## 2AC CP

### 2AC Theory

#### Constitutional amendments never happen are illegitimate—fiats multiple actors which doesn’t reflect a real world opportunity cost—trains us for a bad model of decisionmaking—distracts from substantive topic education because– magnifies all of our theory arguments

Baker 10

[Director of the Con Law Center at Drake, 10 Widener J. Pub. L. 1]

There is a reason that there have been only 27 amendments over more than 200 years: Constitutional amendments must have the sustained and one-sided support of great majorities in the Congress and across the states. Very few issues ever garner such importance and support.

### 2AC Solvency Deficits

#### Immediate court action is key—the Kiyemba case is in the spotlight now for democratic transitions and those questioning US leadership—the CP doesn’t do anything until the court strikes down the executive’s continued detention on the basis of the amendment

#### Even they fiat immediacy, it takes years to have a meaningful effect

Joyce, Prof of Public Administration at George Washington, 98

“The Rescissions Process After the Line Item Veto: Tools for Controlling Spending”

<http://www.rules.house.gov/archives/rules_joyc07.htm>

In the final analysis, there is no clear fallback position for supporters of the Line Item Veto Act. The Supreme Court, in its majority opinion, stated flatly that a different role for the President in the lawmaking process could only "come through the Article V amendment procedures". Deciding the issue through amending the Constitution, however, has two substantial drawbacks. The first is that Constitutional amendments are notoriously difficult to adopt. Even if a Constitutional amendment were adopted, it would likely not take effect for a number of years. The second is more substantive. A constitutionally provided line item veto would only allow the President to veto items that were specifically provided for in appropriation bills. Most federal "line items", however, are found not in statute, but in report language accompanying statutes.

#### It undermines US legitimacy—shifts the spotlight to the constitutional convention

Schiafly 99

[May 1999, The Schiafly Report, Vol 29 No 10, http://www.eagleforum.org/psr/1996/may96/psrmay96.html]

Most of us have watched a Republican National Convention or a Democratic National Convention on television. We've seen the bedlam of people milling up and down the aisles. We've watched how the emotions of the crowd can be stirred, and we've felt the tension when thousands of people make group decisions in a huge auditorium. Now imagine holding the Republican and Democratic National Conventions together -- at the same time and in the same hall. Imagine the confrontations of partisan politicians and pressure groups, the clash of liberals and conservatives, and the tirades of the activists -- all demanding that their view of constitutional issues prevail. Imagine the gridlock as the Jesse Helms caucus tries to work out constitutional change with the Jesse Jackson caucus! No wonder Rush Limbaugh said that a Con Con would be the worst thing that could happen to America and that it might signal time to "move to Australia." That's what it would be like if the United States calls a new Constitutional Convention (Con Con) for the first time in 209 years. It would be a self-inflicted wound that could do permanent damage to our nation, to our process of self-government, and possibly even to our liberty. A Con Con would throw confusion, uncertainty, and court cases around our governmental process by opening up our entire Constitution to be picked apart by special-interest groups that want various changes. It would make America look foolish in the eyes of the world, unsettle our financial markets, and force all of us to re-fight the same battles that the Founding Fathers so brilliantly won in the Constitutional Convention of 1787. George Washington and James Madison both called our Constitution a "miracle". We can't count on a miracle happening again.

#### The CP doesn’t solve the judiciary advantage—undermines judicial review

Sullivan 96, Professor of Law

[January, 1996, Kathleen M. Sullivan, Professor of Law, Stanford University, “CONSTITUTIONAL CONSTANCY: WHY CONGRESS SHOULD CURE ITSELF OF AMENDMENT FEVER”, 17 Cardozo L. Rev. 691]

How have we managed to survive over two hundred years of social and technological change with only twenty-seven constitutional amendments? The answer is that we have granted broad interpretive latitude to the Supreme Court. Narrow construction would necessitate more frequent resort to formal constitutional amendments. Broad construction eliminates the need. Thus, the Court has determined that eighteenth century restrictions on searches of our "papers and effects" apply to our twentieth century telephone calls, and that the command of equal protection forbids racially segregated schools even though such segregation was known to the Fourteenth Amendment's framers. Neither of these decisions - Katz v. United States and Brown v. Board of Education - required a constitutional amendment. Nor did the Court's "switch in time that saved nine" during the New Deal. In the early twentieth century, the Court struck down much federal economic legislation as exceeding Congress's power and invading the province of the states. Under President Roosevelt's threat to expand and pack the Court, the Court desisted, and started to defer to all legislation bearing some plausible relationship to interstate commerce. Some scholars have called the Court's decision to defer to national economic legislation revolutionary enough to count as an informal constitutional amendment, but most view it as within the broad contours of reasonable interpretive practice. Increasing the frequency of constitutional amendment would undermine the respect and legitimacy the Court now enjoys in this interpretive role. This danger is especially acute in the case of proposed constitutional amendments that would literally overturn Supreme Court decisions, such as amendments that would declare a fetus a person with a right to life, permit punishment of flag-burning, or authorize school prayer. Such amendments suggest that if you don't like a Court decision, you mobilize to overturn it. Justice Jackson once quipped that the Court's word is not final because it is infallible, but is infallible because it is final. That finality, though, has many salutary social benefits. For example, it allows us to treat abortion clinic bombers as terrorists rather than protesters. If every controversial Supreme Court decision resulted in plebiscitary overruling in the form of a constitutional amend- [\*703] ment, surely the finality of its word would be undermined, and with it the social benefits of peaceful conflict resolution. The fact that we have amended the Constitution only four times in order to overrule the Supreme Court is worth remembering.

#### Strong judicial model prevents Russian loose nukes

Nagle, Independent Research Consultant Specializing in the Soviet Union, 1994 (Chad. “What America needs to do to help Russia avoid chaos” Washington Times, August 1, Lexis Nexis)

As things stand right now, there is indeed potential for danger and instability in Russia, as Mr. Criner notes. But this is not because America has failed to act as a "moral compass" in the marketplace. Rather, Russia's inherent instability at present stems from the fact that in all of its 1,000-year history, it never had a strong, independent judiciary to act as a check on political power. The overwhelming, monolithic power of the executive, whether czar or Communist Party, has always been the main guarantor of law and order. Now, as a fragile multiparty democracy, Russia has no more than an embryo of a judiciary. The useless Constitutional Court is gone, the Ministry of Justice is weak, and the court system is chaotic and ineffective. Hence, the executive determined the best safeguard against the recurrence of popular unrest, the kind that occurred in October 1993, to be the concentration of as much power as possible in its hands at the expense of a troublemaking parliament. Under a sane and benign president, Russia with a "super presidency" represents the best alternative for America and the West. The danger lies in something happening to cause Mr. Yeltsin's untimely removal from office. If Russia is ever to develop a respected legal system, it will need the protracted rule of a non-tyrannical head of state. In the meantime, the United States can provide a model to Russia of a system in which the judiciary functions magnificently. America, the world's only remaining superpower, can provide advice and technical expertise to the Russians as they try to develop a law-based society. We can also send clear signals to the new Russia instead of the mixed ones emanating from the Clinton administration. Now is the time for America to forge ahead with the "new world order," by promoting the alliance of the industrialized democracies of the Northern Hemisphere on American terms, not Russian. This constitutes the real "historical moment" to which Mr. Criner refers. Russia is not in a position to make threats to or demands of the United States any more so than when it ruled a totalitarian empire. It should learn to play by new rules as a first lesson in joining the family of nations. Coddling an aggressive Russia and giving it unconditional economic aid (as Alexander Rutskoi has called for) would be counterproductive, and might even encourage Russia to "manufacture" crises whenever it wanted another handout. Russia is indeed a dangerous and unstable place. The prospect of ordinary Third World political chaos in an economically marginal country with a huge stockpile of intercontinental ballistic missiles is a nightmare. However, Mr. Yeltsin is busily consolidating power, and the presidential apparatus is growing quickly. With his new team of gray, non-ideological figures intent on establishing order in the face of economic decline and opposition from demagogues (e.g. Vladimir Zhirinovsky and Mr. Rutskoi), Mr. Yeltsin is already showing signs of success. Under such circumstances, the best America can do is stand firm, extend the hand of friendship and pray for Mr. Yeltsin's continued good health.

