## Advantage Answers

### Poverty Answers (Front Line)

#### (--) Their poverty impact assumes worldwide poverty—not just poverty in the US.

#### (--) They won’t create jobs for the poor—the poor have given up on the job market:

**Associated Press, 7/22/2012** (“Poverty in United States Soars to Levels Not Seen Since Since 1960s,”

<http://latino.foxnews.com/latino/news/2012/07/22/poverty-in-united-states-soars-to-levels-not-since-since-160s/>, Accessed 7/27/2012, rwg)

Poverty is spreading at record levels across many groups, from underemployed workers and suburban families to the poorest poor. The official poverty rate among Latinos was 26.7 percent in 2010, according to the Pew Hispanic Center. That number places Latinos behind the country's largest ethnic groups, with the exception of African Americans, 27.5 percent of whom were below the poverty line in 2010. More discouraged workers are giving up on the job market, leaving them vulnerable as unemployment aid begins to run out. Suburbs are seeing increases in poverty, including in such political battlegrounds as Colorado, Florida and Nevada, where voters are coping with a new norm of living hand to mouth.

#### (--) Any solvency is long-term at best—they have to build the transportation infrastructure and then the poor have to find jobs.

#### (--) Multiple alt causes to poverty they don’t solve:

**Associated Press, 7/22/2012** (“Poverty in United States Soars to Levels Not Seen Since Since 1960s,”

<http://latino.foxnews.com/latino/news/2012/07/22/poverty-in-united-states-soars-to-levels-not-since-since-160s/>, Accessed 7/27/2012, rwg)

In an election year dominated by discussion of the middle class, Fritz's case highlights a dim reality for the growing group in poverty. Millions could fall through the cracks as government aid from unemployment insurance, Medicaid, welfare and food stamps diminishes. "The issues aren't just with public benefits. We have some deep problems in the economy," said Peter Edelman, director of the Georgetown Center on Poverty, Inequality and Public Policy. He pointed to the recent recession but also longer-term changes in the economy such as globalization, automation, outsourcing, immigration, and less unionization that have pushed median household income lower. Even after strong economic growth in the 1990s, poverty never fell below a 1973 low of 11.1 percent. That low point came after President Lyndon Johnson's war on poverty, launched in 1964, created Medicaid, Medicare and other social welfare programs.

#### Disad turns the case—war causes poverty—not the other way around.

Douglas **Bulloch**(IR Department, London School of Economics and Political Science) Millennium - Journal of International Studies May **2008** vol. 36 no. 3 575-595

 But the idea that poverty and peace are directly related presupposes that wealth inequalities are – in and of themselves – unjust, and that the solution to the problem of war is to alleviate the injustice that inspires conflict, namely poverty. However, it also suggests **that poverty is a legitimate inspiration for violence, otherwise there would be no reason to alleviate it in the interests of peace**. It has become such a commonplace to suggest that poverty and conflict are linked that it rarely suffers any examination. **To suggest that war causes poverty is to utter an obvious truth, but to suggest the opposite is – on reflection – quite hard to believe**. **War is an expensive business in the twenty-first century,** even asymmetrically. **And just to examine Bangladesh for a moment is enough at least to raise the question concerning the actual connection between peace and poverty. The government of Bangladesh is a threat only to itse**lf, and despite 30 years of the Grameen Bank, **Bangladesh remains in a state of incipient civil strife**. So although Muhammad Yunus should be applauded for his work in demonstrating the efficacy of micro-credit strategies in a context of development**, it is not at all clear that this has anything to do with resolving the social and political crisis in Bangladesh, nor is it clear that this has anything to do with resolving the problem of peace and war in our times.** It does speak to the Western liberal mindset – as Geir Lundestad acknowledges – but then perhaps this exposes the extent to which the Peace Prize itself has simply become an award that reflects a degree of Western liberal wish-fulfilment. It is perhaps comforting to believe that poverty causes violence, as it serves to endorse a particular kind of concern for the developing world that in turn regards all problems as fundamentally economic rather than deeply – and potentially radically – political.

### Poverty Answers--Extensions

#### The poor in America aren’t facing severe hardship—poverty definition is way too high:

Robert **Rector and** Rachel **Sheffield,** 7/19/20**11** (Senior Research Fellow in the Domestic Policy Studies Department & Research Assistant in the Richard and Helen DeVos Center for Religion and Civil Society, at The Heritage Foundation, “Air Conditioning, Cable TV, and an Xbox: What is Poverty in the United States Today?” Accessed 7/27/2012 at [http://www.heritage.org/research/reports/2011/07/what-is-poverty?query=Air+Conditioning +Cable+TV+and+an+Xbox:+What+is+Poverty+in+the+United+States+Today](http://www.heritage.org/research/reports/2011/07/what-is-poverty?query=Air+Conditioning%20+Cable+TV+and+an+Xbox:+What+is+Poverty+in+the+United+States+Today), rwg)

Abstract: For decades, the U.S. Census Bureau has reported that over 30 million Americans were living in “poverty,” but the bureau’s definition of poverty differs widely from that held by most Americans. In fact, other government surveys show that most of the persons whom the government defines as “in poverty” are not poor in any ordinary sense of the term. The overwhelming majority of the poor have air conditioning, cable TV, and a host of other modern amenities. They are well housed, have an adequate and reasonably steady supply of food, and have met their other basic needs, including medical care. Some poor Americans do experience significant hardships, including temporary food shortages or inadequate housing, but these individuals are a minority within the overall poverty population. Poverty remains an issue of serious social concern, but accurate information about that problem is essential in crafting wise public policy. Exaggeration and misinformation about poverty obscure the nature, extent, and causes of real material deprivation, thereby hampering the development of well-targeted, effective programs to reduce the problem.

#### Poor in America are actually quite well off:

Robert **Rector and** Rachel **Sheffield,** 7/19/20**11** (Senior Research Fellow in the Domestic Policy Studies Department & Research Assistant in the Richard and Helen DeVos Center for Religion and Civil Society, at The Heritage Foundation, “Air Conditioning, Cable TV, and an Xbox: What is Poverty in the United States Today?” Accessed 7/27/2012 at [http://www.heritage.org/research/reports/2011/07/what-is-poverty?query=Air+Conditioning +Cable+TV+and+an+Xbox:+What+is+Poverty+in+the+United+States+Today](http://www.heritage.org/research/reports/2011/07/what-is-poverty?query=Air+Conditioning%20+Cable+TV+and+an+Xbox:+What+is+Poverty+in+the+United+States+Today), rwg)

Yet if poverty means lacking nutritious food, adequate warm housing, and clothing for a family, relatively few of the more than 30 million people identified as being “in poverty” by the Census Bureau could be characterized as poor.[2] While material hardship definitely exists in the United States, it is restricted in scope and severity. The average poor person, as defined by the government, has a living standard far higher than the public imagines.

#### The poor in America don’t suffer from hunger:

Robert **Rector and** Rachel **Sheffield,** 7/19/20**11** (Senior Research Fellow in the Domestic Policy Studies Department & Research Assistant in the Richard and Helen DeVos Center for Religion and Civil Society, at The Heritage Foundation, “Air Conditioning, Cable TV, and an Xbox: What is Poverty in the United States Today?” Accessed 7/27/2012 at [http://www.heritage.org/research/reports/2011/07/what-is-poverty?query=Air+Conditioning +Cable+TV+and+an+Xbox:+What+is+Poverty+in+the+United+States+Today](http://www.heritage.org/research/reports/2011/07/what-is-poverty?query=Air+Conditioning%20+Cable+TV+and+an+Xbox:+What+is+Poverty+in+the+United+States+Today), rwg)

On average, the poor are well nourished. The average consumption of protein, vitamins, and minerals is virtually the same for poor and middle-class children. In most cases, it is well above recommended norms. Poor children actually consume more meat than higher-income children consume, and their protein intake averages 100 percent above recommended levels. In fact, most poor children are super-nourished and grow up to be, on average, one inch taller and 10 pounds heavier than the GIs who stormed the beaches of Normandy in World War II.[24]

### Racism Answers (Front Line)

#### Studies prove: Court cannot influence social change.

Richard H. **Fallon**, 20**05** Jr., Professor of Constitutional Law, Harvard Law School, April **2005**

[“Legitimacy and the Constitution,” <http://web.lexis-nexis.com/universe/document?_m=be00e4b6d189ddb647d9365044a5571c&_docnum=1&wchp=dGLbVzb-zSkVb&_md5=7105aae1669b5f945e6a9318b42fc69d>, rwg]

Second, even though indicators suggest that the Court's institutional legitimacy is quite broad and robust, this legitimacy apparently gives the Court relatively little ability to sway public views about the constitutional validity of specific laws and policies. In work that deeply influenced constitutional thinkers, Professors Robert Dahl, Charles Black, and Alexander Bickel all maintained that the Court possesses what Bickel termed a "mystic" capacity to "legitimate" laws or policies in the public mind. Subsequent studies indicate that **most of the public knows too little** about Supreme Court decisions, and that those who are well-informed **tend to be too difficult to sway**, for the Court to exert the influence that Dahl, Black, and Bickel all postulated.
**(--) Extinction trumps their impact**

Sissela Bok, 1988 (Professor of Philosophy @ Brandeis, Applied Ethics and Ethical Theory, Ed. By David Rosenthal and Fudlou Shehadi)

The same argument can be made for Kant’s other formulations of the Categorical Imperative: “So act as to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means”; and “So act as if you were always through actions a law-making member in a universal Kingdom of Ends.” No one with a concern for humanity could consistently will to risk eliminating humanity in the person of ~~him~~self and every other or to risk the death of all members in a universal Kingdom of Ends for the sake of justice. To risk their collective death for the sake of following one’s conscience would be, as Rawls said, “irrational, crazy.” And to say that one did not intend such a catastrophe, but that one merely failed to stop other persons from bringing it about would be beside the point when the end of the world was at stake. For although it is true that we cannot be held responsible for most of the wrongs that others commit, the Latin maxim presents a case where we would have to take such a responsibility seriously—perhaps to the point of deceiving, bribing, even killing an innocent person, in order that the world not perish.

#### The Courts cannot bring about social change-their authoritative legitimacy proves inadequate.

Richard H. **Fallon**, 20**05** Jr., Professor of Constitutional Law, Harvard Law School, April **2005**

[“Legitimacy and the Constitution,” <http://web.lexis-nexis.com/universe/document?_m=be00e4b6d189ddb647d9365044a5571c&_docnum=1&wchp=dGLbVzb-zSkVb&_md5=7105aae1669b5f945e6a9318b42fc69d>, rwg]

Today, nearly all Supreme Court rulings possess a high degree of authoritative legitimacy, whether in the strong or the weak sense, at least with respect to the parties before the Court. In plainer terms, the parties almost always obey the Court's rulings. No logical necessity undergirds this state of affairs. In the past, General Andrew Jackson famously defied a judicial ruling. So did President Abraham Lincoln. To measure the authoritative legitimacy of judicial rulings, however, it does not suffice to look at the parties' responses. The effect on other officials and the broader public also matters. In a well-known and provocative book, Gerald Rosenberg maintains that such celebrated Supreme Court decisions as Brown v. Board of Education and Roe v. Wade proved largely ineffectual as engines of social change. Judicial declarations may not achieve much, he argues, unless other officials implement the Court's message or citizens litigate on a national scale.

#### Courts cannot create social change: regional variations prevent:

Richard H. **Fallon**, 20**05** Jr., Professor of Constitutional Law, Harvard Law School, April **2005**

[“Legitimacy and the Constitution,” <http://web.lexis-nexis.com/universe/document?_m=be00e4b6d189ddb647d9365044a5571c&_docnum=1&wchp=dGLbVzb-zSkVb&_md5=7105aae1669b5f945e6a9318b42fc69d>, rwg]

Although critics have attacked both his methodology and his conclusions, Rosenberg raises important issues about the broader effects of court decisions. On a few points, the facts speak for themselves. Clearly the authoritative legitimacy of judicial decisions can be relative, rather than absolute. Regional variations also can occur. For at least a decade, Brown v. Board of Education met "massive resistance" through much of the South before sentiment hardened that recalcitrance should not be tolerated. Years and even decades after the Supreme Court had declared officially sponsored prayer in public schools to be unconstitutional, teacher-led prayers remained common in broad swaths of the country.

### Racism Answers (Extensions)

#### Court’s ability to bring about social reform is a myth: Court decisions merely reify existing hegemony:

Idit **Kostiner**, Jurisprudence and Social Policy Program, University of California, **2003**

[“Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change”, June, http://www.blackwell-synergy.com/doi/full/10.1111/1540-5893.3702006]

The law and society movement is often associated with questioning the assumptions of legal liberalism and exposing gaps between these assumptions and the operation of law in reality. One of the central assumptions of legal liberalism is the idea that marginalized groups, struggling for social justice, can rely on legal norms and tactics in attempting to promote social reform (Kalman 1996). A famous reaction against this assumption is Scheingold's work on The Politics of Rights (1974). According to Scheingold, the belief in the ability of law (and especially litigation) to bring about meaningful social change is "a myth." In reality, he argues, legal norms and tactics are closely linked to prevalent hegemonic political culture and are therefore highly limited in their capacity to promote significant social reform. Rejecting the "myth of rights" and adopting the more realistic understanding of "the politics of rights," Scheingold urges viewing rights as resources for political mobilization rather than as ends in themselves. Yet even through the lens of "the politics of rights," Scheingold's overall conclusion is rather skeptical with respect to the capacity of legal strategies to alter the balance of power in society and to bring about meaningful change.

#### Social change is a result of domestic and international developments, not individual court decisions

Mary L. **Dudziak**, Professor of Law and History at the University of Southern California Law School, June **2004** [“Brown as a cold war case,” http://www.historycooperative.org/journals/jah/91.1/dudziak.html

Although Brown is still held up as a high point in American legal history, the case ultimately came under assault. In a 2001 collection of essays in which prominent legal scholars rewrote the Court's opinion, Derrick Bell wrote a dissent, arguing that in Brown the Court overestimated the power of law to achieve social change and underestimated the pervasiveness of racism. In spite of criticism, Brown remains an icon, a symbol of the promise of law. Isolating Brown from its international context helps sustain an argument that what happened in Brown was accomplished by litigants, lawyers, and judges within the boundaries of the American legal system. Domesticating the case elevates the role of the legal system as an engine of progressive social change. Law was put to much good use during the civil rights era. But examining the broader forces producing legal change helps us see Brown's historical contingency. Brown was the product of converging domestic and international developments, rather than an inevitable product of legal progress.

#### Court can’t create social change; it’s out of touch with existing social realities

Justice Manuel Jose **Cepeda-Espinosa**, Supreme Court of Justice, **2004**, [Washington University Global Studies Law Review, “Judicial activism in a violent context: the origin, role, and context of the Colombian Supreme Court,” p. lexis]

However, internal disadvantages of the system, such as the justices' election scheme, the imprecise definition of the Supreme Court's functions, and the Court's frequent jurisdictional clashes with other public authorities, together with external factors, such as the Constitution's dim appeal to citizens' ordinary lives, the Supreme Court's controversial decisions striking down two constitutional reforms, several "emergency powers" decrees, and the scarce level of protection it granted to fundamental rights, eventually weakened support for this constitutional scheme of judicial review. These factors cumulatively triggered renovation. The situation was further enhanced by the very formalistic prevailing approach to legal issues. This in turn created a **deep gap between the Constitution and social realities and needs**. It was this gap that undermined the legitimacy of the whole system.

#### Studies prove: Supreme Court decisions don’t cause culture shifting:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

n194. See, e.g., supra note 183 (discussing numerous studies). Earlier studies generated even more skeptical results. See, e.g., David Adamany, Legitimacy, Realigning Elections, and the Supreme Court, 1973 Wis. L. Rev. 790, 807-08 (finding almost no evidence to support claims that Supreme Court rulings confer legitimacy); Larry R. Baas & Dan Thomas, The Supreme Court and Policy Legitimation: Experimental Tests, 12 Am. Pol. Q. 335, 353 (1984) (reporting findings **that cast "a long shadow of doubt** upon the claims advanced (or assumptions made) by many writers that judicial validation by the Supreme Court serves substantially to **enhance the public esteem** for otherwise controversial or unappealing policy prescriptions").

#### (---)Constitutional law is inherently indeterminate—their legal change provides no solvency:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

Third, among the features that mark the Constitution as only minimally morally legitimate is its **indeterminacy or contestability**. There is **widespread disagreement** about what kind of document the Constitution is and, accordingly, about how it should be interpreted. For example, some regard the Constitution as a document whose meaning was fixed by original historical understandings. n11 Others [\*1793] think it a "living" charter with an evolving meaning. n12 Nor do disagreements about the Constitution's nature reflect simple misunderstandings. Only because the Constitution can mean so many things to so many people does it enjoy widespread sociological acceptance.

#### (---)Supreme Court decisions don’t cause “culture shifting:”

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

Second, even though indicators suggest that the Court's institutional legitimacy is quite broad and robust, n186 this legitimacy apparently gives the Court **relatively little ability to sway public views** about [\*1830] the constitutional validity of specific laws and policies. n187 In work that deeply influenced constitutional thinkers, Professors Robert Dahl, n188 Charles Black, n189 and Alexander Bickel n190 all maintained that the Court possesses what Bickel termed a "mystic" n191 capacity to "legitimate" laws or policies in the public mind. n192 **Subsequent studies** indicate that most of the public **knows too little about Supreme Court decisions**, n193 and that those who are well-informed **tend to be too difficult to sway**, for the Court to exert the influence that Dahl, Black, and Bickel all postulated. n194

#### (---)Litigation alone can’t produce social change:

**Cho,** professor, DePaul University College of Law, 20**05** (Sumi, University of Pennsylvania Journal of Constitutional Law, February, 2005, 7 U. Pa. J. Const. L. 809; Lexis)

While I may not completely agree with Professor Klarman's revisionist interpretation of Brown, I fully agree with his insight that "litigation [\*820] without a social movement to support it cannot produce significant social change." n73 Having sketched how my argument is illustrated by the history of massive resistance to Brown, I would now turn to Bakke and what I refer to as the "passive resistance" response to the opinion.

#### Justices will interpret the law to favor the existing socioeconomic status quo:

Lawrence **Baum**, Department of Political Science, Ohio State University, June **2003**

[“The Supreme Court in American Politics,” http://arjournals.annualreviews.org/doi/full/10.1146/annurev.polisci.6.121901.085526;jsessionid=n1HzQqZJALRe]

The role of the courts in a democratic system depends not only on the extent of policy intervention but also on its content. Perhaps the most important aspect of its content is the allocation of gains and losses among segments of society. Judicial interventions on particular issues typically serve those who are unable to gain favorable policies on those issues elsewhere in government. To oversimplify, the primary beneficiaries of interventions in any period might fall into either of two broad classes. One is people and groups that are advantaged in the sense that they have high social and economic status, interests that seek redress from the courts at times when the other branches are relatively unfavorable to them. The other set of interests consists of disadvantaged people with little conventional political power, who seek to gain in the courts what they seldom could win in the other branches. The attitudinal and strategic models do not predict the success of these two classes directly. However, the logic of each might lead us to expect the Court to tilt in favor of advantaged interests. Most justices have come from families of high socioeconomic status, most have achieved financial success in their careers, and in those careers most have associated chiefly with people of relatively high status. Thus their policy preferences might tend to reflect the interests of advantaged groups. Further, since those groups generally have the greatest political power, they would seem to be in the best position to affect the calculations of justices who take the Court's political environment into account.

#### The Court is politically biased-favoring advantaged groups.

Lawrence **Baum**, Department of Political Science, Ohio State University, June **2003**

[“The Supreme Court in American Politics,” http://arjournals.annualreviews.org/doi/full/10.1146/annurev.polisci.6.121901.085526;jsessionid=n1HzQqZJALRe]

In one of the most influential articles in the study of courts, law professor Marc Galanter argued that "the 'haves' come out ahead" in the courts because the various advantages of people with social and economic power translate into success in litigation. Galanter's analysis focused heavily on trial courts. Scholars responding to Galanter have taken a variety of positions, some of them emphasizing the difficulty of testing his argument. But the majority view appears to be that Galanter was more right than wrong, at least at the trial level. The Supreme Court does not act directly on society. Rather, its decisions are directed at other public policy makers, usually lower-court judges and administrators, in the form of legal rules that they are asked to implement. In assessing the Court's efficacy, then, the first question is the extent to which the Court can get those policy makers to carry out its decisions.

#### Justices can reach any conclusion they want to and find plausible legal precedent to back it up:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

Second, although questions about the moral legitimacy of Justices "disobeying the law of their country" n230 would seem in principle to be highly important, they hold little prominence in contemporary constitutional debates, n231 despite Judge Posner's comments about Bush v. Gore. A large part of the reason, I would speculate, is that today, judges and especially Supreme Court Justices rarely experience acute tugs between their senses of moral desirability on one hand and legal duty on the other. If the Justices seldom feel a tension, I would further speculate, it is not because our Constitution is morally perfect, but because practice and precedent across more than two centuries have created a situation in which **Supreme Court Justices can plausibly claim authority** to accommodate almost **any perceived exigency** without [\*1838] overstepping clear bounds of legal legitimacy. n232 Even before Roe v. Wade, Justices who believed recognition of abortion rights to be morally urgent could find support in judicial precedent, n233 despite the lack of firm historical foundations. Even after, Justices who believe abortion to be morally abominable are not strongly bound by Roe, but can plausibly dismiss it as a judicial mistake that ought to be corrected, n234 notwithstanding the doctrine of stare decisis. n235

#### Because the law is indeterminate, judges will interpret the law in line with the broader social context of the time:

Lassiter, Assistant Professor of History, University of Michigan, Michigan Law Review, May, 2005, 103 Mich. L. Rev. 1401

Klarman explains that the judicial decisionmaking process operates simultaneously along a political and a legal axis, although "because constitutional law is **generally quite indeterminate,** constitutional interpretation almost **inevitably reflects the broader social and political context of the times**" (p. 5). Such a perspective on [\*1408] constitutional history suggests that "justices are unlikely to be either heroes or villains ... [because] they rarely hold views that deviate far from dominant public opinion" (p. 6).

### Death Penalty Answers (Front Line)

#### (--) No proof US will ban the death penalty because of a law on transportation infrastructure—it’s survived too many other challenges.

#### Turn: Deterrence means death penalty opponents actually cause innocents to die:

Dudley **Sharp**, 10/29/20**03** (“THE DETERRENT EFFECT OF THE DEATH PENALTY,” Accessed 7/28/2012 at <http://www.hoshuha.com/resources/deteff.htm>, rwg)

Oddly, death penalty opponents believe that the burden of proof is on those who say the death penalty is a deterrent. Clearly it is not. The weight of the evidence, within reason, history, common sense and the social sciences is that the potential for negative consequences restricts the behavior of some. That is not in dispute. Furthermore, if opponents cannot prove it is not a deterrent, which they never have and never will, then they are the ones who risk sacrificing innocents, both by absence of deterrence and reduced incapacitation. Regardless of jurisdiction, under all debated scenarios, more innocents are put at risk when we fail to execute. Any alleged concern for innocents weighs in favor of executions.

#### (--) Alternate cause to human rights credibility—Guatanamo Bay—outweighs other considerations:

**Center for American Progress**, 6/15/20**09** (“Restoring Credibility on Human Rights and Democracy,”

<http://www.americanprogress.org/events/2009/06/restoring_credibility.html/>, Accessed 7/27/2012, rwg)

The panelists focused on the U.S. detention center at Guantánamo Bay, Cuba, which remains at the forefront of conversation on the United States and human rights because of the prison’s questionable conditions and harsh interrogation techniques associated with it.

