Agency Counter-Plans

Answers:

Counterpizzle Shizzle
DJW '03
Your Mom 1NC Courts Shell ____/____

Text: The US Supreme Court should:

We'll Clarify.

Observation 1: Solvency

The Courts can administer new policy to protect the environment.

Lettie **McSpadden**, Prof. of political science, Northern Illinois University, **1995**
(in Environmental Politics and Policy)

At the beginning of the environmental decade, environmental activists made the conscious decision to take their demands to court. Many groups that lobbied Congress for new public laws controlling pollution and conserving natural resources believed they needed to monitor the administration of those laws and wrote into them provisions for citizen suits to help enforce the substantive requirements. Recognizing the success that economically powerless groups, such as civil rights activists, had had in the judicial arena, many attorneys with environmental values argued that the courts offered the most promising forum for achieving their policy goals (Sax, 1971; Landau and Rheingold, 1971).

(5) Cts good Policymakers in env.

Since that time critics have argued that courts are peculiarly unsuited for making the trade-offs necessary for comprehensive policy formulation (Glazer, 1975; Horowitz, 1977; Melnick, 1983). Liberal critics have argued that it wastes resources to take such issues into court, and judicial decisions often do not have the intended effect on policy (Rosenberg, 1991). Alternative methods for resolving environmental conflicts, such as mediation, have been recommended by many analysts on the grounds they are less expensive, time-consuming, and conflictual (Lake, 1980; Susskind et al., 1983; Harter, 1982).

Supporters of courts as policymakers, however, contend that courts are especially suited to uphold principles and values that are often lost sight of in the political arena (Chayes, 1976; Stone, 1974; Zemans, 1983). Moreover, some judges, as well as scholars of court processes, argue that judges are becoming more capable of administering new policy and finding compromises through mediation (Wald, 1985). Some of them are skeptical regarding the outcome of negotiated settlements especially when the parties are not equally powerful (Fiss, 1984; Amy, 1987). It is the purpose of this chapter to examine the record of environmental policy making in the courts for the last twenty years and to suggest some additional types of research that might be undertaken in the future. > 242-243 Roddie

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Counterpizzle Shizzle
DJW '03
Your Mom INC Courts Shell

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Observation 2: Net Benefits

The Courts are immune From political Accountability - their independence From other political actors solves the Disad.

Jeffrey Segal and Harold **Spaeth**, Prof.'s of political science, SUNY Stony-Brook and Michigan State University, **2002**
(The Supreme Court and the Attitudinal Model Revisited)

Relatedly, justices are virtually immune from *political accountability*. Congress can impeach Supreme Court justices, but this has happened only once and the vote to remove failed.[25] The Court's appellate jurisdiction totally depends on Congress and Congress may alter it as it sees fit. Rarely, though, has Congress used this power to check the justices.[26] Overall the negative political consequences, electoral or otherwise, of limiting judicial independence far outweigh whatever short-run policy gains Congress might gain by reining in the Court. Nevertheless, we do note that there is some evidence that two Justices, Roberts in 1937 and Harlan in 1959, reversed previously unpopular decisions in the face of threats by Congress, but such examples are rare indeed. Moreover, while the President appoints the justices, he has no authority over them once they are confirmed. *United States v. Nixon* forcefully illustrates this point, where three Nixon appointees joined a unanimous Court requiring the President to relinquish the Watergate tapes, and thus delivered the coup de grace that forced Nixon to resign.[27] >94

Counterpizzle Shizzle
DJW '03
Your Mom I've got the power!!!

Courts impartial nature makes them policy makers

Terri Jennings **Peretti**, Prof. of political science, Santa Clara University, **1999**
(In Defense of a Political Court)

As a matter of logic, the Court does indeed seem to lack any obvious sources of power and legitimacy. As Mondak and Smithey simply state the matter, "The Supreme Court is an inherently weak institution."[6] This weakness derives from the fact that the Court can rely on neither an electoral connection nor funding and enforcement mechanisms for insuring compliance and ongoing political support. Why is it then that the Court is permitted to endure as a significant national policymaker, particularly when it often acts against the desires of the majority and other powerful institutions?

The traditional answer offered is the special status of the Court in the public mind. As Adamany and Grossman explain, "Legal Realists and political scientists in the 1930s argued that public reverence for the Constitution is rooted in psychological needs for stability and security in human affairs and in the powerful hold that constitutional symbolism has on the American mind. This reverence in turn transferred to the justices of the Supreme Court, as interpreters and protectors of the sacred Constitution."[7]

This "judicial symbolism" or "sancrosanctity proposition"[8] thus argues that public support for the Court, even for its unpopular decisions, is insured by its connection to a powerful symbol, the Constitution. Public support is further assured by expectations of judicial infallibility and impartiality. These expectations arise from the lack of electioneering or partisan campaigning on the part of judges and by the outward symbols of judicial decisionmaking (e.g., the robes, the grandeur of the courtroom, secrecy), which inspire awe and respect.

To conventional legal scholars, certain normative implications follow. To the extent that the Court fulfills those "mythic" expectations, it will continue to receive the public support and confidence necessary for carrying out its often unpopular role of enforcing reason and the rule of law against the arbitrary will of the majority. → 63 - 161 Robe

(9) Cts impartial nature makes them powerful pdgmkr

3

Counterpizzle Shizzle
DJW '03
Your Mom courts & policy ____/____

courts & policy options

Arthur **Miller**, "Toward Increased Judicial Activism:The Political Role of the Supreme Court," **1982**

Courts & Policy options

My proposal is to make the Supreme Court into such a council, but with a broader focus. Not only presidential but Congressional actions would be submitted to it before promulgation—plus, of course, its traditional function of hearing the complaints of individual persons about governmental action. The Court as Council of State (or of Elders) would not necessarily have a veto on proposed policies. Rather, it would insure that all aspects of a proposed policy had been thought through and given due consideration. The Court as Council would not, of course, be a set of philosopher-rulers in Plato's sense of the term. Its function *prior* to policies going into effect would be advisory. But when any policy was issued, and complaints arose, it would then revert to its historical function of *subsequent* judicial review and determine whether the governmental action was in accord with constitutional principles. To be more specific I draw on an analysis by the late Emile Benoit:

courts change policy

Stephen **Powers and** Stanley **Rothman**, research associates, Smith College, **2002** ("The Least Dangerous Branch? Consequences of Judicial Activism")

In the 1960s, as public interest advocates and the courts began to perceive too comfortable an association between various agencies and regulated industries, the courts essentially independently transformed the meaning of the APA by adopting a "hard-look" standard of review. The public's eroding confidence in the executive branch and the intention of Congress to reassert its authority over public policy areas both old and new came after the judiciary's own housecleaning efforts, not before. By the 1970s the courts had already substantially altered the application of the APA by subjecting agencies to more intense scrutiny. As political scientist R. Shep Melnick explains it, the federal courts "increasingly have read the Administrative Procedures Act and other federal statutes to guarantee a wide variety of groups the right to participate directly in agency deliberations as well as to bring their complaints to court. . . . Second, in reviewing the reasonableness of agency action under the Administrative Procedures Act, the courts have increased the burden on the agencies to explain the rationale for their decisions and to demonstrate that they have considered other policy options" (Melnick, 1983:10–11). This has a profound impact on agencies in the sense that in their rulemaking efforts they must be continually prepared to justify their activities before the courts. The courts thus have become the forum in which interest groups exercise enormous influence over public policy (Kerwin, 1994). Congress and the federal judiciary have continued to actively encourage this participation through a number of important procedural reforms initiated in the past several decades.

Counterpizzle Shizzle
DJW '03
Your Mom courts (S)

courts (S) - they are flexible and tailored to specific circumstances

Stuart **Feldman**, editor, Boston College Environmental Affairs Law Review, Summer **1991** (Boston College Environmental Affairs Law Review, p. lexis)

Having decided that equitable relief is necessary or appropriate, a court may maintain jurisdiction over the dispute to review *sua sponte* any changed facts or the terms of its order. n55 A court does not need to reserve explicitly its jurisdiction over the controversy. n56 Just as a court will not force a plaintiff to bring numerous claims for money damages in response to an ongoing tort or statutory violation, it will not issue an injunction that can be enforced only by a fresh suit or a formal reopening of the action. n57 Rather, federal courts can enforce their injunctions under their continuing jurisdiction through supplementary or contempt proceedings. n58 Additionally, changes in law or the facts, or in the defendant's attitude and behavior, may lead a court to modify or dissolve its order. n59

cts = flexible + settings (S)

During the time between a court's decision actively to oversee the enforcement of the remedy and the court's determination that future defendant misconduct is unlikely to occur, a court may turn to its agents for help. To effectuate its decree a court may desire impartial fact-finding n60 or a judicial representative's presence within the defendant's [*818] organization. n61 Indeed, a court may decide to usurp management of the defendant's business. n62 Judicial references to court-appointed agents, like all equitable orders, are flexible and tailored to the circumstances. Because the functions performed by special masters, monitors, and receivers vary in their intrusiveness into a defendant's operations, these agents occupy places along a spectrum that lacks bright line boundaries. n63 A court's aim in any reference is to enlist aid in ensuring that defendants comply with statutes or the common law, or to structure the substantive changes that the court feels are equitable.

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Counterpizzle Shizzle
DJW '03
Your Mom Courts (5)

Courts (5) - they are flexible

Arthur **Miller**, "Toward Increased Judicial Activism: The Political Role of the Supreme Court," **1982**

An even greater role beckons—and is possible. I do not say that the Court will move to a function such as that outlined above, but do say that the Justices can and should make the attempt. As an integral part of an "aristocracy of talent," they can deal with areas such as the following:

First: The Justices can help formulate a new public philosophy, in Benoit's sense of a dynamic equilibrium. This course will mean, at the very least, that the pragmatic temper must give way to a conscious philosophy or ideology. One of the most important aspects of that philosophy would be to recognize that humankind is a part of nature and will survive or become extinct only to the extent that there is cooperation with nature. The millenia-old Judeo-Christian ethic of man's dominance over nature and nature's creatures can no longer prevail.

Second: The Justices can, as has already been suggested, help to alleviate some of the shortcomings of the pluralistic political order. The need is for public- or national-interest decisions. In the context of particular litigation, or at the request of some official to render an advisory opinion, the Court could erect a standard that would help Americans move toward a conservation/simplification ethic. "In ordinary circumstances voters cannot be expected to transcend their particular, localized and self-regarding opinions," Walter Lippmann told us.[197] If that be so, and I think it is, the task of the Supreme Court becomes obvious—determine what the larger interests of the community are and, to the extent possible, enforce those larger interests. This conclusion is not a plea for the interests of the State or of society to be overriding. Rather, it is to note that human dignity for individuals is only possible within the confines of a harmonious social order. As Emile Benoit and others have said, harmony is precisely what is not likely to characterize any nation, including the relatively free or open nations of the West, in the future. Sir Henry Maine, writing in 1886, knew that: "the actual history of popular government since it was introduced, in its modern shape, into the civilized world," does "little to support the assumption that popular government has an indefinitely long future before it. Experience rather tends to show that it is characterized by great fragility, and that since its appearance, all forms of government have become more insecure than they were before."[198] That modern American government has "great fragility" cannot be gainsaid.

courts (5)

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Counterpizzle Shizzle
DJW '03
Your Mom K inquiry

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Courts provide a critical inquiry that other branches do not.

Daniel **Solove**, Iowa Law Review, August **1999**
(p. lexis nexis)

The assumption that meaningful critical inquiry is tantamount to an invasion of discretion is founded on the improper association of critical inquiry with *Lochnerism*. The *Lochner* Court barely engaged in a critical analysis of the facts supporting the necessity of the hour restriction for bakers; instead, it just made the conclusory statement that there were none. This is not critical inquiry. Ideally, critical inquiry does not impose a fixed canon of beliefs and principles on the judgments under review; rather, it is process of openminded exploration. Critical inquiry does not have to be a stifling skepticism, one that annihilates all laws and policies in its presence. Notwithstanding the deference he advocated, Justice Brandeis displayed a sophistication in analyzing facts that serves as a good example of how the Court should have approached New Deal legislation. n389 Thus, the deference principle -- that judges should refrain from injecting their own personal ideologies into their constitutional interpretation -- is quite compatible with critical inquiry. Courts can [*1020] remain critical without substituting their judgment for that of experts and officials. Courts can be sensitive to the needs of officials and institutions while simultaneously engaging in a vigorous critical inquiry into their judgments. Experts serve as a wonderful resource in the process of critical inquiry because they are enmeshed in the actual practical difficulties of institutions, steeped in the facts, and constantly aware of the needs and concerns of practice. Nevertheless, courts must remain critical of the expert. Courts should prevent experts and institutions from cloistering themselves from the rest of the world, keeping their fields insular and impenetrable. Courts should force experts to engage in a dialogue with the nonexperts. Judges must remain wary of blind acceptance of authority and subject everything to constant critical inquiry.

Deference is the negation of critical inquiry. Deference assumes that judicial review via critical inquiry into empirical evidence is equivalent to judicial legislation and the imposition of judicial ideology. By making this equivalency, critical inquiry of facts is banished from judicial review. Deferential review merely becomes a form of additional legitimacy, a judicial stamp of approval for the decisions made by government officials in the bureaucratic state. n390

Counterpizzle Shizzle
DJW '03
Your Mom crts (5)

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Judicial intervention solves

Stephen **Powers and** Stanley **Rothman**, research associates, Smith College, **2002** ("The Least Dangerous Branch? Consequences of Judicial Activism")

[In defense of legal realism, which we discuss in chapter 1, advocates of contemporary judicial practice point out that absent judicial interventions, the political process would be even more vulnerable to overbearing majorities. Jesse Choper argues that the Supreme Court remains weak in spite of its review power because countermajoritarian rulings are likely to face intense resistance and the court loses prestige the more it runs against political tides. Yet he contends that judicial review remains a necessary component of an imperfect democratic system. If "judicial review were nonexistent for popularly frustrated minorities, the fight, already lost in the legislative halls, would have only one remaining battleground—the streets . . . the alternatives to judicial review for individual constitutional rights are either disobedience of the law or discontented acceptance" (Choper, 1980:128). Thus episodic discontent with the Supreme Court is a sign of systemic good health

provided the judges do not go too far for too long. In the interim, far from hindering the political system, the Court provides further possibilities for democratic learning.]

8

Counterpizzle Shizzle ____/____
DJW '03
Your Mom courts & enforcement

courts & enforcement through citizen suits

Leonard **Townsend**, J.D. candidate, Fordham School of Law, Fall **1999**
(p. lexis nexis)

Curiously, while other environmental statutes allow preclusion of citizen suits *either* for actions in a court *or* through administrative proceedings, n100 section 1365 only refers to "courts" and no other express alternative. n101 Nevertheless, courts have still had some confusion as to [*95] what the meaning of the words "in a court" is, even though the words are expressly stated in the statute. n102

only courts & citizen suits w/ envir

In an early case of first impression, n103 the court in *Baughman v. Bradford Coal Co.*, n104 acknowledged that "generally, the word 'court' in a statute is held to refer only to the tribunals of the judiciary and not to those of an executive agency with quasi-judicial powers." n105 The Third Circuit was concerned, however, about the perceived necessity to "provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and [be] most likely to trigger governmental action which would alleviate any need for judicial relief." n106 Thus, for the practical justification of easing clogged dockets of the federal courts, the court in *Baughman* set aside the plain language of the statute, n107 holding "it follows that to constitute a 'court' in which proceedings by the State will preclude private enforcement actions under [the Clean Air Act], a tribunal must have the power to accord relief which is substantially [*96] equivalent to that available to the EPA in federal courts under the Clean Air Act." n108 Consequently, *Baughman* adopted the "Alice in Wonderland" approach to statutory interpretation. n109

Conversely (and thus more toward 'classical' statutory interpretation), in *Friends of the Earth v. Consol. Rail Corp.* n110 enforcement actions by the State culminated in consent orders. n111 These orders were posited by the defendant to be the "functional equivalent of a diligently prosecuted action in a court and therefore [they should] [*97] operate to bar [citizen-plaintiff's] suits" n112 as inspired by the *Baughman* n113 decision. While the court felt the facts in the *Friends of the Earth* case did not meet the *Baughman* test, this was irrelevant because the court held that "the language [i.e. the words "In a court" was] clear and unambiguous, [and thus] judicial inquiry is complete n114 except in 'rare and exceptional circumstances' . . . [where] 'only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the plain meaning of the statutory language.'" n115 Although the court recognized the obvious danger that unlimited public actions might disrupt the implementation of the Act and overburden courts, n116 it nevertheless stated that "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." n117 Thus, a "court is a court and an administrative consent order is not."

Counterpizzle Shizzle
DJW '03
Your Mom courts (S) environment

courts solve environmental protection

Michael **Kraft**, Prof. of public and environmental affairs, University of Wisconsin, **2001** (Environmental Policy and Politics, p. lexis)

The Role of the Courts Much the same argument applies to the courts. Even before President Reagan assumed office, environmentalists had come to rely heavily on using the federal courts to pressure reluctant executive agencies to implement the tough new statutes adopted during the 1970s. They continued to do so where their resources allowed throughout both the Bush and Clinton administrations (O'Leary 1993; McSpadden 2000). Much of the bitter fight over protection of old-growth forests in the Pacific Northwest, for example, has taken place in the federal courts, with either environmentalists or the logging industry challenging administrative plans that sought to balance competing interests (Yaffee 1994). Environmentalists won an important victory in early 2000 when the U.S. Supreme Court voted 7 to 2 in the case of *Friends of the Earth* v. *Laidlaw* to uphold "citizen suit" provisions of environmental laws such as the Clean Air Act and Clean Water Act that had long been opposed by business and conservative interest groups. By permitting such a "standing to sue," the Court kept the door open for citizen groups trying to pressure federal agencies into more aggressive enforcement of environmental laws (Greenhouse 2000). >>

courts solve laws for environment

Stuart **Feldman**, editor, Boston College Environmental Affairs Law Review, Summer **1991** (Boston College Environmental Affairs Law Review, p. lexis)

Congress also has recognized, however, the judiciary's traditional role in balancing the equities of particular controversies and fashioning precise, coercive remedies to abate the public endangerment posed by environmental hazards. Courts hold inherent constitutional powers, in addition to statutory authority, to review the environmental regulatory decisions of other branches of government and to furnish injured parties with meaningful redress. To satisfy these duties, courts may provide for themselves the means to ascertain and implement the most feasible decrees.

Although often decried by litigants, judicial references to special masters and post-judgment monitors do not tarnish the courts, but offer a mechanism through which the courts can assume oversight and supervision of recalcitrant polluters. The judiciary thus becomes [*840] a viable supplement and alternative to administrative action for extensive and continuing environmental redress. As in administrative decisions, however, the creation of a remedy may be as critical to the litigants and the public as the determination of liability, and the fullest airing of the merits of a remedy may occur before an agent rather than a court.

10

Counterpizzle Shizzle
DJW '03
Your Mom courts ⑤ environment

courts ⑤ environmental law of the constitution

Robert **Percival**, Prof. of Law, Lewis and Clark Law School, Sept. **2002**
(p. lexis nexis)

While Congress used to be the primary arena for those seeking to change the environmental laws, today environmental lawyers increasingly turn to the courts. As a result, efforts to protect the environment now confront constitutional challenges at seemingly every turn. These challenges deserve serious attention because of their constitutional dimensions, even if they have not yet substantially altered the fabric of environmental law.

Too often today the Constitution is viewed only as a product of the latest decisions of the United States Supreme Court. Our understanding of its meaning has become dependent on the complex architecture of case law developing and applying specific doctrines as each new controversy arises. It is useful to step back from this mindset to examine the overall consequences of the Court's decisions for society's ability to protect the environment.

This Article assesses the implications for environmental law of this changing constitutional landscape. It begins by reviewing constitutional history through the lens of environmental concerns, highlighting some forgotten episodes that provide valuable insights into current controversies. The Article concludes by discussing how to promote greater harmony between environmental values and the concerns on which our current constitutional architecture is founded.

Harmonization of environmental and constitutional values need not require abrupt change in existing constitutional understandings. The entire enterprise of constitutional interpretation is itself an effort to harmonize tensions between competing, but constitutionally important, interests.

11

Counterpizzle Shizzle
DJW '03
Your Mom courts (5) environment ____/____

courts (5) by preserving a balance between commercial interests and environmental interests.

Stuart **Feldman**, editor, Boston College Environmental Affairs Law Review, Summer **1991** (Boston College Environmental Affairs Law Review, p. lexis)

B. The Public Welfare as an Element in Equitable Balancing

Another distinctive characteristic of equitable remedies is judicial concern for the effect of a court's decree on community interests. After determining liability, a court faces two difficult decisions: first, whether to grant injunctive relief; and second, how to tailor the terms of its order and the scope of the order's intrusiveness. In both decisions, a court will balance the social value of the tortious or unlawful activity against the complained-of injury. n29

Because the courts believed that the public generally benefited from defendants' enterprises, however offensive, traditional equity doctrines hindered private actions to enjoin defendant businesses. n30 [*815] Courts still recognize that socially encouraged commercial ventures incidentally may present environmental dangers, or that municipal agencies that fulfill necessary functions may operate, at least temporarily, outside of statutorily mandated standards. n31

Some early equity cases recognized, however, that the public's right to a clean environment may outweigh even large commercial projects. In *Georgia v. Tennessee Copper Co.*, n32 the state of Georgia asked the United States Supreme Court to enjoin two copper smelting factories located near the Georgia-Tennessee border. n33 Gases emitted from the plants created acid rain that killed Georgia forests and orchards. n34 The Court found the defendant liable for the pollution, but hoped that the parties would stipulate to a workable solution. n35 When, after seven years, the parties had failed to agree, the Court dictated environmental operating standards designed to allow commercial activity while reducing the threat to Georgia lands to acceptable levels. n36

The Court limited the sulphur content percentage permitted in defendant's waste fumes and specified the maximum allowable amount of emissions. n37 The Court further ordered the defendant to keep detailed daily records, and to provide unfettered access to its facilities to a Court-appointed inspector. n38 The inspector reviewed the defendant's operations biweekly and measured the continuing impact of the pollution on Georgia farmland. n39 Based on these observations, [*816] the inspector made recommendations to the Court for future equitable relief. n40 The Court also maintained the case on its docket to enable the parties to apply easily for modifications to the decree. n41

Tennessee Copper illustrates the judiciary's willingness to become deeply involved in a corporate defendant's business when less intrusive solutions are unlikely to achieve the court's desired balance, or the interests of the public welfare are impugned. n42 The *Tennessee Copper* decision predates the advent of our current legislative and administrative environmental regulatory regime. Federal environmental laws, however, are founded largely on common law doctrine. n43 In codifying the common law causes of action, Congress retained the federal courts' traditional equitable remedies. n44

12

courts solve environment

Lincoln **Davies**, associate, Steptoe and Johnson LLP, **2000**
(p. lexis nexis)

Today, an activist Court led by a narrow conservative majority is reshaping constitutional law to limit federal power, bolster state sovereignty, and increase protection for property rights. These decisions should not serve as vehicles for undermining environmental protection if the Constitution is properly understood. Federal power to regulate activities that may cause environmental damage should not be at its lowest ebb when exercised to protect resources like endangered species that are in the greatest peril. The judiciary, which once played a significant role in defending states' sovereign rights to protect against environmental harm, should appreciate the causes and consequences of our legal system's shift away from a private law model to the modern regulatory state. One hopeful sign is that each time the Supreme Court has confronted an opportunity to dismantle fundamental elements of the federal regulatory infrastructure that protects the environment, it has refused to do so. n433 Our Constitution, which was created at a time when the United States was a fledgling, largely agrarian nation, should continue to adapt to the needs of a vast, modern nation with an integrated national economy and a strong public commitment to protecting against environmental harm.

Counterpizzle Shizzle
DJW '03
Your Mom enforcement

courts can ⑤ - they have enforcement

Stuart **Feldman**, editor, Boston College Environmental Affairs Law Review, Summer **1991** (Boston College Environmental Affairs Law Review, p. lexis)

This case illustrates that a court's choice of a remedy may be as critical to the litigants' interests and the public weal as the substantive conduct rules that establish polluters' liability. Whether acting pursuant to centuries-old common law doctrine n3 or recently enacted environmental statutes, n4 federal courts, n5 using their equitable powers, [*810] must forge appropriate remedies to proven and continuing violations of law. n6

Crts can ⑤ enforce

To assure meaningful redress, federal courts may appoint judicial agents, such as special masters and post-decree monitors, n7 to gather information impartially that a court may use either to craft injunctions or to survey defendants' compliance with a decree. n8 Courts have supervised, through judicial delegates, state and municipal facilities to protect individuals' federal constitutional rights to fair housing, n9 unprejudiced public education, n10 and humane treatment in custodial institutions. n11 Complex environmental suits, dominated by concerns for the public welfare, also present compelling grounds for continuous judicial supervision of a recalcitrant polluter's operations.

Nonetheless, courts have hesitated to adopt such an active manner in environmental enforcement. As non-majoritarian and generalist bodies, n12 courts are unwilling to intrude on the institutional prerogatives [*811] of administrative agencies, which have been designated by Congress in many statutes as the primary authors of environmental policy. n13 Some courts, therefore, have limited their role to reviewing procedural fairness in agency rulemaking and adjudication. n14

When courts have exercised continuous guidance in the post-judgment resolution of environmental disputes, they may have acted at the request of a regulatory agency or a regulated entity. Several municipalities, for example, have conceded their inability to operate their sewage treatment plants in compliance with federal Clean Water Act pollutant discharge standards n15 and have invited judicial supervision as a palliative to the political bickering that stymied remedial efforts. n16 In other cases, polluters have attempted to evade environmental liabilities by transferring assets to subsidiaries or shell corporations n17 or otherwise have displayed their unwillingness to adhere to the court's orders. In these egregious circumstances, courts have supplanted the defendants' management by imposing receivership. n18

More commonly, however, the defendants' environmentally injurious operations have high social value, or produce goods or services that are essential to the local or national economies. n19 The equities [*812] of these cases dictate against immediate or total abatement. Rather, they suggest the need to revamp the polluters' procedures. In other environmental suits, litigation may reveal that state or federal regulatory agencies failed to restrain defendants' proven wrongful conduct and that defendants' operations raise the specter of recurring harm. n20 The value of prospective injunctions and judicial oversight through court-appointed agents is most visible in these instances. By maintaining an active posture in the post-judgment phases of litigation, courts insure effective relief to injured plaintiffs and to the public, thereby performing their statutory duties and acting within their traditional equitable role.

