# Courts CP Neg

## Solvency

### Courts Solve- Right of Transportation

#### Courts can mandate transportation policy changes through Equal Protection grounds.

Baldwin 06 (Timothy, Lawyer and contributor to Northwestern University, “The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?”, *Northwestern Journal of Law and Social Policy*, 1(1), p.263-264 http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1001&context=njlsp) GSK

Abundant evidence exists to show that increasing numbers of poor Americans are totally deprived of the right to travel. 344 The primary transportation engineering manual in the United States puts the needs of motor vehicles squarely ahead of alternative forms of transportation. 345 For decades, transportation policy focused on enabling motor vehicle use at the expense of other transportation modes. 346 Large numbers of people below the poverty line are unable to flee from natural disasters, and these individuals tend to be African American. 347 The average cost of operating a motor vehicle is now over $8000 per year. 348 The average individual on welfare cannot afford a car, and less than half of all jobs in the United States are accessible by public transportation. 349 These overwhelming facts appear to satisfy the total deprivation doctrine laid out in San Antonio. Many of the poor individuals that need transportation access are below the poverty line, they have no adequate replacement for the desired benefit in the form of public transportation, and they suffer from a total deprivation of significant portions of the transportation system. Seen through this lens, the total deprivation doctrine avoids the problems associated with a stand-alone fundamental rights analysis involving the right to travel, 350 and remains faithful to the Supreme Court’s jurisprudence that protects the travel rights of poorer members of society. Could a state justify state action that limits non-motor vehicle use under a total deprivation challenge? This remains an open question, and by no means an easy one. A reviewing court could apply intermediate scrutiny to intrastate travel litigation 351 or strict scrutiny to interstate travel cases. 352 As in Lutz, a court might easily find that restrictions on automobiles are a significant state interest. 353 However, in the context of poverty and lack of mobility, a court could also easily find that deprivation of transportation access can not be justified by policy arguments — particularly when public transportation, bicycling, and walking accommodation exist as feasible solutions. In the end, courts will have to decide whether the transportation rights involved are significant enough to be considered “penalties” that warrant interference with legislative policy decisions. It will probably remain true that a rich man will drive in a limousine, while a poor man will have to walk. Nevertheless, the total deprivation doctrine of the Equal Protection Clause offers a legitimate pathway towards protecting the rights of poor individuals to walk, bicycle, and use public transportation. The Supreme Court’s repeated protection of poorer individuals’ travel rights indicates that total deprivation claims have a significant likelihood of success. 354 Non-automobile users finally have the vehicle they need to achieve a balanced transportation system. 355

#### Courts key to protect transportation justice—empirics

Baldwin 06 (Timothy, Lawyer and contributor to Northwestern University, “The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?”, *Northwestern Journal of Law and Social Policy*, 1(1), p.237 http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1001&context=njlsp) GSK

Many of the Supreme Court’s cases that involve the right to interstate travel include fact patterns that implicate distinct travel modes and the economic status of the travelers. 159 Most of the situations in which the Court has invoked the right to interstate travel involve situations where poorer members of society are likely to be impacted by a travel restriction. In Crandall v. Nevada, decided in 1868, the Court invalidated a Nevada statute that allowed the state to tax travelers one dollar as they entered or exited the state by railroad. 160 The Court rejected the law, reasoning that “if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars.” 161 The Court also seemed particularly concerned with keeping major transportation routes open for the majority of citizenry. 162 The Crandall Court emphasized that “we are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption.” 163 Specifically mentioning “all citizens,” the Court implicitly included indigent passengers who presumably would have little impact on the commerce or the prosperity of the individual states.

#### Courts Solve- barriers to accessibility violate the right to travel.

Baldwin 06 (Timothy, Lawyer and contributor to Northwestern University, “The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?”, *Northwestern Journal of Law and Social Policy*, 1(1), p.238-239 http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1001&context=njlsp) GSK

As one commentator has noted, after Dunn, the Supreme Court watered down the standard of review to the point where the current test may be little more than an ad-hoc balancing test. 179 In Memorial Hospital v. Maricopa County, 180 the Supreme Court provided a more specific definition of state actions that penalize the right to travel. 181 Memorial Hospital addressed whether a state’s denial of medical care to an indigent based on durational residency requirements infringed his right to travel. 182 The Memorial Hospital Court had a difficult time defining what types of penalties would infringe on the right to travel and thus require strict scrutiny. 183 Ultimately, Maricopa laid down a two-part test to help determine what constitutes a penalty to the right to travel: (1) denial of fundamental political rights, and (2) denial of the basic necessities of life. 184 The Court went on to describe the limits of the penalty analysis for basic necessities of life: Whatever the ultimate parameters of the Shapiro penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. It would be odd, indeed, to find that the [state] was required to afford [the plaintiff] welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness. 185 As Part IV explains, non-motor vehicle users could assert a claim similar to welfare or health care classifications that warranted protection in Memorial Hospital. Under the Memorial Hospital test, lack of transportation access penalizes the right to travel at least as much as denial of access to welfare and health care benefits. In cases after Memorial Hospital, the Court continued to struggle with defining what constitutes a penalty to the right to travel. 186 Nevertheless, the determination that a penalty exists remains a central factor in right to travel jurisprudence. 187 In Saenz v. Roe, the Court’s most recent pronouncement on the right to travel, the court laid out three protections that the right to interstate travel guarantees: (1) the right of a citizen to enter and leave another state, (2) the right to be treated as a welcome visitor when temporarily present in a state, and (3) for travelers who become new residents of a state, the right to be treated like other citizens of the state. 188 The Saenz Court ruled that when a state actor makes a discriminatory classification, a partial denial (instead of an outright denial) of benefits is enough to constitute a penalty. 189

#### Courts can use the constitutional right to travel to mandate changes in transportation policy.

Baldwin 06 (Timothy, Lawyer and contributor to Northwestern University, “The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?”, *Northwestern Journal of Law and Social Policy*, 1(1), p.266 http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1001&context=njlsp) GSK

This Comment has endeavored to show that some forms of transportation do not have to be more equal than others. While the Monarch decision and its progeny suggest the nonexistence of a constitutional right to use a particular travel mode, Supreme Court case law remains sympathetic to a person with no travel options. 356 Neither the Supreme Court, nor the lower courts, has considered a case where an individual, either by choice or because of poverty, literally has no way of reaching a destination absent a motor vehicle. Considering the general state of the transportation infrastructure in the United States, particularly in rural areas, it is certainly possible to imagine such a scenario. 357 If such a case ever does wind its way through the courts, ample Supreme Court and lower court case law exists to maintain that an individual does have a right to reach a destination, at least through an inexpensive and reasonable means like bicycling or walking. In sum, the constitutional right to travel, combined with the total deprivation doctrine under the Equal Protection Clause, can help reverse America’s addiction to the automobile.

### Courts Solve Transport Racism

#### Courts could overturn Alexander v. Sandoval and remedy transportation racism via disparate impact equal protection analysis.

Carson 9 (D. Malcolm, Managing Attorney of the South Los Angeles Office of the Legal Aid Foundation, “15th Anniversary Bjalp Reflection: Reflections on "Message from the Grassroots: Participatory Democracy, Community Empowerment and the Reconstruction of Urban America"”, *Berkeley Journal of African-American Law and Policy*) GSK

One of the best examples of this kind of strategy that I've been involved in has been the collaboration between public interest lawyers and community organizers confronting "transit racism" in Los Angeles. After years of organizing one of the most dispossessed groups of people anywhere, the transit-dependent in famously car-centric Los Angeles County, the Bus Rider's Union (BRU) teamed up with the National Association for the Advancement of Colored People Legal Defense Fund, along with three other community-based organizations, and filed a lawsuit alleging violations of Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the 14th Amendment by the Los Angeles County Metropolitan Transportation Authority. n13 Although unfortunately the cause of action - disparate impact - that formed the basis of the original case was later overruled by the Supreme Court in Alexander v. Sandoval, 532 U.S. 275 (2001), n14 the BRU had by then already entered into a ten-year consent decree requiring: (1) maintenance of low fares; (2) new and expanded service to improve access to employment, education, and health care [\*26] centers; and (3) a reduction in overcrowding. n15 The BRU, along with other allied transit equity advocates, has been able to leverage the consent decree into approximately $ 1.3 billion in increased transportation services and reduced costs for low-income people in Los Angeles. n16

### Courts Solve Transport Ableism

#### Courts should mandate universal design as a form of reasonable accommodation.

Stein 4 (Michael Ashley, Associate Professor, William & Mary School of Law, “GENERALIZING DISABLITY: Profiles, Probabilities, and Stereotypes” 2004) VZ

I generally agree with the disability studies perspective that the ADA is an appropriate antidiscrimination device because it remedies avoidable exclusion. At the same time, the strongest version of the argument also has limitations. Not all exclusion from the workplace is artificial; some barriers are both natural and necessary. Moreover, there are workers with disabilities whose impairments even reasonable (or super-reasonable) accommodations will be unable to ameliorate. n61 The issue is where to draw the line between artificial and inherent exclusion. Although an exhaustive discussion is well beyond the boundaries of this Review, n62 it bears noting that one way to differentiate these concepts is by assessing the physically constructed environment through Universal Design principles. n63 This is an architectural concept that seeks to create "environments and products [\*1388] that are usable by all people to the greatest extent possible." n64 From a disability rights perspective, a clear example of artificial exclusion caused by non-Universal Design are the courthouse stairs that precipitated the recent Supreme Court case Tennessee v. Lane. n65 The Justices never discussed Universal Design in ruling that States did not have sovereign immunity to suits seeking court access under Title II of the ADA. Nevertheless, in order to find that people with disabilities had been subject to unequal admittance to judicial services, the Court had to believe that this physical barrier was unnecessarily exclusionary; to hold otherwise (as did the Chief Justice in dissent) is to view the exclusion of people with disabilities as opportune, if unfortunate. n66 If allowed to add her own concurring opinion, a disability rights advocate would point out that there is no intrinsic reason for constructing a public building in a manner that as a practical matter excludes members of the public, including those with disabilities. n67 Hence, the provision of reasonable accommodation to the courthouse ameliorates an insensitive and unnecessarily exclusionary social construction of the physical environment.

#### The Supreme Court should apply the precedent from Alexander v. Choate to find that there is a requirement to make public transit accessible.

Rennert 88 (Sharon, senior member of the EEOC's ADA Division staff, “ALL ABOARD: ACCESSIBLE PUBLIC TRANSPORTATION FOR DISABLED PERSONS.” 63 New York University L. Rev. 360, 1988) VZ

This Part also discusses Alexander v. Choate, n129 another Supreme Court case analyzing section 504. Although the DOT claimed Alexander did not "significantly alter the legal bases for the rule," n130 Alexander in fact indicates that a transit agency must modify its operation to some extent in order to permit meaningful access to disabled people. n131 Thus, Americans Disabled for Accessible Public Transportation (ADAPT) v. Dole, n132 a recent district court decision that overlooked Alexander and held that there was no requirement under section 504 to modify mass transit, n133 was wrongly decided. Under the Alexander analysis, transit systems must make at least part of their regular bus fleets accessible to disabled people.

#### Courts can mandate increased accessibility as ‘reasonable accomodation’

Rennert 88 (Sharon, senior member of the EEOC's ADA Division staff, “ALL ABOARD: ACCESSIBLE PUBLIC TRANSPORTATION FOR DISABLED PERSONS.” 63 New York University L. Rev. 360, 1988) VZ

The Supreme Court qualified its Davis analysis in Alexander v. Choate, n184 with significant implications for the issue of transportation. Alexander involved a challenge to Tennessee's proposal to impose a fourteen day limitation on the number of annual in-patient hospital days for which state Medicaid would reimburse hospitals on behalf of a Medicaid recipient. n185 The respondents, a class of disabled Medicaid recipients, argued that because the limitation would have a disproportionate adverse effect on disabled people, it was discriminatory under section 504. n186 Ultimately, the Court concluded that the proposal was not discriminatory under section 504 because it did not deny disabled people meaningful access to, or exclude them from, Medicaid services. n187 However, the Court's analysis elucidated the extent to which accommodation is necessary under section 504 when systemic discrimination is involved. The Court began its analysis by examining whether section 504 reaches only purposeful discrimination or whether it also applies to discrimination by effect. n188 Tennessee contended that section 504 applies only to purposeful discrimination, n189 and that the limitation on Medicaid payments was meant to be a general cost-saving device, without intent to discriminate against disabled people. n190 The Supreme Court "assume[d] without deciding" that section 504 [\*385] does apply to some nonpurposeful conduct having an unjustifiable disparate impact on disabled people. n191 The Court based this conclusion about the reach of section 504 primarily on Congress's recognition of the unique nature of discrimination suffered by disabled people: "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect." n192 The Court cited barriers in access to public transportation as an example of the type of systemic barriers that could not be reached if section 504 applied only to intentional discrimination. n193 The Court stated that section 504 mandates "reasonable accommodation" n194 resulting in "meaningful access" n195 to a program or benefit to remedy conduct having a discriminatory impact on disabled people. n196 The Court made it clear that if, under the Tennessee law, disabled people were being denied meaningful access to health care, then the state would have to make reasonable accommodations to eliminate that result. n197 In Alexander, the Court clarified its decision in Southeastern Community College v. Davis n198 by stating that Davis stood for the proposition that programs were required to make "reasonable" modifications to accommodate disabled people; only accommodations necessitating "fundamental" [\*386] or "substantial" changes were not mandated. n199 Justice Marshall, writing for a unanimous Court, acknowledged the Davis Court's mistaken use of the term "affirmative action" in discussing the accommodations required by section 504. n200 Regardless of the specific language used, the ultimate question under section 504 is the extent to which federally funded programs are required to make reasonable modifications to accommodate disabled people. n201

