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\*\*\*Supreme Court CP\*\*\*

Courts Solve – US Law

Courts have the authority to do the plan – US law proves

Ro, Kleiman, & Hammerle 11 (Theodore U., intellectual property attorney at Johnson Space Center, works for NASA, Matthew J., corporate Counsel @ Draper Laboratory @ Cambridge, Kurt G., intellectual property attorney for NASA, http://bujostl.org/content/WORKING\_PATENT\_INFRINGEMENT\_IN\_OUTER\_SPACE.pdf)JFS

Consistent with the framework established by the Outer Space Treaty, the United States in 1990 extended the reach of its patent laws to U.S.‐registered spacecraft in 35 U.S.C. § 105. Section 105 provides that “any invention made, used, or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States shall be considered to be made, used or sold within the United States for the purposes of [U.S. patent laws].”27 Therefore, an invention conceived or first actually reduced to practice on a U.S.‐registered spacecraft is deemed to have been made in the United States, and a patent infringement lawsuit based on the activities “made, used, or sold” on a U.S.‐ registered spacecraft must be brought in a U.S. court and would only succeed if the activity is covered by a U.S. patent.

Courts Solve – Decca

Courts have authority in space – Decca case establishes precedent

Ro, Kleiman, & Hammerle 11 (Theodore U., intellectual property attorney at Johnson Space Center, works for NASA, Matthew J., corporate Counsel @ Draper Laboratory @ Cambridge, Kurt G., intellectual property attorney for NASA, http://bujostl.org/content/WORKING\_PATENT\_INFRINGEMENT\_IN\_OUTER\_SPACE.pdf)JFS

For the most part, U.S. courts have focused on defining the act of “use or using” for purposes of extraterritorial reach of U.S. patent law. One of the leading cases to examine an extension of the extraterritorial reach of U.S. patent law after passage of the 1952 Patent Act is the 1976 U.S. Court of Claims case of Decca Limited v. United States.33 The underlying technology in this case concerned a worldwide radio navigation system known as “Omega” which was operated by the United States Government. The system included components of a system located in foreign countries and called for the placement of receivers in ships and aircraft so as to retrieve positional information while travelling on or over the high seas. In issuing its per curiam opinion, the court in Decca established that, for “system” or “apparatus” claims to a patent, the determinative factors to consider whether use of the patented system occurs within the United States are: (1) whether “control of a system” occurs on U.S. territory, (2) whether the system is “owned” by a U.S. entity, and (3) whether there is “beneficial use” in the U.S.34 Based on these factors, the Decca court found that the United States Government could be subjected to the court’s jurisdiction for an infringement claim on a U.S patent.35

Courts Solve – Jurisdiction

Courts have authority over space infrastructure and objects

Ro, Kleiman, & Hammerle 11 (Theodore U., intellectual property attorney at Johnson Space Center, works for NASA, Matthew J., corporate Counsel @ Draper Laboratory @ Cambridge, Kurt G., intellectual property attorney for NASA, http://bujostl.org/content/WORKING\_PATENT\_INFRINGEMENT\_IN\_OUTER\_SPACE.pdf)JFS

Assuming one of the §105(a) Exceptions does not apply, another implication of 35 U.S.C. § 105 is its impact to the state of extraterritorial principles in regard to U.S. patent law. For example, note that “control” is a common term used both by the U.S. courts as a factor in determining whether there is an extraterritorial reach of U.S. patent law based on the infringing act of “use” and by §105 in determining applicability of the statute to activities in outer space. Although an intent of 35 U.S.C. § 105 was to define the territorial status of space objects and components thereof, the coincidence of the word “control” being used may result in unintended consequences, such as 35 U.S.C. § 105 effectively further modifying extraterritorial principles with respect to space objects. For instance, to support a finding of extraterritorial application of U.S. patent law to an allegedly infringing use of a system or apparatus under either Decca or NTP, the elements of “control” from and “beneficial use” in the United States must exist. Much like how NTP seemingly removed the consideration of U.S. “ownership” from Decca’s extraterritorial equation, 35 U.S.C. § 105 apparently removes the consideration of “beneficial use” in the United States from NTP’s extraterritorial equation, whereby only the consideration of “control” from the United States remains. Consider the scenario where a space object is not registered under the Registration Convention but is controlled from the United States. Under 35 U.S.C. § 105, one might argue that U.S. courts would have patent law jurisdiction over the space object even without a finding of beneficial use in the United States. A court’s acceptance of this argument would effectively modify the state of extraterritorial application of U.S. patent law to a single consideration for space objects.

Courts Solve – Mining

Court ruling on property rights solves mining

White 1 (Wayne, CATO Author, CATO Inst., http://www.spacefuture.com/archive/the\_legal\_regime\_for\_private\_activities\_in\_outer\_space.shtml)JFS

In several cases, state supreme courts have expanded the pedis possessio doctrine in connection with uranium prospecting. In 1958 the Utah Supreme Court held that miners could base a valid discovery on radiometric detection and geological analysis, particularly when miners had physically discovered deposits nearby.26 In a similar case, Colorado validated a discovery based on radiometric detection, assaying and the type of rock present at the site.27 Finally, in a third case, the U.S. Geological Survey made an initial discovery while preparing anomaly maps from airborne surveys. The Nevada Supreme Court validated the claim of the first on-the-ground locator using a geiger counter (radiometric detection).28 These cases may find application in the law of outer space because extraterrestrial miners face circumstances which mirror those faced by uranium prospectors: they cannot discover minerals without substantial amounts of capital, specialized equipment and engineering, technical and organizational expertise. One author has gone a step further and suggested that courts need to provide protection to miners who do no more than locate claims and demonstrate a feasible plan for their exploration.29 In light of the risks faced by extraterrestrial miners, that would seem to be a valid recommendation for the field of space law.

Courts Solve – Colonization

Courts recognition of property rights is key

SSI 6 (Space Settlement Institute, Independent Inst. For Space Colonization, http://www.space-settlement-institute.org/space-settlement-prize-act.html)JFS

The U.S. needs to promise, now, that when and if anyone succeeds in establishing a permanent, privately funded space settlement and space line, U.S. courts will accept the settlement's claim to ownership of a substantial share of that land. This concept has come to be known as "land claims recognition". (Incidentally, the same incentive would also apply to asteroids and any other object on which a permanent space settlement could be built.) Official recognition by U.S. Courts of a private claim of land on the Moon or Mars (based legally on the occupation and use by a permanent settlement) would allow the settlement to sell deeds to their Lunar land back on Earth. This could begin as soon as - but not before - the actual settlement and space line was built. The settlement company could sell to those who intend to book passage on the settlement's ships and use their land, but also to the much, much larger market of land speculators and investors who hope to make a profit on Lunar land deeds, without ever, themselves, leaving Earth.

Courts Don’t Link – PC

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) ELJ

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.

Court decisions avoid congressional political battles-comparatively save political capital

Ward in 2k9

(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.

Courts Don’t Link – PC

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).

Courts Don’t Link - Perception

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 JWS)

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.

Courts Don’t Link – Perception

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\_dont/)

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.

Decisions specifically are not perceived – FEC & Gore prove

Pew 8-3 (http://pewresearch.org/pubs/1688/supreme-court-lack-of-public-knowledge-favorability)

Similarly, the Supreme Court's decisions typically do not draw a great deal of public interest. In early February, just 19% said they heard a lot about the Supreme Court's decision on corporate campaign contributions. Fully 68% disapproved of that decision, Citizens United v. Federal Election Commission, while just 17% approved. Even the public's reaction to the Supreme Court's 2000 ruling in Bush v. Gore -- arguably the most important decision in a generation -- was somewhat muted. During the week of Dec. 8-14, 2000 -- the court's decision was handed down Dec. 12 -- 34% of the public followed news about the election outcome very closely. And the court's decision was not the most closely followed news story of 2000. Significantly more Americans paid very close attention to the rising price of gas (61%) and the terrorist attack on the USS Cole (44%).

No public perception of Court

Pew 8-3 (http://pewresearch.org/pubs/1688/supreme-court-lack-of-public-knowledge-favorability)

With the Senate confirmation of Elena Kagan's nomination to the Supreme Court, she joins an institution that for the public is largely out of sight and out of mind. While legal scholars analyze Kagan's possible impact on the "Roberts court," most Americans have no idea who "Roberts" is. In Pew Research's latest political knowledge quiz, just 28% correctly identified John Roberts as chief justice -- from a list that included Harry Reid, Thurgood Marshall and John Paul Stevens. Much of the recent debate over the court has centered on whether it has become more conservative since 2006, when Samuel Alito replaced Sandra Day O'Connor. However, the public sees the court moving in the opposite direction. Currently, as many Americans say the court is conservative as say it is liberal (23% each); in July 2007 more than twice as many viewed the court as conservative than viewed it as liberal (36% vs. 14%). The public often has little to go on when making judgments about the court and its ideology. The Supreme Court's workings are largely hidden from the public's view; its proceedings are not televised, and sitting justices seldom give interviews. President Obama cast a rare spotlight on the court in his State of the Union address when he condemned the court's decision allowing corporate spending in elections; Roberts later took the unusual step of publicly criticizing the president's broadside. Such high-profile incidents involving court decisions are few and far between.