Counterpizzle Shizzle
DJW '03
Your Mom SC gets Congressional support and other support

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Supreme Court jets support from Congress and the rest of the population

Lettie **McSpadden**, Prof. of political science, Northern Illinois University, **1995**
(in Environmental Politics and Policy)

> On the other hand a development that has increased public participation in water pollution control is the citizen suit in which public interest groups such as the Sierra Club sue directly an industry that is out of compliance with its effluent permit. Formerly, most environmental litigation involved a government agency that was sued either by industry or environmental groups. However, during the 1980s, as enthusiasm for enforcement actions waned in the agencies, public interest groups took up the slack (Vaughn, 1991). Congress cooperated by providing for citizens' suits in the laws, which enable private citizens to act as private attorneys general. The fact that all point sources must have permits for discharging to waterways greatly facilitated these lawsuits, as reports monitoring effluents are required and provide specific evidence of noncompliance that courts can easily accept. The Supreme Court interpreted the Clean Water Act to prevent citizens from suing for violations that have been corrected (Wolter, 1989). Even though industry may avoid a fine, a citizen suit may either encourage EPA or a state agency to initiate enforcement action or convince the company to bring its plant into compliance with its permit. Either of these outcomes accomplishes the purposes of the suit. > 251 Pollute

(3) SC jets support from Congress and the population.

Counterpizzle Shizzle
DJW '03
Your Mom Courts (S) environment ____/____

Courts (S) environment like civil rights

Lincoln **Davies**, associate, Steptoe and Johnson LLP, **2000**
(p. lexis nexis)

While the Civil Rights Act of 1964 and the Clean Air Act of 1970 shared importance to their movements as symbols of landmark legislation but employed divergent political processes to arrive at that same place, the acts used similar mechanisms for enforcement that led to different implications for their movements' objectives. Both statutes sought to implement their provisions through a unique blend of administrative action and citizen suits. The Civil Rights Act's public accommodations title allowed aggrieved citizens to seek injunctive relief, along with authorizing the Attorney General to intervene if "the case is of general public importance." n578 However, the Act's provisions relating to removal of federal funding when government contractors use discriminatory practices relied largely on administrative action, n579 although the equal opportunity employment title employs enforcement provisions similar to accommodations title. n580 Likewise, the Clean Air Act of 1970 provided for state enforcement of emissions standards, with EPA ensuring state compliance, and allowed citizens to sue EPA "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." n581

Cts (S) enfcd like Civil rts.

Although these statutes' mechanisms for enforcement serve clearly important purposes in effectuating the goals of the laws-segregation in public accommodations disappeared almost overnight after the Civil Rights [*303] Act's passage, n582 and the Act's federal assistance provision serves as an important tool for environmental justice advocates today n583-the implications these provisions had for civil rights and environmental activists were perhaps even more meaningful because of how they helped shape the evolution of the movements. Indeed, the administrative enforcement provisions bestowed great benefits upon those interested in civil rights and environmental protection, but they did not further empower the movements. The Acts' citizen suit provisions, on the other hand, armed the movements with additional legal ammunition; the activists could now themselves seek enforcement of statutes, and thus increasingly petition the legal system for redress. However, the importance of these provisions to each of the movements likely differed. For civil rights activists, bringing lawsuits was nothing new. They had long done so, and now the Civil Rights Act changed the substance n584 of the claims but not their forum-the Act left the oppressed still appealing to the oppressor for relief. For environmentalists, however, the idea of bringing citizen suits to protect the environment was an entirely novel approach, resulting in increased citizen involvement in use of law to protect the environment- and potentially helping to further sustain, forge, and advance the movement as a whole. n585

Counterpizzle Shizzle
DJW '03
Your Mom courts (S) environment

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courts regulate environmental protection act

Lettie **McSpadden**, Prof. of political science, Northern Illinois University, **1995** (in Environmental Politics and Policy)

Enforcement of the Clean Water Act occurs in two phases. In the first EPA sets effluent standards for each industry based on current pollution reduction technology. In phase two EPA or an EPA-authorized state agency issues a National Pollution Discharge Elimination System (NPDES) permit to each point source (municipal sewage treatment plant or industrial plant) specifying the percentage reduction required for each pollutant and the deadline for its achievement. In addition, variances may be granted to each source that may postpone the deadline by which the reduction in pollution must be achieved or reduce the requirement altogether (Rodgers, 1977; Schoenbaum, 1981; Findley and Farber, 1991).

Industry has challenged the discretion of EPA before federal courts at all of these stages. Industry attorneys began with procedural challenges, arguing that EPA had not provided an appropriate hearing or sufficient notice to interested parties to comment on the regulations. EPA was able to meet these challenges primarily by slowing its processes (McKinnon, 1979). Substantive challenges by industry were more difficult to meet, as all federal circuits insisted EPA demonstrate in its administrative record that it had taken Leventhal's "hard look" at all the legally relevant factors for setting effluent standards. The standards for old sources of water pollution were divided by the 1972 amendments into two levels, "best practicable" and "best available." The former was designed to be less strict and to require that the agency balance the cost to industry against the demonstrated benefits to the community brought about by cleaner water. In setting best available treatment, EPA had only to consider cost along with other factors (*Appalachian Power v. Train*, 1976). > 219 Bobbie

(S) Cts Regulate EPA

17

Injunction (S)

Barbara **Safriet**, assoc. Dean, Northwestern School of Law, **2000**
(p. lexis nexis)

The availability of injunction, n159 an extraordinary remedy, n160 depends upon the application of broad equitable principles. n161 Although the procedural distinctions between actions at law and suits in equity are abolished, n162 the substantive distinctions are not. As a result, "[t]he equitable doctrines limiting availability of equitable remedies, such as clean hands or no adequate remedy at law, remain." n163

Inject (S)

An injunction may be mandatory or prohibitory in form. The former orders the performance of an act, resulting in a change of the status quo; it is stayed pending an appeal. n164 The latter directs that action not be taken, thus preserving the status quo; it is not stayed pending an appeal. n165

Injunctions are available only to protect against "future unlawful conduct," and the burden is on the plaintiff to "show that such conduct is probable or threatened." n166 In addition, harmless acts, although "irregular and unauthorized," n167 do not warrant injunctive relief; rather, a private plaintiff must demonstrate a "substantial and positive injury." n168 In fact, some suits for injunctive relief have been allowed only when brought by the state or its [*250] officers. n169

cct injunction (S)

Stuart **Feldman**, editor, Boston College Environmental Affairs Law Review, Summer **1991**
(Boston College Environmental Affairs Law Review, p. lexis)

Whether seeking redress for harm to private property or complaining on behalf of the general public, environmental plaintiffs often request injunctive relief from the courts. Injunctions are judicial orders that require defendants to perform specific acts or to refrain from particular acts, under threat of fines or imprisonment. n21 Plaintiffs desire these tailored commands because they believe that monetary compensation will not vindicate injuries to their interests or prevent defendants' further misconduct. n22

Cct injunct (S)

Injunctions are attractive to environmental plaintiffs because of their strength and flexibility. n23 Backed by a court's criminal contempt powers n24 and crafted to address specific past and future harm, injunctions can be molded to halt a defendant's operations completely, to reform the most injurious aspect, or to establish performance [*814] standards. n25 In contrast to statutory remedies, which necessarily are designed for wide application, permanent injunctions are granted after an adversarial hearing and the development of an evidentiary record. n26 Compared to administrative remedies, injunctions are subject to fewer political and bureaucratic pressures. n27 Creative injunctions ultimately may spawn legislative or administrative guidelines. n28

→ Stop ex 1

Counterpizzle Shizzle
DJW '03
Your Mom Maritime ____/____

Courts have jurisdiction over maritime law

Laura **Schelter**, Dickinson Journal of Environmental Law and Policy, **1997**
(p. lexis nexis)

Article III of the Constitution of the United States provides that the Supreme Court's judicial power extends to all cases arising under the Constitution and the laws of the United States, including cases of admiralty and maritime jurisdiction. n153 The Supreme Court has appellate jurisdiction in cases of this nature. n154 The Constitution also states that the Supreme Court has original jurisdiction in all cases in which a state is a party. n155 Thus, the Supreme Court had federal jurisdiction to review both landmark public trust cases, even though Illinois Central was decided in federal court and Phillips Petroleum was a state court judgment.

Gt Juris over Maritime law

In addition to the constitutional basis for the Supreme Court having reviewed these cases, n156 it is possible that the Court applied federal admiralty and maritime law, particularly in deciding Illinois Central. n157 "The Court's implication, that the reach of the public trust doctrine would be parallel to the reach of the national government's admiralty jurisdiction, followed from navigation being the primary subject of protection and regulation in both contexts." n158 In addition, Congress admits new states [*115] into the Union as a matter of federal law; n159 "thus, ... a federal test of navigability applies to issues of determining original state title in navigable waters and their underlying lands, and Supreme Court decisions are binding as to the

tests determining state title." n160

Counterpizzle Shizzle
DJW '03
Your Mom cts(S) int'l law ____/____

Courts Solve international law issues

Jonathan **Wight**, Dayton Law Review, Spring **1994**
(p. lexis nexis)

cts (S) int. law issues

However, international law does exist, although the incidents of its enforcement often may be lacking. n211 State "subjection to $ (international$) law is as yet imperfect, though it is real as far as it goes; the problem of extending it is one of great practical difficulty, but it is not one of intrinsic impossibility." n212 In the Corfu Channel Case, n213 Judge Alvarez of the International Court of Justice acknowledged: "We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist regime, according to which States were only bound by the rules they had accepted." n214 In reality, "nations have accepted important limitations on their sovereignty, . . . they have observed these norms and undertakings, and the result has been substantial order in international relations." n215 Furthermore, "almost all nations observe almost all principles of international law . . . almost all of the [*1289] time." n216 Regarding the absence of an effective international judiciary, Justice Powell, in a 1972 decision, suggested that "until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law." n217 The United States Supreme Court has played a prominent role in the development of international law. n218 For example, the Court has recognized its obligation to ascertain and administer international customary law. n219 In The Paquete Habana, n220 the Supreme Court stated: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." n221 The Paquete Habana Court not only recognized the application of international law in United States courts, but also explored state practice to determine that a particular customary rule of law did in fact exist. n222

Courts enforce international law

Jonathan **Wight**, Dayton Law Review, Spring **1994**
(p. lexis nexis)

cts enforce int. law

A fourth argument favoring deference to the political branches is that courts lack the power to implement their international law decisions. Although effective "sanctions" against international law violators are missing, nations generally observe international law. n313 A preoccupation with sanctions is misplaced. n314 Nations will observe international law because they have an interest in, among other things, reputation and orderly international relations. n315

Counterpizzle Shizzle
DJW '03
Your Mom cts (S) int'l law

Courts

judicial cm (S) international law

Jonathan **Wight**, Dayton Law Review, Spring **1994**
(p. lexis nexis)

With regard to judicial competence, one argument in support of judicial deference is that the courts are ill-equipped to decide issues of international law. n289 International law cases are infrequent and the sources of international law are unfamiliar. n290 Hence, courts should defer to the political branches when issues of international law are raised. [*1296]

judx cm (S) int. law expertise

The facts, however, are contrary. Although cases are infrequent, United States courts have played a prominent role in the development of international law. n291 Also, American attorneys are well-equipped to argue international cases before the courts. n292 Under the Anglo-American system, the attorney's role is that of advocate. n293 The attorney's duty includes familiarizing the court with the relevant legal issues in a particular case. n294 Furthermore, the sources of international law are similar to domestic sources of law, and thus, are not beyond the cognizance of the courts. n295 For instance, the negotiating history of treaties is similar in form to domestic legislative history. While cases may exist where relevant sources of international law are truly inadequate rendering judicial abstention necessary, the vast majority of cases present issues where the relevant law is relatively settled and the relevant facts are available. n296 In cases where the relevant law is relatively settled, "deference poses the risk that the court would adopt a rule that is contrary to the actual law; abstention may reflect an unjustified abdication of responsibility." n297 Therefore, the argument that judges should defer to the political branches because they lack expertise in international law is weak.

Counterpizzle Shizzle
DJW '03
Your Mom courts ⑤ buisness

courts can regulate buisness

Lettie **McSpadden**, Prof. of political science, Northern Illinois University, **1995**
(in Environmental Politics and Policy)

NEPA Cases

The discussion about how much judicial review of administrative discretion is appropriate often takes place within the context of the National Environmental Policy Act (NEPA). In passing this law, Congress attempted to reduce the tendency of nonenvironmental agencies to overlook environmental values in making decisions. Formulators of NEPA hoped to achieve this result at two levels: through internal reform, by forcing agencies to incorporate environmental values into their thinking, and through external oversight, by informing the public and other agencies about projects under consideration and eliciting comments from them. Evaluation of the effectiveness of NEPA has been mixed. Some observers have argued that writing environmental impact statements (EISs) for government projects has merely lengthened a process without making any substantive impact (Fairfax, 1978). Other have observed some reform of the system (Liroff, 1976; Mazmanian and Nienaber, 1979).

⑤ Crts can Regulate Biz.

It is at the second level, external reform, that the courts enter the process, because NEPA provides for citizen suits through which groups dissatisfied with the EIS process may sue any government agency for shirking its duty. Many who have analyzed the courts' impact argue that only the courts' insistence on strict application of the law in the early days of NEPA forced many agencies to write EISs at all, and to take seriously the information contained in them (Andrews, 1976; Liroff, 1976; Anderson, 1973). During the 1970s various federal courts struggled with procedural questions regarding NEPA: what constitutes a "major federal action" requiring an EIS, who should write it, when it should be written, and what kinds of projects are exempt (Claff, et al. 1977; ABA Environmental Quality Committee, 1978).

Judicial interpretation gives better protection to individual Rights

Cox, Former Special Prosecutor During Watergate, 1987
[Archibald, The Court and the Constitution, pg. 372.]

"The loss of independence would endanger the basic values of constitutionalism. The very purpose of written constitutions containing Bills of Rights and guaranteeing judicial independence was to put some rights beyond the reach of government policy, even beyond the power of a majority of the people. Judicial interpretation gives better protection than the political branches to unpopular individuals and minorities shut out of, or inadequately represented in, the political process. It was the Court that spoke for the national conscience in *Brown* v. *Board of Education* while Congress and the President were silent.

Similarly, judicial review provides better protection for the enduring values that politicians too often neglect and of which the people too often lose sight in the emotional intensity and maneuvering of political conflict, especially in national crises. Individual liberties such as freedom of speech and guarantees of privacy are often in this character. It was the Court that protected unorthodox "troublemakers," such as the Jehovah's Witnesses and truly peaceful civil rights demonstrators, against harassment by local ordinances and officials. It was the Court that excised the cancer of legislative malapportionment when incumbent legislators were perpetuating themselves by refusing to act. The full impact of statutes on individual and minority rights often comes to light only through experience. Judicial review in the years following legislative or executive action provides what Justice Stone called "the sober second thought of the community." 372"

Counterpizzle Shizzle
DJW '03
Your Mom Rights ____/____

Courts (&) rights

James **Huffman**, "A Case for Principled Judicial Activism," May 20 **1993** (http://new.heritage.org/Research/LegalIssues/HL456.cfm)

But we cannot decide every claim of liberty on an ad hoc balancing in particular cases. That would be the rule of man (and woman), not the rule of law. Our solution to this problem is rights. In the case at issue the rights question is whether the employer or landlord has the right to hire or rent to whom they please or the prospective employee or tenant has the right to dress and appear as they please. A positivist judge may conclude that the D.C. ordinance settles the question in favor of the prospective employee or tenant. But there is more positive law to be referenced, namely the Constitution of the United States. Does the police power of the state, or in this case the enumerated and implied powers of Congress, extend to such regulation? Probably so, under established doctrine, but it is just possible that we have it wrong, if liberty is our standard.

(V) courts (&) rights

But even in cases like this, rights problems are not simple. Courts are often faced with competing claims of right and it is the nature of our system that the judge can seldom cut the baby in half. It is one way or the other. One claimant wins and has the claimed right. The other claimant loses and does not have the claimed right. The definition and protection of liberty requires the drawing of boundaries between people. By deferring to past court decisions which have permitted the democratic or bureaucratic denial of liberty, courts violate their obligation to uphold the Constitution.

Courts (S) rights

Stephen **Powers and** Stanley **Rothman**, research associates, Smith College, **2002** ("The Least Dangerous Branch? Consequences of Judicial Activism")

Like most other areas of government activity, judicial intervention is not wholly good or wholly destructive when it is viewed in terms of the causes advanced. In part because it is judged more by the consequences of its doctrinal pronouncements than fidelity to the letter of the Constitution, the judiciary has retained much of its institutional legitimacy in the American polity. As James Q. Wilson astutely observes:

courts (S) Rights

> The court is a vitally important forum in which individuals can assert fundamental rights and seek appropriate remedies, even (especially!) against administrative agencies. The courts began the process of school desegregation, put a stop to some bestial practices in prisons and mental hospitals, and have enabled thousands of people to get benefits to which they were entitled or ended abuses they were suffering. Without courts and lawyers skilled at using them some of these conditions might be far more common today. But like all human institutions, courts are not universal problem solvers competent to manage any difficulty or resolve any dispute. There are certain things courts are good at and some things they are not so good at. (Wilson, 1989:290)

More enthusiastic proponents of judicial activism argue that as the American state expanded its authority, courts simply needed to retain a proportionate influence over the growing responsibilities of legislative and administrative institutions. The judiciary's growth in power was necessary to ensure that it could continue to safeguard individual rights and protect interest groups and the public in an increasingly complex and insular bureaucratic policy-making environment.)

Counterpizzle Shizzle
DJW '03
Your Mom Individual

_____/_____

Courts (5) for the individual

Daniel **Solove**, Iowa Law Review, August **1999**
(p. lexis nexis)

With their ability to focus on individual cases, courts provide a needed dimension to the large-scale focus of bureaucracy. Adjudication permits analysis of the individual case; it allows for the making of policy at a highly individuated level -- the exploration of a concrete instance where law affects an individual or an entity's rights. As John Dewey observed, it is the individual who serves as the source of change in institutions and customs:

> Every invention, every improvement in art, technological, military and political, has its genesis in the observation and ingenuity of a particular innovator. All utensils, traps, tools, weapons, stories, prove that some one exercised at sometime initiative in deviating from customary models and standards. Accident played its part; but *some one* had to observe and utilize the accidental change before a new tool and custom emerged. n388

Courts can force bureaucracies to focus more on the individual perspective. Biased towards the abstract and systematic, bureaucracy concerns itself with masses of empirical data and general broadly-applicable policies. A common assumption is that empirical data must be abstract and systematic in order to be useful. The immediate single experiences are ignored in this bias toward vastness. Individual stories and anecdotal evidence, however, are quite important. Indeed, much can be learned from the individual experience -- much that is ignored by the statistician. By looking beyond this faceless data to particular individual situations, courts can observe new potentialities for improvement and become aware of unforeseen problems. Ironically, it is often not reams of data and empirical evidence that inspire pathbreaking discoveries and reforms, but inspiration from individual experiences.

In the contexts of the bureaucratic state, the courts can initiate an effort to make institutions more democratic and humane, to force officials to base their policies on the best empirical research of the day, to be guided by democratic values, to be more humble and skeptical of their own practices, and to continually look to individual [*1019] cases as well as to the big picture to form regulation. The judiciary is not the only instrument that can effect this change, but it is a powerful one. The conception of the judiciary that underpins deference, however, overlooks these difficulties of bureaucratic expertise and ignores the positive potential of the judiciary. As a result, this conception fails to provide a balanced and nuanced account of the relative competence of the judiciary vis-a-vis bureaucratic institutions in the evaluation of factual evidence.

Counterpizzle Shizzle
DJW '03
Your Mom liberty ____/____

Courts preserve liberty

James **Huffman**, "A Case for Principled Judicial Activism," May 20 **1993** (http://new.heritage.org/Research/LegalIssues/HL456.cfm)

Courts preserve liberty

[Why should the judiciary defer to the democracy, as Justice Scalia would have it? Is the democracy threatened by an occasional overreaching on the rights side? Did Lochner or Griswold hamstring the democracy so that it could not perform its constitutional functions? If we are to err, we should err on the side of liberty. Who has the power in this business of government? Do claims of individual right threaten the survival of the community? Justice Holmes once suggested that speech might on some occasions present a clear and present danger to the survival of the nation, but those occasions have proven rare indeed. All the evidence we have before us in the form of pervasive federal and state regulation demonstrates that government has no problem aggregating and exercising power. Liberty has always been at risk in every society in the world. If the courts have any role to play in preserving our constitutional system, surely it is to side with liberty and the individual. The executive and legislative branches of government have done quite well on their own.]

Counterpizzle Shizzle
DJW '03
Your Mom crts (5) liberty ____/____

Tyranny a risk, courts check tyranny

James **Huffman**, "A Case for Principled Judicial Activism," May 20 **1993**
(http://new.heritage.org/Research/LegalIssues/HL456.cfm)

Tyranny a risk, courts check tyranny

The Presumption for Democracy. In an odd sort of way, conservative judicial restraintists have joined with John Hart Ely in the belief that judicial review is rooted in the protection of democracy. But why this persistent concern about democracy? No doubt the courts will and should intervene to halt governmental action that violates the democratic principle, but do we do it for the sake of democracy? Is ours centrally a democratic constitution? Is democracy the ultimate goal of our system of government? Can anyone articulate a case for democracy that is not rooted in some more fundamental value? I think not. I think democracy is, and, as Martin Diamond has demonstrated, was in the view of the framers, the least worst form of government. Remember, it is American not to trust government. Not even democratic government. Have we forgotten Madison's warning of the tyranny of the majority? The risks of tyranny are less in a democracy than in other forms of government, but they persist nonetheless. Who is there to guard against such tyranny but the courts? But if the courts adhere to a judicial philosophy the fundamental principle of which is deference to the democracy, the tyrannous democracy will go unchecked. By definition it will not be checked by the people. There is nowhere to turn but the courts, and they, inspired by a simplistic philosophy of judicial restraint, will have abandoned liberty for democracy and community. Ironically, the conservative judges have laid a solid foundation for the communitarian visions of the new administration.

courts allways on the side of liberty

Coral Ridge Ministries, "Issues Tearing Our Nation's Fabric," **1997**
(www.leaderu.com/issues/fabric/chap14.html)

courts allways on the side of liberty

The issues favored by the courts almost always err on the side of "liberty without restraint," while religious principles and traditions are quickly dismissed. In 1980 the Supreme Court ruled that the Ten Commandments could not be posted in schools because it could be dangerous to children. Such a poster, the justices ruled, ". . . may induce children to read, meditate upon, perhaps to venerate and to obey the commandments."

Counterpizzle Shizzle
DJW '03
Your Mom Minorities

Cts insulated nature best for minority interests

Mark **Kozlowski**, associate counsel, NYU Law School, **2003**
(The Myth of the Imperial Judiciary)

Second, I think that the American polity has long realized that robust judicial power, if not actually necessary for the system to operate, is certainly conducive to its operation. In one of his addresses in which he railed against purportedly illegitimate judicial power, Lino Graglia opined that "there is no alternative to majority rule except minority rule."[4] This is not, as the saying goes, the American Way.

I know of no better succinct description of the central operating principle of the American polity than what Robert Dahl termed the "Madisonian" conception of democracy:

> What I am going to call the "Madisonian" theory of democracy is an effort to bring off a compromise between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side, and the desire to limit their sovereignty on the other.[5]

From our national beginnings, we have recognized—in principle at least—as has no other nation on Earth that, if dreadful consequences are to be avoided, majority rule cannot be a principle applied without restraint or exception. As we have seen, it was in fact the evil of "faction," when the latter came to constitute a majority, that the framers viewed as the central problem of popular government:

> Indeed, it was this factious majoritarianism, an anomalous and frightening conception, for republican government, grounded as it was on majority rule, that was at the center of the Federalist perception of politics. In the minds of the Federalists the measure of a free government had become its ability to control factions, not, as used to be thought, those of a minority, but rather those of "an interested and overbearing majority." "To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and form of popular government," said Madison, "was the great desideratum of republican wisdom."[6]

As a nation, we have understandably never been wholly at ease with the recognition that our society can produce "factions" that, when able to command a majority of the people's representatives, will do harm to relatively defenseless minorities and individuals. In the main, we are very receptive to politicians who pledge "I'm a uniter, not a divider," and it is not for nothing that the national motto is "*E pluribus unum.*"

I think, however, that, if we are honest, we must agree with Oliver Wendell Holmes: "This tacit assumption of the solidarity of the interests of society is very common, but seems to us to be false."[7] We need not be as pessimistic about human nature as was Holmes to admit that a lack of thoroughgoing social solidarity in a polity that employs majority rule means that minorities and individuals will not infrequently believe that they have been treated unjustly at the hands of the majority.

