# Congress CP

To be read against affirmatives that use the courts.

## NEGATIVE

### 1nc

#### Text: The United States Federal Government should pass legislation to \_\_\_\_\_\_\_\_\_\_ (insert aff specific curtailment of domestic surveillance).

#### The CP solves – Congress is the best actor for surveillance restrictions.

Fenske 8 --- J.D. Candidate (Dan, “ALL ENEMIES, FOREIGN AND DOMESTIC: ERASING THE DISTINCTION BETWEEN FOREIGN AND DOMESTIC INTELLIGENCE GATHERING UNDER THE FOURTH AMENDMENT”, 102 Nw. U.L. Rev. 343, Lexis)//trepka

III. Better Solutions to Intelligence-Gathering Abuse The Supreme Court, for better or worse, is the primary enforcer of the Fourth Amendment. Although this is understandable, given the Court's unique position and ability to check majoritarian excess that can lead to violations of civil liberties, it is unfortunate because it has created in Congress apathy toward its obligation to participate in the protection of Fourth Amendment values. n175 This failure on the part of Congress to **properly assert itself** in the enforcement of constitutional rights **need not continue**. The enactment of FISA is a case in point. Given the widespread acknowledgement that the Constitution does not require that the President conduct foreign intelligence [\*375] surveillance in the United States pursuant to a warrant, n176 Congress - properly exercising its own powers in the foreign intelligence context - limited the President's authority in order to curb perceived intelligence-gathering abuse. n177 FISA requires the Executive to obtain a court order for surveillance, though such court orders are not Fourth Amendment warrants. n178 However, Congress did not **hamstring** the Executive by requiring court approval before the commencement of any and **all** electronic surveillance. In certain emergency situations, the Attorney General can authorize electronic surveillance for up to seventy-two hours before seeking court approval. n179 This is a practical recognition that intelligence gathering frequently requires the relaxation of the warrant requirement, but it still ensures that continued surveillance will be subject to congressional limitations. n180 Congress, then, has **significant authority** in the foreign intelligence arena to create such **pragmatic solutions.** There is no reason to assume that it could not enact legislation like FISA that is applicable to **domestic intelligence**. Moreover, even in the absence of congressional action, the Court could impose solutions by tailoring existing doctrines. The remainder of this Part discusses examples of possible **legislative** and judicial **solutions**.

### Congress Solves

#### Congress solves mass surveillance

Hattem, staff writer, 15 (Julian, 3/24/15, “House effort would completely dismantle Patriot Act”, The Hill, http://thehill.com/policy/technology/236769-house-effort-would-completely-dismantle-patriot-act, accessed 7/2/15, EOT@GDI)

A pair of House lawmakers wants to completely repeal the Patriot Act and other legal provisions to dramatically rein in American spying. Reps. Mark Pocan (D-Wis.) and Thomas Massie (R-Ky.) on Tuesday unveiled their Surveillance State Repeal Act, which would overhaul American spying powers unlike any other effort to reform the National Security Agency. “This isn’t just tinkering around the edges,” Pocan said during a Capitol Hill briefing on the legislation. “This is a meaningful overhaul of the system, getting rid of essentially all parameters of the Patriot Act.” The bill would completely repeal the Patriot Act, the sweeping national security law passed in the days after Sept. 11, 2001, as well as the 2008 FISA Amendments Act, another spying law that the NSA has used to justify collecting vast swaths of people's communications through the Internet. It would also reform the secretive court that oversees the nation’s spying powers, prevent the government from forcing tech companies to create “backdoors” into their devices and create additional protections for whistleblowers. “Really, what we need are new whistleblower protections so that the next Edward Snowden doesn’t have to go to Russia or Hong Kong or whatever the case may be just for disclosing this,” Massie said. The bill is likely to be a nonstarter for leaders in Congress, who have been worried that even much milder reforms to the nation’s spying laws would tragically handicap the nation’s ability to fight terrorists. A similar bill was introduced in 2013 but failed to gain any movement in the House. Yet advocates might be hoping that their firm opposition to government spying will seem more attractive in coming weeks, as lawmakers race to beat a June 1 deadline for reauthorizing portions of the Patriot Act. Reformers have eyed that deadline as their last best chance for reforming some controversial NSA programs, after an effort failed in the Senate last year

#### The future of the NSA is in the hands of congress

Timm, 2015 (<http://www.theguardian.com/commentisfree/2015/apr/08/congress-must-end-mass-nsa-surveillance-with-next-patriot-act-vote>) Timm, Trevor April/8/2015

In less than 60 days, Congress - whether they [like it or not](http://www.theguardian.com/commentisfree/2015/mar/14/congress-wont-protect-us-from-the-surveillance-state-theyll-enhance-it) - will be forced to decide if the NSA’s most notorious mass surveillance program lives or dies. And today, over 30 civil liberties organizations [launched a nationwide call-in campaign urging them](https://fight215.org/) to kill it. Despite doing almost [everything in their power to avoid](http://www.huffingtonpost.com/2014/11/18/nsa-reform-senate_n_6181548.html) voting for substantive NSA reform, Congress now has no choice: On 1 June, one of the most controversial parts of the Patriot Act - known as Section 215 - will expire unless both houses of Congress affirmatively vote for it to be reauthorized. Section 215 of the Patriot Act was the [subject of the very first Snowden story](http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order), when the Guardian [reported](http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order) that the US government had reinterpreted the law in complete secrecy, allowing the NSA to vacuum up every single American’s telephone records - who they called, who called them, when, and for how long - regardless of whether they had been accused of a crime or not. (The NSA’s warped interpretation of Section 215 was also the subject of John Oliver’s [entire show on Sunday night](https://www.youtube.com/watch?v=XEVlyP4_11M). It is [a must-watch](https://www.youtube.com/watch?v=XEVlyP4_11M).) The massive phone dragnet is not the only thing Section 215 is used for though. As independent journalist Marcy Wheeler [has meticulously documented](https://www.emptywheel.net/2015/04/04/section-215s-multiple-programs-and-where-they-might-hide-after-june-1/), Section 215 is likely being used for all sorts of surveillance that the public has no idea about. There are an [estimated 180 orders from the secret Fisa court](https://www.emptywheel.net/2015/04/04/section-215s-multiple-programs-and-where-they-might-hide-after-june-1/) that involve Section 215, but we know only [five of them are directed](https://twitter.com/emptywheel/status/584418543615217664) at telecom companies for the NSA phone program. To give you a sense of the scale: the one Fisa order [published by the Guardian from the Snowden trove](http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order) compelled Verizon to hand over every phone record that it had on all its millions of customers. Every single one. While the government [claims](http://www.theatlantic.com/politics/archive/2015/04/when-will-the-nsa-stop-spying-on-the-communications-of-innocent-americans/389375/?utm_source=NSHR+Rapid+Response&utm_campaign=50c8459129-NSHR_Alerts_News_October_9&utm_medium=email&utm_term=0_3a915757be-50c8459129-391724541) that its other uses of Section 215 are “critical” to national security, it’s extremely hard to take their word for it. After all, the government [lied about collecting](http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/27/darrell-issa-james-clapper-lied-to-congress-about-nsa-and-should-be-fired/) information on millions of Americans under Section 215 to begin with. Then they claimed the phone surveillance program was “critical” to national security after it was exposed. That wasn’t true either: they [later had to admit it has](http://www.theguardian.com/us-news/2015/jan/29/obama-end-nsa-phone-records-collection-privacy-board) never stopped a single terrorist attack. Advertisement We [also just learned two weeks ago](http://www.huffingtonpost.com/2015/03/29/nsa-phone-program_n_6963804.html) that the NSA knew the program [was largely pointless](http://www.huffingtonpost.com/2015/03/29/nsa-phone-program_n_6963804.html) before the Snowden leaks and debated shutting it down altogether. Suddenly, after the Snowden documents became public, NSA officials defended it as “critical” again when they had to go before an increasingly skeptical Congress. Is Section 215 being used to collect massive amounts of other data on Americans? Well, the New York Times[reported last year](http://www.nytimes.com/2013/11/15/us/cia-collecting-data-on-international-money-transfers-officials-say.html?_r=0) that there are multiple different bulk collection programs under different authorities that are still secret. And Ron Wyden, while not specifying which law was being used, [indicated in an interview last month](http://www.theguardian.com/commentisfree/2015/mar/14/congress-wont-protect-us-from-the-surveillance-state-theyll-enhance-it) that there were several spying programs directly affecting Americans that were still secret. And there’s [evidence to suggest](https://www.emptywheel.net/2015/04/04/section-215s-multiple-programs-and-where-they-might-hide-after-june-1/) they’re doing so for supposed “cyber” crime investigations. Whatever else they’re doing with Section 215 behind closed doors, the phone surveillance program is illegal. As the author of the Patriot Act, Republican Congressman Jim Sensenbrenner [has said](https://www.youtube.com/watch?v=XEVlyP4_11M): “I can say that without qualification that Congress never did intend to allow bulk collection when it passed Section 215, and no fair reading of the text would allow for this [mass phone surveillance] program”. It’s also [likely unconstitutional](http://www.cnn.com/2013/12/16/justice/nsa-surveillance-court-ruling/), as the first federal judge to look at the program ruled almost a year ago. Judge Richard Leon [wrote at the time](http://www.cnn.com/2013/12/16/justice/nsa-surveillance-court-ruling/) in his landmark opinion: “I cannot imagine a more ‘indiscriminate’ and ‘arbitrary invasion’ than this systematic and high-tech collection and retention of personal data on virtually every citizen for purposes of querying and analyzing it without prior judicial approval”. These days, Congress can barely get post office names passed, let alone comprehensive reform on any subject affecting the American people. So the fact that they haven’t passed [NSA](http://www.theguardian.com/us-news/nsa) reform yet says more about their near-total dysfunction than the American public’s views about privacy. But now they have no choice. A year and a half ago, the House [came within a few votes](http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/24/plan-to-defund-nsa-phone-collection-program-has-broad-support-sponsor-says/) of cutting off funding for Section 215 in an unorthodox appropriations vote and, since then, opposition to the NSA’s massive spying operation on Americans has remained strong. Only time will tell if Congress will actually receive this message. But if citizens[call their representatives](https://fight215.org/), they might just get it. Then, come June, the NSA will have a lot less of our private data at their fingertips.

#### Congress can and should end warrantless data collection

Nichols, 2013(<http://grayson.house.gov/index.php/newsroom/in-the-news/227-judge-rules-against-nsa-spying-congress-should-do-the-same>) Nichols john, December 16, 2013 CL

Judge Leon’s decision, which will surely be appealed, focuses attention on legal challenges to the spying program. But it also serves as a reminder **that Congress can and should act to defend privacy rights.** “The ruling underscores what I have argued for years**: The bulk collection of Americans’ phone records conflicts with Americans’ privacy rights under the U.S. Constitution and has failed to make us safer,”** says Senator Mark Udall, D-Colorado, a supporter of legislation to end the bulk collection program. “**We can protect our national security without trampling our constitutional liberties.**” Senator Ron Wyden, D-Oregon, said: “Judge Leon’s ruling hits the nail on the head. It makes clear that **bulk phone records collection is intrusive digital surveillance and not simply inoffensive data collection as some have said.** The court noted that this metadata can be used for ‘repetitive, surreptitious surveillance of a citizen’s private goings on,’ that creates a mosaic of personal information and is likely unconstitutional. This ruling dismisses the use of an outdated Supreme Court decision affecting rotary phones as a defense for the technologically advanced collection of millions of Americans’ records. It clearly underscores the need to adopt meaningful surveillance reforms that prohibit the bulk collection of Americans’ records.” The senators had reason to be enthusiastic about Judge Leon determination that legal challenges to the massive surveillance program are valid. So valid, in fact, that he issued a preliminary injunction against the program. The judge suspended the order, however, in order to allow a Justice Department appeal. But Judge Leon was blunt regarding the strength of the challenge that was brought after Snowden revealed details of the agency’s spying in The Guardian. "I have little doubt that the author of our Constitution, James Madison... would be aghast," the judge wrote with regard to the NSA program for surveillance of cell phone records, “The court concludes that plaintiffs have standing to challenge the constitutionality of the government’s bulk collection and querying of phone record metadata, that they have demonstrated a substantial likelihood of success on the merits of their Fourth Amendment claim and that they will suffer irreparable harm absent…relief,” Judge Leon wrote in response to a lawsuit brought by Larry Klayman, a former Reagan administration lawyer who now leads the conservative Freedom Watch group. The case is one of several that have been working their way through the federal courts since Snowden disclosed details of the NSA program. Legal challenges to NSA spying are not new, and they have failed in the past. Challenging the FISA Amendments Act (FAA)—the law that permits the government to wiretap US citizens communicating with people overseas—Amnesty International and other human rights advocates, lawyers and journalists fought a case all the way to the US Supreme Court in 2012. In February 2013, however, the Justices ruled 5-4 that the challengers lacked standing because they could not prove they had been the victims of wiretapping and other privacy violations. The Justice Department has continued to argue that plaintiffs in lawsuits against the spying program lack standing because they cannot prove their records were examined. But Judge Leon suggested that the old calculus that afforded police agencies great leeway when it came to monitoring communications has clearly changed. Suggesting that the NSA has relied on “almost-Orwellian technology,” wrote Judge Leon, who was appointed by former President George W. Bush to the United States District Court for the District of Columbia bench. “The relationship between the police and the phone company (as imagined by the courts decades ago)…is nothing compared to the relationship that has apparently evolved over the last seven years between the government and telecom companies.” The judge concluded, “It’s one thing to say that people expect phone companies to occasionally provide information to law enforcement; it is quite another to suggest that our citizens expect all phone companies to operate what is effectively a joint intelligence-gathering operation with the government.” This case will continue in the courts, as will others. But it is also in Congress. A left-right coalition that extends from Congressmen Justin Amash, a libertarian-leaning Republican, to Congressman John Conyers, a progressive Democrat, has raised repeated challenges to the NSA spying regimen. Now**, Congress needs to step up to what Congressman Alan Grayson**, D-Florida**, refers to as “the spying-industrial complex.” A number of members are ready. Vermont Senator Bernie Sanders responded to Judge Leon's ruling by saying: “In my view, the NSA is out of control and operating in an unconstitutional manner**. Today’s ruling is an important first step toward reining in this agency but we must go further. **I will be working as hard as I can to pass the strongest legislation possible to end the abuses by the NSA and other intelligence agencies**.” The outlines for legislative action have already been presented by the American Civil Liberties Union and other groups that work on privacy issues. **“Congress should not be indifferent to the government’s accumulation of vast quantities of sensitive information about American’s lives,**” Jameel Jaffer, the ACLU’s deputy legal counsel told the House Judiciary Committee in July. “This Committee in particular has a crucial role to play in ensuring that the government’s efforts to protect the country do not compromise the freedoms that make the country worth protecting.” Jaffer told the committee, Because **the problem Congress confronts today has many roots, there is no single solution to it. But there are a number of things that Congress should do right away**: • **It should amend Sections 215 and 702 to expressly prohibit suspicionless or “dragnet” monitoring or tracking of Americans’ communications.**

#### Congress should end NSA phone dragnet program.

Gross, 15 (<http://www.pcworld.com/article/2917992/aclu-nsa-phone-dragnet-should-be-killed-not-amended.html>) Gross, Grant. May, 1 2015 CL

The U.S. Congress should kill the section of the Patriot Act that has allowed the National Security Agency to collect millions of phone records from the nation’s residents, instead of trying to amend it, a civil liberties advocate said Friday. Section 215 of the Patriot Act, which allows the NSA to collect phone records, business records and any other “tangible things” related to an anti-terrorism investigation, expires in June, and lawmakers should let it die, said Neema Singh Guliani, legislative counsel for the American Civil Liberties Union. The House of Representatives Judiciary Committee on Thursday [voted to approve a bill](http://www.pcworld.com/article/2917452/house-committee-approves-bill-to-end-nsa-phone-records-program.html) to amend that section of the anti-terrorism law. The USA Freedom Act would end the NSA’s bulk collection of U.S. phone records by narrowing the scope of the agency’s searches, backers of the bill said. The USA Freedom Act “does not go far enough” to protect U.S. residents from surveillance, Guliani said during a debate about section 215 hosted by the Congressional Internet Caucus. While the bill doesn’t allow NSA searches by state or even zip codes, it would still allow the search of the records of “several hundred people who might share an IP address” over a wireless network, or records on an entire company, she said.