Extinction

Helfand and Pastore 9 [Ira Helfand, M.D., and John O. Pastore, M.D., are past presidents of Physicians for Social Responsibility.

March 31, 2009, “U.S.-Russia nuclear war still a threat”, http://www.projo.com/opinion/contributors/content/CT\_pastoreline\_03-31-09\_EODSCAO\_v15.bbdf23.html]

President Obama and Russian President Dimitri Medvedev are scheduled to Wednesday in London during the G-20 summit. They must not let the current economic crisis keep them from focusing on one of the greatest threats confronting humanity: the danger of nuclear war. Since the end of the Cold War, many have acted as though the danger of nuclear war has ended. It has not. There remain in the world more than 20,000 nuclear weapons. Alarmingly, more than 2,000 of these weapons in the U.S. and Russian arsenals remain on ready-alert status, commonly known as hair-trigger alert. They can be fired within five minutes and reach targets in the other country 30 minutes later.  Just one of these weapons can destroy a city. A war involving a substantial number would cause devastation on a scale unprecedented in human history. A study conducted by Physicians for Social Responsibility in 2002 showed that if only 500 of the Russian weapons on high alert exploded over our cities, 100 million Americans would die in the first 30 minutes.  An attack of this magnitude also would destroy the entire economic, communications and transportation infrastructure on which we all depend. Those who survived the initial attack would inhabit a nightmare landscape with huge swaths of the country blanketed with radioactive fallout and epidemic diseases rampant. They would have no food, no fuel, no electricity, no medicine, and certainly no organized health care. In the following months it is likely the vast majority of the U.S. population would die. Recent studies by the eminent climatologists Toon and Robock have shown that such a war would have a huge and immediate impact on climate world wide. If all of the warheads in the U.S. and Russian strategic arsenals were drawn into the conflict, the firestorms they caused would loft 180 million tons of soot and debris into the upper atmosphere — blotting out the sun. Temperatures across the globe would fall an average of 18 degrees Fahrenheit to levels not seen on earth since the depth of the last ice age, 18,000 years ago. Agriculture would stop, eco-systems would collapse, and many species, including perhaps our own, would become extinct.  It is common to discuss nuclear war as a low-probabillity event. But is this true? We know of five occcasions during the last 30 years when either the U.S. or Russia believed it was under attack and prepared a counter-attack. The most recent of these near misses occurred after the end of the Cold War on Jan. 25, 1995, when the Russians mistook a U.S. weather rocket launched from Norway for a possible attack.  Jan. 25, 1995, was an ordinary day with no major crisis involving the U.S. and Russia. But, unknown to almost every inhabitant on the planet, a misunderstanding led to the potential for a nuclear war. The ready alert status of nuclear weapons that existed in 1995 remains in place today.

#### The CP doesn’t do anything

Strauss, Law Prof at Chicago, 01

114 Harv. L. Rev. 1457

One final implication is the most practical of all. If amendments are in fact a sidelight, then it will usually be a mistake for people concerned about an issue to try to address it by amending the Constitution. Their resources are generally better spent on legislation, litigation, or private-sector activities. It is true that the effort to obtain a constitutional amendment may serve very effectively as a rallying point for political activity. A constitutional amendment may be an especially powerful symbol, and it may be worthwhile for a group to seek an amendment for just that reason. But in this respect constitutional amendments are comparable to congressional resolutions, presidential proclamations, or declarations of national holidays. If they bring about change, they do so because of their symbolic value, not because of their operative legal effect. The claim that constitutional amendments under Article V are not a principal means of constitutional change is a claim about the relationship between supermajoritarian amendments and fundamental, constitutional change. It should not be confused with the very different claim that judicial decisions cannot make significant changes without help from Congress or the President; n25 and it certainly should not be confused with a global skepticism about the efficacy of political activity generally. The point is that changes of constitutional magnitude - changes in the small-"c" constitution - are not brought about by discrete, supermajoritarian political acts like Article V amendments. It may also be true that such fundamental change is always the product of an evolutionary process and cannot be brought about by any discrete political act - by a single statute, judicial decision, or executive action, or (at the state level) by a constitutional amendment, whether adopted by majoritarian referendum or by some other means. What is true of Article V amendments may be equally true of these other acts: either they will ratify (while possibly contributing to) changes that have already taken place, or they will be ineffective until society catches up with the aspirations of the statute or decision. Alternatively, it may be that majoritarian acts (or judicial decisions), precisely because they do not require that the ground be prepared so thoroughly, can force the pace of change in a way that supermajoritarian acts cannot. A coalition sufficient to enact legislation might be assembled - or a judicial decision rendered - at a point when a society for the most part has not changed, but the legislation, once enacted (or the decision, once made), might be an important factor in bringing about more comprehensive change. The difference between majoritarian legislation and a supermajoritarian constitutional amendment is that the latter is far more likely to occur only after the change has, for all practical purposes, already taken place. Whatever one thinks of these broader speculations, however, they certainly do not entail a general skepticism about whether political activity matters at all. On the contrary, legislation and judicial decisions - as well as activity in the private realm that may not even be explicitly political - can accumulate to bring about fundamental and lasting changes that are then, sometimes, ratified in a textual amendment. Sustained political and nonpolitical activity of that kind is precisely what does bring about changes of constitutional magnitude. My claim is that such changes seldom come about, in a mature democracy, as the result of a formal amendment adopted by a supermajority.

#### Amendments are uniquely at risk for narrow interpretation by the Supreme Court

Segal, Poli Sci Prof at SUNY Stony Brok, 02

The Supreme Court and the Attitudinal Model Revisited, Pg. 5-6

If action by Congress to undo the Court's interpretation of one of its laws does not subvert judicial authority, a fortiori neither does the passage of a constitutional amendment, for example, the Twenty-Sixth Amendment reducing the voting age to eighteen and thereby undoing the decision in Oregon v. Mitchell,' which held that Congress could not constitutionally lower the voting age in state elections. Furthermore, not only does a constitutional amendment not subvert judicial authority, courts themselves – ultimately, the Supreme Court – have the last word when determining the sanctioning amendment's meaning. Thus, the Court is free to construe any amendment – whether or not it overturns one of its decisions – as it sees fit, even though its construction deviates appreciably from the language or purpose of the amendment.