\*\*\*A2: Supreme Court CP\*\*\*

Courts Don’t Solve – No Authority

Supreme court has no authority over the plan – laws are not extraterritorial

Ro, Kleiman, & Hammerle 11 (Theodore U., intellectual property attorney at Johnson Space Center, works for NASA, Matthew J., corporate Counsel @ Draper Laboratory @ Cambridge, Kurt G., intellectual property attorney for NASA, http://bujostl.org/content/WORKING\_PATENT\_INFRINGEMENT\_IN\_OUTER\_SPACE.pdf)JFS

With the basic principles of patent and space law in mind, our adventure down the rabbit hole begins with an examination of the current state of jurisprudence on the extraterritorial scope of U.S. patent law. Although a comprehensive examination of this topic is beyond the scope of this article,30 suffice it to say that U.S. courts have struggled with the idea that, as with most national laws, U.S. patent law is strictly territorial. Radically new technologies continue to emerge and develop at seemingly exponential rates, and their manufacture and use have expanded into global systems and applications that reach beyond the borders of the U.S., forcing the historical approach of a strictly territorial application of U.S. patent law, tenuously held by the U.S. Supreme Court in Deepsouth,31 to be tested by such new systems and applications in light of the language of infringing activity defined in § 271 of the Patent Act.32

Courts Don’t Solve – Loopholes

Loopholes ensure the court has no authority

Ro, Kleiman, & Hammerle 11 (Theodore U., intellectual property attorney at Johnson Space Center, works for NASA, Matthew J., corporate Counsel @ Draper Laboratory @ Cambridge, Kurt G., intellectual property attorney for NASA, http://bujostl.org/content/WORKING\_PATENT\_INFRINGEMENT\_IN\_OUTER\_SPACE.pdf)JFS

Our journey down the rabbit hole continues with another question: in light of the §105(a) Exceptions, can a private enterprise in the United States avoid U.S. patent infringement claims based on making, using, and selling a space object by registering it in a foreign country? Alternatively, does Exception 2 eliminate a U.S. court’s ability to rely on the current state of extraterritorial principles even if the space object is “controlled” from the U.S., it has “beneficial use” in the U.S., and it is “owned” by a U.S. company? If so, the attractiveness to a private enterprise of pursuing this type of arrangement is obvious: the risk of being sued in a country with relatively few issued patents is vastly less than in the United States. Do the §105(a) Exceptions represent a loophole for avoiding patent infringement claims in the United States for activities in outer space? Our journey now shifts from following the rabbit down the rabbit hole to exploring the rabbit “loophole.” Exception 2 references the Registration Convention, therefore, one must first look to it for answers.

Courts Don’t Solve – Empirics

Past decisions prove the court has no authority over space

Ro, Kleiman, & Hammerle 11 (Theodore U., intellectual property attorney at Johnson Space Center, works for NASA, Matthew J., corporate Counsel @ Draper Laboratory @ Cambridge, Kurt G., intellectual property attorney for NASA, http://bujostl.org/content/WORKING\_PATENT\_INFRINGEMENT\_IN\_OUTER\_SPACE.pdf)JFS

Under Exception 2, the U.S. courts would not have jurisdiction if Acme’s satellite infringed a U.S. patent based on the satellite being used in outer space because the satellite is registered with the United Kingdom.71 However, assuming *arguendo* that Exception 2 does not apply, would extraterritorial principles yield a different result? Under both *Decca* and *NTP*, the United States would also arguably not have jurisdiction if Acme’s satellite infringed a patented system based on the act of using the satellite because there is insufficient control exercised over the satellite from the United States, albeit the remaining prong(s) in both analyses exist. Indeed, in 1993, the U.S. Court of Claims addressed a similar situation in Hughes Aircraft Co. v. United States, where it held that there was no infringement of a U.S. patent by a satellite, the ARIEL 5,72 that never entered the United States and was built in and primarily controlled from the United Kingdom, even though NASA’s Goddard Space Center in Maryland “was the central communications link for tracking and data acquisition services” for the satellite.73 Applying *Decca*, the court reasoned that although a certain amount of control was provided from Maryland, “the ‘control point’ for the spacecraft itself was in England,” so the United States had insufficient control over the spacecraft to establish jurisdiction.74 We suggest the same analysis would apply to Acme’s satellite launched and primarily controlled from the Turks and Caicos as given in this first scenario.

Courts Don’t Solve – Exceptions

Exceptions in the law ensure no solvency

Ro, Kleiman, & Hammerle 11 (Theodore U., intellectual property attorney at Johnson Space Center, works for NASA, Matthew J., corporate Counsel @ Draper Laboratory @ Cambridge, Kurt G., intellectual property attorney for NASA, http://bujostl.org/content/WORKING\_PATENT\_INFRINGEMENT\_IN\_OUTER\_SPACE.pdf)JFS

At this point in our journey, it would appear that a patent owner would have little recourse against a well‐informed, would‐be, and cunning patent infringer. The §105(a) Exceptions represent significant legal predicaments. In particular, Exception 2 is analogous to sovereign immunity if an invention is made, used, or sold in outer space on a space object registered in a foreign registry in accordance with the Registration Convention, the alleged infringer is immune from an infringement claim based on U.S. patent law with respect to the acts of making, using, or selling the invention. Exception 2 vastly limits a court’s discretionary authority to take into account any other equitable considerations presenting harsh consequences.

Courts Don’t Solve – Lower Courts

Lower Courts Don’t Follow Supreme Court

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(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.

Courts Don’t Solve – Foreign Policy

Judicial decisions in foreign policy issues are not enforced – executive branch will ignore the plan

Jide Nzelibe 4 [Bigelow Fellow and Lecturer in Law, University of Chicago Law School, March 2004 89 Iowa L. Rev. 941, “The Uniqueness of Foreign Affairs”]

Unlike in domestic constitutional controversies, it is also doubtful that the judiciary can draw on the popular underpinnings of its legitimacy should the political branches ignore its foreign affairs determinations. As one commentator has explained, the public appetite for judicial involvement in international issues is not particularly strong. 217 The judiciary's lack of popular legitimacy in foreign affairs is particularly understandable when the relevant controversy touches on matters of national security. As demonstrated above, in matters involving the domestic operations of the government, the court plays an important role in legitimizing the activities of the other branches, as well as providing a reliable mechanism for the resolution of disputes between private individuals. When matters touch on the very existence of the state, however, such as when the state faces an external threat, the justifications for judicial involvement correspondingly diminish. 218 Thus, far from getting popular support in the event of a confrontation with the political branches, it is more likely that the courts will face public criticism for intervening improperly in foreign affairs or jeopardizing national security.

Deference Good – Threat Response

**Deference is key to rapid response in our military**

Carter 3 (Phillip, writer, CNN, July 15, <http://www.cnn.com/2003/LAW/07/15/findlaw.analysis.carter.security/>) ELJ

As the ratification debates reveal, the Framers assigned these powers to the President because they feared that judicial or congressional interference in these areas might render the new nation weak, or incapable of rapid response to threats from abroad. The Framers also felt that because, at the time, the majority of national security knowledge and expertise lay in the Executive Branch, decision making on such issues properly belonged to that branch. Accordingly, while Article II gives expansive military and foreign policy powers to the President, Article I gives Congress only limited military powers. It may "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations"; "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water"; "raise and support armies, but no appropriation of money to that use shall be for a longer term than two years"; "provide and maintain a navy"; "make rules for the government and regulation of the land and naval forces"; and provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions . . ." But that is all. Finally, Article III gives the judicial branch no power at all over the military. As a result, the courts, unlike the other two branches, have no constitutional mandate to make military policy. The tradition of judicial deference to the military grew out of this constitutional structure and history. As commander-in-chief, the argument goes, the President should have the utmost latitude in making decisions that affect the readiness of America's military. Similarly, Congress deserves free rein in exercising its Constitutional responsibilities to fund the military and make laws for its governance. In contrast, the courts have no such Constitutional mandate to make military policy; thus, they should yield to decisions by the President and Congress.

Deference Good – Readiness

A judicial branch rejection of Deference kills military readiness

Hudson 99 (Walter, Major, US Army, Military Law Review 159, March <http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C75~1.pdf>) ELJ

By granting the elected branches plenary and command power over the military, the Constitution links military control to the democratic will and the democratic process. Because the people will feel the burden of war, the elected branches can best respond to that will.223 Furthermore, in granting power to the elected branches to control the military, the Constitution acknowledges that the elected branches grant a degree of legitimacy to military policy that courts cannot. These elected branches can best reflect and respond to the societal consensus, a particularly relevant and important concern when dealing with national security.224 Of the three branches, the judiciary has the least competence to evaluate the military’s formation, training, or command. It has, as one court stated, “no Armed Services Committee, Foreign Relations Committee, Department of Defense, or Department of State” nor does it have the same access to intelligence and testimony on military readiness as does Congress or the President.225 The Supreme Court has thus repeatedly cited its own lack of competence to evaluate military affairs.226

Judicial rejection of deference creates friction in the military that jeopardizes national security

Hudson 99 (Walter, Major, US Army, Military Law Review 159, March <http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C75~1.pdf>) ELJ

It is not thus simply the lack of judicial competence in military affairs, but the effects that the lack of competence may have that is an additional "friction" in the military environment. The problem in applying a standard of review similar to the kind used for civilian society is not just that the court may err, but the ramifications of such an error given the uncertainty of conflict. n240 An error in military policy making could impede military effectiveness and thereby jeopardize national security. n241 These judicial decisions put the courts squarely into the political arena. Judges unwittingly become "strategists" -- unelected and ill-equipped officials deciding matters of potentially ultimate importance.