#### (--) Multiple alternate causes to lost human rights credibility they can’t solve:

John **Shattuck, 2008** (CEO of the John F. Kennedy Library Foundation, “Restoring U.S. Credibility on Human Rights,”

<http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_fall2008/hr_fall08_shattuck.html>, Accessed 7/27/2012, rwg)

First, you should make it clear that one of our country’s bedrock principles is the international rule of law. Human rights are de-fined and protected by the Constitution and international treaties ratified and incorporated into our domestic law. In flaunting basic rules—such as habeas corpus, the Convention against Torture, and the Geneva Conventions—the previous administration created a series of “law-free zones.” Within these zones, detainees were abused, thousands were held indefinitely without charges, and human rights were trampled. Second, you should bring U.S. values and practices back into alignment. The United States in recent years has lost credibility by charging others with the types of human rights violations that it has committed itself. In recent annual country reports on human rights practices, the State Department has criticized other countries for engaging in torture, detention without trial, warrantless electronic surveillance, and other abuses, even though the U.S. record in these areas also has been abysmal.

#### (--) You should assess consequences--their argument creates moral tunnel vision—consequences are ultimately necessary for any meaningful ethics:

Issac 2002 (Jeffery, professor of political science @ Indiana University. Dissent, Spring 2002, 49: 2, p. 32)

Power is not a dirty word or an unfortunate feature of the world. It is the core of politics. Power is the ability to effect outcomes in the world. Politics, in large part, involves contests over the distribution and use of power. To accomplish anything in the political world, one must attend to the means that are necessary to bring it about. And to develop such means is to develop, and to exercise, power. To say this is not to say that power is beyond morality. It is to say that power is not reducible to morality. As writers such as Niccolo Machiavelli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness undercuts political responsibility. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one’s intention does not ensure the achievement of what one intends. Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters ; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of complicity in injustice. This is why, from the standpoint of politics — as opposed to religion— pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that politics is as much about unintended consequences as it is about intentions; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with “good” may engender impotence, it is often the pursuit of “good” that generates evil. This is the lesson of communism in the twentieth century : it is not enough that one’s goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

#### De facto death penalty moratorium exists now:

Michael **Smerconish,** 11/11/20**07** (staff writer, “Death Penalty Deters,” Accessed 7/28/2012 at

<http://www.huffingtonpost.com/michael-smerconish/death-penalty-deters_b_72075.html>, rwg)

Meanwhile, the U.S. Supreme Court has instituted a de facto death-penalty moratorium. For all practical purposes, capital punishment is on life support.

#### Turn: Terrorism

#### Capital punishment deters terrorism—three reasons:

Joanna M. **Shepherd, 2007** (professor of law at Emory, “Capital Punishment Does in Fact Deter Crime,”

[http://2009researchpaper.wikispaces.com/file/view/Capital+Punishment+Pro+1.pdf](http://2009researchpaper.wikispaces.com/file/view/Capital%2BPunishment%2BPro%2B1.pdf))

Capital Punishment May Deter Terrorism Finally, let's talk about what if anything the studies might be able to tell us about whether capital punishment deters terrorism. Unfortunately, there is not yet any empirical research specifically on capital punishment and terrorism. Some people might think that all terrorists are undeterrable fanatics. In fact, it might even be suggested that capital punishment could increase terrorism if potential terrorists view executions as their ticket to holy martyrdom. If executions are a harsher penalty, then some terrorists should be deterred by them. However, the indirect evidence from the other studies suggest that this may not be the case for three reasons: First, research shows that capital punishment deters every kind of murder that has been studied. This includes many kinds of murderers like terrorists who might not seem to be deterrable. My own paper found the death penalty has a deterrent effect on all categories of murder including crimes of passion and intimate murders that many people think are undeterrable. Second, capital punishment could have an overall deterrent effect on terrorism even if many terrorists are not influenced by capital punishment. To give a deterrent effect, all that is necessary is that a small fraction of terrorists are deterred. Obviously, the death penalty does not deter all murders, but it does deter a small important fraction of them. Third, although there are exceptions, news accounts ... are replete with accounts of alleged terrorists who fight strenuously in court to get life imprisonment instead of the death penalty. These terrorists obviously view executions as a worse penalty than life in prison. If executions are a harsher penalty, then some terrorists should be deterred by them. Thanks again for having me, and I look forward to answering any questions you may have.

#### Terrorists will use nuclear weapons triggering global nuclear war and extinction

Mohamed **Sid-Ahmed, 2004** ([**http://weekly.ahram.org.eg/2004/705/op5.htm**](http://weekly.ahram.org.eg/2004/705/op5.htm), 26 August - 1 September 2004)

What would be the consequences of a nuclear attack by terrorists? Even if it fails, it would further exacerbate the negative features of the new and frightening world in which we are now living. Societies would close in on themselves, police measures would be stepped up at the expense of human rights, tensions between civilisations and religions would rise and ethnic conflicts would proliferate. It would also speed up the arms race and develop the awareness that a different type of world order is imperative if humankind is to survive. But the still more critical scenario **is if the attack succeeds**. This could **lead to a third world war**, from which no one will emerge victorious. Unlike a conventional war which ends when one side triumphs over another, this war will be without winners and losers. When **nuclear pollution infects the whole planet, we will all be losers.**

### Death Penalty Deters—Saves Innocent Lives

#### Each execution saves between three and 18 murders:

Joanna M. **Shepherd, 2007** (professor of law at Emory, “Capital Punishment Does in Fact Deter Crime,”

[http://2009researchpaper.wikispaces.com/file/view/Capital+Punishment+Pro+1.pdf](http://2009researchpaper.wikispaces.com/file/view/Capital%2BPunishment%2BPro%2B1.pdf))

Moreover, I find that all categories of murder are deterred by the death penalty, even so-called crimes of passion. My results predict that each execution deters somewhere between 3 and 18 murders. The other 10 modern economics papers used different methods and different data than my own, but all find a significant deterrent effect.

#### Thirteen modern studies prove—death penalty deters crime:

Joanna M. **Shepherd, 2007** (professor of law at Emory, “Capital Punishment Does in Fact Deter Crime,”

[http://2009researchpaper.wikispaces.com/file/view/Capital+Punishment+Pro+1.pdf](http://2009researchpaper.wikispaces.com/file/view/Capital%2BPunishment%2BPro%2B1.pdf))

Today I am going to briefly speak about three things: First I will speak on the early studies on whether capital punishment had a deterrent effect. The studies produced mixed results. Some found deterrence and others did not. Second, I will describe the modern studies from the past decade including my own studies. There have been 13 modern economic studies on the deterrent effect of capital punishment. All find that executions significantly deter murders. Finally, I will discuss what existing studies might be able to tell us about whether capital punishment could deter terrorism. Let me add that this testimony will only address deterrence. It will not consider any of the other possible issues of capital punishment such as moral problems, the socioeconomic patterns of who is executed or the dangers of executing innocent people.

#### Extremely sophisticated studies prove—the death penalty deters crime:

Joanna M. **Shepherd, 2007** (professor of law at Emory, “Capital Punishment Does in Fact Deter Crime,”

[http://2009researchpaper.wikispaces.com/file/view/Capital+Punishment+Pro+1.pdf](http://2009researchpaper.wikispaces.com/file/view/Capital%2BPunishment%2BPro%2B1.pdf))

Panel data are data from several units like the 50 States or all U.S. counties over several years. Panel data techniques fix many of the problems associated with the data that early studies used. Now let's talk about the modern studies. 13 economic studies on capital punishment's deterrent effect have been conducted in the past decade. Most use new improved panel data and modern statistical techniques. They all use multivariate regression analysis to separate the effect on murder, of executions, demographics, economic factors, et cetera. All categories of murder are deterred by the death penalty, even so-called crimes of passion. The studies are unanimous. All 13 of them find a deterrent effect. I have conducted three of these studies. My first study used 20 years of data from all U.S. counties to measure the effect of county differences on murder. My second paper used monthly data from all U.S. States for 22 years to measure the short-term effect of capital punishment. This paper also looks at different categories of murder to determine which kinds of murder are deterred by executions. The third study looks at the effect on murders of the 1970's Supreme Court moratorium on executions. All of my papers find a deterrent effect.

#### Each execution results in 74 fewer murders the next year:

Michael **Smerconish,** 11/11/20**07** (staff writer, “Death Penalty Deters,” Accessed 7/28/2012 at

<http://www.huffingtonpost.com/michael-smerconish/death-penalty-deters_b_72075.html>, rwg)

For me, the only thing that has changed relative to the death penalty in the intervening 20 years is that I've grown accustomed to the public ridicule that often accompanies my view. I still think it's a deterrent, and my opinion is emboldened by a recent analysis of execution and homicide data published in the Wall Street Journal. Roy Adler and Michael Summers, both professors at Pepperdine University, have recently analyzed the relationship between the number of U.S. executions by year and the number of murders in the year thereafter for 1979-2004. They relied on raw data supplied by the Death Penalty Information Center and the FBI. They have documented a relationship between capital punishment and the future rate of homicide. When executions leveled off, the professors found, murders increased. And when executions increased, the number of people murdered dropped off. In a year-by-year analysis, Adler and Summers found that each execution was associated with 74 fewer murders the following year.

#### Turn: the death penalty net protects innocent life at a 74:1 ratio:

Michael **Smerconish,** 11/11/20**07** (staff writer, “Death Penalty Deters,” Accessed 7/28/2012 at

<http://www.huffingtonpost.com/michael-smerconish/death-penalty-deters_b_72075.html>, rwg)

Based on their analysis, Adler and Summers properly recast the issue that confronts society when deciding whether to implement the death penalty. The question is not whether to spare the life of the convicted, but rather, whether to spare the lives of 74 innocents in the year that follows.

#### Turn: the death penalty protects innocent lives:

Dudley **Sharp**, 10/29/20**03** (“THE DETERRENT EFFECT OF THE DEATH PENALTY,” Accessed 7/28/2012 at <http://www.hoshuha.com/resources/deteff.htm>, rwg)

The potential for negative consequences deters some behavior. The most severe criminal sanction -- execution -- does not contradict that finding. Reason, common sense, history and the weight of the studies support the deterrent effect of the death penalty. The death penalty protects innocent lives. The absence of the death penalty sacrifices innocent lives.

#### Each execution results in 18 fewer murders:

Dudley **Sharp**, 10/29/20**03** (“THE DETERRENT EFFECT OF THE DEATH PENALTY,” Accessed 7/28/2012 at <http://www.hoshuha.com/resources/deteff.htm>, rwg)

(2003) Emory University Economics Department Chairman Hashem Dezhbakhsh and Emory Professors Paul Rubin and Joanna Shepherd state that "our results suggest that capital punishment has a strong deterrent effect. An increase in any of the probabilities -- arrest, sentencing or execution -- tends to reduce the crime rate. In particular, each execution results, on average, in eighteen fewer murders -- with a margin of error of plus or minus 10." (1) Their data base used nationwide data from 3,054 US counties from 1977-1996.

#### Each execution reduces homicides by 5 to 6:

Dudley **Sharp**, 10/29/20**03** (“THE DETERRENT EFFECT OF THE DEATH PENALTY,” Accessed 7/28/2012 at <http://www.hoshuha.com/resources/deteff.htm>, rwg)

(2003) University of Colorado (Denver) Economics Department Chairman Naci Mocan and Graduate Assistant R. Kaj Gottings found "a statistically significant relationship between executions, pardons and homicide. Specifically each additional execution reduces homicides by 5 to 6, and three additional pardons (commutations) generate 1 to 1.5 additional murders." Their "data set contains detailed information on the entire 6,143 death sentences between 1977 and 1997. (2)

#### Each execution results in five fewer murders:

Dudley **Sharp**, 10/29/20**03** (“THE DETERRENT EFFECT OF THE DEATH PENALTY,” Accessed 7/28/2012 at <http://www.hoshuha.com/resources/deteff.htm>, rwg)

(2003) Clemson U. Professor Shepherd found that each execution results, on average, in five fewer murders. Longer waits on death row reduce the deterrent effect. Therefore, recent legislation to shorten the time prior to execution should increase deterrence and thus save more innocent lives. Moratoriums and other delays should put more innocents at risk. In addition, capital punishment deters all kinds of murders, including crimes of passion and murders by intimates. Murders of both blacks and whites decrease after executions. (5)

### Death Penalty Answers—Human Rights Credibility Answers Extensions

#### (--) Long time frame for solvency on human rights credibility:

**Center for American Progress**, 6/15/20**09** (“Restoring Credibility on Human Rights and Democracy,”

<http://www.americanprogress.org/events/2009/06/restoring_credibility.html/>, Accessed 7/27/2012, rwg)

 “I think we really shouldn’t underestimate the extent to which the Bush administration damaged the image of the United States [in] the [Middle East],” said Issandr El-Amrani, publisher of a popular group of blogs on Egyptian and Middle Eastern affairs, Arabist.net. El-Amrani encouraged attendees to “be realistic about how long it will take to repair that damage” at a panel discussion on restoring U.S. credibility on democracy and human rights in the Middle East. The Center for American Progress, the Project on Middle East Democracy, and the Heinrich Boll Foundation sponsored the event, which was hosted at the Center.

#### (--) Torture and other human rights violations are an alternate cause they don’t solve:

John **Shattuck, 2008** (CEO of the John F. Kennedy Library Foundation, “Restoring U.S. Credibility on Human Rights,”

<http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_fall2008/hr_fall08_shattuck.html>, Accessed 7/27/2012, rwg)

International public opinion of the recent U.S. record on human rights has been devastating. A poll conducted last year in eighteen countries on all continents by the British Broadcasting Corporation revealed that 67 percent disapproved of U.S. detention practices in Guantanamo Bay, Cuba. Another poll in Germany, Great Britain, Poland, and India found that majorities or pluralities condemned the United States for torture and other violations of international law. A third poll by the Chicago Council on Foreign Relations showed that majorities in thirteen countries, including many traditional allies, believe “the U.S. cannot be trusted to act responsibly in the world.”

#### (--) Obama can’t fulfill other nations desires on human rights—they’ve set the bar too high:

**Center for American Progress**, 6/15/20**09** (“Restoring Credibility on Human Rights and Democracy,”

<http://www.americanprogress.org/events/2009/06/restoring_credibility.html/>, Accessed 7/27/2012, rwg)

Hillebrand described the challenges of the international expectations for Obama on human rights, no matter which path the U.S. government takes in restoring its credibility. She said, “[European] expectations were probably too high, and [Obama] could never fulfill them. At the moment, I think there is a kind of rolling back” as people realize just how long this will all take.

### Environmental Justice Answers (Front Line)

#### (--) No proof of the spillover of the challenge of discriminatory intent to environmental justice.

#### (--) Lack of compensation means attorneys won’t take on environmental justice lawsuits—they don’t solve:

Tseming **Yang, 2002** (Associate Professor of Law, Vermont Law School, Boston College Environmental Affairs Law Review, 29 B.C. Envtl. Aff. L. Rev. 143; Lexis, rwg)

Creative tailoring of traditional environmental legal claims to the needs and particular circumstances of environmental justice communities has met with somewhat greater success. n78 Their overall effectiveness for the movement, however, has been less than clear. n79 For [\*157] example, even though environmental citizen-suits have allowed private individuals to bring enforcement actions against polluters or against the federal government itself, they have been inadequate for environmental justice communities. n80 Citizen-suit provisions do not provide for private damages and thus create no fund out of which litigation costs may be paid by poor plaintiffs. n81 Attorney fees may be awarded if the suit is successful. n82 As has been pointed out by Eileen Gauna, however, both the delay in the payment of such fees, as well as the inherent litigation risk, significantly reduces the incentives that such fee-shifting provisions provide to attorneys to take on environmental justice claims. n83

#### (--) Lack of substantive content undermines the environmental justice movement:

Tseming **Yang, 2002** (Associate Professor of Law, Vermont Law School, Boston College Environmental Affairs Law Review, 29 B.C. Envtl. Aff. L. Rev. 143; Lexis, rwg)

Apart from pointing to the inadequacy of environmental and civil rights law for the vindication of environmental justice complaints, there have also been less sympathetic views of why the movement has found it so difficult to succeed in substantively changing how regulators address environmental justice issues. These views suggest that environmental justice is about "political opportunism," jobs, or narrow disputes about discrimination in waste facility siting. n92 At their base, [\*159] such criticisms of the movement assert that it lacks real substantive content.

#### (--) Lack of specifics prevents environmental justice movement from solving:

Tseming **Yang, 2002** (Associate Professor of Law, Vermont Law School, Boston College Environmental Affairs Law Review, 29 B.C. Envtl. Aff. L. Rev. 143; Lexis, rwg)

Unsympathetic criticisms in this regard have focused on the perception that environmental justice is an amorphous concept with no clear substantive contours and no clear regulatory goals. n98 Most generally [\*161] stated, the argument asserts that, the failure to articulate the contours of environmental justice clearly and specifically is a fatal defect that destroys any basis for reasoned government action by regulators. n99 Some critics have maintained that the environmental justice movement has only been able to maintain public support for its goals by dealing in vague generalities, buzz words, and slogans n100 --that the movement is nothing but rhetorical flair. If forced to articulate more specifics than mere platitudes, ambiguities, and abstract concepts, the movement would simply collapse under its own contradictions and internal inconsistencies. n101 In the eyes of these critics, the movement has contributed little to advancing solutions, and may arguably be an impediment to real progress on environmental protection issues for people of color.

### States Solve Environmental Justice

#### (--) States solve environmental justice better than the federal government:

Michele L. **Knorr, 1997** (University of Baltimore Journal of Environmental Law, 6 U. Balt. J. Envtl. L. 71, “Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses,” Lexis/Nexis, rwg)

n153 Id. On January 4, 1996, Congresswoman Collins reintroduced the Environmental Equal Rights Act which is virtually identical to the 1993 Act. Once again, she relied on the studies mentioned in the 1993 version. To date, this Bill has not passed. With evidence so clear, it is disappointing that no federal legislation has passed to adequately address the disparate environmental impacts on minority and low-income communities. Since the federal legislation has failed to address these problems, the states must enact and enforce environmental justice legislation. 142 Cong. Rec. E13-01 (January 4, 1996).

### Patriarchy Answers

#### (--) Disad turns the case: War destroys women’s rights

Marshall, 2004 **founder of the feminist peace network, 04**

(Lucinda Marshall Founder of the Feminist Peace Network, Feminist Writer and Activist, 12-18-04

“Unacceptable: The Impact of War on Women and Children” http://www.commondreams.org/views04/1219-26.htm)

Women and children account for almost 80% of the casualties of conflict and war as well as 80% of the 40 million people in world who are now refugees from their homes. It is one of the unspoken facts of militarism that women often become the spoils of war, their deaths are considered collateral damage and their bodies are frequently used as battlegrounds and as commodities that can be traded. "Women and girls are not just killed, they are raped, sexually attacked, mutilated and humiliated. Custom, culture and religion have built an image of women as bearing the 'honour' of their communities. Disparaging a woman's sexuality and destroying her physical integrity have become a means by which to terrorize, demean and 'defeat' entire communities, as well as to punish, intimidate and humiliate women," according to Irene Khan of Amnesty International. Sexual violence as a tool of war has left hundreds of thousands of women raped, brutalized, impregnated and infected with HIV/AIDS. And hundreds of thousands of women are trafficked annually for forced labor and sexual slavery. Much of this trafficking is to service western troops in brothels near military bases. Even women serving in the military are subjected to sexual violence. U.S. servicewomen have reported hundreds of assaults in military academies and while serving on active duty. The perpetrators of these assaults have rarely been prosecuted or punished. The impact of war on children is also profound. In the last decade, two million of our children have been killed in wars and conflicts. 4.5 million children have been disabled and 12 million have been left homeless. Today there are 300,000 child soldiers, including many girls who are forced to 'service' the troops.

#### Studies prove—women don’t benefit from affirmative action:

Sally **Pipes and** Michael **Lynch, 1996** (“Women Don't Need Affirmative Action,” Accessed 7/28/2012 at

<http://www.heritage.org/research/commentary/1996/07/women-dont-need-affirmative-action>, rwg)

Finally, women know that their most significant advances in the workplace have not resulted from affirmative action, but from equality of opportunity and hard work. A modern political mantra has it that white women have been the greatest beneficiaries of quota-based affirmative action. But academic analysis finds little conclusive evidence that women, on the whole, have benefited from such preferences.

#### Women’s rights aren’t tied to affirmative action—gains come from other areas:

Sally **Pipes and** Michael **Lynch, 1996** (“Women Don't Need Affirmative Action,” Accessed 7/28/2012 at

<http://www.heritage.org/research/commentary/1996/07/women-dont-need-affirmative-action>, rwg)

That's why it is important to understand why women should reject race- and sex-based "affirmative action." There are at least four reasons. First, like men, women believe in equality before the law. They believe racial, ethnic and gender preferences violate the proposition that all men and women are created equal. Women know their advances in the workplace and voting booth have come not by departing from this creed, but by upholding it -- by showing that America wasn't living up to its own principles of equality.

#### Turn: affirmative action undermines women’s rights:

Sally **Pipes and** Michael **Lynch, 1996** (“Women Don't Need Affirmative Action,” Accessed 7/28/2012 at

<http://www.heritage.org/research/commentary/1996/07/women-dont-need-affirmative-action>, rwg)

Third, women themselves often are treated unfairly under affirmative action plans. Consider the case of Lydia Cheryl McDonald. A Los Angeles resident, McDonald grew up in a broken home and lived on welfare after her father abandoned her family. Yet she accumulated a grade-point average in high school of 4.5 -- on a four point scale -- due to credit for advanced placement classes. In addition to working 15 hours a week, McDonald wracked up an impressive list of achievements and awards, including high honors on California's prestigious Golden State Exam for geometry. She is exactly the kind of candidate the University of California at Berkeley claims to be looking for: high-achieving, well rounded, but poor. In March 1996, McDonald received a rejection letter informing her that "we sought an academically strong freshman class which includes students from a wide range of cultural, ethnic, geographic, racial and socio-economic backgrounds." In other words, "diversity" was more important than excellence. Had it not been for the intervention of a lawyer so outraged by McDonald's case that he offered his services pro bono and threatened the University with a lawsuit, Lydia would not be looking forward to spring admission.

### Right to Travel Answers (Front Line)

#### US strongly protects right to travel now—any symbol has already been sent:

Timothy **Baldwin, 2006** (“The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?” Northwestern Journal of Law and Social Policy, Summer 2006, 1 Nw. J. L. & Soc. Pol'y 213, L/N, rwg)

The Supreme Court has used the right to interstate travel to strike down residency requirements for welfare benefits, n138 voting laws, n139 to protect an individual's free movement from interference by non-state actors, n140 and to prohibit a state from excluding indigents. n141 The [\*233] main purpose of this section is to explain the various factual situations in which courts have upheld a poor individual's right to interstate travel. This overview will help inform the total deprivation doctrine analysis described later in this Comment. n142 Federal case law and commentary make it clear that a constitutional right to travel between states exists. n143 Various members of the Supreme Court have derived this right from different constitutional sources. In Oregon v. Mitchell, Justice Harlan noted that the right to interstate travel is a "nebulous judicial construct" that could not be found in any one particular clause of the Constitution. n144 Other sources of the right to interstate travel have included the Privileges and Immunities Clauses in Article IV n145 and the Fourteenth Amendment, n146 the Due Process Clause of the Fifth Amendment, n147 the Due Process Clause of the Fourteenth Amendment, n148 and the Commerce Clause in Article III, Section 8. n149

#### Emerging democracies don’t model the US—they have much broader definitions of human rights:

Sean **Aughey, 2010** (November 10-11, 2010, “Transatlantic Dialogues in International Law: International Law and Human Rights,” Accessed 7/26/2012 at [http://harvard.academia.edu/SeanAughey/Papers/412927/Transatlantic\_ Dialogues\_in\_International\_Law\_International\_Law\_and\_Human\_Rights](http://harvard.academia.edu/SeanAughey/Papers/412927/Transatlantic_%20Dialogues_in_International_Law_International_Law_and_Human_Rights), rwg)

The US has a longstanding old and highly elaborated domestic rights regime set forth in the Declaration of Independence and the Constitution founded on a concept of fundamental inalienable individual rights. This tradition, which has its philosophical roots in the Enlightenment and the concept of natural rights, predates the modern human rights movement and does not use the language of ‘human rights’. By contrast, newly emergent European democracies with constitutions drafted in the post World War II era are much more robust in their express recognition of human rights protections as such The European system has evolved dramatically over time and today places human rights at its heart. Although the European Convention on Human Rights (ECHR) is the most prominent instrument there are other influential treaties and a considerable body of relevant European Union law. Human rights play a central role in both internal action and external relations of the EU. Internally, since 1969 the European Court of Justice has found sources for fundamental rights as general principles of European Union law.