To my knowledge, no one has suggested a feasible way for a democratic polity to ensure the possibility that minority and individual interests will be protected from majoritarian excess—I am positive that no one knows how to ensure the *certainty* that they will be protected—other than through mechanisms that resemble judicial review and the tempering of laws by the application of equity.[8] Further, I am unaware of any convincing argument that these mechanisms are not best operated by adjudicators who are insulated from continual pressure to please a majority of whomever their constituents might be. One can argue that the American judiciary has not operated these mechanisms particularly well over the course of our history, but I am unconvinced that we can do without the institutional capacity itself. > 26-27

(S) NB Cts insulated Nature best for minority interests

Robbie

29

Courts galvanize special-interest groups

Stephen **Powers and** Stanley **Rothman**, research associates, Smith College, **2002** ("The Least Dangerous Branch? Consequences of Judicial Activism")

Court → ↑ [illegible] interest group acts.

"When the Court attempts to forge major changes, its rulings galvanize special-interest groups. *Brown* sent a signal to groups like the NAACP and the ACLU to use the judicial process to achieve what they could not through the political process. The school prayer and abortion decisions, likewise, fragmented the Court's public. Polarized by the Court's decisions and often divided over its authority to decide major issues of public policy, special-interest groups fuel political struggles at all levels of government. (O'Brien, 1986:300)

Courts ⑤ allocation of powers

James **Huffman**, "A Case for Principled Judicial Activism," May 20 **1993** (http://new.heritage.org/Research/LegalIssues/HL456.cfm)

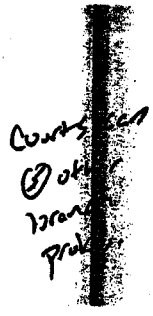
The federal courts have a responsibility to determine whether or not legislative actions are constitutionally within the power of Congress. John Marshall settled this question in Marbury, and, notwithstanding volumes of discussion on the subject in the intervening years, no one seriously questions the principle today. Where does a court look to answer this question? It looks to the power-allocating and rights-protecting provisions of the Constitution. This question is not to be answered without an understanding of the Constitution as an expression of political philosophy.

A central point of the work I am currently doing on federalism is that power allocation is not simply a power struggle between competing governors, although it is inevitably that. Under our Constitution, it is also a careful assignment and division of power for the purpose of assuring that government serves the interests of the people who constitute it. The allocation of power among levels of government is not an issue in which many people take an abstract interest. We are interested in the question only as it affects our individual and group interests. One does not value federal power over state power except to the extent that one will be better served in some sense by federal power than by state power. The same can be said of the separation of powers among the judicial, legislative, and executive branches. No one, other than those who occupy the various positions of power, can have any abstract interest in which branch of government exercises what powers. The structure of government has no end in itself. The framers of the Constitution did not agonize for four months about structure because they cared passionately about the question in the abstract. Rather they cared passionately about the lives of those who would be governed, and they understood that the allocation of power would have great implications for those human lives.

Courts ⑤ allocation of Powers + Fism. SOP

courts can ⑤ other branch problems

Stephen **Powers and** Stanley **Rothman**, research associates, Smith College, **2002** ("The Least Dangerous Branch? Consequences of Judicial Activism")



"In attempting to explain how the courts came to occupy a central and at times controversial role in the American state in the later twentieth century, one could simply argue that the organizational imperatives of a reformed American political system dictated that the courts step in. The courts were forced to act because of external pressures originating in the larger society and impacting the political system as a whole. Issues came before the courts as a matter of course, because other political institutions, either through action or inaction, had failed to resolve or had even exacerbated serious social and political problems. The courts were simply applying constitutional provisions to new circumstances. That is one argument. |

Counterpizzle Shizzle
DJW '03
Your Mom courts (S) - agency action

—/—

Courts (S) agency action on the environment

Lettie **McSpadden**, Prof. of political science, Northern Illinois University, **1995** (in Environmental Politics and Policy)

The judicial branch has long been known as the third branch of government because its nonelective nature has relegated it to a position subordinate to the legislature and executive in a democratic political system. Yet judges' power to say "what the law is" (*Marbury v. Madison,* 1803) enables courts to overturn legislative actions whenever they offend the Constitution and to reverse administrative decisions whenever agencies abuse the power delegated by statute law. The law-defining power of the courts has long been a subject for controversy in our democratic society. Two forms this argument takes are (1) a discussion about judicial restraint in applying constitutional principles and (2) deference to administrative discretion in interpreting laws.

In an administrative state, where technical expertise in policy areas such as the environment is crucial to understanding issues and making decisions, an increasingly large degree of policy-making power has been delegated to administrative agencies not necessarily any more responsive to direct political control than courts. Legal commentators are divided in their opinion as to how much oversight courts should exercise over administrative discretion and how much freedom should be given to the experts who occupy administrative positions. One judge who served on the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, Harold Leventhal (1974), argued during the 1970s that it was the courts' responsibility to guarantee that agencies take a "hard look" at all factors that should be considered when making their decisions. For agencies whose primary mission is distributing benefits or constructing public works, this hard look should emphasize environmental variables. Judges who succeeded Leventhal on the D.C. Circuit in the 1980s, such as Robert Bork and Antonin Scalia, who was later appointed to the Supreme Court, tended to favor more administrative autonomy and less interference from the public with executive decision making. > 244-245 Robbie

(S) Cts can control agency action on the env.

Counterpizzle Shizzle
DJW '03
Your Mom lower crts Follow supreme crt

lower courts must follow the supreme court

Briggs, 1989.
(Laurie A, No Quals Given, Notre Dame Law Review, Presumptive Mens Rea: An Analysis Of the Federal Judiciary's Retreat From Sandstrom v. Montana, 1989, pg. L/N)

Most importantly, the lower courts must follow Supreme Court precedents, even if those courts dislike the precedents or believe that they are misguided. Judge Oakes reminded the Second Circuit of this important point after reviewing that circuit's treatment of Sandstrom: It seems obvious that we will be confronted with Sandstrom issues for some time to come. If consistency on this issue is to be restored, the Second Circuit must follow the teaching of Sandstrom, rather than trying to avoid it through meaningless distinctions that only tend to cloud an otherwise clear holding by the Supreme Court. In stating this, I am reminded of that Court's mandate to the federal judiciary . . . that "a precedent of [the Supreme] Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be." Sandstrom and Franklin remain in the United States Reports. Judicial integrity demands that courts adhere to them.

Possible Sopreme Court reversal make lower courts follow the Supreme Crt.

Baum, Professor at Ohio State University, 1989
(Lawrence. The Supreme Court 3rd edition, pg 22-)

The possibility of reversal not only discourages noncompliance with the Court's decisions but, more broadly, encourages lower courts to follow the Supreme Court's general line of policy. If the Court begins to adopt more conservative policies on civil liberties issues, the proportion of conservative rulings in the lower courts is likely to increase, as judges shift their positions to reduce the chances of reversal. Indeed, studies have found that decisional trends in some policy areas in the lower federal courts move in the same direction as Supreme Court policy.[42]

lower courts follow supreme court

Lawrence Baum, Prof. of Constitutional Law, Ohio State University, '92
(The Supreme Court, p. 238)

Acceptance of the Court's Authority. Policy makers may implement the Supreme Court's decisions even when they have incentives to resist them. One important reason is the Court's authority as interpreter of the law. Most people believe that the Court's decisions are authoritative judgments about the law and that there is an obligation to comply with those decisions. Largely as a result, the Court's association with an unpopular policy may help to foster public acceptance of that policy.[36] For the same reason, even officials who are disposed to disobey the Court's decisions may choose not to do so. Certainly a policy maker who is indifferent toward a Supreme Court policy will be inclined to go along because of the Court's authority.

Counterpizzle Shizzle
DJW '03
Your Mom

Public Trust Doctrine (5)

1. The public trust doctrine gives the courts the ability to solve for environmental problems.

Anna **Caspersen**, managing editor, Boston College Environmental Affairs Law Review, **1996** (Boston College Environmental Affairs Law Review, p.lexis)

The idea of extending the public trust doctrine to wildlife was introduced in Gary Meyers's article, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife.* n191 Meyers suggests that we should move towards a less homocentric approach to wildlife preservation. n192 Meyers argues that wildlife should be preserved for its own sake, rather than for its unknown potential [*378] benefits for humans. n193 Meyers sees the public trust as furthering this more worldly view by offering a forum that encompasses the value of wildlife apart from its economic value or lack thereof to humans. n194 Meyers stresses the physical similarities between water and wildlife, n195 and emphasizes that both wildlife and water cannot be owned by individuals and historically have been viewed as owned by the state in trust for the public good. n196 Looking back to the treatment of both wildlife and water in Roman law as *res nullius* or *res communis,* n197 Meyers argues that the public trust doctrine was always meant to include wildlife, but has artificially been limited to water by centuries of wrongful interpretations of courts. n198

Pub trust (5) endorsed

While most courts have limited use of the public trust doctrine to cases concerning water rights, n199 a small minority have already opened the door for including wildlife in the public trust. n200 In *Geer v. Connecticut,* the United States Supreme Court, upholding the constitutionality of a Connecticut statute prohibiting the transportation of game outside of state boundaries, looked back to the ownership classifications of Roman law and held that natural resources *including wildlife* belong in common to all citizens of a state. n201 The Court held that natural resources should be kept "as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." n202 While *Geer* was overruled as a violation of the Commerce Clause in the 1979 case *Hughes v. Oklahoma,* n203 the Supreme Court took the opportunity to affirm its application of the public trust doctrine to wildlife, stating that "the general rule we adopt in this case makes ample allowance for preserving . . . the legitimate state concerns for conservation and protection of wild animals underlying the 19th Century legal fiction of state ownership." n204 [*379] The sentiment that wildlife is an integral part of the public trust and that wildlife should be protected by the government continues as a slim but constant thread running from even before *Geer* through the present. n205

Public Trust Doctrine (5)

2. The public trust doctrine is headed by environmental activists, ensuring counter-plan solvency.

Geoffrey **Scott**, Prof. of Law, Penn State, Fall **1998**
(p. lexis nexis)

The public trust doctrine has been heralded by environmental activists as a valuable weapon in the fight to preserve the earth's resources in a natural state and to make their enjoyment more readily accessible to the populus at large. n4 While the seminal [*4] principles from which the doctrine is derived purport to date to ancient Greece and Rome and have found a seemingly respected place in the historical jurisprudence of Britain and the United States, it has only been in the last several decades that the doctrine has been employed to assertively readjust notions of the private and public interests in property. The reincarnation of the tool and its manipulation in the service of more general goals may owe credit to the land use control perspectives surrounding such activities as integrated coastal zone management and wetland preservation. To these ends, advocates' voices have stimulated some judicial and legislative minds to declaring that certain property is of its greatest positive value when left in its natural state, and in that condition it should belong, forever, to the public. n5

Counterpizzle Shizzle
DJW '03
Your Mom Judicial Review increases Judicial Independence.

( ) Judicial Review is an effective exercise of Judicial Independence.

Jeffrey **Segal** and Harold **Spaeth**, Prof.'s of political science, SUNY Stony-Brook and Michigan State University, **2002**
(The Supreme Court and the Attitudinal Model Revisited)

Judicial Review

The most striking evidence of judicial independence is a court's exercise of the power of judicial review. Although the power to declare an action of the other branches of government incompatible with the content of the fundamental law is nowhere specified in the Constitution, its exercise comports with the motivations and concerns that led to the drafting and ratification of the document.

First, if the Constitution is to be the fundamental law of the land, some body must be able to decide whether the actions of government conform to it. Such decisions may theoretically be made by Congress and/or the President. After all, they do take the same oath as federal judges to preserve, protect, and defend the Constitution of the United States. But the competition between Congress and President that separation of powers engenders may cause either of them to take a less than objective view of the constitutionality of their own conduct as opposed to that of the other branch. Unseemly squabbles would likely result. How much better to leave such decisions to the judges. Not only are they independent of the other branches, but their lifetime appointment also insulates them from factious electoral pressures.

Independ Judicial Review good

Second, inasmuch as separation of powers ensures conflict between the executive and legislative branches, does it not make sense to position the judiciary, which, as we have seen, is beholden to neither of them, as the balance of power?

Third, given the federal system, a decision maker is also needed to authoritatively resolve disputes between the federal government and the states. The opacity of the constitutional provisions governing their relationship magnifies the need for such an "umpire." To allow the "political" branches of the federal government or the states themselves to resolve such disputes would unduly centralize or decentralize governmental authority depending on which level makes the decisions.

Counterpizzle Shizzle
DJW '03
Your Mom

Iraq Models Us Independent Judiciary

—/—

( ) Post War Iraq using US guidance to develop an Independent Judiciary.

Richard **Pyle**, staff writer, Assocated Press, 5-28-**2003**
(p. lexis nexis)

"We are committed to helping the Iraqi people get on the path to a free society," he said. "The Iraqi people have this historic opportunity."

He said other countries, the United Nations and non-government organizations were welcome to participate in the effort, and 39 countries have offered their help.

Rumsfeld cited no recovery timetable but listed a set of "broad principles" that he said the Bush administration considers critical, "if Iraq's transition from tyranny is to succeed."

He said the administration envisions a country that does not support terrorism, threaten its neighbors or repress its diverse population and that provides market-based economic opportunity and an **independent judiciary.** He added that those "are not solely American principles, nor are they exclusively Western."

The allied coalition will "seek out those Iraqis who support those principles" and are interested in carrying them out, Rumsfeld said.

Counterpizzle Shizzle
DJW '03
Your Mom Russia Models US Independent Judiciary ——/——

( ) Russia is interested in continuing to Model a US-style independent Judiciary

George **Marovich**, International Judicial Relations Committee, 3-31-**2003**
(www.nlj.com/oped/033103marovich.shtml)

Judges learning from judges

I have found that wherever they work, in whatever type of system, judges share the incomparable responsibility, privilege and burden of making decisions that will affect peoples' lives. This bond can assist international efforts in judicial reform. Judges and court professionals are continually impressed by the fact that our judiciary is self-governing and separate from the executive branch, unlike most nations in the world. Many express a desire to imitate this.

When I first began working in Russia, for example, the status of judges was so low that prosecutors would not even meet in the same room with them. Now the courts are largely free from executive branch control, judges are better respected, and the Russian courts have adopted a new administrative support structure that borrows many concepts from our federal court administrative structure. Judges have a greater measure of responsibility for the selection and discipline of judges, and they have adopted their own codes of judicial ethics.

American influence is also evident in the movement many countries are making away from inquisitorial models of justice and toward our adversarial model. In Russia, they have taken the dramatic step of implementing jury trials in all 89 regions. These are major changes that give people a sense of participation in their government and enhance public confidence in the judiciary.

In most of the Eastern European countries, the transition to an independent judiciary remains incomplete and will depend on further reforms. The biggest change is one of attitude. Independence and freedom are heady stuff and very contagious. The people are beginning to feel that their constitutions are alive and have meaning. Judges have a greatly improved sense of self-worth and are confidently asserting their independence. They have been exposed to judges from other countries and know how they are perceived and how they function.

Ultimately, these countries will decide for themselves what legal framework best suits their societies, and it would be arrogant to suggest that the "American way" is the best or only way of doing anything. Yet it is clear that the enduring legacy of Marbury is one or our greatest assets in promoting democratic values and the rule of law.

Robbie

39

Counterpizzle Shizzle
DJW '03
Your Mom Russia Models US Indepnt Judiciary ——/——

( ) Russia wants to Model the US Independent Judiciary.

Administrative Office of the US Courts, November **1999**
(www.worldbank.org/publicsector/legal/InternationalRelCommitee.doc)

The Committee has devoted substantial effort to assisting the Russian Federation in building an independent and efficient judiciary. In 1993 and 1994, the Committee sponsored four programs in this country to assist the Russian judiciary in implementing its newly-authorized jury system. Over the last five years, the Committee has received a number of Russian judicial officers who have traveled to this country to understand better the management and administration of the U.S. federal judicial system. At the same time Committee members and staff have traveled to Russia to meet with Russian judicial officers to provide on-site guidance to policy makers.

Russia Models US Indpnt Judiciary

Over the past several years, the Russian judiciary has made significant progress towards achieving an independent judiciary. It has now separated from the Ministry of Justice, the prosecutorial arm of the Russian government, and has modeled its new institutions closely on those of the U.S. federal judiciary. The courts of general jurisdiction, for example, now have a Council of Judges — similar to the U.S. Judicial Conference — to set policy for the judiciary. In 1997, the Duma created a Judicial Department, an administrative arm of the Russian courts that is modeled after the Administrative Office of the U.S. Courts. > Robbie

( ) Russia Continues to show interest in modelling an independent judiciary.

Administrative Office of the US Courts, November **1999**
(www.worldbank.org/publicsector/legal/InternationalRelCommitee.doc)

The Committee assisted the Russian-American Judicial Partnership in a 1999 study tour of the United States for a number of high-level Russian judges and administrators, including the General Director of the Russian Judicial Department. Committee members and staff conducted a four-day program in Washington, D.C., on court administration, including presentations on the organization, governance, and administration of the federal judiciary, budget and legislative relations, the selection and training of judges and staff, accountability and integrity, and human resources issues.

Russia works w/ US on develop Judiciary

Russian judges and court administrators have expressed interest in establishing ongoing relationships with their federal counterparts in the United States, and the USAID mission in Moscow has expressed interest in facilitating such continuing relationships. Committee representatives recently traveled to Russia to address the Russian Council of Judges. And a delegation from the federal judiciary will attend a conference pertaining to the Russian Judicial Department in late 1999. > Z

Robbie

Counterpizzle Shizzle
DJW '03
Your Mom Independent Judiciary Key to Sluency

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( ) Indepent Judiciary protects the environment Worldwide.

Global News Wire, 8-28-2002
(p. lexis nexis)

They affirmed the importance of an **independent judiciary** and judicial process, and emphasized the importance of the peaceful resolution of conflicts "to avoid situations in which weapons of war degrade the environment and cause irreparable harm directly through toxic agents, radiation, landmines and physical destruction and indirectly destroy agriculture and create vast displacement of people."

UNEP Executive Director Klaus Toepfer called the field of law "the poor relation in the worldwide effort to deliver a cleaner, healthier and ultimately fairer world."

"We have over 500 international and regional agreements, treaties and deals covering everything from the protection of the ozone layer to the conservation of the oceans and seas," Toepfer said. "Almost all, if not all, countries have national environmental laws too. But unless these are complied with, unless they are enforced, then they are little more than symbols, tokens, paper tigers."

The justices are convinced that deficiency in the knowledge, relevant skills and information in regard to environmental law is "one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law." The goal of their plan of action is to address these deficiencies. >

Counterpizzle Shizzle
DJW '03
Your Mom Independant Judiciary Key to Democracy ____/____

( ) Former Soviet Union uses Independent Judiciary to Strengthen democracy.

George **Marovich**, International Judicial Relations Committee, 3-31-**2003**
(www.nlj.com/oped/033103marovich.shtml)

But in emerging democracies around the world, our tradition of judicial independence and competence, along with the confidence Americans have in both their state and federal judiciaries, is recognized as one of our greatest exports. As a member of the U.S. Judicial Conference Committee on International Judicial Relations, I have been involved with judicial leaders in several countries as they pursued judicial reforms.

Since the collapse of communism in Eastern Europe in the early 1990s, many countries in Eastern Europe and the former Soviet Union have shown an extraordinary interest in the constitutional and administrative underpinnings of the U.S. judicial system. These countries have a different legal history and culture than ours, but when communism collapsed, most states in the region began to implement the political and economic reforms that would lead to democracy and a free-market economy. All parties involved with democratic reform seem to agree that democracy is simply impossible without an accessible, effective and independent judiciary.

These countries inherited a system that had a totally different view as to the purpose of law. The Soviet bureaucracy, like its tsarist predecessors, sought to control society through law. The law had nothing to do with the defense of human rights or placing limits on the power of the state. Judges were under the control of the Communist Party, and were subservient to prosecutors and the Ministry of Justice. The law and the justice system were tools of the state, used to advance state powers and control the citizenry.> Robbie

( ) Russian Indepent Judiciary key to Establish Democracy.

James **Hoge** Jr., editor, Foreign Affairs, **1993**
(Foreign Affairs, p. lexis)

Raising up the sturdy pillars of democracy is of prime importance because fixing ***Russia's*** economy requires sustained fortitude and sacrifice. Squeezing such support from ***Russia's*** apathetic and disillusioned people will come from engaging them not coercing them. After last month's climactic battle broke the stalemate between president and parliament, public opinion surveys picked up many moods--relief that the fighting was over, dismay at the carnage and cynicism that it was just a contest between the old corrupt nomenklatura and the new mafia business class. Still, the Russian public was more willing to risk a future with Yeltsin than a return to the past with Rutskoi and Khasbulatov.

Transforming the public's desultory acquiesence into constructive engagement calls for more than the appearance of democracy and constitutionalism. It will take the real thing--a clear separation of powers between a popularly elected president and parliament and an ***independent judiciary***, all operating under the rule of law. Yeltsin's overly detailed constitutional proposal provides for these things as well as for civil rights and private property. But for a nation that has seen high-sounding constitutions honored only in the breach, there is some proving to be done. It starts with elections that allow participation from across the political spectrum and with access to the media. Despite his professed democratic intentions, Yeltsin has kept a tight, self-interested rein on the media, and it has not gone unnoticed or uncriticized by the populace. >

Counterpizzle Shizzle
DJW '03
Your Mom Independent Judiciary Solves Economy

—/—

( ) An Independent Judiciary is Key to Economic transition.

Center for Business Ethics and Corporate Governance, 2000
(www.ethicsrussia.org/perceptions.html)

The Russian Federation's significant effort to establish a free market economy based on the rule of law has been derailed by endemic corruption. In 1999, the Corruption Perceptions Index, an international

rcep standard of the level of transparency in a nation's economy produced by Transparency International (TI), ranked Russia 82nd out of 100 countries surveyed, with a ranking of 2.4 on a 10-point scale.

Corruption ~~pervades government institutions~~ at the federal, krai, oblast and local levels, undermining the legitimacy of government and overriding the rule of law. Multinational and local businesses feed into and are equally plagued by this illegal and inefficient system. Widespread corruption and lack of transparency have undermined privatization and other market reforms by distorting competition, inflating transaction costs, spurring capital flight and asset-stripping, diverting public spending and deterring capital investment in production and infrastructure. Corruption impedes Russia's political and economic transition, limits the role that international financial institutions and foreign investors play in helping Russia and stands in the way of all development efforts, from poverty alleviation to civil society and democracy building efforts to peace and security programs.

Despite repeated efforts, the Russian government has failed to counter the tide of corruption and graft. An unrealistic government pay scale encourages rent-seeking behavior on the part of officials. Due to a lack of resources and political will, the government has been unable to enforce existing laws or adopt new legislation. The lack of strong political institutions and an independent judiciary makes it very difficult to hold public officials accountable. In addition to these immediate concerns, this situation distorts public perception of how a proper market economy works, undermining democratic values and thereby the long-term chances of success.

( ) Independent Judiciary Crucial to Market Economies.

Charles **Oman**, head of research, Development Center, OECD, **2001**
(www.cipe.org/publications/fs/ert/current/e35_09.htm)

C. Oman: The experience of countries that sought to internationalize their economies in the 1980s and 1990s by applying liberal trade and investment policies clearly demonstrates that liberal policies are necessary but not sufficient. Strong, credible, market-supporting institutions, including laws and property rights, are needed in order for countries to benefit from economic liberalization. What Russia provides is an extreme example of the fact that markets cannot work well without the requisite institutions. Over the past 20 years, many countries in Latin America and Asia have liberated market forces significantly, and those that also developed market-supporting institutions are faring much better than those that did not.

Ind't Jud. is to econ'y in Russ

Many institutions are essential to sustain a well-functioning market. Of these, a strong, independent judiciary and an independent competition agency are particularly important. Regulatory institutions that ensure that regulations foster rather than obstruct competitive market forces are crucial for all market economies.

Counterpizzle Shizzle
DJW '03
Your Mom Independent Judiciary Solves Economy ____/____

( ) An Independent Judiciary is crucial to foreign investment.

Global News Wire, 12-30-**2002**
(p. lexis nexis)

KOLKATA, Dec. 29. IS West Bengal - ruled by the Left Front Government for the last 26 years - better poised to attract foreign direct investment than a communist party-ruled country like China?

The answer is yes going by the Minister for Information Technology and Environment, Mr Manadendra Mukherjee.

Inaugurating a buyer-seller meet, Mr Mukherjee said that according to information he had received, many foreign investors are reluctant to invest in China due to the absence of an **independent judiciary.**

A section of the same investors seem to prefer West Bengal as their destination as the State has a strong judiciary and a stable Government.

The meet was jointly organised by the Bengal National Chamber of Commerce & Industry, Indian Chemical Merchants & Manufacturers Association and Indian Plastic Federation.

( ) Western Model Independent Judiciary necessary for Economic development.

Emil **Danielyan**, ICHD, 8-26-**2000**
(www.ichd.org/old/viewpoint/06swamp.htm)

The past decade has demonstrated that reforms have been a success in those ex-Communist nations that have attracted substantial foreign investment. The Caucasus has seen a far more modest influx of Western capital and has been paying a heavy price for that. Azerbaijan's oil sector may be an exception. But its impact on the rest of the Azerbaijani economy, especially its job-creating capacity, has proved to be quite limited. It appears that a number of things must be in place in order for foreign investors to take an interest in the war-ravaged region.

Stable system E to Investment

First is the existence of acceptable and stable "rules of the game". The Western model guarantees this through independent judiciary and a business-friendly institutional framework. The high level of corruption and nepotism in the countries of the South Caucasus is hardly encouraging for potential investors. There is no reason to expect this situation to change dramatically in the next few years. Even so, investors may come to the region in larger numbers if other, no less important conditions are met.

Counterpizzle Shizzle
DJW '03
Your Mom Indepent Judiciary Solves Organized Crime ——/——

( ) Indepent Judiciary in Russia checks organized crime.