### 2AC Condo

#### Multiple conditional options bad – it’s a voter – rejecting the arg incentivizes abuse

#### First is skew – aff can’t read their best offense because the neg can just kick their argument and can cross-apply offense, kills fairness

#### Second is research – they can advocate contradictory positions, kills education and advocacy skills

#### One conditional advocacy solves their offense – we should get to advocate perms – only reciprocal option

## 2AC Deference DA

### 2AC Must Read

#### Defer to rejecting deference—if the court overreaching, Congress can fill in and ensure executive authority, but there’s no comparable check on executive overreaching—star this argument

Jinks and Katyal 7 [April, 2007, Derek Jinks is Assistant Professor of Law, University of Texas School of Law. Neal Kumar Katyal is Professor of Law, Georgetown University Law Center, “Disregarding Foreign Relations Law”, 116 Yale L.J. 1230]

Courts say that the nation must speak in "one voice" in its foreign policy; the executive can do this, while Congress and the courts cannot. They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot. As emphasized in Chevron, the executive, unlike the judiciary, is politically accountable as well as uniquely knowledgeable ... . n78¶ This line of reasoning misses the mark in several important respects and, in our view, offers no good reason to augment the deference already accorded executive interpretations of international law. First, there is no reason to conclude that the current scope of judicial deference unacceptably impedes the ability of the President to respond to a crisis. Second, wholly adequate checking mechanisms limit the power of the courts to foist unwelcome interpretations of international law on the political branches. Consider a few examples. The political branches, in the course of negotiating, ratifying, performing, and otherwise implementing U.S. treaty obligations, undertake a series of actions that signal, and at times establish, the U.S. interpretation of specific treaty terms. When the United States has authoritatively and discernibly embraced an interpretation of its treaty obligations, courts give effect to this interpretation. n79 The President might also issue formal interpretations of U.S. treaty obligations through the proper exercise of his substantial lawmaking (or delegated rulemaking) n80 authority. n81 In addition, the President has the constitutional [\*1251] authority to execute the laws - this power almost certainly includes the authority to terminate, suspend, or withdraw from treaties in accordance with international law. Congress has the constitutional authority to abrogate, in whole or in part, U.S. treaty obligations via an ordinary statute - a lawmaking process that, of course, includes the President. Augmenting the law-interpreting (and lawbreaking) power of the President drastically diminishes the role of courts - thereby effectively depriving international law in the executive-constraining zone of its capacity to constrain meaningfully and, [\*1252] consequently, its status as enforceable "law." Such an expansion of the President's authority also subverts the institutional capacity (and hence, the political will) of Congress to regulate the executive in these domains. These themes merit some elaboration.¶ Exigency does not compel a rejection of the status quo. Indeed, Posner and Sunstein's article is not concerned with whether the President can put boots on the ground without a statute; rather, it is addressed to litigation and what courts should do, typically years after the fact. Speed is often irrelevant. n82 So, too, is accountability. The legislature is just as accountable as the executive. And textually, of course, Congress has a strong role to play in the incorporation of international law into the domestic sphere, from its Article I, Section 8 powers to "declare War," to "make Rules concerning Captures on Land and Water," and to "punish ... Offences against the Law of Nations," to the Senate's Article II, Section 2 power to ratify treaties. n83¶ In one sense, then, our disagreement centers around default rules. Posner and Sunstein acknowledge that Congress can specify an antidelegation/ antideference principle. n84 Yet oddly, their whole article frames the relevant issue as the competence of the executive branch versus that of the judiciary. But given the fact that this tussle between the executive and the judiciary will always play out within a matrix set by the legislature, it is not quite appropriate to compare the foreign policy expertise of the executive branch with that of the courts. n85 After all, Congress could specify a prodelegation/prodeference policy [\*1253] most of the time as well. (In fact, it has repeatedly done so. n86) The more precise question is which entity is better suited to interpret a legislative act of some ambiguity, when international law principles would yield an answer that restrains the executive branch.¶ Once the question is properly framed, much of Posner and Sunstein's challenge to the status quo falls out. Most crucially, they fail to account for a dynamic statutory process - through which mistakes (if any) made by courts in the area can be corrected by the legislature. Such legislative corrections can take place in both the statutory and the treaty realm. If a court reads a statute in light of international law principles and Congress disagrees with those principles, it can rewrite the statute. And if a court reads a treaty to constrain the executive in a way Congress does not like, it can trump the treaty, in whole or in part, with a statute under the "last-in-time" rule. n87 More fundamentally, the Senate can define the role of courts up front - during the ratification process - by attaching to the instrument of ratification specific reservations, declarations, or understandings concerning the judicial enforceability of the treaty. n88¶ With a stylized account that criticizes the relative competence of the judiciary, Posner and Sunstein make it appear that a judicial decision in foreign affairs is the last word. But that set of events would rarely, if ever, unfold in this three-player game. If the courts err in a way that fails to give the executive enough power, Congress will correct them. Surely national security is not an area rife with process failures. In that sense, current law works better than the Posner and Sunstein proposal because it forces democratic deliberation before international law is violated.¶ For this reason, it obscures more than it illuminates to say that "the courts, and not the executive, might turn out to be the fox." n89 Such language assumes [\*1254] a stagnant legislative process, so that the choice is "court" versus "executive," when the real choice is really "court + Congress." That is to say, if the courts grab power in a way that undermines the executive, Congress can correct them. The relevant calculus turns on which type of judicial error is more likely to be resolved, one in which the court wrongly sides with the President (in which case Congress would have to surmount the veto) or one in which the court wrongly sides against the President (in which case the veto would be unlikely to be a barrier to corrective legislation).¶ Recall that Posner and Sunstein are not addressing their argument to constitutional holdings by courts, but statutory ones that are the subject of Chevron deference. There is much to criticize when courts declare government practices unconstitutional in the realm of foreign affairs, as those practices cannot then be resuscitated by the legislature absent a constitutional amendment. But when a court's holding centers on a statutory interpretation, the dynamic legislative process ensures that the judiciary will not have the last word.¶ Indeed, in this statutory area, the risks of judicial error are asymmetric - that is, judicial decisions that side with the President are far less likely to be the subject of legislative correction than those that side against him. While contemporary case law and theory have not taken the point into account, we believe that they provide a powerful reason to reject Posner and Sunstein's proposal. Our claim centers on the President's veto power and how the structure of the Constitution imposes serious hurdles when Congress tries to modify existing statutes to restrict presidential power.¶ Suppose that, for example, the President asserts that the Detainee Treatment Act, n90 sponsored by Senator John McCain and others to prohibit the torture of detainees, does not forbid a particular practice, such as waterboarding. A group of plaintiffs, in contrast, argue that standard principles of international law and treaties ratified by the Senate forbid waterboarding, and that these principles require reading the statute to forbid the practice. Now imagine that the matter goes to the Supreme Court. The risks from judicial error are not equivalent. If the Court sides with the plaintiffs, the legislature can - presumably with presidential encouragement - modify the statute to permit waterboarding, provided that a bare majority of Congress agrees. The [\*1255] prospect of legislative revision explains why many of the criticisms of the Supreme Court's involvement in the war on terror thus far are entirely overblown. n91¶ Now take the other possibility - that the Court sides with the President. In such a case, it is virtually impossible to alter the decision. That would be so even if everyone knew that the legislative intent at the time of the Act was to forbid waterboarding. Even if, after that Court decision, Senator McCain persuaded every one of his colleagues in the Senate to reverse the Court's interpretation of the Detainee Treatment Act and to modify the Act to prohibit waterboarding, the Senator would also have to persuade a supermajority in the House of Representatives. After all, the President would be able to veto the legislation, thus upping the requisite number of votes necessary from a bare majority to two-thirds. And his veto power functions ex ante as a disincentive even to begin the legislative reform process, as Senators are likely to spend their resources and time on projects that are likely to pass. n92¶ So what Posner and Sunstein seek is not a simple default rule, but one with a built-in ratchet in favor of presidential power. The President can take, under the guise of an ambiguous legislative act, an interpretation that gives him striking new powers, have that interpretation receive deference from the courts, and then lock the interpretation into place for the long term by brandishing his veto power. For authors who assert structural principles as [\*1256] their touchstone, Posner and Sunstein's omission of the veto is striking and provides a lopsided view of what would happen under their proposal.

