# 1NC

### 1

#### A. Interpretation – Judicial restrictions must directly prohibit activities currently under the president’s war powers authority – this excludes regulation or oversight

#### Judicial restriction means to reduce the scope of

Newman 8 (Pauline, Judge @ UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 545 F.3d 943; 2008 U.S. App. LEXIS 22479; 88 U.S.P.Q.2D (BNA) 1385; 2008-2 U.S. Tax Cas. (CCH) P50,621, IN RE BERNARD L. BILSKI and RAND A. WARSAW, lexis)

Id. at 315 (quoting U.S. Const., art. I, §8). The Court referred to the use of "any" in Section 101 ("Whoever invents or discovers any new and useful process . . . or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title"), and reiterated that the statutory language shows that Congress "plainly contemplated that the patent laws would be given wide scope." Id. at 308. The Court referred to the legislative intent to include within the scope of Section 101 "anything under the sun that is made by man," id. at 309 (citing S. Rep. 82-1979, at 5; H.R. Rep. 82-1923, at 6 (1952)), and stated that the unforeseeable future should not be inhibited by judicial restriction of the "broad general language" of Section 101: A rule that unanticipated inventions are without protection would conflict with the core concept of the patent law that anticipation undermines patentability. Mr. Justice Douglas reminded that the [\*981] inventions most benefiting mankind are those that push back the frontiers of chemistry, physics, and the like. Congress employed broad general language in [\*\*103] drafting §101 precisely because such inventions are often unforeseeable.

#### B. Vote Neg –

#### 1. Limits – Oversight of authority allows a litany of new affs in each area – justifies indirect effects of judicial review and affs that don’t alter presidential authority – undermines prep and clash

#### 2. Ground – Restriction ground is the locus of neg prep – their interpretation jacks all core disads – judicial deference, court politics, presidential powers, and any area based disad because an aff doesn’t have to prevent the president from doing anything

### 2

#### The court will strike down aggregate limits now – it’ll be close

Chemerinsky, 8-12 (Erwin, American lawyer and law professor. He is a prominent scholar in United States constitutional law and federal civil procedure. He is the current and founding dean of the University of California, Irvine School of Law, “Symposium: The distinction between contribution limits and expenditure limits,” http://www.scotusblog.com/2013/08/symposium-the-distinction-between-contribution-limits-and-expenditure-limits/)

For almost forty years, since Buckley v. Valeo in 1976, campaign finance law has been based on the distinction between contribution limits and expenditure limits. In Buckley, the Court held that contribution limits – restrictions on the amount that a person gives to a candidate or a committee – are generally constitutional. But expenditure limits – restrictions on what a person spends overall – are unconstitutional. Citizens United v. Federal Elections Commission in 2010 applied this distinction and held that limits on independent expenditures by corporations violate the First Amendment.¶ McCutcheon v. Federal Election Commission provides the Supreme Court with an occasion to reconsider this distinction. The issue in McCutcheon is whether aggregate limits on contributions are constitutional. Specifically, the plaintiffs are challenging the Bipartisan Campaign Reform Act’s $74,600 two-year ceiling on contributions to non-candidate committees and the $48,600 two-year ceiling on donations to candidate organizations.¶ Options: The Court could say . . .¶ The Court certainly could rule on this, even declaring it unconstitutional, without calling into question the constitutionality of all contribution limits. In fact, in Randall v. Sorrell (2006), the Court found Vermont’s limits on contributions to be so restrictive as to violate the First Amendment without reconsidering the basic distinction between limits on contributions and limits on expenditures. Vermont law restricted contributions so that the amount that any single individual could contribute to the campaign of a candidate for state office during a “two-year general election cycle” was $400 for governor, lieutenant governor, and other statewide offices; $300 for state senator; and $200 for state representative. The Court noted that the contribution limits in the Vermont law were lower than those upheld in Buckley or in any other Supreme Court decision, that they were the lowest in the country, and that they were not indexed to keep pace with inflation.¶ The aggregate contribution limits being challenged in McCutcheon are much higher and the Court therefore could distinguish Randall, follow Buckley, and uphold them. Or the Court could strike them down, invalidating aggregate limits as a violation of the First Amendment, but without calling into question all contribution limits. Buckley was based, in part, on the view that large contributions to candidates risk corruption and the appearance of corruption. The Court explained that “[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.’’¶ The Court in McCutcheon could say that aggregate limits on the amount that can be contributed do not help to prevent such corruption or appearance of corruption. The Court could say that aggregate limits on contributions are really much more akin to expenditure limits and therefore unconstitutional. The Court could say that the real purpose of aggregate limits is to equalize political influence, a justification for campaign finance laws that the Court expressly rejected in Citizens United. Or the Court could distinguish aggregate limits to candidate committees from those to non-candidate committees, such as political parties.¶ Five votes to reconsider Buckley?¶ Underlying McCutcheon, though, is the question of whether the five conservative Justices want to reconsider Buckley’s holding that contribution limits are generally constitutional. In assessing this, it is important to note that three of these Justices – Antonin Scalia, Anthony Kennedy, and Clarence Thomas – have already called for the distinction between contribution and expenditure limits to be overruled. In his separate opinion in Colorado Republican Federal Campaign Committee v. Federal Election Commission, Justice Thomas declared: “I would reject the framework established by Buckley v. Valeo. . . . Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: both forms of speech are central to the First Amendment.’’¶ In Nixon v. Shrink Missouri Government PAC (2000), the Supreme Court reaffirmed Buckley’s distinction between contributions and expenditures, but four Justices sharply disagreed. Three Justices – Kennedy, Scalia, and Thomas – expressly declared their desire to overrule Buckley’s approval of contribution limits. Justice Kennedy wrote a strong dissent in which he lamented that ‘‘[t]he Court’s decision has lasting consequences for political speech in the course of elections, the speech upon which democracy depends.’’ He accused the Court of being “almost indifferent’’ to freedom of speech and said that he would overrule Buckley. Justice Thomas, joined by Justice Scalia, wrote a lengthier dissent, which began by declaring: “In the process of ratifying Missouri’s sweeping repression of political speech, the Court today adopts the analytical fallacies of our flawed decision in Buckley v. Valeo….Under the guise of applying Buckley, the Court proceeds to weaken the already enfeebled constitutional protection that Buckley afforded campaign contributions. As I indicated [previously], our decision in Buckley was in error, and I would overrule it.”¶ Therefore, it is likely that Justices Scalia, Kennedy, and Thomas are votes to strike down the aggregate contribution limits in McCutcheon and more generally to find contribution limits to violate the First Amendment. The crucial question in McCutcheon will be whether Chief Justice John Roberts and Justice Samuel Alito will join them and how far they are willing to go in reconsidering the distinction between contributions and expenditures.¶ The Chief Justice and Justice Alito were with Justices Scalia, Kennedy, and Thomas in Citizens United in its strong endorsement of the view that spending of money in election campaigns is political speech protected by the First Amendment and in invalidating limits on independent corporate political expenditures. Roberts and Alito also were with Scalia, Kennedy, and Thomas in Davis v. Federal Election Commission (2008), in declaring unconstitutional the “millionaire’s provision” of the Bipartisan Campaign Finance Reform Act unconstitutional. This provision increased contribution limits for opponents of a candidate who spent more than $350,000 of his or her personal funds. Most recently, in Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett (2011), these five Justices were in the majority to declare unconstitutional a public funding system that increased the contribution and spending limits for those not taking public money based on the amount spent by opponents.¶ By contrast, Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor strongly dissented in Citizens United, and Justice Elena Kagan, who as Solicitor General argued for the constitutionality of the law in Citizens United, wrote the dissent in Arizona Free Enterprise Club. They are obviously much more likely to uphold the challenged provisions in McCutcheon and to adhere to Buckley’s distinction between contributions and expenditures.¶ What seems absent on the current Court is any Justice who takes the position espoused by Justice John Paul Stevens, that there is no meaningful distinction between contribution and expenditure limits and that expenditure limits should be constitutional. This long has been my view. Elected officials can be influenced by who spends money on their behalf, just as they can be influenced by who directly contributes money to them. The perception of corruption might be generated by large expenditures for a candidate, just as it can be caused by large contributions. Moreover, I agree with Justice Stevens’s statement in his concurrence in Nixon v. Shrink that “[m]oney is property; it is not speech. . . . These property rights are not entitled to the same protection as the right to say what one pleases.’’¶ Prediction¶ Predicting Supreme Court decisions is always tempting and always dangerous. But for what it’s worth, my prediction is that the Court will vote five-four to strike down the aggregate contribution limits being challenged in McCutcheon and that it will do so without overruling the distinction between contributions and expenditures that is at the core of Buckley. When faced to confront the question in some future case, I fear that the Chief Justice and Justice Alito will join Justices Scalia, Kennedy, and Thomas in rejecting this distinction and they well might signal this in McCutcheon.

#### Capital key to strike down aggregate limits --- Citizens United proves

Gora 8-15 (Joel, professor of law at Brooklyn Law School, “Symposium: McCutcheon v. FEC and the fork in the road,” http://www.scotusblog.com/2013/08/symposium-mccutcheon-v-fec-and-the-fork-in-the-road/#more-168568)

The future of Buckley? Will the McCutcheon case disturb that Buckley equilibrium and call into question the continued validity of contribution limits in general, as some fear? The challengers say it is not necessary to reach that question because, even viewed as contribution limits under the Buckley framework (which they contend requires a much more probing analysis than commonly thought), the aggregate limits are clearly unconstitutional. The aggregate candidate limits are not required to prevent quid pro quo corruption because every separate contribution to a candidate is within the legal base limit. And the aggregate committee caps, claimed to be anti-circumvention safeguards, are constitutionally unnecessary and defective because of all the other statutory and regulatory safeguards in place to insure that the base contribution amount that any one contributor can give to any one party committee cannot be used as a conduit for corruption.¶ But the challengers also contend that the aggregate limits really operate like expenditure limits – i.e., limiting the donor’s overall ability to support a message they endorse, and controlling not just how much can be contributed, but how many candidates and committees the contributor can express support for. Given that, strict scrutiny is the standard of review. To the extent that some of the briefs supporting the law fret that eliminating those aggregate limits will give the wealthy too much political influence and sway, they seem to underscore that these can be viewed as questionable expenditure limits designed to “level the playing field” – the kiss of death for any campaign finance law. Either way, the challengers say, whether viewed as contribution controls or expenditure limits, a careful analysis of the interlocking statutory protections against corruption will show that the aggregate limits fail strict or even close scrutiny and must be struck down.¶ Enter the Roberts Court Of course, the $64,000 question is how the Roberts Court is likely to view these issues. The Court has certainly developed a decided track record on campaign finance issues. Five cases, five decisions striking down various campaign finance mechanisms as violating the First Amendment. Pervading these cases is the application of real strict scrutiny to campaign finance laws, measuring the burdens they impose on candidates, parties and groups, carefully probing in great detail the weight of the justifications offered for the mechanism at issue and showing a deep distrust and a severe skepticism of those justifications. Chief Justice John Roberts wrote a very muscular decision in the Arizona public financing case striking down a scheme that merely gave publicly funded candidates more government financing to counter spending by privately funded candidates. Even that was too much of a burden on the right of the privately funded candidate to spend their own money on their campaign. Here the restrictions are direct and potent and tell the contributor: You’ve expressed enough support for the candidates and party of your choice.¶ As is so often the case, the disposition may come down to Justice Anthony Kennedy. He, of course, is the author of the notorious Citizens United v. Federal Elections Commission (2010) decision, for which, despite its support in some quarters as a proper vindication of core First Amendment rights of all groups and individuals, the Court has taken a brutal battering in the court of public opinion.¶ Many are already raising the specter of the McCutcheon case being another Citizens United, this time dramatically changing the basic law on contribution limits. But McCutcheon and the RNC are not making that argument and are not challenging the validity of the base limits on contributions to candidates or parties. They think they can win within the traditional Buckley framework that permits contribution regulation, but only if properly justified. And Justice Kennedy in Citizens United went out of the way to say that the case involved independent expenditures only, with no direct impact on the validity of contribution limits. But one of the linchpins of his decision was that the only compelling interest that justifies campaign finance limitations is preventing direct quid pro quo corruption. To the extent the supporters of the law seem to be claiming that contributors like McCutcheon might have greater access to and influence on Republican elected officials, these days that does not seem to be much of a winning argument in the Supreme Court.¶ Finally, a win for McCutcheon and the RNC would have one other positive effect. It might give parties and candidates more financial wherewithal to counter the recent rise of “super PACs,” as exaggerated as their electoral impact seemed to be.

#### The plan forces a trade off --- massively spends court capital

McGinnis and Rappaport ’02 (John O., Prof of Law @ Cardozo Law, and Michael B., Prof of Law @ University of San Diego Law, “Our Supermajoritarian Constitution,” 80 Tex. L. Rev. 703)

Significantly, the Supreme Court has not declared these substitutions unconstitutional. In fact, the Court has upheld certain exercises of presidential authority to conclude international agreements that had binding effect [\*768] under domestic law. n276 While the causes of the Court's behavior are complex, the most important reason of the Court's failure to police the treaty clause appears to be its historic deference to the other branches regarding foreign affairs. n277 The consequences of the Court's failure thus underscore that supermajority rules, like other constitutional restraints, often require judicial enforcement.¶ Nevertheless, judicial enforcement of supermajority rules in this area would bump up against the strong institutional reasons that lead courts to defer in foreign affairs. A decision, even if correct as a matter of law, may have dramatically unfortunate consequences that could erode the Court's prestige. n278 For this reason, one may suspect that a Court with many other duties it finds more palatable, like protecting individual rights, might be reluctant to enforce strictly supermajority rules in this area even if clearly given the responsibility to do so. n279 Thus, the enforcement of a supermajority rule in foreign affairs may be more difficult than in the domestic arena, because of the nature of the subject matter.¶ n278. See John O. McGinnis, Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers, 56 Law & Contemp. Probs., Autumn 1993, at 293, 306-07 (contemplating that judicial decisions concerning foreign affairs would jeopardize the political capital of the Court).

#### Key to domestic political moderation – stops the Tea Party

Sides 10/16 (John, Associate Professor of Political Science – George Washington University, “Why striking down campaign contribution limits might make politics better,” Washington Post, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/16/why-striking-down-campaign-contribution-limits-might-make-politics-better/>)

Finally, I want to say more about why striking down aggregate contribution limits might actually attenuate ideological extremism (assuming I’m mostly wrong on my first point that people will not try to circumvent contribution limits!). The current campaign finance system – with its emphasis on interest group spending — favors highly ideological factions that have the means and motive to run independent campaigns. Rules that channel more money through party organizations and candidates might dampen the power of groups like the Tea Party. Against this claim, Bob suggests that political parties ran ads in 2012 that were just as “aggressive” and negative as interest groups. Research by the Wesleyan Media Project indicates that this is not true. But this finding is not relevant to my argument. My point about moderation is not about the tone or content of political ads, but is tied to the nomination process where party factions fight their ideological battles. A generation ago, such battles were waged internally in the proverbial smoke-filled rooms. Today they might be hashed out in the open through primary elections. The advantage goes to the interest group that can raise a lot of money and mobilize its partisan faction of voters. Ideological moderation seems more plausible when political resources are controlled primarily by party leaders whose chief incentive is to win elections rather than take positions. Like Bob, I support reasonable contribution limits, but I do not think the retention of aggregate limits on party committees and candidates improves the current campaign finance system. I certainly do not think, as Bob suggests, that a favorable ruling for McCutcheon will encourage “more money from fewer sources to flow more freely.” That dynamic was partially spurred by Citizens United. If anything removing the aggregate limits could make the system more accountable by channeling funds to political committees that are transparent, particularly party and candidate committees, which must face the voters at the ballot box.