Frank **Cilluffo and** Robert **Johnston**, The International Economy, **1997**
(www.csis.org/tnt/ao970801.html)

The Russian robber baron era is of particular significance to the West because Russia is a nuclear-armed major power. On May 22, Yeltsin dismissed Defense Minister Igor Rodionov for failing to combat corruption in the Russian armed forces. Corruption charges were also filed recently against General Konstantin Kobets, one of Yeltsin's most loyal supporters. These decisions reflect the broad disintegration of the Russian armed forces. The Russian fiscal crisis is undermining urgent maintenance of nuclear command systems and is weakening security and safeguards over nuclear materials and weapons. As former army general and current Duma member Lev Rokhlin (from the pro-Yeltsin "Our Home is Russia" party) warned in June, the Russian strategic nuclear forces were nearing "extinction" for want of funds for maintenance. Both officers and the ranks are unpaid, unfed and unhappy.

In this atmosphere, the prospect for a criminal diversion of nuclear materials or an unauthorized or accidental nuclear weapons launch is at an all-time high. Rogue political or military opposition groups could well capitalize on weak command and control over nuclear weapons to blackmail or even conduct an unauthorized launch against their political foes—either domestic or foreign—during a future crisis. Nowhere else has the robber baron stage of economic development coincided with instability in a nuclear superpower.

Russia should recognize that its robber barons are more the remnants of communism than the product of democratization.

Russian Organized Crime (I)

The continuing robber baron period of Russian economic development has also fostered transnational criminal networks that skirt borders via a well-worn smuggling network that can be used for drugs, illegal migrants, stolen art, raw materials or fissile materials. While exports of legitimate Russian goods and services are stagnant, the export of Russian crime is flourishing. From attempts to sell a submarine and crew to cocaine smugglers to the sale of surface-to-air missiles, Russian organized crime can pose a threat to international security. Russian organized crime groups are brokering illicit joint ventures and establishing spheres of influence in 50 countries. These criminals enjoy the same efficiencies and economies of scale as legitimate transnational business. While criminality knows no boundaries, law enforcement is forced to stop at increasingly meaningless borders. Cultivated under the harsh conditions of a police state, Russian organized crime groups thrive in Western democracies.

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Counterpizzle Shizzle
DJW '03
Your Mom Independent Judiciary Slues Organized Crime

—/—

They Continue . . .

Because its model of robber baron capitalism has been shaped by unique attributes, Russia must try to graduate from this stage of economic development through unique solutions. Economic reform alone will not succeed: Improved transparency and accountability within government and a strong, independent judiciary are crucial. Without a reliable court system, businesses will continue to turn to gangsters to resolve their disputes, enhancing the influence and reach of organized crime within the Russian economy. Yeltsin is following through on his promise to cleanse himself of deputies tied to Russian organized crime--some loosely, some directly. The West must target its training and aid programs to the next generation of young Russians, unschooled in the ways of communism, before the Russified variant of robber baron capitalism becomes their model as well. >

Counterpizzle Shizzle
DJW '03
Your Mom Indepnt Judiciary Key to International Law

—/—

( ) An Independent Judiciary necessary to enforce international law.

Jonathan **Wight**, Dayton Law Review, Spring **1994**
(p. lexis nexis)

With the development of international law in the twentieth century, many of the theories in support of the act of state doctrine are losing force. International law is broadly recognized and is expanding. n204 Furthermore, as evidenced by Eastern European reform, a truly independent judiciary on the municipal level is essential to uphold the international rule of law. n205 United States courts are competent to apply the international rules of law where such rules exist. By applying existing rules of international law to a particular international dispute, a United States court is less likely to embarrass the executive or to touch upon the nerves of a foreign sovereign. n206 When such codification of rules is particularly solid with respect to commercial transactions, a blanket exception to the act of state doctrine is far less warranted. The blanket exception would deprive the courts of their proper role in the
[*1288] resolution of international disputes by removing the determination of justiciability from the courts. n207

Indep. Judic. Int. Law

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Independent Judiciary Solves Rights

( ) An Independent Judiciary is Key to protection of individual rights.

Cox, Former Special Prosecutor During Watergate, 1987
[Archibald, The Court and the Constitution, pg. 373]

"Nor should our personal good fortune in experiencing unbroken liberty lead us to forget that the Dolly Mapps, Jehovah's Witnesses, and Ishmael Jaffrees are fighting our battles, not because we expect our homes to be invaded or our children to refuse to salute the flag and join in prayer but because the constitutional safeguards and judicial assistance that they invoke are our own bulwarks against the imposition of strict orthodoxy, conformity, and suppression of political dissent. Both the English history known to the Framers and later experience in many other lands convincingly demonstrate that when a popular leader seizes power and moves to suppress dissent, an independent Judiciary affords the best, and perhaps the only, protection against such threats to truly fundamental liberties as arbitrary arrest and detention without trial, the invasion of homes by security forces without judicial warrants, and the suppression of political opposition, including all freedom of expression. In countries with written constitutions and other democratic forms of government, the switch to a dictatorship or another form of authoritarian rule has usually been accomplished by declaration of an emergency suspending the constitution and the customary powers of independent courts. [373]

Counterpizzle Shizzle
DJW '03
Your Mom Alt Perm ____/____

( ) Judicial Independence Key to Solve Politics.

Jeffrey **Segal** and Harold **Spaeth**, Prof.'s of political science, SUNY Stony-Brook and Michigan State University, **2002**
(The Supreme Court and the Attitudinal Model Revisited)

The creation of the judiciary as an independent coordinate branch of the government has appreciably promoted the policy-making capabilities of federal judges in general, and that of the Supreme Court in particular. Absent functional independence, the judges would likely be viewed – along with other government officials – as mere politicians and bureaucrats. Their efforts to distinguish themselves and their activities as principled, even-handed, and nonpartisan would likely be unsuccessful, with the result that the public would view them as on all fours with the persons of minimal competence and dubious ethics who engage in the dirty business of politics.

Alt Perm- Judicial Indep. K to Politics.

( ) Distance From other branches is Key to solve politics.

Davis, Brigham Young University, 1994
(Richard, Decisions and Images: The Supreme Court and the press, pg 7)

Impact of Distance: place courts separate from all else

3 A key ingredient to perceptions of independence is the image of distance—distance from other political institutions, public opinion, the press, interest groups, and the political process generally. The image of distance promotes the notion that the Court is separated from the ongoing political process and the forces that determine the outcomes of the process.

This image of distance is reinforced not only by a separate building, but also by a monastic lifestyle that even leads some of the justices to avoid Washington social encounters. "Members of the Court are really quite remote from Washington," according to Lyle Denniston, *Baltimore Sun* reporter. "Some of that is by choice. To some degree the justices cultivate this notion of being removed."

Counterpizzle Shizzle
DJW '03
Your Mom ___AT: Test Case Fiat___ ____/____

1. The court always finds a case to raise a policy issue.

Adamany (Prof. @ NDT Host School) 1990
David, The American Courts: A Critical Assesment p. 9

Since Congress adopted the Judges Bill of 1925, most cases on the ppellate and miscellaneous dockets have been by writ of certiorari—a idest for the justices to hear cases that they may, but are not quired, to hear. Under Supreme Court Rule 17, which gives broad egories of cases that the Court may hear, at least four justices must ee to hear a case before it is considered by the Court. Some cases on e appellate docket have been "appeals by right," certain cases olving the constitutionality of state or federal laws or state constitu- nal provisions. By law, the Court was required to hear these cases; the justices developed broad discretion by rejecting cases that failed pose a substantial federal question as defined by the justices. In 1988, ongress revised the law virtually to eliminate appeals by right, thus ving the justices almost complete choice about which cases to decide.

With more than 5,000 cases pending annually, the Supreme Court n almost always find a case to raise any policy issue that the justices sh to decide. Chief Justice Earl Warren apparently asked his law erks to find a case on the Court's docket that would allow the justices overrule a previous decision holding that there was no right for the oor to have an attorney in every criminal trial. The clerks found such case, and the Court used it to announce a new constitutional rule aranteeing the right to counsel (Danelski and Danelski 1989, 508).

The Court has sometimes gone to great lengths to find the issue it ants to decide. In the landmark case of *Mapp v. Ohio* (367 U.S. 617 961]), the Court held that illegally seized evidence could not be used state criminal trials. But the dissenting justices accused the majority "reaching out" to find that issue in the brief of amicus curiae, ecause the jurisdictional statements, briefs, and oral arguments of the arties had all been devoted to First Amendment free speech issues.

Where the Court cannot find an issue on its docket, it may order arties to argue an issue that the justices want to consider. Over the rong objection of four justices that the majority was raising "a uestion not presented" by the parties, five justices ordered the parties n *Patterson v. McLean Credit Union* (485 U.S. 617 [1988]) to reargue he case to determine whether the Court's 1976 interpretation of a ederal civil rights statute should be reconsidered and changed.[4] The majority pointed out four previous cases within the past twenty years when the Court had also ordered reargument to determine whether an earlier decision should be reconsidered and changed. >7

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Counterpizzle Shizzle
DJW '03
Your Mom AT: Test CASE FIAT

2 The doctrine of standing solves for test cases

Michael **Pernino**, exec. editor, Boston College Environmental Affairs Law Review, **1991** (Boston College Environmental Affairs Law Review, p. lexis)

Although seemingly simple on its face, the doctrine of standing has been described as "among the most amorphous in the entire domain of public law." n10 Standing has been subject to widespread scholarly criticism. n11 This criticism focuses on the erratic manner in which the Supreme Court has applied the doctrine. n12 A number of commentators argue that the primary reason for the Court's inconsistent application of the standing doctrine is its willingness to let its view of the merits dictate the result it reaches on the standing issue. n13 In other words, the Supreme Court uses standing to achieve a number of jurisprudential and functional goals that go beyond the threshold question of the plaintiff's ability to have particular issues heard. n14 In this manner, the Court has used standing: (1) to avoid deciding issues it does not want to decide; (2) to allow the Court to decide issues it wants to decide; (3) to avoid deciding issues that it believes other branches of government should decide; (4) to reflect the subjective values the Court assigns to various constitutional and statutory rights; and (5) to avoid deciding cases where the plaintiff's claim has little merit. n15 Such decisionmaking falls under the rubric [*138] of what can be termed "value-laden decisionmaking." Value-laden decisionmaking arises where judges allow their philosophic predilictions to influence the results of their standing decisions. The result of this value-laden decisionmaking is a disjointed standing doctrine that erects unprincipled exceptions in certain types of cases and yet provides little barrier to litigation in others. n16

Standing doctrine (5) test case

3. The courts "prudential limitations" enable it to use test cases.

Michael **Pernino**, exec. editor, Boston College Environmental Affairs Law Review, **1991** (Boston College Environmental Affairs Law Review, p. lexis)

In addition to this "irreducible minimum" the Court applies a set of discretionary factors -- designated "prudential limitations." These limitations stem from separation of powers notions about when courts should or should not intervene in agency actions. n42 These limitations act as a self-checking device designed to keep the judiciary from usurping functions properly left to other branches of government. One such prudential limitation is that the Court will not decide cases in which the harm is merely a "generalized grievance" shared in substantially equal measure by all or by a large class of citizens. n43 For example, in *Schlesinger v. Reservists Committee to Stop the War*, the respondents, an association of present and former members of the Armed Forces Reserve opposing United States involvement in Vietnam, brought a class action on behalf of all citizens of the United States. n44 They were challenging the Reserve membership of Congressmen as violating the Incompatibility Clause of the Constitution. n45 In *Schlesinger*, the Supreme Court held that respondents had no standing to sue as citizens since the claimed nonobservance of this clause implicates only a generalized interest of all citizens in constitutional governance and is thus merely an abstract injury. n46 Therefore, because the association did not show actual harm, there was no standing.

The Supreme Court in *Schlesinger* reasoned that the generalized grievance limitation was necessary to keep the courts from deciding abstract questions of wide public significance where other governmental institutions were more competent to address the questions and where judicial intervention was unnecessary to protect individual rights. n47 The Court imposed these limits to keep the judiciary within their predetermined constitutional role. n48 The problem with [*142] these "prudential limitations," however, is that they require judges to examine closely the underlying claims, or merits, of a case. Such an in-depth look necessarily focuses the judge's attention on his view of the claim's validity rather than merely the plaintiff's ability to assert the claim. This is a further reason why the courts have reached such widely inconsistent, value-laden results in standing cases. n49

Counterpizzle Shizzle
DJW '03
Your Mom Court is Activist ____/____

1. The court has shifted from formalism and is adopting activist policy.

Stephen **Powers and** Stanley **Rothman**, research associates, Smith College, **2002** ("The Least Dangerous Branch? Consequences of Judicial Activism")

Jud. Activism in SQ

"Though the Court avoided controversy by receding to a generally perfunctory role in review of federal and state economic regulation, philosophically it had shifted profoundly away from the legal formalism of the nineteenth century. Accordingly, the Hughes Court laid out a general guideline for judicial activism against state power in 1937 in the *Carolene Products* footnote. This was later the theoretical edifice upon which the Warren Court built an entire industry for civil rights and civil liberties advocates. Justice Robert Jackson clearly believed that the door was ajar for future judicial statecraft even as he defended the 1937 decisions upholding the New Deal. Jackson declared, "No doubt another day will find one of its tasks to be correction of mistakes that time will reveal in this structure in which we now take pride. As one who knows well the workmen and the work of this generation, I bespeak the right of the future to undo our work when it no longer serves acceptably" (quoted in Schwartz, 1993:245). In principle, then, the Court had freed itself to command a potentially vast policy-making power in applying the Bill of Rights to the states."

2. The U.S. Supreme Court is highly activist.

Robert **Percival**, Prof. of Law, Lewis and Clark Law School, Sept. **2002** (p. lexis nexis)

"More recently, a sharply divided but highly activist United States Supreme Court has been reshaping the landscape of constitutional law. Under the leadership of Chief Justice William H. Rehnquist and Associate justice Antonin Scalia, a 5-4 majority of the justices has significantly altered [*813] constitutional notions of state sovereignty, federal authority, separation of powers, and regulatory fairness. The current Court has been one of the most activist in history, striking down federal and state legislation on constitutional grounds. In its last eight terms, the Court has invalidated federal statutes in thirty-two cases, a rate more than three times that of the Warren Court. n5"

non (U) Activism

Counterpizzle Shizzle
DJW '03
Your Mom Activism Not Perceived ____/____

( ) Can't prove Activism.

Ernest **Young**, associate Prof. of law, UT Austin, **2002**
(University of Colorado Law Review, p. lexis)

To tell Partisan activism

The other difficulty with partisan activism has to do with how it is detected and measured. As Professor Marshall acknowledges, "partisan motivation is notoriously difficult to prove." n66 Unlike the other forms of activism, one will never see partisan motive acknowledged on the face of the opinion. One must therefore infer it from some combination of a result beneficial to the judge's partisan allies and the absence of plausible non-partisan explanations for that result. A charge of partisan activism, in other words, will critically depend on a claim that the result on the merits was so wrong that no reasonable, non-partisan judge could accept it. This is frequently the claim of [*1159] Bush v. Gore's critics, n67 and Professor Marshall's discussion of the census case seems to rely on a similar argument. n68 Alternatively, we might stress the inconsistency of the arguments supporting a result benefiting the judge's party with positions taken by the judge on similar issues in the past. n69

( ) Activism is subjective – can't clearly define

Judge Diarmud **O'Scannlain**, "On Judicial Activism," **2003**
(http://open-spaces.com)

It is notoriously difficult to establish judicial activism 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.

54

Counterpizzle Shizzle
DJW '03
Your Mom Activism doesn't hurt Legitimacy ____/____

( ) Personal opinions don't hurt faith in the courts.

Caldeira, Professor of Political Science, Ohio State University, '92
(Gregory, American Journal of Political Science, Vol. 36, No. 3, August,

In the larger picture, however, none of these relationships is particularly strong; indeed, even with the additions of measures of ideological and partisan identifications, we can explain barely 9% of the variance in support for the Court. And what is more, opinions toward even some of the most contentious issues of our time make little or no dent in citizens' commitments to the basic elements of the Court as a political institution. Consider just one issue. Even though the question of whether capital punishment should be permitted has sparked a substantial amount of controversy, we observe *no* connection between opinions on this issue and support for the Court. These findings do not link policy opinions commitments to the institution in any very strong fashion. Thus, we conclude: preferences on policy issues hold some implications for diffuse support for the Court, but the effects are far from overwhelming. >645

( ) Activism provides legitimacy by overruling Unconstitutional actions

Ernest **Young**, associate Prof. of law, UT Austin, **2002**
(University of Colorado Law Review, p. lexis)

2. Departures from Text and History

Charges that a court exceeds its legitimate institutional role when it refuses to defer to the political branches are usually answered by appeal to a higher authority. The classic account of judicial review is thus that, when a court strikes down a legislative act, it acts not on its own authority but to enforce the People's will as embodied in the Constitution. n26 This defense of judicial review gives rise to a second definition of activism [*1148] as departures from the constitutional authority - whether it be text, structure, or history - that legitimated judicial power in the first place. n27

Court exceed legitimacy

Counterpizzle Shizzle
DJW '03
Your Mom

Activism doesn't hurt legitimacy ____/____

( ) Court doesn't need to hurt its legitimacy to be activist.

Terri Jennings **Peretti**, Santa Clara University political science department, 1999 (In Defense of a Political Court)

The conventional wisdom that an active, political Court will inevitably violate widely held norms of apolitical, impartial decisionmaking and, thus, will lose its legitimacy and power is simply not true. In fact, it is when the Court persistently fails to involve itself in the political process or cares only about textual or legally defensible decisional criteria or excludes political calculations from its decisionmaking that it courts danger. In short, it is a political Court—a generally responsive, politically aware, and politically sensitive Court—that guarantees the ongoing public and elite support necessary to preserve its policymaking power.

Counterpizzle Shizzle
DJW '03
Your Mom

Activism No Impacts

—/—

( ) Courts can be activist without consequences.

Mondak & Smithey, Associate Political Science Professor, Florida State Univ.; Assistant Political Science Professor, Univ. of Pittsburgh, **1997** (Jeffrey J. & Shannon Ishiyama, *Journal of Politics*, v59, n4, November, p. 1124)

The more tenable position, we believe, is that democratic values operate as part of a dynamic process in which the Supreme Court is able to regenerate public support over time. At the individual level, we posit that democratic values fuel what is, for many people, an enduring positive predisposition toward the Court. These positive sentiments are not of such strength that the Court is insulated from backlash against its unpopular edicts; controversial decisions may precipitate a temporary decline in confidence (Caldeira 1991; Caldeira and Gibson 1992). Although short-term considerations can override long-term predispositions as determinants of confidence in the Court, those short-term concerns do not eradicate a lifetime of political socialization. Thus, when support is lost, the loss is not irrevocable. After displeasure with the Supreme Court's actions abates, people return to what is, in essence, a default judgment—confidence in the institution built on a foundation of democratic values.[8]

A person's confidence in the Supreme Court can be shaken by controversial rulings, but the eventual reassertion of democratic values means that the individual's confidence in the Court may be restored. The decisions that spark antipathy toward the Court—and the intensity of that ill will—vary for different people and groups in society. In the aggregate, consequently, return to the value-based default judgment we have described constitutes a continuous process, because some current opponents of the Court always will be at the point where democratic attachments are regaining primacy. Therefore, just as a river cleanses itself over time, we propose that democratic values facilitate regeneration of institutional support:

Proposition 4: Public support for the Supreme Court is subject to value-based regeneration in which lost support is recovered over time due to public perception of a link between the Supreme Court and basic democratic values.

( ) Public thinks Actism is necessary.

Ernest **Young**, associate Prof. of law, UT Austin, **2002**
(University of Colorado Law Review, p. lexis)

Court of Activism too much

For almost any participant in debates over the judicial role, however, there will be some appropriate point of judicial authority along the continuum from absolute passivity to absolute judicial hegemony. n81 "Activist" behaviors that assert judicial authority up to that point will be legitimate; those that go further, illegitimate. Virtually no one, for instance, seems to believe in an absolute rule of stare decisis. If a court chose to overrule one prior decision every hundred years, that individual decision could be viewed as "activist" for that reason. But [*1163] surely no one would think that the court had pushed its activism too far. n82

57

Counterpizzle Shizzle
DJW '03
Your Mom

_____/_____

Activism Good

Activism accepted

1. Judicial activism is accepted among the public.

Lamb, Ass't Prof. of Political Science at SUN Y-Buffalo, **1982**
[Charles, Supreme Court Activism & Restraint, Eds. Stephen Halpern & Lamb]

(S. Studer)

Loren P. Beth has made another noteworthy point regarding the Court's power of judicial review. He believes that "[j]udicial review is democratic in the sense that it is accepted by most people, if in no other way. Such an institution can only survive so long as the general public and officialdom as well accept it, both in principle and in practice."[17] Beth correctly reminds us that the Supreme Court cannot force its decisions on the remainder of the political system without the system's acceptance. "Consequently, if the [Warren] Court 'gets away' with its . . . activist course in cases involving civil liberties, this would seem to be an indication that the general public (a) still respects and is willing to follow the Court and its power; and/or (b) acquiesces in the major line of court decision."[18] According to Beth, it is likely "that the American public (consciously or subconsciously) feels the need for some sort of 'constitutional guardian' despite our general attachment to majority rule."[19] In short, although the Court may make decisions in an undemocratic manner, virtually no one would seriously contend that the Court cannot or should not rely on the power of judicial review when it deems it necessary to do so. Judicial review cannot be said, then, to be inherently undemocratic in character. 11-12

Counterpizzle Shizzle ____/____
DJW '03
Your Mom Activism Good Activism ⑤

1. Court activism is perfect for protection.

Mark **Kozlowski**, associate counsel, NYU Law School, **2003**
(The Myth of the Imperial Judiciary)

First, from the beginnings of the American republic, we have simply found a vigorous judiciary to be *useful*. Most obviously, this has been true with respect to the necessity of resolving private disputes between citizens and for the trying of criminal defendants. (I take it to be uncontroversial that judicial resolution of the former is preferable to flipping a coin and that criminal trials are preferable to leaving the determination of guilt and innocence to prosecutorial discretion.) But, as I have tried to show, the judiciary's utility goes well beyond this. ③ Cts Pull cases for Pltfs

Statutes produced by legislative bodies with large memberships almost inevitably employ a certain amount of vague and general language, both to facilitate compromise among legislators and to make the statute applicable to a range of particular factual circumstances. We have placed the burden of statutory interpretation, which is the act of actually applying statutes to particular factual circumstances, upon the courts. Alexander Hamilton has already been quoted to the effect that statutes "are a dead letter without courts to expound and define their true meaning."[1]

We have also seen that the popular branches of government have conferred tremendous powers upon the courts, in terms of both oversight of the administrative state and adjudication of claims arising from the numerous statutes that Congress has passed over the past several decades that allow citizens to seek court relief for a range of injuries, from racial discrimination to securities fraud. Grant Gilmore writes that, at the dawn of the modern administrative state in the 1930s, conventional wisdom

> among legal thinkers held that "judicial power was a relic of the dead past" that would eventually yield to adjudication and problem solving by bureaucratic expertise alone, unaided by generalist judges.[2] Gilmore continues: "What happened, as is frequently the case, is the opposite of what the conventional wisdom assumed."[3] 7 217-218 Rubric

2. Judicial must be activist to solve.

Daniel **Solove**, Iowa Law Review, August **1999**
(p. lexis nexis)

The judiciary must also become actively involved in this endeavor. Although the Constitution is mostly silent on how cases ought to be tried, leaving much room for the judiciary to shape and alter the future of adjudication, fairly little has been done to reform the customs and techniques of adjudication. Change does not have [*1022] to begin at the systemic level, as a massive all-or-nothing revamping of the entire structure of the judiciary. Meaningful change can occur quite rapidly if it is fostered in an attitude of pragmatic experimentalism. Individual judges can spearhead these efforts. Meaningful change does not require the unified action of the entire judiciary; it can begin with a small number of visionary and creative judges. For example, Justices Marshall, Cardozo, and Holmes each in their own way exerted a profound influence on the law, more than legions of other judges combined. Indeed, a single judge possesses the power to achieve lasting change -- it takes only courage and creativity. Judge Learned Hand was among the first judges to hire law clerks. His idea was so bold and original that he initially experienced difficulty with finding clerks, and he even had to pay them out of his own pocket. n391 It is this type of innovation and creativity that is necessary to achieve a pragmatic reconstruction of judicial review.

The judiciary must take steps to transform itself so that it can engage in a thorough critical inquiry into the complex empirical issues surrounding decisions made by experts in the bureaucratic state. To make such an inquiry, judges do not have to become social scientists. Critical inquiry into factual and empirical judgments does not mean number-crunching or pouring over reams of data. Rather, it is a process of intelligent inquiry into the facts. It is developing methods of evaluation, of testing data, and of interacting with experience.

Counterpizzle Shizzle
DJW '03
Your Mom

Activism Good

Activism O.K.

1. Judicial activism is acceptable.

Stephen **Powers and** Stanley **Rothman**, research associates, Smith College, **2002** ("The Least Dangerous Branch? Consequences of Judicial Activism")

Despite the value of theoretical arguments pointing out the inherent complexity of the judiciary's task in interpreting the Constitution and its institutional precariousness, most observers agree that the courts have vastly expanded their role in the American political system, that the executive and legislative branches have sometimes grudgingly, sometimes enthusiastically acquiesced in this expansion, and that the public for the most part has also accepted it. There has been a sea change in the public philosophy with regard to judicial governance. In a very real sense we are today watched over by the bevy of Platonic guardians that Judge Learned Hand warned against, and this is now considered legitimate by a plurality, if not a majority, of constitutional "experts" (Gunther, 1994).