####  Congressionally operated court’s solve more efficiently than the judicial branch and check power on the executive branch

Jeffrey Rosen, February 11, 2013 “Courting Disaster: A new idea to limit drone strikes could actually legitimize them” Jeffrey Rosen is the President and Chief Executive Officer of the National Constitution Center, the first and only nonprofit, nonpartisan institution devoted to the most powerful vision of freedom ever expressed: the U.S. Constitution. He is a professor at The George Washington University Law School, where he has taught since 1997. He is a nonresident senior fellow at the Brookings Institution, where he explores issues involving the future of technology and the Constitution. He has recorded a lecture series for the Teaching Company’s Great Courses on Privacy, Property, and Free Speech: Law and the Constitution in the 21st Century. http://www.newrepublic.com/article/112392/drone-courts-congress-should-exercise-oversight-instead

On Sunday, Robert Gates, the former Pentagon chief for Presidents Obama and Bush, endorsed an idea that has been floated by Democratic lawmakers in the wake of John O. Brennan's confirmation hearings to be CIA Director: a drone court that would review the White House’s targeted killings of American citizens linked to al Qaida. The administration has signaled its openness to the idea of a congressionally created drone court, which would be modeled on the secret Foreign Intelligence Surveillance Court that reviews requests for warrants authorizing the surveillance of suspected spies or terrorists. But although senators at the Brennan hearings were rightly concerned about targeted killings operating without any judicial or congressional oversight, the proposed drone court would raise as many constitutional and legal questions as it resolved. And it would give a congressional and judicial stamp of approval to a program whose effectiveness, morality, and constitutionality are open to serious questions. Rather than rushing to create a drone court, Congress would do better to hold hearings about whether targeted drone killings are, in fact, morally, constitutionally, and pragmatically defensible in the first place. From the administration’s perspective, the appeal of a drone court is obvious: Despite the suggestion in the recently released Department of Justice White Paper white paper that the president’s unilateral decisions about targeted killings can’t be reviewed by judges, the administration cites Supreme Court cases that suggest the opposite: namely, that the president’s decision to designate Americans as enemy combatants can only be justified when authorized by Congress, with the possibility of independent judicial review. Although the Supreme Court has been most sympathetic to bold claims about executive power when they’re supported by Congress and reviewed by independent judges, a congressionally created drone court would be open to a series of practical and constitutional objections. On the practical side, there’s the question of what, precisely, the court would be reviewing. The administration claims the power to order targeted assassinations when three conditions are met: 1) a high level U.S. officials decides the target is a “senior operational leader of Al-Qaida” who “poses an imminent threat of violent attack against the United States”; 2) “capture is infeasible”; and 3) the operation would be conducted according to the laws of war. But it’s infeasible for judges to make split second decisions about whether or not an attack is, in fact, imminent or capture is feasible. For that reason, the most likely focus of a drone court would be the administration’s decision to put a suspect on the targeted killing list in the first place. But, as Steve Vladek of American University has argued, it’s not clear that judges have the constitutional power to issue warrants that can’t be challenged by the targets in a future judicial proceeding. And there are also serious questions about whether or not Congress has the constitutional power to forbid the president from exercising his war powers without getting judicial approval in advance.

#### Congress has the ability to curtail drone use

**Stepanovich,** Senior Policy Counsel at Access, **12** (Amie, 7/19/12, “Hearing on ‘Using Unmanned Aerial Systems Within the Homeland: Security Game Changer?’”, Electronic Privacy Information Center, https://epic.org/privacy/testimony/EPIC-Drone-Testimony-7-12.pdf, accessed 7/1/15, EOT@GDI)

There are several strategies to provide meaningful privacy protections that address the increased use of drones in our domestic skies. First, Congress should pass targeted legislation, based on principles of transparency and accountability. A first step would be the consideration and passage of Congressman Scott’s bill to limit the use of drone surveillance in criminal investigations without a warrant. State and local governments have also considered laws and regulations to further prevent abuses of drone technology.42 These proposals would serve as a good basis for federal legislation. Drone legislation should include: Use Limitations – Prohibitions on general surveillance that limit drone surveillance to specific, enumerated circumstances, such as in the case of criminal surveillance subject to a warrant, a geographically-confined emergency, or for reasonable non- law enforcement use where privacy will not be substantially affected; Data Retention Limitations – Prohibitions on retaining or sharing surveillance data collected by drones, with emphasis on identifiable images of individuals; Transparency –Requiring notice of drone surveillance operations to the extent possible while allowing law enforcement to conduct effective investigations. In addition, requiring notice of all drone surveillance policies through the Administrative Procedure Act. These three principles would help protect the privacy interests of individuals. In addition, the law should provide for accountability, including third party audits and oversight for federally operated drones and a private right of action against private entities that violate statutory privacy rights. Second, Congress should act to expressly require federal agencies that choose to operate drones, such as DHS and its components, to implement regulations, subject to public notice and comment, that address the privacy implications of drone use. Recently, in EPIC v. DHS, the D.C. Circuit Court of Appeals ruled that the Department of Homeland Security violated the Administrative Procedure Act when it chose to deploy body scanners as the primary screening technique in U.S. airports without the opportunity for public comment.43 The Court observed that there was “no justification for having failed to conduct a notice-and-comment rulemaking.”44 We believe that the public has a similar right to comment on new surveillance techniques, such as unmanned aerial vehicles, undertaken by federal agencies within the United States. Finally, Congress must clarify the circumstances under which the drones purchased by the CBP in pursuit of its mission may be deployed by other agencies for other purposes. The failure to make clear the circumstances when federal and state agencies may deploy drones for aerial surveillance has already raised significant concerns about the agency’s program.45

### Courts Fail

#### Courts bad-Oracle v. Google case proves

Micheal Barclay and Corynne McSherry, 15, EFF Special Counsel and Legal Director “Bad News: Supreme Court Refuses to Review Orcale v. Google API Copyright Decision.”, <https://www.eff.org/deeplinks/2015/06/bad-news-supreme-court-refuses-review-oracle-v-google-api-copyright-decision>, 06-29-2015, 07-01-2015, GAO

Sadly, today the U.S. Supreme Court refused to review [the Federal Circuit’s dangerous decision](https://www.eff.org/deeplinks/2014/05/dangerous-ruling-oracle-v-google-federal-circuit-reverses-sensible-lower-court%22%20%5Ct%20%22_blank)in [Oracle v. Google](https://www.eff.org/cases/oracle-v-google%22%20%5Ct%20%22_blank). Oracle claims a copyright on the Java Application Programming Interface (API), and that Google infringed that copyright by using certain Java APIs in the Android OS. The Federal Circuit had ruled in Oracle’s favor, reversing [a well-reasoned district court opinion](https://www.eff.org/deeplinks/2012/05/no-copyrights-apis-judge-defends-interoperability-and-innovation%22%20%5Ct%20%22_blank) holding that the APIs in question were not subject to copyright. Google had asked the Supreme Court to review the Federal Circuit decision. On behalf of [77 computer scientists](https://www.eff.org/press/releases/computer-scientists-ask-supreme-court-rule-apis-cant-be-copyrighted%22%20%5Ct%20%22_blank), EFF had filed an [amicus brief](https://www.eff.org/document/amicus-brief-computer-scientists-scotus%22%20%5Ct%20%22_blank) supporting Google’s petition. The Federal Circuit’s decision has been [harshly](http://www.vox.com/2014/5/9/5699960/this-court-decision-is-a-disaster-for-the-software-industry%22%20%5Ct%20%22_blank) [criticized](http://www.project-disco.org/intellectual-property/050914-the-federal-circuits-poorly-reasoned-decision-in-oracle-v-google/%22%20%5Ct%20%22_blank) for its misunderstanding of both computer science and copyright law. APIs are, generally speaking, specifications that allow programs to communicate with each other, and are different than the code that implements a program. Treating APIs as copyrightable would have a profound [negative impact on interoperability, and, therefore, innovation](https://www.eff.org/deeplinks/2012/05/oracle-v-google-and-dangerous-implications-treating-apis-copyrightable%22%20%5Ct%20%22_blank). Today’s decision doesn’t mean that Oracle has won the lawsuit. The case will now return to the district court for a trial on Google’s fair use defense. Both the Federal Circuit opinion and a[brief by the U.S. Solicitor General](http://www.project-disco.org/intellectual-property/060115-the-solicitor-generals-peculiar-brief-in-google-v-oracle/%22%20%5Ct%20%22_blank) recognized that Google was entitled to a trial on that defense. However, fair use shouldn’t be the only defense to API copyrightability. Fair use is a complex and potentially expensive defense to develop and litigate. While Google has the financial resources to take that defense to trial, few start-ups have the ability to do so. The Federal Circuit’s decision thus could deter new companies from competing with a large, litigious competitor by using the latter’s APIs. Hopefully other courts will decline to follow the Federal Circuit’s unwise opinion, which fortunately isn’t binding on the other appeals courts.

#### Courts won’t enforce—causes massive delay

Powers and Rothman 2—Stephen Powers is Research Associate for the Center for Social and Political Change at Smith College and Stanley Rothman is Professor of Government and Director of the Center for Social and Political Change at Smith College, “Least Dangerous? Consequences of Judicial Activism,” p179

A recurrent problem with the judiciary’s extension of fundamental rights to the institutions we have studied is that when courts intervene, they do not merely point out a constitutional or statutory violation that must be corrected. They typically dictate a detailed set of remedies to address the issue. This type of intervention has generated a notoriously rigid approach to institutional reform. The judiciary was not designed to legislate or to execute the laws, only to interpret their meaning. It lacks the accountability required of a policy-making body. Judges are only accountable to the public under the most rare and extreme circumstances. Yet in the wake of elaborate court orders, prisons, mental hospitals, schools, police departments, and corporations must all continue to balance individual rights against group or societal interests. Unfortunately, judges do not have the expertise, the time, or the inclination to make the kind of long-term incremental adjustments that may be critical to institutional stability and progress. That is why court-ordered remedies rarely work as planned and have so many unanticipated consequences. Moreover, as we have seen, modification or reversal of court rulings adversely impacting social and political institutions generally takes years.

#### Enforcement kills court’s legitimacy---triggers court stripping and turns enforcement.

Bentley 7 (Curt, Constrained by the liberal tradition, Brigham Young University Law Review, p. lexis)

This institutional limitation theory focuses primarily on the constraints imposed on the Court because of its relationship with the other branches of government. The Supreme Court is not wholly dependent upon other branches of government; the unique legitimacy given its interpretations of the Constitution by the American people provides it with real influence of its own. n116 However, the institutional limitation theory posits that since the Court possesses neither the purse nor the sword, n117 it relies upon its  [\*1745]  legitimacy in the eyes of the American people in order to pressure the legislative and executive branches to enforce its decrees: The Supreme Court ... possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution. This legitimacy the Court jeopardizes if it **flagrantly opposes the major policies** of the dominant alliance; such a course of action, as we have seen, is one in which the Court will not normally be tempted to engage. n118 **Without legitimacy** in the eyes of the public, both Congress and the President might feel justified in **resisting the ruling of the Court** either through jurisdiction-stripping n119 or by simply refusing to enforce its decrees. n120 There is precedent **for both in American history**. n121 The Court risks becoming substantially weakened, or even irrelevant, when the political branches ignore judicial decrees and where it nonetheless doggedly pursues the counter-majoritarian course. n122

#### Courts bad- Congress can strip judicial power

Jeffrey Jamison, 04, American Constitution Society columnist, “Congress Attempts to Strip Federal Courts of Power”, <http://www.acslaw.org/acsblog/congress-attempts-to-strip-federal-courts-of-power>, 09-23-2004, 07-06-2015, GAO

Today, the House of Representatives [voted](http://www.au.org/site/News2?JServSessionIdr005=7ovkx47qy1.app1b&abbr=pr&page=NewsArticle&id=6915&security=1002&news_iv_ctrl=1241) 247-173 to approve [the Pledge Protection Act](http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02028:@@@L&summ2=m&) (H.R. 2028). The bill "denies jurisdiction to any court (including the Supreme Court) established by Act of Congress to hear or determine any claim that the recitation of the Pledge of Allegiance violates the first amendment of the Constitution." Rev. Barry Lynn of Americans United for Separation of Church and State said of today's vote, "[t]he supporters of this bill have shown callous disregard for long-standing constitutional principles. The federal courts should be open to all Americans seeking protection of their constitutional rights." Rep. Todd Akin (R-Mo.), who introduced the Pledge Protection Act, [argues](http://www.cnsnews.com/ViewPolitics.asp?Page=%5CPolitics%5Carchive%5C200306%5CPOL20030619d.html), "[w]e tried to look for something we could do legislatively to restrict or in some way protect the Pledge of Allegiance but also restrict some of this activist mentality of...[some] judges." This is the second court-stripping bill passed by House of Representatives this session. On July 22, 2004, the House of Representatives passed the [Marriage Protection Act of 2004](http://thomas.loc.gov/cgi-bin/query/D?c108:3:./temp/%7Ec108yOiqLg::). This [act](http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR03313:@@@L&summ2=m&), which has not been considered by the Senate yet, would "deny Federal courts (including the Supreme Court) jurisdiction to hear or decide any question pertaining to the interpretation of: (1) the provision of the Defense of Marriage Act (DOMA) that provides that no State shall be required to give effect to any marriage between persons of the same sex under the laws of any other State; or (2) this Act." One might wonder exactly how much power does Congress have the power to block judicial consideration of the constitutionality of a law? The [Washington Post](http://www.washingtonpost.com/wp-dyn/articles/A43360-2004Sep22.html) explains it is, "somewhat surprisingly, an open question -- because Congress wisely has chosen not to test the question. It has, rather, accepted judicial review -- the idea that the courts can strike down legislative enactments that offend the Constitution -- as integral to the system of checks and balances." Additionally, the Supreme Court has never explicitly ruled on the constitutionality of court-stripping legislation. In [Calcano-Martinez et al v. INS](http://supct.law.cornell.edu/supct/html/00-1011.ZS.html), the Supreme Court, in striking down the Illegal Immigration Reform and Immigrant Responsibility Act, side stepped the questions relating to the court-stripping provisions of the act. The court, however, did write, "We agree with petitioners that leaving aliens without a forum for adjudicating claims such as those raised in this case would raise serious constitutional questions." Joanna Grossman, of Findlaw, [explains](http://writ.news.findlaw.com/grossman/20040727.html), "It is well-settled that under the Constitution, Congress can control lower federal court jurisdiction. And the Constitution says that Congress can make "exceptions" to even the Supreme Court's appellate jurisdiction." Professor Doug Kmiec, of Pepperdine University, [adds](http://www.freerepublic.com/focus/f-news/1175499/posts) "[i]t is clearly a constitutional exercise for Congress to assert its authority over the jurisdiction of both the lower federal courts [and the Supreme Court]." Kmiec indicates that the "[t]he idea of removing federal court jurisdiction -- even though it is textually provided in the Constitution -- is a largely unexercised power...When it has been sought to be exercised in the past, it has typically been quite controversial." The ACLU, in a letter opposing the Pledge Protection Act, [warned](http://www.aclu.org/ReligiousLiberty/ReligiousLiberty.cfm?ID=16444&c=29) that this measure, "threatens the separation of powers established by the Constitution, and undermines the unique function of the federal courts to interpret constitutional law...[and] would undermine the longstanding constitutional rights of religious minorities to seek redress in the federal courts in cases involving mandatory recitation of the Pledge. As a result, this legislation will seriously harm religious minorities and the constitutional free speech rights of countless individuals." Wade Henderson, the executive director of the Leadership Conference on Civil Rights (LCCR) [argued](http://www.civilrights.org/issues/glbt/details.cfm?id=24375), "[f]or over 50 years, the federal courts have played an indispensable role in the interpretation and enforcement of civil rights laws. When Congress has sought to prevent the courts from exercising this role, such efforts ultimately tend to do little more than enshrine discrimination in the law."