#### That jacks US/Russian relations – domestic politics key

Sokov 13 (Nicholas – Senior Fellow at the Vienna Center for Disarmament and Non-Proliferation (VCDNP), “US-Russian Relations: Beyond the Reset”, 1/29, http://www.europeanleadershipnetwork.org/us-russian-relations-beyond-the-reset\_459.html)

Looking into the future, most observers of US-Russian relations tend to concentrate on arms control and disarmament – a new treaty to replace New START, missile defense, tactical nuclear weapons and other similar issues. Others pay attention to the human and political rights issues, including first of all the conservative wave that is sweeping through Russia. It is quite sad that nuclear disarmament and political rights dominate the agenda. This only shows that the relationship lacks depth. More than twenty years after the end of the Cold War, trade and investment remain at an extremely low level. They cannot serve as a stabilizer of the relationship (in sharp contrast to Russia’s relations with Europe) and their absence allows other, more volatile and more adversarial issues to top the agenda. Two features are likely to dominate the future of the US-Russian relationship and both will have a negative effect: domestic politics and the political transition in the Middle East and Northern Africa which is commonly known as the “Arab Spring.” Contrary to common opinion, there are very few truly difficult issues on the bilateral agenda that cannot be resolved through negotiation. The increasingly conflictual nature of the relationship results from domestic politics in both countries rather than from strategic, economic, or political differences. A good illustration is the well-known controversy over missile defense. Any decent diplomat could find a solution in a matter of months. Russian concerns concentrate on the fourth – and the last – phase of the American plan (known as the Phased Adaptive Approach), which foresees deployment of systems theoretically capable of intercepting strategic missiles. The solution proposed by Russian military leaders is to limit the capability of the fourth-phase system (for example, through limits on the number of interceptors and the areas of their deployment) so that it does not undermine the existing US-Russian strategic balance while preserving the ability of the American system to intercept a small number of long-range missiles, i.e., to limit the system to its officially proclaimed purpose. In the end, this is about the predictability of the American missile defense capability. The prospect of reaching agreement, however, is barred by the Republican Party, especially its Tea Party wing, which regards any limits whatsoever as anathema. Missile defense is an article of faith. This is not about plans or capabilities: this is about a deeply ideological commitment to unrestricted unilateralism. The increasingly tough and vocal (even shrill) Russian rhetoric also stems from domestic politics. Implementation of phase four of PAA is supposed to begin in the end of this decade and it may be another five to seven years, if not longer, until it begins to affect Russian strategic capability. There is plenty of time to negotiate. However, the rhetoric of the Russian government suggests that the threat is imminent. It is safe to assume that is simply the familiar “rally-around-the-flag” tactic of consolidating the public around the government.

#### Russia relations solve global nuclear war

Allison 11 (Graham, Director – Belfer Center for Science and International Affairs at Harvard’s Kennedy School, and Former Assistant Secretary of Defense, and Robert D. Blackwill, Senior Fellow – Council on Foreign Relations, “10 Reasons Why Russia Still Matters”, Politico, 2011, http://dyn.politico.com/printstory.cfm?uuid=161EF282-72F9-4D48-8B9C-C5B3396CA0E6)

That central point is that Russia matters a great deal to a U.S. government seeking to defend and advance its national interests. Prime Minister Vladimir Putin’s decision to return next year as president makes it all the more critical for Washington to manage its relationship with Russia through coherent, realistic policies. No one denies that Russia is a dangerous, difficult, often disappointing state to do business with. We should not overlook its many human rights and legal failures. Nonetheless, Russia is a player whose choices affect our vital interests in nuclear security and energy. It is key to supplying 100,000 U.S. troops fighting in Afghanistan and preventing Iran from acquiring nuclear weapons. Ten realities require U.S. policymakers to advance our nation’s interests by engaging and working with Moscow. First, Russia remains the only nation that can erase the United States from the map in 30 minutes. As every president since John F. Kennedy has recognized, Russia’s cooperation is critical to averting nuclear war. Second, Russia is our most consequential partner in preventing nuclear terrorism. Through a combination of more than $11 billion in U.S. aid, provided through the Nunn-Lugar Cooperative Threat Reduction program, and impressive Russian professionalism, two decades after the collapse of the “evil empire,” not one nuclear weapon has been found loose. Third, Russia plays an essential role in preventing the proliferation of nuclear weapons and missile-delivery systems. As Washington seeks to stop Iran’s drive toward nuclear weapons, Russian choices to sell or withhold sensitive technologies are the difference between failure and the possibility of success. Fourth, Russian support in sharing intelligence and cooperating in operations remains essential to the U.S. war to destroy Al Qaeda and combat other transnational terrorist groups. Fifth, Russia provides a vital supply line to 100,000 U.S. troops fighting in Afghanistan. As U.S. relations with Pakistan have deteriorated, the Russian lifeline has grown ever more important and now accounts for half all daily deliveries. Sixth, Russia is the world’s largest oil producer and second largest gas producer. Over the past decade, Russia has added more oil and gas exports to world energy markets than any other nation. Most major energy transport routes from Eurasia start in Russia or cross its nine time zones. As citizens of a country that imports two of every three of the 20 million barrels of oil that fuel U.S. cars daily, Americans feel Russia’s impact at our gas pumps. Seventh, Moscow is an important player in today’s international system. It is no accident that Russia is one of the five veto-wielding, permanent members of the U.N. Security Council, as well as a member of the G-8 and G-20. A Moscow more closely aligned with U.S. goals would be significant in the balance of power to shape an environment in which China can emerge as a global power without overturning the existing order. Eighth, Russia is the largest country on Earth by land area, abutting China on the East, Poland in the West and the United States across the Arctic. This territory provides transit corridors for supplies to global markets whose stability is vital to the U.S. economy. Ninth, Russia’s brainpower is reflected in the fact that it has won more Nobel Prizes for science than all of Asia, places first in most math competitions and dominates the world chess masters list. The only way U.S. astronauts can now travel to and from the International Space Station is to hitch a ride on Russian rockets. The co-founder of the most advanced digital company in the world, Google, is Russian-born Sergei Brin. Tenth, Russia’s potential as a spoiler is difficult to exaggerate. Consider what a Russian president intent on frustrating U.S. international objectives could do — from stopping the supply flow to Afghanistan to selling S-300 air defense missiles to Tehran to joining China in preventing U.N. Security Council resolutions.

### 3

#### GOP will gain Senate seats now but won’t retake the Senate – takeover dooms Obama’s remaining agenda

Whitesides 3/8/14 (John, Reuters, "Republicans gain momentum in close fight for U.S. Senate," http://www.reuters.com/article/2014/03/08/us-usa-politics-senate-analysis-idUSBREA2706H20140308)

(Reuters) - Eight months before the November 4 elections, Republicans have expanded the number of competitive races for U.S. Senate seats and have a growing chance of gaining control of that chamber and stalling Democratic President Barack Obama's second-term agenda.¶ Public dissatisfaction with the president, concerns about his healthcare overhaul and a sluggish economy, and a series of retirements by key Democratic senators in conservative states have made a rugged year for Democrats even more so, analysts and strategists in both parties say.¶ Republicans, who are widely expected to retain control of the U.S. House of Representatives, need a net gain of six seats to take back the 100-member Senate. Recent polling indicates they have big leads in three states - Montana, South Dakota and West Virginia - where longtime Democratic senators have retired or will retire in January.¶ Although the primary season is just starting and the candidates in many races are not set, polls suggest Republicans have boosted their odds of gaining additional Senate seats by becoming competitive in politically divided states such as Michigan and Colorado, where a year ago they were given little chance of winning.¶ Senate races in those states and five others now represented by Democrats - Alaska, Arkansas, Iowa, Louisiana and North Carolina - have been close in early voter surveys.¶ Democrats have a chance to pick up Republican-held seats in two states: Kentucky, where Senate Republican Leader Mitch McConnell is expected to dispatch a Tea Party-backed challenger in the primary but would face a tough fight against Democrat Alison Grimes in November; and Georgia, where Michelle Nunn, daughter of former Democratic senator Sam Nunn, will face the winner of a crowded Republican primary in a race to replace retiring Republican Saxby Chambliss.¶ That leaves Republicans needing to win at least three of the seven closely contested races for seats now held by Democrats, while holding off Grimes and Nunn in Kentucky and Georgia. If either of them wins in November, the task for Republicans will be more difficult.¶ "It's moving a little in the Republican direction," said Larry Sabato of the University of Virginia. His Crystal Ball website rates the Senate as a toss-up. "Republicans will pick up Senate seats, probably three or four. The question is, will they get that wave in October that carries them to the six they need?"¶ CONCERN AT THE WHITE HOUSE¶ If Republicans were to control the Senate and the House for the last two years of Obama's presidency, virtually any legislation or nomination he sought from Congress would probably be frozen in place.¶ Republicans also would be likely to press the Senate to join the House in trying to dismantle the Affordable Care Act, known as Obamacare. Although Obama could veto any bill from Congress that targets it, a Republican takeover of the Senate would put him on defense for the balance of his tenure.

#### Liberal Court rulings galvanize GOP turnout and hurt Dems

**Tucker 95** (D.F.B., associate professor of political science at the University of Melbourne, The Rehnquist Court and Civil Rights, p. 40-41)

The point I have been illustrating is that the backlash generated by an activist Supreme Court **is** likely to influence the political process of other political actor**s; indeed, that it is likely to provide an** enormous advantage to those politicians **who are unscrupulous enough to oppose the Court**. We see this in recent presidential contests in the United States for the strategies adopted by the major political parties when conducting election campaigns have been shaped by an on-going debate about liberal values, partly provoked by the activities of the Supreme Court.¶ This phenomenon has been very significant in the South because the Supreme Court was involved as a key instiuttion when the federal government brought segregation to an end. But the Warren-Burger Court’s role as an unwitting agent provocateur for the Republicans, encouraging conservative communities to shift political allegiance away from the Democrats by presenting as a symbol of unpopular liberal principles, has not been confined to the issue of racial justice. The Supreme Court expanded the liberal agenda enormously by bringing down unpopular and controversial rulings relating to police powers, separation of Church and State, speech, and privacy. In a series of decisions, that stretch the legal imagination and ingenuity even of their defenders, it recognized a number of new rights that protected stigmatized groups that had little or no community support (for example, criminals, prisoners, athiests, pornographers, drug users); even more controversially, it acted aggressively to withdraw protection from traditionally protected communities (such as poorly educated rural whaites and the religious communities) by refusing to uphold claims to state autonomy (made in the name of the federal agreement originally embodied in the Constitution). The Supreme Court justices acted in the name of liberal values and conditions of the federal division of powers that were widely recognized and accepted.¶ **These interventions had the effect of placing progressive leaders in the Democratic Party in** a very vulnerable position. Although they knew that they were unable to secure public support for the rights and liberties that the Court had decided to recognize, they felt obligated to defend the agenda the Court had foisted upon them. This was partly because of their own personal values. (How can someone who strongly believes that liberal ideals are worthy easily enter into a campaign to discredit the Court’s imposition of those very values?)

#### War powers restrictions devastate Obama and makes him weak – that undermines Dems in the midterms

Todd 13 (Chuck, Chief Political Correspondent @ NBC, “First Thoughts: Obama's tough challenge ahead”, 9/6, <http://firstread.nbcnews.com/_news/2013/09/06/20357154-first-thoughts-obamas-tough-challenge-ahead?lite>)

\*\*\* What happens to Obama if this goes down: If the Obama administration loses, many might not realize the full-fledged political crisis the president will face. His congressional opposition will be more emboldened, if that was possible. (Any advantage the Democrats hold in the upcoming fiscal fights ahead could quickly disappear.) A year before the 2014 midterms, Democrats will start hitting the panic button with a wounded Democratic president in office. (If you’ve paid attention to politics over the past two decades, when the going gets tough, Democrats often jump ship.) And any lame-duck status for Obama would be expedited. (After all, a “no” vote by Congress would rebuke the nation’s commander-in-chief.) Up until now, the first nine months of Obama’s second term have been, well, a disappointment. Gun control was stopped in the Senate; immigration reform is stalled in the House; no progress has been achieved in the budget talks. So if you throw in Congress rebuking the president from taking military action in Syria -- something he has said is necessary -- that would be a huge political blow to Obama’s political standing.

#### GOP-led Senate undercuts Obama’s climate agenda

Harder 13 (Amy, Environmental Correspondent @ National Journal, "Care About Energy and Environment Policy? Watch These Eight Races," http://webcache.googleusercontent.com/search?q=cache:CM3Nm1CJ-4wJ:www.nationaljournal.com/energy/care-about-energy-and-environment-policy-watch-these-eight-races-20131231+&cd=27&hl=en&ct=clnk&gl=us)

For environmentalists, the 2014 midterm elections are about settling for the lesser of two evils. Several conservative Democrats up for reelection in red states are facing tough competition, and if enough of these members lose, the Senate could flip to Republican control. That would be the worst outcome for environmentalists, who need a Democrat-controlled Senate to defend against efforts to undo President Obama's climate-change agenda and other tough environmental policies.

#### Obama’s climate agenda spurs global action – solves warming

Martinson 14 (Erica, Regulatory reporter @ Politico, "Obama's agenda: EPA leading the charge on climate change," http://dyn.politico.com/printstory.cfm?uuid=3BE87317-0921-4B01-A3B5-C39AEF6CDDC3)

President Barack Obama’s environmental regulators will spend the rest of this year writing climate rules that would reshape the nation’s electricity supply, throw a cloud over the future of coal power and take the biggest stride ever in throttling the nation’s greenhouse gas pollution.¶ And that’s just the beginning.¶ While the EPA takes on carbon pollution from thousands of power plants, the State Department is moving to carry out Obama’s orders to cut off funding for many coal projects overseas. The president’s agencies are also financing giant solar farms in the Mojave desert, working on doubling the federal government’s own reliance on green electricity and coming up with ways to help states gird their roads and bridges against severe storms and rising seas.¶ This is hardly a secret agenda. Obama has spoken of it proudly, most recently in Tuesday night’s State of the Union address, when he said: “Climate change is a fact. And when our children’s children look us in the eye and ask if we did all we could to leave them a safer, more stable world with new sources of energy, I want us to be able to say yes, we did.”¶ But some of the administration’s climate work is taking place under the radar, in ways few Americans would notice until the impacts ripple through the economy. One example: Last year, the administration quietly rejiggered a wonky calculation known as the “social cost of carbon” in a way that will make it easier to justify the economic burdens of a wide range of climate regulations.¶ The regulators are racing the calendar to get the rules in shape to take effect before Obama leaves office. That will be no easy feat, especially with the opponents in industry and coal-friendly states already fighting in the courts and Congress to thwart the new regulations.¶ But Obama and his “green Cabinet” — the secretaries and administrators in charge of energy, the environment and public lands — also have their eyes on 2015. That’s when the U.S. and other countries face a deadline to craft a legally binding agreement committing the world to reducing carbon dioxide emissions.¶ The president’s team is convinced that the U.S. must lead by example if it hopes to get China, India and Russia to follow suit, but the only hope of doing that is through the executive branch’s actions. By showing that his administration has taken concrete action, Obama can wipe out some of the embarrassment the U.S. suffered in international climate circles after rejecting the 1997 Kyoto climate accords.¶ The president made it plain in last year’s State of the Union that he wouldn’t wait for lawmakers to tackle climate change, proclaiming that “if Congress won’t act soon to protect future generations, I will.” But in fact, the administration’s climate efforts have been in motion since the start of his first term.¶ The administration’s major climate effort is a pair of EPA regulations aimed at cutting carbon pollution from power plants. The EPA proposed the first rule, aimed at future plants, in September and must finish writing it by January 2015. This June, it’s due to release the draft of a rule for the nation’s thousands of existing power plants — the agency’s main target and the single largest source of U.S. greenhouse gas pollution.