#### Democratic peace theory is a farce

Layne 2007 Christopher, Professor @ TX A&M, American Empire: A Debate, pg. 94

﻿Wilsonian ideology drives the American Empire because its proponents posit that the United States must use its military power to extend democracy abroad. Here, the ideology of Empire rests on assumptions that are not supported by the facts. One reason the architects of Empire champion democracy promotion is because they believe in the so-called democratic peace theory, which holds that democratic states do not fight other democracies. Or as President George W. Bush put it with his customary eloquence, "democracies don't war; democracies are peaceful."136 **The democratic peace theory is the probably the most overhyped and undersupported "theory" ever to be concocted by American academics.** In fact, it is not a theory at all. Rather it is a theology that suits the conceits of Wilsonian true believers-especially the neoconservatives who have been advocating American Empire since the early 1990s. As serious scholars have shown, however, the historical record does not support the democratic peace theory.131 On the contrary, it shows that democracies do not act differently toward other democracies than they do toward nondemocratic states. When important national interests are at stake, democracies not only have threatened to use force against other democracies, but, in fact, **democracies have gone to war with other democracies**.

**Inequalities in wealth prevent true democratization:**

**Dixon 10** [Dr. Patrick Dixon, PhD Foreign Policy, “The Truth About the War With Iraq”, http://www.globalchange.com/iraqwar.htm]

And so we find an interesting fact: those who live in democratic nations, who uphold democracy as the only honourable form of [government](http://www.globalchange.com/government-debt-expect-higher-inflation-as-secret-weapon-to-reduce-huge-liabilities.htm), are not really true democrats after all. They have little or no interest in global democracy, in a nation of nations, in seeking the common good of the whole of humanity.

And it is this single fact, more than any other, this inequality of wealth and privilege in our shrinking global village, that will make it more likely that our future is dominate by terror groups, freedom fighters, justice-seekers, hell-raisers, protestors and violent agitators.

#### Israeli settlements eliminate the possibility of a Palestinian state:

Nehad **Ismail**, 2/24/20**12** (London based writer/broadcaster, “A one-state solution to the Israeli-Palestinian conflict,” <http://www.defenceviewpoints.co.uk/articles-and-analysis/a-one-state-solution-to-the-israeli-palestinian-conflict>, Accessed 7/28/2012, rwg)

The Quartet which comprises the USA, EU, Russia and the UN have failed to bring about the two-state solution within three years when they launched the much vaunted Road Map in 2002. Earlier this month Daniel Seidemann, an Israeli legal expert on Israeli Palestinian relations delivered a grim message to President Obama; the two-state solution is dead and the US administration is to blame. Mr. Seidemann spent the last two decades trying to broker the two-state solution to end the conflict. Seidemann blamed the surge in settlements for subverting the two-state solution. Sidemann had some harsh words for both Israeli Prime Minister Netanyahu and President Obama, theformer for defying Obama and the latter for keeping quiet about the settlement issue. If a two-state solution is not workable or achievable, the logical conclusion would inevitably lead to a one-state solution. The general view in the Middle East is that the relentless proliferation of settlements throughout the territories occupied by Israel in 1967 has made the very concept of creating a viable Palestinian state, let alone one with East Jerusalem as its capital, unrealistic if not impossible.

#### Palestinian state won’t lead to peace—Palestinian Authority has rejected peace negotiations in the past:

Jonathan **Lis,** 9/16/20**11** (staff writer, “Israel minister: Palestinian state serves to perpetuate Mideast conflict,” <http://www.haaretz.com/news/diplomacy-defense/israel-minister-palestinian-state-serves-to-perpetuate-mideast-conflict-1.384876>, rwg)

The Palestinians want to achieve independence in order to perpetuate their conflict with Israel, not to end it, Education Minister Gideon Sa'ar said on Thursday, adding that the Palestinian Authority repeatedly refused peace negations in the past.

#### Turn: Palestinian state would only continue the state of conflict with Israel:

Jonathan **Lis,** 9/16/20**11** (staff writer, “Israel minister: Palestinian state serves to perpetuate Mideast conflict,” <http://www.haaretz.com/news/diplomacy-defense/israel-minister-palestinian-state-serves-to-perpetuate-mideast-conflict-1.384876>, rwg)

Speaking in a Rosh Hashanah event, Sa'ar severely criticized the Palestinians' UN bid, calling the Palestinian Authority "serial peace refusers. From 1947 they always knew to say 'no' to negotiations." "They don't want to end the conflict by founding a state. They want a Palestinian state that would serve as a basis for the continued conflict between us and them," the education minister added.

### Right to Travel Answers—Extensions: Democracies Don’t Cause Peace

#### Democracy doesn't prevent wars—history and theory prove

* 1. **Schwartz and Skinner '01** Thomas and Kiron K (Research Fellow at the Hoover Institution at Stanford University, associate professor of history and political science at Carnegie Mellon University); December 22, 2001; “The Myth of Democratic Peace”; JAI Press; ORBIS

Here we show that neither the historical record nor the theoretical arguments advanced for the purpose provide any support for democratic pacifism. It does not matter how high or low one sets the bar of democracy. Set it high enough to avoid major exceptions and you find few, if any, democracies until the Cold War era. Then there were no wars between them, of course. But that fact is better explained by NATO and bipolarity than by any shared form of government. Worse, the peace among the high-bar democracies of that era was part of a larger pacific pattern: peace among all nations of the First and Second Worlds. As for theoretical arguments, those we have seen rest on implausible premises. Why, then, is the belief that democracies are mutually pacific so widespread and fervent? The explanation rests on an old American tendency to slip and slide unawares between two uses of the word "democracy": as an objective description of regimes, and as a term of praise--a label to distinguish friend from foe. Because a democracy (term of praise) can do no wrong--or so the thinking seems to run--at least one side in any war cannot be a democracy (regime description). There lies the source of much potential mischief in foreign policy. The Historical Problem Democratic pacifism combines an empirical generalization with a causal attribution: democracies do not fight each other, and that is because they are democracies. Proponents often present the former as a plain fact. Yet regimes that were comparatively democratic for their times and regions have fought each other comparatively often--bearing in mind, for the purpose of comparison, that most states do not fight most states most of the time. The wars below are either counter-examples to democratic pacifism or borderline cases. Each is listed with the year it started and those combatants that have some claim to the democratic label. American Revolutionary War, 1775 (Great Britain vs. U.S.) Wars of French Revolution (democratic period), esp. 1793, 1795 (France vs. Great Britain) Quasi War, 1798 (U.S. vs. France) War of 1812 (U.S. vs. Great Britain) Texas War of Independence, 1835 (Texas vs. Mexico) Mexican War, 1846 (U.S. vs. Mexico) Roman Republic vs. France, 1849 American Civil War, 1861 (Northern Union vs. Southern Confederacy) Ecuador-Columbia War, 1863 Franco-Prussian War, 1870 War of the Pacific, 1879 (Chile vs. Peru and Bolivia) Indian Wars, much of nineteenth century (U.S. vs. various Indian nations) Spanish-American War, 1898 Boer War, 1899 (Great Britain vs. Transvaal and Orange Free State) World War I, 1914 (Germany vs. Great Britain, France, Italy, Belgium, and U.S.) Chaco War, 1932 (Chile vs. Argentina) Ecuador-Peru, 1941 Palestine War, 1948 (Israel vs. Lebanon) Dominican Invasion, 1967 (U.S. vs. Dominican Republic) Cyprus Invasion, 1974 (Turkey vs. Cyprus) Ecuador-Peru, 1981 Nagorno-Karabakh, 1989 (Armenia vs. Azerbaijan) Yugoslav Wars, 1991 (Serbia and Bosnian-Serb Republic vs. Croatia and Bosnia; sometimes Croatia vs. Bosnia) Georgia-Ossetia, 1991 (Georgia vs. South Ossetia) Georgia-Abkhazia, 1992 (Georgia vs. Abkhazia and allegedly Russia) Moldova-Dnestr Republic, 1992 (Moldova vs. Dnestr Republic and allegedly Russia) Chechen War of Independence, 1994 (Russia vs. Chechnya) Ecuador-Peru, 1995 NATO-Yugoslavia, 1999 India-Pakistan, 1999

#### Turn: Democracies start more wars

Henderson 2

Errol **Henderson 2**, Assistant Professor, Dept. of Political Science at the University of Florida, 2002, Democracy and War The End of an Illusion?, p. 146

Are Democracies More Peaceful than Nondemocracies with Respect to Interstate Wars? The results indicate that democracies are more war-prone than non-democracies (whether democracy is coded dichotomously or continu­ously) and that democracies are more likely to initiate interstate wars. The findings are obtained from analyses that control for a host of political, economic, and cultural factors that have been implicated in the onset of interstate war, and focus explicitly on state level factors instead of simply inferring state level processes from dyadic level observations as was done in earlier studies (e.g., Oneal and Russett, 1997; Oneal and Ray, 1997). The results imply that democratic enlargement is more likely to increase the probability of war for states since democracies are more likely to become involved in—and to ini­tiate—interstate wars.

### Right to Travel Answers—Extensions—Democratization Causes War

#### Transitions to democracy lead to war

Manfield and Snyder 2

Edward D. Mansfield, Hum Rosen Professor of Political Science and Co-Director of the Christopher H. Browne Center for International Politics at the University of Pennsylvania, and Jack Snyder, Robert and Renee Belfer Professor of International Relations at Columbia University, Spring 2002, International Organization

In previous research, we reported that states undergoing democratic transitions were substantially more likely to participate in external wars than were states whose regimes remained unchanged or changed in an autocratic direction. [6](http://muse.jhu.edu/journals/international_organization/v056/56.2mansfield.html%22%20%5Cl%20%22FOOT6#FOOT6) We argued that elites in newly democratizing states often use nationalist appeals to attract mass support without submitting to full democratic accountability and that the institutional weakness of transitional states creates the opportunity for such war-causing strategies to succeed. However, these earlier studies did not fully address the circumstances under which transitions are most likely to precipitate war, and they did not take into account various important causes of war. Equally, some critics worried that the time periods over which we measured the effects of democratization were sometimes so long that events occurring at the beginning of a period would be unlikely to influence foreign policy at its end. [7](http://muse.jhu.edu/journals/international_organization/v056/56.2mansfield.html%22%20%5Cl%20%22FOOT7#FOOT7) Employing a more refined research design than in our prior work, we aim here to identify more precisely the conditions under which democratization stimulates hostilities. We find that the heightened danger of war grows primarily out of the transition from an autocratic regime to one that is partly democratic. The specter of war during this phase of democratization looms especially large when governmental institutions, including those regulating political participation, are especially weak. Under these conditions, elites commonly employ nationalist rhetoric to mobilize mass support but then become drawn into the belligerent foreign policies unleashed by this process. We find, in contrast, that transitions that quickly culminate in a fully coherent democracy are much less perilous. [8](http://muse.jhu.edu/journals/international_organization/v056/56.2mansfield.html%22%20%5Cl%20%22FOOT8#FOOT8) Further, our results refute the view that transitional democracies are simply inviting targets of attack because of their temporary weakness. In fact, they tend to be the initiators of war. We also refute the view that any regime change is likely to precipitate the outbreak of war. We find that transitions toward democracy are significantly more likely to generate hostilities than transitions toward autocracy.

#### Democracies don’t solve war

**Ferguson 2006** [Niall, Laurence A. Tisch Professor of History at Harvard University and a Senior Fellow at the Hoover Institution at Stanford. The next war of the world, Foreign Affairs. V 85. No 5.]

others seek the cause of conflict in the internal political arrangements of states. It has become fashionable among political scientiststo posit a causal link between democracy and peace, extrapolating from the observation that democracies tend not to go to war with one another. The corollary, of course, is that dictatorships generally are more bellicose. By that logic, the rise of democracy during the twentieth century should have made the world more peaceful. Democratization may well have reduced the incidence of war between states. But waves of democratization in the 1920s, 1960s, and 1980s seem to have multiplied the number of civil wars. Some of those (such as the conflicts in Afghanistan, Burundi, China, Korea, Mexico, Mozambique, Nigeria, Russia, Rwanda, and Vietnam) were among the deadliest conflicts of the century. Horrendous numbers of fatalities were also caused by genocidal or “politicidal” campaigns waged against civilian populations, such as those carried out by the Young Turks against the Armenians and the Greeks during World War I, the Soviet government from the 1920s until the 1950s, the Nazis between 1993 and 1945 – to say nothing of those perpetrated by the communist tyrannies of Mao in China and Pol Pot in Cambodia. Indeed, such civil strife has been the most common form of conflict during the past 50 years. Of the 24 armed conflicts recorded as “ongoing” by the University of Maryland’s Ted Robert Gurr and George Mason University’s Monty Marshal in early 2005, nearly all were civil wars.

### Right to Travel Answers—Extensions—Supreme Court Isn’t Modeled

#### US Supreme Court isn’t modeled—has lost legal influence:

#### Liptak 8

(Adam, Washington Times, U.S. Supreme Court's global influence is waning, <http://www.nytimes.com/2008/09/17/world/americas/17iht-18legal.16249317.html?pagewanted=all>, 9-28-2008) SQR

Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War.¶ But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices.¶ "One of our great exports used to be constitutional law," said Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. "We are losing one of the greatest bully pulpits we have ever had."¶ From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found. In the six years since, the annual citation rate has fallen by more than half, to about five.¶ Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist. By 2005, the number had fallen to 72.

#### Other countries being used for legal guidance

#### Liptak 8

(Adam, Washington Times, U.S. Supreme Court's global influence is waning, <http://www.nytimes.com/2008/09/17/world/americas/17iht-18legal.16249317.html?pagewanted=all>, 9-28-2008) SQR

"Most justices of the United States Supreme Court do not cite foreign case law in their judgments," Aharon Barak, then the chief justice of the Supreme Court of Israel, wrote in the Harvard Law Review in 2002. "They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems."¶ Partly as a consequence, Chief Justice Barak wrote, the United States Supreme Court "is losing the central role it once had among courts in modern democracies."¶ Justice Michael Kirby of the High Court of Australia said that his court no longer confines itself to considering English, Canadian and American law. "Now we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa," he said in an interview published in 2001 in The Green Bag, a legal journal. "America" he added, "is in danger of becoming something of a legal backwater."

#### Canada being used for guidance because they are not America

#### Liptak 8

(Adam, Washington Times, U.S. Supreme Court's global influence is waning, <http://www.nytimes.com/2008/09/17/world/americas/17iht-18legal.16249317.html?pagewanted=all>, 9-28-2008) SQR

Many legal scholars singled out the Canadian Supreme Court and the Constitutional Court of South Africa as increasingly influential.¶ "In part, their influence may spring from the simple fact they are not American," Dean Slaughter wrote in a 2005 essay, "which renders their reasoning more politically palatable to domestic audience in an era of extraordinary U.S. military, political, economic and cultural power and accompanying resentments."¶ Frederick Schauer, a law professor at the University of Virginia, wrote in a 2000 essay that the Canadian Supreme Court had been particularly influential because "Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier."¶ In New Zealand, for instance, Canadian decisions were cited far more often than those of any other nation from 1990 to 2006 in civil rights cases, according to a recent study in The Otago Law Review in Dunedin, New Zealand.¶ "As Canada's judges are, by most accounts, the most judicially activist in the common-law world — the most willing to second-guess the decisions of the elected legislatures — reliance on Canadian precedents will worry some and delight others," the study's authors wrote.¶ American precedents were cited about half as often as Canadian ones. "It is surprising," the authors wrote, "that American cases are not cited more often, since the United States Bill of Rights precedents can be found on just about any rights issue that comes up."

## Courts Link to Politics

### Courts Link to Politics

#### Health care proves—major Supreme Court decisions will have major political effects:

Stephen **Manual, 6/28/2012** (staff writer, “Will Supreme Court judgment help Obama win presidential election?” Accessed 7/26/2012 at <http://www.allvoices.com/contributed-news/12483143-will-supreme-court-judgment-help-obama-win-presidential-election>, rwg)

Finally, President Barack Obama has carried the day. He stood winner as the Supreme Court ruled on Thursday to uphold the Affordable Care Act. However, the president remained humble during his speech following the decision. He said that it was a victory for the American people and his administration would continue to work for betterment of the people. The Supreme Court judgment is clearly against the anticipation of Republicans, as they were predicting a contrary decision on the issue. The judgment can be called one of the biggest victories of the Obama administration in years. However, the question arises whether the Obama administration will be able to translate the victory into successful election campaign or not. Observers believe the administration would definitely exploit the judgment in its favor and try its best to convince electorates to cast vote for Obama in the upcoming presidential election. The visionary abilities of Obama would be highlighted and people would be told about revolutionary plans of Obama for the people and that all these plans would be implemented only if he is reelected into the office in November’s election. The judgment would also help the Obama administration to undermine capabilities of Republican presidential candidate Mitt Romney. Observers opine the judgment dealt a heavy blow to the Republicans, as they believed the court would strike down the individual mandate – at the very least. They were planning to celebrate the judgment and shaming the Obama administration once the verdict was out, but they were shocked after the judgment was released. Observers believe that the Obama administration has got a fresh opportunity to set the house in order and focus more on public-related issues so that they could bag maximum votes in the upcoming presidential election. It is the best opportunity for Obama to sell his Health-Care law to the masses. Mitt Romney, while giving his reaction on the Supreme Court judgment, said that he would repeal the law if elected to the presidency in the November election. He even said that there was a need to get rid of Obama if people want to get rid of Obama-care. Definitely, Republicans would lash out at the law in their public meetings and try to invoke public anger on the issue. Republicans believe the ruling of the Supreme Court can hamper their campaign against Obama.

#### Health care proves: Republicans will rally against Supreme Court decisions they oppose:

**Fox News Latino, 6/28/2012** (“Supreme Court Upholds Health Care Reform Law in Big Win for Obama,” <http://latino.foxnews.com/latino/politics/2012/06/28/supreme-court-obama-health-care-reform-act-is-constitutional/>, rwg)

Republicans immediately cast the Supreme Court decision as a wake-up call for Americans. In what is surely to be a campaign theme for Romney going forward, the Republican National committee chairman Reince Priebus said: "We need market-based solutions that give patients more choice, not less. The answer to rising health care costs is not, and will never be, Big Government.” Democrats heralded the decision as a much needed extension of basic health care to millions of Americans without access to medical attention.

#### Conservatives will push other branches of Congress to reverse unpopular Supreme Court decisions:

Steffi **Porter, 6/28/2012** (staff writer, “Conservative groups denounce Supreme Court ruling on ‘ObamaCare’” Porter <http://blog.chron.com/txpotomac/2012/06/conservative-groups-denounce-supreme-court-ruling-on-obamacare/>, Accessed 7/26/2012, rwg)

Conservative opponents of “ObamaCare” were not happy to hear that the Supreme Court ruled 5-4 in favor of upholding the controversial health care law. Not just unhappy. Furious. “Today’s Supreme Court decision will do serious harm to American families,” said Family Research Council President Tony Perkins. “Not only is the individual mandate a profound attack on our liberties, but it is only one section among hundreds of provisions in the law that will force taxpayers to fund abortions, violate their conscience rights, and impose a massive tax and debt burden on American families.” American Conservative Union Chairman Al Cardenas called for the law to be “thrown out.” “Today’s unfortunate decision by the Supreme Court to uphold an unpopular and ill-considered law puts the American healthcare system at the mercy of Washington bureaucrats,” Cardenas said in a statement. “This law needs to be thrown out by the Congress and the President immediately, as it exceeds federal power, asserting enormous federal control over the healthcare of every man, woman and child in America. We need a bill that that will actually solve our healthcare problems and reduce the cost — not add to the legacy of debt to our children with trillions of dollars in new spending.”

#### Liberal Supreme Court decisions quickly become fodder for the Republican Party to rally their conservative base:

**Atlanta Journal-Constitution**, 7/10/20**05**; Lexis

With the retirement of Supreme Court Justice Sandra Day O'Connor, and the expected retirement of Chief Justice William Rehnquist, a court that has been unchanged since 1994 is about to take on a very different look. But it's not going to happen without a fight. The conservative movement that has taken control of the Republican Party --- and with it the legislative and executive branches --- now sees its opportunity to remake the Supreme Court as well, clearing the last obstacle to the revolution it seeks to create in American government and culture. To justify that makeoverof the court, Republican activists have spun out an elaborate indictment of the current system, repeating it endlessly until it has taken on the aura of absolute truth in some corners. For instance, much of the rhetoric coming from House Majority Leader Tom DeLay, Senate Majority Leader Bill Frist and other Republican leaders has focused on what they call "judicial activism," judges who in their minds have been overly eager to impose their own personal beliefs on the political system.

## Court Capital DA

### Court Capital DA: Fisher v. Texas

#### Kennedy will strike out a middle ground now in Fisher v. Texas now—voting against Texas but saving Affirmative Action overall:

Allen **Rostron, 2012** (Professor of Law, University of Missouri-Kansas City School of Law, “AFFIRMATIVE ACTION, JUSTICE KENNEDY, AND THE VIRTUES OF THE MIDDLE GROUND,” Lexis/Nexis, Accessed 7/25/2012, rwg)

While it thus seems likely that the University of Texas policy will be struck down, the larger question is whether Justice Kennedy will simply denounce the Texas approach or instead go further and join the Court's conservative quartet in putting a stop to affirmative action across the board. Based on Kennedy's opinions in previous cases, the answer would be no. Although repeatedly voting with the conservatives in affirmative action cases, Kennedy has always conspicuously avoided signing on to more sweeping denunciations of all government consideration of race. In Grutter, he scorned the Michigan law school's policy for pretending to consider all types of diversity while really being nothing more than a racial quota in a holistic disguise. n26 But at the same time, he noted that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity." n27 Likewise, in Parents Involved, Kennedy voted to strike down the particular student/school assignment policies before the Court, but rejected his conservative colleagues' "all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account." n28 Kennedy encouraged school districts to improve the racial balance of their schools in general ways, such as paying attention to race when choosing sites for new school buildings and when drawing up attendance zones, rather than by making race a factor in the individualized determinations about what school a particular student would attend. n29

#### B) Decisions that anger powerful social movements will cause the Court to make decisions that realign themselves with that movement—if the Court angers Conservatives, they’ll do something to get back in their good graces:

Richard H. **Fallon**, Jr., Professor of Constitutional Law, Harvard Law School, April **2005**

[“Legitimacy and the Constitution,” <http://web.lexis-nexis.com/universe/document?_m=be00e4b6d189ddb647d9365044a5571c&_docnum=1&wchp=dGLbVzb-zSkVb&_md5=7105aae1669b5f945e6a9318b42fc69d>, rwg]

Among other things, the public's belief that the Supreme Court is a legitimate institution need not entail a view that the Justices currently are doing a good job. When significant fractions of the public disagree with the Court on salient issues, they may **support political candidates** pledged to change the Court's ideological balance. In recent decades, presidential candidates have repeatedly campaigned against unpopular claims of judicial authority and promised to appoint Justices whom their constituencies would regard as more right-thinking. Justices who defy aroused public opinion risk, and know that they risk, **provoking a political backlash** that ultimately could cause their doctrinal handiwork to collapse. Possibly as a result of the Court's concern for its own sociological legitimacy, **it has seldom remained dramatically at odds with aroused public opinion for extended periods**. In ways that are still little understood, the Justices **undoubtedly are influenced by popular political movements** and by the evolving attitudes of their society.