#### Courts can’t curtail mass surveillance- standing precedent

Prupis, staff writer, 15 (Nadia, 2/11/15, “NSA Spy Program So Secret Judge Can't Explain Why It Can't Be Challenged”, Common Dreams, http://www.commondreams.org/news/2015/02/11/nsa-spy-program-so-secret-judge-cant-explain-why-it-cant-be-challenged, accessed 7/2/15, EOT@GDI)

A federal judge ruled in favor of the National Security Agency in a key surveillance case on Tuesday, dismissing a challenge which claimed the government's spying operations were groundless and unconstitutional. Filed in 2008 by the Electronic Frontier Foundation, the lawsuit, Jewel v. NSA, aimed to end the agency's unwarranted surveillance of U.S. citizens, which the consumer advocacy group said violated the 4th Amendment. The lawsuit also implicated AT&T in the operations, alleging that the phone company "routed copies of Internet traffic to a secret room in San Francisco controlled by the NSA." That charge was based off of a 2006 document leak by former AT&T technician and whistleblower Mark Klein, who disclosed a collection program between the company and the NSA that sent AT&T user metadata to the intelligence agency. US District Judge Jeffrey White on Tuesday denied a partial summary judgment motion to the EFF and granted a cross-motion to the government, dismissing the case without a trial. In his order, White said the plaintiff, Carolyn Jewel, an AT&T customer, was unable to prove she was being targeted for surveillance—and that if she could, "any possible defenses would require impermissible disclosure of state secret information." Offering his interpretation of the decision, EFF senior staff attorney David Greene explained in a blog post: Agreeing with the government, the court found that the plaintiffs lacked “standing” to challenge the constitutionality of the program because they could not prove that the surveillance occurred as plaintiffs’ alleged. Despite the judge’s finding that he could not adjudicate the standing issue without “risking exceptionally grave damage to national security,” he expressed frustration that he could not fully explain his analysis and reasoning because of the state secrets issue. The EFF later Tweeted: Calling the ruling "frustrating," Greene said the EFF "disagree[s] with the court’s decision and it will not be the last word on the constitutionality of the government’s mass surveillance of the communications of ordinary Americans."Jewel v. NSA is the EFF's longest-running case. Despite the decision, the EFF said it would not back down from its pursuit of justice and was careful to note that the ruling did not mean that the NSA's operations were legal. "Judge White’s ruling does not end our case. The judge's ruling only concerned Upstream Internet surveillance, not the telephone records collection nor other mass surveillance processes that are also at issue in Jewel," said Kurt Opsahl, deputy legal council at EFF. "We will continue to fight to end NSA mass surveillance." The issue is similar to the 2013 Supreme Court decision in Clapper v. Amnesty International, which found that plaintiffs who had reason to believe they were being spied on could not provide substantial proof of surveillance, and thus could not bring their case. Jewel v. NSA stems from the EFF's 2006 case, Hepting v. AT&T, which was dismissed in 2009 after Congress, including then-Senator Barack Obama, voted to give telecommunications companies immunity from such lawsuits. "It would be a travesty of justice if our clients are denied their day in court over the 'secrecy' of a program that has been front-page news for nearly a decade," Opsahl added.

### Courts Link to Politics

#### Surveillance rulings link

Ellen Nakashima, May 7, 2015. “NSA program on phone records is illegal, court rules” Ellen Nakashima is a national security reporter for The Washington Post. She focuses on issues relating to intelligence, technology and civil liberties.

https://www.washingtonpost.com/world/national-security/appeals-court-rules-nsa-record-collection-violates-patriot-act/2015/05/07/c4fabfb8-f4bf-11e4-bcc4-e8141e5eb0c9\_story.html

A federal appeals court ruled Thursday that the National Security Agency’s collection of millions of Americans’ phone records violates the USA Patriot Act, marking the first time an appellate panel has weighed in on a controversial surveillance program that has divided Congress and ignited a national debate over the proper scope of the government’s spy powers. In a blistering 97-page opinion, a unanimous three-judge panel of the U.S. Court of Appeals for the 2nd Circuit overturned a lower court and determined that the government had stretched the meaning of the statute to enable “sweeping surveillance” of Americans’ data in “staggering” volumes. The ruling comes as Congress begins a contentious debate over whether to reauthorize the statute that underpins the NSA program or let it lapse. The court did not issue an injunction ordering the program to stop. With the statute scheduled to expire June 1, a bipartisan coalition of lawmakers in the House and Senate is seeking to renew it with modifications that sponsors say will enable the NSA to get access to the records it needs while protecting Americans’ privacy. The bill, the USA Freedom Act, is poised to pass the House next week.

#### Courts are subject to external political pressure- studies prove

Sayre, 2/23/15 (Mike, The Supreme Court is Constrained By Public Opinion In Cases Where The Justices Fear Nonimplementation of Their Decisions. http://ajps.org/2015/02/23/the-supreme-court-is-constrained-by-public-opinion-in-cases-where-the-justices-fear-nonimplementation-of-their-decisions/.MS)

With each controversial case they hear, questions arise about the influence of public opinion on the Supreme Court. Matthew Hall examines the types of cases where the Supreme Court appears constrained**, and finds when a ruling must be implemented by government actors outside the judicial hierarchy, external pressures exert a stronger influence on the Court.** He argues that nonimplementation fears are only relevant to a small subset of cases in the Supreme Court docket, indicating that judicial scholars should be attentive to different contexts rather than searching for universal tendencies of the Court’s behavior.¶ In June 2012, the U.S. Supreme Court issued its landmark decision in the Patient Protection and Affordable Care Act cases. In the months leading up to the ruling, President Obama and congressional Democrats “waged a not-so-subtle pressure campaign on the Supreme Court,” urging the justices to uphold the Act, yet despite these efforts, the justices insisted they were impervious to external pressure. When asked about the health care case, Justice Thomas dismissed the possibility of outside influence: “You stay focused on what you’re supposed to do. All that other stuff is just noise.” Three months later, Chief Justice Roberts unexpectedly joined the liberal wing of the Court and voted to uphold the health care law.¶ Notwithstanding assurances from Justice Thomas, Court observers have long noted its tendency to, in the words of the famous Mr. Dooley, “follow th’ illiction returns” (follow the election returns). **Scholars have amassed considerable evidence that public opinion constrains the justices’ decision making**, and elite preferences constrain their exercise of judicial review. Yet, others raise doubts about the extent and nature of external influence, and scholars continue to debate the causal mechanism behind this phenomenon.¶ Credit: Will O'Neill (Creative Commons: BY 2.0) ¶ In this article, I evaluate an often mentioned, yet untested theory of Supreme Court constraint: I argue **the Court is constrained, at least in part, because the justices fear nonimplementation of their decisions. Accordingly, the effect of external pressure is strongest when the threat of nonimplementation is most severe.** **When the justices can confidently assume implementation of their decisions, they are less constrained by external forces.**¶ The Court has traditionally been viewed as holding “no influence over either the purse or the sword.” In fact, **many argue that the Court is severely limited in its ability to induce social or political change**, and “[i]mplementation of the Court’s policies is far from perfect.” However, other studies suggest the Court may possess significant power to affect social change, at least in certain contexts. The Court is especially successful at altering behavior when it issues rulings related to criminal law, civil liability, or judicial administration, regardless of public opinion. The Court tends to alter behavior in these “vertical” cases because implementation is controlled by lower courts in the judicial hierarchy, and these courtsoverwhelmingly adhere to Supreme Court precedent. Of course, lower-court compliance is not perfect; judges sometimes exercise considerable discretion when making decisions. Nonetheless, lower-court defiance is rare, and the Court’s “hierarchical control appears strong and effective.”¶ The Court does not enjoy the same degree of policy control in cases unrelated to criminal law, civil liability, or judicial administration. **Rulings in these “lateral” cases must be implemented by government actors outside the judicial hierarchy, usually elected officials or their agents. These elected officials must consider their constituents’ interests and generally respond to public opinion**. Consequently, the implementation of Court rulings in lateral cases depends on the popularity of those rulings, whereas the implementation of rulings in vertical cases does not.¶ This differential power dynamic creates an avenue for evaluating whether the fear of nonimplementation drives judicial constraint. If the Court is at least partly constrained by a fear of nonimplementation, then the degree to which it is constrained should depend on its implementation power. Therefore, external constraint should be most prominent in important lateral cases because those are the cases in which implementation depends on public support.¶ U.S. Supreme Court Credit : OZinOH (Creative Commons BY NC)¶ I test my theory of a semiconstrained Court in two separate analyses. First, I evaluate the influence of public opinion and elite preferences on the ideological outcome of Supreme Court decisions. Second, I evaluate the influence of these external forces on the Court’s decision to invalidate federal statutes. I employ logistic regression models to evaluate the influence of public mood and congressional ideology on the justices’ final votes on the merits in vertical versus lateral cases. Each of these analyses confirms that external pressures exert stronger influence when nonimplementation is a concern.¶ I find that the **fear of nonimplementation is a critical factor motivating the Supreme Court’s response to external pressure**. Consequently, these external forces exert differential effects in different issue contexts. When deciding important lateral cases, the Court is highly constrained by external forces because it lacks the necessary implementation powers to give efficacy to its rulings in the absence of popular and/or elite support; however, when deciding vertical cases, the justices are relatively less constrained because their decisions tend to be implemented by lower-court judges regardless of external pressure. When the Court considers unimportant cases, the chance of strong public opposition is low; therefore, nonimplementation is unlikely and the justices can disregard external pressure. Although numerous scholars have found that the Supreme Court is constrained, I find that constraint is a significant factor in only a small subset of its docket.¶ My findings suggest that the U.S. Supreme Court is relatively independent when deciding cases related to criminal prosecution, civil liability, or judicial administration; however, the Court is more constrained when trying to alter policy beyond the control of lower courts, at least when those cases may potentially attract public interest. As a result, studies of judicial independence should be conscious of the varying institutional contexts surrounding cases in different issue areas. Rather than search for universal tendencies of Supreme Court behavior, judicial scholars should be attentive to differences in judicial power and independence across different contexts.

#### Media spin ensures that courts are politicized

Hamilton, 12 (Eric, J.D. Candidate from Stanford, “Politicizing the Supreme Court,” 65 Stanford Law Review 35, http://www.stanfordlawreview.org/online/politicizing-supreme-court. MS)

¶ To state the obvious, Americans do not trust the federal government, and that includes the Supreme Court. **Americans believe politics played “too great a role” in the recent health care cases by a greater than two-to-one margin.**[**[1]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_1) Only thirty-seven percent of Americans express more than some confidence in the Supreme Court.[**[2]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_2) **Academics continue to debate how much politics actually influences the Court, but Americans are excessively skeptical.** They do not know that almost half of the cases this Term were decided unanimously, and the Justices’ voting pattern split by the political party of the president to whom they owe their appointment in fewer than seven percent of cases.[**[3]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_3) Why the mistrust? When the Court is front-page, above-the-fold news after the rare landmark decision or during infrequent U.S. Senate confirmation proceedings, political rhetoric from the President and Congress drowns out the Court. Public perceptions of the Court are shaped by politicians’ arguments “for” or “against” the ruling or the nominee, which usually fall along partisan lines and sometimes are based on misleading premises that ignore the Court’s special, nonpolitical responsibilities.¶ The Framers of the Constitution designed a uniquely independent Supreme Court that would safeguard the Constitution. They feared that the political branches might be able to overwhelm the Court by turning the public against the Court and that the Constitution’s strict boundaries on congressional power would give way. As evidenced in the health care cases, politicians across the ideological spectrum have played into some of the Framers’ fears for the Constitution by politicizing the decision and erasing the distinction between the Court’s holding and the policy merits of the heath care law. Paradoxically, many of the elected officials who proudly campaign under the battle cry of “saving our Constitution” endanger the Court and the Constitution with their bombast. Politicization of the Supreme Court causes the American public to lose faith in the Court, and when public confidence in the Court is low, the political branches are well positioned to disrupt the constitutional balance of power between the judiciary and the political branches.¶ The Framers’ Supreme Court¶ It would have been unsurprising had the Constitutional Convention granted Congress the power to take a vote to change Supreme Court decisions. In fact, the antifederalists’ chief argument against the judiciary was that it was too powerful without a congressional revisionary power on Court opinions.[**[4]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_4) Many of the early state constitutions that were enacted between the Revolution and the ratification of the U.S. Constitution permitted the state executive and legislature to remove, override, or influence judges. Rhode Island judges were called before the legislature to testify when they inv alidated legislative acts.[**[5]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_5) The New Hampshire legislature vacated judicial proceedings, modified judgments, authorized appeals, and decided the merits of some disputes.[**[6]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_6)¶ Instead, the Framers created a Supreme Court that was independent from the political branches and insulated from public opinion. The Supreme Court would be the intermediary between the people and the legislature to ensure that Congress obeyed the Constitution. Congress could not be trusted to police itself for compliance with the Constitution's limited legislative powers. Courts would be “the bulwarks of a limited Constitution against legislative encroachments.”[**[7]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_7)¶ Still, the Framers believed Congress would overshadow the Supreme Court. The Framers were so concerned about helping the Court repel attacks by the legislature that they considered boosting its power and inserting it into political issues. James Madison’s draft of the Constitution included an additional check against congressional power, the Council of Revision.[**[8]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_8) Instead of the presidential veto, the Council would have placed several Supreme Court Justices on a council with the President or asked the President and the Supreme Court to separately approve legislation before it became law.[**[9]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_9) Justices would have the power to oppose legislation on nonlegal policy grounds. The Council is nowhere to be found in the Convention’s final product, but delegates’ arguments from the Council debates reveal a suspicion of Congress, fear for the Court’s ability to defend itself, and concern for the Court’s public reputation. Madison believed that even with the Council, Congress would be an “overmatch” for the Supreme Court and President and cited the experience of spurned state supreme courts.¶ *Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.*[***[10]***](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_10)*¶* Delegates ultimately decided that politicizing the Court would undercut its legitimacy. Luther Martin, a delegate who later became Maryland’s longest-serving attorney general, offered the most prescient comment on the subject: “It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating [against] popular measures of the Legislature.”[**[11]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_11) “It was making the Expositors of the Laws, the Legislators which ought never to be done,” added Elbridge Gerry, a Massachusetts delegate.[**[12]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_12)¶ “Saving the Constitution from the Court”¶ The Framers correctly connected loss of public confidence in the Court with judicial policymaking. Of course, the Constitution does not force judges to “remonstrate” against legislation, but experience proves Martin to be correct. Too often that becomes the public perception when Congress and the President politicize the Supreme Court. Chief Justice Roberts started and ended his health care opinion with the basics—the important distinction between whether the Affordable Care Act is good policy from whether it is a constitutional law. Within two hours, President Obama and Mitt Romney, both Harvard Law School graduates, looked into television cameras and told Americans the opposite. “Today, the Supreme Court also upheld the principle that people who can afford health insurance should take the responsibility to buy health insurance,” said Obama.[**[13]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_13) Romney criticized the majority for deciding not to “repeal Obamacare.” “What the Court did not do on its last day in session, I will do on my first day if elected President,” said Romney.[**[14]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_14)¶ Congress and the President have belittled the Court. President Obama told the public at the 2010 State of the Union address that “the Supreme Court reversed a century of law” with its *Citizens United* decision and suggested that the Court opposed honest elections. The ensuing image was even more damaging. With 48 million Americans watching, the camera panned to a cadre of expressionless Supreme Court Justices sitting in the front row while lawmakers sitting next to them rose to their feet and applauded.[**[15]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_15) Presidents Obama and Bush and members of Congress have derided the Court for its “unelected” nature, with President Obama publicly wondering before the health care decision whether “an unelected group of people would somehow overturn a duly constituted and passed law.”[**[16]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_16)¶ Judges lack clear defenses. **Judges would risk their credibility if they shouted back at the President**, appeared on the Sunday morning talk shows, or held a press conference after a decision. Unlike speeches from members of Congress and the President, Supreme Court proceedings are difficult to follow without legal training. The media coverage of the Supreme Court can be incomplete or inaccurate. FOX News and CNN famously misunderstood Chief Justice Roberts’ oral opinion and misreported that the individual mandate had been invalidated. **The publicly available audio recordings of oral arguments contribute little to public understanding of the Court**. Even before the decision, the Republican Party doctored audio clips of Solicitor General Don Verrilli coughing and pausing during oral argument to suggest in an ad suggesting that the health care law was indefensible.[**[17]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_17)¶ Politicization of the Court is dangerous because it primes the public for a power grab by the political branches. If the Court loses authority to check political power and make unpopular decisions, it cannot enforce the Constitution with the same effectiveness. Without enforcement of the Constitution, Congress is free to invade constitutional rights and exceed its lawful powers.¶ The Supreme Court came frighteningly close to losing some of its independence when the Court made politically significant decisions striking down parts of the New Deal, and President Franklin D. Roosevelt responded with the Court-packing plan. His arguments alleged misconduct by the Court.¶ *The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. . . . The Court has been acting not as a judicial body, but as a policy-making body. . . . We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself.*[***[18]***](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_18)*¶* Roosevelt’s words from seventy-five years ago could be repeated today by Court opponents. In his recent presidential primary campaign, Newt Gingrich promised to employ the tactics of early state constitutions by ignoring disagreeable Court decisions and ordering Justices to testify to congressional committees.[**[18]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_18) Proposals to invade the Court’s independence ignore the Framers’ fears for enforcement of the Constitution without the Supreme Court. Madison believed if the legislature and executive united behind a law and convinced the public that it was in their interest, the people could not properly judge its constitutionality, even if it was patently unconstitutional. The “passions” of the people on the particular issues would prevail over well-reasoned constitutional judgment.[**[20]**](http://www.stanfordlawreview.org/online/politicizing-supreme-court#footnote_20)¶ \*\*\*¶ The health care law’s closely watched journey through the three branches of government concluded in the Supreme Court, a rare opportunity in the sun for the Court. What would have been a shining moment for the Constitution in a vacuum was instead validation of the Framers’ apprehensions. Our Constitution is the longest-lasting in the world because of Americans’ enduring reverence for it. But when elected officials exploit Americans’ patriotism to score political points, they jeopardize the Framers’ carefully constructed balance of power. Instead**, honest public discourse on the Constitution and the Court is the surest security for our government.**

