between political behavior and party affiliation).

³⁰ Levinson & Pildes, *supra* note 28, at 2333, 2336 (noting that political parties in the modern era are ideologically coherent and sharply polarized, leading to a high level of party discipline in many instances). *See also* Graham K. Wilson, *Congress in Comparative Perspective*, 89 B.U. L. REV. 827, 837–840 (2009) (discussing the shift toward rigid party-line voting in the House of Representatives since the 1980s); Issacharoff & Pildes, *supra* note 19, at 652–54 (discussing the important and often undervalued role of the political party in various court cases, including those dealing with all-white primaries in the Jim Crow South, such as the line of cases from *Grovey v. Townsend*, 295 U.S. 45 (1935) (upholding the constitutionality of all-white party primaries as beyond the purview of the Court's inquiry into state action) to *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that the Texas Democratic Party's rule barring blacks from participating in the party primary process violates the Equal Protection Clause)).

³¹ *See* Wilson, *supra* note 30, at 832–835 (discussing the importance of party discipline in the functioning of government in the United Kingdom).

³² *See* James Manor, *supra* note 22, at 434 (arguing that the Congress Party served as the “central integrating institution” of India's state and society).

³³ *See* Rosenblum, *supra* note 10, at 866. Such political behavior in the context of the “war on terror” has been occurring since soon after the attacks of September 11, 2001. For example, a cadre of Democrats and Republicans, based in part on opinion polls cataloging the public's appetites with regard to national security reform efforts, worked in late 2001 and 2002 to develop a new cabinet agency (what would eventually become the Department of Homeland Security), despite initial presidential reluctance to support such an idea. *See*

work to bring politicians into line through intraparty pressure, or to redefine themselves in ways that appeal to a broader group of constituents.³⁴ However, the inability of political parties to successfully whip the vote, coupled with a lack of overall consensus among the electorate on a particular issue, can lead to unusual coalition-building across party lines based on shared micro-objectives motivated by different concerns.³⁵ Indeed, coalition building occurs more frequently in parliamentary democracies that deal with the same tensions in national security and rights protection. As such, using the United Kingdom and India as exemplars in this analysis is particularly useful in evaluating some dynamics and latent possibilities of cross-party U.S. legislative decision-making.

Two examples—that of the short-lived objections to the Patriot Act amendments and renewals in early 2011,³⁶ and the 2010 U.K. Conservative-Liberal Democrat coalition³⁷ stance toward privacy rights³⁸—

generally Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 689–90 (2006).

³⁴ See Rosenblum, *supra* note 10, at 862 (noting that parties, in their effort to maintain loyalty and discipline, are pushed to create broader platforms that encompass a diversity of viewpoints). See also PEW RESEARCH CTR FOR THE PEOPLE & THE PRESS, BEYOND RED VS. BLUE: THE POLITICAL TYPOLOGY 1 (May 2011) [hereinafter PEW POLITICAL TYPOLOGY] (discussing the challenges facing political parties when sub-groups within a party hold views that diverge from core party principles).

³⁵ Rosenblum argues that politicians are often elected with significant support from single-issue voters who hold their views intensely and expect their politicians to do the same, regardless of party disciplinary efforts. See Rosenblum, *supra* note 10, at 865–66. If that is the case, then politicians have greater incentive to split from their party and form atypical coalitions in order to further the interests of the single-issue constituents. See also *id.* at 875 (noting that “Americans have adopted an essentially Machiavellian idea of political virtue: what matters in a leader is the ability to get results.”) (citation omitted).

³⁶ See Glenn Greenwald, *The Patriot Act and Bipartisanship*, SALON, May 23, 2011, http://www.salon.com/2011/05/23/bipartisanship_8/singleton; Charlie Savage, *Deal Reached on Extension of Patriot Act*, N.Y. TIMES, May 19, 2011, at A16, available at <http://www.nytimes.com/2011/05/20/us/20patriot.html>.

³⁷ In some respects, the inability of either major party in the United Kingdom to marshal a majority in parliament speaks to a lack of party discipline and cohesion that may be part of a larger trend. See Wilson, *supra* note 30, at 844–45.

³⁸ See David Cameron & Nick Clegg, *The Coalition: Our Programme for Government* 11 (May 2010), available at http://www.libdems.org.uk/coalition_agreement.aspx (forming an agreement between the Conservatives and Liberal Democrats to include greater protections of civil liberties).

are discussed in more detail in Part II.³⁹ In those instances, national security interest convergence occurred through unorthodox coalition building that rejected straightforward adherence to lawmakers' respective party platforms.

Absent the ability to create such a bipartisan or multi-party coalition, national security policy is held hostage to party imperatives. In the United States, the major parties have not pushed for significant rights protection in the last few years and have shifted their political priorities elsewhere.⁴⁰

³⁹ Also of note, India's 2004 parliamentary elections resulted in an uneasy coalition government that suffered from conflicting political outlooks, but was able to coalesce to fulfill a campaign promise to repeal the Prevention of Terrorism Act of 2002 (POTA), considered by members of the 2004 coalition government to have enabled human rights abuses and fostered corruption. See APURBA KUNDU & EUR. INST. FOR ASIAN STUD., WHAT ARE THE FOREIGN AND NATIONAL SECURITY POLICY IMPLICATIONS OF CONGRESS' RETURN TO POWER IN INDIA? 2 (2004) (describing the tensions within the coalition government led by the Congress Party); *UPA committed to repeal POTA: Pranab*, The Times of India, June 6, 2004, available at http://articles.timesofindia.indiatimes.com/2004-06-06/india/27157105_1_repeal-upa-government-prevention-of-terrorism-act (describing the commitment of the newly elected United Progressive Alliance to the repeal of POTA).

⁴⁰ See 2012 DEMOCRATIC PARTY PLATFORM, available at <http://www.democrats.org/democratic-national-platform#protecting-rights> (addressing rights protection by noting that “[a]dvancing our interests may involve new actions and policies to confront threats like terrorism, but the President and the Democratic Party believe these practices must always be in line with our Constitution, preserve our people's privacy and civil liberties, and withstand the checks and balances that have served us so well. That is why the President banned torture without exception in his first week in office. That is why we are reforming military commissions to bring them in line with the rule of law. That is why we are substantially reducing the population at Guantánamo Bay without adding to it. And we remain committed to working with all branches of government to close the prison altogether because it is inconsistent with our national security interests and our values”); see also 2012 REPUBLICAN PARTY PLATFORM, available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf>, which contains two sections that relate to civil liberties. One section argues that “[a]ll security measures and police actions should be viewed through the lens of the Fourth Amendment; for if we trade liberty for security, we shall have neither.” *Id.* at 13. The second relevant section relates to reform of the Transportation Security Agency, calling for privatization of the Agency and “look[ing] toward the development of security systems that can replace the personal violation of frisking.” *Id.* at 25.

2. The Political Danger of Being Soft on Terror

In many nations, a politician's ability to be perceived as "tough on terrorism" is seen as a predicate of a successful political campaign.⁴¹ President George W. Bush governed and ran for re-election in 2004 based largely on the promise that he would continue to be "tough on terror." This strategy was obviously successful, as evidenced by Bush's re-election and the maintenance of a Republican majority in the House and Senate that year.⁴² By 2008, the appeal of this kind of rhetoric had lessened considerably. Then-Senator Barack Obama's campaign message of restoring the rule of law, protecting civil liberties, and curtailing other aspects of the national security state⁴³ was met with approval by a comfortable majority of the electorate.⁴⁴

President Obama, however, sent mixed messages regarding his national security and civil liberties priorities soon after taking office. Citing the need to restore the rule of law and protect individual rights, he immediately signed an executive order to close the prison facility at

⁴¹ See, e.g., Christina Pantazis & Simon Pemberton, *Reconfiguring Security and Liberty*, 52 BRIT. J. CRIMINOLOGY 651, 652–653 (2012) (noting that the political response in Britain to the September 11 attacks was driven by populist demands that politicians act tougher than their opponents with regard to the potential threat of terrorism) [hereinafter Pantazis & Pemberton].

⁴² See DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 99 (2007) (citing CNN exit polls from the 2004 presidential election which suggested that voters trusted Republicans in the area of national security). See also David E. Sanger & Jodi Wilgoren, *Bush Adds Teeth to His Attacks on Kerry*, N.Y. TIMES, Oct. 19, 2004, available at <http://www.nytimes.com/2004/10/19/politics/campaign/19bush.html> (describing Bush's presidential campaign tactics during the last 15 days of the campaign, including his "scathing attack on Mr. Kerry's national security record" and capitalizing on "the perception that [President Bush] is strong against terrorism – and . . . continuing doubts about whether Mr. Kerry is tough enough.").

⁴³ Adam Cohen, *Democratic Pressure on Obama to Restore the Rule of Law*, N.Y. TIMES, Nov. 14, 2008, at A32, available at http://www.nytimes.com/2008/11/14/opinion/14fri4.html..?pagewanted=print&_r=0 (noting that Democratic legislators were planning to hold then President-Elect Obama to his campaign promises to restore the rule of law).

⁴⁴ *Id.* Critics of the Bush administration's approach had long suggested that a restoration of the rule of law would require a backtracking on the Bush administration's overmilitarization of security matters that led to significant diminutions of civil liberties. See, e.g., Habermas, *Fundamentalism and Terror*, in THE DIVIDED WEST 8 (2007).

Guantanamo Bay, Cuba,⁴⁵ put a temporary stop to the use of military commissions,⁴⁶ declared that the United States would abide by its domestic and international obligations not to torture detainees,⁴⁷ and ordered the review of the status of all of the detainees held by the U.S. military.⁴⁸ Whether out of a genuine change of belief on national security issues or due to mere political calculation,⁴⁹ Obama shifted rightward on some issues shortly after taking office, such as his position on the use of the state secrets privilege,⁵⁰ and has stepped back from many rights-protective positions that he articulated on the campaign trail in 2008⁵¹ and to some extent in 2009.⁵²

⁴⁵ See Exec. Order No. 13,492, § 3, 74 Fed. Reg. 4,897 (Jan. 22, 2009) (ordering the closure of the Guantanamo Bay, Cuba prison facility within a year).

⁴⁶ *Id.* § 7 (specifying in the Order that all proceedings before a military commission are to cease effective immediately).

⁴⁷ See, e.g., Executive Order 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) (ordering that all interrogations of prisoners comply with the mandates of the Army Field Manual and not involve coercive techniques).

⁴⁸ Exec. Order No. 13,492, *supra* note 45, § 4 (creating a task force and requiring it to review the status of each detainee). The “Review” was to be comprised of the Attorney General, Secretary of Defense, Secretary of State, Secretary of Homeland Security, Director of National Intelligence, Chairman of the Joint Chiefs of Staff, and others. *Id.* § 4(b). The Review had to determine whether each detainee should be “returned to their home country, released, transferred to a third country, or transferred to another United States detention facility.” *Id.* § 3.

⁴⁹ JACK GOLDSMITH, *POWER AND CONSTRAINT* 25, 41–42 (2012) (observing that both motivations likely contributed to President Obama’s shift in policy and outlook).