The Courts are too technical for effective military control

Hudson 99 (Walter, Major, US Army, Military Law Review 159, March <http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C75~1.pdf>) ELJ

There are several problems with adjudication as a means of rule making. Adjudication is more costly and more time consuming. Years and millions of dollars can be spent in litigating one issue that involves one individual. n228 Adjudication concerns itself with an individual remedy based upon "a small set of controverted facts" that are highly contextual and may or may not be applicable to a larger class of individuals. n229 Furthermore, adjudication sets up elaborate procedures according to its ultimate goal -- to determine whether a particular individual should prevail in a particular case. n230 [\*48] Dissenters, in particular Justice Brennan, have asserted that the Court decides issues that are far more technically complicated than adjudicating rather straightforward rules on discipline. n231 Yet that argument does not address rules formation in an administrative, as opposed to an adjudicative, system. Military policy-making is, by its nature, meant to do precisely what administrative policy-making does: allocate rights, benefits, and sanctions, among large groups using consistent standards. n232 What makes military policy making along administrative rule-making lines even more advantageous is that the military's primary concern is ensuring military discipline and combat effectiveness of units, rather than focusing primarily on individuals themselves. Applying consistent and predetermined norms among large groups is what administrative rule making is best equipped to do. n233

Deference Good – Readiness

Deference is key to maintain the power of our military

Yoo 3 (John C., Visiting Professor of Law, University of Chicago Law School, The George Washington Law Review 72 Geo. Wash. L. Rev. 427, December, Lexis) ELJ

The role of the courts in reviewing the detention of enemy combatants demonstrates the tension between judicial review and the usual judicial deference to political wartime decisions. In the first category, that of alien enemy combatants captured and held abroad, the courts historically have refused to exercise judicial review. n91 In Johnson v. Eisentrager, the Supreme Court refused to entertain a habeas petition brought by German World War II prisoners who challenged their trial and conviction by the military commission for war crimes. n92 Finding that Article III courts had no jurisdiction over their petition, the Court observed that "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." n93 Further, judicial deference to the decisions of the political branches was warranted because "trials would hamper the war effort and bring aid and [\*446] comfort to the enemy." n94 Judicial proceedings would engender a "conflict between judicial and military opinion," interfere with military operations by recalling personnel to testify, and "would diminish the prestige of" a field commander called "to account in his own civil courts" and would "divert his efforts and attention from the military offensive abroad to the legal defensive at home." n95 In such cases, just as with the initiation of hostilities, judicial review has no role, as such decisions have been vested in the political branches and any exercise of jurisdiction would interfere with the conduct of military operations.

Deference ensures our military can function correctly

Carr 98 (B.S., United States Air Force Academy, J.D., Harvard Law School, The Air Force Law review, 45 A.F. L. Rev. 303Lexis) ELJ

Both courts and commentators have justified the judicial deference to the military on the grounds that the Constitution vests the primary responsibility for respecting the rights of servicemembers with the Legislative and Executive branches. The Constitution gives Congress the power to "raise and support Armies," n23 "provide and maintain a Navy," n24 and "make Rules for the Government and Regulation of the land and naval Forces." n25 The President is designated as the "Commander in Chief of the Army and Navy of the United States." n26 Given this division of responsibility, it has been argued that the two branches have safeguarded the rights of service personnel while protecting the readiness of the military. Senator Nunn explains that: [A] system of military and criminal and administrative law that carefully balances the rights of individual service members and the changing needs of the armed forces . . . has demonstrated considerable flexibility to meet the needs of the armed forces without undermining the fundamental needs of morale, good order, and discipline. The principles of judicial review developed by the Supreme Court recognizes the fact that over the years Congress has acted responsibly in addressing the constitutional rights of military personnel. n27

Deference is key to military order

Carr 98 (B.S., United States Air Force Academy, J.D., Harvard Law School, The Air Force Law review, 45 A.F. L. Rev. 303Lexis) ELJ

The regulations serve two related purposes. The first is to avert clear and present dangers to military order and discipline as described in the preceding court opinions. The second purpose is to maintain a politically disinterested military that remains safely under the control of civilian superiors. The balance between the free speech rights of military personnel and the military's interest in good order and discipline and mission effectiveness can be a particularly challenging task.

Deference Good – Readiness

The courts are too incompetent to be involved in military affairs

Carr 98 (B.S., United States Air Force Academy, J.D., Harvard Law School, The Air Force Law review, 45 A.F. L. Rev. 303 Lexis) ELJ

Underlying the judiciary's cautious excursions into the realm of military command are fears that courts lack the competence to contradict the judgment of military experts. Chief Justice Earl Warren has explained that the Supreme Court's deference to military determinations is based upon the "strong historical" tradition supporting "the military establishment's broad power to deal with its own personnel." n30 According to Warren, the "most obvious reason" for this deference is that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." n31 The Supreme Court has alluded to the judiciary's lack of expertise to review prosecutions based upon military custom. In Parker v. Levy, it cited lower court opinions which held that the applications of military custom are best determined by military officers who are "more competent judges than the courts of common law." n32 Additionally, in the oft-quoted opinion of Orloff v. Willoughby, the Court expressly adopted a hands-off approach to the military, stating: But judges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. n33

Judicial interference in the military kills military readiness

Carr 98 (B.S., United States Air Force Academy, J.D., Harvard Law School, The Air Force Law review, 45 A.F. L. Rev. 303Lexis) ELJ

When deciding constitutional or statutory issues in the military context, the Supreme Court has emphasized the special characteristics of the military community as a separate society. For example, the Court reviewed the nature of and justifications for these characteristics in Parker v. Levy. n34 The Court stressed that it "has long recognized that the military is, by necessity, a specialized society separate from civilian society." n35 This specialization is necessitated by the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." n36 The Court noted that "the military has, again by necessity, developed laws and traditions of its own during its long history." n37 Quoting from previous opinions, it also reiterated that the army "is not a deliberate body" n38 and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." n39 Furthermore, in order to "maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'" n40

Deference Good – Readiness

The Court is ill-equipped to control the military

O’Connor 0 (John F., Former USMC officer, Georgia Law Review, Fall, 35 Ga. L. Rev. 161, Lexis) ELJ

This "hands off" attitude has strong historical support, of course. While I cannot here explore the matter completely, there is also no necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal. n254

Congressional control of the military is key to national security

Aden 4 (Steven H., J.D. (cum laude) 1989, Georgetown Univ. Law Center, Western State University Law Review, 31 W. St. U. L. Rev. 185, Lexis) ELJ

In pertinent part, the former, said the Second Circuit, authorizes Congress to ""provide for the common Defence'" and ""to raise and support Armies.'" n42 Consequently, although the actions of the military remain subject to judicial review, the Supreme Court has historically granted great deference to the content and implementation of armed forces' policies calculated to [\*196] enhance military readiness and promote national safety. n43 In seeking to strike this balance of powers, the Second Circuit wrote: Caution dictates when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion. n44

Judicial limits will degrade our fighting force

Henriksen 96 (Kelly E., J.D. Candidate, 1996, Washington College of Law of The American University Administrative Law Journal Winter, 9 Admin. L.J. Am. U. 1273 Lexis) ELJ

B. The Military as a Separate Community As another justification in support of the principle of deference, the Supreme Court has regularly referred to the military as a "separate community" n27 in which the judiciary must approach restrictions on individual liberties with deference. n28 Based on the need to maintain an effective fighting force, n29 courts have recognized that limits on constitutional rights which may not have a rational basis in our civilian society may survive in the military "society" because the war-making purpose of the military [\*1279] makes those limits compelling. n30 Courts have noted that the military has developed its own practices, laws and traditions in preparation for its ultimate responsibility - war-making. n31 Courts have also framed this particular justification for its deference in terms of the difference in autonomy between being in the civilian community and the military's "separate society." n32 C. The Limited Competence of the Courts A third justification commonly forwarded in support of the doctrine of deference centers on the perceived limits of the courts' competence in dealing with the complex aspects of the military establishment. n33 The professional judgment and experience of those familiar with the military is the primary source for determining the climate of obedience and discipline necessary to sustain an effective fighting force. Traditionally, courts have deemed themselves unable to master these complexities. n34 [\*1280]

Deference Good – Terrorism

Second guessing by the courts kills any chances to fight terrorism

Sekulow 4 (Jay Allen, American Center for Law and Justice Chief Counsel, March 17, http://www.wiggin.com/db30/cgi-bin/pubs/American%20Center%20for%20Law%20%20Justice.pdf) ELJ

We are facing an enemy which willingly commits the most horrendous, suicidal acts against innocent civilians and which will do so again if it can. Because this situation is without historical precedent, no one can know for sure how much success emerging policies will have. As such, it would be inappropriate for the courts of the United States to enter the political fray and attempt to second-guess the policies adopted by the President to meet this threat. Any appearance of official opposition to decisions within the discretion of the President will surely bring aid and comfort to the enemy while demoralizing the men and women in the U.S. armed forces who are daily putting their lives at risk to track down and destroy the confederates of those who planned the 9-11 attacks and seek to repeat them.

Terrorism must be fought by the elected government

The Washington Times 3 (June 18, http://www.washtimes.com/national/20030618-013148-4079r.htm) ELJ

"The Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives," the majority said in an opinion written by Circuit Judge David B. Sentelle, who was nominated by President Reagan. In declaring that tactical decisions in the war on terror must be made by "the government's top counterterrorism officials," not judges, Judge Sentelle was joined by Circuit Judge Karen LeCraft Henderson, a nominee of President Bush in 1990.