###  Court Legitimacy DA

#### The plan shreds the legitimacy and independence of the courts.

Yoo, Law at Berkeley, 97 (John, Law Professor at Berkeley School of Law, “Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act,” Hastings International & Comparative Law Review, V. 20:747)

Structural remedies also indicate that certain roles and certain types of cases can place demands on the integrity of the federal courts as well as on their capabilities. My colleague Paul Mishkin has argued that structural injunctions call upon the courts to employ procedures that undermine the impartiality of the federal judiciary.71 In setting spending priorities for state governments, allocating state resources, and deciding on policies, federal courts can lose their objectivity and become actors in the political process and in the case itself.72 As cases move into the remedial stage, federal courts may lose their sense of detachment and become more interested in effective management of the defendant's conduct and of the overall remedy. An intrusive judiciary, and the failure or shortcomings of its remedies, may breed a lack of confidence in, or even a lack of respect for, the legitimacy of the federal courts. To be sure, there are a great many differences between structural injunction and foreign relations cases. Nonetheless, suits under Title III of Helms-Burton could invite similar problems. To adjudicate a Title III suit, a federal court will have to determine facts and causation that occurred more than 30 years ago in another country. Information on the events producing an expropriation may be hard to discover and may be of doubtful reliability, due to the termination of diplomatic and economic relations between the United States and Cuba. Courts may have to reconstruct complex financial transactions and chains of ownership among many different companies from many different nations that stretch back to the early 1960s. Courts may need to make sensitive judgments about the political relationships and decisions not just of the present day, but of the 1960s, 1970s and 1980s. The Supreme Court long has recognized that adjudicating claims arising from events and policies abroad present unique problems for the federal courts. In its political question cases, the Court has described its unwillingness to hear foreign relations cases both because the foreign affairs power is vested in the other branches, and because the judiciary is functionally ill-equipped for the task. As Justice Jackson wrote, "[s]uch decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large amounts of prophecy... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility ... "n While the political question doctrine does not apply to Helms-Burton, these concerns about judicial competence ought to be taken into account in evaluating how Title III will operate and whether it will succeed. Further, as with structural injunctions, Title III remedies may create significant institutional problems for the judiciary. Defendants are likely to have most of their assets abroad, which would leave the court with little property to attach in order to enforce its judgments. Enforcing judgments abroad is not easy; as the Supreme Court recognized long ago in Hilton v. Guyot, "[ajs an act of government, [a judgment's] effects are limited to the territory of the sovereign whose court rendered the judgment, unless some other state is bound by treaty to give the judgment effect in its territory, or unless some other state is willing, for reasons of its own, to give the judgment effect."74 As the United States has not entered into any international agreements on the enforceability of its judgments abroad, no other nations have a binding obligation to enforce a Title III judgment against their own nationals.75 These difficulties are only compounded when the foreign nations disagree with the policy of the law that gave rise to the liability, to the extent that they even enact "clawback" legislation that allows their corporations to sue in their domestic courts to recover awards rendered under American laws.76 Current disagreement with Helms-Burton abroad may mean that few judgments rendered under Title III will be capable of enforcement. Such ineffectiveness serves to dilute public respect for the federal courts, which, as Alexander Hamilton noted in Federalist No. 7S, "have neither Force nor Will, but merely judgment."77 If Title III leaves the judiciary in the position of issuing judgments that none expect to be enforced, it enhances an image of powerlessness on the part of the courts. It may dilute the institutional capital of the courts in more important areas (such as constitutional rights), in which judges must depend on public respect to enforce counter-majoritarian decrees.73 Although considerations of political capital should not prevent the courts from exercising jurisdiction when the Constitution or federal law require it," they should inform policy decisions on whether to expand federal jurisdiction in the first place. Powerlessness is not the only threat to judicial authority. My colleague Martin Shapiro has written that courts in several different cultures possess certain shared characteristics that enhance their social legitimacy, and hence the willingness of parties and the public to accept their judgments.85 Although courts deviate in different ways from this ideal model, courts essentially find their legitimacy in the "logic of the triad," as Professor Shapiro describes it—the idea that two parties in conflict refer their dispute to a third, neutral party for resolution. As the adjudicators become less neutral and more a part of the machinery of the state and of the political system, they lose their legitimacy. "When we move from courts as conflict resolvers to courts as social controllers, their social logic and their independence is even further undercut. For in this realm, while proceeding in the guise of triadic conflict resolver, courts clearly operate to impose outside interests on the parties."31 Ironically, granting the courts too much of a certain type of power—that of enforcer of public policy-also has the effect of threatening judicial integrity. Title III of Helms-Burton may prove to be a good example of this tension between a court's duty to resolve conflicts on the one hand, and to pursue public policy on the other. In the foreign relations area, a cause of action is more likely to be seen as a tool for the advancement of a specific public goal, rather than as the correction of an injustice or inequity. In other words, courts will be acting as instruments of the national government, even of the State Department, rather than as neutral decisionmakers engaged in conflict resolution. The U.S. House Committee on International Relations made this clear with regard to Title III when it declared that the "purpose of this new civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the Cuban regime the capital generated by such ventures and deter the exploitation of property confiscated from U.S. nationals."82 Usually, these international relations goals would be achieved by the imposition of economic sanctions by the executive and legislative branches, rather than through a cause of action in federal court. Enlisting the judiciary to achieve these purposes encourages a perception of the federal courts as interested implementers of American foreign policy, which will undermine the legitimacy of the federal courts and of their judgment in the eyes of the public and of our allies. Judicialization of Cuba policy raises yet another threat to judicial independence. We have discussed the problems that arise both from the frustration of judicial remedies and from the perception of courts as merely arms of the state. Again as with structural injunctions, a third difficulty may arise when a class of cases calls for a change in the role of the individual judge. In structural injunctions situations, it will be remembered, judges can lose their objectivity and impartiality as they become interested players in the political give-and-take that occurs in remedial proceedings. Helms-Burton might produce a similar problem by placing judges in the difficult position either of executing American foreign policy or of flouting national security concerns. In ruling on the merits of a Title III case, judges may not find it easy cither to put aside their patriotism or to ignore popular support for Cuba sanctions. The price, however, of giving in to these temptations may be the further loss of neutrality and of legitimacy on the part of the courts. Judicialization of Cuba policy also will transfer the political bargaining and confrontation that occurs over foreign policy from the Congress and the White House to the courtroom. In the structural injunction context, the expansion of the courts' remedial power over some of the basic decisions of state government, such as budget, tax, and educational policy resulted in the transformation of the judicial process into a forum for the allocation of resources and the development of public programs.'\*3 A similar prospect may lie in store for the federal courts if the enforcement of foreign policy—in this case Cuba policy-becomes the goal of litigation. For example, in Barclays Bank PLC v. Franchise Tax Board of California?4 a case which challenged the constitutionality of California's tax on multinational corporations, amicus briefs were entered by the United Kingdom, the European Community, Banque Nationale de Paris, the Confederation of British Industry, the Council of Netherlands Industrial Federations, the Federal of German Industries, the Japan Federation of Economic Organizations, the Japan Tax Association, Reuters, the U.S. Chamber of Commerce, and dozens of American states." Instead of fighting in Congress and the executive branch for a different international economic policy, these parties transferred their disputes to a judicial forum because of the Court's jurisdiction over dormant commerce clause cases. A similar result may occur when Cuba policy becomes a regular subject for federal lawsuits. Judicialization may breed politicization, which in the long run would do great harm to the institution of the judiciary.

#### That undermines judicial independence and the legitimacy of the court

O’scannlian, Federal Judge on the 9**th** Circuit Court of Appeals, 6 (Diarmuid, “On Judicial Activism: Judges and the Constitution Today,” Open Spaces Quarterly, volume 3, Number 1, http://www.open-spaces.com/article-v3n1-oscannlain.php)

A judge, however, is not expected to act on any person's behalf or pursuant to anyone's direction. Indeed, he must do precisely the opposite in his official role, spurning not only personal affinities but all communication outside of the courtroom. Even if we were to conceive of a judge as a peculiar kind of agent, one that is charged with acting without concern for his master, the judge-as-agent could be brought to heel by his master when he is derelict in his duties, however they are framed. That is, the judge would be subject to effective oversight. Nevertheless, it is exactly the lack of oversight that makes the judicial office remarkable. If judges fit easily into the framework of the democratic republic, it is not because they are indirectly representative of the popular will. In my view, judges fit into our democratic framework not because they choose to exercise their power in popular ways but because they do not actually exercise personal power at all. Alexander Hamilton captured this idea succinctly with his observation that federal judges have neither force nor will, only judgment. Unlike executing the law, which is the President's role, or making the law, which is the Congress's, judging is a passive process. A judge confronts the law as it is written and the facts as they have been placed in evidence. His power may be great over the parties before him, but almost none of it-if exercised properly-can be exerted to advance a judge's own objectives. It is to guarantee this neutrality that he is given independence. Consider a criminal case. Congress enacts a statute that makes certain conduct a crime and provides a punishment. Someone violates that law. The Attorney General, who is the President's appointee, then prosecutes. Only upon the confluence of these events does the judge become involved. With the government and the defendant before him, the judge evaluates whether the specific acts committed by the defendant fall within the ambit of the statute. Whereas the Congress had broad latitude in formulating the substance of the statute and the President and his officers had significant discretion in their selection of targets and enforcement strategies, the judge has almost no discretion over the course and outcome of the prosecution. If the law has been correctly enforced against the defendant, the judge must announce the defendant's conviction; conversely, if the law has not been correctly enforced against the defendant, the judge must acquit. The role of the judge is thus limited to determining whether the law has been enforced "correctly." This determination is traditionally conceptualized as having two elements. First, the relevant facts must be wholly and accurately established; second, the law must be faithfully applied to the relevant facts. The skeptic will wonder how it is that the judge can be thought to be any more intrinsically "accurate" or "faithful" than the prosecutor who comes before him. That is a fair question, and it gets to the heart of the role of the judge. Those terms are meant to depict the consequences of the decision-making process rather than any metaphysical qualities of the decisions themselves. That is, judicial determinations are presumed to be accurate and faithful exactly because they are made by someone acting solely as a judge: a person who is new to the dispute (and thus without any vested interest in the outcome), is drawing conclusions through due process of law in the context of an open and adversarial presentation (in contrast to a one-sided investigation), and is independent (not answerable to the President or Congress). This presumption, it should be emphasized, does not rest on some unsubstantiated premise that judicial decisions are by their nature good decisions. That is to say, the argument is not that a decision is "good" because it is made by someone who acts like a judge; rather, a decision is "good" because it is made within an accuracy-enhancing procedure, and judicial decisions also tend to be "good" because that same procedure is the one that judges use. The Supreme Court has expressly acknowledged that the marginal improvement secured by this procedure can have constitutional significance even in the context of decisions that are not traditionally reserved to judges. In the 1970 case of Goldberg v. Kelley, the Court concluded that a state could not constitutionally terminate benefits to a welfare recipient without an adversarial hearing. In prescribing the indispensable elements of the constitutionally mandated pre-termination proceeding, the Court stated: "The fundamental requisite of due process of law is the opportunity to be heard." The hearing must be "at a meaningful time and in a meaningful manner." In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases. The Court's observations underscore the importance of several attributes that are intrinsic to judicial decision-making but typically absent from executive and legislative decision-making: a neutral arbiter, written notice to the concerned parties, confrontation of adverse witnesses, and opportunity for oral argument. Unsurprisingly, the Court found these attributes to be critical when rules are applied to "the facts of particular cases." The constitutional underpinnings of the Supreme Court's decision in Goldberg v. Kelly remind us of an essential element of the judicial inquiry into whether the law has been faithfully applied. Judges must consider not just the relevant statute whose vindication the executive specifically seeks, but also the procedural and substantive provisions of law that protect individuals from governmental misconduct and overreaching. In short, judges must ensure that the statute at issue does not, in either its enactment or its enforcement, invade that sphere of constitutional liberty preserved for the individual. Law and liberty will inevitably conflict. Every individual at his liberty may do anything he is physically capable of doing. An individual under law, however, may do only what the law has not proscribed, and this will certainly be less than what the individual might otherwise do. Thus, an individual cannot enjoy absolute liberty under the rule of law. In this light, the rule of law seems distinctly unattractive. Even in that most salubrious of states, the democratic republic, absolute liberty is lost-subsumed to the will of one's community. The loss of some liberty, however, can improve the value of the remainder. As Thomas Hobbes persuasively observed some three hundred and fifty years ago, too much liberty results not in happiness but despair: [D]uring the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man. . . . In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and, which is worst of all, continual fear and danger of violent death; and the life of man solitary, poor, nasty, brutish, and short. In the face of such a prospect, we are only too happy to surrender some of our liberty to law. We continue to wonder, however, just how much liberty we should be surrendering. Too much liberty results in life that is "nasty, brutish, and short," but, as the lives of people in the totalitarian states of the twentieth century made painfully clear, too much law is no better. One can view the guarantees of individual rights in the Constitution as our nation's documented consensus on where to draw the limits of law. At the Founding, we viewed the Constitution and the Bill of Rights as constraining the scope of the national government almost exclusively. That government, imperious and remote, seemed more likely to capitalize upon our collective abdication of individual liberty in a way that would degrade our lives rather than enhance them. We were understandably loath to abdicate too much. At the same time, however, we left to the states relatively unfettered authority to intrude into spheres that we now consider inviolably personal. Most states lacked provisions analogous to the federal Bill of Rights. Our consensus on the appropriate limits of the law changed, however, by the end of the Civil War. During Reconstruction, congressional Republicans sought to prevent the reemergence of the sort of oppressive state law that had been increasingly relied upon to prop up slavery in the ante-bellum South. The Republicans thus proposed and spearheaded the ratification of the Fourteenth Amendment, whose terms imposed upon the states most of the provisions of the Bill of Rights. As a result, the line between law and liberty encroached further on the power of the state and gave individual liberty a wider scope. The constitutional compromise between law and liberty has always been subject to dispute. Many people believe that the government is much more substantially limited in what it may do than is apparent on the face of the Constitution. Others contend the opposite. Occasionally, the dispute has resulted in the revision of the Constitution, as with the Fourteenth Amendment; most of the time, however, no such revision has occurred. In discharging his duty to determine whether the law has been faithfully applied, the judge in any given case must prevent a partisan in the dispute from getting the upper hand. In short, the judge must defend the constitutional compromise between law and liberty as memorialized in the text of the Constitution itself. To alter the compromise (or to allow it to be altered) is not faithfully to apply the Constitution but to amend it-to usurp a power reposed exclusively in the people of the United States. Preserving the constitutional compromise between law and liberty requires federal judges to defer to the legislative and executive branches on all issues properly within the realm of the law. If the text of the Constitution does not preclude the government's action, the judge must uphold it. He must do so even if the government's action is patently unfair or plainly inappropriate, for determining that something is "unfair" or "inappropriate" without an independent standard for fairness or appropriateness requires an exercise of sheer will. And the power to direct government action pursuant to one's own will is precisely the power that a judge lacks. The judge's duty to apply the law faithfully demands that he do more than merely defer to the political branches of government when they permissibly exercise governmental power. The very concept of law requires the judge to apply it in a manner that is both predictable and uniform. Predictability ensures that everyone knows what the law is at any given point in time. Uniformity ensures that the law is applied in the same way by any judge to any party anywhere in the country. When a judge is swayed by his own sentiment rather than considerations of deference, predictability, and uniformity, he fails by definition to apply the law faithfully. This is the essence of judicial activism. It is impossible to say with certainty in any given case that the judge's sentiments will lead him to a "bad" decision, but no one could say that they never would. Any of us would appreciate a judge's merciful departure from a draconian law. How many of us, though, would appreciate a judge's draconian departure from a merciful law? The remedy for a bad law is to change the law through legislative action, not to depart from it one way or the other in the courts. The solution, in short, is democracy-the political process-and not judicial activism. Judicial activism is not always easily detected, because the critical elements of judicial activism either are subjective or defy clear and concrete definition. For instance, a critical consideration is the state of mind of the allegedly activist judge. Judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective. Occasionally, the fact that a judge has an ulterior motive is evident, but oftentimes it is not. We are left to infer the existence of an ulterior motive from the relative distances that separate the judge's actual decision from the decision that would have been correct and the one that would have most perfectly accorded with the judge's personal sentiments. This gives rise to another difficulty in detecting judicial activism, which is that we must establish a non-controversial benchmark by which to evaluate how far from the "correct" decision the supposedly activist judge has strayed. Occasionally this, too, is easy-but not always. Because of the inherent difficulty in detecting judicial activism with any certainty, many activist decisions may pass without significant criticism and many others may be labeled by particularly sensitive commentators as "activist" when they are not. Perhaps the most notorious instance of judicial activism is captured in the century-old Supreme Court case, Rector of the Holy Trinity Church v. United States. Congress had enacted a statute declaring that it shall be unlawful . . . in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien . . . into the United States . . . to perform labor or service of any kind. Because the defendant church had contracted with an English clergyman to come to New York City to serve as rector, the government brought suit under this statute. Both the trial and appellate courts ruled that the Church had violated the law. The Supreme Court disagreed. After observing that "this is a Christian nation," Justice Brewer reached the remarkable conclusion for the Court that religious ministry could not have been the "labor or service of any kind" that Congress had intended to proscribe. Justice Brewer plainly thought, and all of his brethren agreed, that his departure from the statute did nothing but benefit the American people. Even if it was well received at the time, the Court's characterization of the country might not be so benignly received today, particularly as the basis for departing from a statute duly enacted by our democratically elected representatives. The problem with the Court's decision was that it undermined the predictability and uniformity of the law. Before the Supreme Court ruled, the statute was clear; afterwards, no one could predict its true scope. Moreover, lower courts would now be free to apply whatever exemptions they, too, thought Congress might have intended, regardless of the language Congress actually enacted. Judicial activism can have consequences that are far more profound than the unregulated immigration of nineteenth-century English rectors. When applied not simply to arcane statutes but to the United States Constitution-the foundational document of our Republic-judicial activism inevitably works a seismic shift in the balance between government and individual and has often done so on divisive questions. Take, for example, the question of whether an individual's decision to end his own life is beyond the power of the government to regulate. After the people of the State of Washington rejected the ballot measure at the polls, several Washington residents brought suit and invited judges to give them what the legislative process would not: a governmentally enforceable right to assisted suicide. The United States Court of Appeals for the Ninth Circuit, which includes Washington and eight other Western states, eventually ruled for the plaintiffs, declaring that the Constitution guaranteed each of them a "right to die." This decision, though purportedly compelled by the federal Constitution, rested upon nothing written in that document. Eight judges of the eleven-judge panel hearing the case simply promulgated a new constitutional right, one unheard of in over two hundred years of American history. The Supreme Court, in Washington v. Glucksberg, recognized the Ninth Circuit's decision for the rejection of democracy that it was and unanimously reversed, but not before rivers of ink had flowed in celebration or condemnation of a judgment that seemed intrinsically more political than judicial. Perhaps the outcome reached by the Ninth Circuit was the better policy, arguably someone who is terminally ill and wants to end his life really should not have to act alone. It is certain that many people other than the plaintiffs in the Glucksberg case thought so. Even if it were true, which seems rather difficult to ascertain in any objective sense, this belief does not establish that the court made the right decision, because the court was wrong to make the decision at all. Readers who resist this conclusion need only look at the experience of the people of Oregon. Unlike their northern neighbors, a majority of Oregonians went to the polls only a couple of years later and enacted a law giving a terminally ill individual the right to physician-assisted suicide. Nevertheless, just like their northern neighbors, the people of Oregon were rebuked by a federal court declaring that they had overstepped the scope of governmental authority. In that case, entitled Lee v. Oregon, a federal judge held that in his view there was "no set of facts" in which Oregon's newly enacted assisted suicide law could be considered "rational." That conclusion must have come as quite a surprise to the thousands upon thousands of Oregonians who voted for the law. Surely, the conclusion must have unsettled the view of the eight Ninth Circuit judges who had previously joined together in declaring that the Constitution guaranteed the very right to assisted suicide that the same Constitution was now being read to preclude the people of Oregon from enacting. This uncomfortable tension was resolved when the Ninth Circuit reversed the Lee decision and returned the issue of assisted suicide once again to the realm of political discourse, where it belongs. Even for someone who cares not a whit about whether an individual has the right to assistance in committing suicide, these cases underscore the problems that arise when judges purport to apply the law but fail to apply it faithfully-the problems, that is, of judicial activism. The first of these problems is, of course, that our democratic republic descends into what Thomas Jefferson famously reviled as "oligarchy." The will of one judge or a handful is substituted for the will of the popular majority-or, at the very least, the political representatives elected by and accountable to that majority. Moreover, because judges exert their will, when they do, by pronouncements applied retroactively in individual cases rather than by codified statutes or rules, the resulting "law" not only lacks democratic validity but predictability and uniformity as well. Decisions that manifest judicial activism do not, in short, amount to what we think of as "law" at all. When it involves constitutional interpretation, judicial activism presents a unique additional problem. A judicially active interpretation of the Constitution shifts the dividing line between government power and individual liberty. That judge-made shift, unless subsequently repudiated by the Supreme Court, can be remedied only by a constitutional amendment. Ratification of such an amendment, which requires supermajorities at both federal and state levels, is arduous by design and, when undertaken, is rarely successful. The consequence of all of this is that judicial decisions redefining individual liberties distort the delicate balance of power between the branches of government. What Congress could once do by the relatively straightforward process of statutory enactment, it can thereafter do only by discharging the Herculean task of constitutional amendment. Not only does judicial activism in whatever form hobble the political branches of government, it also undermines the judiciary itself. Courts, lacking the power to enforce their own judgments, rely on popular confidence in those judgments for their implementation. Judicial activism erodes this confidence and thereby erodes the efficacy of the judiciary as a whole. One need not look far to find the breakdown of confidence in, and resulting threat to the independence of, judicial decision-making. By far the most famous such incident occurred with the advent of the New Deal in the 1930s. Franklin Delano Roosevelt had been elected President after campaigning on the promise of federal relief from the widespread economic dislocation accompanying the Great Depression. Upon his inauguration, President Roosevelt proposed and, with the assent of the Congress, enacted into law an unprecedented program of economic reform. After the Supreme Court invalidated several popular statutes at the core of the President's program, the President pursued a plan to "pack" the Supreme Court. He proposed to increase its membership so that he could appoint enough new Justices to win a majority in future cases. The plan was never executed because, faced with this threat, the Supreme Court relented and upheld subsequent legislation. It thus appeared that the Supreme Court very nearly became the casualty of its own judicial activism. Far from being merely a product of the exigencies of the Great Depression, political assaults on specific judicial decisions still occur. In the last presidential election, both parties' nominees openly criticized a federal trial judge in New York for his refusal to admit as evidence in a drug prosecution large amounts of cocaine seized by law enforcement officers. After President Clinton suggested on the campaign trail that the judge might resign his office, the judge reconsidered his ruling and reversed it. This incident, like the Supreme Court's about-face sixty years earlier, raises the disturbing specter of judicial decision-making by popular will, and the fear that our judges might have become little more than politicians in robes. What lesson can we learn from these experiences? Judicial activism generates a vicious cycle: it triggers a lack of confidence in judicial decisions which triggers political meddling which reinforces a lack of confidence in judicial decisions. A politician in robes is no judge at all. Once a judge imposes his will as legislator, he loses his democratic legitimacy. No one person in a democratic society of 270 million citizens should wield legislative power if only fifty-two people have approved of him. A judge who wields power like a politician enters the political process. Having forsaken neutrality, he will soon lose his independence. The people will allow a judge to be independent only for as long as they perceive him as truly neutral-forsaking decisions based upon his own interests and biases. Thus, judicial activism encourages political interference both in the process of judging and selection of judges. One need look no further than the current battle between the White House and the Senate over judicial nominees for a glimpse of the extent to which the judicial appointments process has become politicized. Nor does the threat of political interference end after the judge is selected. A multitude of proposals have been offered in Congress to weaken the independence of the judiciary. Some take the form of constitutional amendments to impose term limits on judges; others have been nothing more sophisticated than calls for the impeachment of particular judges who have rendered unpopular decisions. These may be only harbingers of what is to come. Fortunately, judges retain-at least for now-their independence to apply the law neutrally and faithfully. But so long as one judge indulges his own sympathies rather than following the text of the law before him, he will only make it harder for his colleagues to retain the courage to decide cases in faithful, predictable, and uniform ways.