⁵⁰ See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, where plaintiffs brought suit against a subsidiary of the Boeing Company alleging that the CIA and other government entities were involved in an “extraordinary rendition program” as part of the War on Terror, and that they were severely tortured. *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009) (reversing the district court’s dismissal of the complaint and remanding the matter). The government intervened by claiming the state secrets privilege and sought a motion to dismiss. *Id.* at 951. General Michael Hayden, who was the director of the CIA, filed a declaration in support of the motion to dismiss which cited to reasons of national security in support of the state secrets privilege being upheld. *Id.*; see also Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 259 (2009) (describing the continuity between the Obama and Bush administrations with regard to invocations of the state secrets privilege).

⁵¹ See Peter Slevin, *Obama to Palin: Don’t Mock the Constitution*, WASH. POST.COM, (Sept. 8, 2008, 10:09 P.M.), <http://voices.washingtonpost.com/44/2008/09/obama-to-palin-dont-mock-the-c.html> (affirming his belief in access to justice for detainees suspected of terrorism).

⁵² Compare President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09 (stating his intentions to close Guantanamo and decrying prolonged detention), with Scott Shane & Mark Landler, *Obama Clears way for*

For example, the administration has fought aggressively to limit the scope and substance of habeas corpus review for detainees,⁵³ has prosecuted a Canadian child soldier under the reconstituted military commission system,⁵⁴ and has unsuccessfully attempted to curtail attorney access to detainees at the Guantanamo detention facility.⁵⁵

Although left-leaning commentators have expressed surprise and disappointment at Obama's decision to move to the right on national security issues,⁵⁶ when observed through the lens of political self-interest and

Guantanamo Trials, N.Y. TIMES, Mar. 7, 2011, *available at* <http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html> (reporting Obama's decision to resume military trials and the President's inability to close Guantanamo as promised in 2009). Congress shares responsibility for the continued operation of the Guantanamo detention facility. *See* Charlie Savage, *Vote Hurts Obama's Push to Empty Cuba Prison*, N.Y. TIMES, Dec. 23, 2010, at A24, *available at* http://www.nytimes.com/2010/12/23/us/politics/23gitmo.html?_r=0. The decisions to forbid the use of torture and to disallow the use of evidence gleaned through coercion in military commissions are notable examples of the Obama administration following through with campaign promises regarding restoration of the rule of law. *See* Exec. Order No. 13,491, *supra* note 47. Pub. L. 111-84, 123 Stat. 2190.

⁵³ *See* *Al Maqaleh v. Gates*, 605 F. 3d 84 (D.C. Cir. 2010) (dismissing habeas claims of detainees held at the Bagram Air Force Base in Afghanistan); *Al-Bihani v. Obama*, 590 F. 3d 866, 877–8 (D.C. Cir. 2010) (holding that preponderance of the evidence standard and use of hearsay in habeas corpus hearings was constitutionally permissible).

⁵⁴ *See* DEP'T OF DEFENSE, *KHADR CONVENING AUTHORITY DIPLOMATIC PAPERS* (2010), *available at* <http://www.defense.gov/news/Khadr%20Convening%20Authority%20Diplomatic%20Papers%20AE%20342%2013%20Oct%202010%20%28redacted%29.pdf> (including diplomatic correspondence between the Canadian and U.S. government with regard to the military commission trial of Omar Khadr, his sentencing, and the possibility of repatriating him to Canada); *see also* *Military Commission Trial of Ex-Child Soldier*, HUM. RTS WATCH (Oct. 15, 2010) <http://www.hrw.org/news/2010/10/15/qa-omar-khadr-trial> (describing the international legal issues arising from the detention and trial of a child soldier).

⁵⁵ *See* *In re Guantanamo Bay Detainee Continued Access to Counsel*, Misc. No. 12-398 (RCL) (D.D.C. 2012) (rejecting the government's plan to significantly curtail attorney access for Guantanamo detainees as contrary to constitutionally afforded habeas protections), *available at* <http://www.documentcloud.org/documents/423448-lamberth-ruling.html>.

⁵⁶ *See, e.g.,* Peter Finn & Anne E. Korblut, *Guantanamo Bay: Why Obama hasn't Fulfilled His Promise to Close the Facility*, WASH POST.COM, Apr. 23, 2011, http://www.washingtonpost.com/world/guantanamo-bay-how-the-white-house-lost-the-fight-to-close-it/2011/04/14/AftxR5XE_story.html (noting that the lack of closure of the Guantanamo facility is viewed by Obama's "liberal base" as a failure).

party imperatives,⁵⁷ Obama's actions make sense. He largely neutralized Republican efforts to label him as "soft on terror."⁵⁸ The vast majority of congressional Democrats have followed suit,⁵⁹ leading to a tremendous amount of bipartisanship in Congress to support more robust national security measures that do little to address civil liberties and privacy concerns.⁶⁰

For the Obama administration and the Democratic Party, the political cost of tacking right on national security issues has been minimal. Candidates in the 2012 Republican Party primaries offered a national security vision that is less pluralistic and more hawkish than what President

⁵⁷ Of course, it is possible to view President Obama's shift on national security policy not as a matter of political expediency, but as the necessary toughening of U.S. stances on national security issues in the post-September 11 context. *See generally* Bruce Ackerman, *The Emergency Constitution*, 113 *Yale L.J.* 1029 (2004) (discussing the need for constitutional emergency measures that may compromise civil liberties but are limited by some parameters and are necessary to deal with emergency situations like large-scale terrorist attacks). Under that premise, the failure to jettison civil rights and liberties in favor of robust national security measures would be morally and politically unforgivable. Others have disagreed with Ackerman's premise and argued that constitutional protections for individual rights must hold firm even in (and perhaps especially in) times of danger. *See, e.g.*, David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 *MICH. L. REV.* 2565 (2004).

⁵⁸ Scott Wilson & Jon Cohen, *Poll Finds Broad Support for Obama's Counterterrorism Policies*, *WASH. POST*, Feb. 8, 2012, available at http://www.washingtonpost.com/politics/poll-finds-broad-support-for-obamas-counterterrorism-policies/2012/02/07/gIQAFrSEyQ_story.html.

⁵⁹ Legislation to curtail the President's ability to close the Guantanamo facility was passed by a Democratic House and Senate in 2010. Charlie Savage, *Vote Hurts Obama's Push to Empty Cuba Prison*, *N.Y. TIMES*, Dec. 23, 2010, at A24, available at <http://www.nytimes.com/2010/12/23/us/politics/23gitmo.html>.

⁶⁰ This dynamic is abundantly clear in recent congressional sessions, exemplified in a number of bills supported by Democrats and Republicans. *See, e.g.*, Military Tribunals for Terrorists Acts of 2011, H.R. 478, 112th Cong. (2011) (bipartisan bill requiring all foreign suspects of terrorism to be tried before military tribunals instead of in civilian court); Keep our Communities Safe Act of 2011, H.R. 1932, 112th Cong. (2011) (bipartisan bill amending the Immigration and Nationality Act to extend the detention of aliens who had been ordered removed); S. Res. 174, 112th Cong. (2011) (a bipartisan proposal for a Senate Resolution regarding the importance of sharing information on passenger flight manifests). In this vein, Democrats have positioned themselves to fend off Bush-era conservative critiques that liberals were "carping" about national security policies that were merely matters of "inconvenience and annoyance," not taking seriously the gravity of the national security threats at issue. Philip Bobbitt, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 246 (2008).

Obama sought.⁶¹ Such a dynamic has made it politically difficult for left-leaning Democratic politicians or liberties-oriented Republican politicians to curtail national security overreaching for fear of being labeled as “soft on terror” themselves.⁶²

Politicians attempting to avoid the label of “soft on terror” has effectively disallowed straightforward discourse on rights protection in the United States since President Obama took office.⁶³ When rights-protective proposals are brought forward, various interest groups frame those initiatives as a weakness that generates political vulnerability.⁶⁴ This makes it difficult, if not impossible, for politicians to promulgate rights-protective proposals.⁶⁵

⁶¹ Ben Smith & Maggie Haberman, *GOP Takes Harsher Stance Toward Islam*, POLITICO.COM (Aug. 15, 2010, 7:09 A.M.), <http://www.politico.com/news/stories/0810/41076.html> (noting the GOP shift toward harsher and less pluralistic stances on issues ranging from the creation of an Islamic cultural center in lower Manhattan to the convening of hearings on the radicalization of Muslims in the United States as a potential national security threat).

⁶² Recent polling suggests that while issues related to national security were deeply politically divisive in 2005, that divide shrunk considerably by 2011. See PEW POLITICAL TYPOLOGY, *supra* note 34, at 89.

⁶³ For example, the 2008 Democratic Party platform contained strong and specific language on the need to protect civil rights and civil liberties while maintaining a strong counterterrorism program. See *supra* note 40, for discussion of the specific language used in the platform. Further, structural protections in some parliamentary models allow for political parties interested in greater rights protection to be represented in the cabinet or other positions of power even if they are not successful in an election. Such an arrangement, although not a feature of the United States governmental structure, has been recommended as a potential avenue for improving the functioning and fairness of representative government. See David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 584–85 (2009) (noting that such an arrangement protects vulnerable minority groups and “prevents unconstrained winners from overreaching”); see also Bruce Ackerman, *supra* note 23, at 712–13 (noting that structural arrangements in parliamentary systems can simultaneously facilitate greater rights protections and efficiency).

⁶⁴ The 2009 debates over the closure of the prison facility at Guantanamo Bay, Cuba, illustrate this dynamic. See David M. Herszenhorn, *Senate Leaders Balk at Closing Guantanamo Prison*, N.Y. TIMES.COM (May 19, 2009, 11:48 A.M.) <http://thecaucus.blogs.nytimes.com/2009/05/19/senate-leaders-balk-at-closing-guantanamo-prison/> (visited July 27, 2011) (noting that although Democratic leaders had initially supported closure of the Guantanamo facility due to concerns over detainee treatment there, they retreated from that position after partisan rhetoric that emphasized the danger of coddling “terrorists”).

⁶⁵ See Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. TIMES, May 22, 2009, at A1, available at

Although certain politicians continued to discuss the need for rights protection as a policy-making imperative,⁶⁶ such discourse gained little traction, even when Democrats controlled both chambers of Congress and the White House.⁶⁷ When Democrats saw rights protection as a political liability, they rapidly distanced themselves from unpopular stances that protected outsider groups,⁶⁸ thus fulfilling Madisonian predictions that a

<http://www.nytimes.com/2009/05/22/us/politics/22obama.html?pagewanted=all> (discussing the Obama administration's defense of its antiterrorism policies based on Republican efforts to label him as "weak on terror"). See S. Amdt. 1113, 111th Cong. (2009), available at <http://hdl.loc.gov/loc.uscongress/legislation.111samdt1133> (showing a large supporting vote, 90-6, in the Senate to prohibit funding to transfer, release, or incarcerate Guantanamo Bay detainees to or within the United States).