Judicial intervention kills war-making authority that is key to fight terrorism

Yoo 3 (John C., Visiting Professor of Law, University of Chicago Law School, The George Washington Law Review 72 Geo. Wash. L. Rev. 427, December, Lexis) ELJ

Instead, the legality of the war with al Qaeda has arisen in actions challenging the detention of Americans captured fighting in league with the enemy. In these cases, the courts have refused to second-guess whether the nation is at war, but instead have deferred to the judgment of the political branches. In Hamdi v. Rumsfeld, n49 Yaser Esam Hamdi, who was born in Louisiana but grew up in Saudi Arabia, was captured in Afghanistan fighting on the side of the Taliban militia. Hamdi's father, acting as his next friend, filed a petition for a writ of habeas corpus seeking his release because he was not held on criminal charges. n50 In dismissing the writ, Judge Wilkinson, writing for a unanimous panel in the United States Court of Appeals for the Fourth Circuit, did not question whether the United States was in a state of armed conflict in Afghanistan, nor whether that war was properly authorized under the Constitution. n51 Indeed, the court emphasized that its role was limited to reviewing whether the executive branch had properly classified Hamdi as an enemy combatant, under the standards set out by Ex Parte Quirin, and hence could be detained under the laws of war until the end of the conflict. As Judge Wilkinson wrote, "the political branches are best positioned to comprehend this global war in its full context, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches[.]" n52 The Fourth Circuit limited the scope of its review not to whether the war was properly begun, which was a decision for the political branches, but to the legal ramifications of the decision to go to war. n53

Deference Good – Separation of Powers

Deference is key to separation of powers

Henriksen 96 (Kelly E., J.D. Candidate, 1996, Washington College of Law of The American University Administrative Law Journal Winter, 9 Admin. L.J. Am. U. 1273 Lexis) ELJ

A. Separation of Powers Among several traditional justifications for the judiciary's deference to the military, the Supreme Court has repeatedly stated that the Constitution mandates some form of deference by providing for a separation of powers. n22 The Constitution expressly vests power over military affairs in Congress n23 and the Executive. n24 While the Supreme Court has considered article I, section 8, clauses 12-16 a plenary grant of power not subject to [\*1278] unjustified second guessing by the judiciary, n25 it has not completely abandoned its power of review. n26

Judicial interference hurts separation of power

Gerschwer 93 (Lawrence, Columbia Law Review, May 93 Colum. L. Rev. 996, Lexis) ELJ

3. Separation of Powers and Procedural Statutes. -- Separation of powers concerns counsel judicial restraint when litigants attempt to transform constitutional provisions into judicially enforceable proscriptions on government action. n249 The argument for judicial restraint in such cases draws force from the antimajoritarian aspect of judicial review and the struggle to reconcile the role of the judiciary with the democratic underpinnings of our political system. n250 In a democracy, the exercise of judicial power to interfere with legislative outcomes is and should be rare. n251

Deference Good – Pres Powers

Deference is key to presidential power

Masur 5 (Jonathan, Law clerk to the Honorable Richard A. Posner , Hastings Law Journal, February, 56 Hastings L.J. 441, Lexis) ELJ

The perceived duty of courts and judges to defer to the factual assertions and judgments of executive branch actors in times of war represents the unifying principle of all modern wartime cases. "Deference" has become a shibboleth that courts believe they must invoke if their wartime rulings are to have any hope of withstanding appellate (and public) scrutiny. Even a court that eventually concludes that no deference is due the executive branch often appears compelled to recite a statement of judicial fealty to the deference principle for fear of signaling an inappropriate lack of respect for the authority of the coordinate branches in wartime. n14 Judicial deference to administrative decision-making in times of war remains inescapably and intuitively attractive. This Article should not be understood to suggest that courts should exercise anything approaching de novo review over executive decisions in military situations. Yet within wartime jurisprudence, the doctrine of judicial deference has overwhelmed the legal strictures established to constrain the operation of executive power. Courts sitting in judgment of the Executive's wartime actions have permitted the military to effectively define the constitutional scope of its own authority.

Deference is key for the president to declare war

Masur 5 (Jonathan, Law clerk to the Honorable Richard A. Posner , Hastings Law Journal, February, 56 Hastings L.J. 441, Lexis) ELJ

Within the legal lexicon, the phrase "judicial deference" captures a broad swath of court' attitudes and actions united by a single generalized principle: courts will require some heightened measure of proof or surety before overturning a conclusion reached or a judgment made by a different branch of government. n15 Much attention has been given to what one might describe as "legal deference" to the military, or juridical acceptance of the executive branch's extraordinarily broad construction of its own statutory and constitutional powers during wartime. n16 The President's extant power to declare war sua sponte (and [\*446] without an act of Congress) stands as a paradigmatic example of this phenomenon. n17

Deference key to presidential power

Masur 5 (Jonathan, Law clerk to the Honorable Richard A. Posner , Hastings Law Journal, February, 56 Hastings L.J. 441, Lexis) ELJ

For nearly one hundred and fifty years, the judiciary's conception of the reach of the Executive's war-making powers has known few bounds. Beginning with The Prize Cases n20 in 1862, the Supreme Court has read the President's commander-in-chief power broadly to encompass nearly any necessary war-related actions, even without a formal declaration of war. n21 The Court's maxim, gleaned from Hirabayashi v. United States, that "the war power of the Government is "the power to wage war successfully,'" n22 has given rise to an understanding of presidential power that encompasses activities that do not involve the deployment of troops in the field, n23 such as the Japanese-American internment, as well as [\*449] foreign policy making authority not directly tied to national security or the military. n24 In some cases, the Supreme Court has refused even to entertain cases that attempt to demarcate limitations on the President's constitutional military powers. n25 This expansive understanding of the President's wartime authority has led the Executive to argue that an entire range of military questions or executive measures are entirely beyond the court' reach as either non-justiciable or otherwise unsuitable for judicial review. Courts have accepted this argument most decisively in areas that hew closely to the actual mechanics of armed conflict, such as presidential decisions committing American forces to battle or selecting the means and mechanisms of waging war. n26 Yet the judiciary has hardly confined its [\*450] deferential posture to such intimately military questions. n27 Courts have concluded that even administrative decisions implicating traditional judicial authority and significant constitutional or statutory legal structures must command substantial judicial deference. Prominent among the actions receiving such deference are detentions of American citizens who have not been charged with crimes. n28

Deference Good – AT: CMR

Deference key to civil military relations

Sulmasy and Yoo 7 (Glen Sulmasy and John Yoo, UCLA Law Review, 7/22/07, “CHALLENGES TO CIVILIAN CONTROL OF THE MILITARY: A RATIONAL CHOICE APPROACH TO THE WAR ON TERROR”, http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=johnyoo)

Since the founding of the republic, the military justice system was considered distinct and separate from the civilian system. Warfare operations were clearly regarded as distinct from civilian enterprises and therefore demanded a separate judicial system with a reduced expectation of constitutional protections. The Supreme Court consistently deferred to this unique system designed to respect the unique demands of warfare and of the role of the military.

Separation of Powers Turn

CP violates separation of powers

Hudson 99 (Walter, Major, US Army, Military Law Review 159, March <http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C75~1.pdf>) ELJ

The Supreme Court cites the separation of powers doctrine as a basis for deferring to either Congress or the military to create military policy. n219 The idea of separation of powers comes from the text of the Constitution itself. The articles of the Constitution assign each branch distinct roles and functions. The Constitution gives the power to raise, to support, and to train the armed forces to the legislative branch n220 and the authority to command [\*46] them to the executive branch. n221 The Constitution assigns no such role to the judiciary. n222

Collapse of constitutional balance of power risks tyranny and reckless warmongering

Martin Redish, Professor of Law and Public Policy at Northwestern, and Elizabeth Cisar, Law Clerk at the Seventh Circuit Court of Appeals, 1991 41 Duke L.J. 449

In any event, the political history of which the Framers were aware tends to confirm that quite often concentration of political power ultimately leads to the loss of liberty. Indeed, if we have begun to take the value of separation of powers for granted, we need only look to modern American history to remind ourselves about both the general vulnerability of representative government, and the direct correlation between the concentration of political power and the threat to individual liberty. [127](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n127#n127" \t "_self) [\*473] The widespread violations of individual rights that took place when President Lincoln assumed an inordinate level of power, for example, are well documented. [128](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n128#n128" \t "_self) Arguably as egregious were the threats to basic freedoms that arose during the Nixon administration, when the power of the executive branch reached what are widely deemed to have been intolerable levels. [129](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n129#n129" \t "_self) Although in neither instance did the executive's usurpations of power ultimately degenerate into complete and irreversible tyranny, the reason for that may well have been the resilience of our political traditions, among the most important of which is separation of powers itself. In any event, it would be political folly to be overly smug about the security of either representative government or individual liberty. Although it would be all but impossible to create an empirical proof to demonstrate that our constitutional tradition of separation of powers has been an essential catalyst in the avoidance of tyranny, common sense should tell us that the simultaneous division of power and the creation of interbranch checking play important roles toward that end. To underscore the point, one need imagine only a limited modification of the actual scenario surrounding the recent Persian Gulf War. In actuality, the war was an extremely popular endeavor, thought by many to be a politically and morally justified exercise. But imagine a situation in which a President, concerned about his failure to resolve significant social and economic problems at home, has callously decided to engage [\*474] the nation in war, simply to defer public attention from his domestic failures. To be sure, the President was presumably elected by a majority of the electorate, and may have to stand for reelection in the future. However, at this particular point in time, but for the system established by separation of powers, his authority as Commander in Chief [130](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n130#n130" \t "_self) to engage the nation in war would be effectively dictatorial. Because the Constitution reserves to the arguably even more representative and accountable Congress the authority to declare war, [131](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n131#n131" \t "_self) the Constitution has attempted to prevent such misuses of power by the executive. [132](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n132#n132" \t "_self) It remains unproven whether any governmental structure other than one based on a system of separation of powers could avoid such harmful results. In summary, no defender of separation of powers can prove with certitude that, but for the existence of separation of powers, tyranny would be the inevitable outcome. But the question is whether we wish to take that risk, given the obvious severity of the harm that might result. Given both the relatively limited cost imposed by use of separation of powers and the great severity of the harm sought to be avoided, **o**ne should not demand a great showing of the likelihood that the feared harm would result. For just as in the case of the threat of nuclear war**,** no one wants to be forced into the position of saying, "I told you so."