#### C) Conservatives want to overturn Affirmative Action—returning the US back to the Jim Crow era:

**Cho,** professor, DePaul University College of Law, 20**05** (Sumi, University of Pennsylvania Journal of Constitutional Law, February, 2005, 7 U. Pa. J. Const. L. 809; Lexis)

Affirmative action proponents must give them their due. Conservatives have been amazingly productive and successful given their numbers and the normative claim they have been undertaking. They are trying to render as positive, a retreat from full inclusion and a return to **segregation of higher education**. Their strategies have worked with a good segment of the American population, including many among the current generation, and not limited to young whites. Through their litigation narratives, they have been reaching out to the public on a campaign to make exclusion morally upright by transposing whites, almost always white women, as the victims of undeserving African American sinecurists. n126 The progressive community must reject these cynical attempts and reclaim the moral high ground. We must expose the broad appeal of the attempt to re-enshrine whiteness as victimhood, thereby restoring whiteness to its full pre-civil rights, Jim Crow value. n127

#### Affirmative action is key to military readiness:

TODD **NICHOLS**, 3/24/20**03** (staff writer, “Don't undo good done by affirmative action,”

<http://www.seattlepi.com/news/article/Don-t-undo-good-done-by-affirmative-action-1110489.php>, rwg)

The Bush administration has decided to support the plaintiffs in this effort despite the fact that the federal government utilizes affirmative action at its own military academies and benefits from the practice at colleges and universities through the Reserve Officer Training Corps (ROTC). The administration's position places in **peril our military readiness** as well as our nation's greatest civil rights success story.

#### Readiness solves nuclear war:

**Kagan, 2007** (Robert, senior fellow at the Carnegie Endowment for International Peace, “End of Dreams, Return of History”, 7/19, <http://www.hoover.org/publications/policyreview/8552512.html>)

The jostling for status and influence among these ambitious nations and would-be nations is a second defining feature of the new post-Cold War international system. Nationalism in all its forms is back, if it ever went away, and so is international competition for power, influence, honor, and status. American predominance **prevents these rivalries from intensifying** — its regional as well as its global predominance. Were the United States to diminish its influence in the regions where it is currently the strongest power, the other nations would settle disputes as great and lesser powers have done in the past: sometimes through diplomacy and accommodation but often through confrontation and wars of varying scope, intensity, and destructiveness. One novel aspect of such a multipolar world is that most of these powers would possess nuclear weapons. That could make wars between them less likely, or it could simply make them more catastrophic.

### Uniqueness: Court Capital High Now

#### Health care has bolstered the court’s political capital now:

WILLIAM **MCGURN, 7/2/2012** (staff writer, “McGurn: Chief Justice Roberts Taxes Credibility,” Accessed 7/25/2012 at [http://online.wsj.com/article/SB100014240527 02304708604577502933866909916.html](http://online.wsj.com/article/SB100014240527%2002304708604577502933866909916.html), rwg)

Justice Scalia's dissent in Casey illuminates a political handicap imposed on conservatives by their own principles. Whereas the liberal belief in a living Constitution allows them to stretch its limits to justify almost any desired outcome, conservatives believe the Constitution imposes real limits. The chief justice's tax argument rankles because no one else in America is buying it: certainly not the conservative dissenters, who firmly reject it, nor the court liberals, who appear to have winked because it gave them the outcome they wanted. The day after the ruling came down, this newspaper carried an article that explained Justice Roberts's decision this way: "By confounding charges that the court is too partisan, the chief justice might have earned sufficient political capital to move to the right during the next term, when the court will likely confront a host of hot-button issues, including affirmative action, gay marriage and the continued vitality of the Voting Rights Act." If earning "sufficient political capital" is simply a consequence of his ruling, Justice Roberts cannot be blamed. If it was the aim, however, and it led to his voting as chief justice in a way he would not have voted as an associate justice, he has raised rather than resolved questions about the integrity of the Roberts court.

### Court Capital Uniqueness: Fisher will be decided next term

#### Affirmative action will be decided by the court next term:

Mike **Sacks, 2/21/2012** (staff writer, “Supreme Court To Revisit Affirmative Action In University Of Texas Case,” <http://www.huffingtonpost.com/2012/02/21/supreme-court-affirmative-action-texas_n_1290736.html>, rwg)

Affirmative action is heading back to the Supreme Court, and this time its prospects for survival are poorer than ever.¶ The Court announced on Tuesday that it has agreed to hear a challenge to the University of Texas' affirmative action program, which is used in sorting through applications after the automatic admission of all in-state applicants who graduated in the top 10 percent of their high school class.¶ The state's top 10 percent law was passed as a race-neutral way of facilitating diversity on campus after a federal appeals court in 1996 banned affirmative action in Texas' public universities. Then in 2003, the U.S. Supreme Court -- in a majority opinion written by Justice Sandra Day O'Connor for herself and the Court's four liberals -- approved of certain types of race-conscious admissions practices in higher education for the purpose of achieving a diverse student body. In response, the University of Texas reinstated affirmative action, this time to assess applicants who would not be automatically admitted under the top 10 percent law.¶ Abigail Noel Fisher was one such student. In Fisher v. University of Texas, she claims that she was unconstitutionally denied admission because she is white. Texas argues that the use of race in its admissions process is indistinguishable from the University of Michigan Law School practices that the Supreme Court approved in 2003.¶ Unfortunately for Texas, that argument may no longer hold sway at the high court. Justice Samuel Alito, a reliable conservative vote, has since replaced O'Connor, a notable swing vote. In 2007, Alito joined with Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas to strike down affirmative action programs in public high schools in an opinion that concluded, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¶ Justice Anthony Kennedy voted with the majority but refused to join that one sentence in 2007, and will likely spoil the conservative bloc's effort to end affirmative action once and for all this time. That does not mean, however, that Kennedy will uphold Texas' race-based policy. Rather, he may use his crucial fifth vote to keep affirmative action constitutional in theory, but almost impossible to pursue in practice -- a position he staked out in his dissent from O'Connor's 2003 opinion.¶ Justice Elena Kagan has recused herself, likely because of her participation in the early stages of the case when she served as U.S. solicitor general.¶ **Fisher v. University of Texas** could be argued (but not decided) in the fall, just in time to insert its racially charged issues into the tail end of the presidential election.

### Court Capital: Uniqueness—Kennedy Will Save AFF Action Now

#### Most likely scenario is that Kennedy will decide a middle ground position now:

Allen **Rostron, 2012** (Professor of Law, University of Missouri-Kansas City School of Law, “AFFIRMATIVE ACTION, JUSTICE KENNEDY, AND THE VIRTUES OF THE MIDDLE GROUND,” Lexis/Nexis, Accessed 7/25/2012, rwg)

Of course, Justice Kennedy might make a surprising turn to the left or right in Fisher. He might decide that even though he dissented in Grutter, that precedent now has the weight of stare decisis behind it, and it would be better for the Court to stand pat and let the remaining time run on Justice O'Connor's 25-year clock. On the other hand, he might decide to eradicate affirmative action entirely, figuring that it is better to firmly shut the door to it rather than leave even a small crack through which government officials will continually try to squeeze too much. But the most likely outcome is that Kennedy will once again arrive at a middle ground, refusing to put a complete stop to affirmative action, but insisting that government officials must finally realize that rigorous strict scrutiny really and truly will apply.

#### Kennedy will strike a middle ground now:

Allen **Rostron, 2012** (Professor of Law, University of Missouri-Kansas City School of Law, “AFFIRMATIVE ACTION, JUSTICE KENNEDY, AND THE VIRTUES OF THE MIDDLE GROUND,” Lexis/Nexis, Accessed 7/25/2012, rwg)

[\*74] When the Supreme Court hears arguments this fall about the constitutionality of affirmative action policies at the University of Texas, n1 attention will be focused once again on Justice Anthony Kennedy. With the rest of the Court split between a bloc of four reliably liberal jurists and an equally solid cadre of four conservatives, the spotlight regularly falls on Kennedy, the swing voter that each side in every closely divided and ideologically charged case desperately hopes to attract. Critics condemn Kennedy for having an unprincipled, capricious, and self-aggrandizing style of decision-making. n2 Though he is often decisive in the sense of casting the crucial vote that determines a case's outcome, his opinions can be maddeningly indecisive in the sense of failing to establish clear rules of law. Yet in Fisher v. University of Texas, Kennedy's irresolute nature may prove to be a blessing. By taking a middle-ground position that significantly sharpens judicial scrutiny of affirmative action programs but does not absolutely bar them, Kennedy can finesse the issue in a way that accommodates the American public's conflicted feelings about racial preferences, but simultaneously forces everyone to start thinking more seriously about how racial components of affirmative action can be phased out in a manner that will minimize disruption and bitterness.

#### Fisher case will decide affirmative action—right now they will weaken aff action but not end it:

Adam **Cohen, 2/27/2012** (teaches at Yale Law School, “Is the Supreme Court Going to Kill Affirmative Action?” Accessed 7/25/2012 at <http://ideas.time.com/2012/02/27/is-the-supreme-court-going-to-kill-affirmative-action/>, rwg)

Last week the Supreme Court took a case that could dramatically scale back or even end affirmative action. In Fisher v. University of Texas, a white woman named Abigail Fisher is suing the University of Texas (UT) for denying her admission using criteria that take race into account. A few years ago, her suit would have been a sure loser — but the court is now less accepting of affirmative action. The question is, How far has it shifted? In 2003, in Grutter v. Bollinger, the court approved a university’s affirmative-action plan. But Sandra Day O’Connor, who provided the critical fifth vote, retired in 2006. Now, all eyes are on Anthony Kennedy, the court’s new swing vote, who could decide affirmative action’s future. There are several reasons to believe this could be a Big Case. Affirmative-action critics are certainly talking that way. Ward Connerly, president of the American Civil Rights Institute, called the decision to take the case a “potentially historic step.” And it looks like there are at least four Justices ready to take bold action. But there is also reason to believe the court will stop short — weakening affirmative action but not ending it.

#### Kennedy will make a mild decision in the status quo:

Adam **Cohen, 2/27/2012** (teaches at Yale Law School, “Is the Supreme Court Going to Kill Affirmative Action?” Accessed 7/25/2012 at <http://ideas.time.com/2012/02/27/is-the-supreme-court-going-to-kill-affirmative-action/>, rwg)

Fisher is challenging this formula track, arguing that by using race UT deprived her of her 14th Amendment right of equal protection. She lost in the U.S. Court of Appeals for the Fifth Circuit, which makes sense. The Supreme Court has repeatedly said that considering race in a holistic way is O.K. — first in University of California v. Bakke in 1978, and again in Grutter v. Bollinger in 2003. But are the Justices prepared to abandon those precedents and adopt a harder line? Chief Justice John Roberts seems ready to. In a 2007 school integration case, Roberts declared bluntly: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Justices Antonin Scalia, Clarence Thomas and Samuel Alito are also affirmative-action skeptics. Still, to get a majority, they will need a fifth vote — and that would be Justice Kennedy. In past cases, he has been no great fan of affirmative action, repeatedly voting with the conservative bloc. But he has also written his own opinions, setting out a more nuanced position and has suggested that affirmative action is sometimes warranted, but it must be used very carefully. So, what is the court likely to do? It could issue a sweeping anti-affirmative-action ruling. More likely, though, Justice Kennedy will put a mild foot on the brakes — saying that most selection systems that consider race (including UT’s) are unconstitutional but that in rare cases taking race into account is acceptable.

### Court Capital Links: Controversial Decisions Cost Capital

#### (--) Plan consumes court’s limited capital – controversial rulings cost capital.

Grosskopf and Mondak**, 1998** Profs of Poli Sci Long Island U and U of Illinois, 1998

(Anke Grosskopf, Assistant Prof of Political Science @ Long Island University, & Jeffrey Mondak, Professor of Political Science @ U of Illinois, 1998, “Do attitudes toward specific supreme court decisions matter? The impact of Webster and Texas v Johnson on Public Confidence in the Supreme Court” Political Research Quarterly, vol. 51 no 3 633-54 September1998)

The existence of a strong link between basic values and diffuse support does not necessarily preclude a role for specific decisions, particularly when we seek to understand how support comes to change over time (e.g., Caldeira and Gibson 1992: 658-61). We believe that any claim that the Supreme Court is fully immune to backlash against controversial decisions can be rejected on a prima facie level. First, consider the extreme case. Were the Supreme Court to make its occasional blockbusters-Brown v. Board of Education, Roe v. Wade, Texas v. Johnson, etc.-the norm by routinely ruling on the thorniest social questions, we see it as implausible that such actions would bring no cumulative impact on how people view the Court. Second, the Supreme Court's typical mode of operation suggests that justices themselves view institutional support as an expendable political capital (Choper 1980). That is, the Court recognizes its own political limitations, and thus justices pick their spots carefully when approaching potentially controversial cases. From this perspective, the apparent dominance of democratic values as a determinant of institutional support (e.g., Caldeira and Gibson 1992) means not that the Court is insulated from backlash, but that strategic justices tread cautiously so as to keep backlash to a minimum. Consequently, how and where we examine whether public response to Supreme Court decisions affects institutional support may shape what answer we find.

### Link Extensions: Unpopular Decisions Erode Court Capital

#### Unpopular decisions erode the Supreme Court’s institutional capital:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

n183. Compare Gibson et al., supra note 22, at 361 (concluding that "judgments of specific policies are entirely unrelated to confidence in the Court"), and Tyler & Mitchell, supra note 22, at 781 (reporting findings that views of "institutional legitimacy" and thus of whether to empower the Supreme Court to make abortion decisions were "generally unrelated to support for Court decisions"), with Anke Grosskopf & Jeffery J. Mondak, Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court, 51 Pol. Res. Q. 633, 651-52 (1998) (concluding that **confidence in the Supreme Court** depends on **perceptions of particular decisions** and that unpopular decisions **erode the Court's institutional capital**).

#### Legitimacy depends more on present acceptance of decisions than the legal legitimacy of decisions:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

When we examine legitimacy debates with these three concepts in mind, striking conclusions emerge. First, the legal legitimacy of the Constitution depends **more on its present sociological acceptance** than on the (questionable) legality of its formal ratification.

#### Supreme Court actively bases its decisions on perceived public opinion:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

Only when the concepts of sociological and legal legitimacy are distinguished does Casey's provocative aspect come into focus: the majority opinion suggests that the Supreme Court is **permitted and perhaps required by law** to base its decisions partly **on public perceptions** and, in particular, **on an asserted interest** in preserving its own sociological legitimacy. n243

#### Judges don’t live in a cocoon—they respond to public opinion:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

n209. See generally Friedman, supra note 167, at 2611-13 (noting that "judges do not live in a cocoon" and recognizing the **incentives** "to remain **within the range of public opinion**").

#### The Court will bend to public opinion:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

n210. See Robert A. Dahl, Democracy and Its Critics 190 (1989) ("The views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); Robert G. McCloskey, The American Supreme Court 224 (1960) ("It is **hard to find** a single historical instance when the Court has stood firm for very long against **a really clear wave of public demand.**").

#### Controversial overrules uniquely undermine the Court’s authority

Thomas W. **Merrill**, John Paul Professor of Law at Northwestern University School of Law, **1994**, [Harvard Journal of Law and Public Policy, “A Modest Proposal for a Political Court,” p. 137]

Especially when a controversial ruling like Roe v. Wade is involved, a decision to overrule should be avoided at all costs, because this would give rise to the perception that the Court is "surrendering to political pressure" or "over-ruling under fire." Such a perception, in turn, would **lead to "loss of confidence in the judiciary."** Translated, the thesis of the joint opinion is that the further a decision deviates from the Constitution, the more important it is for the Court to adhere to that decision, or else the public may conclude that the emperor is wearing no clothes.

#### Current sociological acceptance is key to legitimacy:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

First, the legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification. Other **fundamental elements of the constitutional order**, including **practices of constitutional interpretation**, also owe their **legal legitimacy to current sociological acceptance**.

### Link Extensions—AT: Public Won’t Notice the Courts:

#### THE GENERAL PUBLIC DOESN’T MATTER—ELITES WILL PERCEIVE THE DECISION AND THEY ARE KEY

**Fallon, 2005** prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis, rwg

To me, at least, these are jarring conclusions. When defenders maintain that the legal legitimacy of the Supreme Court's role rests largely on public acceptance, n168 as I myself have done, we may be saying scarcely more than that the public, being little informed about the Court's practices, has not mounted a revolt. n169 The American people have allowed constitutional law to **become what legal elites**, especially [\*1826] the Supreme Court, say that it is under interpretive standards evolved by the courts and **little understood** outside the legal elite.

#### Major decisions are picked up by the media guaranteeing perception:

Uhlmann, professor of government at Claremont Graduate University, October 2003 (Michael M., “The Supreme Court Rules www.orthodoxytoday.org/articles2/UhlmannSupremeCourt.shtm) Under this new dispensation the Court is increasingly seen as a political institution, different in form and customs from the political branches but not essentially different in kind. And why should it not be so understood? One can scarcely name an issue of political or moral significance on which the Court has not opined or suggested how we ought to think. That is why **judicial nominations are now routinely freighted with hot political debate**; and that is why the full glare of media attention now focuses on the Court whenever a major decision is pending.

#### Elites are key to legitimacy:

**Fallon, 2005** prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis, rwg

n285. See Friedman, supra note 128, at 1387 (observing that "if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges **will be seen as illegitimate**").

#### Even if the public doesn’t notice Supreme Court decisions—elites do—their perception of the Court is closely tied to individual decisions of the Court:

**Fallon, 2005** prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis, rwg

n170. See David Adamany & Joel B. Grossman, Support for the Supreme Court as a National Policy Maker, 5 Law & Pol'y Q. 405, 407-08 (1983) (noting that although most judicial opinions have relatively little salience with the general public, awareness goes up among **elites**, and "**support for the Court among these elites** is ... **very closely correlated** with their approval of **specific court decisions**").

#### Elites are critical to how decisions are perceived:

**Tsai, 2005** Assistant Prof. of Law @ University of Oregon School of Law, 20**05** (Robert, Iowa Law Review, March 2005; 90 Iowa L. Rev. 1095; Lexis, rwg)

But judges do not bear all of the blame, for litigation is not the only process that affects a legal icon's vitality. **How the decisions have been received by intellectual elites** more generally reinforces their gestalt properties in juridic thought. Accordingly, Part V considers the influence of academic culture on these two sacred emblems. Treatment of this pair of cases mirrors the telling of religious creation stories and parables. I close by suggesting that a lasting devotion to our constitutional heritage must be made of more inspiring stuff than the combination of these two decisions.

#### Views of political elites key to Court legitimacy

Thomas W. **Merrill**, John Paul Professor of Law at Northwestern University School of Law, **1994**, [Harvard Journal of Law and Public Policy, “A Modest Proposal for a Political Court,” p. 137]

Perhaps the best decisional rule for a political Court to adopt is to exercise its discretion in accordance with the emerging consensus among the dominant political elites of society. If the Court correctly anticipates the emerging consensus among those with influence, then there is little danger that its decisions will be overruled. Moreover, **if powerful elites are happy with the Court**, then the Court can rest assured that the Executive will enthusiastically enforce its judgments, Congress will not cut its funding, and no attempt will be made to circumscribe its jurisdiction.

### Links: AT: “ONE DECISION NOT ENOUGH TO AFFECT THE COURT’S LEGITIMACY”

#### Webster and Texas v. Johnson prove: specific decisions of the Court can undermine its legitimacy:

**Friedman, 2003** Professor of Law, New York University School of Law

Michigan Law Review, August 2003, 101 Mich. L. Rev. 2596; Lexis, rwg

n103. Anke Grosskopf & Jeffery J. Mondak, Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court, 51 Pol. Res. Q. 633 (1998) (showing that disagreement with one or both decisions of the Court, on Webster and Texas v. Johnson cases, **substantially reduced confidence in the Court**); Hoekstra, supra note 78, at 97 (showing that satisfaction or dissatisfaction with the decisions made by the Court influences subsequent evaluations of the Court).

### Links: AT: Original Decision Violated Precedent

#### Adherence to precedent key to Court legitimacy—even if the original precedent itself is constitutionally suspect:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

Fifth, however, as Part III argues at length, **a virtual consensus exists** that at least some judicial precedents suffice to ground further, future claims of **legitimate judicial authority**, **even when** those precedents were **themselves erroneously decided** in the first instance. Like the legal legitimacy of the Constitution, the legal legitimacy of precedent-based decisionmaking arises from sociological acceptance.

### Court Capital Internals: Capital Key in Fisher Case

#### Court legitimacy will be the key deciding factor in Fisher:

Allen **Rostron, 2012** (Professor of Law, University of Missouri-Kansas City School of Law, “AFFIRMATIVE ACTION, JUSTICE KENNEDY, AND THE VIRTUES OF THE MIDDLE GROUND,” Lexis/Nexis, Accessed 7/25/2012, rwg)

Of course, the Supreme Court's task is to interpret the Constitution rather than to follow public opinion polls. And on some issues, it will not be possible to give each side half a loaf. But where the Court and the nation are closely divided and a reasonable middle ground does exist, there is surely some value in the Court reaching a result that roughly corresponds to the median of the American public's sentiments. Such a result at least lends legitimacy to the Court's decisions in the eyes of the public. Moreover, the need for legitimacy may be particularly great in Fisher, given that it will be decided a year after the Supreme Court's highly controversial ruling about the fate of the federal health care reform legislation. n36

###  Court Capital Internals: Jud Cap Finite

#### Judicial capital is finite – justices need to pick their fights.

Grosskopf and Mondak, Profs of Poli Sci Long Island U and U of Illinois, 1998

(Anke Grosskopf, Assistant Prof of Political Science @ Long Island University, & Jeffrey Mondak, Professor of Political Science @ U of Illinois, 1998, “Do attitudes toward specific supreme court decisions matter? The impact of Webster and Texas v Johnson on Public Confidence in the Supreme Court” Political Research Quarterly, vol. 51 no 3 633-54 September1998)

The existence of a strong link between basic values and diffuse support does not necessarily preclude a role for specific decisions, particularly when we seek to understand how support comes to change over time (e.g., Caldeira and Gibson 1992: 658-61). We believe that any claim that the Supreme Court is fully immune to backlash against controversial decisions can be rejected on a prima facie level. First, consider the extreme case. Were the Supreme Court to make its occasional blockbusters-Brown v. Board of Education, Roe v. Wade, Texas v. Johnson, etc.-the norm by routinely ruling on the thorniest social questions, we see it as implausible that such actions would bring no cumulative impact on how people view the Court. Second, the Supreme Court's typical mode of operation suggests that justices themselves view institutional support as an expendable political capital (Choper 1980). That is, the Court recognizes its own political limitations, and thus justices pick their spots carefully when approaching potentially controversial cases. From this perspective, the apparent dominance of democratic values as a determinant of institutional support (e.g., Caldeira and Gibson 1992) means not that the Court is insulated from backlash, but that strategic justices tread cautiously so as to keep backlash to a minimum. Consequently, how and where we examine whether public response to Supreme Court decisions affects institutional support may shape what answer we find.