#### That collapses our global democratic model

Sobel, President of the American Judicature Society, 5 (Allan, “Executive Director's Report: POLITICAL ASSAULT ON THE JUSTICE SYSTEM,” Judicature, March – April, 88 Judicature 197)

This unprecedented effort of Congress, with assistance from the Executive Branch, to reenergize a private dispute that had already been considered, reconsidered, and resolved by the courts, sets a dangerous precedent and has degenerated into an alarming affront against the delicate balance of power that sustains our democracy. The American Judicature Society is most concerned about the toll this is taking on our courts. Political ambition and political rancor are once again driving our justice systems to a crossroads of either (1) stability through independence, accountability, and respect, or (2) timidity and submissiveness through unfair and intemperate criticism, irresponsible threats, and direct assault on their jurisdiction and powers. Our courts are constitutionally charged with the interpretation of the laws of the land and the protection of our constitutional rights. The judicial branch is uniquely dependent on what the late Judge Richard Arnold called “the continuing consent of the governed” to fulfill its mission of interpreting the law and resolving peacefully seemingly irreconcilable differences. If the courts do not have the support of, and are not shown due deference by, elected officials, how can we expect citizens, our friends and neighbors, to uphold the sanctity of the law of the land? To meet their common responsibility of protecting and empowering the citizens of this country, the navigators of each branch of government must remain above the fray of increasing moral and political polarization, resist resorting to incendiary rhetoric for selfish gain, and above all embrace due respect for and deference to one another. Our democratic government has been challenged often during its history. It has been wounded over the years by destructive forces from both outside and inside its borders. Through each such ordeal, however, America has survived and grown stronger to become the leader of the free world, with the opportunity to serve as an example for emerging democracies around the globe. We could not do so without a strong, independent, and genuinely respected justice system, at local, state, and federal levels. The United States at present is the object of unusually intense scrutiny and virulent criticism from all parts of the world. At a time when we are asking, and in some cases directing, governments across the globe to follow the lead of the United States to achieve freedom and democracy, it is paramount that the United States, as an example to others, embody and practice the ideals of the Constitution. It is the sworn duty of our elected officials to respect and protect the judicial branch. It is the mutual respect of every branch of government that has enabled the country to survive and thrive in spite of significant hardship and challenges to its existence. It is not difficult to understand the powerful emotions welling up in Terri Schiavo's family members and other caring and thoughtful people as they watched from the sidelines the 13-day dénouement of her life. And in this day when moral outrage, religious zeal, and media sensationalism are the norm in America, one might forgive reckless and emotionally\*231 charged, irrational statements directed at those judges, both elected and appointed, who some may deem to be responsible for her death . . . unless those reckless and irrational statements emanate from our elected members of government. For it is the members of Congress and those in power in the Executive Branch who must be held to a higher standard, who more than anyone must bear responsibility for safeguarding the strength and stability of our courts. The American Judicature Society calls on all participants in our government, citizens and holders of elected office alike, to step back and recommit to respect and support for an independent judiciary as guardian and arbiter of the rule of law. For history demonstrates that a judiciary independent of special interests and partisan politics may be necessary to mend the torn seams of this vast and diverse country. The alternative, vividly suggested in some of the actions and words of recent weeks, is anarchy.

### 2NC Court Legitimacy DA

#### Our argument straight turns their internal links – If the court loses it’s legitimacy, it won’t be effectively modeled by other countries AND even if it is modeled, the model is a bad one where the court has TOO MUCH POWER. Limitless judicial review UNDERMINES stable democracies.

Zakaria, Editor of Newsweek & Managing Editor at Foreign Affairs, 97 (Fareed, “The Rise of Illiberal Democracy,” Foreign Affairs, November / December)

The distinction between liberal and illiberal democracies sheds light on another striking statistical correlation. Political scientists Jack Snyder and Edward Mansfield contend, using an impressive data set, that over the last 200 years democratizing states went to war significantly more often than either stable autocracies or liberal democracies. In countries not grounded in constitutional liberalism, the rise of democracy often brings with it hyper-nationalism and war-mongering. When the political system is opened up, diverse groups with incompatible interests gain access to power and press their demands. Political and military leaders, who are often embattled remnants of the old authoritarian order, realize that to succeed that they must rally the masses behind a national cause. The result is invariably aggressive rhetoric and policies, which often drag countries into confrontation and war. Noteworthy examples range from Napoleon III's France, Wilhelmine Germany, and Taisho Japan to those in today's newspapers, like Armenia and Azerbaijan and Milosevic's Serbia. The democratic peace, it turns out, has little to do with democracy. THE AMERICAN PATH AN AMERICAN SCHOLAR recently traveled to Kazakstan on a U.S. government-sponsored mission to help the new parliament draft its electoral laws. His counterpart, a senior member of the Kazak parliament, brushed aside the many options the American expert was outlining, saying emphatically, "We want our parliament to be just like your Congress." The American was horrified, recalling, "I tried to say something other than the three words that had immediately come screaming into my mind: 'No you don't!'" This view is not unusual. Americans in the democracy business tend to see their own system as an unwieldy contraption that no other country should put up with. In fact, the adoption of some aspects of the American constitutional framework could ameliorate many of the problems associated with illiberal democracy. The philosophy behind the U.S. Constitution, a fear of accumulated power, is as relevant today as it was in 1789. Kazakstan, as it happens, would be particularly well-served by a strong parliament -- like the American Congress -- to check the insatiable appetite of its president. It is odd that the United States is so often the advocate of elections and plebiscitary democracy abroad. What is distinctive about the American system is not how democratic it is but rather how undemocratic it is, placing as it does multiple constraints on electoral majorities. Of its three branches of government, one -- arguably paramount -- is headed by nine unelected men and women with life tenure. Its Senate is the most unrepresentative upper house in the world, with the lone exception of the House of Lords, which is powerless. (Every state sends two senators to Washington regardless of its population -- California's 30 million people have as many votes in the Senate as Arizona's 3.7 million -- which means that senators representing about 16 percent of the country can block any proposed law.) Similarly, in legislatures all over the United States, what is striking is not the power of majorities but that of minorities. To further check national power, state and local governments are strong and fiercely battle every federal intrusion onto their turf. Private businesses and other nongovernmental groups, what Tocqueville called intermediate associations, make up another stratum within society. The American system is based on an avowedly pessimistic conception of human nature, assuming that people cannot be trusted with power. "If men were angels," Madison famously wrote, "no government would be necessary." The other model for democratic governance in Western history is based on the French Revolution. The French model places its faith in the goodness of human beings. Once the people are the source of power, it should be unlimited so that they can create a just society. (The French revolution, as Lord Acton observed, is not about the limitation of sovereign power but the abrogation of all intermediate powers that get in its way.) Most non-Western countries have embraced the French model -- not least because political elites like the prospect of empowering the state, since that means empowering themselves -- and most have descended into bouts of chaos, tyranny, or both. This should have come as no surprise. After all, since its revolution France itself has run through two monarchies, two empires, one proto-fascist dictatorship, and five republics. n9 Of course cultures vary, and different societies will require different frameworks of government. This is not a plea for the wholesale adoption of the American way but rather for a more variegated conception of liberal democracy, one that emphasizes both parts of that phrase. Before new policies can be adopted, there lies an intellectual task of recovering the constitutional liberal tradition, central to the Western experience and to the development of good government throughout the world. Political progress in Western history has been the result of a growing recognition over the centuries that, as the Declaration of Independence puts it, human beings have "certain inalienable rights" and that "it is to secure these rights that governments are instituted." If a democracy does not preserve liberty and law, that it is a democracy is a small consolation. LIBERALIZING FOREIGN POLICY A PROPER appreciation of constitutional liberalism has a variety of implications for American foreign policy. First, it suggests a certain humility. While it is easy to impose elections on a country, it is more difficult to push constitutional liberalism on a society. The process of genuine liberalization and democratization is gradual and long-term, in which an election is only one step. Without appropriate preparation, it might even be a false step. Recognizing this, governments and nongovernmental organizations are increasingly promoting a wide array of measures designed to bolster constitutional liberalism in developing countries. The National Endowment for Democracy promotes free markets, independent labor movements, and political parties. The U.S. Agency for International Development funds independent judiciaries. In the end, however, elections trump everything. If a country holds elections, Washington and the world will tolerate a great deal from the resulting government, as they have with Yeltsin, Akayev, and Menem. In an age of images and symbols, elections are easy to capture on film. (How do you televise the rule of law?) But there is life after elections, especially for the people who live there. Conversely, the absence of free and fair elections should be viewed as one flaw, not the definition of tyranny. Elections are an important virtue of governance, but they are not the only virtue. Governments should be judged by yardsticks related to constitutional liberalism as well. Economic, civil, and religious liberties are at the core of human autonomy and dignity. If a government with limited democracy steadily expands these freedoms, it should not be branded a dictatorship. Despite the limited political choice they offer, countries like Singapore, Malaysia, and Thailand provide a better environment for the life, liberty, and happiness of their citizens than do either dictatorships like Iraq and Libya or illiberal democracies like Slovakia or Ghana. And the pressures of global capitalism can push the process of liberalization forward. Markets and morals can work together. Even China, which remains a deeply repressive regime, has given its citizens more autonomy and economic liberty than they have had in generations. Much more needs to change before China can even be called a liberalizing autocracy, but that should not mask the fact that much has changed. Finally, we need to revive constitutionalism. One effect of the overemphasis on pure democracy is that little effort is given to creating imaginative constitutions for transitional countries. Constitutionalism, as it was understood by its greatest eighteenth century exponents, such as Montesquieu and Madison, is a complicated system of checks and balances designed to prevent the accumulation of power and the abuse of office. This is done not by simply writing up a list of rights but by constructing a system in which government will not violate those rights. Various groups must be included and empowered because, as Madison explained, "ambition must be made to counteract ambition." Constitutions were also meant to tame the passions of the public, creating not simply democratic but also deliberative government. Unfortunately, the rich variety of unelected bodies, indirect voting, federal arrangements, and checks and balances that characterized so many of the formal and informal constitutions of Europe are now regarded with suspicion. What could be called the Weimar syndrome -- named after interwar Germany's beautifully constructed constitution, which failed to avert fascism -- has made people regard constitutions as simply paperwork that cannot make much difference. (As if any political system in Germany would have easily weathered military defeat, social revolution, the Great Depression, and hyperinflation.) Procedures that inhibit direct democracy are seen as inauthentic, muzzling the voice of the people. Today around the world we see variations on the same majoritarian theme. But the trouble with these winner-take-all systems is that, in most democratizing countries, the winner really does take all. DEMOCRACY'S DISCONTENTS WE LIVE IN a democratic age. Through much of human history the danger to an individual's life, liberty and happiness came from the absolutism of monarchies, the dogma of churches, the terror of dictatorships, and the iron grip of totalitarianism. Dictators and a few straggling totalitarian regimes still persist, but increasingly they are anachronisms in a world of global markets, information, and media. There are no longer respectable alternatives to democracy; it is part of the fashionable attire of modernity. Thus the problems of governance in the 21st century will likely be problems within democracy. This makes them more difficult to handle, wrapped as they are in the mantle of legitimacy. Illiberal democracies gain legitimacy, and thus strength, from the fact that they are reasonably democratic. Conversely, the greatest danger that illiberal democracy poses -- other than to its own people -- is that it will discredit liberal democracy itself, casting a shadow on democratic governance. This would not be unprecedented. Every wave of democracy has been followed by setbacks in which the system was seen as inadequate and new alternatives were sought by ambitious leaders and restless masses. The last such period of disenchantment, in Europe during the interwar years, was seized upon by demagogues, many of whom were initially popular and even elected. Today, in the face of a spreading virus of illiberalism, the most useful role that the international community, and most importantly the United States, can play is -- instead of searching for new lands to democratize and new places to hold elections -- to consolidate democracy where it has taken root and to encourage the gradual development of constitutional liberalism across the globe. Democracy without constitutional liberalism is not simply inadequate, but dangerous, bringing with it the erosion of liberty, the abuse of power, ethnic divisions, and even war. Eighty years ago, Woodrow Wilson took America into the twentieth century with a challenge, to make the world safe for democracy. As we approach the next century, our task is to make democracy safe for the world.