### 2AC Legitimacy O/W

#### Our internal link outweighs—hegemonic stability is based on security guarantees and trade relationships fostered by the US—ensuring the durability of that system depends states’ acceptance of the hegemon’s role—maintaining the order through military power alone exhausts resources and lead to counterbalancing

#### Our evidence is comparative—the hegemonic model reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts—because a governance in a hegemonic system depends on voluntary acquiescence, the courts are critical

### 2AC Flexibility Bad

#### Executive flexibility leads to detention policy failure—organizational insulation ensures it

Pearlstein 9, Visiting Scholar and Lecturer at Princeton

[July, 2009, Deborah N. Pearlstein is a Visiting Scholar and Lecturer in Public and International Affairs, Woodrow Wilson School of Public & International Affairs, Princeton University, “Form and Function in the National Security Constitution”, 41 Conn. L. Rev. 1549]

Examples of excessive flexibility producing adverse consequences are ample. Following Hurricane Katrina, one of the most important lessons independent analysis drew from the government response was the extent to which the disaster was made worse as a result of the lack of experience and knowledge of crisis procedures among key officials, the absence of expert advisors available to key officials (including the President), and the failure to follow existing response plans or to draw from lessons learned from simulations conducted before the fact. n199 Among the many consequences, [\*1605] basic items like food, water, and medicines were in such short supply that local law enforcement (instead of focusing on security issues) were occupied, in part, with breaking into businesses and taking what residents needed. n200 Or consider the widespread abuse of prisoners at U.S. detention facilities such as Abu Ghraib. Whatever the theoretical merits of applying coercive interrogation in a carefully selected way against key intelligence targets, n201 the systemic torture and abuse of scores of detainees was an outcome no one purported to seek. There is substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security. n202 While there remain important questions about the extent to which some of the abuses at Abu Ghraib were the result of civilian or senior military command actions or omissions, one of the too often overlooked findings of the government investigations of the incidents is the unanimous agreement that the abuse was (at least in part) the result of structural organization failures n203 -failures that one might expect to [\*1606] produce errors either to the benefit or detriment of security. In particular, military investigators looking at the causes of Abu Ghraib cited vague guidance, as well as inadequate training and planning for detention and interrogation operations, as key factors leading to the abuse. Remarkably, "pre-war planning [did] not include[] planning for detainee operations" in Iraq. n204 Moreover, investigators cited failures at the policy level- decisions to lift existing detention and interrogation strictures without replacing those rules with more than the most general guidance about custodial intelligence collection. n205 As one Army General later investigating the abuses noted: "By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved." n206 It was thus unsurprising that detention and interrogation operations were assigned to troops with grossly inadequate training in any rules that were still recognized. n207 The uncertain effect of broad, general guidance, coupled [\*1607] with the competing imperatives of guidelines that differed among theaters of operation, agencies, and military units, caused serious confusion among troops and led to decisionmaking that it is overly kind to call arbitrary. n208 Would the new functionalists disagree with the importance of government planning for detention operations in an emergency surrounding a terrorist nuclear attack? Not necessarily. Can an organization anticipate and plan for everything? Certainly not. But such findings should at least call into question the inclination to simply maximize flexibility and discretion in an emergency, without, for example, structural incentives that might ensure the engagement of professional expertise. n209 Particularly if one embraces the view that the most potentially damaging terrorist threats are nuclear and biological terrorism, involving highly technical information about weapons acquisition and deployment, a security policy structure based on nothing more than general popular mandate and political instincts is unlikely to suffice; a structure that systematically excludes knowledge of and training in emergency response will almost certainly result in mismanagement. n210 In this light, a general take on role effectiveness might suggest favoring a structure in which the engagement of relevant expertise in crisis management is required, leaders have incentives to anticipate and plan in advance for trade-offs, and [\*1608] organizations are able to train subordinates to ensure that plans are adhered to in emergencies. Such structural constraints could help increase the likelihood that something more than arbitrary attention has been paid before transcendent priorities are overridden.

### 2AC AT Expertise/Institutional Competence

#### Court expertise is sufficient—their link is blown out of proportion

Knowles 9 [Spring, 2009, Robert Knowles is a Acting Assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution”, ARIZONA STATE LAW JOURNAL, 41 Ariz. St. L.J. 87]

A common justification for deference is that the President possesses superior competence due to expertise, information gathering, and political savvy in foreign affairs. These conclusions flow from the realist tenet that the external context is fundamentally distinct from the domestic context. The domestic realm is hierarchical and legal; the outside world is anarchical and political. The international realm is thus far more complex and fluid than the domestic realm. The executive is a political branch, popularly-elected and far more attuned to politics than are the courts. n258 Judges are, for the most part, generalists who possess no special expertise in foreign affairs. n259 Courts can only receive the information presented to them and cannot look beyond the record. n260 The President has a vast foreign relations bureaucracy to obtain and process information from around the world. Executive agencies such as the State Department and the military better understand the nature of foreign countries - their institutions and culture - and can predict responses in ways that courts cannot. n261 In the context of the political question doctrine, this rationale often appears when courts conclude that an issue lacks "judicially discoverable and manageable standards." n262 A stronger, related rationale is that the political branches are better suited for tracking dynamic and evolving norms in the anarchic international environment. n263 The meaning of international law changes over time and nations do not agree today on its meaning. Moreover, the relationships among nations in many instances will be governed by informal norms that do not correspond to international law. n264 In addition, many foreign affairs provisions in the Constitution had fixed meanings under international law in the Eighteenth Century - what it meant, for example, to "declare war" or to issue "letters of marquee and [\*129] reprisal" - but subsequent practice has substantially altered their meaning or rendered them irrelevant. n265 Courts are not adept at tracking these shifts. As many critics have observed, the "lack of judicially-manageable standards" argument is weak. Courts create rules to govern disputes regarding vague constitutional provisions such as the Due Process Clause. n266 Furthermore, if courts were to adjudicate foreign affairs disputes more often, they would have the opportunity to create clearer standards, making them more manageable. n267 Thus the lack-of-standards argument does not alone explain why foreign affairs should be off-limits. The argument regarding courts' limited access to information and lack of expertise seem persuasive at first, but it loses its force upon deeper inspection. For instance, expertise is also a rationale for Chevron deference in the domestic context. n268 Generalist judges handle cases involving highly complex and obscure non-foreign affairs issues while giving appropriate deference to interpretations of agencies charged with administering statutory schemes. n269 What makes foreign affairs issues so different that they justify even greater deference? n270 Perhaps foreign affairs issues are just an order of magnitude more complex than even the most complex domestic issues. However, this line of thinking very quickly leads to boundary problems. Economic globalization, rapid global information flow, and increased transborder movement have "radically increased the number of cases that directly implicate foreign relations" and have made foreign parties and conduct, as well as international law questions, increasingly [\*130] common in U.S. litigation. n271 If courts were to cabin off all matters touching on foreign relations as beyond their expertise, it would result in an ever-increasing abdication of their role. The political norm-tracking argument reveals the second major problem with using anarchy as a basis for special deference: it fails to account for the degree of deference that should be afforded to the President. Under the anarchy-based argument, the meaning of treaties and other concepts in foreign affairs depend entirely on politics and power dynamics, which the President is especially competent (and the courts especially incompetent) in tracking. If this is so, the courts must give total deference to the executive branch. If one does not wish to take the position that the courts should butt out altogether in foreign affairs, there must be other reasons for the courts' involvement. Even proponents of special deference generally acknowledge that some of the courts' strengths lie in protecting individual rights and "democracy-forcing." n272 But what is the correct balance to strike between competing functional goals of the separation of powers?