#### Extinction

Flournoy 12 (Don, Citing Feng Hsu, PhD NASA Scientist @ the Goddard Space Flight Center and Don is a PhD and MA from UT, former Dean of the University College @ Ohio University, former Associate Dean at SUNY and Case Institute of Technology, Former Manager for University/Industry Experiments for the NASA ACTS Satellite, currently Professor of Telecommunications @ Scripps College of Communications, Ohio University, “Solar Power Satellites,” January 2012, Springer Briefs in Space Development, p. 10-11)

In the Online Journal of Space Communication , Dr. Feng Hsu, a  NASA scientist at Goddard Space Flight Center, a research center in the forefront of science of space and Earth, writes, “The evidence of global warming is alarming,” noting the potential for a catastrophic planetary climate change is real and troubling (Hsu 2010 ) . Hsu and his NASA colleagues were engaged in monitoring and analyzing climate changes on a global scale, through which they received first-hand scientific information and data relating to global warming issues, including the dynamics of polar ice cap melting. After discussing this research with colleagues who were world experts on the subject, he wrote: I now have no doubt global temperatures are rising, and that global warming is a serious problem confronting all of humanity. No matter whether these trends are due to human interference or to the cosmic cycling of our solar system, there are two basic facts that are crystal clear: (a) there is overwhelming scientific evidence showing positive correlations between the level of CO2 concentrations in Earth’s atmosphere with respect to the historical fluctuations of global temperature changes; and (b) the overwhelming majority of the world’s scientific community is in agreement about the risks of a potential catastrophic global climate change. That is, if we humans continue to ignore this problem and do nothing, if we continue dumping huge quantities of greenhouse gases into Earth’s biosphere, humanity will be at dire risk (Hsu 2010 ) . As a technology risk assessment expert, Hsu says he can show with some confidence that the planet will face more risk doing nothing to curb its fossil-based energy addictions than it will in making a fundamental shift in its energy supply. “This,” he writes, “is because the risks of a catastrophic anthropogenic climate change can be potentially the extinction of human species, a risk that is simply too high for us to take any chances” (Hsu 2010 ).

### 4

#### The Executive Branch of the United States should issue an executive order establishing enjoin targeted killing by the United States federal government of citizens of the United States who are designated by the United States federal government as terrorists without due process on the grounds that federal definitions of terrorism constitute immaterial distinctions from treason.

#### The United States federal government should abide by the mandates of this executive order.

#### Self-restraint solves and is more effective than the plan

Posner and Vermeule 10 (Eric A. Posner is the Kirkland and Ellis Professor of Law @ the University of Chicago School of Law and Editor of the Journal of Legal Studies, Adrian Vermeule is a legal scholar, Oxford University Press, “The Executive Unbound: After the Madisonian Republic”, Google Books)

A Preliminary Note on Law and Self-Binding Many of our mechanisms are unproblematic from a legal perspective, as they ¶ involve presidential actions that are clearly lawful. But a few raise legal questions; in ¶ particular, those that involve self-binding.**74** Can a president bind himself to respect ¶particular first-order policies? With qualifications, the answer is “yes, at least to the same ¶ extent that a legislature can.” Formally, a duly promulgated executive rule or order binds ¶ even the executive unless and until it is validly abrogated**,** thereby establishing a new ¶ legal status quo.75 The legal authority to establish a new status quo allows a president to ¶ create inertia or political constraints that will affect his own future choices. In a practical ¶ sense**,** presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future. A president might commit himself to a long-term ¶ project of defense procurement or infrastructure or foreign policy, narrowing his own ¶future choices and generating new political coalitions that will act to defend the new rules ¶or policies.

#### The Courts are self-interested – they’ll use the aff’s precedent to expand their power vis-à-vis the President

Choper 7 -- Earl Warren Prof of Public Law @ UC Berkeley (Jesse H., 2007, "The Political Question Doctrine and the Supreme Court of the United States," Introduction, p. 1-21)

Because the prudential doctrine allows the Court to avoid deciding a case without an anchor in constitutional interpretation, it is this aspect of the political question doctrine that seems most troublesome. It would be unwise, however, to reject the entire political question doctrine because of the failings of the prudential doctrine. Indeed, the classical political question doctrine is critically important in the constitutional order, and its demise is cause for concern. In particular, the disappearance of the classical political question doctrine has a negative effect on two fronts. First, it has a direct negative impact in that it prevents the political branches from exercising constitutional judgment in those cases in which a classical political question is presented. Admittedly, this is a small category of cases that are not likely to arise very often. Electoral count disputes, judicial impeachments, and constitutional amendment ratification questions do not occur with much frequency. These questions are of fundamental importance, however, and judicial interference in these circumstances could have a negative effect on our government that transcends the scope of the particular case. Nothis provides a more poignant illustration than the Article II issue in the 2000 election cases. the doctrine strikes at the heart of separation of powers and the need for each branch to stay within its sphere to maintain the constitutional order. Second, the end of the classical political question doctrine has a much broader secondary effect. The Supreme Court is effectively left alone to police the boundaries of its power. This is, perhaps, the most difficult of all the Court's tasks, for it requires **the most extreme form of willpower**. It also dramatically displays the tension that exists beneath the surface of all the Court's decisions, That is, when the Court is protecting individual rights against congressional action, deciding whether authority resides with the states or with Congress, or resolving controversies between the executive and Congress, its own interest is not at the fore in the decision. Ostensibly, the Court is protecting one entity from another. When the Court decides whether the political question doctrine applies, however, what is merely implicit in those other decisions becomes explicit: the Court's institutional interests and strengths vis-a-vis the other branches. Thus, when the Court conducts the **threshold inquiry** of whether a matter rests exclusively with another branch, it must **inevitably** weigh the advantages and disadvantages of judicial review versus pure political analysis. This process therefore highlights for the Court its own strengths and weaknesses, as well as the upsides and downsides of giving the question to Congress of the executive. This is a healthy analysis for the Court to undertake, for it highlights the functional concerns behind the separation of powers and forces the Court to take a more modest view of its own powers and abilities. Therefore, eliminating this jurisdictional question from the Court's tasks helps **pave the way for a** much broader vision of judicial supremacy and a much more limited view of deference to the political branches. The end of the classical political question doctrine thus threaten to disrupt our constitutional order and turn the framers' vision of a constitutional conversation among three coordinate branches into a **monologue by the Supreme Court**.

#### Multiple scenarios for nuclear war

**Yoo 12**

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Congress’ track record when it has opposed presidential leadership has not been a happy one. Perhaps the most telling example was the Senate’s rejection of the Treaty of Versailles at the end of World War I. Congress’ isolationist urge kept the United States out of Europe at a time when democracies fell and fascism grew in their place. Even as Europe and Asia plunged into war, Congress passed the Neutrality Acts designed to keep the United States out of the conflict. President Franklin Roosevelt violated those laws to help the Allies and draw the nation into war against the Axis. While pro-Congress critics worry about a president’s foreign adventurism, the real threat to our national security may come from inaction and isolationism. Many point to the Vietnam War as an example of the faults of the “imperial presidency.” Vietnam, however, could not have continued without the consistent support of Congress in raising a large military and paying for hostilities. And Vietnam ushered in a period of congressional dominance that witnessed American setbacks in the Cold War and the passage of the ineffectual War Powers Resolution. Congress passed the resolution in 1973 over President Richard Nixon’s veto, and no president, Republican or Democrat, George W. Bush or Obama, has ever accepted the constitutionality of its 60-day limit on the use of troops abroad. No federal court has ever upheld the resolution. Even Congress has never enforced it. Despite the record of practice and the Constitution’s institutional design, critics nevertheless argue for a radical remaking of the American way of war. They typically base their claim on Article I, Section 8, of the Constitution, which gives Congress the power to “declare war.” But these observers read the 18th century constitutional text through a modern lens by interpreting “declare war” to mean “start war.” When the Constitution was written, however, a declaration of war served diplomatic notice about a change in legal relations between nations. It had little to do with launching hostilities. In the century before the Constitution, for example, Great Britain—where the framers got the idea of the declare-war power—fought numerous major conflicts but declared war only once beforehand. Our Constitution sets out specific procedures for passing laws, appointing officers and making treaties. There are none for waging war because the framers expected the president and Congress to struggle over war through the national political process. In fact, other parts of the Constitution, properly read, support this reading. Article I, Section 10, for example, declares that the states shall not “engage” in war “without the consent of Congress” unless “actually invaded, or in such imminent danger as will not admit of delay.” This provision creates exactly the limits desired by anti-war critics, complete with an exception for self-defense. If the framers had wanted to require congressional permission before the president could wage war, they simply could have repeated this provision and applied it to the executive. Presidents, of course, do not have complete freedom to take the nation to war. Congress has ample powers to control presidential policy, if it wants to. Only Congress can raise the military, which gives it the power to block, delay or modify war plans. Before 1945, for example, the United States had such a small peacetime military that presidents who started a war would have to go hat in hand to Congress to build an army to fight it. Since World War II, it has been Congress that has authorized and funded our large standing military, one primarily designed to conduct offensive, not defensive, operations (as we learned all too tragically on 9/11) and to swiftly project power worldwide. If Congress wanted to discourage presidential initiative in war, it could build a smaller, less offensive-minded military. Congress’ check on the presidency lies not just in the long-term raising of the military. It can also block any immediate armed conflict through the power of the purse. If Congress feels it has been misled in authorizing war, or it disagrees with the president’s decisions, all it need do is cut off funds, either all at once or gradually. It can reduce the size of the military, shrink or eliminate units, or freeze supplies. Using the power of the purse does not even require affirmative congressional action. Congress can just sit on its hands and refuse to pass a law funding the latest presidential adventure, and the war will end quickly. Even the Kosovo war, which lasted little more than two months and involved no ground troops, required special funding legislation. The framers expected Congress’ power of the purse to serve as the primary check on presidential war. During the 1788 Virginia ratifying convention, Patrick Henry attacked the Constitution for failing to limit executive militarism. James Madison responded: “The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist.” Congress ended America’s involvement in Vietnam by cutting off all funds for the war. Our Constitution has succeeded because it favors swift presidential action in war, later checked by Congress’ funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo or Korea, it is only because Congress has chosen not to exercise its easy check. We should not confuse a desire to escape political responsibility for a defect in the Constitution. A radical change in the system for making war might appease critics of presidential power. But **it could** also **seriously threaten American national security.** In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. It is not hard to think of situations where congressional **consent cannot be obtained in time to act**. Time for congressional deliberation, which leads only to passivity and isolation and not smarter decisions, will come at the price of speed and secrecy. The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can take the initiative and Congress can use its funding power to check them. Instead of demanding a legalistic process to begin war, the framers left war to politics. As we confront the new challenges of terrorism, rogue nations and WMD proliferation, **now is not the time to introduce sweeping, untested changes in the way we make war.**

### 5

#### The United States federal judiciary should decline to enjoin targeted killing by the United States federal government of citizens of the United States who are designated by the United States federal government as terrorists without due process on the grounds that federal definitions of terrorism constitute immaterial distinctions from treason on the basis that such a decision would undermine judicial deference to reliance interest.

#### The United States Supreme Court should announce that existing precedent in this area is no longer reliable and that relevant parties should be on notice that the reliance interests that caused it to be upheld in this case will not apply to future challenges on the issue.

#### Deploying the technique utilized in *Great Northern Railway Company v. Sunburst Oil and Refining Company*, the United States Supreme Court should declare that a new rule is established dictating that in all future cases courts should hold that targeted killing by the United States federal government of citizens of the United States who are designated by the United States federal government as terrorists without due process should not be allowed on the grounds that federal definitions of terrorism constitute immaterial distinctions from treason.

#### The United States Supreme Court should not deny certiorari in challenges on the issue.

#### We’ll clarify.

#### Competes --- the CP doesn’t make a decision, it only sets up a new rule to be held in the future, affects a different case, and the plan is retroactively applied as dictated by judicial procedure

**Slocum 8** (Brian G., Professor of Law – University of the Pacific and JD – Harvard Law School, “Overlooked Temporal Issues in Statutory Interpretation”, Temple Law Review, Fall, 81 Temp. L. Rev. 635, Lexis)

I. *The Current Practice of Retroactive Application of Judicially Created Rules*Courts do consider some temporal issues when interpreting statutes. For example, courts consider temporal issues when deciding whether statutes themselves should be applied retroactively or only prospectively. Although Congress can generally enact civil legislation with retroactive effects, the Court has created a rule of interpretation - the presumption against retroactivity - that directs courts to apply statutes only prospectively unless the statutory language is "so clear that it could sustain only one interpretation." [23](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n23)  [\*643]  Another common example of temporal consideration is the judicial use of dictionaries to define statutory terms. [24](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n24) The use of dictionaries can raise temporal issues because the meanings of words often change over time. [25](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all" \l "n25" \t "_self) Thus, if a court consults a dictionary to define a statutory term, the court must decide whether to use a dictionary published contemporaneously with the enactment of the statute at issue or a dictionary published at the time of the case (or at some other time). The Supreme Court has indicated that dictionaries published contemporaneously with a statute's enactment are the most appropriate for determining a statutory term's meaning. [26](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n26) Reflecting its general lack of appreciation for temporal concerns, however, the Court has not followed this principle consistently. [27](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n27) Despite the occasional consideration of some temporal issues when interpreting statutes, courts do not normally consider the temporal implications of creating or modifying rules of statutory interpretation. [28](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n28) The Supreme Court has made a limited exception of sorts, however, when the retroactive application of the rule would require the Court to overrule an earlier statutory interpretation. The Court's reluctance to apply new or modified rules retroactively in such cases is based on its heightened burden for overruling a statutory precedent, which is underpinned by the notion that Congress is able to amend the relevant statutory language if it so wishes. [29](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n29) Thus, in a recent decision, John R. Sand & Gravel Co. v. United States, [30](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n30) the Court refused to overturn its previous interpretation of a statute, in which it had interpreted the limitations period as jurisdictional in nature with regard to suits against the United States,  [\*644]  on the basis of a new rule of interpretation that created a rebuttable presumption of equitable tolling with regard to suits against the United States. [31](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n31) Apart from the occasional exception, little apparent consideration has been evident regarding the appropriateness of the historical inclination of courts to apply the current interpretive rules, even if newly created, to the statute before them. Courts' failure to consider the temporal issues involved when rules of interpretation are created or modified is at least partly understandable, however. The idea that any new judicially created rules (not just rules of statutory interpretation) should be applied only prospectively is a relatively novel concept. [32](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n32) Historically, the common practice has been for courts to apply the current law, even if newly created, at the time of their decisions. [33](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n33) Undoubtedly, one reason courts generally apply judicially created rules retroactively is because doing so is consistent with how judges perceive the adjudicative function. Applying new rules only prospectively would require courts to announce new rules that would not be applied to the case before the court. It is odd, though, for courts to decide issues external to a particular dispute or determine the law applicable in future cases even when such law has not yet served as the basis for any decision. [34](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n34) In addition, it has been argued that a policy where new or modified rules would be applied only prospectively would provide little incentive for parties to argue for changes to the rules, and courts would thus not have the benefit of briefing by the parties on the desirability of changes. [35](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all" \l "n35" \t "_self)

#### CP solves the whole case and avoids the disads --- the new standard will be applied by the Court in the future, creating a clear and certain precedent without undermining court capital

**Auerbach 91** (Carl A., Dean and Professor of Law Emeritus – University of Minnesota and Distinguished Visiting Professor of Law – University of San Diego, “A Revival of Some Ancient Learning: A Critique of Eisenberg's The Nature of the Common Law”, Minnesota Law Review, February, 75 Minn. L. Rev. 539, Lexis)