#### The real basis of democracy and for our democratic model is allowing the people themselves to determine what the Constitution means. The plan sucks out the vitality of popular constitutionalism and our democratic model.

Kramer, Law Professor at NYU, 1 (Larry, “THE SUPREME COURT 2000 TERM: FOREWORD: WE THE COURT,” Harvard Law Review, November, 115 Harv. L. Rev. 4)

Which brings us, finally, to the Rehnquist Court. In a manner not unlike the Court of the Gilded Age, the current Supreme Court has, by slow degrees, begun systematically to extend the reach of judicial review. The Rehnquist Court has, quite simply and literally, abandoned the New Deal settlement, reoccupying ground taken for the people in the 1930s without yielding so much as an inch of territory already held. Change, in itself, is not necessarily wrong. The New Deal system for reconciling judicial supremacy with popular constitutionalism was not the only one possible, and there could be a better one. But the Rehnquist Court has not offered an alternative accommodation. It has, rather, disowned the notion of popular constitutionalism altogether, staking its claim to be the only body empowered to interpret fundamental law with authority. Congress gets to have its say, of course, because the Court reviews actions the legislature has already [\*128] taken. But what Congress thinks about the Constitution carries no formal legal weight in the eyes of the Rehnquist Court, and has only so much practical weight as the Justices think it deserves (which typically turns out to be not much). A majority of the Court may decide that something is constitutionally permitted, but the notion that the decision whether the thing is permitted might be somebody else's to make is fast disappearing. More remarkably still, the Justices have not even tried to explain or justify this grab for power - apparently taking it as obvious, as their right, because the Constitution is "law" and because, if the Constitution is "law," this must mean the whole Constitution. Naturally, assumptions such as these run into difficulty when faced with judicial doctrines developed under different assumptions. But rather than question the rightness of what it is doing, the Rehnquist Court has simply repudiated cardinal principles of twentieth-century jurisprudence (including rational basis scrutiny of ends-means relationships and deferential review of facts), casting aside a century and a half of hard-earned experience in a spasm of "law is law" formalism. Worse, the Court's felt need to maintain its interpretive supremacy - to ensure that it alone controls the meaning of the Constitution - has itself become a doctrine-shaping imperative. The Rehnquist Court has thus devised rules that artificially limit the authority of lawmakers because it finds such rules necessary to ensure its ability to dominate constitutional interpretation. The result is a Constitution that is less and does less, and for no better reasons than the Court's low opinion of Congress and desire to protect its position as king of the hill. Identifying the origins of this drift toward judicial exclusivity is not easy. I suspect that it began before the Rehnquist Court, sometime in the years after Cooper v. Aaron. Controversy over judicial supremacy (though not over the Court's decisions) subsided just as the Justices became increasingly active and ambitious in their interpretations of individual rights. Apart from enforcing these rights, the Warren and Burger Courts made no serious effort to limit the powers of Congress. This may have been because their members had no interest, and not because they were self-consciously committed to a New Deal vision of popular constitutionalism, but unarticulated and incipient understandings were irrelevant so long as the actual terms of the settlement were observed. Yet in this environment, the meaning of the struggle that had been waged to preserve the people's role in defining fundamental law was gradually forgotten, and a notion of the Constitution as nothing more than ordinary positive law, subject to Supreme Court supervision, came to be pervasively held - by liberals as well as by conservatives, by lawyers as well as by nonlawyers. Based on this understanding, conservative critics began to present the Court's failure to secure a judicial vision of Article I as a sellout, a failure by the Justices to live up to their constitutional responsibilities in an important domain. This had no consequences outside the academy so long as the [\*129] Court remained in liberal hands. It is only since the consolidation of a solid conservative majority on the Court, able and willing to be as activist in the domains it cares about as the liberal Court had been in protecting individual rights, that this changed background understanding has started to bear fruit. While this may make the shift explicable, it does not make it any the less a matter of concern. We are witnessing the beginnings of a constitutional revolution, but not the one depicted in the press. The difference between the Rehnquist Court and the Warren Court is not just a matter of activism in different domains. It is not just the reinvigoration of judicially enforced federalism. Triumphant conservative taunts that what is sauce for the goose is sauce for the gander miss the point. The Rehnquist Court's activism explicitly denies the people any role in determining the ongoing meaning of their Constitution, other than by the grace of the Justices themselves (or by the cumbersome process of formal amendment). The practical consequences of this denial are clear in the Court's decisions, which have stripped the federal government of important powers. But its philosophical and, yes, its symbolic importance should not be missed either. A Constitution that truly is nothing more than ordinary law, that has ceased to be the people's law in any meaningful sense, is as unwarranted as it is unprecedented. Popular constitutionalism has been an indispensable element of American government from the beginning, the most profound reflection of what the American Revolution was all about. To squeeze "the people" out of the Constitution is to squeeze the life out of it.

## AFFIRMATIVE

### Courts Solve Better

#### **Courts better than Congress-partisan gridlock prevents actions**

Kimberly Atkins, 12, Columnist http://lawyersusaonline.com/dcdicta/2012/08/22/congress-weakness-is-supreme-courts-strength/, 08-22-2012, 07-02-2015, Via LN, GAO

The worse the Congressional logjam grows, the stronger the role of the U.S. Supreme Court in being the interpreter of laws, according to a new study. The report from Prof. Richard L. Hasen of the University of California, Irvine School of Law points out that, ideally, Congress and the Supreme Court engage in a “dialogue on statutory interpretation” – lawmakers pass a law, the Courtinterprets the law, and then Congress has the power to overrule the Court by amending the law. But when Congress is tied up in partisan gridlock – a growing phenomenon in recent years – it becomes harder for it to serve in this function. As a result, the Court gets the final word much more often. The increasingly partisan atmosphere on Capitol Hill can have other repercussions for Congress and the Court, the study states. “Aside from the statutory interpretation dialogue, Congress interacts with the Supreme Court in other ways, including through Senate confirmation of Supreme Court judicial nominees,” Hasen observed. ” The recent partisan realignment of the Supreme Court makes it more likely that a Supreme Court judicial nominee will be filibustered in the Senate, thanks to the increasing willingness of Senators to oppose nominees on ideological grounds and increased partisan polarization in the Senate. ” The study was reported in the New York Times and by the ABA Journal.

#### **Courts better than Congress- political expediency trumps constitutional principle**

Dahlia Lithwick and Richard Schragger,06, author and law professor, “Congress behaving badly.”, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/07/AR2006100700917.html>, 10-08-2006, 07-02-2015, GAO

While the language of addiction has become the catch-all excuse for bad personal behavior of every sort, it's worth invoking in one more context: the constitutional one. Please do forgive the U.S. Congress its atrocious behavior. It's not a bad institution, per se. It's merely addicted to judicial review. Just days ago, we watched as several senators voted for a bill to redefine the treatment, detention and trials of enemy combatants, even as they expressed doubts about its constitutionality. The measure to set up military tribunals for enemy combatants contains, among other constitutional infirmities, a provision to strip courts of their power to review the constitutionality of the detentions. A number of senators contested this provision, which would suspend the writ of habeas corpus for current and future detainees, but the amendment that sought to excise it from the final bill failed by a vote of 51 to 49. Before that vote, Sen. [Arlen Specter](http://www.lexisnexis.com/lnacui2api/search/XMLCrossLinkSearch.do?bct=A&risb=21_T22277526867&returnToId=20_T22277526883&csi=8075&A=0.5165045863714176&sourceCSI=9369&indexTerm=%23PE0009UQT%23&searchTerm=Arlen%20Specter%20&indexType=P" \t "_parent) (R-Pa.), chairman of the Judiciary Committee, announced, "I'm not going to support a bill that's blatantly unconstitutional . . . that suspends a right that goes back to 1215," and the Magna Carta. He added, "I'd be willing, in the interest of party loyalty, to turn the clock back 500 years, but 800 years goes too far." Specter's justification for then voting for a bill he deemed unconstitutional? "Congress could have done it right and didn't, but the next line of defense is the court, and I think the court will clean it up." There is some irony in this congressional willingness to see the Supreme Court as a kind of constitutional chambermaid -- an entity that exists to clean up after Congress smashes the room. It is especially ironic when it is articulated by members of Congress who like to invoke judicial restraint as a constitutional value. But it is beyond ironic, and approaching parody, when Congress asks the court to clean up a bill it knows to be unconstitutional, when the bill itself includes a court-stripping provision. Criticizing the court for overturning the laws passed by Congress -- as Specter did repeatedly during the confirmation hearings for [John G. Roberts](http://www.lexisnexis.com/lnacui2api/search/XMLCrossLinkSearch.do?bct=A&risb=21_T22277526867&returnToId=20_T22277526883&csi=8075&A=0.5165045863714176&sourceCSI=9369&indexTerm=%23PE0009UK1%23&searchTerm=John%20G.%20Roberts%20&indexType=P" \t "_parent) Jr. and Samuel A. Alito Jr. -- is fair. But crying "judicial activism" at the same time you rely on the courts for political cover when you're too timid to defy the electorate -- or your president -- is hypocritical. Why should the Supreme Court defer to a Congress that adopts laws it suspects are unconstitutional? And what should we think of those elected officials who would take so cavalier an attitude toward their oath to uphold the Constitution? Members of Congress take the same oath as Supreme Court justices do, after all. And Congress regularly asserts its institutional capacity to interpret the Constitution -- to act on an equal footing with the Supreme Court in deciding the constitutionality of a law. Moreover, the justices are supposed to assume that Congress never intentionally adopts an unconstitutional law, and you need attend oral argument for only a few moments to know how seriously they take that charge. So how is it possible that an oath-bound member of Congress can support a law that he or she believes violates the Constitution? Congress gives in to the temptation of passing bills that are of questionable constitutionality because it's easy and convenient. Political expediency seems to trump constitutional principle. The elected branches need never defy the popular will if the courts are available to do so instead. And those members of Congress who insist that the courts should stay out of Congress's business should recognize Congress for the enabler it has become. It's a two-way street: The courts work with what Congress sends them and sometimes Congress purposely sends them unconstitutional legislation, because it is politically expedient to do so. That's why lawmakers who know that legislation to ban flag burning violates the First Amendment regularly trot it out anyway. It is an easy way to mollify voters, while letting some other branch grapple with what the Constitution requires. As a bonus, lawmakers then can blame the courts for usurping the will of the electorate, turning an ordinary political pander into an Olympic-worthy double-pander. So instead of pointing fingers at the court, let's call the whole relationship what it is: dysfunctional. For all its railing against the court, Congress sometimes relies on it to achieve substantive aims. The court, sheltered from political fallout, can sometimes afford to be brave when Congress cannot. But this suggests that cries of "judicial activism" from the Congress should be suspect. As is the case in any dysfunctional relationship, Congress has a vested interest in being upheld when it wants to be, and struck down when it needs to be bailed out. The popular debates about the terms and parameters of judicial activism or restraint must be understood in institutional terms. Congress behaves strategically. When it is convenient, members of Congress will praise and advocate judicial restraint, and when it is not, they will hope for "activist" judicial intervention. Specter's argument during the Alito and Roberts hearings bears this out. It distressed him not that the court was too activist in striking down acts of Congress, but that it was too activist in striking down the wrong acts of Congress. Yet this judicial backstop serves his goals when he is unwilling to make the call. The strategic use of the court reduces accountability, it corrupts the lawmaking process, and it is deeply cynical. Lawmakers should take their constitutional obligations seriously. And if they do not take their own obligations seriously, then they have no right to criticize the judicial branch when it does. Should the Supreme Court bail out Congress for the unconstitutional provisions of the new detainee legislation? Once again, it has no choice. But the real question is whether the public should bail it out. We can always choose not to.

#### Supreme court action creates congressional follow on

Erole 10 CORRELATIONS BETWEEN THE U.S. SUPREME COURT AND PUBLIC OPINION ON THE ISSUES OF ABORTION AND THE DEATH PENALTY, A Thesis Presented to the Faculty of California State University, Chico, Slande Erole, Fall 2010

Other scholars disagree with Rosenberg’s conclusion and argue that it is inaccurate of him to conclude that because the Court did not bring about immediate significant effectual change, then it had absolutely no impact on social reform (Dahl 1957; Casper 1976; Baum 2001). By handing down the decisions that it did, though it may have taken long for the changes to be implemented, the Court did set a precedent. The decision of the Supreme Court in Brown v. Board of Education set in motion at least an awareness of the problems facing African Americans and that there was a need for change. The Court’s decision sent a message that at least one part of the government was ready to act towards social reform. And it enabled Congress to pass anti-discriminatory legislation, such as the Civil Rights Act of 1964. Without the previous decisions of the Supreme Court towards ending discrimination, Congress may not have had a basis for passing the anti-discriminatory laws that it did. If the Court had not decided against the “separate but equal” doctrine, would Congress or the Executive Branch have acted at all? It is impossible for Rosenberg to prove that there was not some type of correlation between the Supreme Court’s decisions and social reform. Ultimately, it can be said that in concert with the other branches of government, political support, economic incentives, mass media, and public opinion, the Supreme Court is able to produce change. Though the changes may not be immediate or dramatic, they do exist. It is very hard to determine 10 the direction that abortion rights, civil rights, or criminal rights would have taken had the Supreme Court not taken action as a policymaker. For example, Jonathan Casper argues that the Court has a particular importance in placing issues on the agenda of the other branches of government and that the Court can provide legitimacy to certain issues, as well as serve to mobilize individuals towards those issues (Casper 1976).