Separation of Powers ext.

Only Congress and the President can make foreign policy – CP violates separation of powers

Frazier 7 (Bart, program director at The Future of Freedom Foundation, Freedom Daily, July 2007, <http://www.fff.org/freedom/fd0707e.asp>) NK

So how were the Framers to protect this nation from unjust wars? They knew that too much power concentrated in the hands of any one man, or group of men, eventually leads to despotism. What provisions did the Constitution have that would attempt to limit the government to only the most necessary of wars? Like so many other functions of the Constitution, the powers that were needed to implement foreign policy were divided between the executive and legislative branches. The power to declare war was given to Congress, but the president was the one with the power to wage it. The president might wish to wage war, but he needed to get a declaration of war from Congress before he could do so. And even if a president was successful in getting a war started, Congress had the power to stop it by cutting off the money that funded it. The system of checks and balances so highly regarded by historians was supposed to prevent the ascension of a tyrannical government. Instead of enabling one man or one body of men to determine when the country was to go to war, the Constitution saw to it that different parts of the federal government would have to debate and ultimately agree among themselves that war was the proper route.

Activism/Legitimacy Turn

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)

**[core_up](http://www.lexis.com/research/retrieve?_m=ddbf2510b880732585956899367e8d09&docnum=20&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAt&_md5=c4f15a2e7705174729c1bc344a6f8617&focBudTerms=supreme%20court%20w/25%20judicial%20activis!%20w/15%20legitima!&focBudSel=all%23r26)**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.

The impact is extinction

Gordon 2 (Harvey, Visiting Lecturer in Forensic Psychiatry – Tel Aviv University, “The ‘Suicide’ Bomber: Is It a Psychiatric Phenomenon?” , Psychiatric Bulletin, 26, http://pb.rcpsych.org/cgi/content/full/26/8/285)

Although terrorism throughout human history has been tragic, until relatively recently it has been more of an irritant than any major hazard. However, the existence of weapons of mass destruction now renders terrorism a potential threat to the very existence of human life (Hoge & Rose, 2001). Such potential global destruction, or globicide as one might call it, supersedes even that of genocide in its lethality. Although religious factors are not the only determinant of ‘suicide’ bombers, the revival of religious fundamentalism towards the end of the 20th century renders the phenomenon a major global threat. Even though religion can be a force for good, it can equally be abused as a force for evil. Ultimately, the parallel traits in human nature of good and evil may perhaps be the most durable of all the characteristics of the human species. There is no need to apply a psychiatric analysis to the ‘suicide’ bomber because the phenomenon can be explained in political terms. Most participants in terrorism are not usually mentally disordered and their behaviour can be construed more in terms of group dynamics (Colvard, 2002). On the other hand, perhaps psychiatric terminology is as yet deficient in not having the depth to encompass the emotions and behaviour of groups of people whose levels of hate, low self-esteem, humiliation and alienation are such that it is felt that they can be remedied by the mass destruction of life, including their own.

Activism/Legitimacy Links

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

CIL Can’t Solve – Vague

Customary international law is not precise.

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

A central theme in many traditional critiques is the imprecise character of CIL. Karol Wolfke, for example, argues that the problem with custom “lies in the intangibility of custom, in the numerous factors which come into play, in the great number of various views, spread over centuries, and in the resulting ambiguity of the terms involved.”42 Vagueness about legal rules, however, need not be fatal. After all, common law adjudication is in significant part about the clarification or establishment of rules that are applied to disputes ex post. That said, the lack of precision in CIL rules does indeed undermine the force of the rules and generate skepticism about their importance.

Customary international law has many problems, including its inherent circularity.

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Beyond vagueness, there is a laundry list of problems with CIL that have long been understood. Anthony D’Amato made perhaps the best presentation of those concerns in his well-known book, The Concept of Custom in International Law.43 One of the most vexing problems discussed by D’Amato is the inherent circularity of CIL.44 It is said that CIL is only law if the opinio juris requirement is met. That is, it is only law if states believe it is law.45 But why would a state believe something to be law if it does not already have the requisite opinio juris? So it appears that opinio juris is necessary for there to be a rule of law, and a rule of law is necessary for there to be opinio juris.

CIL can’ solve – no internal consistency

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Other problems with the conventional definition of CIL are easy to find. Like the opinio juris requirement, the state practice norm is said to be unworkable. There is no agreement on the amount or consistency of practice that is required.46 It is clear that universal state practice is not necessary, but beyond that the opinions of commentators diverge.47 For example, it is unclear whether a single inconsistent act is sufficient to conclude that there has not been “continuous” state practice. Furthermore, if a single inconsistent act is not enough to undermine the consistency of the practice, how much inconsistency is required?48 Even if agreement could be reached on the consistency element, it is difficult to determine how widespread the practice must be. One might hope that the ICJ would provide guidance here, but when the court has addressed the issue it has failed to offer clarity. Judge Lachs, in his dissent in the North Sea Continental Shelf cases, for example, did little more than restate the problem when he commented that a “general practice of States,” which is something less than “universal acceptance,” is sufficient evidence that a practice is accepted as law.49

CIL Can’t solve – Vague

Customary international law lacks a consensus of practice and a definitive evidence base.

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Ultimately, the question is one of the overall importance of practice, and there is no consensus on that issue. In the Anglo-Norwegian Fisheries case, the ICJ stated that “the Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice.”50 Though this quote seems to indicate that practice is of modest consequence, the court then emphasized the importance of “constant and sufficiently long practice.”51 Furthermore, there is no agreement on the forms of evidence that may be used to demonstrate state practice. A liberal view of acceptable evidence of practice includes not only the actual actions of states, but also diplomatic correspondence, treaties, public statements by heads of state, domestic laws, and so on.52 Though there is support for this view, one can also find prominent commentators arguing for a much shorter list.53

Customary international law lacks a definitive evidence base.

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Even if one could resolve the above problems about what counts as practice and the degree of consistency required, there remains the practical problem that observing all relevant evidence from all relevant states will normally be impossible. At the most mundane level, few nations document their actions and statements in a way that allows for an investigation of their practices.60 Furthermore, it is fantastical to think that lawyers in a case, much less adjudicators deciding a case or policymakers selecting a course of action, can canvass the virtually infinite universe of potential evidence, let alone come to some understanding of the extent to which a practice has been followed.61 The challenge is even greater when one realizes that a proper investigation of state practice would consider instances in which states refrain from taking an action because it would be in violation of international law. This latter category of evidence would be the most relevant to an investigation of CIL. The fact that it is unobservable, how- ever, makes it virtually impossible to include in the evaluation of CIL.62 Even if one can identify instances in which states claim to be refraining from certain actions based on CIL, it is difficult to know if they are doing so out of a sincere concern for CIL or if expressions of concern are simply a convenient rhetorical justification for their decision. The interpretation of observable evidence of state action is also problematic. The most visible evidence consists of statements made by countries, including votes in international fora such as the UN General Assembly. Unfortunately, this evidence is also the least reliable, as states may have incentives to misrepresent their beliefs about CIL. In practice, such statements are at times used as evidence by international courts, including the ICJ.63

CIL Can’t Solve – No enforcement

Not enforceable – lacks consistency and coherence

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Finally, in addition to these problems of evidence, attempts to determine state practice inevitably face time and resource constraints, preventing a serious canvassing of all relevant information. The result is that judgments are based on cursory reviews of a few states, biased toward the practices of states with readily available statements about their behavior written in a language understood by the relevant judges,64 heavily influenced by the particular background of the judge, and often inconsistent with the behavior of many states.65 These problems, along with others that are omitted from this brief discussion, make it difficult to take traditional theories of CIL seriously if one approaches the subject with even mild skepticism.66 One illustration of this problem appears in an article by Kelly, who concludes that CIL is “a useless, incoherent source of law that is of little guidance in determining norms.” Even on its own terms, CIL is a problematic area. The basic definitions of CIL are at best difficult to understand and apply and certain to lead to inconsistent judgments about the content of the law; at worst they are incoherent and internally inconsistent.67

Can’t solve: CIL will not be enforced.

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

Third, many treaties and other international declarations are merely empty promises if nations do not actually enforce them. Many nations flout international norms imposed by treaty while others often fail to give them domestic effect. In contrast, Congress expects that the norms it codifies into domestic law will be enforced, providing evidence that those norms are sincerely embraced.