#### Court should find that denial of access is an equal protection violation- empirically solves.

Miltko 95 (Susan Moriarity, Articles Editor for the Northwestern University Law Review, “The Need for Professional Discretion: Health Professionals under the Americans with Disabilities Act” 1995) VZ

Until the middle of the twentieth century, the only federal laws protecting individuals with disabilities were the Social Security Act of 1935 n33 and the LaFollette-Barden Act of 1943. n34 The Social Security Act provided medical and therapeutic services for what it, until 1986, referred to as "crippled" children. n35 Similarly, the LaFollette-Barden Act attempted to provide handicapped individuals over the age of fifteen with services designed to improve their ability to get a job. n36 These Acts were clearly paternal in nature, demonstrating that the federal government's primary focus in its treatment of the disabled was to make a series of goodwill attempts to provide for the needs of these individuals without addressing their civil rights. A rights-based approach to providing for the needs of the disabled was first presented decades later in the area of environmental access. In 1968, Congress passed the Architectural Barriers Act, which required that any building constructed with federal funds or leased by the federal government be made accessible to the disabled. n37 Even though the statute did not address what civil rights existed for the disabled, the statute's content suggested a movement away from the traditional welfare concept and a step toward the ideal of equal access for the disabled to the amenities normally available to individuals in our society. [\*1737] The concept of environmental access was taken a step further with the passage of the Urban Mass Transportation Act of 1970. n38 This Act required local transportation authorities to design mass transit systems that were accessible to the disabled. n39 For the first time, the federal government declared it a national policy that disabled and elderly people should have the same rights and opportunities as others to use mass transportation. n40 Another significant step toward the recognition of rights for the disabled occurred in 1972, when two federal courts applied a rights-based approach, previously used by the Supreme Court in the racial equality setting, to issues involving the rights of the disabled. In 1954, the Supreme Court, in Brown v. Board of Education of Topeka, n41 ruled that by racially separating children in a school system, the school board was denying children their right to equal educational opportunity. In Pennsylvania Association for Retarded Children v. Pennsylvania n42 and Mills v. Board of Education, n43 the courts applied the Supreme Court's reasoning in Brown to the context of the disabled, and found that denying education to disabled children or affording them differential treatment within the educational system was a violation of equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution. n44 While these decisions were limited in scope to public education in Pennsylvania and the District of Columbia, they constituted a major advancement in the recognition of the rights of disabled Americans and set the stage for the more expansive federal legislation that followed.

#### Court can rule on the ADA, which provides broad protections in the area of transportation

Jones 1 (Nancy Lee, Congressional Research Office, “The Americans with Disabilities Act: Statutory Language and Recent Issues” <http://www.policyalmanac.org/social_welfare/archive/crs_ada.shtml> 08/01/01) VZ

The Americans with Disabilities Act, ADA, provides broad nondiscrimination protection in employment, public services, public accommodations and services operated by public entities, transportation, and telecommunications for individuals with disabilities. The Supreme Court has decided fifteen ADA cases, including four cases in the 2001-2002 Supreme Court term. This report will summarize the major provisions of the ADA and will discuss selected recent issues, including the Supreme Court cases. It will be updated as developments warrant.

### Courts can make Policy Change

#### Counterplan solves as well as the aff-court can mandate public policy changes.

**Casper 76** (Jonathon, Associate Professor of Political Science at Stanford University, “The Supreme Court and National Policy Making”, The American Political Science Review, March 1976, Vol. 71 No. 1, JSTOR)

The Court is frequently called upon to interpret the meaning of federal statutes, and in the course of doing so, important policy choices must be made. If we adopt for the moment the notion that influence in policy making is most accurately judged in situations in which various participants conflict with one another, it is clear that the interpretations that are made by the Court even when they are based on "legislative intent" are often quite different from those that members of Congress and the President had in mind when the legislation was passed. The Court's doctrine that it will, if at all possible, interpret a statute in such a way as to "save" it from being de- clared unconstitutional means that the Court will often significantly twist and change the ostensible provisions of a statute. Thus, in interpreting statutes the Court often makes important policy choices, and these choices are at least arguably quite contrary to the preferences of the law-mak- ing majority that passed the legislation. The more influence the Court exercises by virtue of statutory construction, the less influence it will appear to have in terms of Dahl's coding rules. When the Court "saves" a law by interpreting it rather than declaring it unconstitutional, its contribution to the course of public policy is excluded from con- sideration under Dahl's rules.

### AT: Lower Courts won’t Enforce

#### The Lower Courts Will Follow Supreme Court

Kim 2007, Professor of Law, Washington University School of Law, St. Louis., 2007

(Pauline, PCopyright © by Pauline T. Kim. Copyright (c) 2007 New York University Law Review LexisNexis, “Lower Court Discretion,” May, 2007)

If the fear of reversal is insufficient to explain judicial behavior, then the principal-agent model presents a puzzle. In the absence of any effective sanction, why would lower court judges - assumed to be motivated by their policy preferences - choose to follow legal authority rather than pursuing their own \preferred outcomes? The simplest explanation for lower court compliance is that judges have legal preferences independent of their political preferences. More precisely, even if judges care about whether the outcome in a given case advances their preferred policy, they likely care about whether it conforms to legal norms as well. Judges may have a variety of legal preferences regarding matters such as the appropriate mode of interpreting statutes, or the relevance of foreign legal materials, and these preferences may vary from judge to judge. But their decisions are also guided by a set of widely shared norms - some of which are formulated as legal rules - regarding their role in the judicial hierarchy. One fundamental and widely accepted norm requires that lower federal court judges follow precedent established by a court directly in line above them in the judicial hierarchy. Adherence to this norm offers a straightforward explanation of why lower courts comply with superior court precedent, even that with which they disagree. n8

### AT: Legitimacy

#### Overturning bad precedent is crucial to legitimacy

Rosenfeld Professor of Constitutional Law 04

(Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast International Journal of Constitutional Law Volume 2, Number 2, October 650-1 TC)

In theory at least, common law adjudication need not involve repudiation of precedents, only their refinement and adjustment through further elaborations. Accordingly, gaps in predictability may be merely the result of indeterminacies; the recourse to notions of fairness are meant primarily to reassure the citizenry that the inevitably unpredictable will never be unjust. Constitutional adjudication, on the other hand, while relying on precedents as part of its common law methodology, must ultimately be faithful to the constitutional provision involved rather than to the precedents. As a result, when precedents appear patently unfair or circumstances have changed significantly, the U.S. Supreme Court is empowered—perhaps obligated pursuant to its constitutional function—to overrule precedent, thus putting fairness above predictability.60 For example, in its recent decision in Lawrence v. Texas,61 the Supreme Court overruled its 1986 decision in Bowers v. Hardwick,62 which held that the due process clause did not extend constitutional protection to homosexual sex among consenting adults, thus upholding a law that criminalized such conduct. More generally, whenever a constitutional challenge raises a significant question that could entail overruling a constitutional precedent, the Supreme Court faces a choice between predictability and fairness. American rule of law, like the Verfassungsstaat, involves constitutional rule through law, but unlike the Rechtsstaat it produces a rule through law where predictability is but one among several, often antagonistic, elements. American rule of law ultimately amounts to a complex, dynamic interplay between competing elements and tendencies. Moreover, it appears, at least initially, that more than the Rechtsstaat or the État de droit, American rule of law depends for its viability on a broad based consensus regarding extralegal norms, such as fairness and substantive notions of justice and equity. Indeed, if there is a consensus on what constitutes fairness or justice, then the tensions between predictability and fairness, and between procedural and substantive safeguards, seem entirely manageable, and the work of the constitutional adjudicator more legal than political. If, on the contrary, there are profound disagreements over what is fair or just, then the work of the constitutional adjudicator is bound to seem unduly political. Accordingly, at least prima facie, the task of the American constitutional adjudicator seems more delicate and precarious than that of her continental counterpart.

#### Enforcing controversial decisions builds legitimacy

**Law in 2k9** (David S., Professor of Law and Political Science – Washington University, “A Theory of Judicial Power and Judicial Review”, Georgetown Law Journal, March, 97 Geo. L.J. 723, Lexis)

Part IV of this Article discusses a counterintuitive implication of a coordination-based account of judicial power. Conventional wisdom suggests that courts secure compliance with their decisions by drawing upon their store of legitimacy, which is undermined by decisions that are unpopular, controversial, or lack intellectual integrity. [**25**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n25) Part IV argues that precisely the opposite is true: an unpopular or unpersuasive decision can, in fact, enhance a court's power in future cases, as long as it is obeyed. Widespread compliance with a decision that is controversial, unpopular, or unpersuasive serves only to strengthen the widely held expectation that others comply with judicial decisions. This expectation, in turn, is self-fulfilling: those who expect others to comply with a court's decisions will find it strategically prudent to comply themselves, and the aggregate result will, in fact, be widespread compliance. Part IV illustrates these strategic insights--and the Supreme Court's apparent grasp of them--by contrasting  [\*734]  *Bush v. Gore* [**26**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n26) with *Brown v. Board of Education* [**27**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n27) and *Cooper v. Aaron*. [**28**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n28)

#### The Court’s legitimacy is not effected by its decisions and it has power to change political environment separate its popularity.

McDonnell, Stanford U econ pH.D, 97

(Brett, California Law Review, “Dynamic Statutory Interpretations and Sluggish Social Movements”, Vol. 85, No. 4, p. 923, July, JSTOR)

Part VI applies this model to the Civil Rights Act of 1991 and to civil rights politics today. Eskridge thinks the congressional override of many decisions shows the Rehnquist Court has not played the Court/Congress/President game well. The dynamic theory suggests several alternative stories. One possibility is that the Court's recalcitrance has forced advocates to go back to more grassroots Congressional lobbying, strengthening their long-run political position and leading to stronger laws than they would have achieved under a more sympathetic Court. This would not have been the Court's intent, but rather an unanticipated effect of the judicial decisions. An alternative interpretation is that the Court's actions contributed to a changed political environment on racial issues, leading in the long run to national policies closer to its conservative preferences. Either way, with today's conservative Court, a judicial strategy might actually make the law more conservative than the status quo in the short run, and might threaten to make future preferences even more conservative. Even a legislative strategy might be futile in the short run. Thus, today a mass action strategy aimed primarily at shaping future preferences makes the most sense.

### AT: Activism- Not Unique

#### Health Care ruling was activist

Jacobson 6/28/12 (Associate Clinical Professor, Cornell Law School <http://legalinsurrection.com/2012/06/supreme-judicial-activism-in-restraints-clothing/>)

The most disturbing thing about today’s decision is not that we lost on the mandate. The majority opinion on the Commerce Clause (the Chief Justice plus the conservative dissenters) was quite good, and vindicated those who mounted an argument as to “inactivity” to the derision of the law professoriate. What is most disturbing is the judicial activism which took the Chief Justice from the Commerce Clause to the taxing power in order to save the legislation. It required, as Justice Scalia noted in the dissent, a rewriting of the legislation, and the enactment of a tax via judicial fiat where the legislature knowingly and deliberately had refused to do so. For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, e.g., Stamp Act of 765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, §7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 “defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue.” United States v. Munoz-Flores, 495 U. S. 385, 395 (1990). We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. See Affordable Health Care for America Act, H. R. 3962, 111th Cong., 1st Sess., §501 (2009); America’s Healthy Future Act of 2009, S. 1796, 111th Cong., 1st Sess., §1301. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry. (pp. 24-25, emphasis added) Rather than defer to the political process, the Court save the proponents of the legislation from their political decisions, and rewarded a corrupted political process whereby legislation was passed only because it was not sold to the public as a tax, yet saved at the Supreme Court because it was a tax. Yet the Chief Justice clothed such activism in terms of restraint. Restraint would have been to allow the legislature to bear the natural consequences of its political decisions, not to rewrite either history or the legislation.

#### ACA ruling was judicial activism and undermined court legitimacy

Huffman 6/28 Jim Huffman is the dean emeritus of Lewis & Clark Law School, the co-founder of [Northwest Free Press](file:///C:\Users\Geoff\Desktop\Northwest%20Free%20Press) (<http://dailycaller.com/2012/06/28/obamacare-ruling-is-judicial-activism-of-the-most-pernicious-sort/2/>)

The Supreme Court’s validation of the Affordable Care Act’s (ACA) individual mandate will be celebrated as a product of appropriate judicial restraint. To the contrary, it is judicial activism of the most pernicious sort.

Writing for a five-justice majority, Chief Justice Roberts held that the requirement that individuals purchase health insurance or pay a penalty is within Congress’s constitutional power to tax. He reached this conclusion notwithstanding that President Obama and ACA supporters in Congress have repeatedly insisted that it is not a tax.

Why is this judicial activism? Because, by converting into a tax what Congress enacted as a regulation, the court has effectively legislated. It has made possible through judicial decision what Congress chose not to do, and probably could not have done, through the legislative process.

The rationale for the chief justice’s willingness to uphold the mandate as a tax is that the court should, if possible, defer to Congress by searching the Constitution for any plausible source of authority. There is ample precedent for this posture of judicial deference, but it is misguided in this case for reasons Justice Kennedy underscored during oral argument. The usual deference to Congress and presumption of constitutionality should give way, said Kennedy, to a “heavy burden of justification” on government “when you are changing the relation of the individual to the government.”

In other words, the courts should actively restrain, not actively facilitate, government infringement on liberty. Judicial deference is appropriate where Congress is acting pursuant to its enumerated powers and not infringing on constitutional liberties. But when activist government exceeds its enumerated powers and thereby threatens individual liberties, the courts must be vigilant in enforcing the Constitution. Otherwise the courts become party to activism and liberty is lost.