⁶⁶ See *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight? Before the Subcomm. on Terrorism, Tech. and Homeland Sec., S. Committee on the Judiciary*, 110th Cong. 231-32, (2007) (statement of Sen. Russ Feingold, Subcomm. on Terrorism, Tech. and Homeland Sec., S. Judiciary Comm.) (arguing that our freedom and due process rights have been compromised); Amanda Terkel, *Russ Feingold: 'It's A Threat To Our Country' To Elect One Of The GOP Presidential Candidates*, HUFFINGTON POST, Feb. 21, 2012, http://www.huffingtonpost.com/2012/02/21/russ-feingold-book-gop-2012_n_1289428.html (quoting former Senator Feingold, "[i]t's one thing if the Bush actions with regard to civil liberties are sort of an outlier. It's far more dangerous if it becomes reaffirmed under a progressive president like President Obama. . . . [P]rogressives need to urge the president to pick up his game on civil liberties both now and in his second term . . .").

⁶⁷ See, e.g., Eric Lichtblau & Carl Hulse, *Democrats Seem Ready to Extend Wiretap Powers*, N.Y. TIMES (Oct. 7, 2007) (showing how Democrats chose to use their majority power in both chambers of Congress).

⁶⁸ See John J. Farmer, Jr., *Introduction: Awaiting "the Authorities": 9/11 and National Security Doctrine After Ten Years*, 63 RUTGERS L. REV. 1085, 1092 (2010) (stating that although Democrats initially supported rights-protective measures, they began in 2009 to reverse and decided to keep Guantanamo Bay open indefinitely, with detainees being held preventatively without charges or a trial, and to reauthorize the Patriot Act's surveillance provisions); Max Fisher, *Why Democrats Should Run on National Security*, THE ATLANTIC, Feb. 22, 2010, available at <http://www.theatlantic.com/politics/archive/2010/02/why-democrats-should-run-on-national-security/36367/> (arguing that Democrats should frame the issue of national security on their own terms even though "specific policies—civilian trials for terrorists, banning torture—poll poorly," but recognizing the administration's reluctance because "[t]he White House likely fears that tying Obama too publicly to his unpopular policies will tarnish his generalized popularity on national security.").

politician's moral compass⁶⁹ may not guide his or her decision-making if a political cost would be incurred.⁷⁰

I am not arguing that morality is entirely absent in the political discourse around rights protection. In the last decade, the moral imperatives of politicians⁷¹ to demand greater protections for civil rights and liberties have made their mark in curbing excessive or overreaching counterterrorism legislation in the United States and other nations,⁷² or at

⁶⁹ However, there are instances in which a politician's moral compass may also guide him/her to create draconian policies that he/she may perceive to serve the greater good of national security. See Peter Margulies, *True Believers at Law: Legal Ethics, National Security Agendas, and the Separation of Powers*, 68 MD. L. REV. 1, 1 (2008) (arguing that John Yoo and other architects of the Bush administration interrogation policy acted in accordance with their good faith belief that achieving security was the ultimate and morally correct priority and that torture may have been necessary to achieve security).

⁷⁰ James Madison, *supra* note 16, ¶ 11 (arguing that "representative appointments" or politicians are predominately motivated by ambition and self interest over the public good). Of course, such political maneuvering is simply the natural effect of a republican government that is accountable to popular will. See ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* 51 (2005) (describing the responsiveness of republican government to the electorate as a positive aspect of British constitutionalism). Legislators are further limited by their own collective sense of deference to the President with regard to national security matters, based in large part on the current popular belief that they are less qualified to opine on security matters than the executive branch. See Aziz Rana, *Who Decides on Security?* 44 CONN. L. REV. 1417, 1460–63 (2012) (arguing that Congress has ceded its authority to make national security decisions since at least World War II); Josh Chafetz, *Congress's Constitution*, at *6 (forthcoming, 160 U. PA. L. REV. 715, 721 (2012) (noting that Congress's sense of insecurity about its role in national security matters, combined with a lack of consensus in Congress about how to act, has led to Congress not exercising its hard or soft power in determining the parameters of the security state).

⁷¹ Some argue that Congress is the best branch of government to provide for the protection of vulnerable groups. See, e.g., LOUIS FISHER, *DEFENDING CONGRESS AND THE CONSTITUTION* 103 (2011) (arguing that throughout the Reconstruction era and in the early twentieth century, Congress showed the most promise at protecting the rights of racial minorities and women).

⁷² See The Prevention of Terrorism (Repeal) Act, No. 26 of 2004, INDIA CODE (2004), available at <http://indiacode.nic.in> (repealing the Act which led to many human rights abuses in India and gained great opposition from the public); *Home Secretary Theresa May Wants Human Rights Act Axed*, BBC NEWS, Oct. 2, 2011, <http://www.bbc.co.uk/news/uk-politics-15140742> (citing the conservatives desire to get rid of the Human Rights Act since it provides greater human rights protections to, what they believe is, a fault, but suggesting that the coalition with the Liberal Democrats prevented them from doing so). *But see* The Unlawful Activities (prevention) Amendment Ordinance, No. 29 of 2004, INDIA CODE

least in highlighting the costs of such excesses.⁷³ Indeed, President Obama's 2008 presidential campaign gained support based, in part, on the need to maintain the rule of law, preserve civil liberties, and rein in the use of executive power,⁷⁴ and prior to that, lawmakers interested in investigating potential civil rights abuses in counterterrorism efforts were able to make some headway.⁷⁵

However, given the current tenor and substance of political discourse in the United States, it seems unlikely that rights protection of outsider groups will surface as a political priority.⁷⁶ Such consolidated and

(2010), available at <http://indiacode.nic.in> (incorporating many of the provisions that were in The Prevention of Terrorism Act).

⁷³ See Senator Russell Feingold, On Opposing the U.S.A. PATRIOT Act, Address at the Associated Press Managing Editors Conference at the Milwaukee Art Museum, Milwaukee, Wisconsin (Oct. 12, 2001), available at <http://www.archipelago.org/vol6-2/feingold.htm> (cautioning that “we must continue to respect our Constitution and protect our civil liberties in the wake of the attacks,” and that Congress is “press[ing] for the enactment of sweeping new powers for law enforcement that directly affect the civil liberties of the American people without due deliberation by the peoples’ elected representatives.”).

⁷⁴ For a discussion of how the Obama administration’s invocation of the state secrets privilege is consistent with—and sometimes more aggressive than—the George W. Bush administration’s use of the privilege, despite Obama’s campaign pledges to the contrary, see generally Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201 (2009).

⁷⁵ In 2006, after Democrats took control of Congress, numerous investigations were launched into the Bush administration’s national security apparatus. See, e.g., Balancing Privacy and Security: The Privacy Implications of Government Data Mining Programs: Hearing before the S. Comm. on the Judiciary, 110th Cong. (2007); Combating War Profiteering: Are we going enough to investigate and prosecute contracting fraud and abuse in Iraq?: Hearing before the S. Comm. on the Judiciary, 110th Cong. (2007); Misuse of Patriot Act Powers: The Inspector General’s Findings of Improper Use of the National Security Letters by the FBI: Hearing before the S. Comm. on the Judiciary, 110th Cong. (2007); Will REAL ID Actually Make Us Safer? An Examination of Privacy and Civil Liberties Concerns: Hearing before the S. Comm. on the Judiciary, 110th Cong. (2007). Scholars have noted that motivation for such investigations may not have been deontological, but may have simply served the purpose of political gain. See Fontana, *supra* note 63, at 606–07 (noting that the 2007 investigations in torture practices at Abu Ghraib and other detention facilities may have been motivated by genuine moral outrage, the desire for political gain, or both).

⁷⁶ See 2012 DEMOCRATIC PARTY PLATFORM and 2012 REPUBLICAN PARTY PLATFORM, *supra* note 40 (with little language indicating rights protection as a legislative priority). See also PEW POLITICAL TYPOLOGY, *supra* note 34, at 95 (finding that 40% of the U.S. public believes that Islam, as a religion, encourages violence more than other religions, whereas only 42% of the public think that it does not). Such a finding may suggest that the

widespread government support for any measure advertised as being “tough on terrorism” is not a new phenomenon in U.S. history.⁷⁷

II. Interest Convergence Theory and National Security Lawmaking

To understand the political dynamic underpinning the debate over increasing security measures and protecting civil liberties, realist theories about legislative decision-making provide a useful starting point. Interest convergence theory and its relationship to the current political debates over national security can further frame the political dynamic and identify potential areas for rights-protective change in the national security context.

A. Interest Convergence Theory

Professor Derrick Bell developed interest convergence theory in the 1980s in order to understand key Supreme Court decisions and legislative actions in the African-American civil rights movement of the mid-twentieth century. Bell’s interest convergence theory in this context holds that politically powerful groups in the United States (namely elite white people) would only support racial justice initiatives at the point where a self-interested cost-benefit analysis suggested such support to be worthwhile.

Bell posits that a decision such as *Brown v. Board of Education*,⁷⁸ often hailed as a seminal case demonstrating the judicial commitment to equal

protection of Muslims against overreaching counterterrorism measures is not a high priority for the majority of Americans.

⁷⁷ The internment of Japanese residents and Japanese Americans during World War II, facilitated and enabled by Congress, is perhaps one of the most egregious examples in U.S. history of overreaching in the name of national security. See Pub. L. No. 77-503 56 Stat. 173 (1942) (authorizing the exclusion of those of Japanese descent from the West Coast of the United States). The Supreme Court affirmed the exclusion orders that followed, though with some vigorous dissenting opinions. *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting) (noting that exclusions of Japanese Americans under Executive Order 9066, upheld by the majority, amounted to the “ugly abyss of racism”); *id.* at 226 (Roberts, J., dissenting) (arguing that the conviction of Fred Korematsu for defying the exclusion order was tantamount to convicting him for “not submitting to imprisonment in a concentration camp, based on his ancestry”); *id.* at 246 (Jackson, J., dissenting) (arguing that the majority had “validated the principle of racial discrimination in criminal procedure.”).

protection in the United States, is rather a reflection of a need to fulfill interests of the white majority population, which incidentally benefit blacks.⁷⁹ In particular, Bell views *Brown* as part of the U.S. government's effort to improve its human rights record during the Cold War, an era in which the United States was battling the Soviet Union for influence in postcolonial emerging democracies.⁸⁰ Bell concludes that without such motivations that appealed to government and elite white interests, decisions like *Brown* likely would never have been made.

Bell's Cold War interest convergence hypothesis relied upon some of the same foreign policy dynamics that raised concerns about U.S. counterterrorism programs in the post-9/11 context. First, the racist policies of the World War II and early Cold War eras were widely publicized in anti-American messaging to emerging, post-colonial democracies that had yet to form their geopolitical allegiances.⁸¹ Second, the Truman

⁷⁸ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (holding that the racial segregation of public schoolchildren was in violation of the Equal Protection Clause of the 14th Amendment).

⁷⁹ Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest Convergence*]. Bell queries why, in 1954, the principle of "separate but equal" became constitutionally untenable, when segregation laws similar to those challenged in *Brown* had been upheld consistently for the prior 100 years. *Id.* at 523–24. He concludes that:

[T]he availability of Fourteenth Amendment protection in racial cases may not actually be determined by the character of harm suffered. . . . Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.

Id. at 523. For powerful analyses supporting the applicability of interest convergence theory to *Brown v. Board of Education*, see generally Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes: Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

⁸⁰ See Bell, *Interest Convergence*, *supra* note 79, at 524; see also Dudziak, *supra* note 79.