"Overruling" refers to retroactive overruling. Any basic overruling principle, however, must also incorporate prospective overruling because of its significant use by modern courts. [180](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n180" \t "_self) Julius Stone described prospective overruling as an American invention that "remains a momentous witness to the intellectual honesty and functional rationality of which American practice has shown the common law to be capable." [181](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n181" \t "_self) Its use ensures realization of the goals underlying the principle of stare decisis without inhibiting the overturning of socially incongruent doctrine because of a concern for these values. As Justice Cardozo suggested in Great Northern Railway v. Sunburst Oil & Refining Co., [182](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n182" \t "_self) prospective overruling is not only a mode of overruling; it is part of the doctrine of precedent itself: If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process. [183](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n183" \t "_self) Justice O'Connor's plurality opinion in American Trucking Associations v. Smith, [184](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n184" \t "_self) reiterated Justice Cardozo's view that prospective overruling is "part of the doctrine of stare decisis" [185](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n185" \t "_self) because it "allows courts to respect the principle of stare decisis even when they are impelled to change the law in light of new understanding." [186](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n186" \t "_self) Eisenberg, however, fails to appreciate that prospective overruling is an element of the doctrine of precedent.  [\*568]  The requirements of the basic overruling principle, Eisenberg maintains, are satisfied when a doctrine is "jagged," meaning that it is subject to relatively well-established, inconsistent, yet socially congruent exceptions. [187](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n187" \t "_self) Once a doctrine has become "jagged," reliance upon it is "unjustified, shaky, or legally unfounded" [188](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n188" \t "_self) and it does not warrant perpetuation. Any "well-informed lawyer" would so counsel clients. [189](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n189" \t "_self) Eisenberg admits "it is easy to find jagged doctrines that still prevail." [190](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n190" \t "_self) Nonetheless, he believes that courts should and do overturn jagged doctrines. He views a principle "as descriptively accurate if it explains most judicial practice even though it does not explain every instance." [191](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n191" \t "_self) Eisenberg offers an interesting explanation for the survival of jagged doctrines: They may not, in fact, be jagged. A "doctrine may seem to be jagged only because its exceptions reflect a principle that has not yet been stated at the appropriate level of generality." [192](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n192" \t "_self) For example, the announced rule that donative promises are unenforceable was inconsistent with some judicial exceptions for certain types of relied-upon promises. [193](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n193" \t "_self) The courts that created these exceptions did not follow precedent. Eisenberg agrees, however, that if courts had read the rule announced in the non-exceptional cases at a higher level of generality, specifically that foreseeable reliance makes a donative promise enforceable, the "exceptions" would not have been exceptions and precedent would have been followed. This explanation, although accurate, is inconsistent with Eisenberg's basic position that the rule of the precedent is a single rule announced by the precedent court. The basic overruling principle suggests that a non-jagged doctrine should be overturned if the doctrine substantially lacks social congruence and systemic consistency and has been criticized for these reasons in the professional literature. The "literature" includes opinions from other jurisdictions, lower or parallel courts or secondary sources such as restatements, treatises and law review articles. [194](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n194" \t "_self) Once a doctrine receives such  [\*569]  criticism, reliance on it is no longer justified. [195](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n195" \t "_self) Eisenberg's failure to recognize that prospective overruling is inherent in the doctrine of precedent leads him to conclude that even though a non-jagged doctrine is socially incongruent and systemically inconsistent, overruling is often inappropriate if it is not the subject of significant criticism in the professional literature. [196](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n196" \t "_self) Under these circumstances, reliance on the doctrine is more likely to be justified and the values underlying protection of such reliance may be paramount. [197](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n197" \t "_self) The "prudent course," then, is "to employ a technique of partial overturning, such as drawing an inconsistent distinction." [198](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n198" \t "_self) According to Eisenberg, the absence of significant professional criticism does not prove that a deciding court would be wrong to overrule because the doctrine may be new or there may have been a new change in the social propositions on which the doctrine rests. [199](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n199" \t "_self) Moreover, if the doctrine has been neglected in the professional literature or criticized in non-legal literature as lacking the support of applicable social propositions, a court may be correct to overrule. A lack of criticism in the professional literature should not prevent courts from doing justice when prospective overruling will protect the values Eisenberg considers important. Eisenberg's failure to recognize the importance of prospective overruling leads him to assert other dubious principles. Overruling may be inappropriate, he maintains, even if a socially incongruent and systemically inconsistent doctrine has been criticized in the professional literature "if the doctrine concerns an area in which planning on the basis of law is common, certainty is particularly important, and justified reliance is very likely." [200](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n200" \t "_self) This is precisely the situation, however, that is tailor-made for prospective overruling. Prospective overruling also makes unnecessary Eisenberg's second overruling principle: that a socially incongruent and systemically inconsistent doctrine that has been criticized in the professional literature "should be overruled if, but only if, the advantages of making the legal rule socially congruent and systemically consistent outweigh the costs of not serving the values that underlie doctrinal  [\*570]  stability and stare decisis." [201](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n201" \t "_self) Eisenberg is not unaware of the value of prospective overruling. Even in situations in which his second overruling principle applies, the court, he suggests, may resort to "signaling, . . . a technique by which a court follows a precedent but puts the profession on notice that the precedent is no longer reliable," thus paving the way for its eventual overruling. [202](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n202" \t "_self) Eisenberg's example of "signaling" is, as he recognizes, one of prospective overruling. [203](http://www.lexis.com/research/retrieve?_m=daf3fa057c80697625066a8c06e6a81c&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=af813b26403c3207b00b9643b54359d5" \l "n203" \t "_self)

#### Plan undermines settled precedent and drains the Court’s internal perception of capital, CP avoids the disad

**Yoo 00** (John C., Professor of Law – University of California, Berkeley, University of Chicago Law Review, Lexis)

How does the Court maintain this legitimacy? According to the Casey plurality, the Court receives its public support by "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." [39](http://www.lexis.com/research/retrieve?_m=f6c96806b2b5c26f254f61d91f23a994&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=f1d9955669c2a5d199aad5200dd019f2&focBudTerms=the%20overrule%20under%20fire&focBudSel=all#n39) In other words, only by acting in a manner that suggests that its decisions are the product of law rather than politics can the Court maintain its legitimacy. Therefore, the Court must adhere to settled precedent, lest the public believe that the Court is merely just another political actor. "To overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." [40](http://www.lexis.com/research/retrieve?_m=f6c96806b2b5c26f254f61d91f23a994&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=f1d9955669c2a5d199aad5200dd019f2&focBudTerms=the%20overrule%20under%20fire&focBudSel=all#n40) Without this legitimacy, the Court would be unable to perform its role as interpreter of the Constitution, which at times may require the Court to act against the popular will in favor of individual rights. Leading social scientists appear to agree with the Casey plurality's notion of judicial legitimacy. The Court's institutional legitimacy both enhances the legitimacy of particular decisions and increases the voluntarily acceptance of unpopular decisions. [41](http://www.lexis.com/research/retrieve?_m=f6c96806b2b5c26f254f61d91f23a994&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=f1d9955669c2a5d199aad5200dd019f2&focBudTerms=the%20overrule%20under%20fire&focBudSel=all#n41) Valuable as it is, however, legitimacy is hard to come by. Political scientists have emphasized the limited ability of the federal courts to enforce their decisions, and hence have turned to the Court's legitimacy as an explanation for compliance. [42](http://www.lexis.com/research/retrieve?_m=f6c96806b2b5c26f254f61d91f23a994&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=f1d9955669c2a5d199aad5200dd019f2&focBudTerms=the%20overrule%20under%20fire&focBudSel=all#n42) The Court's standing is further complicated because it lacks any electoral basis for its legitimacy. [43](http://www.lexis.com/research/retrieve?_m=f6c96806b2b5c26f254f61d91f23a994&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=f1d9955669c2a5d199aad5200dd019f2&focBudTerms=the%20overrule%20under%20fire&focBudSel=all#n43) The way to acquire this legitimacy, many scholars seem to believe, is for the Court to appear to act neutrally, [44](http://www.lexis.com/research/retrieve?_m=f6c96806b2b5c26f254f61d91f23a994&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=f1d9955669c2a5d199aad5200dd019f2&focBudTerms=the%20overrule%20under%20fire&focBudSel=all#n44) objectively, [45](http://www.lexis.com/research/retrieve?_m=f6c96806b2b5c26f254f61d91f23a994&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=f1d9955669c2a5d199aad5200dd019f2&focBudTerms=the%20overrule%20under%20fire&focBudSel=all#n45) or fairly [46](http://www.lexis.com/research/retrieve?_m=f6c96806b2b5c26f254f61d91f23a994&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=f1d9955669c2a5d199aad5200dd019f2&focBudTerms=the%20overrule%20under%20fire&focBudSel=all#n46) by following standards of procedural justice or by making decisions that follow principled rules.

#### Sunbursting spurs a quick test case to apply the new rule

**Rogers 68** (Candler S., Professor of Law – UMKC, University of Missouri, Kansas City Law Review, p. 48-49)

There is one reason perhaps more often suggested than any other for denying retroactive effect to overruling decisions. This is to protect persons who have ordered their affairs in reliance upon what they in good faith perceive to be the law. It is generally believed to be unsound for courts to disappoint expectations based on reasonable and deliberate reliance. [CONTINUES] Such dictum has the characteristic of providing a definite, but misleading, basis for reliance. It either invites further litigation to establish the new rule, or it discourages further attempts to proceed under the old rule. Thus, if in future cases the court fails to follow its dictum, expectations are terribly frustrated. Where one has litigated in reliance upon the dictum, his invited efforts and expenses are in vain. Where one has refrained from litigation in reliance upon the dictum, he may have suffered a grave sacrifice.

### 6

#### The affirmative’s acquiescence to the law cements epistemologically suspect juridical warfare---that naturalizes global preemptive violence

Morrissey 11 (John Morrissey, Lecturer in Political and Cultural Geography, National University of Ireland, Galway; has held visiting research fellowships at University College Cork, City University of New York, Virginia Tech and the University of Cambridge. Liberal Lawfare and Biopolitics: US Juridical Warfare in the War on Terror, Geopolitics, Volume 16, Issue 2, 2011)

Foucault’s envisioning of a more governmentalized and securitized modernity, framed by a ubiquitous architecture of security, speaks on various levels to the contemporary US military’s efforts in the war on terror, but I want to mention three specifically, which I draw upon through the course of the paper. First, in the long war in the Middle East and Central Asia, the US military actively seeks to legally facilitate both the ‘circulation’ and ‘conduct’ of a target population: its own troops. This may not be commonly recognized in biopolitical critiques of the war on terror but, as will be seen later, the Judge Advocate General Corps has long been proactive in a ‘juridical’ form of warfare, or lawfare, that sees US troops as ‘technical-biopolitical’ objects of management whose ‘operational capabilities’ on the ground must be legally enabled. Secondly, as I have explored elsewhere, the US military’s ‘grand strategy of security’ in the war on terror — which includes a broad spectrum of tactics and technologies of security, including juridical techniques — has been relentlessly justified by a power/knowledge assemblage in Washington that has successfully scripted a neoliberal political economy argument for its global forward presence.’9 Securitizing economic volatility and threat and regulating a neoliberal world order for the good of the global economy are powerful discursive touchstones registered perennially on multiple forums in Washington — from the Pentagon to the war colleges, from IR and Strategic Studies policy institutes to the House and Senate Armed Services Committees — and the endgame is the legitimization of the military’s geopolitical and biopolitical technologies of power overseas,20 Finally, Foucault’s conceptualization of a ‘society of security’ is marked by an urge to ‘govern by contingency’, to ‘anticipate the aleatory’, to ‘allow for the evental’.2’ It is a ‘security society’ in which the very language of security is promissory, therapeutic and appealing to liberal improvement. The lawfare of the contemporary US military is precisely orientated to plan for the ‘evental’, to anticipate a 4 series of future events in its various ‘security zones’ — what the Pentagon terms ‘Areas of Responsibility’ or ‘AORs’ (see figure 1)•fl These AORs equate, in effect, to what Foucault calls “spaces of security”, comprising “a series of possible events” that must be securitized by inserting both “the temporal” and “the uncertain”. And it is through preemptive juridical securitization ‘beyond the battlefield’ that the US military anticipates and enables the necessary biopolitical modalities of power and management on the ground for any future interventionary action. AORs and the ‘milieu’ of security For CENTCOM Commander General David Petraeus, and the other five US regional commanders across the globe, the population’ of primary concern in their respective AORs is the US military personnel deployed therein. For Petraeus and his fellow commanders, US ground troops present perhaps less a collection of “juridical-political” subjects and more what Foucault calls “technical- political” objects of “management and government”.25 In effect, they are tasked with governing “spaces of security” in which “a series of uncertain elements” can unfold in what Foucault terms the “milieu”.26 What is at stake in the milieu’ is “the problem of circulation and causality”, which must be anticipated and pLanned for in terms of “a series of possible events” that need to “be regulated within a multivalent and transformable framework”.27 And the “technical problem” posed by the eighteenth-century town planners Foucault has in mind is precisely the same technical problem of 5 space, population and regulation that US military strategists and Judge Advocate General Corps (JAG) personnel have in the twenty-first century. For US military JAGs, their endeavours to legally securitize the AORs of their regional commanders are ultimately orientated to “fabricate, organize, and plan a milieu” even before ground troops are deployed (as in the case of the first action in the war on terror, which I return to later: the negotiation by CENTCOM JAGs of a Status of Forces Agreement with Uzbekistan in early October 2OO1).2 JAGs play a key role in legally conditioning the battlefield, in regulating the circulation of troops, in optimizing their operational capacities, and in sanctioning the privilege to kill. The JAG’s milieu is a “field of intervention”, in other words, in which they are seeking to “affect, precisely, a population”.29 To this end, securing the aleatory or the uncertain is key. As Michael Dillon argues, central to the securing of populations are the “sciences of the aleatory or the contingent” in which the “government of population” is achieved by the regulation of “statistics and probability”.30 As he points out elsewhere, you “cannot secure anything unless you know what it is”, and therefore securitization demands that “people, territory, and things are transformed into epistemic objects”.3’ And in planning the milieu of US ground forces overseas, JAGs translate regional AORs into legally-enabled grids upon which US military operations take place. This is part of the production of what Matt Hannah terms “mappable landscapes of expectation”;32 and to this end, the aleatory is anticipated by planning for the ‘evental’ in the promissory language of securitization. The ontology of the event’ has recently garnered wide academic engagement. Randy Martin, for example, has underlined the evental discursive underpinnings of US military strategy in the war on terror; highlighting how the risk of future events results in ‘preemption’ being the tactic of their securitization.33 Naomi Klein has laid bare the powerful event-based logic of disaster capitalism’;34 while others have pointed out how an ascendant logic of premediation’. in which the future is already anticipated and mediated”. is a marked feature of the “post-9/1 I cultural landscape”.35 But it was Foucault who first cited the import of the evental’ in the realm of biopolitics. He points to the “anti-scarcity system” of seventeenth-century Europe as an early exemplar of a new ‘evental’ biopolitics in which “an event that could take place” is prevented before it “becomes a reality”.36 To this end, the figure of ‘population’ becomes both an ‘object’, “on which and towards which mechanisms are directed in order to have a particular effect on it”, but also a ‘subject’, “called upon to conduct itself in such and such a fashion”.37 Echoing Foucault, David Nally usefully argues that the emergence of the “era of bio-power” was facilitated by “the ability of ‘government’ to seize, manage and control individual bodies and whole populations”.38 And this is part of Michael Dillon’s argument about the “very operational heart of the security dispositif of the biopolitics of security”, which seeks to ‘strategize’, ‘secure’. ‘regulate’ and ‘manipulate’ the “circulation of species Iife”.3 For the US military, it is exactly the circulation and regulation of life that is central to its tactics of lawfare to juridically secure the necessary legal geographies and biopolitics of its overseas ground presence.