#### Court needs to save capital – controversial decisions burn capital.

Peretti, Prof PoliSci Santa Clara U, 2001

(Terri Jennings Peretti, Prof of Poli Sci at Santa Clara University, 2001, *In Defense of a Political Court,* p.152)

To the degree that a justice cares deeply about her policy goals, she will be quite attentive to the degree of support and opposition among interest groups and political leaders for those goals. She will be aware of the re— sources (e.g.. commitment, wealth, legitimacy) that the relevant interest groups possess who bear the burden of both carrying forward the appropriate litigation necessary for policy success and for pressuring the other branches for full and effective implementation. Only the policy motivated justice will care about the willingness of other government officials to comply with the Court’s decisions or carry them out effectively. And only the policy motivated justice will care about avoiding the application of political sanctions against the Court that might foreclose all future policy options. The school desegregation cases illustrate these points quite nicely. The Court could not pursue the goal of racial integration and racial equality until there was an organized and highly regarded interest group such as the National Association for the Advancement of Colored People willing and able to help. The Court further was required to protect that group from political attack, as it did in NAACP v. Alabama and NAACP v. Button. Avoidance of other decisions that might harm its desegregation efforts was also deemed necessary. Thus, the Court had legal doctrine available to void antimiscegenation statutes, but refused to do so on two occasions.‘°° (Murphy notes that one justice was said to remark upon leaving the conference discussion, "One bombshell at a time is enough."'°‘) The Court additionally softened the blow by adopting its “deliberate speed" implementation formula. Even so, the Court still needed the active cooperation of a broad range of government officials. in all branches and at all levels of government, in order to carry out its decisions effectively. Thus, significant progress in racial integration in the southern schools did not in fact occur until Congress and the Department of Health, Education, and Welfare decided to act. The Court further had to consider whether the political opposition that it knew would ensue would be sufficient to result in sanctions against the Court, such as withdrawal of jurisdiction or impeachment. These considerations arose only in the process of caring deeply about the policy goal at hand—racial equality in public education. They were not a by-product of caring only about the logical or precedential consistency of an opinion or of worrying only about deriving a decision from the Framers’ intentions.

### Court Capital Internals—Capital Key to Rulings

#### Judicial capital is key to rulings.

Gibson and Caldeira, Profs of Political Science at Wash U in St. Louis and Ohio State U, 2009

(James L. Gibson, prof of PoliSci @ Wash U in St. Louis, and Gregory A. Caldeira, Prof of PoliSci @ Ohio State U, January 2009, *“*Confirmation Politics and The Legitimacy of the U.S. Supreme Court” *American Journal of Political Science*, Vol. 53, No. 1, January 2009, Pp. 139–155)

We reiterate our view that institutional legitimacy is an enormously important source of political capital. The conventional hypothesis is that legitimacy is significant because it contributes to acquiescence to decisions of which people do not approve (e.g., Gibson, Caldeira, and Spence 2005). We have devoted considerable effort toward investigating that hypothesis throughout the world. To the extent that we are correct in our analysis of the theory of positivity bias, we suggest here that legitimacy has an even more significant role in the political process: Citizens who extend legitimacy to the Supreme Court are characterized by a set of attitudes that frame a variety of expectations and choices. These frames provide a standing decision that is difficult to rebut in contemporary American politics. This consequence of institutional legitimacy is perhaps the most significant.

### Court Capital Internals--Public Opinion

#### Court capital is limited – public opinion matters

McGuire and Stimson, profs PoliSci @ UNC Chapel Hill, 2004

(Kevin T. McGuire and James T. Stimson, profs of PoliSci @ UNC Chapel Hill, November 2004, “The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences” THE JOURNAL OF POLITICS, Vol. 66, No. 4, November 2004, Pp. 1018–1035)

The reasons for such behavior are not terribly mysterious. The justices may well want to see their preferences reflected in policy outcomes, but that ambition would be fairly hollow if those policies, once promulgated, had no practical effect. The Court requires the cooperation of legislative and executive officials, many of whom are themselves careful auditors of mass opinion. For that reason, the members of the Court must reflect on how well their preferred outcomes will be received and supported by implementers. By no means does this imply that the Court cares about public opinion in the same ways that elected officials do, but we do think it entirely reasonable to assume that justices want their policies to be taken seriously by relevant publics.1 This is not just our opinion, of course. There is abundant evidence of resistance, avoidance, and downright defiance from various constituencies of the Court (Canon and Johnson 1999). It is only when popular opinion supports the Court’s goals that its policies have their full effects (Rosenberg 1991). To be sure, the Constitution affords the Supreme Court institutional independence, but it in no way guarantees the prestige upon which its success is so highly dependent.

#### Public opinion factors into court decisions.

Kramer, Prof Law NYU, 2004

(Larry D. Kramer, Prof Law @ NYU, July 2004, “Popular Constitutionalism” 92 Calif. L. Rev. 959)

We can, in a sense, view all this work on the existence and necessity of popular constitutionalism as a kind of upping the ante on legal realism. Where the realists taught us to look beyond "the rules" to what courts actually do, we now see that even this does not go far enough. We must also look beyond the courts to see how judicial rulings are absorbed, transformed, and sometimes made irrelevant. This is especially true when it comes to the Supreme Court's constitutional jurisprudence. Whether because of practical institutional limitations or a need for support from other branches or a willingness to behave strategically to preserve institutional capital or an inability to overcome deeply inscribed societal norms, the Supreme Court can never monopolize constitutional lawmaking or law interpreting. Popular constitutionalism is, to some extent, perhaps a very great extent, inevitable and unavoidable. The question is what to make of this fact. That the Supreme Court does not fully determine the course of constitutional law is something most lawyers and judges already know - including, I am sure, the Justices of the Supreme Court. We sometimes talk or write as if we thought otherwise, but that is because most legal scholarship is about (and so mainly interested in) only the formal legal system. Aware that there are limits to this system's effectiveness, we leave them unspoken because such qualifications are beyond the problem being addressed and because we assume they will be taken for granted. Maybe this is a mistake. By declining to qualify what we say or failing to consider the fate of law beyond the courthouse, legal scholars have almost certainly overestimated the influence of judicial pronouncements and overlooked extrajudicial influences that matter. To that extent, the work of scholars like Griffin, Whittington, Galanter, Rosenberg, McCann, and others provides a useful and important corrective, a reminder that judicial lawmakers face substantial obstacles and that nonjudicial actors and activities have real significance for law and especially for constitutional law. [n56](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.329995.81338705687&target=results_DocumentContent&reloadEntirePage=true&rand=1248534599929&returnToKey=20_T7030638704&parent=docview#n56) Yet nothing in this scholarship provides a basis for criticizing or challenging even the most ambitious claims of judicial authority. Quite the contrary, evidence that courts face inherent limits in establishing and  [\*974]  enforcing constitutional norms may simply give those who believe in the necessity of judicial supervision a reason to redouble their efforts to shut down extrajudicial interpretation. The reason is straightforward: barriers to the Supreme Court's ability to monopolize constitutional interpretation are not exogenous to beliefs about what the status of the Court's rulings ought to be.

### Court Capital Internals--Court Need to Pick Battles

#### Court needs to pick battles – capital is finite.

Young, Prof Law UT Austin, 2004

(Ernest A. Young, Prof of Law at UT Austin, November 2004, “The Rehnquist Court's Two Federalisms” 83 Tex. L. Rev. 1)

Whether or not Alexander Hamilton was right to call the judiciary the "least dangerous branch," n451 both contemporary theory and historical experience suggest that courts' ability to defy the national political branches is not unlimited. Those limits bear on federalism doctrine in at least three respects. First, they support, at least to some extent, the notion that the judiciary has limited institutional capital. If that is true, then courts may not be able to pursue all possible doctrinal avenues at once and may, in consequence, have to choose among them. Second, these limits suggest that courts should pursue certain kinds of doctrine. In particular, they support doctrine that advances the goal of state autonomy without forcing direct confrontations by invalidating political branch actions. Finally, the limits on the judiciary's ability to confront the political branches ought to temper our expectations (or fears) of what judicial federalism doctrine can accomplish.

#### Court needs to conserve capital.

Pacelle, Prof PoliSci Georgia Southern, 2002

(Richard L. Pacelle, Jr., Prof of Poli Sci @ Georgia Southern University, The Role of the Supreme Court in American Politics: The Least Dangerous Branch? 2002 p 162-3

The Court is supposed to be the voice of reason, charged with the creative function of articulating the durable principles of government. The normative view is that the justices should be governed by principles of constitutional law and statutory interpretation. The justices must respect the governmental structure and use reasoned principle and societal moral tradition, as well as history, the text of the Constitution, and judicial precedent as sources of inspiration. The justices need to pay attention to the broader context that Leslie Goldstein refers to as “the evolving morality of our tradition? Because the Court stands outside popular control, it should refrain from taking and deciding certain cases when it would be politically unwise. The justices need to find the underlying meaning embedded in the plans behind the Constitution. To deny the existence of broader guiding principles is to make the Court “a naked power organ” rather than a court of law (Goldstein 1995, 277--278). In Chapter 2, I argued that since the late 1980s, the Supreme Court has begun to move away from the so-called double standard that dominated judicial decisionmaking for half a century This move would help the Court resolve the dilemmas it faced. Part of the new role urges the Court to adopt judicial restraint when it deals with the actions of the elected branches. To do so would mitigate concerns that the Court is undemocratic. This new role also asks the Court to avoid making sweeping policy pronouncements. That would reduce concerns over the Court°s institutional limitations and arguments about capacity. However, the adoption of such a role would represent an abdication of the role of the Court as a protector of minorities.

### Court Capital Internal Links—Court Will Change Its Opinions to appease the public

#### Fears of the loss of its legitimacy cause the Court to adhere to public opinion after it angers the public:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

(c) Measures of Sociological Legitimacy and the Limits of Judicial Power. - The measures of sociological legitimacy commonly used by social scientists provide poor gauges of the effective limits of judicial [\*1833] power. Indeed, excessive focus on the authoritative legitimacy of Supreme Court rulings and on the Court's institutional legitimacy - as measured by surveys charting "diffuse support" - could prove affirmatively misleading for some purposes. Among other things, the public's belief that the Supreme Court is a legitimate institution need not entail a view that the Justices currently are doing a good job. n207 When significant fractions of the public disagree with the Court on salient issues, they may support political candidates pledged to change the Court's ideological balance. In recent decades, presidential candidates have repeatedly campaigned against unpopular claims of judicial authority and promised to appoint Justices whom their constituencies would regard as more right-thinking. n208 Justices who defy aroused public opinion risk, **and know that they risk**, provoking **a political backlash** that ultimately could cause their doctrinal handiwork to collapse. n209 Possibly as a result of the **Court's concern for its own sociological legitimacy**, it has **seldom remained dramatically at odds with aroused public opinion for extended periods**. n210 In ways that are still little understood, the Justices undoubtedly are influenced by popular political movements and by the evolving attitudes of their society. n211

#### Court decisions will follow public opinion on issues:

**Richey,** staff writer, Christian Science Monitor, **7/11/**20**05** (Warren, Lexis)

Legal analysts say that contrary to growing expectations, the high court generally doesn't take radical action. Changes in the law develop slowly, usually mirroring **established public opinion.** But the fact is, the court can also be an important engine for change. "It will be natural for litigants to try to take the measure of the new justice and see how the new court composed with its new member reacts," says Doug Kmiec, a constitutional law professor at Pepperdine University School of Law in Malibu, Calif. "But I don't think the public should expect, nor would they want, a wholesale revision of the work of the court for the last 10, or 15, or 24 years."

### Court Capital Internals: Striking Down AFF Action will spill-over

#### Fisher decision will affect private schools and employers:

Adam **Cohen, 2/27/2012** (teaches at Yale Law School, “Is the Supreme Court Going to Kill Affirmative Action?” Accessed 7/25/2012 at <http://ideas.time.com/2012/02/27/is-the-supreme-court-going-to-kill-affirmative-action/>, rwg)

If the Supreme Court strikes down UT’s admissions system, other public schools will have to re-evaluate their admissions policies — and other institutions, from private schools to employers, will likely rethink how they consider race. Affirmative action will not disappear overnight, but the Supreme Court’s conservative bloc appears to be intent on reducing the role it plays in university admissions — and other parts of society.

#### Striking down aff action would also mean it is struck down in private universities:

ADAM **LIPTAK, 2/21/2012** (staff writer, “Justices Take Up Race as a Factor in College Entry,”

<http://www.nytimes.com/2012/02/22/us/justices-to-hear-case-on-affirmative-action-in-higher-education.html?pagewanted=all>, rwg)

A Supreme Court decision forbidding the use of race in admission at public universities would almost certainly mean that it would be barred at most private ones as well under Title VI of the Civil Rights Act of 1964, which forbids racial discrimination in programs that receive federal money. In her majority opinion in Grutter, Justice O’Connor said the day would come when “the use of racial preferences will no longer be necessary” in admission decisions to foster educational diversity. She said she expected that day to arrive in 25 years, or in 2028. Tuesday’s decision to revisit the issue suggests the deadline may arrive just a decade after Grutter.

### Court Capital Impacts: Affirmative Action is Key to Readiness

#### Affirmative action is key to military readiness:

TODD **NICHOLS**, 3/24/20**03** (staff writer, “Don't undo good done by affirmative action,”

<http://www.seattlepi.com/news/article/Don-t-undo-good-done-by-affirmative-action-1110489.php>, rwg)

Senior military officers are well aware that racial sensitivity and the **credibility of its officer corps** are vital to national security readiness. Enhancement of these qualities demands the inclusion of minority officers in sufficient numbers to affect their colleagues and to be visible to the enlisted ranks. The academies and ROTC programs based in universities around the country are the prime sources of officer candidates.

#### Top military officials agree—affirmative action key to readiness:

TODD **NICHOLS**, 3/24/20**03** (staff writer, “Don't undo good done by affirmative action,”

<http://www.seattlepi.com/news/article/Don-t-undo-good-done-by-affirmative-action-1110489.php>, rwg)

Twenty senior retired generals and admirals, including Gens. Norman Schwarzkopf, John Shalikashvili, Wesley Clark and Adm. William J. Crowe, are among those filing friend of the court briefs in support of the University of Michigan. They recognize that our armed forces have become and must remain a meritocracy where any person regardless of station in life can succeed. This success and growing equality of opportunity have made our military readiness unsurpassed. Affirmative action involving qualified candidates has, until now, been recognized as proper in achieving compelling interests. It can hardly be argued that national security is not a compelling national interest. The Supreme Court should not set the clock back on decades of progress by barring consideration of race among qualified candidates in admissions policies at institutions of higher education.

#### Readiness deters war:

**Spencer 2000** (Jack, Policy Analyst - Heritage Foundation, The Facts About Military Readiness, 9-15, http://www.heritage.org/Research/MissileDefense/BG1394.cfm)

**Military readiness is vital** because declines in America's military readiness signal to the rest of the world that the United States is not prepared to defend its interests. Therefore, **potentially hostile nations will be more likely to lash out** against American allies and interests, inevitably leading to U.S. involvement in combat. A high state of military readiness is more likely to **deter potentially hostile nations** from acting aggressively in regions of vital national interest, thereby preserving peace.

### Court Capital Impacts: AFF Action Solves Racism

#### (--) Affirmative action is crucial to combat racism.

Edward J. **Eberle**, 20**04** Professor of Law, Roger Williams University School of Law, **2004**. [Arizona State Law Journal, “Cross Burning, Hate Speech, and Free Speech in America, p. lexis, rwg]

Stripping away the problematic conduct associated with hate speech - hate crimes, hate intimidation, hate threats, and other hate harm - and subjecting it to targeted regulation can be an effective way to address the serious problem of hate and bias in society. This direct regulatory approach has the advantage of regulating the underlying racist behavior that lies at the root of cross burning or other expression of bias. Direct regulation of racism, sexism, or other hate can retard the formation and expression of bias. Proactive regulation combating racism and bigotry can help reshape the community we live in so that hate and bias will be rightly viewed as deviant and unacceptable social behavior. n187 Especially effective in facilitating such a transformation is the design and implementation of programs that are inclusive of all citizens. Proactive affirmative action, equal opportunity, and anti-discrimination programs can be effective tools to fight racism and better achieve full integration of all members of society.

## Court Legitimacy DA

### Court Legitimacy DA Shell

#### A) Health care decision has bolstered the legitimacy of the Court:

Brad **Bannon, 7/23/2012** (President of Bannon Communications Research, “Chief Justic John Roberts is Surprising Swing Vote in Affordable Healthcare Act,” Accessed 7/25/2012 at

<http://thelegalbroadcastnetwork.squarespace.com/the-lbn-blog/2012/7/23/chief-justic-john-roberts-is-surprising-swing-vote-in-afford.html>, rwg)

This decision reflects that today, it's not always a clear win on either side. Bannon says that on the one hand, it is an advantage to Obama's presidency because "the Supreme Court ratified the iconic achievement of his administration," and showed Americans that Obama could solve a major problem in a legal and constitutional way. This has put Romney on the defensive as Romneycare was the inspiration for Obamacare. Romney is now talking about how much he disliked the Supreme Court decision but the Supreme Court has essentially ratified the insurance mandate he created in Massachusetts a long time ago. Essentially, this new visibility of healthcare has put Romney in a difficult spot as he's now criticizing a program he pioneered, explains Bannon. Americans dislike Washington, not democrats or republicans and Congress has gotten that message. Bannon feels that's why they've worked with Obama on the Transportation and Student Loan Bills. "Justice Roberts sent a clear signal that this is how he wants the Supreme Court to operate and I think this will have an effect on the whole political process," says Bannon. Thinking this is a smart move from Chief Roberts, Bannon feels it has restored the credibility of the Court, which had very little before this decision.

#### B) LINK: Moving away from settled precedent undermines the legitimacy of the Court:

John C. **Yoo**, Professor of law at the University of California, **2001**, [The University of Chicago Law Review, “In defense of the court’s legitimacy,” p. 75]

How does the Court maintain this legitimacy? According to the Casey plurality, the Court receives its public support by "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."39 In other words, only by acting in a manner that suggests that its decisions are the product of law rather than politics can the Court maintain its legitimacy. Therefore, the Court **must adhere to settled precedent**, lest the public believe that the Court is merely just another political actor. "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would **subvert the Court's legitimacy beyond any serious question**."40 Without this legitimacy, the Court would be unable to perform its role as interpreter of the Constitution, which at times may require the Court to act against the popular will in favor of individual rights.

#### C) Loss of legitimacy prevents court from checking military, ensuring nuclear war.

Kellman, prof of law @ DePaul, 1989

(Barry Kellman, prof of law @ DePaul, Dec 1989, “JUDICIAL ABDICATION OF MILITARY TORT ACCOUNTABILITY: BUT WHO IS TO GUARD THE GUARDS THEMSELVES?” 1989 Duke L.J. 1597)

In this era of thermonuclear weapons, America must uphold its historical commitment to be a nation of law. Our strength grows from the resolve to subject military force to constitutional authority. Especially in these times when weapons proliferation can lead to nuclear winter, when weapons production can cause cancer, when soldiers die unnecessarily in the name of readiness: those who control military force must be held accountable under law. As the Supreme Court recognized a generation ago, the Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders. . . . . . . . We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military. We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. [n1](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n1) Our fears may be rooted in more recent history. During the decade of history's largest peacetime military expansion (1979-1989), more than 17,000 service personnel were killed in training accidents. [n2](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n2) In the same period, virtually every facility in the nuclear bomb complex has been revealed  [\*1598]  to be contaminated with radioactive and poisonous materials; the clean-up costs are projected to exceed $ 100 billion. [n3](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n3) Headlines of fatal B-1B bomber crashes, [n4](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n4) the downing of an Iranian passenger plane, [n5](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n5) the Navy's frequent accidents [n6](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n6) including the fatal crash of a fighter plane into a Georgia apartment complex, [n7](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview#n7) remind Americans that a tragic price is paid to support the military establishment. Other commentaries may distinguish between the specific losses that might have been preventable and those which were the random consequence of what is undeniably a dangerous military program. This Article can only repeat the questions of the parents of those who have died: "Is the military accountable to anyone? Why is it allowed to keep making the same mistakes? How many more lives must be lost to senseless accidents?" [n8](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview#n8) This Article describes a judicial concession of the law's domain, ironically impelled by concerns for "national security." In three recent controversies involving weapons testing, the judiciary has disallowed tort accountability for serious and unwarranted injuries. In United States v. Stanley, [n9](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview#n9) the Supreme Court ruled that an Army sergeant, unknowingly drugged with LSD by the Central Intelligence Agency, could not pursue a claim for deprivation of his constitutional rights. In Allen v. United States, [n10](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview#n10) civilian victims of atmospheric atomic testing were denied a right of tort recovery against the government officials who managed and performed the tests. Finally, in Boyle v. United Technologies, [n11](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n11) the Supreme Court ruled that private weapons manufacturers enjoy immunity from product liability actions alleging design defects. A critical analysis of these decisions reveals that the judiciary, notably the Rehnquist Court, has abdicated its responsibility to review civil matters involving the military security establishment. [n12](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n12)  [\*1599]  Standing at the vanguard of "national security" law, [n13](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.516321.88946738123&target=results_DocumentContent&reloadEntirePage=true&rand=1248485968142&returnToKey=20_T7029935235&parent=docview" \l "n13) these three decisions elevate the task of preparing for war to a level beyond legal  [\*1600]  accountability. They suggest that determinations of both the ends and the means of national security are inherently above the law and hence unreviewable regardless of the legal rights transgressed by these determinations. This conclusion signals a dangerous abdication of judicial responsibility. The very underpinnings of constitutional governance are threatened by those who contend that the rule of law weakens the execution of military policy. Their argument -- that because our adversaries are not restricted by our Constitution, we should become more like our adversaries to secure ourselves -- cannot be sustained if our tradition of adherence to the rule of law is to be maintained. To the contrary, the judiciary must be willing to demand adherence to legal principles by assessing responsibility for weapons decisions. This Article posits that judicial abdication in this field is not compelled and certainly is not desirable. The legal system can provide a useful check against dangerous military action, more so than these three opinions would suggest. The judiciary must rigorously scrutinize military decisions if our 18th century dream of a nation founded in musket smoke is to remain recognizable in a millennium ushered in under the mushroom cloud of thermonuclear holocaust.

### Uniqueness Updates: Health Care Decision Bolstered Legitimacy

#### Health care decision has bolstered the legitimacy of the Supreme Court:

Gary **Kaplan, 7/19/2012** (attorney at Thorp Reed & Armstrong, “Hail the chief justice! His health care vote helps restore credibility to the judiciary,” Accessed 7/25/2012 at <http://www.post-gazette.com/stories/opinion/perspectives/hail-the-chief-justice-his-health-care-vote-helps-restore-credibility-to-the-judiciary-642505/>, rwg)

Thursday's 5-4 Supreme Court decision upholding the constitutionality of the Affordable Care Act (i.e., Obamacare) assures health care for more than 30 million Americans, allows the adoption of innovative ways to limit the debilitating growth of health care costs and buttresses efforts to ferret out fraudulent practices that cost taxpayers hundreds of billions of dollars each year. But perhaps just as importantly, it salvages the credibility of the Supreme Court as our nation's defender of justice and bulwark against political tyranny. The hero of the story is Chief Justice John Roberts. Since handing the 2000 presidential election to George W. Bush in another 5-4 decision, the Supreme Court has whittled away at its legitimacy by seeming to delegate all of its authority to a single justice (Anthony Kennedy) who has served as the swing vote in virtually every politically charged case. If only Justice Kennedy's vote matters, why invest in the pomp, circumstance and charade of a nine-member court? With Thursday's decision, the conservative chief justice plainly decided that the integrity of the court and his own legacy were more important than pandering to the political right. Rather than resting his majority opinion on prior cases establishing the broad scope of congressional authority over interstate commerce, Chief Justice Roberts instead concluded that the "individual mandate" to buy insurance falls within a more limited congressional power to tax. Both the liberal and conservative wings of the court disagreed, each preferring to address the Commerce Clause head on, while disagreeing as to its meaning.

#### Health care decision bolstered the credibility of the Supreme Court:

Dr. Charles G. **Cogan, 7/2/2012** (Associate, Belfer Center for Science and International Affairs at Harvard's Kennedy School, “Pomp, Pederasty, and Peculation -- But Also Social Justice,” Accessed 7/25/2012 at [http://www.huffingtonpost.com/dr-charles-g-cogan/pomp -pederasty-peculation\_b\_1641417.html](http://www.huffingtonpost.com/dr-charles-g-cogan/pomp%20-pederasty-peculation_b_1641417.html), rwg)

What happened? There are a couple of reasons behind this, one up close and credible, and the other more subliminal and arguably far-out. First and foremost, Chief Justice Roberts likely wanted to save the credibility of the Supreme Court as a unique American institution -- a credibility already deeply tarnished by the Court's awarding of the Presidency to George W. Bush over Al Gore in 2000, and the Citizens United case that opened the floodgates of campaign contributions and was seen as blatantly favoring the Republican Party. In the Affordable Care case, for the Court to be seen as overturning the will of the people, as expressed in a majority vote by its elected representatives would add to the growing charge that the justices have simply become politicized in this highly politicized era in the United States.