#### Non-Unique- Citizens United

Chemerinsky 12 (Erwin Chemerinsky is dean of the UC Irvine School of Law. He wrote this for The Los Angeles Times) ://www.post-gazette.com/stories/opinion/perspectives/a-stunning-example-of-judicial-activism-the-supreme-court-overturns-decades-of-precedents-on-campaign-spending-230237/

The Supreme Court's 5-4 decision holding that corporations and unions can spend unlimited amounts of money in election campaigns is a stunning example of judicial activism by its five most conservative justices. In striking down a federal statute and explicitly overturning prior decisions, the court has changed the nature of elections in the United States. At the same time, the conservative justices have demonstrated that decades of conservative criticism of judicial activism was nonsense. Conservative justices are happy to be activists when it serves their ideological agenda.

#### Because of a lack of checks on Judicial power, judges inevitably practice activism

Lipkin, Distinguished Professor of Law, Widener University School of Law (Delaware), J.D., UCLA School of Law, 1984, Ph.D., Princeton University, 1974, 2008

(Robert Justin Lipkin, WE ARE ALL JUDICIAL ACTIVISTS NOW, University of Cincinnati Law Review, 77:181, Fall 2008, JWS)

While there must be checks on the elected branches, no significant [\*193] institutional device exists to protect the other branches of government and the people from judicial excess. n48 Of course, defenders of judicial supremacy invariably argue that the appointments process is a sufficient check on the judiciary, but this a limited check at best. For one thing, it overlooks the fact that consent requires accountability and that once the elected branches nominate and confirm a federal judge, that judge is virtually free from any further serious accountability. n49 It is the combination of judicial supremacy and the absence of judicial accountability that created the fertile conditions under which the seed of judicial activism first began to germinate. Once the seed has been planted, justices - even some who warn against the dangers and illegitimacy of judicial activism - will be unable to prevent themselves or their colleagues from ultra vires judicial decision-making. When judges do transgress, there is enough judicial rhetoric available to hide their transgressions even from themselves. We must remember that federal judges are unelected, life-tenured officials, who cannot be removed from office except by impeachment. Yet, in a republican democracy, consent and accountability are the chief criteria for guaranteeing the government's legitimacy. n50 This raises one of the most suppressed questions buried deep in the recesses of the entrenched understanding, namely, the question of judicial accountability. Which constitutional actor checks the judiciary's excess? Although judicial decisions can be reversed through constitutional amendment or transformative judicial appointments, these practices are extraordinarily difficult to execute, especially as a reliable means of reversing more-than-ordinary but less-than-seminal judicial decisions. n51 Consequently, this defective institutional design guarantees that the ill effects of constitutionally erroneous judicial decisions may last for [\*194] decades.

### AT: Activism- No Impact

#### The court shouldn’t be concerned about credibility or conserving political capital- 200 years of controversial decisions disprove their impact.

Kloppenberg 94 (Lisa, ex-dean at Dayton University Law School, “Avoiding Constitutional Questions”, *Boston College Law Review*)GSK

But even if a judge is correct in her assessment that the public is not ready to accept an unpopular opinion, how long can a court justifiably avoid a constitutional problem by use of the last resort rule? Some scholars argue that preserving credibility or political capital should not concern the judicial branch. n195 Arguably, in addition to the [\*1045] duty to hear cases properly before them, federal courts have a duty to render an unpopular decision when adherence to the Constitution so demands. n196 The last resort rule, however, does not require a court to refuse to decide a case; it requires a refusal to resolve the case on a constitutional ground. As argued when considering the separation principle below, decisions of certain issues, particularly those involving non-majoritarian rights, may never find widespread acceptance. In fact, decision by a federal court on constitutional grounds may be necessary to foster acceptance of such rights. For example, unanimous constitutional interpretation by the Supreme Court and respectful tones in opinions are two methods of addressing viability concerns. n197 In any event, the dilemma of determining the appropriate moment for avoiding constitutional decision cannot always depend on waiting for a right time or receptive audience. Even the initial assertion that judicial credibility is fragile is not without dissenters. Two hundred years of history have disproved "predictions of doom -- that society could not accept a government where judges had discretion to choose constitutional values," including values involved in sensitive social issues such as desegregation and abortion. n198 Rather than fragile, judicial credibility can just as persuasively be characterized as robust, and the Supreme Court arguably has reached a historically unparalleled level of stature and importance. n199 Of course, others might counter that the robust state of the Court's credibility derives from past prudence.

### Activism Good – Rule of Law

#### Judicial Activism is key to protect liberty and the rule of law

Bolick, CATO Institute Writer, 07

(Clint, A Cheer for Judicial Activism, CATO Institute, <http://www.cato.org/pub_display.php?pub_id=8168>, 6/30/09)

Judicial activism has become a universal pejorative, a rare point of agreement between red and blue America. Conservatives and liberals alike condemn courts for overturning policy decisions they support. Both sides would reduce the judiciary's constitutional scrutiny of the actions of other branches of government -- a role it exercises not too much but far too little. To be sure, courts deserve criticism when they exercise legislative or executive powers -- ordering taxes to be raised, assuming control over school systems or prisons, or as the Supreme Court did yesterday, giving regulatory agencies broad lawmaking authority. But better to call this behavior what it really is, which is not "activism" but lawlessness. By contrast, judicial activism -- defined as courts holding the president, Congress, and state and local governments to their constitutional boundaries -- is essential to protecting individual liberty and the rule of law. Judicial review, the power to invalidate unconstitutional laws, was essential to the scheme of republican government established by our Constitution. The courts, declared James Madison, would provide "an impenetrable bulwark against every assumption of power in the executive and legislative" branches, and "will naturally be led to resist every encroachment of rights expressly stipulated for in the constitution by the declaration of rights."

#### Rule of Law key to prevent global nuclear war

Rhyne 58

(Charles, fmr president @ American Bar Association, "Law Day Speech for Voice of America," 5/1/1958, http://www.abanet.org/publiced/lawday/rhyne58.html)

The tremendous yearning of all peoples for peace can only be answered by the use of law to replace weapons in resolving international disputes . We in our country sincerely believe that mankind's best hope for preventing the tragic consequences of nuclear-satellite-missile warfare is to persuade the nations of the entire world to submit all disputes to tribunals of justice for all adjudication under the rule of law. We lawyers of America would like to join lawyers from every nation in the world in fashioning an international code of law so appealing that sentiment will compel its general acceptance. Man's relation to man is the most neglected field of study, exploration and development in the world community. It is also the most critical. The most important basic fact of our generation is that the rapid advance of knowledge in science and technology has forced increased international relationships in a shrunken and indivisible world. Men must either live together in peace or in modern war we will surely die together. History teaches that the rule of law has enabled mankind to live together peacefully within nations and it is clear that this same rule of law offers our best hope as a mechanism to achieve and maintain peace between nations.

### Activism Good – Democracy

#### Judicial Activism Is A Model for Constitutional Democracy

Horowitz, Journal of Democracy Writer, 06

(Donald L., “Constitutional Courts: A Primer For Decision Makers”, <http://muse.jhu.edu.floyd.lib.umn.edu/journals/journal_of_democracy/v017/17.4horowitz.html>, 7/1/09)

Judicial review is a growing institution. Originating in the United States two centuries ago, the power to declare governmental action, whether legislative or executive, unconstitutional has spread around the world in the last half century. As of 2005, more than three-quarters of the world's states had some form of judicial review for constitutionality enshrined in their constitutions.1 This figure includes a good many countries with undemocratic regimes, in which the effectiveness of judicial review might be subject to question, but the prevalence of the institution nonetheless testifies to the current fashion for judicial review. The popularity of judicial review is a recent phenomenon. As we shall see, judicial review is a function performed either by a specialized constitutional court or by a court with more general jurisdiction, typically a supreme court. While a growing number of new constitutions provide for judicial review in a supreme court, the stronger trend in new democracies has been to create separate constitutional courts.2 In 1978, only 26 percent of constitutions provided for a constitutional court,3 while approximately 44 percent did by 2005. There are regional variations in the relative popularity of the two types. For example, supreme-court review is more common than constitutional-court review in Latin America.4 Worldwide, however, only about 32 percent of constitutions locate judicial review in a supreme court or other ordinary court. It has become more and more difficult for constitution-makers to avoid judicial review. In the post-1989 period, constitution-making has become an international and comparative exercise in ways it was not previously. Increasingly, there are norms of constitutional process [End Page 125] and constitutional provisions propagated as desirable. Some part of the fashion for judicial review derived initially from a few conspicuous adoptions, as in Germany, Japan, and India. Some part derived, too, from the adjudication of new rights by new supranational institutions, particularly in Europe.5 Once optional for new democracies, constitutional courts are now generally regarded as standard equipment. To be sure, it is possible for constitutional drafters to defy the counsel of international advisors and monitors of democratic progress by choosing, as Afghanistan and Iraq did, not to create constitutional courts. It is, however, exceedingly unusual to fail to provide for judicial review altogether, and the more common choice, exemplified by Indonesia (2002), Côte d'Ivoire (2000), Latvia (2003), Chile (2001), and Spain (1992), is the constitutional-court model.

#### Democracy prevents nuclear warfare, ecosystem collapse, and extinction

Diamond 95 (Larry, a professor, lecturer, adviser, and author on foreign policy, foreign aid, and democracy, “Promoting Democracy in the 1990s: Actors and instruments, issues and imperatives : a report to the Carnegie Commission on Preventing Deadly Conflict”, December 1995, http://wwics.si.edu/subsites/ccpdc/pubs/di/di.htm)

This hardly exhausts the lists of threats to our security and well-being in the coming years and decades. In the former Yugoslavia nationalist aggression tears at the stability of Europe and could easily spread. The flow of illegal drugs intensifies through increasingly powerful international crime syndicates that have made common cause with authoritarian regimes and have utterly corrupted the institutions of tenuous, democratic ones. Nuclear, chemical, and biological weapons continue to proliferate. The very source of life on Earth, the global ecosystem, appears increasingly endangered. Most of these new and unconventional threats to security are associated with or aggravated by the weakness or absence of democracy, with its provisions for legality, accountability, popular sovereignty, and openness.

### Activism Good- SOP

#### Activism good- key to enforcing limits on other branches.

Neily 11 (Clark, WSJ correspondent and leading attorney, “The Myth of Judicial Activism”, *Wall Street Journal*, http://search.proquest.com/docview/894290504)

The explosive growth in the size and scope of government has been abetted by an ethic of judicial restraint that seems more concerned with rationalizing laws than judging their constitutionality. The Supreme Court's new term starts Monday and will include a number of high-profile cases, including whether police may install tracking devices on people's cars without a warrant and a property-rights case involving draconian efforts by the Environmental Protection Agency to enforce the Clean Water Act against homeowners in Idaho. The court may even take up the challenges to the Patient Protection and Affordable Care Act, also known as ObamaCare. No matter where you come down on the political spectrum, the stakes are high, as always. Our Constitution imposes significant limits on government power -- limits that are not being properly enforced because too many judges have adopted an ethic of reflexive deference toward the other branches of government. What America needs instead is a properly engaged judiciary that understands the importance of constitutionally limited government and refuses to be cowed by empirically baseless accusations of judicial activism.

### Activism Good- Minority Rights

#### Activism is necessary to protect minority rights.

G Stone 12 Geoffrey R. Stone is a law professor at the University of Chicago. (<http://articles.chicagotribune.com/2012-04-13/news/ct-perspec-0413-restraint-20120413_1_judicial-activism-judicial-deference-judicial-restraint>)

The central question in constitutional law is: When is judicial activism appropriate? The best answer, which is grounded in the vision of the framers and has been a central part of constitutional law for more than 70 years, is that judicial activism is appropriate when there is good reason not to trust the judgment or fairness of the majority. It is in that situation when it is most important for judges to intervene to enforce the guarantees of the Constitution. As Alexander Hamilton observed in the Federalist Papers, we must rely upon judges who have life tenure and are thus insulated from political pressure to protect "the rights of individuals from the effects of those ill humours which … sometimes disseminate among the people." In other words, judicial deference is inappropriate when there is good reason to believe that prejudice, intolerance or bigotry has tainted the fairness of the political process. Invoking this understanding of judicial responsibility, the Supreme Court issued a series of decisions that faithfully interpret and apply the Constitution in circumstances in which judicial activism was most necessary to guard against such majoritarian dysfunction. These decisions ended racial segregation, recognized the principle of "one person, one vote," forbade government suppression of political dissenters, established an effective right to counsel for persons accused of crime, struck down government discrimination against women and upheld the right of "enemy combatants" to due process of law, to cite just a few examples. What these decisions have in common is that they protect the rights of the powerless. Such decisions animate the most fundamental aspirations of our Constitution and are necessary and proper examples of judicial activism.