#### The courts are just as competent and can effectively exercise discretion

Marguilies 4 [April 2004, Peter Margulies is a Professor of Law, Roger Williams University School of Law, “JUDGING TERROR IN THE "ZONE OF TWILIGHT"\*: EXIGENCY, INSTITUTIONAL EQUITY, AND PROCEDURE AFTER SEPTEMBER 11”, 84 B.U.L. Rev. 383, Lexis]

Equitable tailoring of executive authority to detain alleged unlawful combatants is the most appropriate way to minimize false positives, balance hardships, and fit exigent procedures into the gaps in existing remedies. Considerations of institutional competence favor courts performing this tailoring function, instead of leaving a void for the legislature to fill. As the Supreme Court noted in Hecht Co. v. Bowles, courts have the ability to draw exceptions narrowly to respond to "the necessities of the particular case" without undermining overarching norms. n206 In the unlawful combatant situation, courts can tailor the scope, manner, and duration of detention to reflect both the exigencies of national security and the transcendent values of due process. In contrast, Congress, if required to legislate expressly, may be tempted to fashion an overbroad authorization that will grant the Executive excessive authority. n207 Such a broad grant may require subsequent tailoring by the Court to comply with due process [\*426] guarantees. n208 Alternatively, Congress may experience paralysis, finding itself unable to act despite the exigency of the questions involved. The more efficient path to institutional dialog would be to permit the Court to take an initial assay at the matter, which Congress can then modify if it sees fit. The prudence of this path fits the pragmatic account of institutional architecture offered by Justice Jackson in the Steel Seizure Case. n209 In grappling with the needs posed by a particular situation, courts can exercise equitable discretion to promote a "workable government." n210 Absent a clear statement from Congress that constrains equitable discretion, courts should read a legislative enactment such as the Joint Resolution to reflect legislative acknowledgment of the courts' tailoring role. n211 This equitable tailoring would embody the Court's observation that "strong procedural protections" typically accompany grants of authority to detain individuals for substantial periods. n212 In the enemy combatant context, [\*427] protections provided either by statute or via habeas corpus should include an individualized evidentiary hearing and the right to representation by counsel. n213 An institutional equity court should also impose limits on the duration of detention. n214 The imposition of a time limit reflects institutional equity's debt to both the flexibility of habeas jurisprudence and the "public law" tradition of injunctive relief against overreaching agencies of government. n215 A time limit [\*428] on enemy combatant detentions serves a public law purpose by balancing the political and bureaucratic momentum of exigency n216 with increased accountability for both the executive and legislative branches of government. Time limits also accommodate the special demands of transnational investigation and negotiation, n217 while ensuring that government uses detention [\*429] as an interstitial measure, not as a permanent escape-hatch from fora with greater procedural safeguards. n218 Moreover, time limits reduce the impact of the lack of coherent standards for release from enemy combatant detention. This lack of standards would otherwise transform enemy combatant detention into a de facto life sentence, triggering substantial due process concerns. n219 A delegation of such scope [\*430] should require express legislative authority, given the constitutional problems raised by indefinite detention n220 and the existing legislation purporting to limit the federal government's use of the practice. n221 To require any less would, as Justice Jackson noted in the Steel Seizure Case, license legislative lassitude and executive "usurpation." n222 By failing to impose time limits, the Fourth Circuit in Hamdi committed the error the Supreme Court avoided in the Steel Seizure Case when it enjoined the Executive from seizing the steel mills; n223 it treated the war power as unitary and authorized sweeping executive action at home to match the scope of executive action abroad. n224 In contrast, imposing a time limit remands the matter to Congress, n225 obliging legislators to consider whether breaking alleged terrorists justifies bending long-standing commitments to fairness. By granting the Executive a measure of flexibility, but requiring express legislative authority for more drastic departures from due process norms, institutional equity preserves the balance between the three branches and promotes the [\*431] deliberation and debate at the core of constitutionalism. n226

### 2AC N/U

#### Syria non-unique’s the DA

Beecher 9/3 [09/03/13, William Beecher is a Pulitzer Prize-winning former Washington correspondent for the Boston Globe, the Wall Street Journal and the New York Times. He also served as an Assistant Secretary of Defense, “Obama, the Cowardly Lion”, http://www.worldpolicy.org/blog/2013/09/03/obama-cowardly-lion]

It’s one thing to be a reluctant warrior. Given President Obama’s natural instincts and the American public’s war-weariness, that’s understandable under the circumstances. But, after checking with Congressional leadership in both parties, and being told there may well not be sufficient support for military action against the Syrian government’s horrific use of nerve gas, and then going ahead and daring Congress to take the Commander-in-Chief’s war powers out of his hands, that’s not leadership. That’s sophistry. President Barack Obama, in withholding military action at the eleventh hour and shocking his own closest aides in the process, is risking telling the American body politic and an amazed world of friend and foe, that he does not have the inner strength to be a leader in crisis. He gives a new meaning to the expression “red line.” If you dare cross it, who knows what might befall you? If anything. Putting aside the reaction at home for the moment, how do you think the ayatollahs in Iran will react to his repeated threats not to allow Tehran to possess nuclear weapons? How will Vladimir Putin react to the warnings that Obama will make Russia pay a price for harboring Edward Snowden and not cooperating in US efforts in Syria and Iran? How will the leaders of France, who deployed warships alongside those of the U.S. navy offshore Syria, react to the appearance that Obama has lost his courage? In point of fact, it was shaping up as merely a military slap on Bashar Assad’s wrist – in the President’s words, “a shot across the bow” not aimed at weakening his hold on power. How will Israeli planners, who wanted to believe that Obama was not bluffing when he warned Iran that “all options” are on the table if it proceeds to build nuclear weapons, react? Will the Israelis, who have existential worries, decide to go it alone—and soon? Is this how the Leader of the Free World exercises his leadership? Or, is this the personification of the cowardly lion in the Wizard of Oz?

### 2AC No Targeted Killing

#### The aff only maintains the effectiveness of Boumediene—that doesn’t result in targeted killings

Vladeck 12 [10/01/12, Professor Stephen I. Vladeck of the Washington College of Law at American University, “Detention Policies: What Role for Judicial Review?”, <http://www.abajournal.com/magazine/article/detention_policies_what_role_for_judicial_review/>)]

The short chapter that follows aims to take Judge Brown’s suggestion seriously. As I explain, although Judge Brown is clearly correct that judicial review has affected the size of the detainee populations within the territorial United States and at Guantanamo, it does not even remotely follow that the jurisprudence of the past decade has precipitated a shift away from detention and toward targeted killings. To the contrary, the jurisprudence of Judge Brown’s own court has simultaneously (1) left the government with far greater detention authority than might otherwise be apparent where noncitizens outside the United States are concerned; and (2) for better or worse, added a semblance of legitimacy to a regime that had previously and repeatedly been decried as lawless. And in cases where judicial review prompted the government to release those against whom it had insufficient evidence, the effects of such review can only be seen as salutary. Thus, at the end of a decade where not a single U.S. military detainee was freed by order of a federal judge, it is more than a little ironic for Judge Brown to identify “take no prisoners” as Boumediene’s true legacy.