⁸¹ DUDZIAK, *supra* note 79, at 12 (describing extensive international attention given to racial discrimination sanctioned by the U.S. Government, and the use of U.S. racial problems by the Soviet Union in the late 1940s to stoke foreign relations problems for the United States in Asia, Africa, and Latin America). Dudziak asserts that "[c]oncern about the effect of U.S. race discrimination on Cold War foreign relations led the Truman administration to

administration argued that the improvement of the U.S. civil rights record was essential as part of the overall Cold War strategy.⁸² The Truman administration simultaneously argued that the judiciary should play an active role in improving and enforcing racial equality.⁸³ It is, therefore, unsurprising that President Truman's Justice Department filed an amicus brief in *Brown v. Board of Education* that contextualized the desegregation case in the Cold War imperative to spread democracy throughout the world.⁸⁴

adopt a pro-civil rights posture as part of its international agenda to promote democracy and contain communism." *Id.* at 27. This thinking was reflected in contemporaneous media accounts, such as a New York Times Magazine article published in 1948 in which the author laments that although "the nation finds itself the most powerful spokesman for the democratic way of life . . . [i]t is unpleasant to have the Russians publicize our continuing lynchings, our Jim Crow statutes and customs, our anti-Semitic discriminations and our witch-hunts; but is it undeserved?" *Id.* at 29 (internal citations omitted). Dudziak offers further evidence in the reports of diplomats and State Department officials expressing concern as to the extent to which U.S. racial discrimination undermined U.S. foreign policy efforts. *Id.* at 29–39.

⁸² See PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 100-101 (1947) (noting that "our civil rights record has growing international implications. These cannot safely be disregarded by the government at the national level which is responsible for our relations with the world" and arguing that powers usually left to the states such as law enforcement, voting, and education, may need to be shifted to the federal level to deal with the international implications of U.S. racial discrimination). The Committee report bluntly stated the need for improving race relations in the United States as a foreign policy and security matter:

Our position in the postwar world is so vital to the future that our smallest actions have far-reaching effects. We have come to know that our own security in a highly interdependent world is inextricably tied to the security and well-being of all people and all countries. Our foreign policy is designed to make the United States an enormous, positive influence for peace and progress throughout the world. We have tried to let nothing, not even extreme political differences between ourselves and foreign nations, stand in the way of this goal. But our domestic civil rights shortcomings are a serious obstacle.

Id. at 146. See also HARRY S TRUMAN, SPECIAL MESSAGE TO THE CONGRESS, ON CIVIL RIGHTS (1948) (emphasizing the need to improve race relations in the United States as part of a national security imperative). The Truman administration also offered moral and economic justifications for improving the U.S. civil rights record. See Dudziak, *supra* note 79, at 79–80.

⁸³ See TO SECURE THESE RIGHTS, *supra* note 82, at 105–110 (citing the constitutional responsibilities of the judiciary to improve and enforce racial justice).

⁸⁴ Brief for the United States as Amicus Curiae, *Brown v. Board of Education*, 347 U.S. 483 (1954), at 6, 1952 WL 82045 at *6. The Truman Administration describes the government's interest in the case in blunt foreign policy terms:

Bell's interest convergence theory is not limited to judicial decision-making. He argued that executive action can also be understood through interest convergence theory, citing President Abraham Lincoln's use of the Emancipation Proclamation.⁸⁵ Here, Bell asserted that the Emancipation Proclamation was rights-protective in that it freed enslaved African Americans, but that Lincoln's primary purpose in issuing the proclamation at the time and in the manner that he did was to undermine Confederate troop strength by empowering Southern blacks to stop fighting and working for the Confederacy.⁸⁶ In terms of legislative action at the time, Bell contends that the post-Civil War amendments not only protected the interests of the newly emancipated slaves, but also helped solidify the political prospects of the Republican Party.⁸⁷

Scholars have applied Bell's interest convergence theory to legislative actions as well, arguing that recent efforts to cut back the prison population through reformation of state laws will undoubtedly benefit the poor people of color who make up a disproportionately large sector of the prison population;⁸⁸ this aspect of the legislation led to the NAACP lending its support to reform efforts by fiscal conservatives who focused almost

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.

Id.

⁸⁵ Bell, *Interest Convergence*, *supra* note 79, at 524.

⁸⁶ Derrick A. Bell, *Brown v. Board of Education: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 24 (2004).

⁸⁷ *Id.* at 23.

⁸⁸ Michelle Alexander, *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 15, 2011, at WK9, available at <http://www.nytimes.com/2011/05/15/opinion/15alexander.html>.

exclusively on the need to cut costs and reduce state budget deficits.⁸⁹ The combined efforts of fiscal conservatives and civil rights groups may be sufficient to move the legislative process.⁹⁰ Although Bell's interest convergence work focused largely on African-American civil rights, his framework for evaluating judicial and political decision-making lends itself to the post-9/11 security context in which Muslims and Arabs are the targeted or disparately impacted groups.⁹¹

B. Framing Efforts to Curtail National Security Programs in the Post-9/11 Context

Bell recognized that some whites who worked toward racial justice in the 1950s and 1960s were motivated by a moral imperative—the recognition that racial equality was worth fighting for, and that it ought to be the primary motivation of legislators. However, Bell also recognized that the number of whites motivated by racial justice was simply insufficient to effect reform.⁹²

The same may be said for politicians in the post-9/11 context. Rights-protective arguments that were once championed by Democrats in Congress—for example, curtailing warrantless surveillance by the government, complying with international law obligations regarding the detention and trial of terrorism suspects, and reforming the laws governing removal of immigrants—have fallen prey to the phenomenon that Bell observed: There is simply not enough political will to support these objectives to meaningfully alter national security laws or policies. However,

⁸⁹ See Jesse Washington, *NAACP Joins With Gingrich in Urging Prison Reform*, ASSOCIATED PRESS (April 7, 2011), available at <http://cnsnews.com/news/article/naacp-joins-gingrich-urging-prison-reform>. The article described the interest of fiscal conservative Grover Norquist as follows: “Norquist said his group got involved because when it comes to making the argument for reducing the number of prisoners, ‘liberals can’t do it. People say, ‘You just want to let all the murderers out.’ But we are spending a great deal of money keeping people in prison, and for many of them it doesn’t make sense to keep them there year after year.” *Id.*

⁹⁰ *Id.*

⁹¹ Scholars recognized but did not focus on the potential application of interest convergence theory soon after September 11. See, e.g., Eric K. Yamamoto *supra* note 4, at 1331–33.

⁹² See Bell, *Interest Convergence*, *supra* note 79, at 525 (asserting that “the number [of whites] who would act on morality alone was insufficient to bring about the desired racial reform.”).

framing those initiatives in a way that speaks to mainstream constituencies is the next-best option.

The following Subsections lay out areas in which rights-protective legislation can gain political traction by reframing initiatives in terms that will appeal to more legislators and their major constituencies.

1. Foreign policy

Effective foreign policy depends on the ability of the United States to maintain its soft power, which in turn depends on maintaining the respect of other nations and preserving the willingness of our allies to cooperate with us on policy and security matters. That respect and willingness is most forthcoming when the United States acts as a vanguard in protecting the rights of the politically powerless. The perception that U.S. soft power in foreign relations or U.S. counterterrorism and intelligence efforts might be jeopardized could—as it did in Bell’s original thesis—serve as a persuasive means of garnering support for rights protective measures.

Thus, there are two important facets to the relationship between foreign policy and rights-protective interest convergence. First, the U.S. government has made it an imperative to win over the support and loyalty of allied nations who are skeptical of U.S. antiterrorism efforts that previously have been dismissive of the countries’ own priorities and cultural norms.⁹³ This, in many respects, reflects the most natural application of

93 See Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism Affairs, Remarks at Harvard Law School: Strengthening Our Security By Adhering to Our Values and Laws (Sept. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>. Additionally, the U.S. military has made clear that part of the effort to build and maintain transnational allegiances must involve remaining sensitive to the cultural viewpoints of other nations, and maintaining a respect for the views of allied nations. See ADMIRAL MICHAEL G. MULLEN, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, *THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2011: REDEFINING AMERICA’S MILITARY LEADERSHIP*, 10 (Feb. 2011) (hereinafter “2011 NATIONAL MILITARY STRATEGY”) (noting that “[w]ith partner nation support, we will preserve forward presence and access to the commons, bases, ports, and airfields commensurate with safeguarding our economic and security interests worldwide. We must thoughtfully address cultural and sovereignty concerns in host countries. Global posture remains our most powerful form of commitment and provides us strategic depth across domains and regions.”).

Bell's interest convergence theory, which addressed the interests of the U.S. political elites in the context of the Cold War. The *Brown v. Board of Education* decision helped market the United States as a post-World War II moral authority, responsive to the concerns of emerging democracies and to the growing international focus on human rights treaties and protocols.⁹⁴ In the post-September 11 context, government responses to concerns that the United States has flouted its own human rights standards,⁹⁵ disregarded the rule of law,⁹⁶ and lacked sensitivity to Muslims around the world,⁹⁷ have served not only moral interests, but realpolitik interests as well. In this respect, the framing of rights protection as a foreign policy matter has occurred on occasion, but has not been consistent.

Second, the United States government has made clear that military and homeland security readiness depends heavily on the intelligence and cooperative security efforts of allied nations.⁹⁸ Although the U.S. military

⁹⁴ Bell argues that powerful whites, in government and in the powerful strata of U.S. society, benefited immediately from the *Brown* decision by providing immediate credibility to U.S. efforts to counter Communist threats and increase its sphere of influence in developing nations. Bell, Interest Convergence, *supra* note 79, at 524 (citing a *Time* magazine article in which the *Brown* decision is described as having a profound international impact in terms of improving the perception of U.S. leadership and moral standing).

⁹⁵ Joseph E. Stiglitz, *The Economic Consequences of Mr. Bush*, VANITY FAIR (Feb. 2007), available at <http://www.vanityfair.com/politics/features/2007/12/bush200712> (describing the difficulties America faces from Bush's term in office, including being the "most disliked country in the world" for reasons such as Guantanamo Bay and Abu Ghraib).

⁹⁶ *See, e.g.*, Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs, [2009] EWHC 2549, [7] (Admin) (Eng.), Case No. CQ/4241/2008, Oct. 16, 2009 (discussing the rule of law problems involving the U.S. extraordinary rendition of U.K. citizen Binyam Mohamed, and the subsequent pressure exerted by the U.S. government on the U.K. Foreign Office to forestall litigation by Mohamed); *see also* Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 Brook. L.R. 201, 240-44 (2009) (for a fuller discussion of the rule of law issues surrounding Binyam Mohamed's case..).

⁹⁷ *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY, 3, 19, 22 (2010) (highlighting the importance of improving outreach to Muslim communities around the world as one means to strengthen U.S. national security interests).

⁹⁸ *See* 2010 NATIONAL SECURITY STRATEGY, *supra* note 97, at 112 (highlighting the importance of preserving alliances and developing transnational counterterrorism strategies). The United States government has leveraged the near-universal understanding that countries must rely on each other for valuable counterterrorism intelligence to pressure other governments to comply with its preferred course of action, under threat of withholding counterterrorism intelligence garnered by the United States. *See, e.g.*, Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs, [2008] EWHC

does not suggest that unilateral security operations are untenable, military leaders have made clear that unilateral action is less desirable and often less successful.⁹⁹ Further, a majority of the American public desires that the government continue seeking multilateral solutions to transnational issues,¹⁰⁰ which provides popular support for working with allied nations on such issues, even if the result is sometimes a compromise in American foreign policy goals to build such a coalition.