### AT: Court Politics DA

#### No link – empirical studies prove justices don’t vote based on public or congressional responses

Brace et al 1999, Hall, Langer, Clarence Carter Professor, Department of Political Science, Rice University, Professor, Department of Political Science, Michigan State University. Assistant Professor, Department of Political Science, University of Arizona, 1999

(Paul, Melinda, Laura, Judicial choice and the politics of abortion: institutions, context, and the autonomy of courts, Albany Law Review, 62 Alb. L. Rev. 1265, Accessed By SA)

While these two alternative perspectives on the status of the United States Supreme Court will continue to be debated as new evidence is brought to bear on the issue, some very recent research raises serious doubts about the utility of models derived from positive theory for explaining the Supreme Court's interaction with Congress. n12 In a highly thought-provoking paper, Jeffrey Segal presents a convincing case that assumptions about the insularity of courts are theoretically sound and empirically correct for the Supreme Court, even in matters of statutory interpretation. n13 As Segal demonstrates, very much in accordance with the voluminous literature on attitudinal theory, individual justices cast votes on the basis of their personal preferences, displaying little evidence of deference to Congress. n14 In other words, the Supreme Court's decisions are not constrained by anticipated reactions from Congress. As mentioned, Segal attributes the failure to find empirical support for separation-of-powers models to the institutional arrangements that define the Court and free its members from the need to engage in strategic voting. n15

## CP Avoids Politics

### Court Decisions Don’t Cost Political Capital

#### Court decisions shield presidents’ political capital

**Jennifer Greenstein Altmann**, assistant editor at the Princeton Weekly Bulletin, **2007** – News At Princeton, http://www.princeton.edu/main/news/archive/S18/17/72G06/?section=featured)

In his new book, "Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court and Constitutional Leadership in U.S. History," Whittington argues that in recent years the court has become the key player in an important political tussle: Who has the final say in constitutional matters? Whittington asserts that the court has become the final arbiter, but that status did not result from a power grab by the court. Its power, remarkably, has come from politicians, who have pushed onto the court the responsibility for making final rulings on constitutional matters because, paradoxically, it benefits the politicians. "Presidents are mostly deferential to the court," said Whittington. "They have pushed constitutional issues into the courts for resolution and encouraged others to do the same. That has led to an acceptance of the court's role in these issues." It seems counterintuitive that politicians would want to defer to the court on some of the most high-stakes decisions in government, but Whittington has found that they do so because the court often rules in the ways that presidents want — and provides politicians with the political cover they need. In 1995, the Clinton administration faced a proposal from the Senate to regulate pornography on the Internet. The president thought the bill was unconstitutional, but he didn't want to risk appearing lenient on such a hot-button issue right before he was up for re-election, Whittington said. Clinton signed the legislation with the hope that the Supreme Court would strike it down as unconstitutional, which it later did.

#### Court decisions avoid congressional political battles-comparatively save political capital

Ward in 9

(Artemus, Professor of Poli Sci @ NIU “*Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court*”, Congress & the Presidency, Jan-Apr, (36)1; p. 119)

After the old order has collapse the once- united, new-regime coalition begins to fracture as original commitments are extended to new issues. In chapter 3 Whittington combines Skowronek's articulation and disjunctive categories into the overarching "affiliated" presidencies as both seek to elaborate the regime begun under reconstructive leaders. By this point in the ascendant regime, Bourts are staffed by justices from the dominant ruling coalition via the appointment process - and Whittington spends time on appointment politics here and more fully in chapter 4. Perhaps counter-intuitively, affiliated political actors - including presidents - encourage Courts to exercise vetoes and operate in issue areas of relatively low political salience. Of course, this "activism" is never used against the affiliated president per se. Instead, affiliated Courts correct for the overreaching of those who operate outside the preferred constitutional vision, which are often state and local governments who need to be brought into line with nationally dominant constitutional commitments. Whittington explains why it is easier for affilitated judges, rather than affiliated presidents, to rein in outliers and conduct constitutional maintenance. The latter are saddled with controlling opposition political figures, satisfying short-term political demands, and navigating intraregime gridlock and political thickets. Furthermore, because of their electoral accountability, politicians engage in position-taking, credit-claiming, and blame-avoidance behavior. By contrast, their judicial counterparts are relatively sheltered from political pressures and have more straightforward decisional processes. Activist Courts can take the blame for advancing and legitimizing constitutional commitments that might have electoral costs. In short, a division of labor exists between politicians and judges affiliated with the dominant regime.

#### The Supreme Court can preserve political capital

Whittington 3 (Keith, Princeton University, Department of Politics, November 17, 2003, <http://www.law.northwestern.edu/colloquium/legalhistory/Keith%20Whittington.pdf>)

Black civil rights again provides an illustration. Extending the story of the Court's midcentury intervention in behalf of black civil rights, we can now focus less on how the president could turn to the Court to circumvent legislative gridlock and more on how politicians positioned themselves so as to minimize the personal political fallout from the Court's actions. For Democrats, civil rights fell along the central fault line of their existing legislative and electoral coalition, dividing white southern Democrats from more liberal northern Democrats. Both black voters in the North and white voters in the South were increasingly regarded as potentially pivotal in determining the control of the White House, but they put con- flicting demands on presidential candidates. The Court as a policymaker was a potential strategic resource for overcoming a fragmented coalition and achieving policy outcomes greatly desired by some constituents. The independence of the judiciary from explicit political control allowed poli- ticians to distance themselves from judicial actions greatly disliked by other constituents, allowing politicians to roll with the judicial punches rather than having to retaliate against them. Feeling pressure from the left and convinced that blacks in the North held a critical swing vote in the presidential election while southern whites were safely in the pocket of the Democratic Party, Truman launched a brief but vigorous rhetorical, adminstrativem and legislative civil rights campaign in the months preceding the 1948 election.

#### Courts allow politicians to avoid controversial issues

Solum, Professor of Law, 05

(Lawrence Solum, Professor of Law at Loyola Law School in Los Angeles, "Legal Theory Lexicon 047: The Counter-Majoritarian Difficulty" 6-19-2005 <http://lsolum.typepad.com/legal_theory_lexicon/2005/06/legal_theory_le_1.html>)

There is another side to this story. There may be reasons why elected politicians prefer for the Supreme Court to “take the heat” for some decisions that are controversial. When the Supreme Court acts, politicians may be able to say, “It wasn’t me. It was that darn Supreme Court.” And in fact, the Supreme Court’s involvement in some hot button issues may actually help political parties to mobilize their base: “Give us money, so that we can [confirm/defeat] the President’s nominee to the Supreme Court, who may cast the crucial vote on [abortion, affirmative action, school prayer, etc.].” In other words, what appears to be counter-majoritarian may actually have been welcomed by the political branches that, on the surface, appear to have been thwarted.

#### Courts rulings shield congress members from political blame

Evensky, Professor of Economics at Syracuse, 07

(Jerry Evensky, Professor of Economics and Laura J. and L. Douglas Meredith Professor for Teaching Excellence at Syracuse University, 2007, “ Adam Smith's Moral Philosophy”)

The question of why Congress has tended to devolve quasi-legislative powers to agencies and the courts remains. Plainly, institutional politics has become quite complex. Some commentators argue that members of Congress often use the agencies and the courts to avoid difficult choices and political blame. Members, according to this view, often are unable or unwilling to resolve their differences so they give up and leave legislation ambiguous or include contradictory provisions, a practice which sometimes leaves interested parties no option but to take the matter to court. Other observers note that Congress and the courts have largely been willing allies in the expansion of the federal bench into the legislative arena. Unwilling to trust agency regulators under Republican administrations. Democratic majorities in Congress repeatedly turned to the courts to help put teeth into increasingly complex and detailed legislation in the 1970s and 1980s. Yet other analysts emphasize the influence of interest groups to whom Congress and the president are responding when they approve legislation. Each of these interpretations seems to fit at least some major legislation. Members of Congress have certainly tried to use the courts when they have lacked the political support to secure policy goals through legislation. As just discussed, failed efforts by members to enforce the War Powers Resolution in the courts show the limits of enticing the courts to resolve political controversies. But Congress’s tendency to draw the courts into the policy arena also reflects the cumbersome nature of legislating under divided government. Unable to procure favorable outcomes from regulators, members of Congress and organized groups have deliberately sought the assistance of the courts in battling administrations.

#### Courts shield legislators from political backlash

Whittington, Professor of Politics at Princeton, 07

(Keith E. Whittington, William Nelson Cromwell Professor of Politics at Princeton University and currently director of graduate studies in the [Department of Politics](http://www.princeton.edu/politics/graduate/), 2007, “Political foundations of judicial supremacy” )

Effective political leaders find the means for achieving the policy results that they want while protecting legislators from any political backlash that might result from those policies (and insuring that legislators reap any political rewards that might result). As Doug Arnold has explained, voters can only hold legislators accountable for their past performance if their can follow a “traceability chain” between the actions of the legislator and policy outcomes. When the policy is a popular one, legislators strive to “strengthen” the traceability chain (they engage in highly visible position taking). When the policy is unpopular, they take steps to “weaken” or “break” it. Coalition leaders can manipulate the timing of unpopular votes, for example, so that legislators need not cast too many at once or too close to an election. They can avoid putting the unpopular actions of individual legislators on record. They can bundle legislative proposals so as to avoid separate votes on unpopular items. They can create complex and indirect mechanisms for implementing unpopular policies, such as automatic cost-of-living increases for congressional salaries. They can delegate unpopular policy decisions to others, such as bureaucrats or special commissions, allowing legislators to avoid blame themselves while shifting blame to others. Position taking is fundamentally about taking actions without policy consequences. In order to take an electorally advantageous position, politicians need only posture, not achieve results. Legislators on the losing side of an issue still score political points with their constituents by taking the “right” stance, even if the policy outcome goes against the preferences of the voters. Because legislators also have policy preferences of their own, as well as longer-term concerns about how voter attitudes might be affected by real events, they cannot simply take the electorally popular position. Sometimes legislators believe taxes need to be raised despite voter hostility. If legislators could simply posture without consequence, then they could always vote against taxes, but their responsibility for policy outcomes constrains their position taking. The more pivotal a legislator’s vote becomes to determining policy outcomes, then the more the value of the substantive policy outcome must be weighed against the value of the position taking. When legislators know that a president will veto a given piece of legislation, for example, they may be free to vote in favor of it in order to satisfy constituents (or perhaps, some particular group of constituents). When the threat of a presidential veto is removed, however, legislators may be forced to switch their own votes in order to prevent an undesired bill from becoming law. Independent and active judicial review generates position-taking opportunities by reducing the policy responsibility of the elected officials. They may vote in favor of a bill that they personally dislike secure in the knowledge that it will never be implemented. State statutes regulating abortion after the Roe decision, for example, were often pure symbolism, though they could also play a more productive role in pressing the Court to refine its doctrine or in filling in the lacuna left by the judicial decisions.

#### Supreme Court decisions avoid congressional political battles

Curry, Pacelle, and Marshall 8 (Brett, Richard, Bryan, Professors of Political Science @ Georgia Southern University, "*An informal and limited alliance*", Presidential Studies Quarterly, 6/1, http://www.accessmylibrary.com/coms2/summary\_0286-34845337\_ITM)

Presidents have an incentive to use their time in the White House to cement their place in history. Presidents must work closely with Congress to ensure that their legislative agendas survive and flourish. But, as most presidents soon learn, that is not enough. An important consideration depends on the context the president faces (Barber 1992; Lewis and Strine 1996; Skowronek 1997). Over the bulk of the past 50 years, a number of presidents have served during periods of divided government, which, of course, complicates their attempts to exert influence and establish their legacies (Fiorina 1996; Quirk 1991). This has prodded presidents to seek influence and advance their policy goals in other ways, such as relying on executive orders to circumvent Congress (Deering and Maltzman 1999; Howell 2005; Krause and Cohen 1997; Krause and Cohen 2000; Marshall and Pacelle 2005; Mayer 2001) and using executive agreements instead of treaties to bypass the Senate (Howell 2003; Johnson 1984). Presidents have also turned to the Supreme Court in attempting to advance and protect their goals and initiatives. The institutional relationship between the president and the Court seems almost natural. Indeed, according to Robert Scigliano, that was the intent of the framers. Scigliano argues that the framers designed the judicial and executive branches as "an informal and limited alliance against Congress" (1971, vii). The rise of presidential and judicial power has largely come at the expense of Congress. The Court has generally been reluctant to challenge the exercise of executive power, particularly in wartime (Fisher 1997, 1998; Pritchett 1984, 281-338; Silverstein 1997). The Court has also helped the expansion of presidential power by silent assent (Barilleaux 2006). This study provides an empirical investigation of part of Scigliano's proposition: Does the Supreme Court appear responsive to the president in its decisions? Thus, this study is not concerned with those occasional cases involving executive power but with whether the Court systematically responds to the president in its overall decision making. Presidents can try to impress their philosophy on the courts through their appointments to all levels of the federal judiciary (Abraham 1999; Epstein and Segal 2005). This is particularly true of presidential influence over the Supreme Court, although opportunities to change the Court's composition are more intermittent (Krehbiel 2007). But presidents are equipped with additional tools to influence the Court as well. The president can rely on the Office of the Solicitor General to advance his agenda before the Court (Bailey, Kamoie, and Maltzman 2005; Pacelle 2003; Salokar 1992). The president can bring negative sanctions to bear if the Court issues unfavorable decisions. He can use the bully pulpit to initiate legislation or push for a constitutional amendment overturning a judicial decision. Finally, as the nation's chief executive, the president often determines the extent to which the Court's decisions will be implemented and respected (Canon and Johnson 1999).

#### The supreme court is resilient – it will take the blame without political backlash.

Shesol 3/13/10 (Jeff, The New York Times “Justices Will Prevail” <http://www.nytimes.com/2010/03/14/opinion/14shesol.html?pagewanted=2>

First, the Supreme Court is highly resilient. While Americans are often unhappy with it — and can be quick to complain that its members are politically or ideologically driven — the institution is consistently held in higher regard than either of the “political” branches of government. The judicial robe confers a kind of exaltation on nearly everyone who wears it. Judicial sanctity may be a myth, but it is a powerful one; it reinforces our hope that this really is a government of laws, not merely of fallible human beings.

#### And the court is seen as apolitical – no spillover to everyday politics

Vanessa A. Baird and Amy Gangl, professors of political science, 6 (Political Psychology, Vol. 27, “Shattering the Myth of Legality: The Impact of the Media’s Framing of Supreme Court Procedures on Perceptions of Fairness” pg 597)

The tendency of the media to depict the Supreme Court as inherently apolitical, some scholars argue, is part of the reason that many believe in the “myth of legality” in which the Court is perceived to operate above the ideological skirmishes of everyday politics. Our experimental analyses show that citizens react more negatively to press reports of a politically motivated Court than they do to coverage portraying a Court that strictly follows legal guidelines. Interestingly, our results also suggest that it is not so much the perceived absence of political wrangling among justices but rather it is the presence of legal guidelines driving the outcome that is the source of the perception of fairness.