#### Our alternative is to refuse technical debates about war powers in favor of subjecting the 1ac’s discourse to rigorous democratic scrutiny – politics is the only way to solve – not the law

Rana 12 (Aziz Rana, Assistant Professor of Law, Cornell University Law School; A.B., Harvard College; J.D., Yale Law School; PhD., Harvard University, July 2012, “NATIONAL SECURITY: LEAD ARTICLE: Who Decides on Security?,” 44 Conn. L. Rev. 1417)

But this mode of popular involvement comes at a key cost. Secret information is generally treated as worthy of a higher status than information already present in the public realm—the shared collective information through which ordinary citizens reach conclusions about emergency and defense. Yet, oftentimes, as with the lead up to the Iraq War in 2003, although the actual content of this secret information is flawed,197 its status as secret masks these problems and allows policymakers to cloak their positions in added authority. This reality highlights the importance of approaching security information with far greater collective skepticism; it also means that security judgments may be more ‘Hobbesian’—marked fundamentally by epistemological uncertainty as opposed to verifiable fact—than policymakers admit. If the objective sociological claims at the center of the modern security concept are themselves profoundly contested, what does this meahn for reform efforts that seek to recalibrate the relationship between liberty and security? Above all, it indicates that the central problem with the procedural solutions offered by constitutional scholars-emphasizing new statutory frameworks or greater judicial assertiveness-is that they mistake a question of politics for one of law. In other words, such scholars ignore the extent to which governing practices are the product of background political judgments about threat, democratic knowledge, professional expertise, and the necessity for insulated decision-making. To the extent that Americans are convinced that they face continuous danger from hidden and potentially limitless assailants-danger too complex for the average citizen to comprehend independently-it is inevitable that institutions (regardless of legal reform initiatives) will operate to centralize power in those hands presumed to enjoy military and security expertise. Thus, any systematic effort to challenge the current framing of the relationship between security and liberty must begin by challenging the underlying assumptions about knowledge and security upon which legal and political arrangements rest. Without a sustained and public debate about the validity of security expertise, its supporting institutions, and the broader legitimacy of secret information, there can be no substantive shift in our constitutional politics. The problem at present, however, is that it remains unclear which popular base exists in society to raise these questions. Unless such a base fully emerges, we can expect our prevailing security arrangements to become ever more entrenched.

### Curriculum

#### --Their case doesn’t solve anything – there is no internal link to analogical reasoning

#### 1. Reading evidence for 9 minutes isn’t a way to put legal analysis into practice – too fast paced, we aren’t involved in the legal questioning of treason in the first polace

#### 2. No material outcome as a result of the plan means that we cannot change the analogical reasoning behind the plan – we don’t directly affect the law, means we should debate about the outcome of the plan and not necessarily the process

#### 3. Saying legal processes good isn’t an impact – we can engage in it too

#### Survival is a pre requisite to our rights

**Schell 1982**

(Jonathan, Professor at Wesleyan University, *The Fate of the Earth*, pages 136-137 uw//wej) Implicit in everything that I have said so far about the nuclear predicament there has been a perplexity that I would now like to take up explicitly, for it leads, I believe, into the very heart of our response-or, rather, our lack of response-to the predicament. I have pointed out that our species is the most important of all the things that, as inhabitants of a common world, we inherit from the past generations, but it does not go far enough to point out this superior importance, as though in making our decision about extinction we were being asked to choose between, say, liberty, on the one hand, and the survival of the species, on the other. For the species not only overarches but contains all the benefits of life in the common world, and to speak of sacrificing the species for the sake of one of these benefits involves one in the absurdity of wanting to destroy something in order to preserve one of its parts, as if one were to burn down a house in an attempt to redecorate the living room, or to kill someone to improve his character. ,but even to point out this absurdity fails to take the full measure of the peril of extinction, for mankind is not some invaluable object that lies outside us and that we must protect so that we can go on benefiting from it; rather, it is we ourselves, without whom everything there is loses its value. To say this is another way of saying that extinction is unique not because it destroys mankind as an object but because it destroys mankind as the source of all possible human subjects, and this, in turn, is another way of saying that extinction is a second death, for one's own individual death is the end not of any object in life but of the subject that experiences all objects. Death, however, places the mind in a quandary. One of-the confounding characteristics of death-"tomorrow's zero," in Dostoevski's phrase-is that, precisely because it removes the person himself rather than something in his life, it seems to offer the mind nothing to take hold of. One even feels it inappropriate, in a way, to try to speak "about" death at all, as. though death were a thing situated somewhere outside us and available for objective inspection, when the fact is that it is within us-is, indeed, an essential part of what we are. It would be more appropriate, perhaps, to say that death, as a fundamental element of our being, "thinks" in us and through us about whatever we think about, coloring our thoughts and moods with its presence throughout our lives.

#### Extinction outweighs

Bok 88

(Sissela, Professor of Philosophy at Brandeis, Applied Ethics and Ethical Theory, Rosenthal and Shehadi, Ed.)

The same argument can be made for Kant’s other formulations of the Categorical Imperative: “So act as to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means”; and “So act as if you were always through your actions a law-making member in a universal Kingdom of Ends.” No one with a concern for humanity could consistently will to risk eliminating humanity in the person of himself and every other or to risk the death of all members in a universal Kingdom of Ends for the sake of justice. To risk their collective death for the sake of following one’s conscience would be, as Rawls said, “irrational, crazy.” And to say that one did not intend such a catastrophe, but that one merely failed to stop other persons from bringing it about would be beside the point when the end of the world was at stake. For although it is true that we cannot be held responsible for most of the wrongs that others commit, the Latin maxim presents a case where we would have to take such responsibility seriously – perhaps to the point of deceiving, bribing, even killing an innocent person, in order that the world not perish. To avoid self-contradiction, the Categorical Imperative would, therefore, have to rule against the Latin maxim on account of its cavalier attitude toward the survival of mankind. But the ruling would then produce a rift in the application of the Categorical Imperative. Most often the Imperative would ask us to disregard all unintended but foreseeable consequences, such as the death of innocent persons, whenever concern for such consequences conflicts with concern for acting according to duty. But, in the extreme case, we might have to go against even the strictest moral duty precisely because of the consequences. Acknowledging such a rift would post a strong challenge to the unity and simplicity of Kant’s moral theory.

# 2NC

### K – Framing

#### -- Ethics DA – their focus on procedural solutions obscures moral questions , a legalist approach focuses on what is legal and confuses that with what is right or wrong and blurs morality – this is true in the context of the plan – their selective focus on domestic killing means we think things are moral because it is legal – the impact to this is constant militarism

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(Thomas, International Studies Quarterly 46, The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence)

The role of military lawyers in all this has, according to one study, “changed irrevocably” ~Keeva, 1991:59!. Although liberal theorists point to the broad normative contours that law lends to international relations, the Pentagon wields law with technical precision. During the Gulf War and the Kosovo campaign, JAGs opined on the legal status of multinational forces, the U.S. War Powers Resolution, rules of engagement and targeting, country fly-overs, maritime interceptions, treatment of prisoners, hostages and “human shields,” and methods used to gather intelligence. Long before the bombing began, lawyers had joined in the development and acquisition of weapons systems, tactical planning, and troop training. In the Gulf War, the U.S. deployed approximately 430 military lawyers, the allies far fewer, leading to some amusing but perhaps apposite observations about the legalistic culture of America ~Garratt, 1993!. Many lawyers reviewed daily Air Tasking Orders as well as land tactics. Others found themselves on the ground and at the front. According to Colonel Rup- pert, the idea was to “put the lawyer as far forward as possible” ~Myrow, 1996–97!. During the Kosovo campaign, lawyers based at the Combined Allied Operations Center in Vicenza, Italy, and at NATO headquarters in Brussels approved every single targeting decision. We do not know precisely how decisions were taken in either Iraq or Kosovo or the extent to which the lawyers reined in their masters. Some “corrections and adjustments” to the target lists were made ~Shot- well, 1993:26!, but by all accounts the lawyers—and the law—were extremely accommodating. The exigencies of war invite professional hazards as military lawyers seek to “find the law” and to determine their own responsibilities as legal counselors. A 1990 article in Military Law Review admonished judge advocates not to neglect their duty to point out breaches of the law, but not to become military ombuds- men either. The article acknowledged that the JAG faces pressure to demonstrate that he can be a “force multiplier” who can “show the tactical and political soundness of his interpretation of the law” ~Winter, 1990:8–9!. Some tension between law and necessity is inevitable, but over the past decade the focus has shifted visibly from restraining violence to legitimizing it. The Vietnam-era perception that law was a drag on operations has been replaced by a zealous “client culture” among judge advocates. Commanding officers “have come to realize that, as in the relationship of corporate counsel to CEO, the JAG’s role is not to create obstacles, but to find legal ways to achieve his client’s goals—even when those goals are to blow things up and kill people” ~Keeva, 1991:59!. Lt. Col. Tony Montgomery, the JAG who approved the bombing of the Belgrade television studios, said recently that “judges don’t lay down the law. We take guidance from our government on how much of the consequences they are willing to accept” ~The Guardian, 2001!. Military necessity is undeterred. In a permissive legal atmosphere, hi-tech states can meet their goals and remain within the letter of the law. As noted, humanitarian law is firmest in areas of marginal military utility. When opera- tional demands intrude, however, even fundamental rules begin to erode. The Defense Department’s final report to Congress on the Gulf War ~DOD, 1992! found nothing in the principle of noncombatant immunity to curb necessity. Heartened by the knowledge that civilian discrimination is “one of the least codified portions” of the law of war ~p. 611!, the authors argued that “to the degree possible and consistent with allowable risk to aircraft and aircrews,” muni- tions and delivery systems were chosen to reduce collateral damage ~p. 612!. “An attacker must exercise reasonable precautions to minimize incidental or collat- eral injury to the civilian population or damage to civilian objects, consistent with mission accomplishments and allowable risk to the attacking forces” ~p. 615!. The report notes that planners targeted “specific military objects in populated areas which the law of war permits” and acknowledges the “commingling” of civilian and military objects, yet the authors maintain that “at no time were civilian areas as such attacked” ~p. 613!. The report carefully constructed a precedent for future conflicts in which human shields might be deployed, noting “the presence of civilians will not render a target immune from attack” ~p. 615!. The report insisted ~pp. 606–607! that Protocol I as well as the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons “were not legally applicable” to the Gulf War because Iraq as well as some Coalition members had not ratified them. More to the point that law follows practice, the report claimed that certain provisions of Protocol I “are not a codification of the customary practice of nations,” and thus “ignore the realities of war” ~p. 616!. Nor can there be any doubt that a more elaborate legal regime has kept pace with evolving strategy and technology. Michael Ignatieff details in Virtual War ~2000! how targets were “developed” in 72-hour cycles that involved collecting and reviewing aerial reconnaissance, gauging military necessity, and coding antici- pated collateral damage down to the directional spray of bomb debris. A judge advocate then vetted each target in light of the Geneva Conventions and calcu- lated whether or not the overall advantage to be gained outweighed any expected civilian spillover. Ignatieff argues ~2000:198–199! that this elaborate symbiosis of law and technology has given birth to a “veritable casuistry of war.” Legal fine print, hand-in-hand with new technology, replaced deeper deliberation about the use of violence in war. The law provided “harried decision-makers with a critical guarantee of legal coverage, turning complex issues of morality into technical issues of legality.” Astonishingly fine discrimination also meant that unintentional civilian casualties were assumed to have been unintentional, not foreseen tragedies to be justified under the rule of double effect or the fog of war. The crowning irony is that NATO went to such lengths to justify its targets and limit collateral damage, even as it assured long-term civilian harm by destroy- ing the country’s infrastructure. Perhaps the most powerful justification was provided by law itself. War is often dressed up in patriotic abstractions—Periclean oratory, jingoistic newsreels, or heroic memorials. Bellum Americanum is cloaked in the stylized language of law. The DOD report is padded with references to treaty law, some of it obscure, that was “applicable” to the Gulf War, as if a surfeit of legal citation would convince skeptics of the propriety of the war. Instances of humane restraint invariably were presented as the rule of law in action. Thus the Allies did not gas Iraqi troops, torture POWs, or commit acts of perfidy. Most striking is the use of legal language to justify the erosion of noncombatant immunity. Hewing to the legal- isms of double effect, the Allies never intentionally targeted civilians as such. As noted, by codifying double effect the law artificially bifurcates intentions. Har- vard theologian Bryan Hehir ~1996:7! marveled at the Coalition’s legalistic word- play, noting that the “briefers out of Riyadh sounded like Jesuits as they sought to defend the policy from any charge of attempting to directly attack civilians.” The Pentagon’s legal narrative is certainly detached from the carnage on the ground, but it also oversimplifies and even actively obscures the moral choices involved in aerial bombing. Lawyers and tacticians made very deliberate decisions about aircraft, flight altitudes, time of day, ordnance dropped, confidence in intelligence, and so forth. By expanding military necessity to encompass an extremely prudential reading of “force protection,” these choices were calculated to protect pilots and planes at the expense of civilians on the ground, departing from the just war tradition that combatants assume greater risks than civilians. While it is tempting to blame collateral damage on the fog of war, much of that uncertainty has been lifted by technology and precision law. Similarly, in Iraq and in Yugoslavia the focus was on “degrading” military capabilities, yet a loose view of dual use spelled the destruction of what were essentially social, economic, and political targets. Coalition and NATO officials were quick to apologize for accidental civilian casualties, but in hi-tech war most noncombatant suffering is by design. Does the law of war reduce death and destruction? International law certainly has helped to delegitimize, and in rare cases effectively criminalize, direct attacks on civilians. But in general humanitarian law has mirrored wartime practice. On the ad bellum side, the erosion of right authority and just cause has eased the path toward war. Today, foreign offices rarely even bother with formal declara- tions of war. Under the United Nations system it is the responsibility of the Security Council to denounce illegal war, but for a number of reasons its mem- bers have been extremely reluctant to brand states as aggressors. If the law were less accommodating, greater effort might be devoted to diplomacy and war might be averted. On the in bello side the ban on direct civilian strikes remains intact, but double effect and military demands have been contrived to justify unnecessary civilian deaths. Dual use law has been stretched to sanction new forms of violence against civilians. Though not as spectacular as the obliteration bombing to which it so often is favorably compared, infrastructural war is far deadlier than the rhetoric of a “clean and legal” conflict suggests. It is true that rough estimates of the ratio of bomb tonnage to civilian deaths in air attacks show remarkable reductions in immediate collateral damage. There were some 40.83 deaths per ton in the bombing of Guernica in 1937 and 50.33 deaths per ton in the bombing of Tokyo in 1945. In the Kosovo campaign, by contrast, there were between .077 and .084 deaths per ton. In Iraq there were a mere .034 ~Thomas, 2001:169!. According to the classical definition of collateral damage, civilian protection has improved dramatically, but if one takes into account the staggering long-term effects of the war in Iraq, for example, aerial bombing looks anything but humane. For aerial bombers themselves modern war does live up to its clean and legal image. While war and intervention have few steadfast constituents, the myth of immaculate warfare has eased fears that intervening soldiers may come to harm, which polls in the U.S., at least, rank as being of great public concern, and even greater military concern. A new survey of U.S. civilian and military attitudes found that soldiers were two to four times more casualty-averse than civilians thought they should be ~Feaver and Kohn, 2001!. By removing what is perhaps the greatest restraint on the use of force—the possibility of soldiers dying—law and technology have given rise to the novel moral hazards of a “postmodern, risk-free, painless war” ~Woollacott, 1999!. “We’ve come to expect the immacu- late,” notes Martin Cook, who teaches ethics at the U.S. Army War College in Carlisle, PA. “Precision-guided munitions make it very much easier to go to war than it ever has been historically.” Albert Pierce, director of the Center for the Study of Professional Military Ethics at the U.S. Naval Academy argues, “standoff precision weapons give you the option to lower costs and risks . . . but you might be tempted to do things that you might otherwise not do” ~Belsie, 1999!. Conclusion The utility of law to legitimize modern warfare should not be underestimated. Even in the midst of war, legal arguments retain an aura of legitimacy that is missing in “political” justifications. The aspirations of humanitarian law are sound. Rather, it is the instrumental use of law that has oiled the skids of hi-tech violence. Not only does the law defer to military necessity, even when very broadly defined, but more importantly it bestows on those same military demands all the moral and psychological trappings of legality. The result has been to legalize and thus to justify in the public mind “inhumane military methods and their consequences,” as violence against civilians is carried out “behind the protective veil of justice” ~af Jochnick and Normand, 1994a:50!. Hi-tech states can defend hugely destructive, essentially unopposed, aerial bombardment by citing the authority of seemingly secular and universal legal standards. The growing gap between hi- and low-tech means may exacerbate inequalities in moral capital as well, as the sheer barbarism of “premodern” violence committed by ethnic cleansers or atavistic warlords makes the methods employed by hi-tech warriors seem all the more clean and legal by contrast. This fusion of law and technology is likely to propel future American interventions. Despite assurances that the campaign against terrorism would differ from past conflicts, the allied air war in Afghanistan, marked by record numbers of unmanned drones and bomber flights at up to 35,000 feet, or nearly 7 miles aloft, rarely strayed from the hi-tech and legalistic script. While the attack on the World Trade Center confirmed a thousand times over the illegality and inhu- manity of terrorism, the U.S. response has raised further issues of legality and inhumanity in conventional warfare. Civilian deaths in the campaign have been substantial because “military objects” have been targeted on the basis of extremely low-confidence intelligence. In several cases targets appear to have been chosen based on misinformation and even rank rumor. A liberal reading of dual use and the authorization of bombers to strike unvetted “targets of opportunity” also increased collateral damage. Although 10,000 of the 18,000 bombs, missiles, and other ordnance used in Afghanistan were precision-guided munitions, the war resulted in roughly 1000 to 4000 direct civilian deaths, and, according to the UNHCR, produced 900,000 new refugees and displaced persons. The Pentagon has nevertheless viewed the campaign as “a more antiseptic air war even than the one waged in Kosovo” ~Dao, 2001!. General Tommy Franks, who commanded the campaign, called it “the most accurate war ever fought in this nation’s history” ~Schmitt, 2002!.9 No fundamental change is in sight. Governments continue to justify collateral damage by citing the marvels of technology and the authority of international law. One does see a widening rift between governments and independent human rights and humanitarian relief groups over the interpretation of targeting and dual-use law. But these disputes have only underscored the ambiguities of human- itarian law. As long as interventionist states dominate the way that the rules of war are crafted and construed, hopes of rescuing law from politics will be dim indeed.