CIL Can’t Solve – No Spillover

No spillover –we’ve incorporated specific provisions before without complete incorporation

Harold Hongju Koh**,** Yale Law Professor**,** 1998,Harvard law Review, Vol. 111, No. 7, May, p. 1839-40

Take, for example, the federal doctrine of foreign sovereign immunity, which originated in the customary international law doctrine of absolute foreign sovereign immunity. Over time, the Supreme Court incorporated that decision into United States law and melded it with a federal common law doctrine of judicial deference to federal executive suggestions of immunity. Eventually, executive policy brought US practice into line with the emerging customary international law doctrine of restrictive sovereign immunity, and Congress codified the new doctrine in the Foreign Sovereign Immunities Act (FSIA), whose gaps federal courts have subsequently filled by declaring rules of federal common law. In short, rules that originate in customary international law are regularly determined by United States courts and incorporated into federal common law, then updated by executive policy as customary law evolves, and codified in federal statutes whose interstices are filled through federal common lawmaking.

CIL Bad – AT: Environment

Treaties solve – don’t need CIL

Daniel W. Drener, Political Science Professor University of Chicago, 2001**,** Chicago Journal of International Law, 2 Chi. J. Int'l L. 321, p. 326-7

Second, the law here is growing largely through treaty ratification, not through customary international law. One could argue that the declarations produced by UN conferences are an attempt to use customary law as a way of bypassing democratic institutions. However, this overlooks the constraints that domestic legal institutions place upon international environmental accords. Case studies of fallout from the 1992 Rio Summit suggest that countries implement environmental accords only to the extent permitted by their domestic political institutions. n24 In the case of the Kyoto Protocol, objections in the United States about the treaty's costs of implementation and the distribution of costs led the Bush administration to reject ratification of the treaty. These actions highlight the fact that when international environmental law has moved forward, it has only occurred with the backing of the great powers. While NGOs do play a role in persuading powerful states to alter their policies, so do other factors, such as the material costs and benefits of such treaties.

CIL Bad – AT: Satellites (Koplow)

Koplow Concedes – CIL is not enough for an ASAT ban

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

In sum, general CIL gets us only halfway toward an effective ASAT ban. There is, I submit, sufficient evidence of congruent behavior by the leading spacefaring States to satisfy the objective criterion; they have in general refrained from testing or using ASAT devices. The observed pattern of conformity is not perfect, but especially in the past two decades (and, specifically, until the U.S. and Chinese events in 2007 and 2008), the aberrations from a "no ASATs" rule have been few. If physical actions alone were sufficient to entrench a CIL rule, then we would have such a standard. On the other hand, the evidence to satisfy the subjective component of the usual definition of CIL is essentially lacking. States have not generally asserted the belief that ASAT testing or use is already a violation of the world community's expectations. The three States that have occasionally conducted ASAT events have certainly not conceded the illegality of their respective programs, and the many other States that observe and comment on those ASAT programs have criticized them with rhetoric that sounds in policy, not in law. To date, there has  [\*1242]  been little affirmative argumentation that an opinio juris already exists to outlaw ASATs under general CIL. [n179](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n179)

CIL Bad - Undemocratic

**Customary international law can’t solve because it has democratic deficits built into its definition.**

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

A glaring problem with customary international law, the most important category of raw international law, is that it has a democratic deficit built into its very definition. To be customary international law, a principle must result “from a general and consistent practice of states followed by them from a sense of legal obligation.”7 This definition mentions only the “general and consistent practice of” nation‐states without any reference to representative processes or to the welfare of citizens. Thus, by its very definition, customary international law neglects democratic decision making. In addition to this theoretical problem, customary international law has at least five different democratic deficits that arise in practice.

CIL is undemocratic, nonbinding, and meaningless

**Kelly 00** (J. Patrick, Winter, Law Professor Widener University, Virgina Journal of International Law)

I argue that CIL should be eliminated as a source of international legal norms and replaced by consensual processes. My goal is not to undermine international law, but to encourage the use of more democratic, deliberative processes in formulating this law. My argument has three components. First, the substantive CIL norms of the literature lack the authority of customary law and therefore are not binding on states. CIL lacks authority as law, because such norms are not, in fact, based on the implied consent or general acceptance of the international community that a norm is obligatory. Both implied consent and general acceptance are fictions used at different historical periods to justify the universalization of preferred norms. In a world of many cultures and values, general acceptance is neither ascertainable nor verifiable.

Second, CIL has evolved into a meaningless concept that furnishes neither a coherent nor objective means of determining the  [\*453]  norms of international law, how and when they come into existence, and which nations are bound. As an undefined and indeterminant source, it is unable to perform its assigned function as a relatively objective source of international norms based on social fact.

Third, the CIL process lacks procedural legitimacy. The process of norm formation, as actually practiced, violates the basic notion of democratic governance among states and is a particularly ineffective way to generate substantive norms that will command compliance. Few nations participate in the formation of norms said to be customary. The less powerful nations and voices are ignored. There is little consideration of alternatives and trade-offs in reconciling diverse values and interests. Consequently, CIL should be discarded as a source of law and replaced by consent-based processes that permit wide participation, the discussion of alternatives, and the commitment of nations to their norms.

Can’t solve: CIL has the democratic deficit of not having to assent affirmatively.

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

First, nations do not have to assent affirmatively to the creation of a principle of customary international law. Instead, nations are considered to have consented to a principle if they simply failed to object.8 This measure of assent compares unfavorably with the requirements of domestic democracy, which assure both deliberation and accountability. Domestic political actors cannot create norms by inaction but instead must affirmatively embrace a practice to make it law.

CIL Bad - Undemocratic

Can’t solve: CIL has been influenced by totalitarian countries.

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

Second, undemocratic, even totalitarian, nations wield influence on international law. This influence is most obvious in multilateral human rights treaties, like the U.N. Convention on the Rights of the Child,9 which are often asserted as a basis for customary international law even if not ratified by the United States.10 Totalitarian nations like the Soviet Union and communist China participated in the negotiations of these treaties. One can hardly be confident that the same provisions would have emerged absent the influence of those “evil empire[s].”11 Consider this analogy: Should the United States give domestic effect to provisions of treaties that it did not ratify, but that instead were approved by Nazi Germany and other Axis powers?

Can’t solve: CIL law doesn’t have the solvency that domestic law has.

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

Thus, international law has many democratic deficits. Domestic democracy is far from perfect, but elections, deliberation, and the scrutiny of public officials provide substantial assurance that norms beneficial for Americans will develop over time. Defenders of international law sometimes note that the American legal system makes use of undemocratic norms, like custom and the common law. But international law simply does not possess the virtues of domestic custom or the common law. For example, the notion behind efficient custom is that individuals interacting reciprocally and repeatedly will adopt norms that maximize their joint surpluses.15 Because nations rather than people create customary international law, it is not well designed to maximize the welfare of people.16

Courts Link – PC

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

Brickman 7 (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 JFS

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.

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)JFS

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 – PC

Court decisions create a political ripple effect – provoking massive debate in Congress

Campbell 2k (Colton, Government Prof, CONGRESS CONFRONTS THE COURTS, p. 22)JFS

The final situation in which the judiciary usurps the legislative power may be equally dangerous to the legitimacy of the Court. This is when an ideological majority (on some issues a very narrow majority) on the Court is not behind public a opinion but too far ahead of it, and proceeds to overturn long-standing laws in the name of a 'living constitution' or the Court's higher constitutional authority to protect rights and minorities. When this happens, unfortunately for the Court, it is likely to provoke a widespread popular backlash that will be reflected in the other branches of the federal government that are more responsive to the popular will, even if elite opinion is on the side of the Court. The decisions of the later Warren and early Burger courts clearly appear to fit this pattern, when the Supreme Court emboldened by its success in changing national policy on civil rights attempted to change state and federal law on matters such as criminal suspects' rights, school prayer, the death penalty, school busing, and abortion, when a national consensus for change' as not yet apparent or on some of these issues (such as the death penalty and suspects' rights) was actually moving n the opposite direction. And while the Court may succeed in changing the law in defiance of a majority of the public, the sustained hostility engendered toward the legislative branch is not healthy for the Court's authority. A Supreme Court perceived as arrogant, elitist, and out-of-touch is unlikely to be respected.

Courts Link – Obama

Obama linked to the Court – influence via Solicitor General ensures the link

USA TODAY 8 (Joan, 11-6-8 “New solicitor general on Obama to-do list, http://www.usatoday.com/news/washington/judicial/2008-11-06-obamacourt\_N.htm, accessed 3-5-9)

While it may be several months — or longer — before President-elect Barack Obama has an opportunity to fill a seat on the Supreme Court, his administration could still have an immediate impact at the high court. One of Obama's early appointments after he takes office is likely to be a new U.S. solicitor general, the government's top lawyer before the court. Obama also will soon have to decide whether to alter strategy on a swath of cases at all levels of the judiciary, including on Guantanamo detainees, environmental standards and health and safety regulation. The solicitor general would play a key role in those decisions. The post has been held by prominent lawyers such as Thurgood Marshall (named by President Lyndon Johnson) and Robert Bork (President Nixon). Unlike justices, who are appointed for life, the solicitor general (SG) serves for four years or less during the president's term. A vacancy on the bench may arise by next summer. Five of the nine justices are 70 or older, and John Paul Stevens is 88. In recent decades, retiring justices generally have waited until the end of a court term, around June, to reveal their intentions. Dubbed "the 10th justice," because of his [the] close relationship to the court, the solicitor general is involved in about two-thirds of the court's cases and significantly shapes its docket. He [The Solicitor General] often will weigh in when the government is not a party in a case, and the court routinely asks the SG's office for advice on whether to take a pending appeal. "The SG is the face that the administration presents to the Supreme Court, and it sets the direction for the administration throughout the federal justice system," says Yale Law professor Drew Days, who was President Clinton's first solicitor general. While a new administration routinely makes immediate changes in domestic policy, it is trickier to suddenly alter arguments in a lawsuit. That's particularly true at the high court, where the justices traditionally hear from the SG not simply a policy position but a long-considered legal judgment rooted in prior cases. "The solicitor general is the ultimate repeat player at the Supreme Court," says Paul Clement, who was President Bush's solicitor general from June 2005 to this past June. "A change in the government's position could affect the court's perception of its arguments in other cases." Walter Dellinger, a former Clinton solicitor general, says a new administration faces a difficult balance. "Positions strongly held by a new president deserve to be put before the court," he says, "but, at the same time, you are going to have a solicitor general there for four years. You don't want to appear to be a windmill" affected by political winds. In 1993, although newly elected President Clinton opposed the Bush administration's policy of deporting Haitians who had fled their homeland, Clinton lawyers defended the Bush stance. Typically, an administration's most high-profile legal positions are crafted by consensus among the president's top lawyers. Yet it falls to the solicitor general, overseeing an office of 25 attorneys, to present the position at the ritual-laden Supreme Court.