2. Long-term Security/Domestic Discontent

Bell identified the need to quell domestic discontent and unrest among racial minorities as integral to the mid-twentieth century cases and legislation supporting civil rights for African Americans. Bell notes that the level of discontent among African Americans regarding segregation increased dramatically in the years after World War II, particularly as the Cold War developed and the Soviet Union made substantial changes to eliminate state-sponsored racial discrimination ahead of the United States.¹⁰¹

Current levels of discontent among Muslim populations within the United States have remained relatively low,¹⁰² arguably cutting against the utility of interest convergence in this context right now. However, quelling domestic discontent among those communities most affected by domestic counterterrorism policies would serve two imperatives: first, it would

(Admin) 2048, [62] (Eng.) (in which the court noted that the United States government had threatened to withhold terrorism-related intelligence from the British government if mention of U.S. classified information were to be made public in an English court).

⁹⁹ See 2011 NATIONAL MILITARY STRATEGY, *supra* note 93, at 1 (noting that allied nations face similar security challenges from similar threats, and that cooperation is preferable to attempting to safeguard homeland security unilaterally).

¹⁰⁰ See PEW POLITICAL TYPOLOGY, *supra* note 34, at 90 (finding that 53% of the public supports the U.S. taking into account the interest of allies, despite the possible resultant policy compromises).

¹⁰¹ Bell, *Interest Convergence*, *supra* note 79, at 524–25 (citing arguments made by Paul Robeson in 1949).

¹⁰² See ABU DHABI GALLUP CENTER, MUSLIM AMERICANS—FAITH, FREEDOM, AND THE FUTURE: EXAMINING U.S. MUSLIMS' POLITICAL, SOCIAL AND SPIRITUAL ENGAGEMENT TEN YEARS AFTER 9/11, at 13 (Aug. 2011) [hereinafter 2011 GALLUP POLL] (noting that although Muslim Americans tend to be more skeptical of U.S. foreign policy, military and law enforcement than other religious groups within the United States, they are optimistic about their futures in the United States).

encourage buy-in from Muslim communities by demonstrating that the government does not perceive Muslim communities to be singularly threatening in terms of posing a threat of terrorism; second, it would encourage Muslim communities to counteract radicalizing messages that may be reaching individuals within the communities.¹⁰³

Such efforts have been important in countries like the United Kingdom, where the radicalization of domestic Muslims has been significant and has assisted terrorist groups in recruitment, financing, and currying sympathy among discontented Muslims.¹⁰⁴ Efforts in the post-9/11 context (and more specifically, in the post-July 2005 context)¹⁰⁵ have focused on combating radicalization in U.K. Muslim communities and mosques, improving outreach by law enforcement, and stepping up recruitment of racial and religious minorities in law enforcement positions that interact with Muslim communities.¹⁰⁶

This effort has also been undertaken by the Obama administration and has been largely successful in terms of maintaining Obama's

¹⁰³ See generally THE WHITE HOUSE, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (Aug. 2011) (emphasizing both points throughout the White House plan to counter radicalization). Cf. Press Release, Representative Peter T. King, *King Statement on Obama Administration Violent Extremism Strategy*, <http://homeland.house.gov/press-release/king-statement-obama-administration-violent-extremism-strategy> (Aug. 3, 2011) (voicing concern that "the report which suggests some equivalency of threats between al-Qaeda and domestic extremists and also with the politically correct inference that legitimate criticism of certain radical organizations or elements of the Muslim-American community should be avoided.").

¹⁰⁴ See ANDREW BLICK ET AL., DEMOCRATIC AUDIT, THE RULES OF THE GAME: TERRORISM, COMMUNITY AND HUMAN RIGHTS 3 (2006), <http://filestore.democraticaudit.com/file/649c8cd74218a40c8f84fccf5b2e3379-1282640509/jrrt-leaflet.pdf> (citing polls that show as many as 120,000 Muslims in the U.K. stated that the London bombings were justified); JOHN THORNE & HANNAH STUART, THE CTR. FOR SOCIAL COHESION, ISLAM ON CAMPUS: A SURVEY OF UK STUDENT OPINIONS43 (2008), available at http://www.socialcohesion.co.uk/files/1231525079_1.pdf (reporting that an online survey of over 600 Muslim students in U.K. showed 32% of them thought it would be justifiable to kill in the name of religion).

¹⁰⁵ Britain's outreach to Muslim communities stepped up in the wake of the July 2005 attacks on the London public transportation system, which killed 52 people and injured over 700. See Ralph Frammolino, *British Muslim Outreach Hits a Rough Patch*, L.A. TIMES Aug. 21, 2006, available at <http://articles.latimes.com/2006/aug/21/world/fg-social21>.

¹⁰⁶ See Tom Parker, *United Kingdom: Once More unto the Breach*, in SAFETY, LIBERTY AND ISLAMIST TERRORISM 26-27 (Gary Schmitt ed., 2011).

favorability ratings among U.S. Muslims.¹⁰⁷ However, the long-term confidence in the U.S. government and U.S. law enforcement may erode,¹⁰⁸ as it has in other countries,¹⁰⁹ if the perception that Muslims are being unfairly targeted by U.S. national security policy increases. Potential difficulties in reconciling the rhetoric of pluralism, diversity and protection of civil liberties that have been the focal point of administration statements with actual policies are exemplified in the Obama administration's recent aggressive prosecution of Muslims in the United States on allegations of material support to terrorism,¹¹⁰ the widespread detention and removal of Muslim immigrants,¹¹¹ and the administration's use of the state secrets privilege to forestall any civil rights litigation by Muslim Americans who allege that their mosques were targeted for warrantless surveillance purely on religious grounds.¹¹²

¹⁰⁷ See 2011 GALLUP POLL, *supra* note 102, at 19 (noting that approximately 80% of Muslim Americans approved of President Obama's job performance, the highest of any religious group).

¹⁰⁸ Stephen J. Schulhofer et al., *American Policing at a Crossroads*, 101 J. CRIM L. & CRIMINOLOGY 335, 365–66 (2011), *available at* http://www.law.northwestern.edu/jclc/backissues/v101/n2/1012_335.Schulhofer_et_al.pdf (discussing the fragileness of cooperation in the counterterrorism context because “cooperation could mean exposing people with whom they share close ethnic and religious ties to unusually harsh procedures and sanctions.”); David Cole, *Enemy Aliens*, *supra* note 2 (warning that law enforcement needs to be careful with its treatment towards Muslim communities because its crime-fighting tactics might alienate them).

¹⁰⁹ See BLICK ET AL., *supra* note 104, at 3–4 (2006) (citing how Muslims in the United Kingdom feel separated from the UK population as a whole because of the counterterrorism policies implemented).

¹¹⁰ See, e.g., Press Release, Federal Bureau of Investigation, Woodbridge Man Charged with Providing Material Support to Terrorist Organization, (Sept. 2, 2011), *available at* <http://www.fbi.gov/washingtondc/press-releases/2011/woodbridge-man-charged-with-providing-material-support-to-terrorist-organization> (detailing the arrest of a Pakistani man residing in Virginia based on his posting of videos to YouTube that expressed support for Lashkar-e-Tayyiba, a designated foreign terrorist organization).

¹¹¹ See generally CTR. FOR HUM. RTS. AND GLOBAL JUSTICE & ASIAN AM. LEGAL DEF. AND EDUC. FUND, UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM 8 (2011) (stating that “the government is actively trying to deport and deny entrance, green cards, or citizenship to Muslim citizen,” and quoting David Cole who remarked that Muslims and the Arab community in the United States are subjected to a zero-tolerance immigration policy).

¹¹² See Memorandum of Points and Authorities in Support of the Motion for Summary Judgment at 27–30, *Fazaga v. F.B.I.*, (C.D. Cal. 2012) No. SA11-CV-00301 (describing the alleged national security threat of allowing the plaintiffs' *Bivens* action to continue). The government's brief further argues that “mounting a full and effective defense against the religious discrimination claims would create an unjustifiable risk of revealing state secrets,

Nonetheless, because the Obama administration has been successful in maintaining the political support of a vast majority of Muslims, the likelihood of domestic discontent within the United States acting as a significant factor in bringing about rights-protective legislation or policy seems low at this point.

3. Curbing Government Spending

Fiscal responsibility and the curtailment of government spending is a cornerstone of conservative political platforms.¹¹³ As such, it is unsurprising that many libertarians and some conservatives support or are willing to tolerate a significant reduction in defense spending as a way to reduce the U.S. budget deficit,¹¹⁴ even though such views have not percolated into conservative platforms yet. Such a move is often championed by liberals and many Democrats¹¹⁵ for both fiscal and ideological reasons.¹¹⁶ In particular, cutting back on expensive counterterrorism efforts that have not been proven necessary, such as the Department of Homeland Security's use of fusion centers,¹¹⁷ may have the effect of protecting communities most affected by them while helping to balance budgets.

even if plaintiffs could make a *prima facie* case . . . with nonprivileged evidence.” *Id.* at 34 (internal citations omitted). *See also* Declaration of Eric H. Holder, Attorney General of the United States, *Fazaga*, (No. SA11-CV-00301) (detailing the reasons why the state secrets privilege was asserted by the Department of Justice).

¹¹³ *See* 2012 REPUBLICAN PARTY PLATFORM, *supra* note 40, at 3–4.

¹¹⁴ *See* PEW POLITICAL TYPOLOGY, *supra* note 34, at 72 (showing that 48% of Libertarians and 28–29% of conservative Republicans support lowering defense spending as a means of deficit reduction). *See also* Rand Paul, *Romney's Wrong on Middle East, Defense Spending*, CNN.COM. (Oct. 10, 2012), <http://www.cnn.com/2012/10/10/opinion/rand-paul-romney-foreign-policy/index.html> (arguing that defense spending should be cut as a matter of fiscal responsibility).

¹¹⁵ *See* PEW POLITICAL TYPOLOGY, *supra* note 34, at 72 (showing that 79% of “Solid Liberals” and between 40 to 49% of moderate Democrats support a reduction in defense spending).

¹¹⁶ *See, e.g.*, Christopher Drew & Elisabeth Bumiller, *Military Budgets Reflects a Shift in U.S. Strategy*, N.Y. TIMES, Apr. 6, 2009, *available at* <http://www.nytimes.com/2009/04/07/us/politics/07defense.html?pagewanted=all>.

¹¹⁷ *See* STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. AND GOV'T AFF., 112TH CONG., FEDERAL SUPPORT FOR AND INVOLVEMENT IN STATE AND LOCAL FUSION CENTERS 3–4 (Comm. Print 2012) (noting that the work of fusion centers appears to have violated the civil liberties of many U.S.