#### Court politics aren’t perceived by the public

Christopher E. Smith, Associate Professor of Criminal Justice, Michigan State University, 1993 (Courts, Politics and the Judicial Process pg 1)

What images come to mind when Americans hear the words "government" and "politics"? Politicians making campaign speeches ... Legislators debating controversial public policies ... The president being followed by reporters, microphones, and television cameras. It is unlikely, however, that many people immediately visualize black-robed judges presiding over solemn, ornate courtrooms. Yet, the judicial system constitutes one of the three branches of government. In the United States Constitution, after Article I describes the structure and powers of the legislative branch and Article II describes the president's authority, Article III establishes the Supreme Court and describes the jurisdiction of the judicial branch. Although the courts are a component of government, generally accepted beliefs about the proper role and behavior of judicial actors differ from expectations about the actions and motivations of officials in the other branches of government. For example, when legal commentators speak about "the independence of the judiciary from the political branches [of government],"' they are clearly identifying the courts as different from the other branches. Unlike the judicial branch, the legislative and executive branches are recognized as "political" in nature!

Justice Felix Frankfurter echoed this theme when he warned that the judicial system should be kept separate from political issues and institutions: "It is hostile to a democratic system to involve the judiciary in the politics of the people."' When Americans discuss the court system, they convey the image of a governmental branch which, by its very nature, is distinctively different from other components of government. Courts are unique among government institutions because of their association in the public mind with law rather than politics.

#### The court has political cover

David M **O’Brien**, professor of Government and Foreign Affairs at the University of Virginia, 20**03** (Storm Center: The Supreme Court in American Politics Sixth Edition pg 337-338)

Public opinion serves to curb the Court when it threatens to go too far or too fast in its rulings. The Court has usually been in step with major political movements, except during transitional periods or critical elections .47 It would nevertheless be wrong to conclude, along with Finley Peter Dunne's fictional Mr. Dooley, that "th' supreme court follows th' iliction returns ."48 To be sure, the battle over FDR's "Court-packing" plan and the Court's "switch in time that saved nine" in 1937 give that impression. Public opinion supported the New Deal, but after his landslide reelection in 1936, turned against FDR when he proposed to "pack the Court" by increasing its size from nine to fifteen. In a series of five-to-four and six-to-three decisions in 1935-1936, the Court had struck down virtually every important measure of FDR's New Deal program. But in the spring of 1937, while the Senate Judiciary Committee considered FDR's proposal, the Court abruptly handed down three five-to-four rulings upholding major pieces of New Deal legislation. Shortly afterward, FDR's close personal friend and soon-to-be nominee for the Court, Felix Frankfurter, wrote jus­tice Stone confessing that he was "not wholly happy in thinking that Mr. Dooley should, in the course of history turn out to have been one of the most distinguished legal philosophers ."49 Frankfurter, of course, knew that justices do not simply follow the election returns. The fact that the Court abandoned its opposition to the New Deal when it did, moreover, significantly undercut public support for FDR's Court-packing plan. Gallup polls taken during the spring of 1937 reveal that the Court's switch-in-time influenced the shift in public opinion away from support for FDR's proposed reforms. In this instance at least, as political scientist Gregory Caldeira concludes, the Court "outmaneuvered the president" and by retreating from its defense of con­servative economic policy shaped public opinion in favor of preserving its institutional integrity. However, as noted in Chapter Two, the "switch in time that saved nine," the actual vote to uphold New Deal legislation, took place in conference in December i936, prior to FDR's introduction of his Courtpacking proposal. But, the publication of its opinions upholding progressive legislation in spring 1937 was, to be sure, timely and influential.

#### Court Has Political Cover

Stephen Powers and Stanley Rothman. 2002. The Least Dangerous Branch. Consequences of Judicial Activism. P. 2. Research Associate at the Center for the Study of Social and Political Change, Smith College. Mary Huggins Gamble Professor Emeritus of Government and Director of the Center for the Study of Social and Political Change, Smith College.

Bickel's own formulation of the Court's appropriate role, the thesis of his book, is that its unique function is to judge on the basis of principle. Legislatures and the president are not sufficiently insulated from political pressure to make difficult principled decisions. Courts are not perfectly suited to this task either, but Bickel argues that they are better. "Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.... Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry" (Bickel, 1962:25-26). The judiciary is designed to be insulated enough from public opinion and political expediency to rule on the basis of principle, constrained by application to cases and controversies, yet not so constrained as to be prevented from rising above the case and invoking and enforcing general principles. General principles are absolute in the sense that they may not give way to expedient considerations in various cases; however, they may have internal flexibility that allows for varying implementation by courts, legislative bodies, or executive agencies (Bickel, 1962:59).

### Courts Don’t Affect Election

#### Courts shield the electoral parts of the government

Whittington 3 (Keith, Princeton University, Department of Politics, November 17, 2003, <http://www.law.northwestern.edu/colloquium/legalhistory/Keith%20Whittington.pdf>)

An active and independent Court can assume the blame for advancing constitutional commitments that might have electoral costs. The relatively obscure traceability chain between elected officials and judicial action allows coalition members to simultaneously achieve certain substantive goals while publicly distancing themselves from electoral responsibility for the Court and denouncing it for its actions. Elected officials have an incentive to bolster the authority of the courts precisely in order to distance themselves from responsibility for any of its actions. As long as the Court is acting in concert with basic regime commitments, and thus is not imposing serious electoral or policy costs on other affiliated political actors, it may enjoy substantial autonomy in interpreting those commitments.

### Courts Not Perceived

#### People don’t know anything about the Court

AOL News 10 (http://www.aolnews.com/the-point/article/most-americans-cant-name-any-supreme-court-justices/19500941)

They are among the most powerful people in the nation. They're appointed for life, and they make decisions that affect all of us. And, if a new survey is right, you probably have no idea who they are. Nearly two-thirds of the people questioned by FindLaw.com could not name even one member of the U.S. Supreme Court, and only 1 percent knew all nine justices.

#### Proves no perception

Mataconis 10(Doug, award-winning blogger, http://www.outsidethebeltway.com/know\_your\_supreme\_court\_justices\_most\_americans\_don/)

This isn’t entirely surprising, of course. Outside of confirmation hearings, Supreme Court Justices do their work outside the view of the public and even when a controversial or highly publicized decision is issued, it comes from a collective body and is communicated by reporters rather than the Justices themselves. Unlike, say, people who don’t have enough awareness of politics to identity their Federal or state representatives, the fact that large numbers of Americans don’t know who Stephen Breyer or Anthony Kennedy might be is neither surprising or concerning. One imagines that these numbers would change, though, if the Court ever did accept the long-discussed idea of cameras in the courtroom.

#### There is a low public perception of the courts

**Jennifer Greenstein Altmann**, assistant editor at the Princeton Weekly Bulletin, **2007** – News At Princeton, <http://www.princeton.edu/main/news/archive/S18/17/72G06/?section=featured>)

The Supreme Court frequently is viewed as an isolated fortress of thoughtful deliberation, where robe-clad justices ponder right and wrong far from the political maneuvering taking place in the White House. But [Keith Whittington](http://www.princeton.edu/~kewhitt/), the William Nelson Cromwell Professor of Politics, doesn't see it that way. "The court is often portrayed as being above politics — there is an expectation that the court is specifically in conflict with political imperatives," Whittington said. "I tend to be skeptical of that way of thinking."

#### Court politics are not percieved by the public

Smith 93 (Christopher, Associate Professor of Criminal Justice, Michigan State University, Courts, Politics and the Judicial Process, p1)

What images come to mind when Americans hear the words "government" and "politics"? Politicians making campaign speeches ... Legislators debating controversial public policies ... The president being followed by reporters, microphones, and television cameras. It is unlikely, however, that many people immediately visualize black-robed judges presiding over solemn, ornate courtrooms. Yet, the judicial system constitutes one of the three branches of government. In the United States Constitution, after Article I describes the structure and powers of the legislative branch and Article II describes the president's authority, Article III establishes the Supreme Court and describes the jurisdiction of the judicial branch. Although the courts are a component of government, generally accepted beliefs about the proper role and behavior of judicial actors differ from expectations about the actions and motivations of officials in the other branches of government. For example, when legal commentators speak about "the independence of the judiciary from the political branches [of government],"' they are clearly identifying the courts as different from the other branches. Unlike the judicial branch, the legislative and executive branches are recognized as "political" in nature! Justice Felix Frankfurter echoed this theme when he warned that the judicial system should be kept separate from political issues and institutions: "It is hostile to a democratic system to involve the judiciary in the politics of the people."' When Americans discuss the court system, they convey the image of a governmental branch which, by its very nature, is distinctively different from other components of government. Courts are unique among government institutions because of their association in the public mind with law rather than politics.

#### The court is not perceived

Burton 4, graduate of Georgetown University Law Center

(Adam Burton, PAY NO ATTENTION TO THE MEN BEHIND THE CURTAIN: THE SUPREME COURT, POPULAR CULTURE, AND THE COUNTERMAJORITARIAN PROBLEM, UMKC Law Review, 73:53, Fall 2004)

At any rate, by the 1990s, restraint in popular culture had all but evaporated. In the most obvious example, the salivating media devoured and propagated the most lascivious details of the allegations put forth in the Starr Report, and President Clinton's sexual practices became a staple of popular culture, inspiring countless Saturday Night Live sketches, Monica Lewinsky Halloween costumes (complete with stained blue dress), n92 and Monica internet fan pages, n93 to name only a few indicators of popular culture's obsession with the story. That the most intimate details of the President's encounters, and not merely the simple fact of the encounters, could be revealed in the government's official reports is a testament to the lack of regard that our popular culture holds for the privacy of public figures. While the degree of detail might have been thought of as excessive and in poor taste in earlier times, and may have inspired sympathy for the President's situation and repulsion for his attackers, the architects of the Starr Report calculated that exposing the salacious minutiae of the President's sex acts would fascinate the American public in the age of Jerry Springer. n94 And the new tools of information technology were quickly utilized to allow the public to satisfy its desire to know. In addition to garnering widespread [\*66] television coverage, the Starr Report was available on the Internet within minutes of its official publication. n95 The Clinton-Lewinsky scandal is the most obvious example of the exposure of the private life of a political figure, but by no means the only one. Exposure is not limited to circumstances of scandal, sexual or otherwise. Even before the Lewinsky scandal, the private lives of the Clintons were subject to scrutiny; an audience member at a 1992 campaign speech famously asked the future President what style of underwear he preferred. n96 The inspection of the Clintons was not limited to the family's patriarch. Chelsea's braces garnered unwanted attention, even inspiring a scene in the film Beavis and Butt-Head Do America. n97 In the same vein, the arrest of President Bush's daughter, Jenna, for underage drinking also generated headlines n98 and is manifest in expressions of popular culture. n99 How has the Supreme Court fared in an age of no restraint? If the Court's power is, as in Oz, equivalent to mystery, n100 what are the implications of this culture of exposition to the Court's ability to maintain its distance from the public, and therefore its institutional clout? Or, if, as in Frankfurter's estimation, the Court's authority rests on its "moral sanction," can the Court retain its aura of moral righteousness when purveyors of popular culture pander to public tastes, coveting scandal, eager to expose and exaggerate the deficiencies of any public figure? The Court has, even in our age, remained largely immune from attack in the avenues of mass visual popular culture. Novelists and journalists have, at times, closely scrutinized, if not excoriated, the Justices and the Court as a whole. n101 Bob Woodward and Scott Armstrong examined the inner workings of the Berger Court in their best-selling non-fiction book The Brethren, n102 in which the Justices [\*67] were depicted as a body of men who engaged in petty politics not only to advance their policy preferences, but also to gratify their personal jealousies. n103 Edward Lazarus published a similar tell-all expos6 of the Rehnquist Court in Closed Chambers. n104 However, the Court as an institution has generally remained below the radar of representational popular culture and the more general audience it attracts, except in extraordinary circumstances, after which it again fades into relative obscurity. As I will show below, the Court's decisions sometimes frame the background of fictional productions exploring controversial social issues, such as abortion or capital punishment, and the Court has as such been portrayed as a tangential "character," sometimes without ever actually "appearing" on-screen. n105 The Court itself, however, rarely is depicted as a subject worthy of exploration: The real Justices rarely appear on television, in the national media, or in fictitious representation. The lack of publicity can be explained in part by the Court's protection of its anonymity. Thus, "no American institution has so . . . controlled the way it is viewed by the public," n106 although that control is neither absolute nor complete.

#### Even in today’s no restraint society, the court has remained immune from public scrutiny.

Burton, graduate of Georgetown University Law Center, 2004

(Adam Burton, PAY NO ATTENTION TO THE MEN BEHIND THE CURTAIN: THE SUPREME COURT, POPULAR CULTURE, AND THE COUNTERMAJORITARIAN PROBLEM, UMKC Law Review, 73:53, Fall 2004 )

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### Democrats avoid Blame for Court Decisions

#### No backlash on democrats – Supreme Court is mostly Republican appointees.

Perine 8 (Katherine, Staff at CQ Politics, “Congress Unlikely to Try to Cover Supreme Court Detainee Ruling,” *CQ Politics*, June 12, http://www.cqpolitics.com/wmspage.cfm?docID=news-000002896528&cpage=2)

Thursday’s decision, from a Supreme Court dominated by Republican appointees, gives Democrats further cover against GOP sniping.

“This is something that the court has decided, and very often the court gives political cover to Congress,” said Ross K. Baker, a Rutgers Universitiy political science professor. “You can simply point to a Supreme Court decision and say, ‘The devil made me do it.’ ”

### Courts are Perceived

#### Courts are widely perceived

Lawrence Baum, professor of political science at Ohio State University, The Supreme Court, 2001, p. ix.