Counterpizzle Shizzle _____/_____
DJW '03
Your Mom Activism Good Political Authority

1. The courts have the political authority to enact policies.

Stephen **Powers and** Stanley **Rothman**, research associates, Smith College, **2002** ("The Least Dangerous Branch? Consequences of Judicial Activism")

Political Authority

Beginning in the 1950s, following the *Carolene Products* construction, the Warren Court reasserted the Court's independent political authority within the modern welfare state on behalf of the individual and "discrete and insular minorities." As Bernard Schwartz has written in his history of the Supreme Court, "Judicial restraint was to prove inadequate to meet the needs of the society during the second half of the century. Starting with the accession of Chief Justice Warren, the Court was once again to assume a primary role in the constitutional structure" (Schwartz, 1993:245). Were these changes legitimate exercises of judicial power, or, as Bork and others have suggested, were the courts asserting only thinly veiled judicial will against elected officials under a mere pretense of constitutional adjudication?

Counterpizzle Shizzle
DJW '03
Your Mom Activism Good Constitution

1. Courts should promote activism to defend constitution.

James **Huffman**, "A Case for Principled Judicial Activism," May 20 **1993**
(http://new.heritage.org/Research/LegalIssues/HL456.cfm)

Courts should be activist for the constitution

"For Judicial Activism. In sum, my argument is this. The federal courts should be restrained in the review of actions which are constitutionally undertaken by the other branches and levels of government. Indeed once the court concludes that government has acted within its constitutional powers, there is no further role for the court. This means there is no room for judicial utilitarianism, ... la Judge Richard Posner, or for judicial communitarianism, ... la Justices Douglas, Rehnquist, and Scalia. But in deciding whether or not the government is acting within its constitutional powers, as defined by constitutional definitions and allocations of power and by constitutional guarantees of individual rights, the courts should be unabashedly activist."

2. Judicial activism is constitutional.

Judge Diarmud **O'Scannlain**, "On Judicial Activism," **2003**
(http://open-spaces.com)

"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."

Counterpizzle Shizzle
DJW '03
Your Mom

Politics No Links

____/____

( ) Supreme Court isn't involved in DC's political swamp.

CSM 97 (June 25, p. lexis) - Christian Science Monitor

The court stands out now because it is not part of Washington's political swamp. The carefully cultivated aloofness of the Supreme Court is, in the Washington scene, almost countercultural in nature. The court's warts don't show.

"People don't see the court infighting; it seems more harmonious and less political," says one court-watcher. "With Congress and the White House, we see the blood-letting on the street." Importantly, say scholars, current justices benefit from courageous stands the court took in cases like Brown school desegregation, and the Roe abortion-rights case - when the majority was fragile and the justices felt under great pressure. Those decisions are a main reason the court image is so buffed today.

Counterpizzle Shizzle ____/____
DJW '03
Your Mom Politics No Links

( ) Supreme Court is the most impartial institution.

Jeffrey **Segal** and Harold **Spaeth**, Prof.'s of political science, SUNY Stony-Brook and Michigan State University, **2002**
(The Supreme Court and the Attitudinal Model Revisited)

With regard to *ambition*, lower court judges may desire higher office and thus be influenced by significant political others. Lobbying for a Supreme Court seat from the lower courts, through speeches or through written opinions, is not uncommon. One interested in reaching the High Court could hardly vote his or her personal policy preferences on abortion during the Bush administrations if those preferences were prochoice. Lower court judges might also be interested in other political positions besides the Supreme Court. Howell Heflin (D-Ala.) went from the Supreme Court of Alabama to the United States Senate. Thus we cannot assume that those interested in higher office will necessarily vote their personal policy preferences.

Sup. Crts Nonpolitical stance Politics

Efforts to seek higher office – assuming that such exists – is most improbable for today's justices. During the first decade of the Court's existence, members used the office as a stepping stone to run for positions such as governor,[34] but today few – if any – positions have more power, prestige, and security than that of Supreme Court justice. Three times during the twentieth century members have resigned for alternative (or at least the potential of alternative) political positions, but in only one case was the move for a potentially higher office. That occurred in 1916, when Charles Evans Hughes resigned in order to seek the presidency. The other two cases occurred in 1942, when the exigencies of World War II led President Roosevelt to ask James Byrnes to become Director of Economic Stabilization, and 1965, when President Johnson convinced Arthur Goldberg to become United Nations Ambassador in order, Goldberg believed, to negotiate an end to the Vietnam War.

>95-96

Finally, the Supreme Court is the *court of last resort*. Other judges are subject to courts superior to their own. Unless they wish to be reversed, they must follow the legal and policy pronouncements of higher courts. Though the evidence is mixed, examination of appellate court decisions in several different issue areas shows little overtly noncompliant behavior.[35] The Supreme Court, of course, sits at the pinnacle of both the federal and state judicial systems. No court overrules it.[36]

Lwr Crt efforts

>96

64

Counterpizzle Shizzle
DJW '03
Your Mom Politics No Links

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( )Courts insulated from political pressure.

(Parker Folse III and Craig Youngblood, J.D. University of Texas Law School, 1981, Governing through courts.)

Courts are composed of men and women not directly responsible to the public they serve. They are either appointed to office or chosen in elections that turn more on legal competence or relatively neutral administrative issues than on the candidates' stands on prominent political questions. Accordingly, judges enjoy greater insulation from political pressures than their legislative or executive counterparts.

( ) Supreme Court viewed seperately from other branches.

Caldeira, Professor of Political Science, Ohio State University, '92 (Gregory, American Journal of Political Science, Vol. 36, No. 3, August

Table 3 presents the relationships between our measure of diffuse support and the indicators of trust and of personal satisfaction. Overall, the 10 variables in Table 3 can account for less than 5% of the variation in diffuse support for the Court—not an impressive showing. Of these indicators, only trust in people reaches statistical significance in the multivariate analysis. The more citizens express trust in people, the greater the degree of support they accord to the Supreme Court. Neither trust in local government nor trust in the federal government showed any appreciable connection to diffuse support for the Supreme Court. Similarly, there is no measurable relationship between the confidence the sample bestows upon our national institutions and the degree of diffuse support it lends the Court. Moreover, we have regressed diffuse support for the Supreme Court on indicators of confidence in 12 institutions,[14] and the resulting equation explains only about 8% of the variance.

Perhaps at one time, back in the 1960s, Americans saw the Supreme Court and other national political institutions as peas in the same pod, but our best evidence, based upon a wide range of indicators, suggests that this is no longer true. Furthermore, the public does not seem to condition diffuse support for the Court upon personal satisfaction or optimism. > 646-7

65

Counterpizzle Shizzle
DJW '03
Your Mom Politics No Links ____/____

( ) Courts are outside of Political Pressure.

Lawrence Baum, Prof. of Constitutional Law, Ohio State University, '92
(The Supreme Court, p. 201)

Freedom from External Pressures. Perhaps the most important characteristic of the Supreme Court's environment is its limited impact on the Court's decisions. Compared to policy makers such as legislators or trial judges, Supreme Court justices have unusual freedom to adopt the policies that they prefer.

This freedom explains a great deal about the Court's policies, because it allows justices to take positions that diverge from the local and national consensus of opinion. The Court's decisions on black civil rights in the 1950s and early 1960s illustrate the potential for divergence. During that period the strong opposition of constituents prevented southern policy makers in other institutions from supporting civil rights. Members of Congress from the Deep South were likely to be defeated for reelection if they voted for any civil rights legislation. For this reason, even the liberals among them generally felt compelled to oppose this legislation. Federal district judges in the South held lifetime terms, but they faced possible ostracism by their friends and violence from their neighbors if they favored the interests of blacks. In contrast, southern members of the Supreme Court had both lifetime tenure and geographical separation from the South. As a result, they were relatively free to support civil rights, and they frequently did so. The unanimous Court in *Brown v. Board of Education* (1954), for instance, included members from Kentucky, Texas, and Alabama.

( ) Courts can act outside public opinion without political repercussions.

Lawrence Baum, Prof. of Constitutional Law, Ohio State University, '92
(The Supreme Court, p. 186-7)

Legislators may try to act in accordance with public opinion in order to maintain public support for future elections. They may also feel some responsibility to represent their constituents' views in order to serve their district effectively. Both of these motives have limited relevance to the Supreme Court. Justices do not depend on public opinion to keep their positions, and few are interested in other positions. Moreover, the Court is not intended to be a representative body. Still, justices might pay attention to public opinion simply because they want to be liked, and a few justices have been concerned about their popularity because they harbored political ambitions. More important, justices are concerned about public regard for the Court, because high regard can help to protect the Court in conflicts with the other branches and increase people's willingness to carry out its decisions.

It is uncertain how much public opinion influences the Court's decisions. Undoubtedly, justices sometimes take particular positions because they know of public attitudes on an issue and want to align themselves or the Court with the public; such instances, however, are difficult to pinpoint. We do know that the Court sometimes adopts highly unpopular policies, exhibiting an independence from public opinion that is much less common in the legislative branch. For example, the Court's decisions prohibiting organized prayers in public schools and promoting busing of students for racial desegregation were supported by a relatively small minority of the public and opposed strongly by large segments of that public.

Counterpizzle Shizzle _____/_____
DJW '03
Your Mom SOP Non-Unique

( ) Bush violated SOP by pulling out of the ABM treaty.

David **Krieger**, "Farewell to the ABM Treaty," June 13, **2002**
(wagingpeace.org)

Bush acceding SOP

T Bush told the American people that he was withdrawing from the ABM Treaty so that the US could proceed with the deployment of missile defenses defenses that most independent experts believe are incapable of actually providing defense. The president has traded a long-standing and important arms control treaty for the possibility that there might be a technological fix for nuclear dangers that would allow the US to threaten, but not be threatened by, nuclear weapons. In doing so, he has pulled another brick from the foundation of international law and created conditions that will undoubtedly make the US and the rest of the world less secure. He has also moved toward establishing an imperial presidency, unfettered by such constitutional restraints as the separation of powers.

Counterpizzle Shizzle
DJW '03
Your Mom

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Ati SoP

( ) SoP Frequently shifts- your Impacts are empirically denied.

Cooper, Stanford Law student, Jan 94
(Stanford LR v46)

— Finally, power analysis restores an important equilibrium in inter-governmental relations by returning a measure of flexibility to Congress. *Chadha* and *Bowsher* robbed Congress of much of its ability to structure an administrative process in which the President plays an increasingly significant role.[229] Eliminating those restrictions and righting this balance can only revitalize perhaps the most important separation of powers protection of all: inter-governmental political struggle.[230] The history of separation of powers is one of political conflict among the branches. As one branch gains, it shapes the agenda to favor its own ends.[231] Politics rules. Nevertheless, this history also reveals frequent shifts in institutional dominance.[232] The imperial presidency of the late 1960s was followed by the expansion of congressional power in the 1970s and then a return to a more powerful and assertive executive under President Reagan. History, therefore, suggests that the other branch will ultimately reassert itself:

> Ambiguities in the Constitution permit one branch to infringe upon another. Generally this encroachment consists of brief raids in and out of the neutral zone. But at some point, after passing beyond a threshold of common sense and prudence, aggressive actions become counterproductive. They trigger revolts, leading to the recapture of ground taken not only in the most recent assault but in earlier offenses as well. It is not true that "let one occupant of the presidency exercise an additional power, and the advantage thus acquired is never abandoned." Consider what happened with impoundment, the pocket veto, reorganization authority, and executive privilege. Power distorted the judgment of the wielder. The moth circled too near the flame.[233]

SP-no

( ) SoP doesn't assume modern government- violations are inevitable.

Feely and Robin, Professors at University of California, 1998
(Malcolm and Edward, Judicial Policy Making and the Modern State: How the Courts reformed America's Prisons, pg 3434)

The pragmatic reason courts tend to ignore federalism and the separation of powers, therefore, is that these principles no longer describe the governmental system in which they exist or the model of governmental action that modern government embodies.[8] To the extent that these principles continue to be relevant at all, it is as a traditional version of equally pragmatic concerns – decentralization in the case of federalism, and specialization in the case of separation of powers. But because the principles are now part of a pragmatic calculus of governance, they no longer carry normative force, and simply serve as elements in a complex analysis. The demand that courts continue to be constrained by these structural principles, particularly when other branches have abandoned them, simply excludes the courts from the modern governmental process. This may appeal to those who disagree with the substantive policies of modern government, a position that possesses increasing rhetorical appeal but thus far not enough serious support to produce significant change. Federal judges did not disagree with these substantive policies, however, certainly not in the 1960s and 1970s. They are part of the modern administrative state, not critics of it, and they fulfill their role within that context. Under certain circumstances that role involves public policy making; as our state has become increasingly administrative and managerial, judicial policy making has become both more necessary for judges to produce effects and more legitimate as a general model of governmental action. 343-44

Counterpizzle Shizzle
DJW '03
Your Mom Ati SOP

____/____

( ) Court power checks increasingly powerful Congress and Executive.

Marci **Hamilton**, Prof. of law, New York University, 11-9-**2002**
(http://writ.news.findlaw.com/hamilton/20001109.html

< Were either political branch inclined to take constructive action to limit its own increasing abuse of its powers, the Court would not need to step in. But in light of former Courts' laissez faire attitude to these abuses, it is unlikely that either branch will. Indeed, it is common knowledge on the Hill that the last concern Congress has with any piece of legislation is whether it is constitutional, and that includes whether it burdens the states or violates the delegation doctrine. And the agencies, too, have developed an attitude that it is the courts' job to determine constitutionality as they barrel toward whatever is politically expedient. In the current dance of power, the Court is the only check that can bring Congress and the executive branch back to the limited sphere of power that was envisioned by the Framers.

Ati SOR Sup. Crt. DJs increasingly outfit Cong. & Pres.

Both Congress and the executive agencies have lost sight of the constitutional parameters set for them. Many of my liberal academic colleagues decry the current Court's move to draw and enforce the boundaries of power set out in the Constitution. But this Court is the best hope we have to bring the other two branches back within the boundaries that the Framers knew were necessary to deter abuses of power. >

( ) SOP is arbitrary - no impact to violations.

Massey, Constitutional Law Professor, **1992** (*Hastings Constitutional Law Review*, Fall,

The proper separation of the powers of the federal government is an inherently amorphous topic. Once it is granted that these powers ought to be controlled by vesting each branch with an array of checks on the powers of the other branches, rather than by an attempt to seal hermetically the powers of each branch,[1] the debate becomes, in essence, a prudential argument about the wisdom of the extent of the mutually overlapping encroachments. Even if the more formalist inquiry is preferred, the sorting of governmental functions into executive, legislative, and judicial categories is uncertain, arbitrary, and inevitably partakes more of sheer assertion than reasoned analysis. It is thus unsurprising that the constitutional doctrine pertaining to separation of powers is so muddled.

Counterpizzle Shizzle
DJW '03
Your Mom Rosenberg Indict ____/____

( ) Rosenberg Undervalues Courts influence.

Terri Jennings **Peretti**, Prof. of political science, Santa Clara University, **1999**
(In Defense of a Political Court)

Some contrary evidence exists, however, and is worthy of mention. For example, two studies conclude that Rosenberg undervalues the Court's influence on public opinion, at least with regard to its ability to draw media and public attention to issues with which the Court is concerned.[79] Johnson and Martin find that the Court can affect public opinion, but only under certain conditions—for example, when the Court has made an initial ruling on a salient issue rather than a subsequent revision to an existing ruling.[80] Caldeira also offers evidence of the Court's impact on public opinion in his study of changing public opposition to President Roosevelt's 1937 Court-packing plan. Two Court actions—its decision to uphold the Wagner Act in *NLRB* v. *Jones and Laughlin Steel*[81] and the resignation decision of a powerful New Deal opponent, Justice Van Devanter—succeeded in decreasing support for FDR's plan by almost 10 percent.[82] Through its own initiative and actions, according to Caldeira, the Court affected public opinion and thus "outmaneuvered the president."[83] Although based on skimpier evidence, a second study, by Wlezien and Goggin, attributed growing public support in the 1980s for "current abortion policy" to media reports that Supreme Court decisions and nominations would lead to greater restrictions on abortion access.[84] In this case then, the Court may have shifted public opinion away from its own more conservative policy path. > 171-172

Hi Rosenberg

Counterpizzle Shizzle
DJW '03
Your Mom ATiCLS

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( ) Lack of Judicial Constraint doesn't hurt democracy.

Terri Jennings **Peretti**, Prof. of political science, Santa Clara University, **1999**
(In Defense of a Political Court)

Although the Critical Legal Studies scholars are persuasive in their critique of conventional approaches and in their view that constitutional decisionmaking is inherently subjective and "political," their final conclusion is inadequate. These Critics despair and throw up their hands, denigrating all exercises of judicial power as arbitrary and illegitimate due to our inability to stop judges from making subjective and personally biased judgments

AT: CLS

244 • *In Defense of a Political Court*

when interpeting the Constitution. However, the lack of objective constraints on judicial power is not, I have argued, such a troublesome matter in a democracy. > 243 – 244

Robbie

Counterpizzle Shizzle
DJW '03
Your Mom

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AT: Stare Decisis

1. Stare decisis isn't a inexorable command; it is made to test consistency of overruling prior decisions.

Geoffrey **Scott**, Prof. of Law, Penn State, Fall **1998**
(p. lexis nexis)

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of stare decisis is not an "inexorable command," and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of [*69] overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification. n208

Stare

Counterpizzle Shizzle
DJW '03
Your Mom

Courts Don't (5)

General Courts ✓ (5)

1. Courts have been consistently hostile and the court shifts its position on environmental policies.

Christine **Klein**, Prof. of Law, Michigan State University, **2003**
(Harvard Environmental Law Review, p. lexis)

This study supports two principal conclusions. First, the modern Court has been consistently hostile to environmental regulation. In the context of the commerce clause, for the past quarter century the Court has rarely upheld a natural resource law, whether promulgated by Congress or by the states. n18 This Article considers cases in which the Court invalidated the governmental regulation under scrutiny in ten out of eleven instances. n19 Observing this trend, Chief Justice Rehnquist and Justice Blackmun accused some of their colleagues of engineering a return to laissez faire government. n20

As a second principal conclusion, this study has uncovered a subtle inconsistency between the Court's affirmative and dormant commerce clause analyses. In particular, when the federal government has sought to regulate the use of water and land under the affirmative commerce clause, the Court has emphasized the natural, noncommercial nature of the protected [*5] resources rather than the commercial nature of the regulated activity. n21 In the absence of commercial or economic activity, therefore, the federal government lacks commerce clause regulatory authority under the rationale of *Lopez*. n22 Simultaneously, when the states have attempted to regulate the use of land, water, or fish, the Court has treated such things as market commodities rather than natural resources. n23 As a result, the Court has invalidated those state regulations under the dormant commerce clause as constituting an undue interference with commodities in the flow of interstate commerce. n24

Thus, the Court has bolstered its environmental hostility through an elusive rhetorical device--shifting back and forth between the metaphor of environment-as-natural-resource (thus precluding federal regulations protecting noncommercial objects such as land, water, and wildlife that fall within the traditional realm of the states' police power) n25 and environment-as-commodity (thus precluding state regulations that might interfere with interstate commerce). As a practical result of this inconsistent approach, the Court effectively treats the environment as neither commodity nor natural resource, thus frustrating both federal and state efforts to protect the natural environment.

73

Counterpizzle Shizzle
DJW '03
Your Mom

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Courts Don't Solve

General - Courts ø(5)

2. Courts can't solve policy because of lack of fundings.

Lincoln **Davies**, associate, Steptoe and Johnson LLP, **2000**
(p. lexis nexis)

Judicial doctrines concerning attorney's fees provisions impose many of the same problems on environmental advocates as they do on civil rights activists: they dodge an apparent congressional intent of providing for private attorneys general, n693 and they limit access to the courts by undercompensating lawyers willing to take the cases. At least one study has shown that because environmental fee-shifting jurisprudence provides disincentives to private law firms who might take such cases, most plaintiffs' groups are forced to turn to public interest law firms, which also are hesitant to accept the cases for fear of losing their non-profit status. n694 Similarly, less possibility of receiving attorney's fees translates into an even greater discrepancy between stellar legal representation for wealthy communities concerned about their environment and little- to-no representation for poor and minority communities worried about their already unfair share of pollution n695-an effect that may be further compounded by jurisprudence in the civil rights attorney's fee area. Moreover, as in the civil rights arena, the potentially synergetic effects of these decisions may serve to simply provide for less environmental enforcement, less environmental cleanup, n696 and in the case of CERCLA, fewer settlements and more delay in remediation of the nation's worst hazardous waste sites. n697

$ ~~$~~ CRA (5) no $ for lawyers

3. Courts can't secure Compliance.

Schultz, Prof of Political Science at the University of Wisconsin, **1998**.
(David A., editor, Leveraging the Law, p. 5)

While the *Brown* decision, busing for integration, and the legacy of Warren Court judicial activism prompted debates over the legitimacy of the courts to make social policy, another line of research and criticism has addressed the capacity of the courts to achieve social change. By that line, the courts are institutionally inferior to make policy when compared to the other branches of the government, in terms of both their inability to secure compliance with their decisions and their institutional capacity to undertake the functions necessary for effective policy implementation and oversight. 7 6

4. Courts can't solve foreign treaties.

Jonathan **Wight**, Dayton Law Review, Spring **1994**
(p. lexis nexis)

Historically, the courts of the United States recognized the absolute immunity of a foreign sovereign from the jurisdiction of the courts of the United States. n133 The American doctrine of sovereign immunity dates back to Justice Marshall's opinion in The Schooner Exchange v. McFaddon. n134 In The Schooner Exchange, American plaintiffs sought the return of a vessel which had been forcibly taken on the high seas for military use by the French Emperor. n135 In affirming the dismissal of the suit, Justice Marshall wrote for the Court:

Aff / cts (5) foreign Treaties

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. n136

Thus, as expressed by the Court in The Schooner Exchange, the absolute theory of sovereign immunity was premised upon a positivist view of state sovereignty. n137 Accordingly, nonconsenting foreign sovereigns were never subjected to suit in United States courts through the exercise of extraterritorial jurisdiction.

5. Courts can't enforce decisions.

Stoddard, Ex-Professor of Law, New York University School of Law (He Died), 1997
[(Thomas B.) Bleeding Heart, P.LN]

The fourth prerequisite for legal change that accomplishes "culture-shifting" as well as "rule-shifting" is overall and continuous enforcement of the new rule by the government. Rules that are not enforced, particularly if they are dramatic or controversial, will simply be disregarded by all or part of the public.

I use the word "enforcement" in its broadest possible sense. "Enforcement" to me is not simply the imposition of penalties, civil or criminal. It is also the systematic notification - or lack of notification - of the new rule, and the provision of civil remedies to aggrieved individuals. Effective enforcement of a new law ought to incorporate mechanisms to promote public awareness and adherence as well as provide appropriate punishment: "culture-shifting" may be impossible without multiple systems of enforcement.

Counterpizzle Shizzle
DJW '03
Your Mom

Courts Don't Solve

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General-
Courts #3

7. Courts can't influence behavior of implementors.

Edward Keynes and Randall K. Miller, professors of Political Science at Penn State University, 1989, The Court vs. Congress pg. 63

Variations in the implementation of public policies and differences between the intended and the actual consequences of a policy may be the result of several factors. The capacity of the court to shape the implementation process is one factor that is particularly relevant to the relationship between the judiciary and the implementing population. Using an implementation model proposed by Paul Sabatier and Daniel Mazanian. Lawrence Baum argues that the courts are in a weak position to influence the behavior of the implementors. He points out that, first, "courts are imprisoned within the adjudicative process," and second " courts lack some very important legal powers. The judiciary does not control the sword or the purse. The effects of these two factors are substantial and underscore the tenuous nature of the relationship between judicial body is and implementing groups.

8. Courts ~~shouldn't~~ decisions aren't abided by.

Segal & Spaeth, New York University; Michigan State University, **1993** (Jeff & Harold, *The Supreme Court and the Attitudinal Model*, p. 354)

Despite a few contrary instances, compliance with Supreme Court decisions occurs. Lower court judges don't like to be overruled, and thus outright defiance rarely happens. Nevertheless, lower court judges, no less than Supreme Court justices, have tools that enable them to mitigate the full import of High Court rulings. Precedents can be found on both sides of cases, unfavorable precedents can be distinguished, facts can be obfuscated. Given the small percentage of appealed cases, and the even smaller percentage of cases that the Court reviews, lower court judges have substantial leeway to act independently.

Compliance with Supreme Court rulings by those in the implementing population may also be problematic. If a teacher in a small, homogenous, Bible Belt community leads class in prayer and no one complains, there is little the Supreme Court or the American Civil Liberties Union can do about it. So too is there little that the Court can do to sanction police officers who inaccurately claim to have read defendants their rights or who routinely assert that incriminating evidence came into their possession not because of an unreasonable search or seizure, but because the defendant suffered from "dropsy." In sum, full compliance with the Court's decisions is no more likely than full compliance by motorists with speed limits. Even so, compliance is the rule rather than the exception, even among those who disagree with the law.

Counterpizzle Shizzle
DJW '03
Your Mom Courts Don't Solve Environment ____/____

1. Empirically the Courts can't solve environmental policy.

Lincoln **Davies**, associate, Steptoe and Johnson LLP, **2000**
(p. lexis nexis)

In the years following enactment of the Civil Rights Act of 1964 and the Clean Air Act of 1970, both the civil rights and environmental movements came to increasingly rely on these and other acts' provisions allowing citizens to bring litigation to enforce the laws. At the same time, the judiciary began a countermovement of sorts, using various procedural and other devices to limit the new access to the courts afforded to the movements by congressional mandates. The overall effect on both movements' litigation attempts was in many ways the same. Fewer of their cases arrived in the halls of the federal judiciary, and accordingly, fewer legal victories emerged for the movements. As a result, private enforcement of both civil rights and environmental laws decreased, a fact that for both movements seemed to run contrary to the congressional intent behind attorney's fees provisions and many of the statutes themselves. Indeed, restrictions on attorney's fees awards meant that lawyers became undercompensated for taking cases with potential public benefits and possible reputational risks. This in turn created a larger barrier for both citizens discriminated against and citizens concerned about the environment that might want to bring suit to remedy these problems. In so doing, the legal recoil also quieted public participation in the ongoing policy discourse by gagging the voices of those who might care most-those personally affected by the nation's racial and ecological dilemmas.