## 2AC Court DA

### 2AC Warming Impact

Democratization solves your warming impact

Bättig & Bernauer, ’09 [Michèle B. Bättig, Ph.D. in environmental sciences from ETH Zurich, Project director at Econcept AG, Thomas Bernauer, Professor of political science at ETH Zurich, Center for Comparative and International Studies and Institute for Environmental Decisions, “National Institutions and Global Public Goods: Are democracies more cooperative in climate change policy?,” 2009, <http://www.ib.ethz.ch/docs/ClimatePolicy.pdf>] AP

In climate change policy, democracies have obviously had a slow start in moving from paper (policy output) to practice (policy outcomes). This should not come as a great surprise. Climate change is a much more complex challenge than most local or regional environmental degradation issues, such as air and water pollution. It is also characterized by a global free-rider problem. However, there are signs that more democratic countries are likely to perform better over the long run in policy-outcome terms as well. As argued in the theory section, public and interest group demand for climate change mitigation is likely to be stronger in democracies than in nondemocracies. The available empirical evidence in fact suggests that public concern over climate change risks tends to be higher in democracies, independently of income. And so is environmental NGO activity. 71 Moreover, democracies tend to have higher income levels, and the available data shows that the environmental Kuznets curve for GHG emissions has already reached a turning point in most of the very rich and democratic countries. Democracies are, independently of income, also more active in environmental monitoring and research and development 72 – this increases knowledge about risks and generates new technologies that are more energy efficient. Democracies also tend to perform better in terms of sustainable development more broadly defined (e.g., measured in the form of the World Bank index of Adjusted Net Savings and the CIESIN’s Environmental Performance Index). 73 It is hard to see why this pattern should not extend to global environmental problems, such as climate change, at least in the long run. The evidence presented in this paper is largely congruent with this argument. In combination with the assumption that democratic institutions are more likely to motivate policy-makers to supply policies that meet public and interest group demand for climate change mitigation, these findings leave considerable room for optimism

#### Developing countries, lax regulation, and profit maximization means warming is inevitable

Porter 2013 - writes the Economic Scene column for the Wednesday Business section (March 19, Eduardo, “A Model for Reducing Emissions” <http://www.nytimes.com/2013/03/20/business/us-example-offers-hope-for-cutting-carbon-emissions.html?_r=1&>)

Even if every American coal-fired power plant were to close, that would not make up for the coal-based generators being built in developing countries like India and China. “Since 2000, the growth in coal has been 10 times that of renewables,” said Daniel Yergin, chairman of IHS Cambridge Energy Research Associates.¶ Fatih Birol, chief economist of the International Energy Agency in Paris, points out that if civilization is to avoid catastrophic climate change, only about one third of the 3,000 gigatons of CO2 contained in the world’s known reserves of oil, gas and coal can be released into the atmosphere.¶ But the world economy does not work as if this were the case — not governments, nor businesses, nor consumers.¶ “In all my experience as an oil company manager, not a single oil company took into the picture the problem of CO2,” said Leonardo Maugeri, an energy expert at Harvard who until 2010 was head of strategy and development for Italy’s state-owned oil company, Eni. “They are all totally devoted to replacing the reserves they consume every year.”

#### No impact – empirics

Willis et. al, ’10 [Kathy J. Willis, Keith D. Bennett, Shonil A. Bhagwat & H. John B. Birks (2010): 4 °C and beyond: what did this mean for biodiversity in the past?, Systematics and Biodiversity, 8:1, 3-9, <http://www.tandfonline.com/doi/pdf/10.1080/14772000903495833>, ]

The most recent climate models and fossil evidence for the early Eocene Climatic Optimum (53–51 million years ago) indicate that during this time interval atmospheric CO2 would have exceeded 1200 ppmv and tropical temperatures were between 5–10 ◦ C warmer than modern values (Zachos et al., 2008). There is also evidence for relatively rapid intervals of extreme global warmth and massive carbon addition when global temperatures increased by 5 ◦ C in less than 10 000 years (Zachos et al., 2001). So what was the response of biota to these ‘climate extremes’ and do we see the large-scale extinctions (especially in the Neotropics) predicted by some of the most recent models associated with future climate changes (Huntingford et al., 2008)? In fact the fossil record for the early Eocene Climatic Optimum demonstrates the very opposite. All the evidence from low-latitude records indicates that, at least in the plant fossil record, this was one of the most biodiverse intervals of time in the Neotropics (Jaramillo et al., 2006). It was also a time when the tropical forest biome was the most extensive in Earth’s history, extending to mid-latitudes in both the northern and southern hemispheres – and there was also no ice at the Poles and Antarctica was covered by needle-leaved forest (Morley, 2007). There were certainly novel ecosystems, and an increase in community turnover with a mixture of tropical and temperate species in mid latitudes and plants persisting in areas that are currently polar deserts. [It should be noted; however, that at the earlier Palaeocene–Eocene Thermal Maximum (PETM) at 55.8 million years ago in the US Gulf Coast, there was a rapid vegetation response to climate change. There was major compositional turnover, palynological richness decreased, and regional extinctions occurred (Harrington & Jaramillo, 2007). Reasons for these changes are unclear, but they may have resulted from continental drying, negative feedbacks on vegetation to changing CO2 (assuming that CO2 changed during the PETM), rapid cooling immediately after the PETM, or subtle changes in plant–animal interactions (Harrington & Jaramillo, 2007).]

### 2AC Theory False

#### Judges don’t consider capital when deciding.

Landau, JD Harvard and clerk to US CoA judge, 2005

(David Landau, JD Harvard Law, clerk to Honorable Sandra L. Lynch, U.S. Court of Appeals for the First Circuit, 2005, “THE TWO DISCOURSES IN COLOMBIAN CONSTITUTIONAL JURISPRUDENCE: A NEW APPROACH TO MODELING JUDICIAL BEHAVIOR IN LATIN AMERICA” 37 Geo. Wash. Int'l L. Rev. 687)

Theoretically, attitudinalists could argue that judges rule in accordance with their own ideological preferences honestly, rather than strategically, because for some reason judges simply are not capable of, or prefer not to, act strategically. In practice, however, this is not what they say. Attitudinalists instead say that the factual environment renders strategic action unnecessary, at least for U.S. Supreme Court justices, because, for example, federal judges have life tenure, U.S. Supreme Court justices have no real ambition for higher office, and congressional overrides are rarely a realistic danger. [n25](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n25) "The Supreme Court's rules and structures, along with those of the American political system in general, give life-tenured justices  [\*696]  enormous latitude to reach decisions based on their personal policy preferences." [n26](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n26) In other words, both strategic and attitudinal models, in practice, assume that judges are willing and able to act strategically. Where the two theories differ is in their factual assumptions: Strategic models support the belief that judges face various types of constraints that force them to support decisions that differ from their preferred policy points, while attitudinalists believe that the institutional environment leaves at least those judges that they study - generally U.S. Supreme Court justices - free to make decisions that are exactly in accord with their preferred policies. Similarly, followers of strategic theory could theoretically believe that judges act strategically to maximize achievement of some set of goals other than their ideological policy preferences. For example, perhaps judges could prefer "legalistic" goals like adherence to precedent, but would have to defect strategically from absolute adherence to those goals given the presence of other institutions with some clout, like the U.S. Congress. In practice, however, this is not what happens. Instead, strategic theorists virtually always model judges as strategically furthering sets of ideological policy goals, which are the exact same goals modeled by the attitudinal theorists. [n27](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n27) What we have, then, are two theories that in practice tend to collapse into one. In both theories, actors are assumed: (1) to have preferences; and (2) to act strategically for the maximization of those preferences. [n28](https://webgateway.dartmouth.edu/us/lnacademic/%2CDanaInfo%3Dwww.lexisnexis.com%2Bframe.do?tokenKey=rsh-20.940299.0671169885&target=results_DocumentContent&reloadEntirePage=true&rand=1248637360461&returnToKey=20_T7032636157&parent=docview#n28) In addition, attitudinalists and strategic theorists both believe in a particular kind of rational choice theory: Specifically, the actors' preferences are assumed to be solely ideological, policy-based goals derived from the political realm. It is important to emphasize that both theories also believe that the  [\*697]  proper way to test judicial behavior is to look at what judges actually do, not at what they say: Thus, what matters is the outcome, not the reasoning of the case.