#### Legal restraints guarantee increasing public resistance and executive secrecy – only starting with the political can solve

Glennon 14 (Michael J. Glennon 14, I-law prof at Tufts, National Security and Double Government, <http://harvardnsj.org/wp-content/uploads/2014/01/Glennon-Final.pdf>)

If Bagehot’s theory is correct, the United States now confronts a precarious situation. Maintaining the appearance that Madisonian institutions control the course of national security policy requires that those institutions play a large enough role in the decision-making process to maintain the illusion. But the Madisonians’ role is too visibly shrinking, and the Trumanites’ too visibly expanding, to maintain the plausible impression of Madisonian governance.504 For this reason and others, public confidence in the Madisonians has sunk to new lows.505 The Trumanites have resisted transparency far more successfully than have the Madisonians, with unsurprising results. The success of the whole dual institutional model depends upon the maintenance of public enchantment with the dignified/ Madisonian institutions. This requires allowing no daylight to spoil their magic,506 as Bagehot put it. An element of mystery must be preserved to excite public imagination. But transparency—driven hugely by modern internet technology, multiple informational sources, and social media— leaves little to the imagination. “The cure for admiring the House of Lords,” Bagehot observed, “was to go and look at it.”507 The public has gone and looked at Congress, the Supreme Court, and the President, and their standing in public opinion surveys is the result**.** Justices, senators, and presidents are not masters of the universe after all, the public has discovered. They are just like us. Enquiring minds may not have read enough of Foreign Affairs508 to assess the Trumanites’ national security polices, but they have read enough of People Magazine509 to know that the Madisonians are not who they pretend to be. While the public’s unfamiliarity with national security matters has no doubt hastened the Trumanites’ rise, too many people will soon be too savvy to be misled by the Madisonian veneer,510 and those people often are opinion leaders whose influence on public opinion is disproportionate to their numbers. There is no point in telling ghost stories, Holmes said, if people do not believe in ghosts.511 It might be supposed at this point that the phenomenon of double government is nothing new. Anyone familiar with the management of the Vietnam War 512 or the un-killable ABM program 513 knows that double government has been around for a while. Other realms of law, policy, and business also have come to be dominated by specialists, made necessary and empowered by ever-increasing divisions of labor; is not national security duality merely a contemporary manifestation of the challenge long posed to democracy by the administrative state-cum-technocracy?515 Why is national security different? There is validity to this intuition and no dearth of examples of the frustration confronted by Madisonians who are left to shrug their shoulders when presented with complex policy options, the desirability of which cannot be assessed without high levels of technical expertise. International trade issues, for example, turn frequently upon esoteric econometric analysis beyond the grasp of all but a few Madisonians. Climate change and global warming present questions that depend ultimately upon the validity of one intricate computer model versus another. The financial crisis of 2008 posed similar complexity when experts insisted to hastily-gathered executive officials and legislators that—absent massive and immediate intervention—the nation’s and perhaps the world’s entire financial infrastructure would face imminent collapse.516 In these and a growing number of similar situations, the “choice” madeby the Madisoniansis increasingly hollow; the real choices are made by technocrats who present options to Madisonians that the Madisonians are in no position to assess. Why is national security any different? It is different for a reason that I described in 1981: the organizations in question “do not regulate truck widths or set train schedules. They have the capability of radically and permanently altering the political and legal contours of our society.”517 An unrestrained security apparatus has throughout history been one of the principal reasons that free governments have failed. The Trumanite network holds within its power something far greater than the ability to recommend higher import duties or more windmills or even gargantuan corporate bailouts: it has the power to kill and arrest and jail, the power to see and hear and read peoples’ every word and action, the power to instill fear and suspicion, the power to quash investigations and quell speech, the power to shape public debate or to curtail it, and the power to hide its deeds and evade its weak-kneed overseers. It holds, in short, the power of irreversibility. No democracy worthy of its name can permit that power to escape the control of the people. It might also be supposed that existing, non-Madisonian, external restraints pose counterweights that compensate for the weakness of internal, Madisonian checks. The press, and the public sentiment it partially shapes, do constrain the abuse of power—but only up to a point. To the extent that the “marketplace of ideas” analogy ever was apt, that marketplace, like other marketplaces, is given to distortion. Public outrage is notoriously fickle, manipulable, and selective, particularly when driven by anger, fear, and indolence. Sizeable segments of the public—often egged on by public officials—lash out unpredictably at imaginary transgressors, failing even in the ability to identify sympathetic allies.518 "[P]ublic opinion," Sorensen wryly observed, "is not always identical with the public interest."519 The influence of the media, whether to rouse or dampen, is thus limited. The handful of investigative journalists active in the United States today are the truest contemporary example of Churchill's tribute to the Royal Air Force.520 In the end, though, access remains everything to the press. Explicit or implicit threats by the targets of its inquiries to curtail access often yield editorial acquiescence. Members of the public obviously are in no position to complain when a story does not appear. Further, even the best of investigative journalists confront a high wall of secrecy**.** Finding and communicating with (on deep background, of course) a knowledgeable, candid source within an opaque Trumanite network resistant to efforts to pinpoint decision-makers 521 can take years. Few publishers can afford the necessary financial investment; newspapers are, after all, businesses, and the bottom line of their financial statements ultimately governs investigatory expenditures. Often, a second corroborating source is required. Even after scaling the Trumanite wall of secrecy, reporters and their editors often become victims of the deal-making tactics they must adopt to live comfortably with the Trumanites. Finally, members of the mass media are subject to the same organizational pressures that shape the behavior of other groups. They eat together, travel together, and think together. A case in point was the Iraq War. The Washington Post ran twenty seven editorials in favor of the war along with dozens of op-ed pieces, with only a few from skeptics.522 The New York Times, Time, Newsweek, the Los Angeles Tunes, and the Wall Street Journal all marched along in lockstep.523 As Senator Eugene McCarthy aptly put it, reporters are like blackbirds; when one flies off the telephone wire, they all fly off.524 More importantly, the premise—that a vigilant electorate fueled by a skeptical press together will successfully fill the void created by the hollowed-out Madisonian institutions—is wrong.525 This premise supposes that those outside constraints operate independently, that their efficacy is not a function of the efficacy of internal, Madisonian checks.526 But the internal and external checks are woven together and depend upon one another.527 Non-disclosure agreements (Judicially-enforced gag orders, in truth) are prevalent among those best positioned to criticize/28 Heightened efforts have been undertaken to crush vigorous investigative journalism and to prosecute and humiliate whistleblowers and to equate them with spies under the espionage laws. National security documents have been breathtakingly over-classified. The evasion of Madisonian constraints by these sorts of policies has the net effect of narrowing the marketplace of ideas, curtaining public debate, and gutting both the media and public opinion as effective restraints.529 The vitality of external checks depends upon the vitality of internal Madisonian checks, and the internal Madisonian checks only minimally constrain the Trumanites. Some suggest that the answer is to admit the failure of the Madisonian institutions, recognize that for all their faults the external checks are all that really exist, acknowledge that the Trumanite network cannot be unseated, and try to work within the current framework.530 But the idea that external checks alone do or can provide the needed safeguards is false**.** If politics were the effective restraint that some have argued it is,531 politics—intertwined as it is with law—would have produced more effective legalist constraints. It has not. The failure of law is and has been a failure of politics. If the press and public opinion were sufficient to safeguard what the Madisonian institutions were designed to protect, the story of democracy would consist of little more than a series of elected kings, with the rule of law having frozen with the signing of Magna Carta in 1215. Even with effective rules to protect free, informed, and robust expression—which is an enormous assumption—public opinion alone cannot be counted upon to protect what law is needed to protect. The hope that it can do so recalls earlier reactions to Bagehot’s insights—the faith that “the people” can simply “throw off” their “deferential attitude and reshape the political system,” insisting that the Madisonian, or dignified, institutions must “once again provide the popular check” that they were intended to provide.532 That, however, is exactly what many thought they were doing in electing Barack Obama as President. The results need not be rehearsed; little reason exists to expect that some future public effort to resuscitate withered Madisonian institutions would be any more successful. Indeed, the added power that the Trumanite network has taken on under the BushObama policies would make that all the more difficult. It is simply naive to believe that a sufficiently large segment of informed and intelligent voters can somehow come together to ensure that sufficiently vigilant Madisonian surrogates will somehow be included in the national security decisionmaking process to ensure that the Trumanite network is infused with the right values. Those who believe that do not understand why that network was formed, how it operates, or why it survives. They want it, in short, to become more Madisonian. The Trumanite network, of course, would not mind appearing more Madisonian, bul its enduring ambilion is lo become, in reality, less Madisonian. It is not clear what precisely might occur should Bagehot's cone of government "fall to earth." United States history provides no precedent. One possibility is a prolongation of what are now long-standing trends, with the arc of power continuing to shift gradually from the Madisonian institutions to the Trumanite network. Under this scenario, those institutions continue to subcontract national security decisionmaking to the Trumanites; a majority of the public remains satisfied with tradeoffs between liberty and security; and members of a dissatisfied minority are at a loss to know what to do and are, in any event, chilled by widely-feared Trumanite surveillance capabilities. The Madisonian institutions, in this future, fade gradually into museum pieces, like the British House of Lords and monarchy; Madisonians kiss babies, cut ribbons, and read Trumanite talking points, while the Trumanite network, careful to retain historic forms and familiar symbols, takes on the substance of a silent directorate. Another possibility, however, is that the fall to earth could entail consequences that are profoundly disruptive, both for the government and the people. This scenario would be more likely in the aftermath of a catastrophic terrorist attack that takes place in an environment lacking the safety-valve checks that the Madisonian institutions once provided. In this future, an initial "rally round the flag" fervor and associated crack-down are followed, later, by an increasing spiral of recriminatory reactions and counter-reactions. The government is seen increasingly by elements of the public as hiding what they ought to know, criminalizing what they ought to be able to do, and spying upon what ought to be private. The people are seen increasingly by the government as unable to comprehend the gravity of security threats, unappreciative of its security-protection efforts, and unworthy of its own trust. Recent public opinion surveys are portentous. A September 2013 Gallup Poll revealed that Americans' trust and confidence in the federal government's ability to handle international problems had reached an all-time low;533 a June 2013 Time magazine poll disclosed that 70% of those age eighteen to thirty-four believed that Edward Snowden "did a good thing" in leaking the news of the NSA's surveillance program.534 This yawning attitudinal gap between the people and the government could reflect itself in multiple ways. Most obviously, the Trumanite network must draw upon the U.S. population to fill the five million positions needed to staff its projects that require security clearances.535 That would be increasingly difficult, however, if the pool of available recruits comprises a growing and indeterminate number of Edward Snowdens—individuals with nothing in their records that indicates disqualifying unreliability but who, once hired, are willing nonetheless to act against perceived authoritarian tendencies by leaving open the vault of secrecy. A smaller, less reliable pool of potential recruits would hardly be the worst of it, however. Lacking perceived legitimacy, the government could expect a lesser level of cooperation, if not outright obstruction, from the general public. Many national security programs presuppose public support for their efficient operation. This ranges from compliance with national security letters and library records disclosure under the PATRIOT Act to the design, manufacture, and sale of drones, and cooperation with counterintelligence activities and criminal investigations involving national security prosecutions. Moreover, distrust of government tends to become generalized; people who doubt governmental officials' assertions on national security threats are inclined to extend their skepticism. Governmental assurances concerning everything from vaccine and food safety to the fairness of stock-market regulation and IRS investigations (not without evidence536) become widely suspect. Inevitably, therefore, daily life would become more difficult. Government, after all, exists for a reason. It carries out many helpful and indeed essential functions in a highly specialized society. When those functions cannot be fulfilled, work-arounds emerge, and social dislocation results. Most seriously, the protection of legitimate national security interests would itself suffer if the public were unable to distinguish between measures vital to its protection and those assumed to be undertaken merely through bureaucratic inertia or lack of imagination. The government itself, meanwhile, could not be counted upon to remain passive in the face of growing public obduracy in response to its efforts to do what it thinks essential to safeguard national security. Here we do have historical precedents, and none is comfortably revisited. The Alien and Sedition Acts in the 1790s;537 the Palmer Raids of 1919 and 1920;538 the round-up of Japanese-American citizens in the 1940s;539 governmental spying on and disruption of civil rights, draft protesters, and anti-war activists in the 1960s and 1970s;540 and the incommunicado incarceration without charges, counsel, or trial of "unlawful combatants" only a few short years ago541—all are examples of what can happen when government sees limited options in confronting nerve-center security threats. No one can be certain, but the ultimate danger posed if the system were to fall to earth in the aftermath of a devastating terrorist attack could be intensely divisive and potentially **destabilizing**—not unlike what was envisioned by conservative Republicans in Congress who opposed Truman's national security programs when the managerial network was established.542 It is therefore appropriate to move beyond explanation and to turn to possibilities for reform—to consider steps that might be taken to prevent the entire structure from falling to earth.