Cits (8) Civil rts grads

Although the judiciary's fettering of access to courts has broad similarities in its overall effect on both the civil rights and environmental movements, it has done so in different and potentially important ways. Most significantly, the Supreme Court's decisions in the employment discrimination context shift claims to other forums, primarily state courts and arbitration. The decisions do not, however, entirely bar the claims. In fact, the claim preclusion doctrine still explicitly allows claims to be brought in federal court, only earlier and with perhaps more difficulty. In contrast, the Court's standing decisions in the environmental area serve to stop many genuinely interested would-be plaintiffs from bringing citizen suits altogether, and the unpredictable course of the decisions may both confuse lower courts and leave some claimants who deserve standing, even under the Court's labyrinthian doctrines, without it.

Cits (5)

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77

Counterpizzle Shizzle
DJW '03
Your Mom

Courts Don't Solve Environment

On its face, this difference may spell potential danger for environmentalists, but what the difference might represent is just as worrisome. While the Court's application of different doctrines to the two movements is a simple matter of legal chance, it may also reflect a divergence in the impacts the movements have made on the judiciary. Civil rights advocates, for example, have long voiced their concerns and have long used the courts to resolve their disputes. In fact, the judiciary was the first branch of the government to rise this century in an attempt to stomp out legalized racism. Environmentalists, on the other hand, are relative newcomers to court halls and courtrooms, and it is possible that not as [*321] much of their message has been absorbed by the judiciary. n698 In the standing context, for instance, the Court's decision in National Wildlife Federation that plaintiffs had not established an "injury in fact" because of their failure to specify what portion of land they were interested in highlights judges' unwillingness to incorporate very basic ecological principles-that all things are connected-into our legal understanding. While it is true that the National Wildlife Federation example may also fall under the old problem of line-drawing, other factors also point in the direction of judicial rejection of the environmental message. For instance, the Court's decision in Key Tronic concerning CERCLA's fee-shifting provision frustrates not only the citizen suit or attorney's fees provisions of CERCLA, but also hampers the overall purpose of the statute: remediating seriously polluted hazardous waste sites. n699 Indeed, it may well be that the Court's decisions concerning judicial access represent a regression for both movements but a much larger and swifter one for environmentalists. Civil rights advocates who are precluded or are sent to arbitration still voice their claims, still have the option of beginning in federal court, and may ultimately achieve their goals. However, environmentalists sent packing by frustrating limits on attorney's fees and a rigid standing doctrine may fail to accomplish anything for the good of the planet on the federal level, especially if EPA and other agencies turn their head and plug their ears as they did in the Reagan years.

Courts Don't Solve Environment

2. Courts drive away environmentalists

Peter **Van Tuyn**, Litigation director of Trustees, Alaska, Winter **2000**
(Northwestern School of Law, p. lexis nexis)

[With increasing frequency over the last twenty-five years, federal courts have been driving away environmentalists with decisions that ring like mockery in the ears of the dispatched plaintiffs. This disturbing trend originated with conservative members of the federal judiciary who are prevented by the constitutional principle of separation of powers from changing the underlying environmental laws that appear to cause them so much grief. Instead, they twist other constitutional principles in order to prevent ordinary citizens from even entering the courthouse. Championed by United States Supreme Court Justice Antonin Scalia, this trend can wreak significant damage on the environment and alienate people from the judicial system.]

Standing (S) — No new case

3. The standing doctrine doesn't support environmental policy.

Lincoln **Davies**, associate, Steptoe and Johnson LLP, **2000**
(p. lexis nexis)

[The Court's development of standing doctrine has not been especially predictable, nor has it been especially kind to the environmental movement. n681 It severely limits the number and type of cases environmentalists can bring. Under National Wildlife Federation and Defenders of Wildlife, some groups may be barred from bringing suit because they cannot locate members who have current plans to use a very specific resource or study a certain endangered species. Likewise, under Steel Company, corporations may evade enforcement of more procedural statutes like the EPCRA by simply admitting violation and thus squelching any chance at proving redressability. Indeed, to the extent that the Court's new standing principles disallow citizen enforcement of procedural requirements, they also undermine the congressional intent behind many statutory provisions. In Defenders of Wildlife, for instance, Justice Scalia's assessment of redressability missed the mark entirely; plaintiffs were not necessarily seeking to invoke judicial power to halt funding of the Aswan Dam, but were instead attempting to enforce the ESA's requirement that government agencies consult with the Fish and Wildlife Service before undertaking any action that may harm an endangered species. Similarly, in Steel Company the plaintiffs' primary motivation was not to gain an admission of guilt but instead to enforce the EPCRA reporting requirements. Moreover, the Court's new stance on standing also seems to ignore the legislative history of the environmental citizen suit provisions themselves. Congress included these provisions in the statutes "precisely to obviate disputes over standing and to

Standing — Crt (S)

↓ ↓ ↓ ctd . . .

Courts Don't Solve ____/____ Environment

enable any persons with the constitutionally-mandated degree of interest to enjoin violations of environmental laws." n682 Accordingly, the Court's reluctance to recognize mere alleged violations of the statutes as enough to constitute standing imposes a higher hurdle on the nation's environmentally interested citizens than Congress had ever imagined. In Laidlaw, for example, even though the Court granted standing, its requirement that Friends of the Earth demonstrate its members' interest in the polluted river cut away at Congress's seemingly clear vision that "any person" interested in protecting the nation's water could use litigation to enforce the statute. n683 This result may have the additional effect of forming [*318] yet another barrier to enforcement for communities consisting primarily of low-income and minority citizens, communities that already share an unequal portion of society's pollution burden. n684 Indeed, apart from the intellectual shakiness of its new standing doctrines, n685 the apparent disingenuousness of the Court's approach n686 may send a strong signal out of line with the nation's popular-and legally represented notions-of democratic participation and environmental protection.

4. Standing doctrine prevents environmentalism in the courts

Peter **Van Tuyn**, Litigation director of Trustees, Alaska, Winter **2000** (Northwestern School of Law, p. lexis nexis)

The widespread and continual offensive use of the standing doctrine to prevent environmentalists from raising claims in court may be a result of several factors. First, many right-wing litigators likely desire to further Justice Scalia's agenda by raising the issue in as many factual contexts as possible, with the hope that conservative federal judges will solidify Justice Scalia's views into law. Moreover, on the theory that the best defense is a good offense, litigators concerned about defending a case on the merits may stir in the standing issue with the hope that defending the case on the merits might be wholly avoided. It is also noteworthy that challenges to standing [*48] often result in lengthy depositions and voluminous briefing, both of which generate significant billable hours for private attorneys. n54

Standing bad — crt (3)

Whatever reason compels industry and government litigators to make standing an issue in particular cases, it is a travesty of justice that standing is becoming such a significant hurdle to parties who act in the general public interest to enforce environmental laws. When successful, the new standing arguments threaten human rights and chip away at our collective right to clean air and water and a healthy and diverse environment. n55 The arguments also represent a significant trend - possibly the most disturbing one - in environmental law in the late twentieth century.**

Courts Don't Solve Environment

5. Court ignores environmental cases.

Lincoln **Davies**, associate, Steptoe and Johnson LLP, **2000**
(p. lexis nexis)

By the early 1990s, however, the Supreme Court, led by Justice Scalia, had begun down a path in which it would evince a number of decisions increasingly limiting environmental plaintiffs' access to court. The first of [*315] these cases, Lujan v. National Wildlife Federation, n663 signaled the Court's abrupt turnaround, as the majority found inadequate to establish standing plaintiffs' affidavits that seemed to precisely meet the "injuries in fact" required by Sierra Club. In National Wildlife Federation, environmentalists again used the APA to challenge the Bureau of Land Management's reclassification of lands allowing leases for oil and gas excavation and mining, asserting standing on the grounds that the organization's members used the lands for "recreational use and aesthetic enjoyment." n664 Despite their apparently sufficient interest in the Bureau's decisionmaking process, Justice Scalia, writing for the Court, rejected their suit due to an alleged lack of specificity in their affidavits: "[Standing requirements are] assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory . . . . It will not do to 'presume' the missing facts because without them the affidavits would not establish the injury . . . ." n665

Standing (5) Crt won't hear envtl cases

Indeed, the National Wildlife Federation decision ushered in a dark era for environmentalists hoping to use litigation to advance their cause, as the Court would soon apply its reasoning from the procedure-oriented realm of the APA to the movement's toughest substantive statute, the Endangered Species Act (ESA). n666 In Lujan v. Defenders of Wildlife, n667 environmentalists charged that the government's funding of the Aswan Dam in Egypt and the Mahaweli Project in Sri Lanka violated the ESA's section 7 for failure to consult with the Fish and Wildlife Service about its adverse impacts on the habitat of endangered species. Justice Scalia's majority decision began by clarifying the test for standing, noting that plaintiffs must suffer an injury in fact that is both traceable to the defendant's alleged action and redressable by the court. n668 Next, however, the decision proceeded to demonstrate how Defenders had failed to satisfy these requirements. Although plaintiffs' affidavits alleged harm for loss of enjoyment and study of the imperiled species-and plaintiffs had in fact studied these species in the precise locations at issue and intended to continue doing so in the future-the Court found these injuries were not imminent enough to qualify for standing: "[P]rofession of an 'intent' to return . . . [is] simply not enough [to establish standing]. Such 'some day' intentions-without any description of concrete plans, or indeed even any specification of when the some day will be-do not support a finding of . . . 'actual or imminent' injury." n669 Similarly, a plurality of the Court found that Defenders had not demonstrated that a court ruling could sufficiently redress any harm suffered, because even an injunction forcing the United States to withdraw its funding would not [*316] ensure that the projects would cease. n670

6. Courts don't hear environmental cases.

Peter **Van Tuyn**, Litigation director of Trustees, Alaska, Winter **2000** (Northwestern School of Law, p. lexis nexis)

Justice Scalia has relentlessly pursued his desire to raise the standing bar well above its current height. n14 He pushes an interpretation of the case or controversy requirement that mandates more than the traditional application of this test. n15 At the heart of his theory on standing is the idea that courts must reject cases that go against the court's "traditional undemocratic role of protecting individuals and minorities against impositions of the majority." n16 Consequently, he believes the courts must reject cases that place them in the "undemocratic role of prescribing how the other two branches of government should function in order to serve the interest of the majority itself." n17

Justice Scalia has been successful in pushing his agenda. Writing for the majority in three recent cases in which constitutional standing was at issue, Justice Scalia used his theory to deny standing to environmental plaintiffs in two of the cases yet to grant standing to industry plaintiffs in the third case. n18 Notably, Justice Scalia's theory appears to lower the bar for establishing standing for industrial polluters and others who are the object [*44] of government regulation, but to raise the same bar for the beneficiaries of regulation. n19 The threat to the environment posed by Justice Scalia's vision for the standing doctrine is hard to underestimate. As scholars and environmental litigators have stated,

> the implications of this theory for environmental advocates are disastrous. According to this view, timber companies, mining firms, industrial manufacturers, and so on - the objects of environmental regulation - should routinely be granted standing to challenge regulatory requirements. On the other hand, environmental groups, which commonly complain about inadequate regulation resulting in widespread environmental harms, should routinely be denied standing. The upshot of this theory is a dramatic redefinition of the role of the federal judiciary in environmental disputes, to the benefit of those who are subject to (and sometimes object to) environmental standards, and to the detriment of those seeking to enforce environmental standards. n20

Counterpizzle Shizzle
DJW '03
Your Mom

Courts Don't Change Social Policy

1, Courts able to shift public opinion.

Wolfe, Professor of Political Science @ Marquette University, '97
(Christopher, Judicial Activism: Bulwark of Freedom or Precarious Security?,

The Court's contribution to social change is a greater or lesser factor in different areas, but its influence is undeniable. The Court does not necessarily initiate broad social change. What can happen is that a movement or movements often identified with a segment of elite social opinion come into existence to modify previous laws or mores; these movements slowly gain ground but lack the political muscle (a majority in the legislature) to achieve drastic change. The Court, sharing the progressive opinion, intervenes to make the "emerging" opinion the basis of public policy. Once established in the law, the process of social change is accelerated, public opinion shifts more quickly, and the original Court decision is thus "vindicated." For example, the widespread change in sexual mores in the last generation was certainly encouraged by Court decisions in the 1960s.[48] Even the Court's change of face on obscenity in 1973 was nowhere near a reestablishment of the *status quo ante*, since *Miller* v. *California* and *Paris Adult* v. *Slaton* protect a considerable amount of material that would not have been protected in 1958.[49] The legal protection afforded obscene materials has helped change the tone of our society in many ways. As so many moral philosophers have held, mores, the prevailing customs, and the "tone" of a society are essential elements in the formation and maintenance of the moral standards of its citizens, so that a change in them contributes to a long-term change in moral standards, a change that undermines the political forces that oppose the Court's original decisions.[50] 7 17

R: Courts aren't suited for changing public policy

Counterpizzle Shizzle
DJW '03
Your Mom Courts Don't Change Policy

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2. Courts don't have structure to ~~shift~~ cause reform.

Schultz, Prof of Political Science at the University of Wisconsin, 1998. (David A., editor, Leveraging the Law, p. 6)

< In *The Courts and Social Policy*, Donald Horowitz (1977) provides several case studies of judicial intervention to reform police behavior, juvenile justice, school financing, and citizen participation plans. In critiquing the impact that the Court had in these cases, three sets of claims are made. First, the courts, as an adversarial resolution body, lack the structure, resources, and capacity to engage in policy making because courts are ill suited to gather social facts. Second, courts are passive and reactive institutions that get a skewed set of facts that many not be representative of a policy area. This means that a single case may make the rule for an entire policy area when the policy area is more diffuse or when the case at hand is not characteristic of the entire policy domain. Hence, the policy that the courts make is too ad hoc and not comprehensive. Three, courts treat policy areas as homogeneous and cannot differentiate among different cases or situations. Fourth, courts can not oversee implementation and therefore follow up on their orders or otherwise monitor enforcement. Overall, courts have moved from performing a grievance-answering to problem-solving function in seeking to bring about social or institutional reform, and this type of function is ill-suited or inapplicable to the structure of the courts and the adjudicative process (Fuller 1978, 355). > 76

84

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DJW '03
Your Mom

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Courts Don't Solve

Courts ✓ Signal

1. The court doesn't receive any public perception.

Davis (Prof. of Political Science, Brigham Young Univ.) **94**
Richard, Decisions & Images: The Supreme Court and the Press,

But the greater problem for the Court is not identification of the justices by name or ideology, but miscommunication or even lack of information about the Court's decisions. This problem is real for the Court. Miscommunication has been documented in several cases. Following the *Engel v. Vitale* (school prayer) case in 1962, press reporting devoted greater attention to interest group reaction to the case, which generally exaggerated the decision's effects, than to the decision itself. In a rare move, the news reporting subsequently was criticized by one of the justices.[36] The controversy surrounding the case of *Gannett v. DePasquale* (1979) occurred partly due to misunderstanding. The Court's ruling that the public, including the press, had no constitutional right to attend pretrial hearings was interpreted by many reporters and editors as extending to criminal trials as well.[37] Lack of public knowledge of Court decisions is common. According to a 1990 survey, only half the public knew the Court had ruled that anti-flag burning legislation was unconstitutional. Nearly one-third thought it had ruled in the opposite direction.[38]

Even those groups most affected are often uninformed about a ruling.[39] In the mid-1970s, a survey of Florida public school teachers found only 17 percent were aware of the *Engel v. Vitale* decision, one of the more publicized of the Court's decisions.[40]

Major decisions of the Court receiving saturation press coverage, such as those on abortion, do penetrate mass awareness and shape attitudes. But these decisions are rare. Even these decisions often fail to affect attitudes because individuals do not receive enough information about them. According to one CBS/*New York Times* survey, two months after the *Webster* decision, three-fourths of the public said they had not heard enough about the decision to form an opinion.[41]

This lack of public knowledge leads to misunderstanding about policy the Court has declared or even about the role of the Court itself. For many Americans, the Court's role appears to be a blur. In one survey, less than half of the respondents mentioned the power of judicial review when asked what the Supreme Court is supposed to do.[42] If less than half of the public understand the Court's power of judicial review, then one of Murphy and Tanenhaus's conditions—perception of responsibility as constitutional arbiter—is unfulfilled.

85

Counterpizzle Shizzle
DJW '03
Your Mom Courts Don't Solve

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Courts & Signal

2. The Supreme Court is an American "invisible institution"

Slotnick & Segal, Associate Political Science Professor, Ohio State University; Assistant Political Science Professor, University of Kentucky, **1998** (Elliot E. & Jennifer A., *Television News and the Supreme Court: All the News That's Fit to Air?*, p.)

Throughout our narrative we have documented at many junctures that the Supreme Court is a uniquely invisible institution in the eyes of the American public both in a relative as well as in an absolute sense. As Gregory Caldeira notes, numerous studies have demonstrated that "there is only a shallow reservoir of knowledge about . . . the Court in the mass public . . . Few . . . fulfill the most minimal prerequisites of the role of a knowledgeable and competent citizen vis-à-vis the Court" (1986: 1211). At any given moment if the average American were queried about any decisions the Court had rendered in its current or past term, the questioner would likely come up largely empty. Considerable research documents "that many Americans little recognize or little remember the Court's rulings. On open-ended questions that probe for specific likes or dislikes about Court rulings, only about half (or fewer) . . . can offer an opinion on even the most prominent Supreme Court decisions" (Marshall, 1989: 143). The lack of public information about the Court extends beyond its decisions, per se, to a similar lack of familiarity with the justices who comprise the Court. Thus, in one study, fewer than 10 percent of the public could name the Chief Justice of the United States while, somewhat ironically, more than a quarter of the populace could recognize the name of Judge Wapner of the *People's Court* television fame (Morin, 1989). > 1989

Counterpizzle Shizzle
DJW '03
Your Mom No signal ____/____

Courts don't send a signal, No sole Voice

~~Courts doesn't sole Voice~~

Jonathan **Wight**, Dayton Law Review, Spring **1994**
(p. lexis nexis)

3. Sole Voice

A further argument in support of judicial deference to the political branches is that the field of foreign affairs uniquely requires a sole voice in the development and exposition of international policy: "It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a unified voice." n316 Historically, the executive branch has possessed the sole voice. n317 Where court pronouncements conflict with those of the executive branch, the executive branch's effectiveness in international relations is reduced. n318

cts ∅ sole voice

Contrary to this logic, "a binding court judgment may be the best vehicle for forging a unified U.S. position." n319 Where United States courts expound upon a rule of law, the political branches have a certain obligation to adhere to that law. n320 Although the branches' adherence may suggest a powerful role for the courts in the area of foreign affairs, in reality, the courts only find and apply existing law to which the political branches are already bound. n321 Thus, judicial deference is not necessarily the most effective means to promote a unified voice in foreign affairs. [*1299]

87

Counterpizzle Shizzle
DJW '03
Your Mom

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Courts Don't Solve

States nullify Supreme Court

1. States' here ability to nullify Supreme Court decisions.

Victor **Schwartz** and Mark **Behrens**, "Judicial Activism in the Civil Justice System: Problems and Solutions," **2001**
(www.fed-soc.org)

State courts do their own thing

"The third development _ state courts' use of state constitutional provisions to nullify legislative decisionmaking and limit legislative independence in liability law _ represents another serious threat to our system of government. Besides further blurring the already-compromised separation of powers, it also could stop legislatures from doing anything to curb runaway liability created by medical monitoring or big-government lawsuits.

The growing willingness of state courts to substitute their own views of proper tort law for that of state legislators has been facilitated by contingency fee lawyers who try to "game" the legal system by relying solely on obscure state constitutional provisions that have little historical explanation or precedent of judicial interpretation. Indeed, Association of Trial Lawyers of America ("ATLA") President Mark Mandell recently bragged that a brief written by ATLA _ and argued by liberal Harvard Law Professor Laurence Tribe _ resulted in an Indiana health liability statute being overturned based on an state constitutional provision "that was previously regarded as toothless."

88

Counterpizzle Shizzle
DJW '03
Your Mom Afi Rosenberg Indict

( ) Rosenberg is Right - Courts bad for Social Change.

Terri Jennings **Peretti**, Prof. of political science, Santa Clara University, **1999**
(In Defense of a Political Court)

Most studies, however, support the view that the Court has a very limited capacity to enhance public support for and confer legitimacy upon contested government policies. For example, Baas and Thomas conducted several experiments in which college students were asked their opinions on controversial policy statements, half of which were unattributed and half of which were identified by source, including in some cases the Court and the Constitution. Contrary to the legitimation thesis, there was no evidence that Court endorsement enhanced acceptance of any of the controversial policy views.[85] However, a similar study conducted by Mondak did find evidence of the Court's "persuasive force," but only under certain conditions, for example, when the issue lacked personal relevance or when the Court's credibility was substantially greater than other attributed sources (such as high school principals or city police).[86] Furthermore, the Court's influence, though significant according to another study by Mondak, is nonetheless "minor," "incremental," and "confined to the margins of public opinion."[87]

A study by Franklin and Kosaki regarding the impact of *Roe* v. *Wade* on public attitudes toward abortion suggests that the Court may influence public opinion, but in unexpected and unintended ways.[88] *Roe* did increase public support for abortion involving "hard" reasons, for example, in the case of fetal defect or when the health of the mother is endangered. However, with regard to public support for discretionary abortions (i.e., for "soft" reasons, such as being unmarried, poor, or not wanting more children), *Roe* had the effect of *polarizing* public opinion, increasing the opposition of prolife advocates and the support of prochoice advocates, with overall approval changing not at all.[89] Similarly, Rosenberg argues that the Court may have unwittingly given impetus to the antiabortion movement with its *Roe* decision.[90]

Counterpizzle Shizzle
DJW '03
Your Mom Courts Violate SOP

( ) Supreme Court Statutory interpretation violates SOP.

Leonard **Townsend**, J.D. candidate, Fordham School of Law, Fall **1999**
(p. lexis nexis)

This ambiguity in exactly what rules (if any) to apply may result in 'judicial legislation'; accordingly this interpretation power given to judges under the Federal Constitution comes with a *caveat*. Use of this power may either under*pin* or under*mine* n222 the foundations of [*120] the doctrine of Separation of Powers n223 depending on the care exerted by the judiciary, because if a judge interprets or constructs a statute *unnecessarily*, he tends to usurp the power of the legislative branch. n224 Thus, in its essence the question is, when should judges "interpret" and/or "construct" n225 a statute and when should judges [*121] decline to do so, the ultimate goal being not to violate the doctrine of Separation of Powers. Should this be discretionary with the judge (essentially *ad hoc*) or should there be a clear set of rules as to when statutory interpretation should "kick in"?

Crt Statute interp UVD SOP

This question has intrigued legal thinkers both here and abroad for many years. n226 Some 400 years ago in England, Lord Coke provided a foundation for a philosophy favoring legislative supremacy in interpreting statutes:

> For the full and true interpretation of all statutes in general . . . four things are to be considered -- 1st. What was the common law before the making of the [*122] act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the [government] hath resolved and appointed to cure the disease of the [community]? And 4th. The true reason for the remedy. n227

Because of the magnitude of responsibility assigned to judges in this area, it is important to "recognize the necessity of care in the consideration of any means of explanation outside of the statute itself, because of the possibility of error in the broad field in which judgment must operate." n228 Typically in an area that so directly and forcefully affects the functioning of our society, we enact certain unambiguous (or as near to unambiguous as possible) rules n229 or canons to ensure that both a consistency is achieved and that all come to understand exactly what is required of them. It follows that a "subject so important as the . . . interpretation of the laws [should not] be left to the mere arbitrary discretion of the judiciary. This would be to put in their hands power really superior to that of the Legislature itself." n230

Counterpizzle Shizzle
DJW '03
Your Mom

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SOP Impacts

( ) Must protect SOP to check Tyranny.

MARTIN H. **REDISH AND** ELIZABETH J. **CISAR , Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University AND Law Clerk to Chief Judge William Bauer, United States Court of Appeals, Seventh Circuit ,91**
(1991 Duke L.J. 449, PG.LN)

One could, we suppose, define "tyranny" -- assumed to be an unacceptable result -- as the undue accumulation of political power, yet nevertheless adopt either the "undue accretion" or "clear-and-present danger" modifications of separation of powers as the best means to avoid such a danger. Closer examination reveals, however, that neither is acceptable. The reason to reject the "undue accretion" model derives from the same type of pragmatic, experiential, common-sense analysis that led the Framers to adopt a separation of powers structure in the first place. As Jefferson recognized, once the power is accreted it will, as a practical matter, be virtually impossible to remove it: "The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered." n85 The far wiser methodology, then, would be to focus on the means to prevent the accretion in the first place. It is this reasoning that renders the prophylactic nature of separation of powers protections so essential an element of that concept.

( ) SOP Solves Tyranny.

MARTIN H. **REDISH AND** ELIZABETH J. **CISAR , Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University AND Law Clerk to Chief Judge William Bauer, United States Court of Appeals, Seventh Circuit ,91**
(1991 Duke L.J. 449, PG.LN)

The sad irony in this is that the body of the Constitution -- the document to which the Framers devoted so much time and energy at the Convention in Philadelphia n7 -- contained precious few direct references to the protection of individual rights. n8 Rather, the document was primarily devoted to the implementation of an intricate and innovative political theory: a constitutionally limited, federally structured, representative democracy. n9 Although one may of course debate the scope or meaning of particular constitutional provisions, it would be difficult to deny that in establishing their complex structure, the Framers were virtually obsessed with a fear -- bordering on what some might uncharitably describe as paranoia -- of the concentration of political power. Almost every aspect of their ingenious political structure was in some way related to their implicit assumption that, simply put, "power corrupts." Thus, much as a modern urban resident bolts his door shut with several different locks (so that if one fails, another may keep out the dangers of urban life) so, too, the Framers chose to rely on a number of different structural devices to check what they assumed to be the natural and inherent tendency of government to proceed toward tyranny.