#### Court Capital is not finite—inaction hurts institutional capital worse

Weinberg 94 [Fall, 1994, Louise Weinberg is a Wynne Professor in Civil Jurisprudence, The University of Texas, “IRA C. ROTHGERBER, JR. CONFERENCE ON CONSTITUTIONAL LAW: GUARANTEEING A REPUBLICAN FORM OF GOVERNMENT: POLITICAL QUESTIONS AND THE GUARANTEE CLAUSE”, 65 U. Colo. L. Rev. 887]

Some writers trace concerns of the kind we have been discussing to one overriding concern, the need to preserve the prestige and authority of the Supreme Court. It is thought that the Court must [\*907] husband these priceless assets for the historic occasions when they must be deployed. Though we associate these views today with the "neutral principles" theorists of another day, n73 about whose teachings we have become skeptical, n74 these are not trivial concerns. Insofar as the rule of law depends on courts, and especially on the Supreme Court, it depends too on our reverence for the Court and our continuing consent to be governed by its decisions. There are those in every generation who oppose judicial review and do not comprehend it as an organic feature of the Constitution. But I think most Americans do share such reverence and consent. It is, perhaps, a civic religion. n75 It might be that this shared faith is essential to the survival of the republic under the Constitution. n76 Perhaps when President Nixon obeyed Judge Sirica's order even though it made inevitable his resignation from his presidency, it was in part this faith that informed his understanding of the importance to the country of his obedience. I doubt very much that the prudential principles of judicial restraint which an earlier generation of writers urged upon us are what keep this faith alive, as they imagined. To the contrary, I think Americans are stirred to believe in the courts because the courts have the courage to act and do act, not because they deny action. Recall the Supreme Court's effort to protect the rights of individuals in the wake of the Civil War, days of martial law and bills of attainder. n77 Recall how the Radical Republicans in Congress tried to [\*908] bring articles of impeachment against President Andrew Johnson, failed, and reacted by cutting back to seven the number of Justices of the Supreme Court, and thus -- killing two birds with one stone -- carving back as a practical matter the President's power of nomination. In this atmosphere of crisis and confrontation, the question became whether the Court would stick to its guns in opposing the forcible "Reconstruction" of the South. The significant test probably was the famous case of Ex parte McCardle. n78 McCardle first came to the Court as an appeal from a denial of habeas corpus. McCardle was a Mississippi newspaper editor, held in military custody for writing bad things about Reconstruction. By challenging the authority of his military custodians to deprive him of a civil trial by jury, he challenged the validity of the new Reconstruction Acts. n79 The Attorney General argued for an expedited appeal in McCardle's case, advising -- perhaps on the instructions of President Andrew Johnson -- that in his opinion the Reconstruction Acts were unconstitutional, and that he had so instructed the military commanders. n80 The Court did grant expedited review in McCardle's case, and heard four days of oral argument, making unusual allowances of time in appreciation of the importance of the case. Interestingly, the Johnson administration itself now backed off, as it had in Mississippi v. Johnson. n81 Now the Government argued that the Court should not decide McCardle's case because it presented a political question. Congress placed no bets on the government's position. Rather, Congress famously changed the Supreme Court's jurisdictional statutes, n82 over President Johnson's veto, in order to deny the Court the possibility of using McCardle's case to pronounce on the validity of Reconstruction. The issue in McCardle's case now became the one for which we remember it: whether Congress had power to strip the [\*909] Court of its statutory jurisdiction over a pending, argued case awaiting decision. At this crucial juncture the Court simply took an early adjournment -- early by a few days -- without decision. Thus, the Court put McCardle off for a year. n83 This seemingly discreet retirement probably was as inglorious n84 as its numerous critics would have us understand. The Court in this way avoided decision until after the elections of April 14-16, 1868. Charles Fairman takes the position that, if there ever was a historical moment for invalidation of the first Reconstruction Acts, this was it -- and the Court let it slip by. In Fairman's view, a decision on the merits in the following year would have been without practical consequences, coming "too late to interfere with the Congressional program." n85 In the event, the Court avoided the merits in the following year as well, sustaining the power of Congress to strip it of the particular head of jurisdiction. n86 This, in effect, was a decision to leave Reconstruction in place. But it was the earlier adjournment without decision, as Professor Fairman suggests, that was perceived by contemporary observers as the decision to leave Reconstruction in place. Thus, in a famous letter, McCardle's counsel, Jeremiah Black, wrote of this quiet adjournment that the Court had "knuckled under," adding: "The Court stood still to be ravished and did not even hallo while the thing was being done." n87 This sort of strategic withdrawal, far from preserving the Court's institutional capital, seems to me to squander it. Some will always be found to praise the Court for its prudence when it backs away from the judicial duty to decide even a sensitive issue; but others will recognize the circumspect retreat for what it is: pusillanimity. Professor [\*910] Choper, a proponent of judicial discretion to refuse to decide, seems to share this recognition himself, when he gives us, in no tone of admiration, the sorry record of confrontations in which the Court has backed down. n88 In Baker v. Carr, a central concern of Justice Frankfurter's dissent was that requiring reapportionment of the legislature of Tennessee could compromise the Court's authority. Effective relief might prove impossible, and the Court's mandate would be flouted. n89 But the Court seems to have come unbruised out of its intervention in state legislative malapportionment, and Congress authorized judicial enforcement for the brunt of the job in the Voting Rights Act of 1965. Indeed, in 1992, in United States Department of Commerce v. Montana, n90 the Supreme Court held unanimously, in an opinion written by Justice Stevens, that when Congress reapportions seats to a state after a fresh census, the validity of that reapportionment is not a political question confided to Congress, but is judicially examinable under Article I, Section 2. The Court relied, in part, on Baker v. Carr. n91 It is time to recognize that the Court's "legitimacy" never was a real issue. The Supreme Court, and the judicial power of the United States, are established by the Constitution of the United States. In deciding cases under federal law, courts usurp nothing. Rather, they conform to their oaths of office and the Supremacy Clause. It is time to understand that it is the Supreme Court itself that legitimizes and delegitimizes. That is what we pay it to do.

### 2AC Winners Win

#### Winners Win

Lawrence G. Sager Prof Law ’81 (Professor of Law, New York University) April, 1981 Constitutional Triage Columbia Law Review, Vol. 81, No. 3. pp. 707-719.

A second objection, to which Professor Choper has made himself more directly vulnerable, concerns the validity of those premises. The assertion that deciding controversial cases dissipates the moral or political authority of the federal judiciary is far from self-evident, and Professor Choper's arguments, balanced and reflective though they be (pp. 129-70), do not persuade me. Even quite harrowing episodes like the Supreme Court's confrontation with Georgia over the status of the Cherokee Nation' may in the long run have accrued to the benefit of the Court's national prestige. 5 [Footnote] 5. "Long run" may misstate the case. In the fall of 1832, with Georgia openly defying the decision of the Court in Worcester v. Georgia, and President Jackson unwilling—possibly unable—to do anything about it, John Marshall wrote to Justice Story, "1 yield slowly and reluctantly to the conviction that our Constitution cannot last." But within six months, Jackson had moved to denounce South Carolina's Nullification Ordinance and to request legislation giving the federal government power to act against states that defied Supreme Court authority, Congress had enacted such legislation (the Force Bill) amidst a clamor of support for the Court, and the Governor of Georgia had pardoned Samuel Worcester and Elizur Butler, who had in turn withdrawn their suit. Charles Warren is thus moved to speak of the period, only months after the decision in Worcester, as one of "renewed confidence in the Court," with the Court finding itself in "a stronger position than it had been for the past fifteen years." 1 C. Warren, The Supreme Court in United States History 778 (1926). See generally id., at 729-79. Speculation about such questions is difficult, and there is a tendency to ignore an important variable in the factual equation. Much of the Court's ability to weather the storms of its unpopular decisions may well depend upon a popular sense that federal judges are obliged to decide constitutional controversies, and to decide them according to their best understanding of the dictates of the Constitution. Displays of political discretion, while a short-term means of avoiding controversy, may serve over time to erode public tolerance of the Court's controversial decisions.