### Solvency

#### Court rulings are toothless – enforcement is delayed and merely result in legal limbo

Scheppele 12 (Kim Lane, Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values; Director of the Program in Law and Public Affairs, Princeton University, “THE NEW JUDICIAL DEFERENCE BOSTON UNIVERSITY LAW REVIEW,” vol 92, <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SCHEPPELE.pdf>)

In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides - the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won.¶ Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to. n6 But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won [\*92] in these cases - and they prevailed overwhelmingly in their claims, especially at the Supreme Court - but courts looked metaphorically over the suspects' heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question. Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference.7 Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter arma silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still “hot,” courts jumped right in, dealing governments one loss after another.8 After 9/11, it appears that deference is dead. But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice.9 Suspected terrorists have received from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives. Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference. This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted – often bold, ambitious, and brave solutions – nonetheless fail to address the plights of the specific individuals who brought the cases. This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something – an appearance not entirely false in the long run – while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

#### Obama can circumvent the plan- covert loopholes are inevitable

**Lohmann 1-28**-13 [Julia, director of the Harvard Law National Security Research Committee, BA in political science from the University of California, Berkeley, “Distinguishing CIA-Led from Military-Led Targeted Killings,” <http://www.lawfareblog.com/wiki/the-lawfare-wiki-document-library/targeted-killing/effects-of-particular-tactic-on-issues-related-to-targeted-killings/>]

The U.S. military—in particular, the Special Operations Command (SOCOM), and its subsidiary entity, the Joint Special Operations Command (JSOC)—is responsible for carrying out military-led targeted killings.¶ Military-led targeted killings are subject to various legal restrictions, including a complex web of statutes and executive orders. For example, because the Covert Action Statute does not distinguish among institutions undertaking covert actions, targeted killings conducted by the military that fall within the definition of “covert action” set forth in 50 U.S.C. § 413(b) are subject to the same statutory constraints as are CIA covert actions. 50 U.S.C. § 413b(e). However, as Robert Chesney explains, many military-led targeted killings may fall into one of the CAS exceptions—for instance, that for traditional military activities—so that the statute’s requirements will not always apply to military-led targetings. Such activities are exempted from the CAS’s presidential finding and authorization requirements, as well as its congressional reporting rules.¶ Because such unacknowledged military operations are, in many respects, indistinguishable from traditional covert actions conducted by the CIA, this exception may provide a “loophole” allowing the President to circumvent existing oversight mechanisms without substantively changing his operational decisions. However, at least some military-led targetings do not fall within the CAS exceptions, and are thus subject to that statute’s oversight requirements. For instance, Chesney and Kenneth Anderson explain, some believe that the traditional military activities exception to the CAS only applies in the context of overt hostilities, yet it is not clear that the world’s tacit awareness that targeted killing operations are conducted (albeit not officially acknowledged) by the U.S. military, such as the drone program in Pakistan, makes those operations sufficiently overt to place them within the traditional military activities exception, and thus outside the constraints of the CAS.¶ Chesney asserts, however, that despite the gaps in the CAS’s applicability to military-led targeted killings, those targetings are nevertheless subject to a web of oversight created by executive orders that, taken together, largely mirrors the presidential authorization requirements of the CAS. But, this process is not enshrined in statute or regulation and arguably could be changed or revoked by the President at any time. Moreover, this internal Executive Branch process does not involve Congress or the Judiciary in either ex ante or ex post oversight of military-led targeted killings, and thus, Philip Alston asserts, it may be insufficient to provide a meaningful check against arbitrary and overzealous Executive actions.

# 1NR

### Solvency – 2NC

#### 1. Prospective action solves the bulk of the case. Future production is allowed, restrictions are prospectively removed, sending a clear signal to the market, and the CP changes policy from now until forever, effecting a dramatic shift in energy law. Good is good enough, its *sufficient* to solve the Aff.

#### CP triggers binding legal change and avoids the DA

**Traynor 99** (Roger J., Chief Justice – CA Supreme Court, Professor of Legal Science – Cambridge University, “Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility”, Hastings Law Journal, 50 Hastings L.J. 771, April, lexis)

It is my opinion that however sound this prevailing rule may be in the main, it can on occasion unduly restrict the development of the law. A court usually will not overrule a precedent even if it is convinced that the precedent is unsound, when the hardship caused by a retroactive change would not be offset by its benefits. The technique of prospective overruling enables courts to solve this dilemma by changing bad law without upsetting the reasonable expectations of those who relied on it. [16](http://www.lexis.com/research/retrieve?_m=52ec50952a7639b8b1aa68cd2f075259&docnum=7&_fmtstr=FULL&_startdoc=1&wchp=dGLzVlz-zSkAA&_md5=f4a841623bc7024af70ab40adb909c40#n16) Only occasionally will there  [\*780]  be cases that clearly demand this technique. [17](http://www.lexis.com/research/retrieve?_m=52ec50952a7639b8b1aa68cd2f075259&docnum=7&_fmtstr=FULL&_startdoc=1&wchp=dGLzVlz-zSkAA&_md5=f4a841623bc7024af70ab40adb909c40#n17) In the hands of skilled judicial craftsmen, acting under well-reasoned guidelines, it can be an instrument of justice that fosters public respect for the law. [18](http://www.lexis.com/research/retrieve?_m=52ec50952a7639b8b1aa68cd2f075259&docnum=7&_fmtstr=FULL&_startdoc=1&wchp=dGLzVlz-zSkAA&_md5=f4a841623bc7024af70ab40adb909c40#n18) Although the technique is frequently invoked in overruling precedents, it can serve in any case in which new rules are announced.

#### 2. Predictability and certainty are DAs to the Aff, not the CP. The plan is applied retroactively, disturbing settled law and all the parties that rely on existing precedent. Prospective rulings create legal stability but don’t pull the rug out under past litigants --- that’s Slocum and Auerbach

### Sequencing – 2NC

#### They dropped sequencing --- it devastates the solvency deficit:

#### Sunbursting spurs a quick test case to apply the new rule. Litigants will flock to the court to test the announcement that current precedent is no longer reliable. Results in the plan in the short-term, but avoids the DA because it gives fair warning to affected parties --- that’s Auerbach and Rogers.

#### Happens fast

**Bradford 90** (C. Steven, Assistant Professor of Law – University of Nebraska College of Law, “Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling”, Fordham Law Review, October, 59 Fordham L. Rev. 39, Lexis)

The effect of anticipatory overruling on judicial economy is indeterminate. Some authors have argued that anticipatory overruling will increase the number of lawsuits [218](https://www.lexis.com/research/retrieve?_m=783584b8ceaa7fc4d929e1f13f95f452&docnum=73&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAW&_md5=eeb205f00183f67ec470b509b7ccde9a&focBudTerms=%28prospects%20or%20chances%20or%20likel%21%20or%20hopeful%20or%20outlook%29%20w/10%20%28success%20or%20victory%20or%20win%29%20w/35%20%28influence%21%20or%20factor%20or%20determin%21%20or%20incentiv%21%20or%20spur%21%20or%20cause%20or%20result%20in%20or%20lead%20to%20or%20fly%20paper%20or%20flypaper%29%20w/40%20%28go%20to%20or%20take%20case%20or%20take%20their%20case%20or%20challeng%21%20or%20bring%20suit%20or%20test%20case%20or%20look%20to%29%20w/10%20%28court%20or%20%28%28test%21%20or%20clarif%21%29%20w/25%20new%20standard%20or%20new%20test%29%29&focBudSel=all#n218) and decrease the number of settlements. [219](https://www.lexis.com/research/retrieve?_m=783584b8ceaa7fc4d929e1f13f95f452&docnum=73&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAW&_md5=eeb205f00183f67ec470b509b7ccde9a&focBudTerms=%28prospects%20or%20chances%20or%20likel%21%20or%20hopeful%20or%20outlook%29%20w/10%20%28success%20or%20victory%20or%20win%29%20w/35%20%28influence%21%20or%20factor%20or%20determin%21%20or%20incentiv%21%20or%20spur%21%20or%20cause%20or%20result%20in%20or%20lead%20to%20or%20fly%20paper%20or%20flypaper%29%20w/40%20%28go%20to%20or%20take%20case%20or%20take%20their%20case%20or%20challeng%21%20or%20bring%20suit%20or%20test%20case%20or%20look%20to%29%20w/10%20%28court%20or%20%28%28test%21%20or%20clarif%21%29%20w/25%20new%20standard%20or%20new%20test%29%29&focBudSel=all#n219) Plaintiffs who would have lost if the lower courts blindly followed the doubtful precedent are more likely to sue because the prospect of anticipatory overruling will increase their chances of ultimate victory. Victory would no longer depend on a successful Supreme Court challenge. Justice Roberts made this argument in a dissent in Mahnich v. Southern S.S. Co. [220](https://www.lexis.com/research/retrieve?_m=783584b8ceaa7fc4d929e1f13f95f452&docnum=73&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAW&_md5=eeb205f00183f67ec470b509b7ccde9a&focBudTerms=%28prospects%20or%20chances%20or%20likel%21%20or%20hopeful%20or%20outlook%29%20w/10%20%28success%20or%20victory%20or%20win%29%20w/35%20%28influence%21%20or%20factor%20or%20determin%21%20or%20incentiv%21%20or%20spur%21%20or%20cause%20or%20result%20in%20or%20lead%20to%20or%20fly%20paper%20or%20flypaper%29%20w/40%20%28go%20to%20or%20take%20case%20or%20take%20their%20case%20or%20challeng%21%20or%20bring%20suit%20or%20test%20case%20or%20look%20to%29%20w/10%20%28court%20or%20%28%28test%21%20or%20clarif%21%29%20w/25%20new%20standard%20or%20new%20test%29%29&focBudSel=all#n220) : In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. [221](https://www.lexis.com/research/retrieve?_m=783584b8ceaa7fc4d929e1f13f95f452&docnum=73&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAW&_md5=eeb205f00183f67ec470b509b7ccde9a&focBudTerms=%28prospects%20or%20chances%20or%20likel%21%20or%20hopeful%20or%20outlook%29%20w/10%20%28success%20or%20victory%20or%20win%29%20w/35%20%28influence%21%20or%20factor%20or%20determin%21%20or%20incentiv%21%20or%20spur%21%20or%20cause%20or%20result%20in%20or%20lead%20to%20or%20fly%20paper%20or%20flypaper%29%20w/40%20%28go%20to%20or%20take%20case%20or%20take%20their%20case%20or%20challeng%21%20or%20bring%20suit%20or%20test%20case%20or%20look%20to%29%20w/10%20%28court%20or%20%28%28test%21%20or%20clarif%21%29%20w/25%20new%20standard%20or%20new%20test%29%29&focBudSel=all#n221)

### Perm – Do Both – 2nC

#### Links --- it includes both retroactive and prospective rulings, undermines capital by changing settled law --- that’s Auerbach. If it doesn’t, it severs --- voting issue because it destroys all ground.

#### Links to McCutcheon -

#### Kennedy prefers the counterplan alone – including retroactive change he views as interventionist

Luneberg 91 (William V., Professor of Law, University of Pittsburgh School of Law, “Retroactivity and administrative rulemaking,” Duke Law Journal February, 1991 1991 Duke L.J. 106)

Justice Kennedy's opinion in Bowen fails to disclose the basis for its clear statement canon. By noting that "[r]etroactivity is not favored in the law," n170 the Court may be indicating either that Congress generally does not desire retroactive effect or that Congress should not authorize it [\*136] because of the problems of surprise which may have due process overtones. The two rationales for clear statement approaches may blend here as well as elsewhere. For example, as the Supreme Court and other courts construe statutes to avoid retroactivity, this approach becomes part of the legal context in which Congress operates and of which it is presumably aware -- a background rule against which Congress legislates. On this theory, a lack of clarity on retroactivity may, therefore, be taken to evidence congressional intent to prohibit a retroactive effect. One might argue that if prospectivity generally is associated with rules, then a grant of rulemaking power must be a grant of the power to act prospectively. Congress, however, sometimes acts retrospectively and -- because agencies frequently act in Congress' stead -- it is odd to assume that Congress did not authorize agencies to act retrospectively as well. Justice Scalia rejects this analogy on the basis of his interpretation of the APA and on what he views as the disfavor in which retroactive legislation has been held. n171 But to reject the legislative analogy on the basis of the law's disfavor of retroactivity is at best a weak reed; that disfavor has not prevented retroactive legislative policymaking. Furthermore, given Thorpe, it is difficult to argue that Congress must have intended to limit general grants of rulemaking power to prospective rules. To assert, as Justice Scalia does, that "[i]t is entirely unsurprising, therefore, that even though Congress wields such power itself, it has been unwilling to confer it upon the agencies" n172 assumes what is to be proved. It is plausible to assume that congressional silence or a lack of clarity means that Congress does not approve of an agency engaging in retroactive rulemaking, even when that action will reasonably promote congressional goals? Such a proposition lacks empirical support. One criticism of Bowen, therefore, is that the Court may disallow retroactive rulemaking even in cases where Congress intended it. Moreover, by saying that "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant," n173 Justice Kennedy's opinion suggests that a mere showing of need for retroactivity will not necessarily be deemed sufficient as a basis for authority to act retroactively. n174 And yet in American Trucking, the Court upheld the validity of an [\*137] agency action which was in practical effect equivalent to retroactive rulemaking on a showing of legitimate need by the agency to achieve statutory mandates. n175 Addison similarly indicated that retroactive rulemaking could be sustained on a showing of need. n176

### Perm Do the CP: 2NC

#### Severance --- the CP *does not fiat a ruling*. It’s an announcement that parties must be “on notice” that current precedent is unreliable and paves the way for *future* application --- that’s Auerbach

#### Sunbursting is *dicta*, not a *holding*. It’s not controlling, but shapes policy.

**Shannon 3** (Bradley Scott, Visiting Associate Professor – University of Idaho College of Law, “The Retroactive and Prospective Application of Judicial Decisions”, Harvard Journal of Law & Public Policy, Summer, 26 Harv. J.L. & Pub. Pol'y 811, Lexis)

For precedential purposes, it is still generally accepted that court opinions may be divided between holding and dicta. [173](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n173) This distinction between holding and dicta often is critically important, for: "It is a commonplace that holdings carry greater precedential weight than dicta, 'which may be followed if sufficiently persuasive but which are not controlling.'" [174](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n174) "No universal agreement exists as to how to measure the scope of judicial holdings," nor, consequently, "is there agreement as to how to distinguish between holdings and dicta." [175](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n175) According to Michael Dorf, "federal courts sometimes treat the question whether a particular judicial statement is holding or dictum as a feature of the  [\*847]  facts and outcomes of the case, but other times they treat this question as a feature of the rationale of the prior opinion under analysis." [176](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n176) For purposes of the retroactivity/prospectivity question, one need not decide which of these appropriately defines the scope of a holding, though, for it is difficult to see how even the broader, rationale-based view [177](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n177) could comprehend rules of law that are only to be applied at some point in the future. Such announcements of prospective rules of law are not simply "those elaborations of legal principle broader than the narrowest proposition that can decide the case." [178](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n178) Rather, prospective announcements of rules of law are more in the nature of asides [179](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e" \l "n179" \t "_self) --asides in some way related to those rules of law actually determined to be controlling, to be sure--but asides nonetheless. For even if a court were to announce a different prospective rule of law (or no prospective rule of law), its decision in the underlying case, including the bases therefor, would remain unchanged. [180](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n180) Similarly, that same court could not reach a different result as to the same issue in a later case through the adoption of a different rule of law (even if that different rule of law was announced prospectively in the earlier decision) without overruling its earlier decision. [181](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n181) Thus, rules of law  [\*848]  that are to be applied only prospectively can only be regarded as being what they are: dicta [182](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n182) (albeit very strong dicta [183](http://www.lexis.com/research/retrieve?_m=8527f499b486eab75842d216a98f2da6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAl&_md5=0bd00c4ea3d62a4434217138cff05c3e#n183)).

[CONTINUES – TO FOOTNOTE]

n183 See Jonathan Mallamud, Prospective Limitation and the Rights of the Accused, 56 IOWA L. REV. 321, 334 (1970) ("Where a dictum has been carefully considered by a court, and where it is stated with the clear intent that it be followed, it is not very likely that a subordinate court would fail to follow it."). It has also been argued:

Although the rule laid down for the future is dictum rather than holding, when the court indicates clearly that this rule will be applied by the court in future cases, it necessarily rises above the statute of ordinary dictum; from that time forward, no person would be justified in relying upon the old rule which the court has repudiated.