Counterpizzle Shizzle
DJW '03
Your Mom

SoP Impacts

( ) SoP solves Tyranny.

MARTIN H. **REDISH AND** ELIZABETH J. **CISAR**, **Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University AND Law Clerk to Chief Judge William Bauer, United States Court of Appeals, Seventh Circuit**, 91
(1991 Duke L.J. 449, PG.LN)

However, we believe that the separation of powers provisions of the Constitution are tremendously important, not merely because the Framers imposed them, but because the fears of creeping tyranny that underlie them are at least as justified today as they were at the time the Framers established them. For as the old adage goes, "even paranoids have enemies." It should not be debatable that, throughout history, the concept of representative and accountable government has existed in a constant state of vulnerability. This has been almost as true in the years since the Constitution's ratification as it had been prior to that time. n17 Abandonment or dilution of separation of powers as one of the key methods of reducing the likelihood of undue concentration of political power will dramatically increase that vulnerability. What is called for, then, is an interpretational model that will avoid the diluting impact that recent Supreme Court doctrine has sometimes had on the beneficial protective force of separation of powers. The model we recommend is a type of "formalistic" approach to the interpretation and enforcement of separation of powers -- one grounded on the deceptively simple principle that no branch may be permitted to exercise any authority definitionally found to fall outside its constitutionally delineated powers. n18

Counterpizzle Shizzle
DJW '03
Your Mom Constitution Good ____/____

( ) The Constitution provide stability to avoid [redacted] catastrophe

Jeffrey **Segal** and Harold **Spaeth**, Prof.'s of political science, SUNY Stony-Brook and Michigan State University, **2002**
(The Supreme Court and the Attitudinal Model Revisited)

> The fact that the Constitution has lasted longer than that of any other nation evidences the Framers' success. Its long life has added political stability to the distinguishing features of American life. Although a resurrected Framer might be appalled at the size of the governmental system he helped create, he most assuredly would recognize the workings of what he had wrought. Other societies may achieve stability through an established church, to which the citizenry pay at least pro forma obeisance, or through the hierarchical social control that a hereditary caste or group exercises. Alternatively, the economic system may prove unchanging, as in a nonindustrialized society where subsistence farming occupies all but a privileged elite. Or national boundaries may coincide with ethnic or tribal lines, insuring cultural homogeneity. In these environments, the political sphere provides the vehicle for change. Radical regime changes, bloody or otherwise, become commonplace. Not so in the United States. The Constitution and its system of government furnish us with our link to the invariant.

Constitution good

( ) Constitution ensures personal autonomy.

Carter, Yale Law Prof, '87 [Stephen, Brigham Young University Law Review, no.3, pg 75]

But constitutionalism assigns enormous importance to process, and consequently assigns costs, perhaps intangible ones, to violating the constitutional process. For the constitutionalist, as for classical liberal democratic theory, the autonomy of the people themselves, not the achievement of some well-intentioned government policy, is the ultimate end for which the government exists. As a consequence, no violation of the means the people have approved for pursuit of policy - here, the means embodied in the structural provisions of the Constitution - can be justified through reference to the policy itself as the end.

Counterpizzle Shizzle
DJW '03
Your Mom Constitution Good ___/___

( ) The Constitution has made the US the greatest country on the globe.

Craig **Haller**, "Of Affirmative Action: Judicial Activism and Constitutionalism," (www.ashbrook.org/publicat/respub/v6n1/haller.html) April **1995**

The United States of America is the sole remaining superpower on the planet. It is, and has been for some time, the greatest country on the globe. Since its conception it has seemingly possessed a destiny to become the true bastion of liberty and equality in a world that has recurrently denied such tenets that "all men are created equal" and that each of them possesses a sufficient amount of human dignity to decide exactly what is in his best interest. It is not a preordained destiny, however, and quite frankly, the undeniable success of the United States owes nothing to fate or luck. The glorious history of America has not been bestowed on her by God. Rather, we owe our triumphant past to honorable, industrious men and women who have not yielded to the temptations of compromise in their attempt to forge a correct interpretation of the proper humane society out of the wilderness of human passion and human infallibility. The classic manifestation of such an effort, of course, is the Constitution. It is precisely this document, as well as the principles sanctified by it, that have allowed America to become great.

US so powerful b/c of Past + Constitution

Counterpizzle Shizzle
DJW '03
Your Mom Democracy Good

—/—

( ) Democracy is the least worst form of government.

James **Huffman**, "A Case for Principled Judicial Activism," May 20 **1993** (http://new.heritage.org/Research/Legalissues/HL456.cfm)

Democracy fails to individual freedom

Why is democracy the ~~least~~/worst form of government? Why is it the best form of government? Is there something to be valued in having 50 percent of the population plus one dictate to the other members of society? Is there something mystical about the agreement of a majority which changes the self-interested opinions of individuals into the public good? Or, if you believe that individuals have a dual capacity as self-interested consumers and public spirited citizens, do differing opinions of the public good become the public good simply by the agreement of 50 percent plus one? I believe that the reason democracy is the least worst, or best, form of government is because it comes as close as we can in an extended republic to permitting individuals control on their lives. We value democracy because it is as close as functional government can come to being libertarian. Only unanimity would totally satisfy liberty, but in a society of 280 million we must settle for republican democracy. We settle for it not because it has merit by itself, rather because it serves, as best we know how, liberty.

Counterpizzle Shizzle
DJW '03
Your Mom Stare Decisis Link ——/——

1. overturning president kills stare decisis.

Geoffrey **Scott**, Prof. of Law, Penn State, Fall **1998**
(p. lexis nexis)

¶ As a result of many of the public trust decisions, numerous confidences and assurances in title to property have been undermined or qualified. Therefore, the second issue to be raised is under what circumstances should a court alter prior judicial trends, and what are the standards it should apply in that exercise of judicial discretion. Justice O'Connor has provided some cogent insight into the apposite principles in Planned Parenthood v. Casey: (L) Stare

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed. ¶

98

Counterpizzle Shizzle
DJW '03
Your Mom Politics Links ____/____

Courts rely on political actors for implementation

Charles Johnson, Prof. @ Texas A&M University
Bradley Canon, Prof. @ University Kentucky
Judicial Policies: Implementation and Impact 1999 pg,

In this chapter we have introduced the notion that judicial decisions are not self-implementing: courts must frequently rely on other courts or on nonjudicial actors in the political system to turn law into action. Moreover, the implementation of judicial decisions is a political process; the actors upon whom courts must rely to translate law into action are usually *political* actors and are subject to political pressures as they allocate resources to implement a judicial decision. The events and actors following the Supreme Court's 1973 abortion decisions illustrate the initial premises underlying the remainder of this book. p25

Courts decisions get public reactions

(David Barnum, prof, DePaul u., 1993, The Supreme Court and American Democracy.)

The frequency with which elected officials and other political leaders criticize the Supreme Court indicates that Supreme Court decisions often provoke strong reactions from the public itself. Public reactions can take various forms. First, opinion polls may reveal how the public in general feels about the Court and its decisions. Second, public reaction may be sufficiently intense to produce actual demonstrations for or against the Court's decisions. Third, public reaction can become more ominous and manifest itself in the form of intimidation of members of the judiciary. Finally, the public can react to Supreme Court decisions by resisting or ignoring the Court's pronouncements.

99

Counterpizzle Shizzle
DJW '03
Your Mom Politics Links ____/____

Courts get reactions from Congress, The president and The general public who can thwart their decisions

O'Brien, David M., professor at Woodrow Wilson Department of Government and Foreign Affairs at the University of Virgina, 1993 (Storm Center) pg. 349

> The political struggles of the Court (and among the justices) continue after the writing of opinions and final votes. Announcements of decisions trigger diverse reactions from the media, interest groups, lower courts, Congress, the President, and the general public. Their reactions may enhance or thwart compliance and reinforce or undermine the Court's prestige. Opinion days thus may reveal something of the political struggles that might otherwise remain hidden within the marble temple. They may also mark the beginning of larger political struggles for influence in the country.

Judicial policies are a political process.

Charles **Johnson and** Bradley **Canon**, professor and department head of Political Science at Texas A&M and political science at Kentucky, **99** (Judicial Policies: Implementation and Impact, jlux)

— President Andrew Jackson, unhappy with a Supreme Court decision, is said to have retorted: "John Marshall has made his decision, now let him enforce it." His remark reminds us of a central fact of American democracy: judicial policies do not implement themselves. In virtually all instances, courts that formulate policies must rely on other courts or on nonjudicial actors to translate those policies into action. Inevitably, just as making judicial policies is a political process, so too is the implementation of the policies—the issues are essentially political, and the actors are subject to political pressures.

environment court cases get publicized

Jennifer **Johnson**, business editor, Boston College Environmental Affairs Law Review, **1996** (Boston College Environmental Affairs Law Review, p. lexis)

Although many environmental justice scholars suggest that the speech of the community, rather than that of the lawyer, is essential to environmental justice, n193 this Comment suggests that once litigation has commenced, the speech of the lawyer becomes equally, if not more, important. n194 Battles in the environmental justice movement are fundamentally political and economic battles--not legal ones. n195 Therefore, environmental justice lawsuits, environmental poverty lawyer Luke Cole urges, "must be brought in recognition of their political nature, in order to lift a community's morale, strengthen the community group, raise the profile of the group, and build the political [*596] momentum necessary to win such struggles." n196 Trial publicity, one of the political benefits of environmental justice lawsuits, n197 is more permissible under 1994 Model Rule 3.6 than it was under the rule's predecessors. 1994 Model Rule 3.6, therefore, increases the benefits of environmental justice lawsuits while removing a weapon for polluters to use to attack those in support of environmental justice.

A. *The Importance of Trial Publicity in Environmental Justice Cases*

As an attorney for the plaintiff class in *Escamilla v. Asarco, Inc.*, Cowles brought media attention to the struggle of the Globeville community against corporate giant Asarco. n198 Cowles's comments to the press were published in national publications such as the *Wall Street Journal* and *The American Lawyer*. n199 Cowles and members of the community also were featured on national news shows such as CNN. n200 Publicity, like that Cowles generated, is important in drawing attention to struggles by communities faced with environmental harms and in building momentum for the environmental justice movement, especially since these communities are often disempowered and disenfranchised with respect to their corporate opponents. n201

The publicity surrounding an environmental justice case also may encourage other, similarly situated communities to take collective action. n202 Seeing or hearing a similar situation recounted on television or in the papers, and seeing what one community has accomplished by fighting that situation, may encourage other communities to fight back as well. n203 Not only will other communities join the environmental justice battle, but other plaintiffs in the class action. In fact, the publicity Cowles generated encouraged other plaintiffs to [*597] join the legal battle against Asarco. n204 The original suit against Asarco, which was filed by nine Globeville residents, later became a class-action suit by 567 Globeville homeowners. n205

Trial publicity serves yet another purpose--political education. Using publicity, a community group can educate its members, politicians, and other communities. n206 Publicity may aid local residents, decisionmakers, and company officials in viewing environmental problems differently. n207

Counterpizzle Shizzle
DJW '03
Your Mom Courts Aren't Activist ____/____

1. Courts are returning to its older function of conserving order, justice, and freedom. The court has abandoned activism

Russel Kirk, President of the Wilber Foundation and president of The Education Review, 97
(*The Conservative Constitution* Pg ix)

ADDRESSED TO THE COMMON READER—supposing him still to be in the land of the living, despite Demon TV—this book is a desultory examination of the Constitution of the United States, emphasizing its conservative purpose. After a prolonged lapse into ritualistic liberalism, the Supreme Court now appears to be making its way back toward its old function of maintaining the rule of law; of conserving American order and justice and freedom. This is not a systematic history of interpretations of the Constitution; rather, it is an endeavor to examine the conservative ends of our basic federal law, and to suggest the varying fortunes of conservative constitutional concepts over the years. Some chapters are concerned with the relationships between political economy and the Constitution.

2. The Court has made a return to self-restraint

Christopher Wolfe, Judicial Activism: Bulwark of Freedom or Precarious Security, '97, pg.

More important, judicial activism's defenders argue that the net effect of increasing judicial power since 1937 has been beneficial. It is not pre-1937 activism or activism in general that they defend, but rather the libertarian and egalitarian activism of the modern era. The raison d'être of modern activism is the need to defend the integrity of the political process and the rights of discrete and insular minorities. The fact that an institutional power, such as that wielded by the modern Court, could be used badly (e.g., to protect powerful interests against the representatives of the people, as the Court did during the laissez-faire transitional era) is a factor to be weighed, but it is not conclusive. Even given the possibility that activism might once again be systematically put to purposes that would undermine its legitimacy, the benefits are substantial enough to justify the limited risk. The most likely "bad" scenario for judicial activists, which is occurring, to some extent, is the Court's return to self-restraint, leaving more matters to legislatures, where the activists can still wage a battle for their principles. From that standpoint, judicial activism is close to a no-lose situation for most of its contemporary defenders. If they succeed in maintaining it or extending judicial power, they benefit politically; if they do not succeed, they are no worse off than they would have been anyway.)95

102

Counterpizzle Shizzle
DJW '03
Your Mom Judicial Policymaking violates SOP ——/——

( )Judicial Action outside of interpretation upsets Seperation of Powers.

Sunderland Writer of Popular Government and the Supreme Court ((Lane V), The Popular Government and the Supreme Court, 1993 Pg .]

7. [The judiciary should not act in a manner that either obstructs the strictly republican nature of the Constitution or upsets the balance of powers by using its independence to establish rights that are not fairly inferable from the Constitution and its principles. Although the judiciary must have a measure of independence, it was not designed to be an external force independent of republican principles. Likewise, the legislative and executive powers must have their measure of independence from judicial domination if other salutary features of the government are to be preserved. Public opinion and majority will, properly moderated, are more fundamental constitutional principles than is the claim for completely independent judges. An appreciation of the way in which security of private rights and the furtherance of the public good are promoted through the mechanism of the separation of powers is essential to understanding how the Constitution as a whole protects rights; therefore, it is also necessary to ascertaining the proper role of the judiciary in relation to rights. If the judiciary exceeds its proper constitutional role it may undermine the delicate system of separated powers, which relies heavily on representation and constitutional structures designed to secure the public good and private rights. But the Constitution's doctrine of enumerated powers and federalism also plays a role in perpetuating individual rights. Judicial overreaching may also erode important benefits of decentralized power—what we call our system of quasi-federalism. Thus, the judicial protection of rights must be understood in relationship not only to separated powers, but to enumerated powers and federalism as well.]

( )Judicial Policymaking is brute force - only the legislator should formulate policy.

Scott M. Pearson, 1993
Class of 1994, University of Southern California Law Center. Southern California Interdisciplinary Law Journal. CANONS, PRESUMPTIONS AND MANIFEST INJUSTICE: RETROACTIVITY OF THE CIVIL RIGHTS ACT OF 1991\\jan

One of the most fundamental principles underlying the American regime is that "Governments ... [derive] their just powers from the consent of the governed." n381 As the anti-federalist Brutus wrote during the constitutional ratification debates, "there can be no free government where the people are not possessed of the power of making [*520] the laws by which they are governed, either in their own persons, or by others substituted in their stead." n382 Because a republic depends upon the consent of its people for authority and legitimacy, "the nature of representation is that all power must flow from the people as directly as possible." n383 Allowing a "small body of experts in the law, who are not accountable, except in the most minimal way, to the community, threatens this basic [democratic] principle." n384 Moreover, as a practical matter, laws cannot be effectively enforced without general consent unless the government uses brute force. n385 Legislators, in theory at least, represent and are accountable to the people. n386 Because federal judges are protected by Article III, people have little recourse when judges make "wrong" decisions. n387 The consent theory underlying the American regime therefore suggests that only the legislature should have the power to apply laws retroactively. n388

103

Counterpizzle Shizzle
DJW '03
Your Mom Judicial Policymaking violates SoP

—/—

( ) Judicial Policymaking places it outside of impartiality.

Dickey, JD McGeorge School of Law, 1997.

[Joshua m., McGeorge Law Review, Fall 1997, p.LN]

Where actions encroach upon the judicial function, a violation of separation of powers will be found. n118 Encroachment occurs where the judiciary's authority and independence are undermined. n119 The impartial appearance of the judiciary is critical to the integrity and legitimacy of the judicial branch n120 because the judiciary's legitimacy derives from the public perception that the judiciary is impartial and independent. n121 Public cynicism towards the judicial system jeopardizes the authority of the judicial branch and magnifies the need for the appearance of an impartial judiciary. n122

Separating the judiciary from politics preserves this appearance of impartiality. n123 By drafting legislation, a judge participates in a function typically considered legislative and thus political. n124 Therefore, by participating in drafting legislation, judges surrender their politically impartial appearance. Moreover, when judges draft legislation, they implicitly assert that the legislation is valid. n125 This apparent approval suggests that the judge has decided the legislation is valid and will not be impartial when he or she decides a challenge to the legislation. Drafting legislation is analogous to pretrial statements of a judge. If a judge, prior to a particular defendant's trial, announced to the press that she thinks that the defendant is guilty, common sense weighs against the conclusion that the judge could decide the case in a neutral manner. n126 When a judge drafts legislation, the appearance of partiality is arguably worse.

Counterpizzle Shizzle
DJW '03
Your Mom Judicial Policymaking Not Democratic

____/____

( ) Judicial Policymaking, because it doesn't include the people, violates democracy.

CHISTOPHER **WOLFE**, 1997
(JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY PG._____)

"It is precisely this concern for the work rather than the workman that makes the extension of judicial power look dangerous. The power of even a body of genuinely prudent judicial guardians would have to be greatly restricted in a democracy, because the price of whatever good it could mandate would be the loss of the people's experience of self-government. Advocates of extended judicial power often base their arguments on the necessity of guaranteeing the conditions of democracy, for example, procedural conditions such as free speech or substantive conditions such as social equality, either for its own sake or to prevent gross political inequality. What these advocates fail to fathom is that the conditions of democracy no less than particular actions within a democratic framework ultimately depend on an informed public opinion that flows from political experience."[8] 102

Counterpizzle Shizzle
DJW '03
Your Mom

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Activism Internal Link

1. Ruling by Supreme Court signals that more litigation is acceptable.

Schick, prof. Political Science, New School for Social Research, 1982
(Marvin. Supreme Court Activism and Restraint, ed. Lamb, p. 37- 38)

Although the Supreme Court has been distinctly activistic during most of the twentieth century, the lion's share of this judicial activism has occurred in the lower federal courts.[11] This is not surprising. It is inevitable in activist times that lower court judges do the nuts-and-bolts work of expanding the reach of judicial authority. A single ruling by the Supreme Court permitting judicial intervention in a new field serves as a signal to the bench and bar that additional litigation is acceptable. The Supreme Court thereby imparts legitimacy to actions by inferior courts which may themselves be a good deal more far-reaching that what the Court has pronounced and even more far-reaching than what it would accept should the actions come before it for review. For example, Burger Court decisions involving education, welfare policy, and prisons have contributed in this way to the prevailing climate of activism.

2. Supreme Court can cause activist snowballs

Schick, prof. Political Science, New School for Social Research, 1982
(Marvin, Supreme Court Activism and Restraint, ed. Lamb, p. 41)

As much as judicial discretion is limited by the past, the present environment in which the Court operates restricts even more the freedom of the justices. For all their discretionary jurisdiction, Supreme Court members exercise little control over the feeder processes which supply cases for their docket. Success in convincing Congress to expand the boundaries of discretion at the Supreme Court level has not been matched in influencing what Congress has done to stimulate activist-oriented litigation throughout the judicial system.[33] Nor has the Supreme Court been able to cool off activist impulses in the parts of the legal profession which promote constitutional litigation. Ultimately all of this activity in the lower federal courts affects what the Supreme Court is required to do. A torrent of activist decisions in the district courts and the courts of appeals at the very least generates requests for Supreme Court review. There must be some action by the Supreme Court, if only the perfunctory denial of review, which intended or not is a signal to the activist bench that they can continue to expand the role of courts and judges.

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Activism Internal Link

3. Court decisions of informal amendment undermines the Constitution.

Christopher Wolfe, professor of political science at Marquette University, 1997, *Judicial Activism* p. 44-45

This difficulty in obtaining the necessary national consensus may seem at first to be a reason to rely on an easier method of changing the Constitution. In fact, however, this is precisely the reason *not* to opt for an "easier" method that would give this power to change the fundamental law to something short of a national consensus—to a temporary or transient majority, or even to a minority. There is no question that judicial amendment is easier. Getting five people not subject to reelection to agree to do something will always be easier than persuading a national legislature and most state legislatures. But this ease carries a threat of unchecked and dangerous political power; that is, unjust action that is contrary to the rights of Americans, majorities and minorities alike.

Moreover, the dangers of informal amendment, or de facto revision of the Constitution, are considerable. Above all, ready recurrence to informal amendment undermines the Constitution's permanence, making it easier to justify further modifications. This sounds attractive if the amending is being done by a group that one feels ideological fraternity with, but there is always the possibility that the situation might be different. Some of the advocates of judicial activism during the Warren Court years were considerably sobered by the new lineup of the Supreme Court in the 1970s and 1980s.[28] 44-45

4. Supreme Court decision creates snowball for other courts.

Schick, prof. Political Science, New School for Social Research, 1982 (Marvin, Supreme Court Activism and Restraint, ed. Lamb, p. 41)

Likewise, the options of the Burger Court were severely limited in the criminal cases by earlier decisions which held that most of the procedural rights of the first eight amendments were both fundamental and applicable to the states through the due process clause of the Fourteenth Amendment. What was the Supreme Court to do in the 1970s—defundamentalize certain rights? Was the Burger Court to say that states were no longer bound by the various provisions of the Bill of Rights? The clock could not be turned back. All that the Supreme Court has been able to do is to refuse to move the clock ahead, and this it has done by refusing to expand on precedents and by restricting the meaning, though not the applicability, of certain rights.

Generally, whenever the Supreme Court in an activist vein decides that a certain question is justiciable, all that a later Court can do is to rule on the merits. Thus, once the Warren Court entered the political thicket of legislative apportionment (and found that it was not as forbidding or treacherous as Justice Felix Frankfurter had warned),[32] as a practical matter there was no way for the Court to use jurisdictional grounds as an excuse for avoiding such questions. 744

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Activism Internal Link

5. When courts are activist, the door is opened for ~~tobt~~ late— activist courts as well.

Talmadge, Washington Supreme Court Justice, 1999
(Philip, Seattle U. Law Review, Winter 1999, p LN)

(Second, does the judicial resolution of an issue affect a core function of a coordinate constitutional branch? This question is designed to focus the courts on separation of powers concerns so as to avoid impinging upon the core functions of coordinate constitutional branches of government. The overlap of functions among the branches of government is often a gray area without easily demarcated parameters. The courts must be sensitive to the interests at issue when resolving problems in this sphere. For example, in Lowry, both the legislative and executive branches jockeyed for particular advantage when asking the courts to define the scope of the governor's line item veto power. More troubling yet is the invitation by those branches to the judiciary to address the issue at all. n157 Once the principle is established that courts will referee conflicts between the executive and the legislature, the door is opened for the courts to referee additional conflicts of this nature.)

Activism Impacts

( ) Judicial Activism destroys the very meaning of the courts.

Mitchell S. G. **KLEIN**, MA & PhD From Northwestern In Political Science, '84 Law, Courts, And Policy, Page 255

[Two points of confusion are common with regard to the notions of judicial activism and restraint. First, judicial activism is emphatically not the same as liberalism. Clearly, the Warren Court was active in promoting liberal values such as liberty, equality, and procedural justice. However, an activist Court may instead expand rights related to conservative values such as social order and private property. Indeed, until recent decades the Supreme Court's history has largely been the fairly active pursuit of conservative values. Beyond that, it is also important that "activism" not be equated with "rights-consciousness." Normally, we think of an activist Court as one that expands the list of individual rights. However, an activist Court need not be protective of constitutional rights. Recall that an activist Court, as traditionally defined, is one that permits the easy access of litigants to address constitutional questions. In addition, activism also implies a strong willingness to depart from stare decisis and go against legislative and executive desires. Clearly, however, this can mean the use of judicial review to erode the extent of our rights. The direction that Supreme Court activism takes is largely a function of the backgrounds, attitudes, and other attributes of the justices on the Court.]

( ) Judicial Activism creates a vicious cycle - linking you to politics and killing Solvency.

Judge Diarmud **O'Scannlain**, "On Judicial Activism," **2003** (http://open-spaces.com)

TA bad

[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.]

Activism Impacts

( ) Judicial Activism destroys all faith in government.

D.J. **Cunnoly**, "Desirable Policy Results," **1998**
(http://tempknak.home.att.net/policy.html)

DEMOCRACY IN THE DUMPSTER

Judicial activism is a major driver for failures elsewhere in government. You no doubt think I've gone off the deep end here. How can one blame the judiciary for somebody else's failure?

That's easy. Any facility that is not exercised will atrophy and decay. Elected politicians, like most of us, look out for their own interests; and they usually play the hand they are dealt. When they came on the job, the system had long since come to accept judicial usurpation of their responsibilities.

That abuse seemed impossible for them to change; so they adopted a career strategy that allowed them to coexist with it. The judges, who the voters can't touch, pass the unpopular laws. Those who get elected to implement the will of "We the People" can then avoid making any hard choices. Consequently, our government is unresponsive to public demands.

( ) Judicial Activism hurts individual liberty.