**[ADRI NOTE – EVIDENCE HAS BEEN GENDER MODIFIED]**

Courts Links – Solicitor General

The Court links – Obama’s Solicitor General defends the federal government’s position in front of the Court – this guarantees the link – win OR lose –

A. If the Solicitor General wins, and the decision is unpopular, the Administration gets the blame because she’s Obama’s Solicitor General

B. If the Solicitor General loses, and the decision is unpopular, the Administration gets the blame because the Solicitor General is a loser

Office of the Solicitor General no date (“About the Office of the Solicitor General” http://www.usdoj.gov/osg/about\_us.htm, accessed 3-7-9)JFS

The task of the Office of the Solicitor General is to supervise and conduct government litigation in the United States Supreme Court. Virtually all such litigation is channeled through the Office of the Solicitor General and is actively conducted by the Office. The United States is involved in approximately two-thirds of all the cases the U.S. Supreme Court decides on the merits each year. The Solicitor General determines the cases in which Supreme Court review will be sought by the government and the positions the government will take before the Court. The Office's staff attorneys, Deputy Solicitors General and Assistants to the Solicitor General, participate in preparing the petitions, briefs, and other papers filed by the government in the Supreme Court. The Solicitor General conducts the oral arguments before the Supreme Court. Those cases not argued by the Solicitor General personally are assigned either to an Assistant to the Solicitor General or to another government attorney. The vast majority of government cases are argued by the Solicitor General or one of the office attorneys. Another responsibility of the Office is to review all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, what position should be taken. Moreover, the Solicitor General determines whether the government will participate as an amicus curiae, or intervene, in cases in any appellate court.

Solicitor General ensures the link to Obama – he appointed her, and Solicitor General defends the government’s position

Issenberg 9 (Sasha, Boston Globe “Harvard dean nominated to be Obama's solicitor general” http://www.mercurynews.com/nationworld/ci\_11383083, accessed 3-5-9)JFS

WASHINGTON — Elena Kagan, the Harvard Law School dean and a onetime clerk to Supreme Court Justice Thurgood Marshall, was nominated Monday to become President-elect Barack Obama's solicitor general, charged with defending the government's position before the Supreme Court. Kagan, who as an academic specialized in charting the limits of the president's regulatory authority and as an aide to President Clinton tested them, is likely to play a key role in Obama's efforts to redraw such powers after what he has described as his predecessor's abuses in expanding them.

Court decisions inherently politicized – Solicitor General gets drawn in – Brown proves

Devins 2k (Neal, William and Mary law professor, The Green Bag, Spring, p. 260-1)JFS

Third, political judgments shape Court doctrine. In Brown v. Board, a highly influential Solicitor General brief emphasized how segregation undermined America's status as leader of the free world and, as such, strengthened Russia's hand in the Cold War.

Courts Links – Solicitor General

Solicitor General is an agent of the executive branch, and is responsible for arguing the U.S. position before the Court, ensuring the link

U.S. Solicitor General Waxman, 1998

(Seth P., “Presenting the Case of the United States As It Should Be: The Solicitor General in Historical Context: Address to the

Supreme Court Historical Society”, 6-1-98, *US DOJ*, <http://www.usdoj.gov/osg/aboutosg/sgarticle.html#N_0_>, accessed: 9-19-06)

The Solicitor General is of course an Executive Branch officer, reporting to the Attorney General, and ultimately to the President, in whom our Constitution vests all of the Executive power of the United States. Yet as the officer charged with, among other things, representing the interests of the United States in the Supreme Court, the position carries with it responsibilities to the other branches of government as well. As a result, by long tradition the Solicitor General has been accorded a large degree of independence.

To the Congress, Solicitors General have long assumed the responsibility, except in rare instances, of defending the constitutionality of enactments, so long as a defense can reasonably be made.[(5)](http://www.usdoj.gov/osg/aboutosg/sgarticle.html#N_5_#N_5_) With respect to the Supreme Court, the Solicitor General has often been called "the Tenth Justice."[(6)](http://www.usdoj.gov/osg/aboutosg/sgarticle.html#N_6_#N_6_) But alas, although I get to participate a lot, I do not get a vote (and in some important cases I could really use one). No, the Solicitor General's special relationship to the Court is not one of privilege, but of duty -- to respect and honor the principle of stare decisis, to exercise restraint in invoking the Court's jurisdiction, and to be absolutely scrupulous in every representation made. As one of my predecessors, Simon Sobeloff, once described the mission of the office:

The Solicitor General is not a neutral, he [the Solicitor General] is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice.[(7)](http://www.usdoj.gov/osg/aboutosg/sgarticle.html#N_7_#N_7_)

So what does the Solicitor General do, and how did the office come to be? As for the "what," for the past 50 years or so, the Solicitor General has had two principal functions: to represent the United States in the Supreme Court and, with respect to the lower federal courts and state courts, to decide when the United States should appeal a case it has lost, when it should file a brief amicus curiae, and when the United States should intervene to defend the constitutionality of an Act of Congress. Ultimately, it is the responsibility of the Solicitor General to ensure that the United States speaks in court with a single voice -- a voice that speaks on behalf of the rule of law.

**[NOTE – THIS EVIDENCE HAS BEEN GENDER MODIFIED]**

Solicitor General is the government’s litigator, ensuring the link

Baylor University Office of Public Relations, 9-6-06

(“U.S. Solicitor General Draws a Crowd for Public Leadership Lecture”, *Baylor University Office of Public Relations*, <http://www.baylor.edu/pr/news.php?action=story&story=41608>, accessed 9-19-06)

The major function of the Solicitor General's Office is to supervise and conduct government litigation in the United States Supreme Court. Virtually all such litigation is channeled through the Office of the Solicitor General and is actively conducted by the Office. The United States is involved in about two-thirds of all the cases the U.S. Supreme Court decides on the merits each year. The Solicitor General determines the cases in which Supreme Court review will be sought by the government and the positions the government will take before the Court. The Office's staff attorneys participate in preparing the petitions, briefs and other papers filed by the government in its Supreme Court litigation.

Courts Link – Decisions Politicized

Decisions are politicizes and invite blaming

Katzman 97 (Robert, prof of law and public policy, Courts and Congress, pg. 109)JFS

For defenders of the judiciary, such expressions risk making the courts a political football. In this view, Congress, unabletodefinitively address a problemitself, passes ambiguous legislation, leaves it to the judiciary to interpret, and then blame judges for the decisions made. The upshot of these criticisms may well be more frequent calls for judicial discipline or even impeachment.

Court is not insulated in an apolitical vacuum – Congress will retaliate

Campbell 2k (Colton, George Mason Govt Prof, Congress Confronts The Courts, p. 9)JFS

In most respects, the politics of congressional response to the Court's invalidation of federal law resembles congressional politics generally, and the Court generally acquiesces. Some overrides follow soon after a decision, while others come considerably later. In many cases, lawmakers are constrained by the lobbying efforts of beneficiaries of the Court's ruling. Still, Congress regularly reviews and challenges the decisions of the Supreme Court; the High Bench does not exist in an apolitical vacuum.

Court decisions have political repercussions – can provoke sharp divisions and political opposition coalitions

Puro 2k (Steven, St Louis U Prof of Poli Sci and Public Policy, St Louis U Public Law Rev, p. 125)JFS

Congress's willingness to rewrite legislation that has been overturned by the Supreme Court has been limited by divisions within Congress and the constitutional or legislative interpretations of key committee members. Canon and Johnson argue that the Court can make lasting policy interpretations more easily when Congress has sharply divided policy preferences. But when there are solid coalitions opposing the Court in Congress, Congress can enforce its preferences against the Court's.

Congress attacks court decisions

Carp 96 (Robert, law professor, JUDICIAL PROCESS IN AMERICAN, p. 381)JFS

Congressional attacks on the federal courts in general and on certain judges in particular are another method of responding to judicial decisions. Sometimes these attacks are in the form of verbal denouncements that allows a member of Congress to let off steam over a decision or series of decisions. Members of Congress often denounce the Court publicly.

Congress will politicize decisions for electoral gains

Meernik 95 (James, political scientist, POLITICAL RESEARCH QUARTERLY, pp. 47-8)JFS

Congressional willingness to respond to public anger or demands for action may also occur when Court decisions are handed down in election years. By attacking the Court during these periods, Congress as well as individual representatives and senators are usually assured of greater media attention and opportunity to make their case. Campaigning against unpopular Court decisions may also prove to be good politics when the electorate is outraged by Court decisions, such as the 1954 school desegregation case.