### 2AC Normal Means

#### Normal means is courts will announce their decision at the end of the term and that solves the link

Mondak 92 [Jeffery J., assistant professor of political science @ the University of Pittsburgh. “Institutional legitimacy, policy legitimacy, and the Supreme Court.” American Politics Quarterly, Vol. 20, No. 4, Lexis]

The process described by the political capital hypothesis acts as expected in the laboratory, and the logic of the link between institutional and policy legitimacy has thus gained strong empirical corroboration. However, the dynamic's pervasiveness defies precise estimation due to the limitations of available public opinion data. Still, the results reported here are provocative. First, this view of legitimation may apply to institutions beyond the Supreme Court. Consequently, efforts to use this theory in the study of other institutions may yield evidence supportive of a general process. A second concern is how the Court responds to its institutional limits. Specifically, strategy within the Court can be considered from the context of legitimacy. For example, what tactics may the Court employ to reduce the erosion of political capital? By releasing controversial rulings at the end of a term, for instance, the Court may afford itself a healing period, a time to repair damaged credibility prior to the next round of efforts at conferring policy legitimacy. This suggests a third issue, the manner in which institutional approval is replenished. Does institutional support return to some equilibrium once dispute surrounding a particular ruling fades, or must the Court release popular edicts to offset the effects of its controversial actions?

### 2AC Positivity Bias\*\*\*

#### Public perceptions ensure every ruling only increases court legitimacy—positivity frames cushion controversy

Kenyatta and Gibson 3

[2003, Lester Kenyatta Spence And James L. Gibson, Political Sci, Washington University and Gregory A. Caldeira, Poli Sci, Ohio State University. “The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?” B.J.Pol.S. 33]

These results may reflect the bias of “positivity frames” when it comes to the Court (and perhaps judicial institutions in general), in the sense that exposure to courts — including exposure associated with controversial circumstances — enhances rather than detracts from judicial legitimacy, even among those who are disgusted with the Court’s ruling. When courts become salient, people become exposed to the symbolic trappings of judicial power – “the marble temple, the high bench, the purple curtain, the black robes.”38 When the news media covered the Court’s deliberations surrounding the election, it generally did so with the greatest deference and respect. The contrast in images of the “partisan bickering” in Florida and the solemn judicial process in Washington could not be more stark. No matter how one judges the outcome in Bush v. Gore, exposure to the legitimizing symbols of law and courts is perhaps the dominant process at play. Thus, the effect of displeasure with a particular court decision may be muted by contact with these legitimizing symbols. To know courts is indeed to love them, in the sense that to know about courts is to be exposed to these legitimizing symbols. One way to investigate this conjecture is to compare the views of partisans in 1987 and 2001.39 Following the methodology reported in Kritzer,40 we display in Table 7 the relationship between party attachment and a two-item loyalty index (based on Table 2, above). The correlation between loyalty and party identification in 1987 is .05; in 2001, it is .20. Thus, our findings comport with Kritzer’s in the sense that attitudes toward the Court seem to be more partisan following the election of 2000 — but not greatly so. [PLACE TABLE 7 ABOUT HERE] The more interesting evidence has to do with whether our conclusion that legitimacy changed little between 1987 and 2001 is due to off-setting tendencies among Democrats and Republicans. That is, if Democrats reduced their support for the Court as a result of Bush v. Gore and Republicans increased their support, then the overall level of support would appear not to have changed. Support would, however, be more closely related to partisanship. Most important, this would be evidence that people were adjusting their loyalty on the basis of the Court’s ruling on the election. Table 7 reports data of considerable relevance to the hypothesis that loyalty frames reactions to individual decisions and that unwelcome decisions contribute little to the diminution of institutional loyalty The evidence in Table 7 indicates that, between 1987 and 2001, support for the Court did not decline among Democrats, even as it increased somewhat among Independents and Republicans. In 2001, 46.6 per cent of the Democrats gave two supportive replies to our questions; in 1987, this figure was insignificantly lower (43.0 per cent). That Democrats in the aggregate seem not to have been affected by the adverse ruling in Bush v. Gore is a finding compatible with the general view that institutional loyalty inoculates against an unwelcome policy decision. The data also reveal that Republican support for the Court was boosted by the decision. Thus, these data are compatible with the conclusion that the Court profits from a bias of positivity frames in the sense that the Court gets “credit” when it pleases people, but that it is not penalized when its actions are displeasing. DISCUSSION AND CONCLUDING COMMENTS Several significant conclusions have emerged from this analysis. In terms of substantive politics, we have shown that the Supreme Court decision in Bush v. Gore did not have a debilitating impact on the legitimacy of the US Supreme Court. Perhaps because the Court enjoyed such a deep reservoir of good will, most Americans were predisposed to view the Court’s involvement as appropriate, and therefore dissatisfaction with the outcome did not poison attitudes toward the institution. This finding is an important corrective to popular and scholarly views of the politics of the election. Nevertheless, no one can doubt that loyalty toward an institution is influenced by the policy outputs of that institution, at least in the long term.41 Neither should any one doubt that loyalty toward an institution can cushion the shock of a highly controversial decision. Within any given cross-section, the causal relationship between perceptions of an opinion and loyalty is surely reciprocal. Nonetheless, Bush v. Gore seems to have had a much smaller effect on the attitudes of Americans toward their Supreme Court than many expected. The various analyses presented in this paper support the view that the weak effect of the Supreme Court’s participation in the election is most likely due to pre-existing attitudes toward the Court that blunted the impact of disapproval of the Court’s involvement in the election. Thus, in general, the conclusions in which we have the greatest confidence are: (1) the ruling in Bush v. Gore did not greatly undermine the legitimacy of the Court, (2) probably because the effect of pre-existing legitimacy on evaluations of the decision was stronger than the effect of evaluations on institutional loyalty, and (3) institutional loyalty predisposed most Americans to view the decision as based on law and therefore legitimate. From a more theoretical viewpoint, we have posited the existence of a bias of positivity frames when it comes to popular perceptions of courts. In most areas of political and social life, negativity predominates. We have suggested that positive reactions result from exposure to the highly effective legitimizing symbols in which courts, and the Supreme Court in particular, typically drape themselves. Further research should more rigorously investigate exactly how—and under what conditions—symbols are effective at legitimizing judicial institutions.

### 2AC Human Rights T/

#### Turn—incorporating HUMAN RIGHTS garners public support for the courts.

Soohoo and Stolz, ’08 [Cynthia Soohoo\* and Suzanne Stolz Director, U.S. Legal Program, Center for Reproductive Rights \*\* Staff Attorney, U.S. Legal Program ‘8, Center for Reproductive Rights 2008 Fordham Law Review Fordham Law Review November, 2008 77 Fordham L. Rev. 45]

A recent poll conducted by The Opportunity Agenda indicates that most Americans identify with human rights as a value and think that human rights violations are occurring in the United States. n1 Eighty-one percent of Americans polled agreed that "we should strive to uphold human rights in the United States because there are people being denied their human rights in our country." n2 And approximately three quarters (seventy-seven percent) of the public expressed that they would like the United States to work on making regular progress to advance and protect human rights. n3 Globalization and recent political events have played an important role in educating the American public about human rights standards and in thinking about the United States as a country in which human rights violations can occur. However, public attitudes about domestic human rights also reflect, and are being promoted by, two shifts in advocacy work. International human rights organizations are increasingly focusing on the United States, and domestic public interest lawyers and activists are integrating human rights strategies into their work. n4