### Congress Fails

#### Courts better than congress- congress can’t curtail surveillance

Glenn Greenwald 14, constitutional lawyer, journalist, author “Congress is irrelevant on mass surveillance. Here’s what matters instead.”, <https://firstlook.org/theintercept/2014/11/19/irrelevance-u-s-congress-stopping-nsas-mass-surveillance/>, 11-19-2014, 7-5-2015, GAO

When pro-privacy members of Congress first unveiled the bill many months ago, it was actually a good bill: real reform. But the White House worked very hard— in partnership with the House GOP—to water that bill down so severely that what the House ended up passing over the summer did more to strengthen the NSA than rein it in, which caused even the [ACLU](https://www.aclu.org/files/assets/USA%20FREEDOM%20Act%20backgrounder.pdf) and [EFF](https://www.eff.org/deeplinks/2014/05/eff-dismayed-houses-gutted-usa-freedom-act)to withdraw their support. The Senate bill rejected last night was basically a middle ground between that original, good bill and the anti-reform bill passed by the House. \* \* \* \* \* All of that illustrates what is, to me, the most important point from all of this: the last place one should look to impose limits on the powers of the U.S. government is . . . the U.S. government. Governments don’t walk around trying to figure out how to limit their own power, and that’s particularly true of empires. The entire system in D.C. is designed at its core to prevent real reform. This Congress is not going to enact anything resembling fundamental limits on the NSA’s powers of mass surveillance. Even if it somehow did, this White House would never sign it. Even if all that miraculously happened, the fact that the U.S. intelligence community and National Security State operates with no limits and no oversight means they’d easily co-opt the entire reform process. That’s what happened after the eavesdropping scandals of the mid-1970s led to the establishment of congressional intelligence committees and a special FISA “oversight” court—the committees were instantly captured by putting in charge supreme servants of the intelligence community like Senators Dianne Feinstein and Chambliss, and Congressmen Mike Rogers and “Dutch” Ruppersberger, while the court quickly became a rubber stamp with subservient judges who operate in total secrecy. Ever since the Snowden reporting began and [public opinion](http://www.usatoday.com/story/news/politics/2014/01/20/poll-nsa-surveillance/4638551/) (in both [the U.S.](http://www.theguardian.com/commentisfree/2013/jul/29/poll-nsa-surveillance-privacy-pew) and [globally](http://www.pewglobal.org/files/2014/07/2014-07-14-Balance-of-Power.pdf)) began radically changing, the White House’s strategy has been obvious. It’s vintage Obama: Enact something that is called “reform”—so that he can give a pretty speech telling the world that he heard and responded to their concerns—but that in actuality changes almost nothing, thus strengthening the very system he can pretend he “changed.” That’s the same tactic as Silicon Valley, which [also supported this bill](http://thenextweb.com/insider/2014/11/18/google-apple-others-push-usa-freedom-act-open-letter/): Be able to point to something called “reform” so they can trick hundreds of millions of current and future users around the world into believing that their communications are now safe if they use Facebook, Google, Skype and the rest. In pretty much every interview I’ve done over the last year, I’ve been asked why there haven’t been significant changes from all the disclosures. I vehemently disagree with the premise of the question, which equates “U.S. legislative changes” with “meaningful changes.” But it has been clear from the start that U.S. legislation is not going to impose meaningful limitations on the NSA’s powers of mass surveillance, at least not fundamentally. Those limitations are going to come from—are now coming from —very different places: 1) Individuals refusing to use internet services that compromise their privacy. The [FBI](http://time.com/3514931/fbi-director-implies-action-against-apple-and-google-over-encryption/) and [other U.S. government agencies](http://online.wsj.com/articles/apple-and-others-encrypt-phones-fueling-government-standoff-1416367801), as well as [the U.K](http://www.nytimes.com/2014/11/05/world/europe/GCHQ-director-tech-companies-militants.html?_r=0).[Government](http://www.nytimes.com/2014/11/05/world/europe/GCHQ-director-tech-companies-militants.html), are [apoplectic](http://www.bloomberg.com/news/2014-09-30/u-s-seeks-to-reverse-apple-android-data-locking-decision.html) over new products from Google and Apple that are embedded with strong encryption, precisely because they know that such protections, while [far from perfect](https://firstlook.org/theintercept/2014/09/22/apple-data/), are serious impediments to their power of mass surveillance. To make this observation does not mean, as some [deeply confused people](http://dissidentvoice.org/2014/11/et-tu-poitras/) try to suggest, that one believes that Silicon Valley companies care in the slightest about people’s privacy rights and civil liberties. As much of the Snowden reporting has proven, these companies don’t care about any of that. Just as the [telecoms have been for years](http://www.salon.com/2008/07/09/fisa_vote/), U.S. tech companies were more than happy to [eagerly cooperate with the NSA](http://www.theguardian.com/world/2013/jul/11/microsoft-nsa-collaboration-user-data) in violating their users’ privacy en masse when they could do so in the dark. But it’s precisely because they can’t do it in the dark any more that things are changing, and significantly. That’s not because these tech companies suddenly discovered their belief in the value of privacy. They haven’t, and it doesn’t take any special insight or brave radicalism to recognize that. That’s obvious. Instead, these changes are taking place because these companies are[petrified](http://www.theguardian.com/technology/2013/sep/11/yahoo-ceo-mayer-jail-nsa-surveillance) that the perception of their collaboration with the NSA will harm their future profits, by making them vulnerable to appeals from competing German, Korean, and Brazilian social media companies that people shouldn’t use Facebook or Google because they will hand over that data to the NSA. That—fear of damage to future business prospects—is what is motivating these companies to at least [try to convince users](http://www.theverge.com/2014/3/13/5505628/zuckerberg-calls-obama-over-nsa-surveillance-complaints) of their commitment to privacy. And the more users refuse to use the services of Silicon Valley companies that compromise their privacy—and, conversely, resolve to use only truly pro-privacy companies instead—the stronger that pressure will become. Those who like to claim that nothing has changed from the NSA revelations simply ignore the key facts, including [the serious harm to the U.S. tech sector](http://www.nytimes.com/2014/03/22/business/fallout-from-snowden-hurting-bottom-line-of-tech-companies.html) from [these disclosures,](http://www.washingtonpost.com/business/technology/2013/12/17/6569b226-6734-11e3-a0b9-249bbb34602c_story.html) driven by the newfound knowledge that U.S. companies are [complicit in mass surveillance](http://www.businessweek.com/news/2014-07-29/tech-companies-reel-as-nsa-spying-mars-image-for-clients). Obviously, tech companies don’t care at all about privacy, but they care a lot about that. Just yesterday, the messaging service WhatsApp [announced](http://gizmodo.com/whatsapp-now-provides-end-to-end-encryption-for-your-me-1660089798) that it “will start bringing end-to-end encryption to its 600 million users,” which “would be the largest implementation of end-to-end encryption ever.” None of this is a silver bullet: the NSA will work hard to circumvent this technology and tech companies are hardly trustworthy, being notoriously close to the U.S. government and often co-opted themselves. But as more individuals demand more privacy protection, the incentives are strong. As The Verge [notes](http://www.theverge.com/2014/11/18/7239221/whatsapp-rolls-out-end-to-end-encryption-with-textsecure) about WhatsApp’s new encryption scheme, “‘end-to-end’ means that, unlike messages encrypted by Gmail or Facebook Chat, WhatsApp won’t be able to decrypt the messages itself, even if the company is compelled by law enforcement.” 2) Other countries taking action against U.S. hegemony over the internet. Most people who claim nothing has changed from the Snowden disclosures are viewing the world jingoistically, with the U.S. the only venue that matters. But the real action has long been in other countries, acting individually and jointly to prevent U.S. domination of the internet. Brazil is [building a new undersea internet infrastructure](http://www.bloomberg.com/news/2014-10-30/brazil-to-portugal-cable-shapes-up-as-anti-nsa-case-study.html) specifically to avoid U.S. soil and thus NSA access. That same country [punished Boeing](http://www.reuters.com/article/2013/12/18/brazil-jets-idUSL2N0JX17W20131218) by denying the U.S. contractor a long-expected $4.5 billion contract for fighter jets in protest over NSA spying. Another powerful country, Germany, has[taken the lead with Brazil](http://www.reuters.com/article/2014/11/06/us-spying-un-idUSKBN0IQ28320141106) in pushing for international institutions and regulatory schemes to place real limits on NSA mass surveillance. U.S. diplomatic relations with [numerous key countries](http://america.aljazeera.com/opinions/2014/7/us-germany-relationsspyingscandal.html) have been [severely hampered](http://america.aljazeera.com/opinions/2014/7/us-germany-relationsspyingscandal.html) by revelations of mass surveillance. In July, Pew [reported](http://www.pewglobal.org/files/2014/07/2014-07-14-Balance-of-Power.pdf) that “a new…survey finds widespread global opposition to U.S. eavesdropping and a decline in the view that the U.S. respects the personal freedoms of its people” and that, while the U.S. remains popular in many countries, particularly relative to others such as China, “in nearly all countries polled, majorities oppose monitoring by the U.S. government of emails and phone calls of foreign leaders or their citizens.” After just one year of Snowden reporting, there have been massive drops in the percentage of people who believe “the U.S. government respects personal freedom,” with the biggest drops coming in key countries that saw the most NSA reporting: All of that has significantly increased the costs for the U.S. to continue to subject the world, and the internet, to dragnets of mass surveillance. It has resulted in serious political, diplomatic, and structural impediments to ongoing spying programs. And it has meaningfully altered world opinion on all of these critical questions. 3) U.S. court proceedings. A U.S. federal judge already ruled that the NSA’s domestic bulk collection program likely violates the 4th Amendment, and in doing so, obliterated many of the government’s underlying justifications. Multiple cases are now on appeal, almost certainly headed to the Supreme Court. None of this was possible in the absence of Snowden disclosures. For a variety of reasons, when it comes to placing real limits on the NSA, I place almost as little faith in the judiciary as I do in the Congress and executive branch. To begin with, the Supreme Court is dominated by five right-wing justices on whom [the Obama Justice Department has repeatedly relied](https://www.eff.org/deeplinks/2013/02/supreme-court-dismisses-challenge-fisa-warrantless-wiretapping-law-effs-lawsuit) to endorse their most extreme civil-liberties-destroying theories. For another, of all the U.S. institutions that have completely abdicated their role in the post-9/11 era, the federal judiciary has probably [been the worst](http://www.salon.com/2012/05/04/more_federal_judge_abdication/), the most consistently subservient to the National Security State. Still, there is some chance that one of these cases will result in a favorable outcome that restores some 4th Amendment protections inside the U.S. The effect is likely to be marginal, but not entirely insignificant.

#### ACLU vs. Clapper proves courts have a lot of influence in restricting surveillance

Toomey, 5/7/15 (Patrick, Staff Attorney, Why Today’s Landmark Court Victory Against Mass Surveillance Matters, ACLU National Security Project, https://www.aclu.org/blog/speak-freely/why-todays-landmark-court-victory-against-mass-surveillance-matters. MS)

**In a landmark victory for privacy, a federal appeals court ruled unanimously today that the mass phone-records program exposed two years ago by NSA whistleblower Edward Snowden is illegal** because **it goes far beyond what Congress ever intended to permit when it passed Section 215 of the Patriot Act.** The ruling in ACLU v. Clapper is enormously significant, and not only because the program in question — the first to be revealed by Edward Snowden — **is at the heart of a legislative reform effort playing out right now**, or because it sparked the most significant debate about government surveillance in decades. The decision could also affect many other laws the government has stretched to the breaking point in order to justify dragnet collection of Americans’ sensitive information. Under the program, revealed in the Guardian on June 5, 2013, telecommunications companies hand over to the NSA, on a daily basis, records relating to the calls of all of their customers. Those records include information about who called whom, when, and for how long. The ACLU sued the NSA over the program just days after it was revealed, and we took the case to the Second Circuit Court of Appeals after it was dismissed by a district court.A few points on what makes the decision so important.**¶** 1. It recognizes that Section 215 of the Patriot Act does not authorize the government to collect information on such a massive scale. Section 215 allows the government to demand from third parties “any tangible thing” relevant to foreign intelligence or terrorism investigations. “Relevant” is a pretty abstract term, but the government employed a pretty fantastical interpretation to argue that every single call record in America is “relevant” because some of those records might come in handy in a future investigation. The decision says: Excerpt from 2nd Circuit ruling on NSA call records program.

2. The decision’s significance extends far beyond the phone records program alone. It implicates other mass spying programs that we have learned about in the past two years and — almost certainly ­— **others that the government continues to conceal from the public**. For example, we know that the Drug Enforcement Administration, for decades, employed a similar definition of “relevance” to amass logs of every call made from the United States to as many as 116 different countries. The same theory was also used to justify the collection of email metadata. Both those programs have been discontinued, but the legal reasoning hasn’t, and it could very well be the basis for programs the government has never acknowledged to the public, including the CIA’s bulk collection of Americans’ financial records.The judges wrote: Excerpt from 2nd Circuit decision on NSA call records program. 3. Metadata is incredibly sensitive and revealing. The government has long argued that the phone records program doesn’t reveal the contents of calls, and as such, it is not an invasion of privacy. But metadata, especially in aggregate, can be just as revealing as content, painting a detailed picture of a person’s life. The decision reads:Excerpt from 2nd Circuit Court decision in NSA call records program case. 4. The importance of adversarial review. The court recognized that public, adversarial litigation concerning the lawfulness of this spying program was vitally important to its decision — **and** it drew a direct contrast to the secret, one-sided proceedings that occur in the Foreign Intelligence Surveillance Court. The FISC operates in near-total secrecy, in which it almost always hears only from the government. It oversees a wide variety of broad surveillance programs without any public participation or input, approving a body of secret law that has no place in a democracy. This decision affirms the role that federal courts — and the public — have in overseeing practices with such sweeping constitutional implications. 5. The congressional reforms under consideration just don’t cut it. Ahead of Section 215’s sunset on June 1, Sen. Majority Leader Mitch McConnell (R-Ky.) is trying to push through a straight reauthorization of the provision, extending its life by another five years. After today’s decision came down, he took to the floor to defend the program — a position altogether at odds with the appeals court decision, with the conclusions of multiple executive-branch review groups who found the program hasn’t been effective in stopping terrorism, and with the clear consensus that supports far-reaching surveillance reform. Another bill in play (which the ACLU neither supports nor opposes), the USA Freedom Act of 2015, doesn’t go nearly far enough, most notably in ensuring that the government cannot engage in broad collection of innocent Americans’ private information. CONGRESS: LET SECTION 215 DIE FIGHT PATRIOT ACT We didn’t do this alone. Members of Congress — Rep. James Sensenbrenner (R-Wisc.) and Sen. Ron Wyden (D-Ore.) among them — have played an instrumental role in the fight for surveillance reform. Along with a number of organizations and experts, including the NRA, they filed amicus briefs on the ACLU’s behalf and championed the cause in Congress. We hope that today’s ruling prompts Congress to consider and enact legislation that’s more robust than what’s currently on the table. Short of that, we continue to believe that Congress should seize the June 1 expiration date as an opportunity to let Section 215 die.

#### Court will have the last word and won’t get rolled back.

Lipak 12 Adam Litpak, Writer for the New York Times, August 20, 2012 “In Congress’s Paralysis, a Mightier Supreme Court” http://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html

The Supreme Court does not always have the last word. Sure, its interpretation of the Constitution is the one that counts, and only a constitutional amendment can change things after the justices have acted in a constitutional case. But much of the court’s work involves the interpretation of laws enacted by Congress. In those cases, the court is, in theory at least, engaged in a dialogue with lawmakers. Lately, though, that conversation has become pretty one-sided, thanks to the legislative paralysis brought on by Congressional polarization. The upshot is that the Supreme Court is becoming even more powerful. Here is the way things are supposed to work. In cases concerning the interpretation of ambiguous federal statutes, the justices give their best sense of what the words of the law mean and how they apply in the case before them. If Congress disagrees, all it needs to do is say so in a new law. The most prominent recent example of this dynamic was Ledbetter v. Goodyear Tire and Rubber Company, the 2007 ruling that said Title VII of the Civil Rights Act of 1964 imposed strict time limits for bringing workplace discrimination suits. In her dissent, Justice Ruth Bader Ginsburg reminded lawmakers that on earlier occasions they had overridden what she called “a cramped interpretation of Title VII.” “Once again,” she wrote, “the ball is in Congress’s court.” Congress responded with the Lilly Ledbetter Fair Pay Act of 2009, which overrode the 2007 decision. This sort of back and forth works only if Congress is not paralyzed. An overlooked consequence of the current polarization and gridlock in Congress, a new study found, has been a huge transfer of power to the Supreme Court. It now almost always has the last word, even in decisions that theoretically invite a Congressional response. “Congress is overriding the Supreme Court much less frequently in the last decade,” Richard L. Hasen, the author of the study, said in an interview. “I didn’t expect to see such a dramatic decline. The number of overrides has fallen to almost none.” The few recent overrides of major decisions, including the one responding to the Ledbetter case, were by partisan majorities. “In the past, when Congress overturned a Supreme Court decision, it was usually on a nonpartisan basis,” said Professor Hasen, who teaches at the University of California, Irvine. In each two-year Congressional term from 1975 to 1990, he found, Congress overrode an average of 12 Supreme Court decisions. The corresponding number fell to 4.8 in the decade ending in 2000 and to just 2.7 in the last dozen years. “Congressional overruling of Supreme Court cases,” Professor Hasen wrote, “slowed down dramatically since 1991 and essentially halted in January 2009.” Tracking legislative overrides is not an exact science, as some fixes may be technical and trivial. And there may be other reasons for the decline, including drops in legislative activity generally and in the Supreme Court’s docket. But scholars who follow the issue say that Professor Hasen has discovered something important. “Particularly since the 2000 elections, there has been a big falloff in overrides,” said William N. Eskridge Jr., a law professor at Yale and the author of a seminal 1991 study on which Professor Hasen built his own. “It gives the Supreme Court significantly more power and Congress significantly less power.” Richard H. Pildes, a law professor at New York University, said the findings were further proof that “the hyperpolarization of Congress is the single most important fact about American governance today.” It is, he said, a phenomenon that has “been building steadily over the last 30 years and is almost certainly likely to be enduring for the foreseeable future.” “The assumption,” he added, “has long been that when the court interprets a federal statute, Congress can always come back in and fix the statute if it disagrees with the court. Now, however, the court’s decisions are likely to be the last word, not the first word, on what a statute means.”