#### Health care ruling bolsters the court’s credibility:

Vikram David **Amar And** Akhil Reed **Amar, 7/2/2012** (professor and the associate dean of the University of California-Davis School of Law and professor at Yale Law School, “Roberts reaches for greatness,”

<http://www.jsonline.com/news/opinion/roberts-reaches-for-greatness-aq5vomg-161114785.html>, rwg)

Roberts' health care ruling did exactly the same things. Even as it upheld a law in which the president had invested significant political capital, Roberts' ruling placed new limits on Congress' commerce and spending clause powers, thereby promoting the conservative constitutional values that Roberts always has espoused. Moreover, he accomplished this in the context of an overall outcome that makes it hard for Obama and others who differ from Roberts' basic constitutional outlook to complain and in a manner that enhances the credibility of the court as an independent, nonpartisan arbiter.

#### Health Care ruling helps the court—avoids perceptions of partisanship:

David Paul **Kuhn, 6/29/2012** (staff writer, “The Incredible Polarization and Politicization of the Supreme Court,” <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>, rwg)

That worry may have shaped Roberts' health-care ruling. The ruling will likely temper, for now, charges that the Court has become a predictably political institution. Thursday's decision marked an unusual respite from this predictably ideological Court. Anthony Kennedy is the traditional swing vote. But Kennedy sided with three more conservative members on Thursday. In the minority opinion, he wrote that the law is "invalid in its entirety." No Supreme Court had struck down presidential legislation this significant since the mid 1930s. So it was Roberts, the conservative chief justice who Senator Obama voted against, who saved, for now, the signature law of Obama's presidency. It was a strikingly non-ideological moment for ideological Washington.

#### Health care decision bolstered the legitimacy of the Supreme Court:

Thomas **Friedman, 6/30/2012** (staff writer, “Taking One for the Country,”

<http://www.nytimes.com/2012/07/01/opinion/sunday/taking-one-for-the-country.html>, rwg)

It was not surprising to hear liberals extolling the legal creativity and courage of Chief Justice Roberts in finding a way to greenlight Obama’s Affordable Care Act. But there is something deeper reflected in that praise, and it even touched some conservatives. It’s the feeling that it has been so long since a national leader “surprised” us. It’s the feeling that it has been so long since a national leader ripped up the polls and not only acted out of political character but did so truly for the good of the country — as Chief Justice Roberts seemingly did. I know that this was a complex legal decision. But I think it was inspired by a simple noble leadership impulse at a critical juncture in our history — to preserve the legitimacy and integrity of the Supreme Court as being above politics. We can’t always describe this kind of leadership, but we know it when we see it and so many Americans appreciate it.

#### Health care decision frees up the court:

ASHBY **JONES And** BRENT **KENDALL, 6/28/2012** (staff writers, “Roberts Straddles Ideological Divide,” Accessed 7/25/2012 at [http://online.wsj.com/article/SB100014240 52702303561504577494723149538572.html](http://online.wsj.com/article/SB100014240%2052702303561504577494723149538572.html), rwg)

"Had the court struck down health care, it would have ratcheted up expressions from a lot of corners that the court was taking sides in an election-year political debate," said Paul M. Smith, an appellate lawyer in Washington, D.C., and a former law clerk to Justice Lewis F. Powell, Jr. "This ruling wipes out those concerns and could **free up the court** going forward."

#### Health care decision helps the court—makes it appear less partisan

ASHBY **JONES And** BRENT **KENDALL, 6/28/2012** (staff writers, “Roberts Straddles Ideological Divide,” Accessed 7/25/2012 at [http://online.wsj.com/article/SB100014240 52702303561504577494723149538572.html](http://online.wsj.com/article/SB100014240%2052702303561504577494723149538572.html), rwg)

Legal scholars called his upholding of the law an act colored by pragmatism. It deferred to Congress, avoided roiling a major part of the U.S. economy and could go some way to reducing the court's reputation for being partisan.

### Internal Links: AT: Legitimacy Resilient

#### Legal legitimacy of the Courts always at risk because it rests on uncertain foundations:

**Fallon, 2005** prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis, rwg

Fourth, because the Constitution invites disagreement about so much, many claims about the legal legitimacy of practices under the Constitution - especially those of the courts - **rest on inherently uncertain foundations**.

#### Constitutional law always rests on shifting sands of legitimacy:

**Fallon, 2005** prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis, rwg

Finally, as should be evident already, constitutional law does not rest on a single rock of legitimacy, as many appear to assume, but on sometimes shifting sands. Realistic discourse about constitutional legitimacy must reckon with the snarled interconnections among constitutional law, its diverse sociological foundations, and the felt imperatives of practical exigency and moral right.

### Internals: Legitimacy Key to Check Presidential Powers

**(--) Legitimacy is necessary for the Court to be willing to decide against the President:**

**Segal et al, polisci professor, 04.** Jeffrey Segal et al., Prof. pol. sci. @ Stony Broon, 2004 “The effect of war on the U.S. Supreme Court” [www.nyulawglobal.org/workingpapers/detail/documents/GLWP0304Segal.pdf](http://www.nyulawglobal.org/workingpapers/detail/documents/GLWP0304Segal.pdf)

In raising this question, Grossman suggests that the justices in Korematsu were forced to think long and hard about President Roosevelt’s response to a decision adverse to his order. Apparently, though, pressure from the same administration in the Nazi saboteur case, Ex Parte Quirin,130 avoided any need for Court members to cull subtle and not-so-subtle historical signals.131 According to Turley: Roosevelt’s Attorney General Francis Biddle warned that the president would not accept anything but total support from the court [in the Quirin case]. Justice Owen J. Roberts conveyed this warning to the whole court in its conference on July 29, 1942. He informed his colleagues that the President intended to have all eight men shot if the Court did not acknowledge his authority, warning that they must avoid such a “dreadful” confrontation.132 Similar, though perhaps less overt, political pressure continued with President George W. Bush’s Justice Department leveling threats against appellate courts it believes have contravened anti-terrorism measures passed in the wake of September 11th . For example, after the Fourth Circuit ruled, in United States v. Moussaoui,133 that the defendant facing trial for the September 11th attacks should be allowed to interview a captured Al Qaeda member as a potential witness to his case, the Justice Department defied the order in the name of national security. It also threatened to move the prosecution to a military tribunal.134 What these stories suggest is that when the political branches credibly threaten to circumvent or ignore disliked outcomes, the Supreme Court is well advised to exercise “passive virtues.”135 Rather than squandering its resources on “ineffective judgments,”136 as Alexander Bickel warned, the Court ought and does assume a more deferential stance. Institutional legitimacy thereby may become an implicit decision calculus that leads justices to issue decidedly different opinions during times of war.137 In addition, because concerns over institutional legitimacy are constant, the Court must follow precedent established during wartime even after the crisis dissipates. If it does not, it once again may risk undermining its fundamental efficacy. That is so for several reasons, not the least of which is that members of legal and political communities base their future expectations on the belief that others will follow existing rules. Should the Court make a radical change in those rules, the communities may be unable to adapt, resulting in a decision that does not produce a (new) efficacious rule. If a sufficient number of such decisions accumulate overtime, the Court will undermine its legitimacy. Hence, the norm of stare decisis can constrain the decisions of all justices, even those who do not believe they should be constrained by past decisions or who dislike extant legal principles.

### Impacts: AT: Pres Power Impact Doesn’t Assume Obama

#### Obama is massively expanding presidential powers—he’s channeling Cheney:

Steven **Thomma and** William **Douglas, 6/21/2012** (staff writer, “Obama asserts presidential powers he once spoke critically of,” <http://www.mcclatchydc.com/2012/06/21/153365/obama-asserts-presidential-powers.html>, Accessed 7/26/2012, rwg)

WASHINGTON — President Barack Obama is starting to channel his inner Cheney.¶ For years, Obama talked about the limits on presidential power. Now, driven either by principle or political expediency, he’s working to build and maintain a powerful presidency that pushes the edge of what it can do, while often telling Congress and the courts to mind their own business.¶ In the last week alone, he refused a subpoena to share Justice Department emails with Congress, told courts he doesn’t have to justify his claimed power to assassinate suspected terrorists and decided to stop deporting certain illegal immigrants even though Congress has refused to enact a law to do that.¶ Those moves cap a slow buildup of executive branch power since Obama took office in January 2009. Some actions build on war powers seized by the administration of President George W. Bush and Vice President Dick Cheney. Some assert new domestic authority.¶ Taken together, they reinforce the strengthening presidential power that Cheney pursued ever since he served as White House chief of staff to Gerald Ford and watched Congress take power away from a presidency weakened by Vietnam and Watergate.¶ “Particularly with regard to national security powers, Obama is as vigorous in exercising those powers, and expanding some of them, as his predecessor,” said Gene Healy, the author of the book “The Cult of the Presidency: America’s Dangerous Devotion to Executive Power.”

### Links: Upholding Precedent Key to Legitimacy

#### Ignoring legal consistency threatens the Court’s legitimacy:

**Fallon, 2005** prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis, rwg

For example, critics who claimed that the Supreme Court acted **illegitimately** in Bush v. Gore mostly seemed to imply that the majority acted not merely erroneously, but with a **willful disregard** for applicable constitutional principles. n143 More particularly, some thought that the majority breached the requirement that judges **must apply legal principles consistently**, without regard to the parties or a case's partisan impact. n144

#### Adherence to precedent critical to the foundations of legitimacy:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

First, the foundations of contemporary constitutional legitimacy - regardless of whether that term is used in a legal, sociological, or moral sense - necessarily **lie in current states of affairs.** **If precedent is accepted as a legally valid source** of authority for future decisions, **then it enjoys legal legitimacy**, regardless of its relation to the original understanding of constitutional language. Nor does any tinge of moral illegitimacy sully this state of affairs. If the current constitutional regime deserves to be supported, as I believe that it does, it is because the current regime furnishes the great benefits of the rule of law and because it is reasonably just, not because we are bound by the intentions of generations now long dead.

#### Distorting precedent weakens the judiciary:

ALBERTO **GONZALES, 2/2/2007** (Federal News Service; Lexis)

Activist judges - those who on a pretense substitute their own views for the will of the legislatures - can, of course, find some rationale to support any desired outcome. They can find some quote to support their viewpoint in legislative history. Or, from a footnote in an earlier decision, they can extrapolate a new principle despite what the language of the law itself says. But in the end, **distorting history or precedent to support a pre- determined outcome weakens the Judiciary**, undermines the rule of law, and harms our democracy.

#### Upholding precedent key to Supreme Court legitimacy:

ALBERTO **GONZALES, 2/2/2007** (Federal News Service; Lexis)

Judicial decisions have been obeyed historically in large part because the judgment of the federal Judiciary is respected. But it is perhaps underappreciated that when courts apply an activist philosophy that stretches the law to suit policy preferences, they **reduce the Judiciary's credibility and authority**. In contrast, a judge who humbly understands the role of the courts in our tripartite system of government renders decisions based on neutral principles. He generally defers to the judgment of the political branches, **and respects precedent** - the collective wisdom of those who have gone before him. In so doing, that judge **strengthens respect for the Judiciary,** upholds the rule of law, and permits the People - through their elected representatives - to decide the issues of the day.

#### Court’s legitimacy depends upon its adherence to legal norms:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

In this passage, the Supreme Court invoked - sometimes alternately and sometimes simultaneously - sociological and legal concepts of legitimacy. When the Court equated its institutional legitimacy with its power and said that its power depends on acceptance, it referred to legitimacy in a sociological sense: the Court's sociological legitimacy resides in the public's acceptance of its role (institutional legitimacy) and in the public's willingness to accept judicial mandates (authoritative legitimacy). n241 As the Court recognized, however, its sociological legitimacy depends on its adherence or apparent adherence to legal [\*1841] norms. If the Court did not base its decisions on legal principles, the public would lose respect for it. n242

### Links: Overruling Decisions

#### Overruling its decisions undermine the Court’s legitimacy.

Thomas W. **Merrill**, John Paul Professor of Law at Northwestern University School of Law, **1994**, [Harvard Journal of Law and Public Policy, “A Modest Proposal for a Political Court,” p. 137]

The legitimacy of the Supreme Court is widely assumed to depend on the perception that its decisions are dictated by law. This is the central thesis of the extraordinary joint opinion in Planned Parenthood v. Casey, decided by the Supreme Court at the end of the 1991 Term. The joint opinion observes that the Court's power lies in its legitimacy and that its legitimacy is "a product of the substance and perception" that it is a court of law. Thus, **frequent overrulings are to be avoided**, because this would "overtax the country's belief' that the Court's rulings are grounded in law.

### Legitimacy: Unpopular Decisions Undermine Legitimacy

#### Legitimacy is affected by perception of the Court:

**Tsai,** Assistant Prof. of Law @ University of Oregon School of Law, 20**05** (Robert, Iowa Law Review, March 2005; 90 Iowa L. Rev. 1095; Lexis)

These themes were played out in the contentious battle over the scope of the right to abortion. In Planned Parenthood v. Casey, the plurality opinion transparently explored the idea that the Court's legitimacy is **a "product of substance and perception."** n209 In justifying their decision to affirm the core [\*1143] of Roe on stare decisis grounds, Justices Kennedy, O'Connor, and Souter found occasion to discuss Brown's legacy.

#### Legal legitimacy rests fundamentally on societal acceptance of judicial rulings:

Fallon, prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis

Following a well-trod jurisprudential path, n279 I have maintained that legal legitimacy depends fundamentally on sociological legitimacy. To repeat now familiar formulae, the foundations of law, including constitutional law, lie in sociological embrace and acceptance of rules, norms, and interpretive practices. The Constitution is law **because it is accepted as such**. Judicial precedent contrary to what otherwise would be the best interpretation of the Constitution is law for the same reason.

#### The Court’s legitimacy, institutional legitimacy, is dependent on public opinion.

John C. **Yoo**, Professor of law at the University of California, **2001**, [The University of Chicago Law Review, “In defense of the court’s legitimacy,” p. 75]

Legitimacy is a word often used in our political debate, but seldom defined precisely. We can think of institutional "legitimacy" as the belief in the binding nature of an institution's decisions, even when one disagrees with them.10 This sociological or even psychological definition of the term is concerned with whether people will think the Court's decision in Bush v Gore was legitimate, and as a result will obey it.11

#### Public opinion key to the Court’s legitimacy:

John C. **Yoo**, Professor of law at the University of California, **2001**, [The University of Chicago Law Review, “In defense of the court’s legitimacy,” p. 75]

"The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."38 Without the sword or purse, the Casey plurality believes, the Court's authority derives from **the public's acceptance of its power to interpret the Constitution**.

### Legitimacy Impacts: Strong Courts Check Presidential Powers

#### Strong courts are key to check presidential powers:

Michael P. **Allen, 2007** (Associate Professor of Law, Stetson University College of Law, Brooklyn Law Review, Spring 2007, 72 Brooklyn L. Rev. 871; Lexis/Nexis, rwg)

Rather, the Article explores the serious question of the role of courts in a time of actual or potential constitutional change. The change we face in our time happens to concern the actions of the federal executive branch under the leadership of a Republican President. But the theoretical underpinning of the approach I describe would apply equally to an attempt by Congress to broaden its powers, or to the actions of a President Hillary Rodham Clinton or a President Barack Obama. I ask, then, that the reader put aside questions of my partisanship -- at least for the moment -- and judge the theory on its merits. If those of us in the world of legal academia are unable to do so, the nation may be in greater difficulty than is imagined. What is needed instead is a longer-term focus not on this President, [\*876] but on the presidency as one of many institutions in the constitutional structure.¶ The jury is still out on the administration's ultimate success in redefining the scope of executive power. In some cases, the courts effectively have supported the administration. n23 In others, the administration has been rebuked. n24 In the great majority of situations, a debate still rages over the propriety of unilateral presidential authority. n25 I will not join the debate about the constitutionality of any of the specific actions taken by the current administration. For present purposes, I assume merely that the administration's positions are pushing the constitutional envelope in terms of presidential power under the Constitution.¶ My aim is to explore the role of courts in response to such a broad-based and coordinated assertion of envelope-pushing executive power. Of course, one obvious response to such an inquiry is that the judiciary should follow Chief Justice Roberts's comment during his confirmation hearings: judges are umpires who should call balls and strikes. n26 Thus, the judiciary's role is to take each case challenging a given executive action on its own and use standard principles of constitutional and statutory interpretation to resolve the narrow issue presented. As I explain further below, however, such a narrow approach provides insufficient protection for the structural underpinnings of American democracy.¶ I begin in Part II by laying out a constitutional theory that should guide courts when faced with a broad, constitutionally envelope-pushing assertion of power by one structural part of the American constitutional system. In brief, courts must serve as agents of systemic structural equilibrium. [\*877] The judiciary must ensure that the fundamental structural safeguards built into the fabric of the Constitution are maintained even if a constitutional change in the balance of power is implemented. The way in which equilibrium is re-established will vary depending upon the particular change at issue, but the goal of maintaining the boundaries of the structural safeguards embedded in the Constitution remains constant.¶ Part II also identifies the fundamental structural principles that should guide courts. The Constitution and the documents surrounding its drafting and ratification reveal three foundational principles: (1) The Constitution is based on maintaining multiple and meaningful centers of political authority situated horizontally and vertically from one another. These power centers -- the three coordinate branches of the federal government and the states -- must be capable of meaningfully playing their roles in maintaining a separation of governing authority; (2) the People must be allowed to have meaningful participation in the governing process; and (3) whatever power relationships are implemented, the resulting governmental structure must be functional. The goal of Part II is to prepare specifically to address how courts should respond to the Bush administration's assertion of executive authority.¶ Before one is able to do so, one must get a better understanding of the Bush administration's specific conception of executive authority. Part III is a descriptive exercise devoted to distilling the single dominant theme and three distinct but related sub-attributes of President Bush's constitutional Chief Executive. The dominant and overarching theme of the Bush administration's stance is a strongly unilateral executive who is constitutionally empowered to take a wide array of actions without "interference" from any other power center in American government. The three distinct sub-attributes associated with unilateralism are: (1) the unilateral authority is often exercised in secret, greatly reducing transparency in government (such lack of transparency applies to citizens as well as to other institutions of government); (2) the administration is highly intolerant of criticism and questioning associated with its exercise of power; and (3) the administration is disciplinarian and retributive with respect to those people and entities that do challenge its exercise of authority. [\*878] ¶ Part IV of the Article turns to the specific question of the courts and President Bush by applying the theory set out in Part II to the description of the Bushian constitutional executive laid out in Part III. In order to do so, I use cases considered by the United States Supreme Court during its October 2005 Term. I consider cases in such divergent areas as the legality of military commissions, n27 federal attempts to interfere with state laws providing a limited right to physician-assisted suicide, n28 partisan redistricting, n29 campaign finance reform, n30 and First Amendment protections for public employees and citizens alike. n31 I explain how these cases, as well as some others, fit into the structural equilibrium approach. In some instances the theory produces the same results as those actually reached, while in other important respects I argue that the Court should have approached matters quite differently in order to act as an agent of structural equilibrium. Finally, Part V concludes by considering issues on the horizon in which courts will again have the opportunity to respond to the Bush vision of Article II. It is not hyperbole to suggest that what happens in the next few years will decide in many respects the type of government enjoyed by our children and grandchildren. The stakes are unquestionably high.

#### Supreme Court is a key check on executive power:

Michael P. **Allen, 2007** (Associate Professor of Law, Stetson University College of Law, Brooklyn Law Review, Spring 2007, 72 Brooklyn L. Rev. 871; Lexis/Nexis, rwg)

V. Conclusion and a Glimpse of the Road Ahead¶ Times change and so does the Constitution. When constitutional change is formalized through an Article V amendment, courts have a constitutional duty to enforce the new constitutional structure or other rule in conformity with the amendment. When the change is an extra-constitutional one, however, courts must ensure that they protect the three foundational principles on which the original constitutional architecture is based.¶ I have explained the central attributes of the potential constitutional change advocated by the Bush administration. It is wide-ranging and potentially quite dangerous to American fundamental constitutional values. My goal has been to develop the operation of the structural equilibrium theory with the Bushian model as an example. I did so using the Supreme Court's October 2005 Term. As discussed above, with the structural equilibrium model as a baseline, the Court did well as to some matters but was deficient with respect to others.¶ This effort addressing how the structural equilibrium approach would have operated is important in its own right. Without doing so, one would not be in as good a position to evaluate the merits of the approach I advocate. However, the true significance of the approach is forward-looking. I hope that the Court consciously acts on the approach I have suggested here, because the challenges most certainly continue in the future. How will the Court rule on cases raising the continued viability of the "state secrets" privilege? n298 What will [\*938] the Court decide concerning executive preemption in a case it heard during the October 2006 Term? n299 And what will the Court do when it next confronts the applicability of the Chevron doctrine in the context of aggressive administrative agency actions? n300 Each of these issues implicates core elements of the proposed new constitutional order. In each case, the Court will need to decide how to synthesize the new with the old. When it does so, it should consciously act as an agent of constitutional structural equilibrium to preserve the foundational principles in the most effective way possible.¶ In sum, as Professor Ackerman recently wrote considering executive power and terrorism, "our great constitutional tradition of checks and balances provides the material we need to withstand the tragic attacks and predictable panics of the twenty-first century." n301 They also provide the material to weather the more general storm of extra-constitutional change, whether it is instigated by Democrats or by Republicans. Now, the Court needs to act on that constitutional tradition.

#### Court puts checks on executive power:

TODD S. **PURDUM**, 6/29/20**04** (“THE SUPREME COURT: THE PRESIDENT; In Classic Check and Balance, Court Shows Bush It Also Has Wartime Powers,” Accessed 7/26/2012 at <http://www.nytimes.com/2004/06/29/world/supreme-court-president-classic-check-balance-court-shows-bush-it-also-has.html?pagewanted=all&src=pm>, rwg)

In the fall of 2001, President Bush justified his decision to treat some captured terrorist suspects as ''enemy combatants'' without access to lawyers, courts or other long-established legal rights on the grounds that he could not let the United States' ''enemies use the forums of liberty to destroy liberty itself.'' On Monday morning, the Supreme Court upended a good-sized chunk of that logic, and offered a powerful reminder that in the United States, even in wartime, no prisoner is ever beneath the law's regard, and no president above its limits. It was Justice Robert H. Jackson who first noted 52 years ago this month, in another wartime election summer, that a president is not commander in chief of the country, only of the military. Justice Jackson wrote that in his concurring opinion overturning Harry S. Truman's seizure of the American steel industry during the Korean war, and Justice David H. Souter cited those words approvingly in his concurrence on Monday. The effect of the current court's rulings in two related cases was to place a classic institutional and political check on Mr. Bush's effort to keep some citizens and aliens held as the most dangerous ''enemy combatants'' from ever having their day in any court. It is precisely the right to some such hearing, the court held, that defines the constitutional separation of powers and by extension the American governing creed.

#### Court will check the executive:

TODD S. **PURDUM**, 6/29/20**04** (“THE SUPREME COURT: THE PRESIDENT; In Classic Check and Balance, Court Shows Bush It Also Has Wartime Powers,” Accessed 7/26/2012 at <http://www.nytimes.com/2004/06/29/world/supreme-court-president-classic-check-balance-court-shows-bush-it-also-has.html?pagewanted=all&src=pm>, rwg)

''It is a clear demonstration of how much our system of checks and balances, of separation of powers, continues to be an effective brake on any one branch,'' said the historian Robert Dallek. ''After all, this is not a left-leaning court, or one dominated by justices who are left of center. But ultimately the court has a unique degree of independence from the executive and legislative branches, that even in times of great difficulty it does not lightly give up.''