Courts Link – A2: President Not Involved

Politicization of decisions ensures the president gets drawn into the debate over the decision

Baum, Ohio State Research Professor in Political Science, 98

(Lawrence, THE SUPREME COURT, 1998, p. 253)

The president can influence congressional responses to the Supreme Court by taking a position on proposals for action. Sometimes it is the president who first proposes anti-Court action. The most dramatic example in the twentieth century is President Roosevelt's Court-packing plan. Since the 1960s, conservative presidents have encouraged efforts in Congress to limit or overturn some of the Court's liberal rulings on civil liberties. For instance, George Bush led the effort to overturn the Court's flag-burning decisions in 1989 and 1990.

Legislative backlash against the decision ensures the president would have to take a position on Congress’s attempt to retaliate

Meernik, University of North Texas, 1995

(James POLITICAL RESEARCH QUARTERLY, v. 48, pp. 46-7)

We hypothesize that when a majority is in favor of overturning the Court decision, or opposed to the position the Court has taken, the Congress believing majoritarian rule has been thwarted, will be sufficiently aroused to make a significant and genuine attempt at reversing the ruling.

Courts Link – A2: No Perception

Public perceives the Court

Levin, Landmark Legal Foundation President, 5 (Mark, National Review, "Men in Black," 2-1-05, Lexis)

I think the general public is becoming increasingly aware of, and concerned about, the judiciary's power. The public sees the courts issuing increasingly extreme and even bizarre decisions, which receive considerable media attention. And if the callers to my radio show are any indication, they know what's going on and don't like it one bit.

Empirically, unpopular decisions are perceived

Clegg, general counsel of the Center for Equal Opportunity, 5

(Roger, *National Review*, June 2 2005, http://www.nationalreview.com/comment/clegg200506020745.asp, accessed 9-13-6)

There are at least two problems here. The first is that it is not at all clear that the public sides with the Court on these issues. The second is that whether it does or not ought to be irrelevant to the Court. On the first point, consider, for instance, a Harris Interactive survey taken in July 2003, just after the Court’s decisions in the University of Michigan cases. The survey found that 76 percent of Americans disagreed with the proposition — a fair statement of the Court’s ruling — that “A university is allowed to use race as one of several factors in deciding whom to admit.” Only 19 percent agreed. This is in line with many other surveys, and it is simply not true to say that the public favors the racial preferences the Court has allowed. Or consider gay rights. Popular initiatives in state after state have rejected gay marriage, as Rosen himself concedes later in the same paragraph. In the Court’s two gay-rights decisions, it had to strike down not only a Texas state statute but also a Colorado state-wide popular referendum that had passed just four years earlier. As for abortion, the issue these days is hardly “early-term abortions.” Rather, the courts have been limiting or striking down parental notification requirements and partial-birth bans, both of which the public supports.

The Court is perceived and media bolsters the link

Casillas, Enns, & Wohlfarth 9 (Chris, Peter, & Patrick-Cornell Ptx, http://www.unc.edu/~pcwohlf/sc\_ajps\_revised.pdf)

Focusing on legislative policies, Stimson (1991) describes the public's region of acceptability as a \zone of acquiescence."4 As long as policy makers act within the zone of acquiescence, the public would rather pay attention to things other than politics. If policy makers stray outside of this zone, however, the media may bring the deviation to light, igniting the public's ire. We hold that the same applies to Supreme Court decision making. Most of the time, the public is content to ignore the activities of the Court. But if the Court strays beyond the zone of acquiescence, this deviation could be newsworthy. Thus, rulings outside the zone of acquiescence increase the probability that negative news about the Court will come to the attention of the public. Although the Court enjoys high levels of diffuse support" (Caldeira & Gibson 1992, 658) and media often reflect a \positivity bias" depicting the Court in a positive light (Gibson, Caldeira & Spence 2003), negative news and unpopular decisions can erode public support for the Court (Durr, Martin & Wolbrecht 2000, Gibson, Caldeira, & Spence 2003, 555, Grosskopf & Mondak 1998, Hoekstra 2000, Posner 2008, 274).

Courts Link – A2: No Perception

The public even knows details of decisions

Casillas, Enns, & Wohlfarth 9 (Chris, Peter, & Patrick-Cornell Ptx, http://www.unc.edu/~pcwohlf/sc\_ajps\_revised.pdf)

It is worth noting that recent research suggests that the public's knowledge of the Court is higher than previously thought (Gibson & Caldeira 2009) and that for some non-salient cases, individuals near the origin of the dispute do show some case-specific knowledge (Hoekstra 2000, Hoekstra 2003). Yet, our primary answer to this question begins with the assertion that even without case-specific knowledge, the public's support for the Court changes in meaningful ways. The public is largely ignorant about economic theory and facts, yet holds highly informed expectations about the state of the economy (Erikson, MacKuen & Stimson 2002). Similarly, without being able to provide information about candidates or the campaign, voters systematically select the candidate who aligns with their preferences (Lodge, Steenbergen & Brau 1995). The seeming incongruence between factually unin- formed citizens and meaningful public opinion has been explained by the theory of on-line processing, which holds that countervailing impressions, such as good news or bad news, are 20 incorporated into summary evaluations, even when facts and arguments are poorly under- stood and discarded (Lodge, Steenbergen & Brau 1995, Lodge, McGraw & Stroh 1989). To the extent individuals rely on an \on-line tally," when rulings that were originally non-salient receive attention at a future time period, these decisions can influence the public's summary evaluations of the Court even if individuals do not learn the details of the case.

Media and opinion leaders draw attention to details of Court decisions

Casillas, Enns, & Wohlfarth 9 (Chris, Peter, & Patrick-Cornell Ptx, http://www.unc.edu/~pcwohlf/sc\_ajps\_revised.pdf)

Importantly, media and organized interests regularly draw attention to prior non-salient rulings, or series of rulings, that deviated from public opinion. Consider, for example, Hudson v. Michigan (2006) and Herring v. United States (2009), two \non{salient" rulings during the Roberts Court on the \exclusionary rule." Two weeks after Herring, the New York Times highlighted the Court's expansion of permissible search and seizures with the front page story (1/31/2009), \Supreme Court Edging Closer to Repeal of Evidence Ruling."28 Similarly, even though Tushnett (2005, 277) notes, \no one besides the justices really cares about federalism," following Federal Maritime Commission v. South Carolina State Ports Authority (2002), the New York Times headline, \At the Court, Dissent over States' Rights is Now War" called attention to the increasingly vocal dissent against repeated rulings in favor of states' rights.29 Additionally, pundits regularly incorporate non-salient cases into their overall assessments of the Court. These examples illustrate that justices cannot assume that media will always ignore decisions that initially do not command attention, particularly if rulings become part of a pattern of unpopular decisions.

Interest groups tout the plan

Casillas, Enns, & Wohlfarth 9 (Chris, Peter, & Patrick-Cornell Ptx, http://www.unc.edu/~pcwohlf/sc\_ajps\_revised.pdf)

Organized interests also bring information about prior non-salient decisions and patterns of decisions to the public's attention.30 Consider, for example, the National Urban League press release (May 2, 2006) referring to the Voting Rights Act Reauthorization and Amend- ments Act of 2006. The press release stated, \Among other things, the bill reauthorizes and restores Section 5 to the original congressional intent that has been undermined by the Supreme Court in Reno v. Bossier Parish II and Georgia v. Ashcroft."31 Reporting on the \Top Issues that Shaped the Quality of Aging in America" in 2000, an AARP press release referred to the non-salient Reeves v. Sanderson Plumbing Products, Inc. as \a landmark decision for victims of age discrimination in the workplace."32 Thus, the Court can also receive positive coverage for ruling in a way that benefits a group. Furthermore, as these examples suggest, organized interests typically frame information about decisions in ways that facilitate using an \on-line tally" to update summary evaluations about the Court. Even when the Supreme Court makes a ruling that does not initially attract attention, some of the time, media and organized interests draw attention to the case. This fact alone might be sufficient for a strategic Court to consider public opinion in non-salient cases. To behave otherwise would risk negative attention at a future time point. Of course, the incentives for considering public opinion would be even stronger if evidence showed that the accumulation of deviant opinions in non{salient cases in fact reduces support for the Court.

Courts Link – A2: No Perception

Decisions are perceived

Hrezo 4 (Margaret, Ptx-Radford, http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Hoekstra104.htm)

Hoekstra begins with the premise that the bulk of the Supreme Court's work consists of "ordinary" cases. It is these cases, she argues, that researchers should study in order to understand the nature and extent of public support for the Court and the role of specific decisions in building or losing that support. She focuses on four cases: LAMB'S CHAPEL v. CENTER MORICHES FREE UNION SCHOOL DISTRICT (1993), BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT v. GRUMET (1994), OKLAHOMA TAX COMMISSION v. CHICKASAW NATION (1995), and BABBITT v. SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON (1995). Hoekstra's substantive thesis is the simple but powerful idea that the public is more attentive to the work of the Supreme Court than researchers usually suppose. Thus, in the end, "court decisions matter" (p.145). If information about decisions is available, and citizens are sufficiently motivated by the issues to learn about them, then public awareness of the Court and its work increases. Although Hoekstra finds very little evidence that the Court can shape public opinion, her findings support the notion that decisions do change some people's views of the Court. In addition, those who are initially receptive to the position adopted by the Court's decision tend to become more supportive of the Court after the decision, while those on the other side of the issue become less supportive. Thus, "the Court's political capital appears expendable and … people appear to evaluate the Court based on its actions" (p.30).