The Court’s importance is well understood by people in politics and by the public at large. Certainly it receives its share of attention from the mass media. Major decisions are reported on front pages of newspapers and at the beginning of newscasts, and appointments to the Court garner enormous coverage.

#### Court actions change the public’s perception of its legitimacy

Christopher E. Smith, Assistant Professor of Political Science, University of Akron, Kentucky Law Journal 1991 79 Ky. L.J. 317

Although the public may have relatively little awareness of the specific details of judicial processes and decisions, n144 public opinion research indicates that the public's perceptions of the Supreme Court are influenced by the justices' actions. n145 If the new Supreme Court majority continues to collide with Congress in its efforts to reverse established precedents in civil rights and other areas, there may be a cost to the Court's image and legitimacy. After studying public opinion data concerning the Supreme Court, one scholar concluded,

Expressed consistently, judicial opposition to Congress may in and of itself lead to resentment and loss of trust among the public -- not because of any great love of the national legislature but, rather, as a result of the perception that the Court has upset the balance of our constitutional system. n146

Unabashed activism by the politically unrepresentative Supreme Court may thus tarnish the public's perception of the Court.

#### Perception is inevitable – court decisions have to be implemented by political actors

David M O’Brien, professor of Government and Foreign Affairs at the University of Virginia, 203 (Storm Center: The Supreme Court in American Politics Sixth Edition pg 314)

Denied the power of the sword or the purse, the Court must cultivate its institutional prestige. The power of the Court lies in the persuasiveness of its rulings and ultimately rests with other political institutions and public opinion. As an independent force, the Court has no chance to resolve great issues of public policy. Dred Scott v. Sandford (i857) and Brown v. Board of Education (i954) illustrate the limitations of Supreme Court policy-making. The "great folly," as Senator Henry Cabot Lodge characterized Dred Scott, was not the Court's interpretation of the Constitution or the unpersuasive moral position that blacks were not persons under the Constitution. Rather, "the attempt of the Court to settle the slavery question by judicial decision was simple madness." As Lodge explained: Slavery involved not only the great moral issue of the right of one man to hold another in bondage and to buy and sell him but it involved also the foundations of a social fabric covering half the country and caused men to feel so deeply that it finally brought them beyond the question of nullification to a point where the life of the Union was at stake and a decision could only be reached by war. A hundred years later, political struggles within the country and, notably, presidential and congressional leadership in enforcing the Court's school desegregation ruling saved the moral appeal of Brown from becoming another "great folly."

#### Congress perceives and reacts to Supreme Court decisions

Brickman in 2k7 (Danette. "Congressional Reaction to U.S. Supreme Court Decisions: Understanding the Introduction of Legislation to Override" Paper presented at the annual meeting of the Southern Political Science Association, Hotel InterContinental, New Orleans, LA, Jan 03, 2007 <Not Available>. 2009-05-24 <http://www.allacademic.com/meta/p143265\_index.html>

The United States Constitution sets forth a government that prescribes specific roles for each of its branches. While, constitutionally, Congress is the policy-making branch, the U.S. Supreme Court enters the policy-making arena through statutory interpretation and judicial review decisions. The preferred policies of these two branches of government do not always coincide, causing conflict between the Court and Congress. At such times this conflict can lead to a battle over control of national policy. This paper explains congressional reaction to Supreme Court decisions by relaxing two of the assumptions of the separation of powers game and incorporating changing congressional preferences and context. U.S. Supreme Court decisions tend to be viewed “not as a mere interpretation of law, but a determinative statement of national policy that is, for all practical purposes, irrevocable” (Paschel 1991:144). While the majority of Supreme Court decisions remain untouched by Congress, a number of statutory interpretation and judicial review decisions have been successfully overridden by the legislative branch, making it apparent that Supreme Court decisions are not necessarily final. In certain circumstances Congress is willing to do battle with the Court to achieve their preferred policy. Although successful congressional overrides of Supreme Court decisions are infrequent, their occurrence has generated a body of research that has contributed to our understanding of the interaction between these two branches of government. What is missing from the discourse is an examination that focuses on the introduction of legislation to override Supreme Court decisions 1 . This paper fills that gap, examining the circumstances under which Congress introduces legislation attempting to override a Supreme Court decision. Using an approach which incorporates changing congressional preferences and context this research contributes to our understanding of Court-Congress interaction.

# Courts CP- Aff

### Courts Don’t Solve (General)

#### Courts are bad at policymaking- can’t cause social change and the attempt to do so undermines legitimacy.

Yoo 96 (John Choon, professor in law and previous Dep. of Justice official, “Who Measures the Chancellor's Foot--The Inherent Remedial Authority of the Federal Courts”, *Cal. L. Rev.*, 84, p. 1137-1138) GSK

Before I address the constitutional difficulties with the extensive use of far-reaching and invasive equitable remedies, I will examine the practical difficulties courts have experienced in managing institutions. Courts, some critics have argued, simply are functionally incapable of addressing "polycentric" problems that involve many different factors and relationships.101 Case studies have found that courts experience great difficulty in weighing policy alternatives and in calculating costs and benefits.IO3 Courts were shown to be unable to gather and to absorb the sort of sufficient, objective data required to make considered decisions.104 In terms of institutional competence, legislatures and bureaucracies appeared much better suited for these tasks. To put it differently, courts are structurally worse off than other arms of government at developing an intellectually coherent solution to social problems. While courts are expert at determining historical fact and causation, structural remedies call upon them to engage in very different activities. They must conduct social fact-finding and must discover and address the political, economic, and social factors that may have created an unconstitutional condition.1" Formulating the correct remedy requires courts to predict how the remedy will affect, and be affected by, the political, economic, and social context within which it is implemented. Courts are ill-suited for these tasks because they have little experience or facility for operating or administering complex institutions and social programs.106 Once a decree is decided upon, courts have proven ineffective at implementing their structural remedies. Courts possess only imperfect tools for communicating their decrees, and, in fact, they usually must rely upon the personnel of the institutional defendant to disseminate and to implement their orders.107 In perhaps the sharpest contrast with bureaucracies and legislatures, courts have few resources for guaranteeing compliance on the part of the defendants or for creating positive incentives to encourage adherence to judicial orders. Aside from the threat of a contempt order, courts must rely upon the moral persuasiveness of their judgments to acquire legitimacy. This highlights another deficiency in a court's ability to implement a remedy: its lack of resources for marshaling political and public support for its decrees, without which the court's efforts likely will fail.108 If courts inject themselves into the political arena, they risk undermining the impartiality and moral authority they need to persuade others to support their orders.

#### No solvency- congress will balk at the court mandating policy action

Robert A. Schapiro, NOTE: The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction, Yale Law Journal October, 1989 99 Yale L.J. 231

The growth of structural litigation, in which Federal judges mandate basic reordering of bureaucratic institutions, has occasioned increasing conflicts between courts and legislatures. n1 To implement their remedial goals, institutional reform decrees frequently require increased appropriations, n2 the promulgation of new enabling legislation, n3 or some other kind of affirmative legislative performance. n4 Legislators often resist these intrusions into what they conceive as their legitimate realm of discretion, refusing to act in accordance with the judicial plan.

### Lower Courts won’t Enforce

#### Lower Courts Don’t Follow Supreme Court

Borochoff 2008J.D. Candidate, 2010, Harvard Law School; M.A. Political Science, 2007, Emory University; B.A. Political Science, 2007, Emory University, 2008

(Elise, Copyright (c) 2008 Touro College Jacob D. Fuchsberg Law Center Touro Law Review/LexisNexis, “Lower Court Compliance With Supreme Court Remands,” 2008, ]

The traditional model of the United States legal system envisions the relationship between federal district courts, appeals courts, and the Supreme Court as strictly hierarchical. n13 The district courts constitute the base of the judicial pyramid, the appeals court the middle, and the Supreme Court its peak. n14 This model implies the Supreme Court issues the final edict in any area of law, and the lower levels of the judicial hierarchy simply implement Supreme Court policy. Consequently, early legal scholars focused their research solely on Supreme Court decision making, and assumed that both federal and state lower courts strictly obeyed the Supreme Court's rulings. n15 Supreme Court decisions were viewed as the reigning law of the land  [\*856]  and compliance was a foregone conclusion.

Under the hierarchal view of the federal judiciary, Supreme Court remands would not be an issue. Lower courts are faithful implementers of Supreme Court decisions and their decisions are an extension of the Supreme Court's legal views. Thus, all lower court decisions would comply with the Supreme Court, whether heard on remand or for the first time. B. Recognition of Noncompliance with the Supreme Court

Beginning in the 1950s, legal scholars began to doubt the hierarchical model's validity. n16 First, some articles noted that state courts would often rely on state law, effectively ignoring the Supreme Court's reasoning. n17 Others soon noted that even federal courts, while relying on federal law, also ignored Supreme Court decisions. n18 While authors did not openly criticize the hierarchical model, the increasing profile of noncompliance shed doubt on its accuracy. Implicit critiques of the hierarchical model became more explicit after the Warren Court's decisions in Brown v. Board of Education n19 and other controversial civil rights cases. n20 Noncompliance  [\*857]  with the Supreme Court's decisions undermined the model of the Supreme Court as an apolitical institution ruling over the entirety of the judicial branch.

### Permutation Shields Link to Politics

#### Court decisions provide cover for unpopular policies.

Rosenberg 91 (Gerald, professor of Political Science at the University of Chicago, “Hollow Hope”, *University of Chicago Press*, p. 34-35)GSK

Finally, court orders can simply provide a shield or cover for administrators fearful of political reaction. This is particularly helpful for elected officials who can implement required reforms and protest against them at the same time. This pattern is often seen in the school desegregation era. Writing in 1967 - one author noted that "court order is useful in that it leaves the official no choice and a perfect excuse". While the history of court-ordered desegregation unfortunately shows that officials often had many choices other than implementing court orders, a review of school desegregation cases did find that "many school boards pursue from the outset a course designed to shift the entire political burden of desegregation on the courts". This was also the case in the Alabama mental health litigation where "the mental health administrators wanted judge Johnson to take all the political heat associated with specific orders while they enjoyed the benefits of his action. Thus, Condition IV; Courts may effectively produce significant social reform by providing leverage, or a shield cover, or excuse for persons crucial to implementation who-are willing to act.

### Links to Politics

#### Congress perceives and reacts to Supreme Court decisions-the counterplan links to politics

Brickman in 2k7 (Danette. "Congressional Reaction to U.S. Supreme Court Decisions: Understanding the Introduction of Legislation to Override" Paper presented at the annual meeting of the Southern Political Science Association, Hotel InterContinental, New Orleans, LA, Jan 03, 2007 <Not Available>. 2009-05-24 <http://www.allacademic.com/meta/p143265_index.html>

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#### Court’s decisions affect politics – relationship with the executive branch

Smith 7 (Joseph L. , Assistant Professor, The University of Alabama , Department of Political Science, Journal of Law, Economics, and Organization May 9, http://jleo.oxfordjournals.org/cgi/content/full/23/2/346)

The consequences of the institutional choice are more complex and potentially far-reaching. A decision endorsing the disputed agency action not only allows the agency decision to stand (with whatever policy consequences that entails) but also signals to the lower courts that agencies should be given latitude to take the disputed action. Every decision upholding a disputed agency action expands, ever so slightly perhaps, the ability of agencies to implement their agendas. Because lower courts are supposed to implement the legal doctrines articulated by the Supreme Court, the effects of this institutional choice, whether or not to defer to the agency decision, will ripple throughout the lower courts and should affect the decisions in many disputes. This article continues a line of research begun by Linda Cohen and Matt Spitzer in the 1990s. Cohen and Spitzer began with the insight that Supreme Court decisions evaluating agency actions do more than merely uphold or overturn the action being litigated. These decisions also communicate legal doctrine to the lower courts, sending signals regarding the level of deference they should show to agency decisions. Given the small number of administrative law cases the Supreme Court hears each term, they assert that the signal-sending or doctrinal element of these decisions will have a larger impact on policy than the direct effects on the litigants. Cohen and Spitzer argue that Supreme Court Justices can best achieve their policy-related goals if they consider their ideological relationship with the executive branch and then factor this relationship into their decisions evaluating administrative actions. Their model generally suggests that as the median member of the Court gets ideologically closer to the president, the Court should become more deferential to the administrative action.

#### Courts link to politics- debates over funding and backlash

Mondak and Smithey 97(Jeffery J., Florida State University, Shannon Ishiyama, University of Pittsburgh, “The Dynamics of Public Support for the Supreme Court” [The Journal of Politics](http://www.jstor.org.proxy.lib.umich.edu/action/showPublication?journalCode=jpolitics),

Nov. (59) 4 p. 1114-1142

The Supreme Court is an inherently weak institution. To give impact to its decisions, the Court depends on legislators for funding, the executive for enforcement, and the public for compliance. This last relationship-between the Supreme Court and the public provides the Court with its most daunting obstacles. A disgruntled public may not only refuse to cooperate with a Supreme Court decision, but may also pressure elected officials to resist implementation of judicial orders. As such, despite the Supreme Court's nominal insulation from the American people, the Court's justices have strong incentives to be concerned with their public standing. The Supreme Court would seem to be in a perilous strategic position: if the Court acts as a policy leader, it risks loss of critical public esteem; conversely, if the Court's justices attend too closely to their standing in the polls, they may avoid addressing the thorny social and political questions for which a judicial decision is most needed.