### No Politics Links

#### Court decisions avoid congressional political battles

Ward 9 Artemus, Professor of Poli Sci @ NIU “Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court”, Congress & the Presidency, Jan-Apr, (36)1; p. 119

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

#### Courts evade electoral consequences

Stoutenborough 6 et al., Political Science Dept @ Utah, [James, Political Science Dept @ Utah, Reassessing the Impact of Supreme Court Decisions on Public Opinion, Political Research Quarterly, p. 419]

In many cases, courts have been empowered by and served the interests of other political actors. While this undermines the countermajoritarian difficulty as an empirical hypothesis, it is not at all reassuring from a democratic perspective. Judicial review can provide an opportunity for elected political actors to evade responsibilities or to pursue policies while evading electoral consequences. Such actions may enhance or enable domination by letting those actors pursue policies that might lead to domination without suffering electoral consequences. The possibility that judicial review can provide another outlet that permits legislators to "run from daylight"85 and effect important policy changes with a minimum of public scrutiny is a serious concern, and may especially contribute to domination by powerful economic elites. An additional concern is that judicial review can have the perverse effect of making legislators less attentive to their constitutional responsibilities, as they may vote for legislation they believe to be unconstitutional under the assumption that the courts will correct their mistake.86

### A2: Legitimacy DA

#### Court decision-making maintains legitimacy

Sherry, 13 (Suzanne, Herman O. Loewenstein Professor of Law at Vanderbilt University Law School in Nashville, Tennessee, *Influence and Independence: Politics in Supreme Court Decisions*, ://iipdigital.usembassy.gov/st/english/publication/2013/02/20130206142159.html#ixzz3etDg9HfT.MS)

Almost two centuries ago, the famous student of American life and customs Alexis de Tocqueville wrote, “[T]here is hardly a political question in the United States which does not sooner or later turn into a judicial one.” That statement is still accurate today, and it poses a unique dilemma for American courts. How can judges resolve issues that, by their nature, are political rather than legal? The answer lies in the structure of the judicial branch and the decision-making process in which judges engage.¶ Unlike judges in many other countries, American judges are drawn from the ranks of ordinary lawyers and installed on the bench without any specialized training. Not even Supreme Court justices, although they often have prior experience on other courts, receive specialized training beyond the legal education of every lawyer in the United States. And while individuals (including future Supreme Court justices) studying to become lawyers may choose to emphasize particular subject areas, such as employment law or antitrust law, there are no courses that aim to prepare them for a judicial career.¶ Supreme Court justices, then, begin their careers as lawyers. Their backgrounds, their political preferences, and their intellectual inclinations are, in theory, as diverse as you might find in any group of lawyers. This diversity on the Supreme Court — especially political diversity — is somewhat narrowed by the process through which justices are chosen: Each is nominated by the president and must be confirmed by a majority vote in the Senate. Once appointed, justices serve until they die or choose to retire; there are no fixed terms and no mandatory retirement. Vacancies on the Supreme Court are thus sporadic and unpredictable, and the political views of any particular justice will depend on the political landscape at the time of his or her appointment. A popular president whose party is in the majority in the Senate will likely make very different choices than a weak president faced with a Senate in which the opposing party has the majority.¶ At any particular time, the Court will consist of justices appointed by different presidents and confirmed by different Senates. As the Court began its term in October 2012, for example, the nine sitting justices were appointed by five different presidents — three Republicans and two Democrats. **The diversity of political views on the Court and the periodic appointment of new justices guarantee that no single political faction will reliably prevail for long.¶ Differences aside, all of the justices share a commitment to uphold the Constitution. Their fidelity to that goal makes the United States a country governed by the rule of law, rather than by the rule of men. The justices, in interpreting and applying the Constitution and laws, do not view themselves as Platonic guardians seeking to govern an imperfect society but, instead, as faithful agents of the law itself.** The Supreme Court can, and does, decide political questions, but does so using the same legal tools that it uses for any legal question. **If it were otherwise, the Court might jeopardize its own legitimacy**: The public might not regard it as an institution particularly worthy of respect.¶ Personal and Political Views¶ Nevertheless, justices do have personal views. They are appointed through a political process. Observers naturally must ask how great a role their political views actually play. Some scholars argue that the justices’ political preferences play a large role, essentially dictating their decisions in many cases. They point to the fact that justices appointed by conservative presidents tend to vote in a conservative fashion and those appointed by liberal presidents vote the opposite way. The confirmation battles over recently nominated justices certainly suggest that many people view the justices’ personal politics as an important factor in judicial decision making.¶ Dwight Eisenhower and William J. Brennan shaking hands (AP Images)¶ Republican President Dwight Eisenhower (left) selected William J. Brennan for the Supreme Court. Brennan became one of the most liberal justices of the 20th century.¶ But we should not so quickly conclude that Supreme Court justices, like politicians, merely try to institute their own policy preferences. A number of factors complicate the analysis. First, it is difficult to disentangle a justice’s political preferences from his or her judicial philosophy. Some justices believe that the Constitution should be interpreted according to what it meant when it was first adopted or that statutes should be interpreted by looking only to their texts. Others believe that the Constitution’s meaning can change over time or that documentary evidence surrounding a statute’s enactment can be useful in its interpretation.¶ Some justices are extremely reluctant to overturn laws enacted by state or federal legislatures, and others view careful oversight of the legislatures as an essential part of their role as guardians of the Constitution. A justice who believes that the Constitution ought to be interpreted according to its original meaning and who is reluctant to strike down laws will probably be quite unsympathetic to claims that various laws violate individuals’ constitutional rights. If that justice also happens to be politically conservative, we might mistakenly attribute the lack of sympathy to politics rather than judicial philosophy.¶ A justice’s personal experiences and background also may influence how he or she approaches a case — although not always in predictable ways. A judge who grew up poor may feel empathy for the poor or may, instead, believe that his or her own ability to overcome the hardships of poverty shows that the poor should bear responsibility for their own situation. A justice with firsthand experience with corporations or the military or government bodies (to choose just a few examples) may have a deeper understanding of both their strengths and their weaknesses.¶ In the end, it seems difficult to support the conclusion that a justice’s politics are the sole (or even the primary) influence on his or her decisions. There are simply too many instances in which justices surprise their appointing presidents, vote contrary to their own political views, or join with justices appointed by a president of a different party. Two of the most famous liberal justices of the 20th century, Chief Justice Earl Warren and Justice William Brennan, were nominated by Republican President Dwight Eisenhower — and Warren was confirmed by a Republican-majority Senate. Between a quarter and a third of the cases decided by the Supreme Court are decided unanimously; all the justices, regardless of their political views, agree on the outcome. One study has concluded that in almost half of non-unanimous cases, the justices’ votes do not accord with what one would predict based on their personal political views. Moreover, some deeply important legal questions are not predictably political: We cannot always identify the “conservative” or “liberal” position on cases involving, for example, conflicting constitutional rights or complex regulatory statutes.¶ Other Factors in Decision Making¶ The structure and functioning of the judiciary also temper any individual justice’s tendency toward imposing personal political preferences. The most important factor is that the Court must publicly explain and justify its decisions: Every case is accompanied by one or more written opinions that provide the reasoning behind the Court’s decision, and these opinions are available to anyone who wants to read them. They are widely discussed in the press (and on the Internet) and are often subject to careful critique by lawyers, judges, and scholars. This transparency ensures that justices cannot bend the law indiscriminately; their discretion is cabined by the pressures of public exposure. And any justice who does not want to be thought a fool or a knave will take care to craft persuasive opinions that show the reasonableness of his or her conclusions.¶ Deliberation also plays a role in moderating the influence of politics on justices’ decision-making. Before reaching a decision, each justice reads the parties’ briefs, listens to (and often asks questions of) the parties’ lawyers at oral argument, and converses with other justices. The justices may also discuss cases with their law clerks, recent law school graduates who may bring a somewhat different perspective. After an initial vote on the case, the justices exchange drafts of opinions. During this long deliberation process, the justices remain open to persuasion, and it is not unusual for a justice to change his or her mind about a case. Because the justices, the lawyers, the parties, and the clerks represent a diverse range of political views, this process helps to focus the justices on legal, rather than political, factors.¶ Finally, the concept of stare decisis, or adherence to the decisions made in prior cases, limits the range of the Court’s discretion. Absent extraordinary circumstances, the Supreme Court will follow precedent — the cases it has previously decided. Even justices who might disagree with a precedent (including those who dissented when the case was originally decided) will almost always feel bound to apply it to later cases. As decisions on a particular issue accumulate, the Court might clarify or modify its doctrines, but the earlier precedents will mark the starting point. History is full of examples of newly elected presidents vowing to change particular precedents of the Supreme Court, but failing despite the appointment of new justices. Stare decisis ensures that doctrinal changes are likely to be gradual rather than abrupt and that well-entrenched decisions are unlikely to be overturned. This gradual evolution of doctrine, in turn, fosters stability and predictability, both of which are necessary in a nation committed to the rule of law.¶ No system is perfect, of course. In a small number of cases, one likely explanation for particular justices’ votes seems to be their own political preferences. These cases are often the most controversial and usually involve political disputes that have divided the country along political lines. It is no surprise that they similarly divide the justices. The existence of such cases, however, should not lead us to conclude that politics is a dominant factor in most of the Court’s cases.¶ Many factors, therefore, influence the Supreme Court’s decisions. The justices’ political views play only a small role. Were it otherwise, the Court would be less able to serve as an independent check on the political branches, less able to protect the rights of individuals, and less secure in its legitimacy. The public would not have as much confidence in a Court seen as just another political body, rather than as an independent legal decision maker. The justices (and other judges) know this, and they safeguard the Court’s reputation by minimizing the role of politics in their own decisions.

#### Overruling is extremely common- ten examples prove the disad is empirically false

Calabresi 6 Steven G., Professor of Constitutional Law – Northwestern U., Alabama LR, 57 Ala. L. Rev. 635, Spring

Many other examples exist of the Court implicitly or explicitly overruling itself on the most major constitutional issues. These include the following:  [\*684]  1) the Legal Tender Cases where Hepburn v. Griswold, **[313](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n313" \t "_self)** banning the issuance of paper money, was explicitly overruled one year later by Knox v. Lee, **[314](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n314" \t "_self)** upholding the constitutionality of the issuance of paper money; 2) the proper rule of decision under the Free Exercise Clause, where Employment Division, Department of Human Resources of Oregon v. Smith **[315](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n315" \t "_self)** in effect overruled a thirty-year-old line of Warren Court precedents first announced in Sherbert v. Verner; **[316](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n316" \t "_self)** 3) the Taney Court's departure from the broad Marshall Court reading of the commerce power in Gibbons v. Ogden **[317](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n317" \t "_self)** in Mayor of the City of New York v. Miln; **[318](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n318" \t "_self)** 4) the Taney Court's departure from the broad Marshall Court reading of the Contracts Clause in Charles River Bridge v. Warren Bridge; **[319](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n319" \t "_self)** 5) the Fuller Court's departure in Lochner v. New York **[320](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n320" \t "_self)** from the narrow reading of Section 1 of the Fourteenth Amendment adopted in the Slaughterhouse Cases; **[321](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n321" \t "_self)** and 6) the Rehnquist Court's rejection of twenty years of practice allowing upward departures by judges without aid of a jury in the Apprendi **[322](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n322" \t "_self)** line of cases, culminating with United States v. Booker. **[323](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n323" \t "_self)** To these six additional instances of overruling, either explicit or implicit, might be added the four Supreme Court decisions in which "We the people" **[324](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n324" \t "_self)** have overruled directly by constitutional amendment: Chisholm v. Georgia, **[325](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n325" \t "_self)** Dred Scott v. Sandford, **[326](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n326" \t "_self)** Pollock v. Farmers' Loan & Trust Co., **[327](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n327" \t "_self)** and Oregon v. Mitchell. **[328](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n328" \t "_self)** In all four cases, substantial numbers of those advocating the constitutional amendments thought that the decisions being overturned were not merely bad as a matter of policy but were also wrong as a matter of constitutional interpretation. The rejection of these four precedents involved to some degree an effort to restore fundamental constitutional principles in the face of contrary Supreme Court precedent. I submit that the cases, overrulings, and departures from practice discussed above suggest that it is **common practice** in the United States to appeal to the text of the Constitution or the principles that animate it to **trump even long-established lines of precedent** around which substantial reliance interests have formed. Contrary to the writings of Professors Strauss and Merrill, our actual practice is for the Supreme Court not to give important  [\*685]  constitutional precedents all that much weight. **[329](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n329" \t "_self)** It might thus be said of the Burkean writings of Professors Strauss and Merrill that "a theory that leaves such a huge unexplained gulf with practice is suspect." **[330](http://www.lexis.com/research/retrieve?_m=d6745b8f9ca586613f55b30039901d77&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAz&_md5=e56fe9e0c297495fecab2b875d88d48d&focBudTerms=planned%20parenthood%20w/45%20originalis%21&focBudSel=all" \l "n330" \t "_self)**

#### No spillover

Healy 1 Thomas, Associate – Sidley Austin Brown & Wood, Washington D.C.; J.D. – Columbia University Law School, West Virginia Law Review, Fall, Lexis

In Part III, I acknowledge that even if stare decisis is not dictated by the founding generation's assumptions or by the system of checks and balances, it might nonetheless be essential to the legitimacy of the courts. By following the doctrine consistently for the better part of two centuries, the courts may have created an expectation that they will continue to do so. And to the extent that their legitimacy now rides on this expectation, they may no longer be free to abandon the doctrine. **Even if this is true, however, it does not necessarily follow that non-precedential decisions threaten the courts' legitimacy**. Stare decisis is not an end in itself, but a means to promote certain values, such as certainty, equality, efficiency, and judicial integrity. Although a complete abandonment of stare decisis might undermine these values, the discrete practice of issuing nonprecedential opinions does not. Because a court must still follow past decisions even when it issues a nonprecedential opinion, problems arise only when the nonprecedential opinion differs in a meaningful way from the precedents upon which it is based (or when it is based on no precedents at all, as in cases of first impression).

#### Link inevitable- 3 overrules per term

Hansford and Spriggs 2 James F. and Thomas G., UC Davis, Explaining the Overruling of U.S. Supreme Court Precedent, http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1030&context=csls

As Justice Kennedy’s opinion suggests, the doctrine of stare decisis, by which courts follow the legal precedents articulated in previously decided cases, does not preclude the Supreme Court from overruling a prior case. Yet, as Justice Kennedy also states in his opinion, stare decisis is “‘of fundamental importance to the rule of law’” (491 U.S. 164, at 172). Adherence to precedent reportedly serves such goals as clarity, stability, and predictability in the law (Douglas [1949] 1979; Powell 1990; Rasmusen 1994; Stevens 1983), efficiency (Landes and Posner 1976; Stevens 1983), legitimacy (Knight and Epstein 1996; Powell 1990, 286-87; Stevens 1983, 2), and fairness and impartiality (Freed 1996; Padden 1994). Justices and scholars alike argue that for these reasons the Court is loathe to overrule past cases. Between 1946 and 1992, however, the Supreme Court overruled 154 of its prior decisions, for an **average of** about **three overruled decisions each term** (Brenner and Spaeth 1995). In this paper, we ask a simple yet important question: What explains why and when the Supreme Court chooses to overrule one of its precedents?