### Legitimacy: Executive Will Comply with the Supreme Court

#### Executive will comply with Supreme Court decisions:

TODD S. **PURDUM**, 6/29/20**04** (“THE SUPREME COURT: THE PRESIDENT; In Classic Check and Balance, Court Shows Bush It Also Has Wartime Powers,” Accessed 7/26/2012 at <http://www.nytimes.com/2004/06/29/world/supreme-court-president-classic-check-balance-court-shows-bush-it-also-has.html?pagewanted=all&src=pm>, rwg)

Some historians were not surprised by the court's decisions. Alonzo Hamby, a scholar of the presidency at Ohio University, noted wryly that ''once upon a time, it was not assumed that presidents necessarily had to pay attention to Supreme Court decisions.'' In the 1830's, when the Supreme Court declared the government's forced removal of Indian tribes from their lands illegal, President Andrew Jackson famously dismissed the ruling by the chief justice by saying: ''John Marshall has made his decision. Now let him enforce it.'' Mr. Hamby said, ''But in the world we live in now, it's literally impossible for a president to ignore a Supreme Court decision, no matter how wrong or dangerous he may think it is.''

### Legitimacy Impacts: Unchecked Pres Powers = Nuke War

#### Unchecked presidential power risks a nuclear war:

Ray **Forrester, 1989** (Professor, Hastings College of the Law, The George Washington Law Review, August 1989, 57 Geo. Wash. L. Rev. 1636, Lexis/Nexis, rwg)

In the most basic terms, the "football" contains the authentication code that the President would use in the outbreak of nuclear war to verify to the Joint Chiefs of Staff that he had ordered the use of atomic weapons.¶ ¶ Abramson, Wherever President Goes, the Nuclear War 'Football' is Beside Him, Los Angeles Times, April 3, 1981, at 10, col. 1 (copyright, 1981, Los Angeles Times. Reprinted by permission).¶ On the basis of this report, the startling fact is that one man alone has the ability to start a nuclear war.¶ A basic theory--if not the basic theory of our Constitution--is that concentration of power in any one person, or one group, is dangerous to mankind. The Constitution, therefore, contains a strong system of checks and balances, starting with the separation of powers between the President, Congress, and the Supreme Court. The message is that no one of them is safe with unchecked power. Yet, in what is probably the most dangerous governmental power ever possessed, we find the potential for world destruction lodged in the discretion of one person.¶ As a result of public indignation aroused by the Vietnam disaster, in which tens of thousands lost their lives in military actions initiated by a succession of Presidents, Congress in 1973 adopted, despite presidential veto, the War Powers Resolution. Congress finally asserted its checking and balancing duties in relation to the making of presidential wars.¶ Congress declared in section 2(a) that its purpose was to¶ fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.¶ The law also stated in section 3 that¶ [t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated. . . .¶ ¶ Other limitations not essential to this discussion are also provided.¶ The intent of the law is clear. Congress undertook to check the President, at least by prior consultation, in any executive action that might lead to hostilities and war.¶ [\*1638] President Nixon, who initially vetoed the resolution, claimed that it was an unconstitutional restriction on his powers as Executive and Commander in Chief of the military. His successors have taken a similar view. Even so, some of them have at times complied with the law by prior consultation with representatives of Congress, but obedience to the law has been uncertain and a subject of continuing controversy between Congress and the President.¶ Ordinarily, the issue of the constitutionality of a law would be decided by the Supreme Court. But, despite a series of cases in which such a decision has been sought, the Supreme Court has refused to settle the controversy.¶ The usual ground for such a refusal is that a "political question" is involved. The rule is well established that the federal judiciary will decide only "justiciable" controversies. "Political questions" are not "justiciable." However, the standards established by the Supreme Court in 1962 in Baker v. Carr, 369 U.S. 186, to determine the distinction between "justiciable controversies" and "political questions" are far from clear. One writer observed that the term "political question"¶ [a]pplies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail.¶ ¶ Finkelstein, Judicial Self-Limitation, 37 HARV. L. REV. 338, 344 (1924)(footnote omitted).¶ It is difficult to defend the Court's refusal to assume the responsibility of decisionmaking on this most critical issue. The Court has been fearless in deciding other issues of "vast consequences" in many historic disputes, some involving executive war power. It is to be hoped that the Justices will finally do their duty here.¶ But in the meantime the spectre of single-minded power persists, fraught with all of the frailties of human nature that each human possesses, including the President. World history is filled with tragic examples.¶ Even if the Court assumed its responsibility to tell us whether the Constitution gives Congress the necessary power to check the President, the War Powers Resolution itself is unclear. Does the Resolution require the President to consult with Congress before launching a nuclear attack? It has been asserted that "introducing United States Armed Forces into hostilities" refers only to military personnel and does not include the launching of nuclear missiles alone. In support of this interpretation, it has been argued that Congress was concerned about the human losses in Vietnam and in other presidential wars, rather than about the weaponry.¶ Congress, of course, can amend the Resolution to state explicitly that "the introduction of Armed Forces" includes missiles as well as personnel. However, the President could continue to act without prior consultation by renewing the claim first made by President [\*1639] Nixon that the Resolution is an unconstitutional invasion of the executive power.¶ Therefore, the real solution, in the absence of a Supreme Court decision, would appear to be a constitutional amendment. All must obey a clear rule in the Constitution.¶ The adoption of an amendment is very difficult. Wisely, Article V requires that an amendment may be proposed only by the vote of two-thirds of both houses of Congress or by the application of the legislatures of two-thirds of the states, and the proposal must be ratified by the legislatures or conventions of three-fourths of the states.¶ Despite the difficulty, the Constitution has been amended twenty-six times. Amendment can be done when a problem is so important that it arouses the attention and concern of a preponderant majority of the American people. But the people must be made aware of the problem.¶ It is hardly necessary to belabor the relative importance of the control of nuclear warfare.¶ A constitutional amendment may be, indeed, the appropriate method. But the most difficult issue remains. What should the amendment provide? How can the problem be solved specifically?¶ The Constitution in section 8 of Article I stipulates that "[t]he Congress shall have power . . . To declare War. . . ." The idea seems to be that only these many representatives of the people, reflecting the public will, should possess the power to commit the lives and the fortunes of the nation to warfare. This approach makes much more sense in a democratic republic than entrusting the decision to one person, even though he may be designated the "Commander in Chief" of the military forces. His power is to command the war after the people, through their representatives, have made the basic choice to submit themselves and their children to war.¶ There is a recurring relevation of a paranoia of power throughout human history that has impelled one leader after another to draw their people into wars which, in hindsight, were foolish, unnecessary, and, in some instances, downright insane. Whatever may be the psychological influences that drive the single decisionmaker to these irrational commitments of the lives and fortunes of others, the fact remains that the behavior is a predictable one in any government that does not provide an effective check and balance against uncontrolled power in the hands of one human.¶ We, naturally, like to think that our leaders are above such irrational behavior. Eventually, however, human nature, with all its weakness, asserts itself whatever the setting. At least that is the evidence that experience and history give us, even in our own relatively benign society, where the Executive is subject to the rule of law. [\*1640] Vietnam and other more recent engagements show that it can happen and has happened here.¶ But the "nuclear football"--the ominous "black bag" --remains in the sole possession of the President.¶ And, most important, his decision to launch a nuclear missile would be, in fact if not in law, a declaration of nuclear war, one which the nation and, indeed, humanity in general, probably would be unable to survive.

### Legitimacy Impacts: Rights

#### (--) A weakened Supreme Court in a time of war leads to massive rights violations—Korematsu is the example:

David **Fontana**, student of law at Yale and Oxford Universities, **2002**. [The Connecticut Law Review, “A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States,” p. lexis, rwg]

Most of the "greatest hits" of American wartime constitutional law--*Korematsu v. United States, n150 Hirabayashi v. United States*, n151 and *Ex parte McCardle* n152 --all involved the Supreme Court **caving to political pressure** and approving restrictions on civil liberties, in a manner that made courts **seem weak** and unable to protect civil liberties. More recently, the case of *Ex parte Quirin* n153 has received substantial attention and has therefore been added to this greatest hits list of American wartime constitutional law, despite the fact that this case might be the most embarrassing example of courts caving to political pressure during wartime. n154 These cases are not usually presented in constitutional law casebooks, and when they do appear in casebooks they are not yoked together n155 with cases demonstrating courts standing up to political pressure and protecting civil liberties in a time of war. The above mentioned cases are painful reminders that, in times of war, courts often do not protect citizens against incursions on civil  [\*66]  liberties and act in ways that we often later regret. n156

### Court Clog Impact Extension

#### A) GRANTING RIGHTS TO A NEW GROUP OF PEOPLE OPENS THE FLOODGATES TO OTHER COURT CLAIMS

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

Obviously, one of those consequences feared by the Court was the prospect that if the mentally retarded were granted suspect class status, **many other groups** could make similar arguments for heightened scrutiny. **This "floodgates" concern is a legitimate one** - at least since the legal realists, it has been accepted that a court formulating a legal rule must be aware of the rule's practical implications as well as its formal logic.

#### B) A flood of frivolous claims trivializes worthy cases—gutting the AFF. Solvency:

**Van Schaack,** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis)

Further, cases advancing weak or frivolous claims may **threaten to trivialize more worthy cases.** Pleas for a cautionary approach have even begun to be heard from seasoned ATCA lawyers who, as a result of this more decentralized development of ATCA jurisprudence and the emerging diversity of lawyers engaged in this work, **have difficulty keeping track of all the cases that have been filed to date** n48 and must consider whether and how to influence **shaky cases** in order to protect case precedent and the integrity of the enterprise.

### LEGITIMACY IMPACT ADD ON: COURT-STRIPPING

#### A) Threats to the Court’s legitimacy risk Court stripping:

John C. **Yoo**, Professor of law at the University of California, **2001**, [The University of Chicago Law Review, “In defense of the court’s legitimacy,” p. 75]

The nature of the Court's interference in these issues almost inevitably sparked a response by the other actors in the political system. In the case of the Marshall Court, it was Jefferson's muttered threats to defy judicial orders.31 With the Taney Court, it was Abraham Lincoln's attacks on Dred Scott and, ultimately, the coming of the Civil War.32 With the New Deal Court, President Roosevelt responded by campaigning against the Court and introducing his famous Court packing plan.33 With the Warren Court, it was resistance throughout the southern states, criticism in Congress, and criticism from presidential candidates.34 The response of the political branches or the states demonstrates that the Court had acted in a manner that threatened its own legitimacy. Because the Court had sought to foreclose society (or parts of it) from using the lawmaking process to achieve certain ends, and because those ends were of such intense importance to the people, the chief if not only way for the people (or interest groups, if one prefers a public choice approach to the political process) to pursue their policy preferences was to attack the Court. In other words, the other political actors had to undermine the Court's legitimacy as an institution so as to convince the electorate to support efforts to evade or overturn its decisions.

#### B) Court stripping guts the case solvency and turns the case—all rights protections would go completely unenforced—trampling meaningful rights:

Barry W. Lynn, bachelor's degree at Dickinson College, theology degree from Boston University School of Theology, minister in the United Church of Christ, of the Washington, D.C. bar, law degree from Georgetown University Law Center, the Executive Director of Americans United for Separation of Church and State, 20**04**[“Congress and Court Stripping: Just Keep Your Shirts On” Church and State Magazine, May]

Another measure, the misnamed "Constitution Restoration Act of 2004," was written by former Alabama Supreme Court Chief Justice Roy Moore and his allies. It would ban all cases challenging state-sponsored acknowledgement of "God as the sovereign source of law, liberty, or government." For good measure, it would also retroactively overturn all existing rulings in this area and establish a mechanism for impeaching federal judges who dare to uphold church-state separation! One wonders if the legislators who wrote these bills slept through high school civics class. The separation of powers means that the U.S. government consists of three co-equal branches: the president, the Congress and the courts. Congress does not have the power, through simple legislation, **to decimate the authority of the courts** over issues dealing with the Bill of Rights. Such power would **rapidly make the courts superfluous**. Whenever a judge ruled in a manner that displeased a legislator, **a court-stripping bill would be drawn up and passed**. Pretty soon the courts would be **nothing but a rubber-stamp body for Congress**. Some members of Congress might want that, but **it would be a disaster for American democracy**. Courts exist to make hard decisions. When lawmakers overstep their bounds and infringe on constitutional rights, courts are there to pull them back. Without the judiciary to protect us, Americans would quickly be at the mercy of the momentary whims of the majority. **Our rights would be trampled on**.

### Legitimacy Impacts: Judicial Independence

#### Judicial independence key to democracy:

ALBERTO **GONZALES, 2/2/2007** (Federal News Service; Lexis)

JUDICIAL INDEPENDENCE Democracy depends on the rule of law. The rule of law **depends on a strong, independent Judiciary**. But what does "independent" mean? What "judicial independence" does not mean is complete freedom from scrutiny or criticism. Judges' decisions will be criticized. After all, the "case and controversy" requirement guarantees that every case will have a loser. The Framers granted federal judges lifetime tenure precisely so that they would be insulated from the pressures of criticism-the kinds of pressures that politicians do respond to. As Alexander Hamilton put it in Federalist 78, life tenure is the "best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."

#### Judicial independence key to democracy:

ALBERTO **GONZALES, 2/2/2007** (Federal News Service; Lexis)

The Framers left us a great and powerful legacy when they created our Judiciary. Respecting the prerogatives of the Executive and the Legislature, yet strong and independent, the courts have a vital role in protecting our democracy and the rule of law. Likewise, all of us are privileged to have the opportunity as officers of the court to promote the rule of law. As lawyers we have no greater responsibility.

### Legitimacy Impacts: Democracy

#### Limited role for judges key to strong democracy:

ALBERTO **GONZALES, 2/2/2007** (Federal News Service; Lexis)

Chief Justice Roberts explained it well: "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire." When judges uphold laws enacted by Congress and actions taken by Executive Branch officials, they send a very clear message to the American people: "You have chosen this path, and it is presumed to be the right one because you have chosen it." This makes for a strong democracy. It makes the People responsible for their choices. If our elected representatives make foolish decisions, we should not expect the judges to clean up the mess-we should vote Congress or the President out of office. That is the Constitution's method for keeping control in the hands of the People-and keeping our limited government limited.

## Hollow Hope DA

### Hollow Hope DA

#### Uniqueness: Supreme Court has retreated from protecting minority rights now:

PETER D. **EHRENHAFT, 2012** (Senior Counsel, Harkins Cunningham, LLP, Wake Forest Journal of Law & Policy, Spring 2012, “WHAT WOULD WARREN SAY NOW--CAN BROWN AND BAKER BE RECONCILED?” 2 Wake Forest J. L. & Pol'y 321, Lexis/Nexis, rwg)

More than a half century later, what has Brown wrought? Statistics lay bare the brutal facts that a very large proportion of minority students continue to attend schools that are de facto segregated, even if the schools are neither compelled nor allowed to admit students of only one race. At the public primary school level, racial segregation may be as prevalent today as it was when the Warren Court ruled. n10 Voluntary and court-mandated plans, from magnet schools to busing to area-wide assigned enrollments, have been tried and often found ineffective or impractical. n11 And courts, from the Supreme Court down**, have retreated** from "affirmative action" to a "color-blind" approach that defers to the unwillingness of most white parents to send their children to schools in which minority-race children begin to approach a majority of the school population. n12 Thus, Brown and its companion case cannot be celebrated as successful transformative [\*323] decisions with regard to public primary education--what the initial case was all about. n13

#### B) LINK: Civil Rights decisions are “flypaper” for movements—they convince people that litigation is an avenue for social change:

**Yeazell, 2004** professor of law @ UCLA, 20**04** (Stephen, Vanderbilt Law Review, November, 2004, 57 Vand. L. Rev. 1975; Lexis, rwg)

First, Brown and the **civil rights litigation movement** helped create **a renewed belief**, not just in the law, but more specifically in **litigation as a noble calling and as an avenue for social change.** That belief **lies open to challenge**, and it can leave students and lawyers **frustrated at the distance between the aspirations** that brought them to law school and the world of practice as they perceive it. But whether or not it is well-founded, this belief, with roots traceable to Brown and civil rights litigation, has endured for several generations. Thus, Brown reshaped the aspirations of lawyers in ways that are still important.

#### C) Litigation deflects attention for other strategies of social change that are more effective at solving the case—this turns their case and then some:

**Van Schaack,** 20**04** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis, rwg)

Although litigation can provoke and promote other processes of social change, it can **also inhibit the development of, deflect attention** [\*2344] **and resources away from**, or even **undermine other strategies for social change** that may be more efficacious or durable. These alternative strategies include **reparations strategies** through the political process; n199 direct action; **transnational advocacy** in countries where abuses are prevalent; n200 **grassroots educational campaigns**; traditional human rights advocacy based upon **fact-gathering and shaming**; the development of **monitoring bodies and international regulatory standards**, such as environmental or labor codes of conduct for extraterritorial activities; n201 and the **creation and promotion of international institutions.** n202 The technical, rarified and inaccessible nature of litigation may do little to contribute to the growth of grassroots social movements in certain contexts and communities, especially where individuals are not accustomed to invoking judicial processes to bring about social change. n203 Likewise, lawyers may actually displace natural leaders within community groups, leading to the disempowerment, and **even demise, of the group**. n204 In addition, litigation (and its attendant legalisms such as standing rules, statutes of limitation, or justiciability doctrines) may diffuse political or moral claims rather than empower potential political constituencies. Indeed, litigation in the United States may **ultimately contravene or undermine the strategies of local activists** where it is not part of a campaign at the grassroots level in the targeted country.

### Links: Court decisions are flypaper

#### Human rights litigation has a flypaper effect—it attracts litigants to the courts and undermines social change:

**Van Schaack,** 20**04** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis)

Indeed, practitioners of ATCA-style litigation should be **wary of espousing an overabundance of objectives for this litigation**, because **doing so may undermine or overshadow what these cases do accomplish** for individual victims of human rights abuses. Likewise, human rights advocates **should not pin their hopes** on achieving these broader impacts at the expense of their clients and their clients' experience with the litigation process. In any case, notwithstanding the first and second order effects that have been achieved, this Essay cautions that **such litigation should not replace other forms of human rights advocacy**. An **overreliance on adversarial litigation, as opposed to other processes of social change**, raises some of **the same concerns** that surface in the civil rights context about the efficacy of resorting to law and the judicial process to promote durable social change and the ability of the judicial process to address major social and economic problems. n9

#### Litigation on human rights issues threatens to derail processes of social change:

**Van Schaack,** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis)

A focus on litigation here to the exclusion of other processes of social change has the potential to **marginalize the voices of victims of human rights abuses** and **derail** other potentially efficacious strategies for social change.

### Links: International Law Decisions

#### Relying on litigation to enforce international human rights laws traps lived experiences in the language of the law—undermining real solutions to human rights:

**Van Schaack,** 20**04** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis)

A reliance on litigation to enforce the corpus of international human rights **also invokes a more fundamental critique** about the efficacy of a rights-based discourse in achieving social change. n156 According to this perspective, not all reform goals "can be presented in the name of rights." n157 The rhetoric of rights forces a desiccation and abstraction of real life experience by obliging plaintiffs to mould their [\*2338] lived experiences in terms of available legal rights and remedies. In so doing, plaintiffs may lose sight of real objectives as their visions for the reform and rehabilitation of society become "trapped" in the language of law. n158 Given the subordination of ESC rights in particular, plaintiffs may only advance a limited number of atomistic claims, which may be at odds with how communities view themselves and the harms suffered. n159 Indeed, potential plaintiffs may care more about damage to their communities' ways of life, a concern that ATCA litigation cannot accommodate except minimally through the class action mechanism, which is an imperfect arbiter of group rights. Nonetheless, victims often view their experience in terms of a denial of rights, n160 and thus **the rhetoric of rights** possesses a **powerful symbolic meaning** for plaintiffs and other victims. n161

### Impacts: Supreme Court Decisions Undermine Civil Rights

#### The decisions of the Supreme Court are counterproductive—Brown v. Board of Education proves:

Robert L. **Tsai,** 20**05** Assistant Professor of Law, University of Oregon School of Law, March

[“Sacred Visions of Law,” <http://web.lexis-nexis.com/universe/document?_m=be00e4b6d189ddb647d9365044a5571c&_docnum=3&wchp=dGLbVzb-zSkVb&_md5=9a9770a9c5b4097b9b283e0cc42a252e>, rwg]

In the second epoch, Brown is far more likely to be thought of as **holding out "a hollow hope,"** signifying the "limits of judicial power," or tantalizingly, representing unrealized potential. It is true, of course, that Brown remains important to academic belief systems irrespective of what judges and lawyers do - any serious theory of constitutional law labors in its long shadow, and must confront its legacy. But here again, many such treatments have a **wistful and disappointed flavor**.

#### Courts undermine the effectiveness of civil rights groups

Stephen C. **Yeazell**, 20**04** Professor of Law, UCLA School of Law, **2004**

[“*Brown*, The Civil Rights Movement, and the Silent Litigation Revolution,” [http://ssrn.com/abstract=608002](http://ssrn.com/abstract%3D608002), rwg]

In the first half of the twentieth century one could see litigation as an agent of social change only in two areas, but it was on the side of the forces against whom the Progressives and New Dealers were working. The first arena lay in the legislation of the New Deal. A number of its programs, especially in the early years, raised constitutional issues. A few were struck down. More were threatened. In either case, the task of these lawyers at the leading edge of social change was to defend legislative and administrative programs against judicial invalidation. Such innovations as the “Brandeis brief,” which sought to bring to judicial notice facts drawn from social science and legislative hearings, aimed at supporting with non-doctrinal arguments legislation and administrative actions that might otherwise succumb to judicial review. this area, then, litigation played an important, but defensive role. The second area involved collective bargaining and the then-growing labor union movement. As they had for decades, employers sought to use courts and the injunction as a weapon both against organizing and against strikes. For those on the union side, the question was not how to use the courts to help the movement, but how to prevent them from harming it. This point emerges most clearly in the work of Felix Frankfurter and Nathan Greene, whose study of the labor injunction concluded that courts should be stripped of jurisdiction to issue injunctive relief in labor disputes. Legislation followed. For those who thought of themselves as social progressives, the best one could hope for from the courts was to **stay out of society’s way**.

#### Courts cause backlash against social movements: turning the case:

Idit **Kostiner**, 20**03**, Jurisprudence and Social Policy Program, University of California, **2003**

[“Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change”, June, <http://www.blackwell-synergy.com/doi/full/10.1111/1540-5893.3702006>, rwg]

Following Scheingold's argument on the "myth of rights," several empirical studies were conducted to explore whether specific litigation campaigns had been successful in promoting social reform. Focusing primarily on the direct effects of legal tactics, many of these studies revealed a substantial gap between the promises of rights litigation and its minimal impact in reality. In his well-cited book The Hollow Hope (1991), Rosenberg concludes that major litigation campaigns for school desegregation, abortion rights, and environmental justice failed to produce significant social reform. According to Rosenberg, some of these campaigns even had negative effects on social movements, as they **led to backlash reactions** and the rise of **reactionary social movements**. Other studies of the impact of litigation campaigns conclude with **similarly pessimistic accounts** of the fate of legal tactics as a tool for social reform.

### Courts Demobilize Civil Rights Protests

#### Individual court decisions cause civil rights demonstrations to decrease

James T. **Patterson**, 20**01** Ford Foundation Professor of History, Brown University, **2001**

[“The Troubled Legacy of Brown v. Board,” http://wwics.si.edu/topics/pubs/ACF236.pdf]

Rosenberg and others have pointed out that one would have expected the number of civil rights demonstrations in the United States to have increased after Brown v. Board, particularly when the South thumbed its nose at the decision as it did in the late fifties. In fact, there were fewer civil rights demonstrations in most of the late 1950s than there had been in 1943 or in 1946, 1947, and 1948, when there was a fair amount of demonstrating led particularly by returning black war veterans who had fought a war to save democracy but came back to a Jim Crow South. There was no steady escalation of demonstrations during the first five or six years after the decision.