#### The distinction is critical --- CP isn’t binding, even if the effect is nearly identical

**Kniffin 82** (Margaret N., Professor of Law – St. John's University School of Law and JD – Harvard University Law, “Overruling Supreme Court Precedents: Anticipatory Action By United States Courts Of Appeals”, Fordham Law Review, October, 51 Fordham L. Rev. 53, Lexis)

I. SOME NECESSARY DISTINCTIONS Examination of anticipatory overruling requires first that the topic be distinguished from subjects that may resemble it but that differ from it in significant respects. Departure by a court of appeals from a precedent impliedly overruled by the Supreme Court should not be confused with anticipatory overruling. Implied overruling occurs when the Supreme Court, without mentioning that it is overturning its previous decision, [21](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n21) determines that the rule of law that the precedent enunciated is no longer correct. [22](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n22) The precedent therefore no longer exists as such, and a lower court should not follow it. [23](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n23) An example of implied overruling is the demise of the precedent declaring constitutional the "separate but equal" treatment of the black and white races with respect to public transportation. [24](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n24) When the Supreme Court held that segregation in public schools was unconstitutional, [25](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n25) most other courts concluded. [26](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n26) Anticipating overruling, by contrast, occurs when a lower court departs from a higher court s decision embodying a rule of law that the higher court has not repudiated either explicitly or by implication. Anticipatory overruling should also be differentiated from a lower court's failure to follow dictum of a higher court. Dictum does not [\*58] have the force of precedent, and therefore deviation from it does not involve overruling. [27](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n27) If a higher court engages in prospective overruling [28](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n28) (stating that it will hold in a particular way, not in the current case, but in future instances), such a prediction is not necessarily binding. Some would suggest that it is mere dictum until it has been applied in an actual controversy. [29](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=04a8a853c401d4686011fd5dfcdf70d3&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlW-zSkAA&_md5=88001e65da326118125ebfa73c639c63&focBudTerms=prospective+overrul%21+w%2F35+binding%21+or+non-binding+or+nonbinding&focBudSel=all#n29) To the extent that it is dictum, a lower court that disregards such a statement is not overruling a holding and therefore has not engaged in anticipatory overruling.

#### “Substantial” requires legal effect

**Words & Phrases 64** (40 W&P 759)

The words “outward, open, actual, visible, substantial, and exclusive,” in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including admitting, or pertaining to any others; undivided; sole; opposed to inclusive.

#### Judicial restriction deny the executive’s freedom of action – only binding rules can do that – the CP doesn’t place a restriction

Garland 12 (Merrick, Judge @ UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 671 F.3d 1258; 399 U.S. App. D.C. 425; 2012 U.S. App. LEXIS 5252, OSCAR SALAZAR, BY HIS PARENTS AND NEXT FRIENDS, ADELA AND OSCAR SALAZAR, ET AL., APPELLEES v. DISTRICT OF COLUMBIA, ET AL., APPELLANTS, lexis)

The District also contends that continuation of the orders "threatens 'serious, perhaps irreparable' harm to separation of powers and democratic principles" because it "depriv[es] its current elected officials of their 'designated legislative and executive functions'" until the district court issues a final order. Reply Br. 7 (quoting Horne v. Flores, 557 U.S. 433, 129 S. Ct. 2579, 2594, 174 L. Ed. 2d 406 (2009)). This argument, once again, has sweeping implications -- suggesting that judicial restriction of the District's freedom of action in administering one of its programs constitutes per se irreparable injury. But whether or not the argument might satisfy Carson in some other case, it rings hollow on the facts of this one.

#### Voting issue ---

#### Intrinsic --- they rule prospectively in the case of the plan, CP only effects a future test case, voting issue: lets them fiat out of all offense

#### Plan can’t be only prospective --- it’s not specified in the plan, 2AC clarification is illegitimate and a voting issue because it makes stable ground impossible. Retroactive effect is established legal practice --- that’s Slocum --- more evidence

**Slocum 8** (Brian G., Professor of Law – University of the Pacific and JD – Harvard Law School, “Overlooked Temporal Issues in Statutory Interpretation”, Temple Law Review, Fall, 81 Temp. L. Rev. 635, Lexis)

Like most judicially created substantive and constitutional rules, courts generally apply rules of procedure retroactively. [41](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all" \l "n41" \t "_self) The retroactive application of procedural rules is less controversial because they are thought to present fewer issues regarding justifiable reliance on settled rules. [42](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all" \l "n42" \t "_self) The fact that a new procedural rule was promulgated after the conduct giving rise to a lawsuit is not seen as presenting troublesome retroactivity issues because rules of procedure regulate secondary rather than primary conduct. [43](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all" \l "n43" \t "_self) Due to the lack of similar reliance concerns, new or modified rules of statutory interpretation have been analogized to procedural rules as a reason for their automatic retroactive application. [44](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all" \l "n44" \t "_self) [\*646] II. An Argument for Applying New or Modified Rules of Interpretation Only Prospectively A. The Background Rules Theory as a Reason for Prospective-Only Application of New or Modified Rules of Statutory Interpretation Despite the historical inclination of judges to apply new or modified rules of statutory interpretation retroactively, and notwithstanding the comparison made to procedural rules, there are compelling reasons why new or modified interpretive rules should be applied only prospectively. The strongest argument is that applying new or modified rules only prospectively is consistent with legislative expectations regarding statutory meaning. The legislative expectations that are relevant to courts are the expectations of the originally enacting Congress. Thus, as self-styled "faithful agents" of Congress in matters of statutory interpretation, courts attempt to interpret statutes in accordance with either the original public meaning of the statutory language or the original intent of the enacting Congress, rather than some subsequent meaning of the statutory language or the preferences of some later Congress. [45](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=f874e24a7558c7955dc4740f654736e8&docnum=5&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAW&_md5=90b3023246ce07635b1018ced01a216e&focBudTerms=The+retroactive+and+prospective+application+of+judicial+decisions+and+immigr%21&focBudSel=all#n45)

#### “Should” means “must” and requires immediate legal effect

**Summers 94** (Justice – Oklahoma Supreme Court, “Kelsey v. Dollarsaver Food Warehouse of Durant”, 1994 OK 123, 11-8, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13)

¶4 The legal question to be resolved by the court is whether the word "should"[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287" \l "marker3fn13) in the May 18 order connotes futurity or may be deemed a ruling *in praesenti*.[14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287" \l "marker3fn14) The answer to this query is not to be divined from rules of grammar;[15](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287" \l "marker3fn15) it must be governed by the age-old practice culture of legal professionals and its immemorial language usage. To determine if the omission (from the critical May 18 entry) of the turgid phrase, "and the same hereby is", (1) makes it an in futuro ruling - i.e., an expression of what the judge will or would do at a later stage - or (2) constitutes an in in praesenti resolution of a disputed law issue, the trial judge's intent must be garnered from the four corners of the entire record.[16](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287" \l "marker3fn16)

[CONTINUES – TO FOOTNOTE]

[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn13) "*Should*" not only is used as a "present indicative" synonymous with *ought* but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15. Certain contexts mandate a construction of the term "should" as more than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an *obligation* *and to be more than advisory*); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, [802 P.2d 813](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=802&box2=P.2D&box3=813) (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an *obligation* to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony"). [14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn14) *In praesenti* means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is *presently* or immediately effective, as opposed to something that *will* or *would* become effective *in the future [in futurol*]. See Van Wyck v. Knevals, [106 U.S. 360](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=106&box2=U.S.&box3=360), 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

### Court Politics – 2NC

#### The counterplan doesn’t link to court politics – it isn’t a departure from settled law, but projects a future change in policy, which preserves institutional capital, that’s Yoo.

#### Kennedy prefers the counterplan – he defaults to a view of presumption as “less change,” as should the judge

Luneberg 91 (William V., Professor of Law, University of Pittsburgh School of Law, “Retroactivity and administrative rulemaking,” Duke Law Journal February, 1991 1991 Duke L.J. 106)

Justice Kennedy's opinion in Bowen fails to disclose the basis for its clear statement canon. By noting that "[r]etroactivity is not favored in the law," n170 the Court may be indicating either that Congress generally does not desire retroactive effect or that Congress should not authorize it [\*136] because of the problems of surprise which may have due process overtones. The two rationales for clear statement approaches may blend here as well as elsewhere. For example, as the Supreme Court and other courts construe statutes to avoid retroactivity, this approach becomes part of the legal context in which Congress operates and of which it is presumably aware -- a background rule against which Congress legislates. On this theory, a lack of clarity on retroactivity may, therefore, be taken to evidence congressional intent to prohibit a retroactive effect. One might argue that if prospectivity generally is associated with rules, then a grant of rulemaking power must be a grant of the power to act prospectively. Congress, however, sometimes acts retrospectively and -- because agencies frequently act in Congress' stead -- it is odd to assume that Congress did not authorize agencies to act retrospectively as well. Justice Scalia rejects this analogy on the basis of his interpretation of the APA and on what he views as the disfavor in which retroactive legislation has been held. n171 But to reject the legislative analogy on the basis of the law's disfavor of retroactivity is at best a weak reed; that disfavor has not prevented retroactive legislative policymaking. Furthermore, given Thorpe, it is difficult to argue that Congress must have intended to limit general grants of rulemaking power to prospective rules. To assert, as Justice Scalia does, that "[i]t is entirely unsurprising, therefore, that even though Congress wields such power itself, it has been unwilling to confer it upon the agencies" n172 assumes what is to be proved. It is plausible to assume that congressional silence or a lack of clarity means that Congress does not approve of an agency engaging in retroactive rulemaking, even when that action will reasonably promote congressional goals? Such a proposition lacks empirical support. One criticism of Bowen, therefore, is that the Court may disallow retroactive rulemaking even in cases where Congress intended it. Moreover, by saying that "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant," n173 Justice Kennedy's opinion suggests that a mere showing of need for retroactivity will not necessarily be deemed sufficient as a basis for authority to act retroactively. n174 And yet in American Trucking, the Court upheld the validity of an [\*137] agency action which was in practical effect equivalent to retroactive rulemaking on a showing of legitimate need by the agency to achieve statutory mandates. n175 Addison similarly indicated that retroactive rulemaking could be sustained on a showing of need. n176

### Impact – 2NC – Russia

#### DA outweighs –

#### Failure to stop the tea party means that relations collapse – Only barrier to solving Russia nuclear war-

#### 1% risk means you vote neg

**Bostrum 5** (Nick – prof of philosophy at Oxford University and recipient of the Gannon Award, Transcribed by Packer, 4:38-6:12, p. http://www.ted.com/index.php/talks/view/id/44, accessed 10/20/07)

Now if we think about what just reducing the probability of human extinction by just one percentage point. Not very much. So that’s equivalent to 60 million lives saved, if we just count currently living people. The current generation. One percent of six billion people is equivalent to 60 million. So that’s a large number. If we were to take into account future generations that will never come into existence if we blow ourselves up then the figure becomes astronomical. If we could you know eventually colonize a chunk of the universe the virgo supercluster maybe it will take us a hundred million years to get there but if we go extinct we never will. Then even a one percentage point reduction in the extinction risk could be equivalent to this astronomical number 10 to the power of 32 so if you take into account future generations as much as our own every other moral imperative or philanthropic cause just becomes irrelevant. The only thing you should focus on would be to reduce existential risk, because even the tiniest decrease in existential risk would just overwhelm any other benefit you could hope to achieve. Even if you just look at the current people and ignore the potential that would be lost if we went extinct it should still be a high priority.

#### Evaluate consequences – allowing violence for the sake of moral purity is evil

Isaac 2 (Jeffrey C., Professor of Political Science – Indiana-Bloomington, Director – Center for the Study of Democracy and Public Life, Ph.D. – Yale, Dissent Magazine, 49(2), “Ends, Means, and Politics”, Spring, Proquest)

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

### U – 2NC – Yes Strike Down

#### The court will Act now to strike down contribution limits to political parties now - Scalia, Thomas, and Kennedy were on top in Citizens United and have called for limits to be overruled- it will be a 5-4 – that’s Chemerinsky - prefer him – he’s the Dean of UC Irvine law school and has made a prediction about the vote

#### Its High Profile

Baker ’13 (Sam, Court Reporter for The Hill, “RNC urges Supreme Court to strike campaign-finance limits,” 5-7, http://thehill.com/blogs/ballot-box/fundraising/298307-rnc-urges-supreme-court-to-strike-campaign-finance-limits)

The Republican National Committee [RNC] urged the Supreme Court on Tuesday to strike down certain limits on campaign contributions, saying they're a violation of the First Amendment.¶ The RNC filed its opening brief in a case challenging limits on the total amount one person can donate in a single election cycle. The RNC says the limits are unconstitutional.¶ If the court agrees, donors who now max out at around $120,000 per year could be able to donate more than $3 million per cycle.¶ The campaign-finance suit is already one of the highest-profile cases of the Supreme Court's next term, which begins in October.

### Link – War Powers – 2NC

#### The plan costs court capital – McGinnis and Rappaport says the court doesn’t want to overturn deference in foreign affairs and judicial review would erode prestige and undermine capital

#### The plan drains court capital

McGinnis ’93 (John O., Prof of Law @ Cardozo Law @ Yeshiva, “Constitutional Review By The¶ Executive In Foreign Affairs And¶ War Powers: A Consequence Of¶ Rational Choice In The¶ Separation Of Powers,” *Law and Contemporary Problems*, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4213&context=lcp)

The Court has the least interest of all in exercising rights of governance in¶ the foreign affairs and war powers areas. The Court does not have the¶ institutional capacity to make assessments in these areas. Any inept decision¶ about war and peace may have dramatic and readily understood real world¶ consequences that may erode the Court's prestige and endanger its public¶ respect. Thus, decisions in this area stand in contrast with decisions elaborating¶ individual rights, a role in which it may appear as the tribune of the people. The latter decisions, even when controversial, are likely to have some group of¶ supporters, and their real world consequences are less immediate and dramatic¶ than issues of war and peace. Resistance, if encountered, can be tempered by¶ incremental implementationY7¶ A useful thought experiment to aid in evaluating the interests of the Court¶ in deciding war powers and other separation of powers cases is to imagine the¶ Court divided into two entirely separate courts: a structural court and a rights¶ court. The structural court would adjudicate only separation of powers and¶ federalism, the structural provisions of the Constitution. The rights court would¶ adjudicate only individual rights, principally the Bill of Rights. A structural court¶ in such a regime may be rationally more interested in deciding more structural¶ cases, because structural cases will be its raison d'etre.68 A court, like the¶ Supreme Court, with a discretionary jurisdiction that includes both rights and¶ structural functions, however, would rationally consider the possibility that some¶ structural cases would so endanger its political capital that they should be¶ shunned.¶ Against this background of interests, it is therefore not surprising that the¶ Court has largely ceded the rights of governance in foreign affairs and war¶ powers to the executive, because the executive values them more. In this way,¶ the Court maximizes utility among the branches and, thus, minimizes the chance¶ of retaliation against its own interests.69 The Court, however, has largely given this control to the executive not so much through substantive decisions favoring¶ the executive (although there have been some substantive doctrines favorable to¶ the executive), but through decisions invoking the political question doctrine or¶ justiciability doctrine, thus providing the executive with some initial authority to¶ fashion the substantive law in the area.7¶ ' The strategy of ceding power to the¶ executive through decisions on such threshold matters rather than on the merits¶ has three additional advantages for the judiciary. First, it provides the judiciary¶ with a graceful way of avoiding substantive decisions against congressional¶ interests. Second, since the Court has not put its imprimatur on a substantive¶ allocation of rights in this area, Congress may more readily use its own powers¶ to take concrete action against the executive, thus providing the judiciary with¶ additional information about the value it attached to these rights. Given such¶ information, the Court might find ways of redistributing some rights from the¶ executive to the Congress without disturbing as much substantive precedent.71

### Yes Make-Up/Spillover – 2NC

#### Court capital true – spills over to decisions

Grosskopf and Mondak ‘98 (Anke Grosskopf, Assistant Prof of Political Science @ Long Island University, & Jeffrey Mondak, Professor of Political Science @ U of Illinois, 1998, “Do attitudes toward specific supreme court decisions matter? The impact of Webster and Texas v Johnson on Public Confidence in the Supreme Court” Political Research Quarterly, vol. 51 no 3 633-54 September1998)

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