#### Courts link to politics- Obama nomination means he’ll take the blame

Samuel 9 (Terence Samuel, Deputy Editor, The Root and Senior Correspondent- Prospect, “Obama's Honeymoon Nears Its End”, American Prospect, 5/29, http://www.prospect.org/cs/articles?article=obamas\_honeymoon\_nears\_its\_end)

This week, Barack Obama named his first nominee to the Supreme Court, then headed west to Las Vegas and Los Angeles to raise money for Democrats in the 2010 midterms. Taken together, these two seemingly disparate acts mark the end of a certain period of innocence in the Obama administration: The "blame Bush" phase of the Obama administration is over, and the prolonged honeymoon that the president has enjoyed with the country and the media will soon come to an end as well. Obama is no longer just the inheritor of Bush's mess. This is now his presidency in his own right. The chance to choose a Supreme Court justice is such a sui generis exercise of executive power -- it so powerfully underscores the vast and unique powers of a president -- that blame-shifting has become a less effective political strategy, and less becoming as well. Obama's political maturation will be hastened by the impending ideological fight that is now virtually a guarantee for Supreme Court nominations. Old wounds will be opened, and old animosities will be triggered as the process moves along. Already we see the effect in the polls. While Obama himself remains incredibly popular, only 47 percent of Americans think his choice of Judge Sonia Sotomayor is an excellent or good choice for the Court, according to the latest Gallup poll. The stimulus package scored better than that. The prospect of a new justice really seems to force people to reconsider their culture warrior allegiances in the context of the party in power. This month, after news of Justice David Souter's retirement, a Gallup poll showed that more Americans considered themselves against abortion rights than in favor: 51 percent to 42 percent. Those number were almost exactly reversed a year ago when Bush was in office and Obama was on the verge of wrapping up the Democratic nomination. "This is the first time a majority of U.S. adults have identified themselves as pro-life since Gallup began asking this question in 1995," according to the polling organization. Is this the same country that elected Obama? Yes, but with his overwhelmingly Democratic Senate, the public may be sending preemptory signals that they are not interested in a huge swing on some of these cultural issues that tend to explode during nomination hearings. Even though Obama will win the Sotomayor fight, her confirmation is likely to leave him less popular in the end because it will involve contentious issues -- questions of race and gender politics like affirmative action and abortion -- that he managed to avoid or at least finesse through his campaign and during his presidency so far.

#### Courts link to politics- lobby backlash

Ignagni and Meernik 94 Professor at the University of Texas, PhD from MSU, Associate Dean for Academic Affairs for the College of Liberal Arts AND Professor and Department Chair of Political Science at UNT [Joseph and James, "Explaining Congressional Attempts to Reverse Supreme Court Decisions" Political Research Quarterly, Vol 47, No 2, June, p. 356-357, JSTOR]

Organized Pressure. Senators and representatives are just as likely to be cognizant of the impact of the views of important groups within the electorate as they are of the general population. More specifically, groups or individuals affected by the outcome of Supreme Court decisions are likely to lobby the Congress to overturn or blunt the impact of those rulings they find objectionable (Murphy 1962; Nagel 1969; Johnson and Canon 1984; Baum 1992; Solimine and Walker 1992). Henschen theorizes that "if the interests of powerful groups have been injured by Court decisions, it is likely that they will turn to an arena that has been more favorable to them in the past . . . Thus, it may be at the behest of interest groups that Congress reacts to Supreme Court interpretations"(1 983: 453). Or as noted in the HarvardL aw Review, "Analysis of the instances of congressional reversal of Supreme Court decisions since the Second World War demonstrates that nearly all of these reversals . . . enjoyed the almost unanimous support of politically articulate groups affected by the Court's decision" (1958: 1336-37). Stumpf (1965) confirms these findings. Congressmen and congresswomen are fully aware of the material, political, and financial resources such groups bring to bear in the electoral process, and thus of the need to respond to these groups' grievances. Thus, we ought to find that the likelihood of a congressional response to Court decisions on federal legislation increases as the amount of pressure rises. Even if the probability of obtaining desired legislation is rather low, the Congress may take at least some visible action to demonstrate its awareness and sensitivity to the demands of powerful constituents. As was the case with public opinion, measuring the impact of group pressure on Congress' willingness to react to Court decisions is problematic. We seek to determine the amount of pressure being applied to individual representativesa nd senators, but the many subtle and hidden ways in which such influence is brought to bear are ill-suited to quantitative measurement. Instead, we focus on the potential degree of pressure that groups and individuals may bring by counting the number of such groups and individuals that file amicus curiae briefs with the Court regarding a decision in question. We count the number of briefs that are in favor of Court affirmance of the constitutionality of the legislation and whom we might therefore expect to work toward a congressional response. Thus, we hypothesize that the greater the number of those filing briefs, the greater is the potential for the Congress to be lobbied by those dissatisfied with the outcome of the case.

### Links to Elections

#### Courts link to elections- controversial rulings cause public outcry for Congressional action.

Ignagni and Meernik 94 Professor at the University of Texas, PhD from MSU, Associate Dean for Academic Affairs for the College of Liberal Arts AND Professor and Department Chair of Political Science at UNT [Joseph and James, "Explaining Congressional Attempts to Reverse Supreme Court Decisions" Political Research Quarterly, Vol 47, No 2, June, p. 356-357, JSTOR]

Electoral Forces The goals of individual members of Congress are typically theorized to include policy, power, and reelection (Rieselbach 1973; Fenno 1973; Sinclair 1983). The only objective among these three that is largely invariant regardless of party, region, seniority, and the like, however, is reelection (Mayhew 1974; Arnold 1990). Members may desire different policy ends and varying levels of influence within Congress, but all (except those contemplating retirement) wish to continue their career. Hence, those domestic political conditions that are most likely to influence this objective will exercise a powerful impact over not only individual voting behavior, but the two chambers' legislative output. If members expect to gain public support for their attacks on the Court or their attempts to reverse its decisions, any indication of public interest or displeasure over Court action is likely to encourage a response. While it may also be argued that in reacting to electoral forces, the Congress is also responding to the policy goals of its members, we argue that electoral considerations come first and act as a sufficient condition for a congressional response. Policy aims may facilitate the likelihood of a response but in the absence of public or special interest pressure, the Congress is unlikely to take action. Public Opinion. For most of the public, the vast majority of Supreme Court decisions are of little consequence or salience. As Murphy (1962), Nagel (1969), Johnson and Canon (1984), and Marshall (1989) show, however, periods of judicial activism and highly controversial Court decisions have often led to public outcry and demands for action. During the 1950s, the Warren Court alienated many inside and outside Washington by defending the First and Fifth Amendment rights of communists in this country. In the 1960s, Court decisions expanding the rights of accused criminals were also granted with similar disapproval. And just recently, the more conservative Rehnquist Court aroused considerable debate by weakening civil rights legislation and supporting restrictions on abortions. When cases such as these arise and the public voices its disapproval of Court action, a politically attuned Congress will likely find need or added incentive to take action against the Court (Murphy 1962). Similarly, Marshall further finds that when Court rulings are not in agreement with the public's views, such rulings are much less likely to prevail (p. 179). We hypothesize that congressmen and congresswomen, being mindful of the possible electoral consequences of not reflecting majoritarian views on such matters, will wish to show the electorate that they are taking some steps to rein in the Court-if only to appease voters temporarily.

### Court Policymaking = Activist

#### Institutional reforms are the worst judicial activism—doesn’t matter if the status quo is unconstitutional

Young 02 (Ernest, Professor in constitutional law at Duke School of Law, “Judicial Activism and Conservative Politics”, *U. Colo. L. Rev.*, 73, p.1163-1166) GSK

We might call a fifth sort of activist behavior "remedial activism," signifying "the expansive remedies imposed and monitored by federal district courts pursuant to evidentiary showings of constitutional injury."50 Remedial activism would include, most prominently, what Owen Fiss has called the "structural injunction"—that is, broad injunctive relief designed to restructure public institutions to conform to constitutional norms.51 Such relief may include intrusive judicial involvement in the day-to-day running of public institutions, court-ordered expenditures amounting to millions of dollars, and continuing judicial supervision for periods of years or even decades.52 Court-ordered busing to achieve racial integration of public schools, as well as judicial administration of prisons and mental health institutions, are some of the most prominent examples.53 This sort of activism has been much criticized, primarily by judges and commentators on the rightward end of the political spectrum.54 It continues to be the focus of political resentments grounded in the era of busing to achieve school desegregation; four of the five characteristics of "activism" identified in the Senate Judiciary's questionnaire for judicial nominees arguably focus on remedial activism.55 Such activism is not, however, a vice usually attributed to the Rehnquist Court.56 Instead, criticism of the current Court's decisions on issues of structural remedies has focused on its willingness to depart from prior precedents that had permitted broad remedial orders in school desegregation and similar cases.57 This criticism shows, once again, how different sorts of "activism" may press in different directions once we try to categorize the results of particular cases.

#### Court action to reform state institutions is unconstitutional and activist.

Yoo 96 (John Choon, professor in law and previous Dep. of Justice official, “Who Measures the Chancellor's Foot--The Inherent Remedial Authority of the Federal Courts”, *Cal. L. Rev.*, 84, p. 1123-1124) GSK

In this Article I hope to identify the fundamental problem with the judiciary's assertion of inherent remedial power. Not only does this power violate principles of judicial restraint, but it also oversteps the limitations on the power of the federal courts imposed by Article III. The legitimacy of federal judicial management of state institutions does not ultimately turn on whether federal courts are functionally well suited to the job—although such institutional difficulties are a symptom of the disease. Instead, the essential flaw of judicial management is that the Constitution does not permit the federal courts to exercise their remedial powers to engage in the structural reform of local institutions and local government. If the remedies needed to correct a constitutional violation lie outside a court's traditional remedial powers, then separation of powers principles require that the answer come from the political branches, which are far better equipped to manage the structural reform of state and local institutions.

### Activism Kills Court Credibility

#### Judicial activism net harmful—credibility

Cha 5 (J., PhD from London U, “A CRITICAL EXAMINATION OF THE ENVIRONMENTAL JURISPRUDENCE OF THE COURTS OF INDIA”, *Albany Law Environmental Outlook Journal*) GSK

The unequivocal willingness to act independently is a true mark of an activist court. n52 A reason the Supreme Court has adopted this activist stance is based on its perception of the lack of remedies available in current legislation. n53 While this activist approach may be necessary to pursue an aggressive [\*205] environmental protection policy, the result of this judicial activism may be more harmful then helpful, especially in cases where the judiciary oversteps its authority. n54

### AT: N/U- Health Care Ruling Was Activist

#### Health care ruling showed restraint- wasn’t activist

**San Francisco Chronicle** 6/28

(<http://www.sfgate.com/opinion/editorials/article/SCOTUS-health-care-ruling-Constitutionally-sound-3670649.php>)

What a relief. President [Obama's](http://www.sfgate.com/barack-obama/) landmark health care stands- a win for the White House and millions of uninsured Americans. But there's something else in the [Supreme Court](http://www.sfgate.com/?controllerName=search&action=search&channel=opinion%2Feditorials&search=1&inlineLink=1&query=%22Supreme+Court%22)s 5-to-4 decision: the nation's top judges stuck with constitutional issues and left the policy choice to Congress. ‌ Few decisions were as heavily anticipated as this one. Would the Republican-appointed justices band together and strike down or hamstring the Affordable Care Act in ways that would deepen an angry debate? The court's own image as a dispassionate oracle of legal thinking was on the line. [Chief Justice John Roberts](http://www.sfgate.com/?controllerName=search&action=search&channel=opinion%2Feditorials&search=1&inlineLink=1&query=%22Chief+Justice+John+Roberts%22) rode to the rescue and settled the issue. He flipped from the conservative column to join four mainstay liberals on the nine-member court. He not only preserved the law but also the court's image as objective arbiter of constitutional principles. At the heart of the ruling was the individual mandate. The provision obliges those who can pay and do not have health care to purchase a policy. Pro and con arguments had centered mainly on to so-called Commerce Clause, which allows Congress to regulate interstate business. Was Obamacare in line with this concept or was it a far-fetched extension? Roberts sidestepped this debate with a plainer interpretation. The mandate was actually a tax , and Congress surely has the power enact all such levies. As a constitutional issue, Roberts found no problem with Congress action. There are, of course, hitches with his approach. It may be a fair legal argument, but it labels Obamacare as a tax, a notion the White House definitely doesn't want in a tight presidential race. For Republicans, who lost on the overall decision, the tax idea will fuel their renewed attack on the health care law both in Congress and the presidential campaign trail. The Romney campaign wasted no time in using the decision in a fund-raising pitch. But the high court ruling is still masterful. It keeps politics and personal views out of the Supreme Court's mainstay duty to rule on constitutional matters. It honors Congress' role to determine policy and its intersection with politics. A sweeping health care was saved. So was the nation's respect for the Supreme Court.

### Legitimacy Turn

#### ACA ruling saved court legitimacy

Beinart 6/28 (Peter Beinart is editor in chief of Open Zion, a blog about Israel, Palestine, and the Jewish future at The Daily Beast. He is the author of [The Crisis of Zionism](http://www.amazon.com/exec/obidos/ASIN/0805094121/thedaibea-20/) (Times Books).) http://www.thedailybeast.com/articles/2012/06/28/obamacare-ruling-peter-beinart-on-the-favor-justice-roberts-did-the-right.html

it’s easy to see why liberals are relieved today: the most important progressive legislation of most of our lifetimes has [survived](http://www.thedailybeast.com/articles/2012/06/28/supreme-court-s-split-verdict-on-obamacare.html). It’s easy to see why centrists are relieved: the Supreme Court’s legitimacy has survived. Centrists understand that it’s not a good thing for an ostensibly nonpartisan institution like the Supreme Court to be at war with one of America’s two major parties. [John Roberts](http://www.thedailybeast.com/articles/2012/06/27/john-roberts-faces-historic-moment-of-truth-as-supreme-court-confronts-obamacare.html) has made sure that didn’t happen, and as a result, the court’s legitimacy is no longer in free fall.