#### Courts demobilize social protest:

James T. **Patterson**, 20**01** Ford Foundation Professor of History, Brown University, **2001**

[“The Troubled Legacy of Brown v. Board,” http://wwics.si.edu/topics/pubs/ACF236.pdf]

It is the force of that kind of resistance over ten years that Gerald Rosenberg makes so much of in The Hollow Hope. Michael Klarman, another leading revisionist, made many of the same points in a very important article in the 1994 Journal of American History, in essence agreeing that the Supreme Court made its decision, little happened, and therefore **courts are often limited agents of social change**. Rosenberg looks at the areas of desegregation, women’s rights, and abortion rights, and shows how little the Court actually accomplished. If the Court **hadn’t involved itself**, Rosenberg adds, **protest might have emerged more quickly** as militant demonstrations, which in fact brought forth concrete gains.

### HOLLOW HOPE Extensions—ROSENBERG IS CORRECT

#### Despite questionable methodology, Rosenberg is largely correct--judicial rulings have little influence on social change:

**Fallon, 2005** prof. of Constitutional Law @ Harvard, Harvard Law Review, April 2005, 118 Harv. L. Rev. 1787; Lexis, rwg

To measure the authoritative legitimacy of judicial rulings, however, it does not suffice to look at the parties' responses. The effect on other officials and the broader public also matters. In a well-known and provocative book, Gerald Rosenberg maintains that such celebrated Supreme Court decisions as Brown v. Board of Education and Roe v. Wade proved **largely ineffectual** as engines of social change. n198 Judicial declarations may not achieve much, he argues, unless other officials implement the Court's message or citizens litigate on a national scale. Although critics have attacked both his methodology and his conclusions, n199 Rosenberg **raises important issues** about the broader effects of court decisions. n200 On a few points, the facts speak for themselves. Clearly the authoritative legitimacy of judicial decisions can be relative, rather than absolute. Regional variations also can occur. For [\*1832] at least a decade, Brown v. Board of Education met **"massive resistance"** through much of the South before sentiment hardened that recalcitrance should not be tolerated. n201 Years and even decades after the Supreme Court had declared **officially sponsored prayer** in public schools to be unconstitutional, n202 teacher-led prayers remained common in broad swaths of the country. n203

## Congress Counterplan

### CONGRESS COUNTERPLAN 1NC SHELL

#### OBSERVATION 1: MANDATES

#### THE UNITED STATES CONGRESS WILL UTILIZE ITS POWER UNDER SECTION 5 OF THE 14TH AMENDMENT TO INTERPRET THE EQUAL PROTECTION CLAUSE TO PROVIDE THE PROTECTIONS OF THE PLAN [INSERT].

#### FUNDING AND ENFORCEMENT GUARANTEED, WE’LL CLARIFY INTENT.

#### OBSERVATION 2: THEORETICALLY LEGITIMATE:

#### (--) COMPETES VIA NET BENEFITS: WE’LL PROVE THE CONGRESS SOLVES BETTER THAN THE COURTS WHILE AVOIDING THE DISADVANTAGES.

#### OBSERVATION THREE: SOLVENCY

#### Congress is the most attuned to shifting social reality—makes it the best branch for equal protection decisionmaking:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

The combination of the Court's new limitations on the Section 5 power and the blurring of the Court's equal protection jurisprudence makes it an appropriate time to rethink the relationship between Congress, the Court, and the Equal Protection Clause. An obvious response to a Court that seems unenthusiastic about a rigid doctrinal structure, and more interested in contextual answers to equal protection questions, is to accord increased respect to legislative input. If context matters, the argument goes, then Congress, as the federal branch **most attuned to shifting or nuanced social reality**, should **play a larger role in equal protection decisionmaking**.

#### Congress is better at enforcing equal protection law than the Courts—2 reasons:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

Where this Article diverges from current doctrine is in its suggestion that the Court's resolution of an equal protection claim **does not necessarily produce an authoritative statement of the Clause's meaning,** warranting status as superior judicially announced law. The case law supports this more modest understanding of the Court's jurisprudence, which thus makes this approach a more promising vehicle for carving out a broader Section 5 power. The general point that courts do not speak authoritatively on every constitutional issue has been made before, most notably in Professor Sager's now classic article on underenforced constitutional [\*526] norms. n27 What is new since that article, though, is the rise of the less rigid, more contextualized approach to equal protection sketched above. n28 That approach, and especially its application in the "rational basis plus" cases, illustrates the Court's estimation of the limits of judicial review under the Equal Protection Clause. In particular, the Court's discussion of the rational basis standard in such cases indicates that that standard flows more from the institutional limits on judicial review of legislative classifications, and less from the likelihood that a given classification is constitutional in the abstract sense. At the same time, the Court's application of more muscular rational basis review involves it in contextualized decisionmaking that, exactly because it is more sensitive to the underlying context, is less reflective of legal principles and more reflective of particularistic applications of principle to fact. The more contextualized the issues become, however, **the stronger the argument is that Congress should have a say** in the matter, given its **superior capacity to** distinguish reasonable differential treatment of a group from exclusion or animus targeted at that same group.

### CONGRESS COUNTERPLAN SOLVENCY EXTENSIONS: EQUAL PROTECTION

#### Congress is more institutionally suited to enforce equal protection guarantees:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

Part II presents the case that **Congress is** **better institutionally suited than the courts** to consider the reasonableness of most legislative classifications. n29 Some of these features are obviously relevant to the Section 5 issue - for example, Congress's superiority at **finding facts**. Others are not so obviously relevant - for example, Congress's capacity for acting by fiat, rather than as the result of a process of self-conscious legal reasoning. For our purposes, the important point is that **these factors operate with special force when the issue is enforcement of the equal protection guarantee**.

#### Legislative “line-drawing” makes the Congress better than the Courts at enforcing equal protection:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

Additionally, legislatures can draw certain lines better than courts. In particular, legislatures can embrace distinctions that are arbitrary, in the sense of being based not on principled reasoning but instead on the practical need for a line, even if that line could be drawn in another place with just as much justification. In Archibald Cox's words, this type of line is arbitrary "in the sense that it makes a sharp cut off at some point in a range shading from one extreme to the other by infinitely small differences of degree." n114

Judicial drawing of such arbitrary lines creates problems for reasons relating to the source of judicial legitimacy. The legitimacy of judicial line-drawing derives largely from a court being able to defend its decisions as the results of reasoned decisionmaking, explainable (and explained) in terms of legal principle. n115 That type of reasoning - deriving principles from earlier cases, applying linguistic and other interpretive tools to ambiguous texts, finding underlying structural principles in a particular textual provision, and then applying the resulting law to the facts of the case - is in tension with the line-drawing described by Professor Cox. n116 By contrast, Congress does not gain its legitimacy from principled explanation, but instead by simply acting in the public good, constrained only by barebones procedural requirements, n117 by textual n118 and penumbral n119 boundaries on its power, [\*547] and by the legitimacy bestowed by elections. As long as it stays within these broad limits, Congress can act in a plenary fashion. Because it need not explain itself in the way a court must, it may draw lines that a court would find difficult to justify as an application of legal principle. Such an advantage is clearly relevant in the context of the Equal Protection Clause, which ultimately concerns federal supervision of state classifications. In supervising those classification decisions, Congress or a court might also need to draw a line. This Article suggests that Congress is superior at that task.

### CONGRESS COUNTERPLAN—NET BENEFIT: SUPREME COURT LEGITIMACY

#### Congress is best actor on equal protection—enhanced legitimacy by a representative branch of government key:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

Still, the enhanced legitimacy that undeniably flows when a social revolution is led by **Congress,** rather than the courts, renders the former **an indispensable player** in making such revolutions succeed. n113 This is especially the case when judicial pronouncements are based on indeterminate constitutional language, of which the Equal Protection Clause is a prime exemplar. This is not to say that those judicial pronouncements are illegitimate. Nor is it to say that, as a matter of [\*546] institutional role, courts should stand on the sidelines when controversial equality issues arise. It is, however, to suggest that in some cases the **popular legitimacy** attached to **legislative action** makes such action a necessary part of the attempt fully to implement the guarantees of the Equal Protection Clause.

#### ---“LINE DRAWING” MAKES LEGITIMACY A NET BENEFIT:

#### A) Arbitrary line-drawing by the Court undermines legitimacy:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

**Judicial drawing of such arbitrary lines** creates problems for reasons relating to the **source of judicial legitimacy**. The legitimacy of judicial line-drawing derives largely from a court being able to defend its decisions as the results of reasoned decisionmaking, explainable (and explained) in terms of legal principle. n115 That type of reasoning - deriving principles from earlier cases, applying linguistic and other interpretive tools to ambiguous texts, finding underlying structural principles in a particular textual provision, and then applying the resulting law to the facts of the case - **is in tension with the line-drawing** described by Professor Cox.

#### B) Congressional line-drawing flexibility justifies Congressional action with regard to equal protection:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

This analysis suggests a larger congressional role in enforcing the equal protection guarantee, given the nature of the inquiry that equal protection mandates. In particular, Section 5 statutes, as lines drawn by an entity that draws its legitimacy from a source other than its pretensions to accuracy in discerning constitutional rules, need not be the result of the interpretive process, with all its constraints and methodological requirements. But the rules in Section 5 laws still need to be anchored in some legal principle. This issue - a crucial one going to the heart of the Section 5 power - is taken up later in this Article. For now, it suffices to acknowledge that Congress's superior flexibility in drawing arbitrary lines comes with a price - the need to justify those lines as something other than an interpretation of the Constitution. The basic point remains, however: Congress does have more line-drawing flexibility than courts, and that flexibility should **logically allow Congress a significant role** in prescribing rules of conduct as part of its Section 5 power, **especially with regard to equal protection**.

### CONGRESS COUNTERPLAN NET BENEFIT—SEPARATION OF POWERS

#### A) Failure of other branches to play a proper role in interpreting the Constitution undermines Separation of Powers:

Robert J. **Kaczorowski**, Professor of Law at Fordham University School of Law, March **2005**. [The Fordham Law Review, “Theories of taking the Constitution seriously outside the courts: popular Constitutionalism versus justice in plain clothes: reflections from history,”p.lexis]

A majority of the American public today believes that the Supreme Court should have the final authority to interpret the Constitution. In light of history, Kramer argues, the current acceptance of judicial supremacy "is exceedingly anomalous." The practice of judicial supremacy takes control over fundamental law away from the people and turns it over to "a judicial oligarchy." Consequently, Kramer contends that advocates of judicial supremacy are anti-democratic who believe "that popular politics is by nature dangerous and arbitrary; that "tyranny of the majority' is a pervasive threat; that a democratic constitutional order is therefore precarious and highly vulnerable; and that substantial checks on politics are necessary lest things fall apart." Kramer sees the current debate regarding judicial supremacy as the same debate over the question of how to control an excess of democracy or popular rule that arose at the founding and again during the middle of the nineteenth century. It is a debate between democracy and aristocracy, and aristocracy is currently winning.

#### B) Flawed model of separation of powers causes global wars

**Zakaria, 1997** editor of Newsweek International, ’97 (Fareed, Foreign Affairs, November, LN)¶

When divining the cause behind this correlation, one thing becomes clear: the democratic peace is¶ actually the liberal peace. Writing in the eighteenth century, Kant believed that democracies were¶ tyrannical, and he specifically excluded them from his conception of "republican" governments, which lived in a zone of peace. Republicanism, for Kant, meant a **separation of powers**, checks and balances, the rule of law, protection of individual rights, and some level of representation in government (though nothing close to universal suffrage). Kant's other explanations for the "perpetual peace" between republics are all closely linked to their constitutional and liberal character: a mutual respect for the rights of each other's citizens, a system of checks and balances assuring that no single leader can drag his country into war, and classical liberal economic policies -- most importantly, free trade -- which create an interdependence that makes war costly and cooperation useful. Michael Doyle, the leading scholar on the subject, confirms in his 1997 book Ways of War and Peace that without constitutional liberalism, democracy itself has no peace-inducing qualities: Kant distrusted unfettered, democratic majoritarianism, and his argument offers no support for a claim that all participatory polities -- democracies -- should be peaceful, either in general or between fellow democracies. Many participatory polities have been non-liberal. For two thousand years before the modern age, popular rule was widely associated with aggressiveness (by Thucydides) or imperial success (by Machiavelli) . . . The decisive preference of [the] median voter might well include "ethnic cleansing" against other democratic polities. The distinction between liberal and illiberal democracies sheds light on another striking statistical correlation. Political scientists Jack Snyder and Edward Mansfield contend, using an impressive data set, that over the last 200 years democratizing states went to war significantly more often than either stable autocracies or liberal democracies. In countries not grounded in constitutional liberalism, the¶ rise of democracy often brings with it hyper-nationalism and war-mongering. When the political¶ system is opened up, diverse groups with incompatible interests gain access to power and press their¶ demands. Political and military leaders, who are often embattled remnants of the old authoritarian¶ order, realize that to succeed that they must rally the masses behind a national cause. The result is¶ invariably aggressive rhetoric and policies, which often drag countries into confrontation and war.¶ Noteworthy examples range from Napoleon III's France, Wilhelmine Germany, and Taisho Japan to¶ those in today's newspapers, like Armenia and Azerbaijan and Milosevic's Serbia. The democratic¶ peace, it turns out, has little to do with democracy.¶

### CONGRESS COUNTERPLAN—ANSWERS TO: “ONLY COURTS CAN ENFORCE EQUAL PROTECTION/SOP DISAD”

#### Equal Protection law is committed to the Congress:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

Analogously, this Article argues that the rational basis standard reflects the Court's understanding that standards for judging the reasonableness of some classifications are [\*535] simply beyond judicial ken. To complete the political question analogy, as the textual commitment of a decision to another branch of government justifies commitment of that issue to that branch, so too Section 5 is evidence that some constitutional decisions **are in fact "committed" to Congress**, or at least that Congress has a role along with the Court in making them. In sum, both the very nature of equal protection claims and the font of modern equal protection law are consistent with an **institutional competence-based congressional authority to vindicate the equal protection guarantee**. This argument is buttressed by the Court's explanations of its equal protection doctrine, which follow in Part I.B. Those explanations focus largely on the proper role of courts in reviewing legislative classifications. They indicate that the Court's self-perceived role requires it to stop short of making conclusive pronouncements about what equal protection requires. This Article argues that the incompleteness of the Court's pronouncements leaves a constitutional lawmaking hole that **may be appropriate for Congress to fill**.

#### Fears of Separation of Powers violations from Congressional equal protection enforcement are unwarranted:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

At first blush, this analysis appears to carry extraordinarily broad implications. If legislatures have the leeway to determine what consti-tutes reasonable classifications when the Court, by adopting the rational basis standard, confesses its inability to do so, and if Section 5 gives Congress the authority to supervise the states in their own determinations on this issue, then Section 5 has become a powerful tool indeed. Because the rational basis standard applies to a breath-takingly broad array of modern legislation - indeed, to all legislation that classifies, with the exception of legislation that affects suspect classes or impacts fundamental rights - Congress's power to determine the reasonableness of classifications would give it the authority to police states' classification choices across this variety of regulatory fields, all under the rubric of ensuring that states not engage in invidious classifications. Section 5 would give Congress the power to forbid states from discriminating against, or in favor of, recent property purchasers as opposed to long-time owners, n204 relatives of riverboat captains as opposed to all other applicants for riverboat captain positions, n205 or truck owners who place their own advertising on the sides of their vehicles, as opposed to owners who rent out the sides of their trucks to others. n206 **But this fear of overly broad congressional power turns out to be unwarranted**. Recall that this problem seemingly arises because the judicial rule in rational basis cases is seemingly that there is no rule - courts' incompetence to determine the reasonableness of most classifications means that they will uphold almost any legislative line-drawing. But there is court-made law here, and it adequately cabins Congress's Section 5 power. To repeat, the judicial rule for equal pro-tection asks whether there is a reasonable relation between the statute [\*571] and a legitimate government interest. This formula makes clear that animus is not allowed; in the Court's words, "a bare ... desire to harm a politically unpopular group" n207 can never justify a classification. Thus, in ensuring that states' classifications are reasonable, it may be appropriate to limit Congress to guarding against animus. In brief, the judicial rule is "no animus," and Congress's role in enforcing that rule is to determine when state classifications fail that test.

#### Nothing prevents other branches from interpreting the Constitution

Richard H. **Fallon**, Jr., Professor of Constitutional Law, Harvard Law School, April **2005**

[“Legitimacy and the Constitution,” http://web.lexis-nexis.com/universe/document?\_m=be00e4b6d189ddb647d9365044a5571c&\_docnum=1&wchp=dGLbVzb-zSkVb&\_md5=7105aae1669b5f945e6a9318b42fc69d]

Among the complications in gauging the authoritative legitimacy of Supreme Court rulings is the possibility of change across time. In an important book, Larry Kramer has argued that many among the Constitution's founding generation subscribed to a "departmental" theory under which Congress, the President, and even the states would act according to their own interpretation of the Constitution, sometimes in disagreement with the Supreme Court. In cases of persistent inter-branch dispute, the departmentalists expected ultimate resolution by "the people themselves," presumably through political action. As Kramer documents, the departmental theory gradually lost currency, but **a similar approach could imaginably take root again.** Such a development **would not require the Supreme Court** to revise its claims about the legal authority of its decisions. The authoritative sociological legitimacy of judicial rulings is ultimately a matter of fact, capable of either evolutionary or revolutionary change regardless of the Court's pronouncements.

### CONGRESS COUNTERPLAN—ANSWERS TO: “COUNTERPLAN WILL DECREASE RIGHTS”

#### Morgan doctrine CAN ONLY increase rights beyond Court protections, it can’t decrease them:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

This analysis in turn presents a new perspective on the Court's declaration in Morgan that the Section 5 power is **a one-way ratchet**, **authorizing expansions but not dilutions of court-found Fourteenth Amendment rights**.

### CONGRESS CP: AT: SUPREME COURT STRIKEDOWN

#### Judiciary won’t strike down the Counterplan: the door is open for Congress to vigorously enforce equal protection norms:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

Scholars, most notably Robert Post and Reva Siegel, have argued for a robust congressional role in defining the meaning of the Fourteenth Amendment. n22 Their argument focuses largely on the struggle for control over the Constitution's meaning; in particular, it critiques the judicial supremacy claim they find implicit in the Court's recent Section 5 jurisprudence. But such arguments should be attuned to the particular Fourteenth Amendment provision at issue. This Article focuses on the Equal Protection Clause. It argues that the Supreme Court itself has often refrained from explicit pretensions to judicial omniscience in equal protection cases. It therefore suggests that much of the Court's equal protection jurisprudence does not authoritatively announce constitutional norms. The Article builds on that conclusion to suggest that the relative paucity of judicially announced equal protection "law" opens the way for Congress to be more creative in applying the few equal protection norms that the Court has in fact announced.

### CONGRESS COUNTERPLAN—CAUSES CULTURE SHIFTING

#### Legislative process better creates “cultural shifting” this is key to lasting social change:

**Van Schaack,** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis)

A complex dialectic exists between litigation and legislative processes. It has been long theorized that majoritarian victories [\*2341] through the political process **may be more effective** than judicial victories in provoking the kind of "cultural shifts" or transformation of norms and practices necessary to **invoke more lasting social change**.

### Congress Counterplan Solves Best

#### Congress is the best actor for social reform: best secures popular acceptance of Court decisions:

Robert C. **Post** and Reva B. **Siegal**, June 8, **2003** [The Yale Law Journal, “Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel,” p. 110]

In the aftermath of Brown, the Court **invited Congress’s participation in vindicating equality norms**, both because Congress could **secure popular acceptance of the Court’s decisions** interpreting the Equal Protection Clause and because the representative branches of government were an important resource for the Court as it struggled to learn from and speak to the American people about the meaning of the Fourteenth Amendment’s guarantee of “equal protection of the laws.” In this era, the Court established a relationship with Congress that was fluid and dynamic, and that could not be adequately comprehended by mechanical criteria like “congruence and proportionality.” This institutional relationship enabled the Court to interpret the Equal Protection Clause in a manner that was attentive to evolving and contested social norms. The framework of the Court’s recent Section 5 decisions represents a fundamental break with the forms of interaction that the Warren and Burger Courts cultivated with Congress in this formative period of the modern antidiscrimination tradition.

### Congress Counterplan: Solves Equal Protection

#### Congress is best suited to interpret equal protection law:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis, rwg)

**Congress is better situated than courts** to engage in this particularized sifting, because Congress can mold a Section 5 statute to address what are perceived to be the most serious threats of unconstitutional conduct. A statute can provide a detailed set of regulations for one subject area and a different set for another, while leaving a third area largely untouched, all based on perceived constitutional concerns. In the context of mental retardation, for example, Congress could impose more intrusive requirements with regard to zoning laws, which it might perceive as especially susceptible to animus-based manipulation based on residents' unreasonable fears of retarded individuals, and less intrusive requirements, or none at all, with regard to education, if it appears that states can be trusted to do the right thing, or if the "right thing" is a matter of honest disagreement among professionals. In short, **the flexibility inherent in legislative action** allows Congress to **more effectively detect and remedy** the merely occasional **equal protection violations** that burden most groups in society. Judicial decisionmaking does not allow for this flexibility. A court considering a rational basis challenge to a government action tests the facts against the single, broad legal principle that government action may not be based on animus or, as in Allegheny, on some [\*564] extreme level of irrationality. Thus, a court's decision striking down a government action as lacking a rational basis is almost necessarily particularistic. Under standard doctrine, that decision means that every legitimate explanation for the challenged action has been considered and found wanting, revealing an unusual, almost idiosyncratically foolish or mean-spirited government action. n187 Such a decision sends a decidedly mixed message to lower courts. On the one hand, the action struck down is condemned as severely irrational or mean-spirited, while on the other hand, the court's focus is necessarily so particularized that the precedential impact of that decision is presumably quite narrow. n188 This problem is compounded by the fact that judicial review yields an all-or-nothing result - an affirmance or a strike down. These characteristics of rational basis review make it less of an effective guard against unthinking or animus-based action, and more an arbitrary lightning bolt that, when effective at all, completely wipes out one action but leaves similarly problematic conduct untouched. Congress, with the flexibility inherent in legislation, can craft a result that is at once broader, in the sense of applying to a general species of potentially problematic government action, and more nuanced, in the sense of imposing rules that fall between complete approval and outright prohibition.

### Congress Counterplan: Legitimacy is the Net Benefit

#### Failure to allow a Congressional role in enforcing the Equal Protection Clause actually undermines the legitimacy of the Court:

Robert C. **Post** and Reva B. **Siegal**, June 8, **2003** [The Yale Law Journal, “Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel,” p. 110, rwg]

At stake in the framework of analysis advanced by Kimel and Morrison, therefore, is the survival of the very institutional ecology in which legal and social understandings of equality have provoked, inspired, and shaped each other over the last four decades. Yet at no point in last Term’s cases did the Court identify or weigh the potential costs of disrupting this ecology, which its newfound interest in limiting the ways that Congress may enforce the Equal Protection Clause threatens to do. Restricting the participation of the representative branches in enforcing the Equal Protection Clause **does not necessarily enhance the authority of the Court** or the Constitution and, we argue, may ultimately diminish the authority of both.

#### Congressional actions have stronger legitimacy than Court actions:

**Araiza,** Professor of Law @ Loyola Law School, 20**05** (William, Tulane Law Review, February 2005, 79 Tul. L. Rev. 519; Lexis)

These concerns about overreaching and line-drawing are much less salient for a legislature. As a political institution with a constantly renewed democratic mandate, Congress is less susceptible to the charge of imperialism. n174 The idea of self-limitation is at least formally inapplicable to the body that represents the people, and whose powers, within its proper sphere, are understood to be plenary. Congress's democratic legitimacy also **spares it from the requirement** that it use legal reasoning to justify the lines it draws.