A comparative example is useful: U.K. political parties are not known for their willingness to form coalitions unless absolutely necessary to secure governmental control.¹¹⁸ Yet in 2010, the Tory-Liberal Democrat coalition government made clear that it would try to curtail some antiterrorism measures that were prone to abuse,¹¹⁹ giving rise to the possibility that coalition-building between the political left—interested in protecting civil liberties and reducing the marginalization of outsider communities¹²⁰—and the political right—interested in cutting back on costly government programs and lessening government involvement in the lives of private citizens¹²¹—can lead to limited synergies in curtailing

citizens, has not produced successful counterterrorism results, and cost between \$289 million and \$1.4 billion in federal funds from 2003 to 2011).

¹¹⁸ MICHAEL RUSH, PARLIAMENT TODAY 24 (2005). Such coalition-building is more likely in other parliamentary nations in which more political parties wield significant power. *Id.* See also S.H. BELAVADI, THEORY AND PRACTICE OF PARLIAMENTARY PROCEDURE IN INDIA 215 (1988) (arguing that the multiplicity of parties in India lends itself to a lack of order and cohesion, but also allows for movement beyond traditional party rivalries).

¹¹⁹ See SECRETARY OF STATE FOR THE HOME DEPARTMENT, Review of Counter-Terrorism and Security Powers, Review Findings and Recommendations, 2011, Cm. 8004, at 3 (U.K.) (recommending the repeal or narrowing of various counterterrorism measures in order to “correct the imbalance that has developed between the State’s security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary”); Conservative-Liberal Democrat Coalition Agreement, CIVIL LIBERTIES ¶10 (2010). The Agreement states that, among other goals, the coalition government will work toward curtailing invasive and overreaching laws, and instituting “safeguards against the misuse of anti-terrorism legislation.” *Id.* See also Queen’s Speech - Freedom (Great Repeal) Bill, NUMBER 10 (May 25, 2010), <http://www.number10.gov.uk/queens-speech/2010/05/queens-speech-freedom-great-repeal-bill-50647> (emphasizing the need to repeal legislation that has compromised civil liberties).

¹²⁰ See LIBERAL DEMOCRATS, LIBERAL DEMOCRAT MANIFESTO 94–95 (2010). This 2010 campaign platform by the Liberal Democrats noted that “the best way to combat terrorism is to prosecute terrorists, not give away hard-won British freedoms.” The manifesto promised four reforms in Britain’s security framework: to “[r]each out to the communities most at risk of radicalisation to improve the relationships between them and the police and increase the flow of intelligence,” to eliminate “control orders, which can use secret evidence to place people under house arrest,” to “[r]educe the maximum period of pre-charge detention to 14 days,” and to “[m]ake it easier to prosecute and convict terrorists by allowing intercept evidence in court and by making greater use of postcharge questioning.” *Id.*

¹²¹ See CONSERVATIVE PARTY, INVITATION TO JOIN THE GOVERNMENT OF BRITAIN: CONSERVATIVE MANIFESTO 79 (2010). This 2010 campaign platform by the Conservatives argued that the Labor government had “trampled on liberties and, in their place, compiled huge databases to track the activities of millions of perfectly innocent people, giving public

potential misuse and abuse of national security powers.¹²² Although such a coalition may be highly flawed in terms of both rights protection and decision-making on fiscal austerity,¹²³ it may represent a political opportunity that would otherwise not exist.

In the domestic sphere, such concern about financial strain and cutting budget deficits can lead to the exertion of left-right pressure to decrease the U.S. financial commitment to the war in Afghanistan.¹²⁴

In a time of fiscal austerity and pressure to bring government spending under control in numerous categories, politicians who advocate for better cost-benefits analyses of homeland security spending—a measure long recommended by nonpartisan observers¹²⁵—would be on solid political ground, regardless of party affiliation.¹²⁶

bodies extraordinary powers to intervene in the way we live our lives.” *Id.* Instead, the Conservatives suggested that new legislation be introduced to stop “state encroachment,” “protect people from unwarranted intrusion by the state,” and save money by cutting back on unnecessary security initiatives. *Id.*

¹²² See Henry Porter, *A Tory-Lib Dem Coalition Offers Hope for Civil Liberties*, THE GUARDIAN, May 10, 2010, available at <http://www.guardian.co.uk/commentisfree/henryporter/2010/may/10/conservative-liberal-democrat-coalition-civil-liberties> (noting that civil liberties was one of a few areas in which Conservative and Liberal Democrat priorities were aligned). See also David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 606 (2009) (theorizing that national security policy may be better reasoned in nations where political minorities take an active role in governance).

¹²³ Adam Tomkins, *National Security and the Due Process of Law*, 64 CURRENT LEGAL PROBS. 215, 217–223 (2011) (describing due process problems with regard to the regime of special advocates and closed material that had yet to be addressed by the Coalition Government).

¹²⁴ Helene Cooper, *Sagging Economy Draws Attention to War Spending*, N.Y. TIMES, June 22, 2011, at A1 (highlighting a bipartisan critique of war spending during a slow economic recovery, and quoting 2012 Republican presidential candidate Jon M. Huntsman, Jr. as noting that national security can be maintained without the level of expense being incurred by the United States).

¹²⁵ See John Mueller & Mark G. Stewart, *Does the United States Spend Too Much on Homeland Security*, SLATE (Sept. 7, 2011), available at <http://www.slate.com/id/2303167/> (noting that the increased cost of homeland security had totaled over one trillion dollars since 2001, and that recommendations by Government Accountability Office, the 9/11 Commission and other sources to institute a rigorous cost-benefit analysis regarding homeland security spending had been largely ignored).

¹²⁶ Fiscal austerity can, in the extreme, lead to measures such as mass detention in the name of efficiency. However, assuming that the “tolerant values” articulated by Sen still have sway in society, such a result in the name of pure fiscal austerity seems unlikely. SEN, THE IDEA OF JUSTICE, *supra* note 21, at 352.

4. Appealing to Libertarian interests

The 2010 success of libertarian Rand Paul's U.S. Senate campaign and the success of several "Tea Party" congressional candidates exemplify the strength of libertarian interests in supporting measures that curtail government spending and the reach of government into private lives, even in the areas of national security and surveillance powers. Since the 2010 elections, several left-right congressional coalitions have attempted (largely unsuccessfully) to curb national security measures out of concern for civil rights and for preservation of liberty interests. For example, in early 2011, amendments to the Patriot Act were delayed briefly due to a left-right objection to the broad surveillance powers accorded to the government.¹²⁷ In May 2012, a momentary left-right coalition emerged to attempt to limit provisions of the National Defense Authorization Act of 2012 that allowed for the indefinite detention without charge or trial for those apprehended on U.S. soil.¹²⁸ Ultimately, both of these efforts failed, largely based on accusations that lawmakers who supported these limitations were "coddling terrorists."¹²⁹

A similar dynamic occurred in the United Kingdom in 2008, when libertarian-leaning Conservatives and Liberal Democrats opposed proposed expansions of the right to detain individuals without charge.¹³⁰ Nonetheless, proposed legislative changes promoted by civil libertarians were largely rejected based on the strength of the center-right political consensus.¹³¹

Although these efforts failed, there is still some value in considering interest convergence theory with regard to libertarian groups. Because libertarian and conservative interests that promote protection of individual rights include the protection of gun ownership rights, libertarians have expressed concern that gun-owning Americans will find their rights hemmed by antiterrorism measures. Despite the Department of Homeland

¹²⁷ See Charlie Savage, *Patriot Act Battle Could Hinder Investigators*, N.Y. TIMES, May 25, 2011, at A18, available at http://www.nytimes.com/2011/05/26/us/politics/26patriot.html?_r=0.

¹²⁸ Jonathan Weisman, *House Vote Upholds Indefinite Detention of Terror Suspects*, N.Y. TIMES, May 19, 2012, available at <http://www.nytimes.com/2012/05/19/us/politics/house-votes-to-preserve-a-power-of-indefinite-detention.html>.

¹²⁹ *Id.*

¹³⁰ See Pantazis & Pemberton, *supra* note 41, at 654.

¹³¹ *Id.*

Security reporting on the dangerousness of right-wing extremism within the United States,¹³² libertarians have attempted to curtail the applicability of lone wolf provisions of the Patriot Act possibly applying to right-wing gun owners.¹³³ This clearly gives rise to an opportunity for left-right coalition-building.

A modern example of this kind of convergence involving gun ownership rights can be found in the amicus briefs of *United States v. Jones*, recently decided by the United States Supreme Court.¹³⁴ *Jones* raised the issue of whether the attachment by law enforcement of a GPS tracking device to a vehicle for a one-month period constitutes a search such that Fourth Amendment protections attach to the surveillance of the vehicle.¹³⁵ Although *Jones* involved the issue of cocaine trafficking, the government, defendants, and amici curiae were fully cognizant of the potentially broad implications of this case with regard to counterterrorism law and policy.

The government, in its writ petition, argued that to foreclose warrantless GPS surveillance would detrimentally affect counterterrorism operations.¹³⁶ The appellants, on the other hand, raised the specter that to allow such surveillance would lead to “mass, suspicionless GPS monitoring” within the United States.¹³⁷ Both of the primary briefs focused on the traditional Fourth Amendment concerns—the tension between privacy rights and civil liberties of individuals on the one hand, and the ability of law enforcement to effectively investigate illegal activity on the other.

¹³² See generally U.S. DEP’T OF HOMELAND SECURITY, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (2009), available at <http://www.fas.org/irp/eprint/rightwing.pdf>.

¹³³ Protecting gun ownership rights continues to be a priority for vast majorities of staunch conservatives and libertarians in the United States. PEW POLITICAL TYPOLOGY, *supra* note 34, at 89 (finding that 77% of libertarians and 86% of staunch conservatives find the protection of gun ownership to be important).

¹³⁴ *United States v. Jones*, 132 S. Ct. 945 (2012).

¹³⁵ *Id.* at 946–47 (2012).

¹³⁶ Petition for Writ of Certiorari at 24, certiorari, *Jones*, 132 S. Ct. 945 (2012) (No. 10-1259) (arguing that the D.C. Circuit decision “prevents law enforcement officers from using GPS devices in an effort to gather information to establish probable cause, which will seriously impede the government’s ability to investigate leads and tips on drug trafficking, terrorism, and other crimes.”).

¹³⁷ Brief in Opposition to Petition for Writ of Certiorari at 19, *Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).

The amicus brief filed by the Council on American-Islamic Relations (CAIR) on behalf of Jones likewise focused on Fourth and First Amendment concerns, noting that Muslims have borne the disparate impact of law enforcement's warrantless attachment of GPS tracking devices to vehicles.¹³⁸ Further, CAIR argued that this disparate impact leads to a chilling effect on the religious expression, associational rights and speech of Muslims in the United States, constituting a First Amendment violation.¹³⁹

The amicus brief filed by the Gun Owners Association of America, Inc. ("Gun Owners Association"),¹⁴⁰ however, offers a very different take on the nature of the opposition to government surveillance. The Gun Owners Association supported the Government's petition for a writ of certiorari, but for the purpose of encouraging the Court to rethink its Fourth Amendment jurisprudence altogether and draw a harder line against warrantless surveillance conducted by law enforcement in all contexts, including counterterrorism surveillance.¹⁴¹ The Gun Owners Association argued that the Fourth Amendment jurisprudence predicated on a privacy interest is constitutionally unsound,¹⁴² and advocated, based on the recent gun rights decision in *District of Columbia v. Heller*,¹⁴³ for an originalist approach to the Fourth Amendment that protects the property interests of individuals from unlawful search and seizure by the government.¹⁴⁴

This approach appeared to be singularly unconcerned with the rights of marginalized outsider groups, but the effect of agreeing with the argument here is the same: Extensive warrantless surveillance using GPS technology—no matter whether the subject is a gun owner, an alleged cocaine trafficker, or a person under suspicion of a terrorism connection—

¹³⁸ Brief of *Amicus Curiae* the Council on American-Islamic Relations in Support of the Respondent at 4, 10–12, *Jones*, 132 S. Ct. 945 (2012) (No. 10-1259) [hereinafter CAIR Brief].