#### Activist decisions undermine court legitimacy

**Earle 93** (Caroline S., J.D. Candidate – Indiana University, Bloomington, “The American Judicial Review Quagmire: A Canadian Proposal”, Indiana Law Journal, Fall, 68 Ind. L.J. 1357, Lexis)

n26 John Hart Ely notes that commentators have been ominously portending the "destruction" of the activist Supreme Court for years. He notes that the Court has thrived despite these predictions, and suggests that it will continue to do so. ELY, *supra* note 9, at 46-48. Ely's attention, however, is directed toward executive and/or legislative reaction to Supreme Court activism. In contrast, my point is that the Supreme Court is sowing the seeds of its own "destruction." Judicial activism has served to undermine the Supreme Court's legitimacy with the people. Minorities, who in the past have looked to the Court for protection of their rights, may feel that the Court is increasingly susceptible to majority impulse. Similarly, those in the majority may fear the influence of special interest groups on the Court and also may view the politicization of the Court as inconsistent with its unelected and effectively unchecked status.

#### Court legitimacy key to prevent terrorism

Shapiro 3 (Jeremy, Associate Director and Research Associate – Brookings Institute, March “French Lessons: The Importance of the Judicial System in Fighting Terrorism http://www.brookings.edu/fp/cusf/analysis/shapiro20030325.htm)

The unique nature of terrorism means that maintaining the appearance of justice and democratic legitimacy will be much more important than in past wars. The terrorist threat is in a perpetual state of mutation and adaptation in response to government efforts to oppose it. The war on terrorism more closely resembles the war on drugs than World War II; it is unlikely to have any discernable endpoint, only irregular periods of calm. The French experience shows that ad-hoc anti-terrorist measures that have little basis in societal values and shallow support in public opinion may wither away during the periods of calm. In the U.S., there is an enormous reservoir of legitimacy, established by over 200 years of history and tradition, in the judiciary. That reservoir represents an important asset that the U.S. government can profit from to maintain long-term vigilance in this type of war. Despite the unusual opportunity for innovation afforded by the crisis of September 11, the U.S. government has not tried to reform American judicial institutions to enable them to meet the threat of terrorism. To prevent the next wave of attacks, however far off they might be, and to avoid re-inventing a slightly different wheel each time will require giving life to institutions that can persist and evolve, even in times of low terrorist activity. Given the numerous differences between the two countries, the U.S. cannot and should not simply import the French system, but it can learn from their mistakes. Their experience suggests a few possible reforms: A specialized U.S. Attorney tasked solely with terrorism cases and entirely responsible for prosecuting such cases in the U.S. Direct and formal links between that U.S. Attorney’s office and the various intelligence agencies, allowing prosecutors to task the intelligences agencies during judicial investigations Special procedures for selecting and protecting juries in terrorism cases and special rules of evidence that allow for increased protection of classified information in terrorist cases Creating a normal, civilian judicial process that can prosecute terrorists and yet retain legitimacy is not merely morally satisfying. It may also help to prevent terrorist attacks in the long run. Not incidentally, it would demonstrate to the world a continuing faith in the ability of democratic societies to manage the threat of terrorism without sacrificing the very values they so desperately desire to protect.

### XT: Kills Legitimacy

#### Controversial decisions undermine legitimacy

**Gibson and Caldiera 7** (James L., Professor of Government – Washington University and Fellow – Centre for Comparative and International Politics, and Gregory A., Distinguished University Professor in Political Communications and Policy Thinking – Ohio State University, “Supreme Court Nominations, Legitimacy Theory, and the American Public: A Dynamic Test of the Theory of Positivity Bias”, 7-4, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=998283)

Social scientists have taught us a great deal about the legitimacy of the U.S. Supreme Court. Unfortunately, however, most research fails to consider how the public’s views of political institutions like the Court change over time. But opinions can indeed change, with at least two types of “exogenous” sources — controversial Supreme Court decisions and politicized confirmation hearings — providing engines for attitude change. Events such as these may awaken attitudes from their hibernation, allowing for the possibility of updating. Two types of change seem possible: Attention to things judicial may be associated with exposure to highly legitimizing symbols of judicial power (e.g., robes), symbols that teach the lesson that the Court is different from ordinary political institutions and therefore is worthy of esteem. Gibson and Caldeira refer to this as “positivity bias.” Alternatively, events may teach that the Court is not different, that its role is largely “political,” and that the “myth of legality”really is a myth. Since so few studies have adopted a dynamic perspective on attitudes toward institutions, we know little about how these processes of attitude change take place.

#### Overturning a constitutional precedent or controversial decision subverts Court legitimacy

Peters, 8 (Christopher J., Associate Professor of Law @ Wayne State University Law School and Visiting Professor of Law @ Loyola Law School Los Angeles, Symposium: The Roberts Court at Age Three: Under-The-Table Overruling, The Wayne Law Review, Fall, Lexis)

But the Court also went farther. In a remarkable passage-remarkable because it directly engaged the question of the Court's role in a constitutional democracy to a degree rarely seen in majority opinions  [\*1080]  of the Court n54 -it argued that overruling Roe would undermine the Court's own legitimacy. N55The Court's power, it asserted in Casey, "lies . . . in its legitimacy, a product of substance and perception." n56 In tying its legitimacy to "substance," the Court appeared to mean that part of its power depends on widespread public acceptance of the content of its decisions, on the impression that the Court is getting things right most (or at least an acceptably high percentage) of the time. n57 In citing "perception," however, the Court meant something different and perhaps more complex. Some segment of the public inevitably will disagree with the substance of any constitutional decision by the Court; as the Court put it, "not every conscientious claim of principled justification [for a Court decision] will be accepted as such." n58Thus "something more"-more than agreement with the substance of Court decisions-"is required" to support the Court's power. n59 That something more is a widespread perception that the Court is procedurally legitimate, that the way it makes constitutional decisions is generally acceptable, even to those who disagree with the substance of particular decisions. n60 And this procedural legitimacy "depends on making legally principled decisions," decisions that are "grounded truly in principle, not . . . compromises with social and political pressures." n61Frequent overrulings of the Court's own constitutional precedents-or overrulings of highly controversial decisions that have produced extraordinary "social and political pressures," like Roe-would foster the impression that the Court is giving in to those pressures rather than making decisions of principle. n62 This "would subvert the Court's legitimacy" and thus its power. n63

### Kills Court Political Capital

#### Court policy making kills political capital, causing restrictions on the courts from other branches.

Sakas 6 (Zachary, attorney, “FOOTNOTES, FORESTS, AND FALLACY: AN EXAMINATION OF THE CIRCUIT SPLIT REGARDING STANDING IN PROCEDURAL INJURY-BASED PROGRAMMATIC CHALLENGES”, *University of Baltimore School of Law*) GSK

As previously discussed , Article III restricts federal courts to adjudicating only "cases" and "controversies." n124 The underlying idea is that the courts hear only those cases that have finely tuned arguments. A crucial point of academic debate that arises out of this doctrinal examination is the interaction of Article III's standing doctrine and the separation of powers doctrine. n125 Many of the Framers felt that the separation of powers was extremely important; n126 a liberal standing doctrine can lead to an "overjudicialization of the process of self-government." n127 The Framers' goal was for courts to have a limited role in democratic society. n128 When standing is too liberal, the argument goes, the judiciary is able to extend too much oversight and control over legislative and executive functions. There is a "functional relationship" between standing and the role of the courts, in that "the law of standing excludes [the courts] from the ... undemocratic role of prescribing how the other two branches should function. ..." n129 "The degree to which courts become converted into political forums depends... upon what issues they are permitted to address ... ." n130 The federal courts have become a "crucial" component in the political process due to their standing jurisprudence. n131 There is a concern that courts will expend their scarce political capital too quickly if the courts interact too often in areas that are traditionally within the domain [\*190] of the other branches. n132 When this political capital is spent too often, "the courts will meet rebuke and restriction from the other branches." n133 The separation of powers is best served when a court carefully applies the standing doctrine. If standing becomes too narrow, however, the other branches may be free to run amok without the judicial branch as a check on power.

#### Doctrine change kills court PC

Rehnquist 86 (James, lawyer, former federal prosecutor, “THE POWER THAT SHALL BE VESTED IN A PRECEDENT: STARE DECISIS, THE CONSTITUTION AND THE SUPREME COURT.”, *Boston University Law Review*)GSK

A recurring argument is that overrulings of precedent jeopardize the Supreme Court's "legitimacy." n50 This argument is rooted in the conception [\*354] of the Supreme Court as a "deviant institution" n51 -- deviant because it is countermajoritarian. n52 The public will only grudgingly accept invalidations of the decisions of democratically elected legislatures, the argument goes, so the Supreme Court must cautiously avoid any appearance of arbitrariness or politicization lest its scarce political capital be squandered. n53 Professor Maltz addresses this concern in the context of Mapp v. Ohio's n54 overruling of Wolf v. Colorado: n55 A pattern of such behavior [overruling precedent] threatens to do serious damage to the unique position of the Supreme Court in the American governmental structure. The Court's continued ability to function effectively depends on the willingness of the public to accept the Court in this role; this acceptance in turn depends upon the public perception that in each case the majority of the Court is speaking for the Constitution itself, rather than simply for five or more lawyers in black robes. n56

#### Judicial activism costs court capital

Heise 2000 (Michael, Prof of Law at Case Western University, “DUCATION AND THE CONSTITUTION: SHAPING EACH OTHER AND THE NEXTCENTURY”, Akron Law Review) GSK

Professor Paul Tractenberg, long active in the New Jersey school finance litigation, n81 identifies institutional credibility as an important practical concern for courts. Tractenberg is acutely aware of the institutional stakes involved in active judicial participation, particularly within the school finance setting. On the one hand he reasons that an active judicial posture might provide political cover for reluctant legislators. After all, politically accountable legislators could point to the state supreme court and suggest that the justices left them with little choice but to increase school spending. n82 Such a calculation, Professor Tractenberg correctly notes, risks [\*87] depleting the court's limited and valuable "political capital." n83 He goes on to note that: There are only so many times that the court [the New Jersey Supreme Court] can be portrayed as the dictatorial villain forcing the State to do, in the name of a constitutional mandate, what a majority of its citizens disfavor before judicial credibility is undermined. n84

#### Ethical issues require court capital

Kanter 6 (Stephen, ex-dean at Louis and Clark Law School, ex-professor of law at Yale, “THE GRISWOLD DIAGRAMS: TOWARD A UNIFIED THEORY OF CONSTITUTIONAL RIGHTS”, *Cardozo Law Review*)GSK

n155. As politicians achieve policy goals partially by earning and selectively using political capital, so too are courts able to restrain the political branches by developing and expending judicial legitimacy capital. Examples where previously accumulated legitimacy capital were essential to the Supreme Court's ability to act, and to have the acts followed, however reluctantly, include Brown v. Bd. of Educ., 347 U.S. 483 (1954), and United States v. Nixon, 418 U.S. 683 (1974) (the Nixon Watergate tapes litigation). It is fanciful to imagine even minimal compliance by recalcitrant segregationist States, or a powerful executive, without the weight of a long tradition of acceptance of judicial review and judicial mandates in less sensitive cases.

### Courts Link Worse to Federalism

#### Judicial policymaking undermines federalism worse than legislative action.

Yoo 96 (John Choon, professor in law and previous Dep. of Justice official, “Who Measures the Chancellor's Foot--The Inherent Remedial Authority of the Federal Courts”, *Cal. L. Rev.*, 84, p. 1140-1141) GSK

The practical difficulties courts have experienced in implementing structural reforms point to deeper problems with the enterprise of federal remedial power. Several authors have criticized the judicial management of state institutions on both federalism and separation of powers grounds."' According to these observers, structural reform decrees have invaded a core area of state responsibility guaranteed by the Tenth Amendment. Further, as these critics have argued, even if the federal government had the authority to seize control of a state institution, prudential considerations should weigh against an active judicial role in supervising day-to-day operations. While these writers have been critical of this type of judicial management, they have questioned only the scope and exercise of the judiciary's power, rather than its roots. These critics have pointed out that federalism and separation of powers are interrelated doctrines. Both principles act to place limits on what the federal courts can do, but in issuing structural reform decrees, federal judges have been evading these restrictions. In the course of attempting to remedy constitutional violations, the federal courts not only have tread upon principles of federalism, but they also have employed procedures that undermine the impartiality of the federal judiciary. In imposing institutional remedies, courts have set spending priorities for state governments, and then have implemented those priorities by specifying how the funds are to be spent. Federal courts have infringed on the core state prerogatives to allocate resources, to decide on policies, and, ultimately, to manage their own governments. Worse yet, these transgressions have occurred in areas, such as education, that the Supreme Court has recognized as traditionally falling under state control."9 Critics' concerns that these courts have not been properly aware of the separation of powers issues involved touch on a difficult aspect of the problem. The problem is not that federal, rather than state, actors are running state institutions, but rather that members of the federal judiciary are performing tasks better left to the political branches. Supervising and controlling the everyday operations of a hospital, school, or prison are executive and legislative, rather than judicial, functions. By assuming such powers, courts threaten to circumvent democratic decision making processes and to transform themselves into roving cominis-sions whose aim is to "do the right thing," rather than to interpret and to enforce the law. As one observer warned early in 1978, "issuing orders of this kind as a regular matter in the ordinary course of business" threatened to bring into question the very "legitimacy of the federal courts."110 In Jenkins III, the Court indicated that it is becoming aware of the inherent limitations upon the equity powers of the federal courts. As Justice O'Connor stated, "The necessary restrictions on [the Court's] jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills.'"31 Or, as Justice Thomas declared, "[W]hat the federal courts cannot do at the federal level they cannot do against the States; in either case, Article ED courts are constrained by the inherent constitutional limitations on their powers.'"22 The remainder of this Article will attempt to show that these Justices' comments are supported by the textual, structural, and historical context of the federal courts' equitable powers.