¹³⁹ *Id.* at 13, 15–20.

¹⁴⁰ Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, *Jones*, 132 S. Ct. 945 (2012) (No. 10-1259) [hereinafter Gun Owners Amicus Brief] (in support of the petition for a writ of certiorari).

¹⁴¹ *See id.* at 3–5.

¹⁴² *Id.* at 14–18.

¹⁴³ *District of Columbia v. Heller*, 554 U.S. 570 (2008) (using an originalist and textualist interpretation of the Second Amendment to find an individual's constitutionally guaranteed right to possess and carry firearms for the purpose of self-defense).

¹⁴⁴ *See* Gun Owners Amicus Brief, *supra* note 142, at 7–10 (citing *Heller* and looking to the text of the Fourth Amendment to support a property-based approach).

would be prohibited under both a rights-based approach and a property-based approach.

These multifaceted approaches to limiting the power of the government to conduct warrantless surveillance proved successful in the context of *Jones*.¹⁴⁵ The majority opinion, authored by Justice Scalia, looked to originalist understandings of physical trespass and property rights under the Fourth Amendment to invalidate the government's surveillance of Jones, specifically leaving open the question of whether prolonged warrantless surveillance of a suspected terrorist that did not involve physical trespass would be found similarly unconstitutional.¹⁴⁶ The concurrences authored by Justices Sotomayor¹⁴⁷ and Alito focused on Fourth Amendment protections based on contemporary reasonable expectations of privacy by individuals.¹⁴⁸ These varied approaches ultimately added up to every member of the Court agreeing that the warrantless surveillance conducted in *Jones* was unconstitutional,¹⁴⁹ a decision that was heralded by groups on the right and left of the political spectrum.¹⁵⁰ This support across political boundaries

¹⁴⁵ See *United States v. Jones*, 132 S. Ct. 945 (2012).

¹⁴⁶ See *id.* at 954. The Court's opinion made no reference to *Heller* or the specific arguments raised in the Gun Owners Amicus Brief, but the property-based Fourth Amendment arguments made were largely similar. See *id.* at 949 (holding that there was "no doubt" that actions similar to the physical attachment of the GPS tracking device to Jones's property "would have been a 'search' within the meaning of the Fourth Amendment when it was adopted" (citing *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)).

¹⁴⁷ See *Jones*, at 954 (Sotomayor, J., concurring). Justice Sotomayor argued that warrantless surveillance that involves no physical trespass but mines and stores a large volume of data may still be subject to classification as a "search" for Fourth Amendment purposes. *Id.* She noted that such surveillance "chills associational and expressive freedoms," and "is susceptible to [government] abuse," particularly when such surveillance can disclose a range of private data, including "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." *Id.* at 955–56 (quoting *People v. Weaver*, 12 N.Y. 3d 433, 441–42 (2009) (internal quotations omitted)).

¹⁴⁸ See *id.* at 962–63 (Alito, J., concurring). Justice Alito would evaluate Fourth Amendment claims based on the reasonable expectation of privacy of individuals, taking into account the changing nature of this expectation as technological advances occur. See *id.*

¹⁴⁹ Justice Alito notes that legislation that curtails warrantless surveillance may be the best action to deal with the questions left open by *Jones*, but notes that such legislation does not seem to have materialized at the state or federal level. See *id.* at 964.

¹⁵⁰ See, e.g., Ategh Khaki, *Supreme Court Rules Government Violated Privacy Rights in GPS Tracking Case*, ACLU, (Jan. 23 2012), <http://www.aclu.org/blog/technology-and-liberty/supreme-court-rules-government-violated-privacy-rights-gps-tracking-case> (discussing the ongoing

speaks to the possibility of using interest convergence to garner legislative support for such measures.

5. When Measures Affect Insider Groups

The majority population is more likely to accept the use of oppressive or intrusive national security measures so long as the effects of those measures do not impinge on the rights and privileges of the majority population,¹⁵¹ but instead are limited to outsider groups whose welfare is of diminished concern to majority groups.¹⁵²

struggle for judicial recognition of a broad range of privacy rights); Jim Harper, *U.S. v. Jones: A Big Privacy Win*, THE CATO INSTITUTE (Jan. 23, 2012), <http://www.cato-at-liberty.org/u-s-v-jones-a-big-privacy-win/> (lauding the Court's focus on a property-based Fourth Amendment protection against warrantless surveillance).

¹⁵¹ See Cole, *Enemy Aliens*, *supra* note 2, at 988–89 (noting that U.S. citizens are complacent about the deprivation of liberty because of explicit or implicit assurances that citizens' rights will be left intact). Government rhetoric has fostered this dichotomy since soon after the September 11 terrorist attacks. In late 2001, then-Attorney General John Ashcroft argued that civil liberties-based critiques of the post-September 11 legal framework were trying to “aid terrorists” “erode our national unity,” and “scare peace-loving people.” *Department of Justice Oversight, Preserving Our Freedom While Defending Against Terrorism, Hearing Before the S. Jud. Comm.*, 107th Cong. 313 (2001) (statement of John Ashcroft, Att’y Gen. of the United States). In setting up this dichotomy, Ashcroft is clearly implying that the vast majority of Americans are not interested in the preservation of civil liberties, presumably because they are not personally and significantly affected by the national security state.

¹⁵² The differential reaction of those within a societal majority to policies that affect outsider groups has been well-documented. See Keith Aoki, *Foreignness and Asian American Identities: Yellowface, World War II Propaganda and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 5–6 (1996) (discussing the disparate legal, societal and media treatment of Asian Americans); Muneer I. Ahmad, *A Rage Shared By Law: Post September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1262 (2004) (noting that “hate violence against Arabs, Muslims, and South Asians...[received] short shrift in governmental, media or public attention”). Some have couched this perspective on national security laws as part of postcolonial theory. See e.g., Nick J. Sciullo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561, 575 (2011). For a finding that hate crimes toward Muslims and Arabs increased dramatically since September 11 highlights the perceived “otherness” of these groups see William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1234–1240 (2004) (documenting and analyzing the surge in post-September 11 hate crimes). Adrien K. Wing has thoughtfully analyzed how the current “otherness” of Arabs and Muslims is part of a long trend in U.S. history of marginalizing particular groups depending on public sentiment at the time. See 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, 721, 728–29 (2003).

However, at the point that the mainstream public finds that it is impacted negatively by the creep of national security measures on constitutionally guaranteed freedoms and liberties, opposition tends to grow dramatically.¹⁵³ This dynamic has been most pronounced in the context of concerns over privacy rights and the fear of Fourth Amendment erosions affecting the majority of Americans.¹⁵⁴

For example, the public backlash against Transportation Security Administration (TSA) parameters of airport screening searches¹⁵⁵ was extreme, involving intense media scrutiny as to whether body scanners and invasive pat-down searches were necessary to enhance airport security.¹⁵⁶ The Department of Homeland Security and TSA moved relatively quickly to make the searches less onerous and invasive,¹⁵⁷ to some extent reflecting the power of constituents when they also had to experience the universally applicable intrusive body scans and pat downs.¹⁵⁸

¹⁵³ See PEW POLITICAL TYPOLOGY, *supra* note 34, at 96 (finding that 68% of those surveyed opined that Americans should not have to forgo privacy for national security reasons, and that this belief was relatively consistent across all political groups).

¹⁵⁴ See David K. Shipler, Op-Ed., *Free to Search and Seize*, N.Y. TIMES, June 23, 2011, at A21. Shipler argues that the public should be concerned about precedent that is broad enough to encompass intrusions on the general public's Fourth Amendment rights, noting that "if a black man in a poor neighborhood can be stopped and frisked with minimal reason, so can a white woman in a rich neighborhood," and observing that "American history is replete with assaults on liberties that first target foreigners, minorities and those on the political margins, then spread toward the mainstream." *Id.* He also attempts to galvanize the "mainstream" by noting that currently, the F.B.I. is using some of its counterterrorism tools to investigate peace activists and labor leaders in the Midwest. *See id.*

¹⁵⁵ See John Pistole, Adm'r, Transp. Sec. Admin., Remarks to AVSEC World 2010 (Nov. 2, 2010) (transcript available at http://www.tsa.gov/press/speeches/110210_avsec_world_2010.shtm) (remarking about the new technological advances with body scanners).

¹⁵⁶ See Derek Kravitz, *Airport 'pat-downs' cause growing passenger backlash*, WASH. POST, Nov. 13, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111206580.html>.

¹⁵⁷ See Susan Stellin, *Screening Still a Pain at Airports, Fliers Say*, N.Y. TIMES, Nov. 21, 2011, at B1, available at http://www.nytimes.com/2011/11/22/business/airport-screening-is-still-a-pain-fliers-complain.html?pagewanted=all&_r=0 (noting the new, less invasive, security policies implemented by TSA).

¹⁵⁸ See Pico Iyer, *We're All Terror Suspects Now*, GUARDIAN NEWSPAPER, Aug. 28, 2011, <http://www.guardian.co.uk/world/2011/aug/28/we-all-terror-suspects-now> (describing the irritation of white Westerners at the presumption of guilt that accompanies the heightened security at airports and other high-value security sites).

This indignant response yielded rights-protective results at the legislative level as well. Bipartisan efforts at curbing intrusive TSA search methods reflected the concern of politicians and their constituents that too many members of the public are being affected by counterterrorism measures that may have been more acceptable if applied only to outsiders.¹⁵⁹

Likewise, widespread counterterrorism-oriented data mining efforts by the government that encompass broad swaths of the U.S. public are viewed as problematic by libertarians and others concerned with privacy rights. However, others have posited that such efforts, if targeted only at a discrete minority population, would be met with significantly less resistance from the mainstream population.¹⁶⁰ Unease surrounding broad surveillance authority is not limited to the United States, and calls for reform of broad surveillance measures in the United Kingdom suggests that the impact on majority groups may translate into support for civil libertarian efforts that curtail such authority.¹⁶¹

III. Rights Protection and the Limitations of Interest Convergence

When reflecting on the phenomenon of what this Article calls interest convergence, Professor Bell concluded with some disappointment that civil rights groups like the NAACP allowed the fight for racial justice to be compromised and perhaps co-opted by a government focused primarily on foreign policy and anti-communist concerns.¹⁶² I share Bell's disappointment with the unwillingness to focus fully on rights protection as the priority and purpose of groups like the NAACP. Yet it is easy to understand the NAACP's motivation in aligning its work with the

¹⁵⁹ See, e.g., Aircraft Passenger Whole-Body Imaging Limitation Act of 2011, H.R. 1279, 112th Cong. (1st Sess. 2011) (bipartisan proposal to establish limitations on the advanced imaging technology used for airport security screening).

¹⁶⁰ See Tal Z. Zarsky, *Governmental Data Mining and its Alternatives*, 116 PENN. ST. L. REV. 285, 327–28 (2012).

¹⁶¹ See Pantazis & Pemberton, *supra* note 41, at 664–65.

¹⁶² See Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 509–10 (2008) (reviewing RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007)) (lamenting the NAACP's refusal to provide legal assistance to individuals such as Paul Robeson and W.E.B. Dubois, who were perceived as being "too involved with far-left groups," that intimated potential communist ties).

government's anti-communist platform: Even a limited victory in the realm of racial justice would be achieved only through the garnering of some measure of political and popular support; this support was highly vulnerable to attacks based on perceived communist sympathies; and without the support, courts were unlikely to support civil rights measures, no matter how important racial justice was.¹⁶³ The NAACP was formulating strategy based on the realpolitik nature of garnering political support. Likewise, in the post-September 11 landscape in which political support for those marginalized by the national security state is hard to marshal, focusing on specific issues where interest convergence allows for the achievement of political victories without the vulnerability of being labeled "soft on terror" is a matter of negotiating otherwise precarious political realities.¹⁶⁴

The fact that Americans feel strongly that they should not have to sacrifice privacy and civil liberties for the sake of national security¹⁶⁵ suggests possible avenues for political consensus-building that would likely also positively impact the civil liberties of marginalized groups.

Yet leveraging interest convergence to realize rights-protective gains has serious limitations. Bell recognized the natural limitation of interest convergence, namely, when the interests of the majority diverge from that of the outsider group, then the majority will no longer spend its political capital on a measure that happens to be rights-protective. Bell argued in the education context that truly effective desegregation remedies were unavailable in the line of school segregation cases following *Brown* because whites eventually believed that they may suffer substantial negative effects, or may not inure any benefits, from large-scale desegregation measures.¹⁶⁶

¹⁶³ See generally Jacobi, *supra* note 13 (applying positive political theory to the decision-making of courts).

¹⁶⁴ Amartya Sen's theory of justice predicated on guiding "reasoned choice of policies, strategies or institutions" apart from identifying "fully just social arrangements" is particularly useful here, given that agreement—legal, moral or political—on what constitutes a fully just social arrangement is not possible for those coming from different philosophies and perspectives. SEN, *supra* note 21, at 15.

¹⁶⁵ See PEW POLITICAL TYPOLOGY, *supra* note 34, at 96. The authors of the Pew study noted that this consensus was one of the very few areas of convergence across the political spectrum. *Id.*

¹⁶⁶ Bell, *Interest Convergence*, *supra* note 79, at 526–33. Examples of the Supreme Court's narrowing view of the constitutional obligation to desegregate schools began in the 1970s, almost two decades after *Brown* and the lack of meaningful desegregation in many school districts. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that multi-district

In other words, at the point at which the cost to the white majority of desegregation outweighed its benefits, desegregation no longer became a priority. As such, the promise of integration—as opposed to the mere removal of *de jure* segregation—contemplated in *Brown* was never achieved.¹⁶⁷ Extrapolating from Bell's point, certain issues of social justice—whether in the realm of civil rights, education or national security policy-making—that are not ripe for interest convergence but raise serious rights concerns may never be addressed, even in a limited fashion.¹⁶⁸

A second objection to using interest convergence stems from the use of utilitarian justifications instead of basing reform efforts squarely on justice, civil rights and human dignity. In the context of the African-American civil rights movement of the mid-twentieth century, Martin Luther King, Jr. argued that such pragmatism corrupted the search for justice as the basis of reform efforts.¹⁶⁹ This loss of overt moral justification is ameliorated by the fact that the larger goal of promoting rights-protective legislation is a morally laudable effort that may only be possible through interest convergence.¹⁷⁰

desegregation plans were unconstitutional unless a showing of intentional segregation were made in each district).

¹⁶⁷ See Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 548 (1994) (arguing that *Brown* accomplished relatively little in terms of reducing *de facto* segregation).

¹⁶⁸ See, e.g., Fed. Bureau of Investigation, *Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Arrested Inside the United States*, N.Y. TIMES (Mar. 25, 2011), available at <http://www.nytimes.com/2011/03/25/us/25miranda-text.html> (providing an internal memorandum from the F.B.I. that recommends withholding Miranda rights from terrorism suspects). Although the larger criminal defense bar may have had strong objections to the chipping away of Miranda rights if the FBI policy applied to a broader group of suspects, limitation of the policy to terrorism suspects has defused strong objections from the non-terrorism defense bar.

¹⁶⁹ See MARTIN LUTHER KING, JR., LETTER FROM A BIRMINGHAM JAIL (1963). King argued against those who counseled him toward a less direct approach in demanding civil rights, noting that “[he] who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, ‘I agree with you in the goal you seek, but I cannot agree with your methods of direct action’; who paternalistically believes he can set the timetable for another man’s freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a ‘more convenient season’” are a threat to the concepts of justice and freedom which ought to be at the heart of reform efforts for more rights. *Id.*

¹⁷⁰ See Cynthia Lee, *Cultural Convergence: Interest Convergence Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 921 (2007). Lee considers Herbert Wechsler’s *Toward Neutral Principles of*

Additionally, even the existence of interest convergence may not be sufficient to compel legislative movement that includes a rights-protective effect. Politicians will occasionally choose to forego action on a desirable rights protective measure in the hopes that judicial review will bring about the same result (albeit several years later) but without the political cost being borne by individual representatives and senators.¹⁷¹ In such cases, legislators may be gambling on the courts as a backstop, without knowing if a rights-denigrating measure will be found unconstitutional or otherwise illegal.¹⁷² This reliance on the courts is sometimes ill-founded, since judges have expressed reticence in second-guessing the political branches of government in many security-related matters.¹⁷³

Constitutional Law, 73 HARV. L. REV. 1, 22–23 (1959), in which Wechsler argues that the Supreme Court desegregation cases following *Brown v. Board of Education*—in which the Supreme Court struck down numerous segregation statutes in brief *per curiam* decisions—were not apparently decided on neutral principles of constitutional law. Derrick Bell’s critique of Wechsler was based on Bell’s opinion that post-*Brown* desegregation jurisprudence could have been decided on the neutral principle of racial equality before the law, but ultimately was decided based on interest convergence. See Lee at 921. In this sense, Bell is arguing that the morally preferable outcome of desegregation did occur, even if by suboptimal means.

¹⁷¹ See Kate Zernike, *Top Republicans Reach an Accord on Detainee Bill*, N.Y. TIMES (Sept. 22, 2006), available at <http://www.nytimes.com/2006/09/22/washington/22detain.html>.

¹⁷² Samuel Issacharoff and Richard Pildes have argued that courts often consider and decide cases using a highly flawed “rights-versus-state-interest” formula, which lacks a consistent theoretical framework from which the courts can articulate a reason that they are intervening with legislative decision-making. See Samuel Issacharoff & Richard H. Pildes, *supra* note 19, at 646. Following this line of reasoning, legislators cannot assume that the courts are impartial to partisan political pressures when determining where on the rights/state interest spectrum to locate the constitutionality of a particular measure. Hence, an assumption that the courts will be more rights-protective on a specific issue or piece of legislation than the democratic process may be unwarranted and a matter of wishful thinking for those politicians wanting to protect rights but lacking the political will or support to do so.

¹⁷³ See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1091–92 (9th Cir. Cal. 2010) (opining that if redress for victims of torture cannot be provided by the courts, redress could still be provided by Congress). In India, the judiciary has opined that protection of fundamental rights is a core mission of the courts. See *A.K. Gopalan v. Union of India*, AIR 1950 SC 27, at 34 (opinion of Kania, C.J.); see also SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA* 13 (2011) (discussing the judiciary’s commitment to the basic structure doctrine). Nonetheless, courts often view their own role as limited when national security matters are at stake. See Shylashri Shankar, *SCALING JUSTICE: INDIA’S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS* 61–71, 90–91 (2009) (arguing that whereas social rights are considered an area in which the judiciary is expected

Finally, issue-specific coalition building may not yield the exact result desired by at least one group involved in the coalition. For example, although the desire for fiscal restraint and to scale back intrusive surveillance created a moment of convergence in the Tory-Lib Dem coalition, members of each party and much of the public appeared dissatisfied with the resulting fiscal austerity measures.

Conclusion

The lack of moral compass guiding policymakers when it comes to fundamental questions of justice and fairness can be discouraging to activists seeking better protection for civil rights and liberties. Yet using national security interest convergence can do two important things: First, it can serve as a positive analytical tool to better understand whether and how rights-protective policies may be effectuated. Second, as a normative matter, it can offer some insight as to what types of issue-specific coalition-building can be used to yield small-scale results that are rights protective and benefit outsider groups by hemming in certain aspects of the national security state. This is particularly important when the national security framework has evolved in a haphazard way that reflects political survivalist thinking on the part of Congress and the President.¹⁷⁴

Derrick Bell posited that many measures of racial justice for African Americans were (and are) a matter of blacks being the third-party beneficiaries of government actions meant primarily to effect a different result. The Emancipation Proclamation helped the Union recruit freed slaves as soldiers and disrupt the Confederate work force; the post-Civil War amendments solidified political power for the Republican Party; *Brown v. Board of Education* buttressed U.S. efforts to improve its international standing

to take an active role, security and secrecy are areas in which the constitutional framers and Parliament have purposefully curtailed the judiciary's ability to curb executive power).

¹⁷⁴ Kent Roach describes the U.S. national security policy mash-up of the laws of war and criminal justice system in the post-September 11 era as "largely unsuccessful," since "[the policymakers] have left the bitter impression of double standards that allow the state to cherry-pick those aspects of the law of war and crime that best facilitates [their] interests and powers. Such an approach is so casual when it comes to traditional legal categories that it smacks of extra-legalism." KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM* 165 (2011).

and foreign policy during the Cold War.¹⁷⁵ Certainly this list is not exhaustive when it comes to providing a framework for the success of racial justice efforts for African Americans. The same principles can be applied to finding measures of justice for disparately impacted communities who have been marginalized by national security laws and policies over the last decade.¹⁷⁶ By embracing the realities of realist political theory and using them to create atypical coalitions around specific issues, national security interest convergence resulting in genuine rights protection becomes a better possibility.

¹⁷⁵ DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 71 (2004). Certainly this historical account is not without opposition. Bruce Ackerman categorizes the political momentum behind the post-Civil War amendments as legislators acting in a statesmen-like “higher lawmaking” capacity. BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 207 (1998).

¹⁷⁶ Two decades ago, Derrick Bell argued that:

The availability of constitutional protection for the society’s disadvantaged—blacks, women, the poor, homosexuals, and the mentally and physically disabled—is not actually determined by the quantity of harm alleged or of liability proved. Social reform remedies, judicial and legislative, are instead the outward manifestations of unspoken and perhaps unconscious policy conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by the middle and upper classes.

Derrick Bell, “*Victims as Heroes: A Minority Perspective on Constitutional Law*,” in *THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES* 176–77 (A.E. Dick Howard ed., 1992). Certainly the same can be said for the application of realist theory to national security measures.