Judge Diarmud **O'Scannlain**, "On Judicial Activism," **2003**
(http://open-spaces.com)

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.

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DJW '03
Your Mom

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Activism Impacts

( ) Judicial Activism perpetuates Tyranny.

Judicial

Lino A. Graglia, professor of constitutional law at the University of Texas School of Law, 1982, *Supreme Court Activism and Restraint*, (Stephen Halpern and Charles Lamb, editors), p. [redacted] 135

[American judges have, almost from the beginning, assumed and exercised a degree of power unique in the history of government. Over the past quarter century, this power has been so expanded, the judges have taken from the democratic political process and assumed final say over so many fundamental issues of the nature of the American polity, culture, and civilization, that it is no longer an exaggeration to say that we now have a system of government by unelected judges holding office for life. If tyranny describes government in which the governors are not regularly subject to the control of the governed, this system qualifies for the description. That this extraordinary system should have developed in a nation founded on the revolutionary principle that the people are capable of governing themselves and need not be governed by an elite, and founded on a Constitution that does not grant such power to judges, makes the situation not only all the more remarkable but ironic as well.]

( ) Judicial Activism endangers democracy.

CHISTOPHER WOLFE, 1997
(JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY PG._____)

[The danger to democracy occasioned by extended judicial power is surely more subtle than what most of the Court's contemporary critics are concerned with. That danger is reflected in a footnote to *Democracy in America:*

It cannot be absolutely or generally affirmed that the greatest danger of the present age is license or tyranny, anarchy or despotism. Both are equally to be feared; and the one may proceed as easily as the other from one and the same cause: namely, that *general apathy* which is the consequence of individualism. It is because this apathy exists that the executive government, having mustered a few troops, is able to commit acts of oppression one day; and the next day a party which has mustered some thirty men in its ranks can also commit acts of oppression. Neither the one nor the other can establish anything which will last; and the causes which enable them to succeed easily prevent them from succeeding for long; they rise because nothing opposes them, and they sink because nothing supports them. The proper object, then, of our most strenuous resistance is far less either anarchy or despotism than that apathy which may almost indifferently beget either the one or the other.[19]] 102-3

111

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DJW '03
Your Mom Deference Not Key to CMR ____/____

( ) Civilian control of the military doesn't hurt CMR.

Diane **Mazur**, Prof. of Law, University of Florida, Fall **2002**
(Indiana Law Journal, p. lexis)

[In Duncan v. Kahanamoku, the concurrence of Justice Murphy, who provided the necessary fifth vote to release the defendants from military custody, emphasized the constitutional core that controls civilian-military relations. n123 Relying on Milligan, he wrote that the "supremacy of the civil over the military is one of our great heritages." n124 Claims of military necessity were simply immaterial when offered as reasons to disregard that proper constitutional order, absent foreign invasion or civil war that "actually closes the courts and renders it impossible for them to administer criminal justice." n125 While the military may have had a good faith belief that compliance with constitutional expectations would interfere with good order and discipline and disadvantage the war effort, the military deserved no special deference when its judgment carried consequences for civilian citizens. n126 "Constitutional rights are rooted deeper than the wishes and desires of the military." n127

No deference → hurt civil

2. Deference will cause a thermonuclear holocaust.

Barry **Kellman**, Prof. of Law, Depaul University, December **1989**
(Duke Law Journal, p. lexis nexis)

What is the underlying basis for the Court's fear that it will interfere with the military? Of course, the United States has real security needs, and the military's response to those needs should not be matters for judicial review. But those security needs are not always at stake. There have to be limits to this concept of judicial **deference.** If there are no limits, then the threat of an external enemy, ever vigilant to destroy us if our military is at all constrained, will be used to justify the loss of the very freedom and security that we seek. If there are no criteria by which courts may determine whether a given decision is indeed the essence of national security policy, then the primary force of accountability -- judicial review -- will be barred at the Pentagon's gate.

Underlying this call for criteria is the belief that the age of nuclear deterrence poses special problems for the application of law to the military establishment. America has spent much of the twentieth century defending liberty, and only a fool would claim that victory may be declared and our guard let down. Yet America is not at war. While the many threats that the nation must face compel readiness, no state of war exists. Recent revolutionary changes in the Eastern Bloc nations present this country with a unique opportunity to reflect on the Cold War and the policies it spawned. Despite these improved prospects and the fearsome military capabilities of the Soviet Union and of the United States, weapons testing escalates.

In an age of nuclear weapons, "mutual assured destruction" has become the ultimate justification for the sovereign's immunity: If military authority is interfered with by judicial review, then the chance of **thermonuclear** holocaust may increase and we may all be destroyed. Such was the justification of medieval knights who literally obeyed a different code [*1653] than that obeyed by civilian subjects. But medieval knights could never point to any external threat -- any dragon in the woods -- quite so terrifying as Soviet ICBMs. It must be remember however that these modern protectors, the armored and immune United States military, have caused more death and disease than any Soviet weapon. Now judicial abdication to the purported needs of the warrior class renders us all the bearers of the unknown and unknowable consequences of weapons testing.

What we do know is that American citizens have been drugged, radiated, and negligently equipped -- and no one is legally accountable.

Counterpizzle Shizzle
DJW '03
Your Mom Deference ____/____

Military Must follow Constitution

1. The military is obligated to follow the constitution, but ~~the~~ judicial deference circumvents that.

Barry **Kellman**, Prof. of Law, Depaul University, December **1989**
(Duke Law Journal, p. lexis nexis)

Justice Murphy's dissent from this shameful abdication of responsibility presaged the thesis of this Article:

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. n17

Counterpizzle Shizzle
DJW '03
Your Mom Deference Bad

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1. Deference is bad for 3 reasons:

Daniel **Solove**, Iowa Law Review, August **1999**
(p. lexis nexis)

There are at least three reasons why the practice of deference poses significant problems for liberal theories of judicial review. First, the bureaucratic state poses problems that all liberal theories of judicial review, regardless of their differences, cannot ignore. Increasingly, individual autonomy and freedom are becoming circumscribed by government institutions. The problem for liberalism is that the geography of liberty has radically changed since the founding days of the Constitution. Today, our liberty is bound up in the institutions that employ, license, regulate, conscript, imprison, police, and educate us. We live under a sprawl of numerous interacting and overlapping regulatory regimes, controlling the types of food we eat, the medicines we take, the roads we drive, the products we use, the air we breathe, and the layout of the cities in which we live. Decisions about what we watch on television, what we learn in school, what we can say at work, and how much privacy we will have are frequently made by public and private bureaucrats, officials to whom we have scant access to and over whom we have little power. Their decisions, however, play an enormous role in shaping liberty in the modern state. Deference places the burgeoning contexts of the bureaucratic state -- the rise of administrative agencies, the growth in the power and pervasiveness of existing institutions -- outside the scope of more searching judicial inquiry. This means that the geography of liberty is shifting toward areas that are protected only by deferential judicial review.

Second, due to the growing emphasis on factual and empirical evidence in constitutional interpretation, the effects of deference are proving to be quite significant. Because the practice of deference insulates governmental judgments about factual and empirical evidence [*968] from judicial scrutiny, it has an increasingly greater effect on the outcome of judicial decisions. In light of the growing emphasis on facts in constitutional interpretation, deference threatens to eviscerate judicial review in the contexts of the bureaucratic state. The cases discussed earlier dealt with rights that are central to rights-based liberalism: the right to the free exercise of religion in *O'Lone* and *Goldman*; the right to free expression in *Clark*, the rights to liberty and equality in *Korematsu*. The practice of deference represents a disturbing degradation of the power of judicial review. This does not mean that liberal values go unprotected but that judicial review, which history has demonstrated can be a powerful tool for the furtherance of liberal values, is effectively shut out of the bureaucratic state.

The third reason why deference poses a difficulty for liberalism is that the current developments in society, government, and the judicial system are all leaning toward a heightening of the practice of deference. The 1990 Report of the Federal Courts Study Committee indicated that within the past thirty years, the caseload of the federal courts has increased at a much greater rate than the number of judges and that the federal court system was quite near the feasible limit of its growth. n147 The legislative and executive branches, as well as the administrative agencies, have grown much more substantially than the judiciary. n148 In *The Federal Courts*, Judge Posner paints a portrait of the federal judicial system strained, stretched, and compromised by a burgeoning caseload and its consequences. n149 Indeed, the federal judiciary increasingly resorts to unpublished dispositions, streamlining of review, and assembly-line jurisprudence with the aid of law clerks. n150 Judge Posner observes that judicial deference has escalated, in part, to help alleviate the caseload crisis:

> [The modern tendency] has been to enlarge the deference due the court or administrative agency whose decision is being reviewed. The result, whether intended or not, is to reduce the incentive to appeal by making it more difficult to obtain a reversal, and to reduce the amount of work that [*969] the appellate court has to do in cases that are appealed, since it is easier to decide whether a finding is reasonable or defensible than to decide whether it is right n151

115

Counterpizzle Shizzle
DJW '03
Your Mom Deference Bad

_____/_____

2. The moral problems with deference outweigh readiness

Christina **Gleason**, Women's Rights Law Reporter, **1999**
(p. lexis nexis)

Our courts act as the arena of last resort for all citizens when constitutional rights are violated. These citizens, whether soldiers or civilians, rely on our judicial system - our self-proclaimed system of justice - to produce fair and just results. Instead, they often face a court that fails to consider the entire, three-dimensional setting of the legal issues before dispensing "justice." Courts fail to consider the role of politics in the development of our laws and the role of majoritarian morals, mores, and attitudes towards "others" in that process. n197 As a result, our judicial interpretation is incomplete and inaccurate.

This unjust justice is handed down even more frequently when deference doctrine is blindly invoked. Courts rarely, if ever, consider the true political rationale for the passage of laws that blindly ignore otherwise protected constitutional rights. Instead, our courts fail to contemplate the true role of politics driving the political branches in policymaking. When courts consider the importance of legislative history in judicial interpretation, they continue to rely on the deference crutch as a court-created excuse to ignore the political realm and reality completely. n198 The Second Circuit's most recent decision in Able is a perfect example of this phenomenon in action. n199

As we have seen from the seesaw decisions in the Able case, when judges review the content as well as the volume of legislative history supporting a policy, judges can get a more accurate view of the legislative rationale behind the law. How can a judge accurately classify a law and consider whether deference, as considered by our founding fathers, is justified? Without knowing the whole story - that the law, which purportedly regulates conduct, passes on the strength of improper, discriminatory, morally driven purposes - the judge cannot.

Our constitution and its creators never intended for our court system to allow Congress and the President free reign to turn the military system into a legislative playground in the name of morality, rather than military **readiness.** Permitting unfettered deference to Congress in all military related social policies - whether they deal with sexuality, sexual harassment, or judgments about the proper roles for women - without considering the political landscape permits the legislative and executive branches to do just that. Our legal and judicial ignorance of the importance of politics in the creation of legislation perpertuates this situation and allows unjust, inaccurate results to flow and allows all citizens - soldiers and civilians alike - to suffer.

Counterpizzle Shizzle ____/____
DJW '03
Your Mom Deference Impacts MPX

1. ↑ Unconstitutional policies are often defered and can cause military immorality.

Diane **Mazur**, Prof. of Law, University of Florida, Fall **2002**
(Indiana Law Journal, p. lexis)

This Article argues that judicial deference to the military, at least as the principle is understood in contemporary decisions of the Court, is surprisingly recent and not at all constitutionally established. In fact, this deference departs from constitutional text and from a line of Supreme Court precedent concerning civilian-military relations extending back before the Civil War. Broad judicial deference to military discretion is only a creation of the post-Vietnam, all- volunteer military and, more specifically, only a creation of one single Justice of the Supreme Court, William H. Rehnquist. Bad Defer ↛ Const.

Rehnquist enlisted the military as a combatant in the culture wars of the Vietnam era, engineering a convergence of military culture and social conservatism that would reach its peak in the decade following the Persian Gulf War. He dismantled a well-established constitutional understanding of civilian control of the military by disabling the judiciary from substantive review of military policy, even under circumstances in [*705] which military policy imposed significant, collateral effects on civilians and on civilian society. Under Rehnquist's leadership on military issues, the Court became increasingly comfortable with a military that was constitutionally separate and constitutionally immune. Judicial deference to matters of military concern has allowed Congress to use claims of military necessity-whether rational or irrational- as a means of resistance to evolving constitutional expectation. It has allowed Congress to use its power to govern the military as a way of influencing social policy within civilian America-and without the limitations otherwise imposed by the Constitution. A generation ago, the reality of the draft made our constitutional understanding of civilian-military relations acutely relevant. Today, in an all- volunteer era, our attention to the subject has diminished. The relevance of civilian-military relations under the Constitution, however, has only grown; its effects are just more stealth. → mil immunity

Counterpizzle Shizzle
DJW '03
Your Mom Deference Impacts MPX

3. Deference values the military above the law providing no check against military action and increasing the risk of a thermonuclear destruction.

Barry **Kellman**, Prof. of Law, Depaul University, December **1989**
(Duke Law Journal, p. lexis nexis)

In this era of **thermonuclear** weapons, America must uphold its historical commitment to be a nation of law. Our strength grows from the resolve to subject military force to constitutional authority. Especially in these times when weapons proliferation can lead to nuclear winter, when weapons production can cause cancer, when soldiers die unnecessarily in the name of readiness: those who control military force must be held accountable under law. As the Supreme Court recognized a generation ago,

the Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders.

. . . .

. . . We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military.

We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. n1

Our fears may be rooted in more recent history. During the decade of history's largest peacetime military expansion (1979-1989), more than 17,000 service personnel were killed in training accidents. n2 In the same period, virtually every facility in the nuclear bomb complex has been revealed [*1598] to be contaminated with radioactive and poisonous materials; the clean-up costs are projected to exceed $ 100 billion. n3 Headlines of fatal B-1B bomber crashes, n4 the downing of an Iranian passenger plane, n5 the Navy's frequent accidents n6 including the fatal crash of a fighter plane into a Georgia apartment complex, n7 remind Americans that a tragic price is paid to support the military establishment. Other commentaries may distinguish between the specific losses that might have been preventable and those which were the random consequence of what is undeniably a dangerous military program. This Article can only repeat the questions of the parents of those who have died: "Is the military accountable to anyone? Why is it allowed to keep making the same mistakes? How many more lives must be lost to senseless accidents?" n8

This Article describes a judicial concession of the law's domain, ironically impelled by concerns for "national security." In three recent controversies involving weapons testing, the judiciary has disallowed tort accountability for serious and unwarranted injuries. In *United States v. Stanley,* n9 the Supreme Court ruled that an Army sergeant, unknowingly drugged with LSD by the Central Intelligence Agency, could not pursue a claim for deprivation of his constitutional rights. In *Allen v. United States,* n10 civilian victims of atmospheric atomic testing were denied a right of tort recovery against the government officials who managed and performed the tests. Finally, in *Boyle v. United Technologies,* n11 the Supreme Court ruled that private weapons manufacturers enjoy immunity from product liability actions alleging design defects. A critical analysis of these decisions reveals that the judiciary, notably the Rehnquist Court, has abdicated its responsibility to review civil matters involving the military security establishment. n12

[*1599] Standing at the vanguard of "national security" law, n13 these three decisions elevate the task of preparing for war to a level beyond legal [*1600] accountability. They suggest that determinations of both the ends and the means of national security are inherently above the law and hence unreviewable regardless of the legal rights transgressed by these determinations. This conclusion signals a dangerous abdication of judicial responsibility. The very underpinnings of constitutional governance are threatened by those who contend that the rule of law weakens the execution of military policy. Their argument -- that because our adversaries are not restricted by our Constitution, we should become more like our adversaries to secure ourselves -- cannot be sustained if our tradition of adherence to the rule of law is to be maintained. To the contrary, the judiciary must be willing to demand adherence to legal principles by assessing responsibility for weapons decisions. This Article posits that judicial abdication in this field is not compelled and certainly is not desirable. The legal system can provide a useful check against dangerous military action, more so than these three opinions would suggest. The judiciary must rigorously scrutinize military decisions if our 18th century dream of a nation founded in musket smoke is to remain recognizable in a millennium ushered in under the mushroom cloud of **thermonuclear** holocaust.

118

4. Deference provides no check on military archecks.

Diane **Mazur**, Prof. of Law, University of Florida, Fall **2002**
(Indiana Law Journal, p. lexis)

Goldman v. Weinberger has been criticized as representing the Court's conceptualistic, categorical, and formalistic approach to the assessment of government interest in "special exception" contexts such as the military. n404 Claims of military necessity are treated as though they raise uniformly indispensable concerns and are entitled to uniformly unquestioning deference. There is no lesser and greater as far as claims of military necessity are concerned; anything that could affect the military does affect the military, and anything that does affect the military affects it with equal gravity, automatically presenting an unacceptable risk of loss of life or detriment to national security. Peacetime is equated with wartime, service within the United States is equated with service in foreign territory, and the headgear worn by military clinical psychologists is equated with the exigency of ground combat. There is no "gray area" subject to judgment; there is not even black and white, which would suggest that claims of military necessity could be sorted into those with merit and those without, or those that are rational and those that are not. Every assertion of military necessity is of one color, without gradation and of equal weight.

Defer all mil. cases

The contemporary military suffers from an acute fear of exercising judgment, which tends to operate in tandem with an acute fear of accepting responsibility. n405 This [*773] observation refers to military judgment in more than just the Rehnquist sense of military judgment, which would mean only that the military had manifested its belief in the truth of a particular assertion. It refers instead to military judgment in the now-obsolete sense of a true judgment that requires thoughtful and deliberate balance of competing factual and legal considerations. By eliminating the prospect of substantive judicial review, Rehnquist has effectively eliminated the need for any branch of government to engage in responsible constitutional judgment in any matter related to military affairs. Rehnquist simultaneously has insulated 1) the military, 2) Congress (when acting on the military's behalf), and 3) the Court itself from their conventional constitutional responsibility to explain, defend, and justify exercises of judgment. n406 This transformation in civilian-military relations has contributed to the evolution of a contemporary military and a contemporary Congress that irresponsibly substitute conclusory moral judgment for nuanced rational judgment in evaluating constitutional [*774] issues involving military service.

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5. Deference can cause unjust rights violations, like Korematsu

Barry **Kellman**, Prof. of Law, Depaul University, December **1989**
(Duke Law Journal, p. lexis nexis)

History shows that serious consequences ensue when the judiciary defers excessively to military authorities. Perhaps the most celebrated precedent for the **deference** to military discretion reflected in these recent decisions is the Supreme Court's 1944 decision in *Korematsu v. United* [*1601] *States. n14 Korematsu* involved the conviction of an American citizen of Japanese descent for violating a wartime exclusion order against all persons of Japanese ancestry. That order, issued after Japan's attack on Pearl Harbor, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." n15 Justice Hugo Black's opinion for the Court, upholding the exclusion order and Korematsu's conviction, stressed the hardships occasioned by war and held that "the power to protect must be commensurate with the threatened danger." n16

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DJW '03
Your Mom Aff: Defence Bad.

( ) Supreme Court limitations on weapons knowledge makes deference necessary.

Diane **Mazur**, Prof. of Law, University of Florida, Fall **2002**
(Indiana Law Journal, p. lexis)

Not one of the Justices would have awarded any part of the remedy sought. The decision turned on whether the controversy was now moot and the claim should simply be dismissed. Four Justices dissented on that basis, noting that the Ohio National Guard had already adopted new methods of training and "use of force" rules in response to the incident. n229 Two additional Justices seemed to concede that the controversy was moot, yet they chose to join the majority in making a statement concerning the relationship of the military and the judiciary. n230 Although Gilligan v. [*739] Morgan concerned the activities of the militia or, in modern vernacular, the National Guard, n231 the constitutional underpinning of the case was parallel to the provisions that control the active military forces. In both instances, the Constitution has set aside a protected core of military discipline and governance subject to the control of Congress. n232 A court that assumed the sort of "continuing regulatory jurisdiction" n233 over the Ohio National Guard urged by the petitioners would not only infringe upon, but would supplant, the Article I governance of core military functions intended by the Constitution. n234 The Court's choice to forego a supervisory role was the only one that reasonably could have been made. The idea that a federal district court should select specific weapons for the Guard, establish standards for their use, and exercise continuing surveillance of weapons training activities approaches frivolousness.

* Aff Some Defer concern weapons

The majority opinion, however, did not stop there. It took the opportunity to plant a seed, in the most general terms, that might later grow to discourage judicial review of military discretion under a much broader range of circumstances than those at hand. The contribution of Rehnquist may tip its hand in the Court's citation of the obscure Orloff v. Willoughby from twenty years before, n235 as well as in the Court's insistent protestations of its own incompetence in any matter of a military nature:

Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian [*740] control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. n236

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12

Counterpizzle Shizzle
DJW '03
Your Mom AT: Judicial Deference ____/____

1. The judiciary doesn't play any role in [redacted] deference

John **O'Conner**, University of Georgia, Fall **2000**
(Georgia Law Review, p. lexis nexis)

The difficulty posed by these new types of military cases was that such cases did not fit neatly into the jurisprudential regime the Court had developed for challenges to court-martial proceedings. As previously discussed, the Court had traditionally addressed challenges to court-martial convictions by making a jurisdictional inquiry and then moving on. n307 In the new non-criminal cases, there was no "offense" over which to ensure the military had jurisdiction. [*219] This difficulty prompted the Court to jettison its prior method for deciding "military" cases, at least as it related to non-criminal cases. Instead, the Court adopted the current **military deference** doctrine, which accords special weight to the political branches' estimation of the discipline and obedience needs of the armed forces, as reflected in various military regulations. Indeed, this new, deferential review of military regulations led to the complete dismantling of the O'Callahan doctrine that had briefly suggested a greater judicial role in military affairs.

2. The president and legislature solve deference best.

John **O'Conner**, University of Georgia, Fall **2000**
(Georgia Law Review, p. lexis nexis)

Thus, the military cases decided by the Supreme Court and the federal courts of appeals in the 1990s really were no different than the military cases of the 1980s, which in turn were no different than the **military deference** decisions issued by the Supreme Court from 1974-76. To the extent a constitutional challenge required a judgment as to the significance of the governmental interest involved in the legislation, courts must be exceedingly deferential to determinations by Congress and the President that they have struck the proper balance between military necessity and a respect for individual rights. The upshot of this manner of adjudication is that it remains extremely difficult for an individual litigant to argue successfully that his interest in individual rights is sufficient to overcome the considered judgment of the political branches with respect to military regulations. Unlike the Supreme Court's noninterference cases of the nineteenth and early-twentieth century, there will be a substantive review of the challenged regulations. However, so long as the American people elect leaders who are at all responsive to the desires of their constituencies, it is difficult to imagine Congress or the President approving regulations that are so oppressive to individual rights as to overcome the tremendous jurisprudential advantage afforded the political branches through the **military deference** doctrine. Moreover, and perhaps more properly, it is difficult to imagine military regulations oppressive enough to overcome the **military deference** doctrine without first triggering sufficient public opprobrium to cause Congress and the President to take corrective action before the courts are called upon to intervene.

Counterpizzle Shizzle
DJW '03
Your Mom Deference

1. The Supreme Court defers to the military.

Mark **Strasser**, Associate prof. of law, Capital University, **1995**
(Colorado Law Review, p. lexis nexis)

Traditionally, courts have been unwilling to interject themselves into the everyday affairs of the military. n2 Because decisions regarding the composition, management, and control of a military force are within the realm of professional military judgment and are subject to civilian control by the legislative and executive branches, these decisions are not appropriately made by the judiciary. n3 Further, the military has certain disciplinary needs that do not exist in the civilian context and thus might not be appreciated by a civilian court. n4

Arguably, the military's control and disciplinary needs are greatest in the context of a military operation. Thus, the clearest and most persuasive case for deference to the military can be made for operations during times of war. n5 Even in nonwar times, however, the military requires special flexibility. n6 Indeed, the Court has recognized that the "military is, by necessity, a specialized society separate from civilian society." n7 This specialized society, with obedience to authority and [*378] security needs far greater than those in civilian society, criminalizes far more than does civilian society. n8

Certainly, it is understandable that the need for discipline might require that the military regulate behavior more strictly than civilian society does. n9 However, difficulties will arise if the military is given complete discretion. n10 Lord Acton's warning, "Power tends to corrupt and absolute power corrupts absolutely," should be heeded. n11

In the military context, a variety of practices have been shielded from public view because of security considerations. n12 Even when abuses have come to light, those committing the wrongdoing have often been shielded from punishment. For example, soldiers have been exposed to mustard gas, n13 nuclear radiation, n14 and L.S.D. n15 without their knowledge or consent. Those responsible for this experimentation have escaped punishment. n16

There are clear dangers in allowing the government to plead national security to prevent such actions from coming to light and in allowing those responsible to escape punishment when such abuses do come to light. Such a policy encourages rather [*379] than discourages further abuse. n17 Common sense suggests that neither civilian nor military officials should be allowed such discretion. n18 It would not be surprising for individuals with such broad discretionary powers to withdraw benefits or impose burdens for vindictive reasons, n19 for example, punishing an individual for having appeared as a defense witness in a court martial. n20

2. The Court reasons that deference is the best form of judicial review.

Daniel **Solove**, Iowa Law Review, August **1999**
(p. lexis nexis)

According to these justifications, deference responds to the practical difficulties faced by the judiciary in the evaluation of complex empirical data. The Court recognizes that "the nature of the judicial process makes it an inappropriate forum for the determination of complex factual question of the kind so often involved in constitutional adjudication," n341 and thus, deference is the proper [*1006] method of judicial review given the limitations of the judiciary. Further, the Court often contrasts the expertise of the officials under review to its own generalist and uninformed nature. For example, in *Youngberg v. Romeo*, n342 the Court applied deference to the decisions of "the judgment exercised by a qualified professional" concerning matters affecting the rights individuals involuntarily committed to government treatment facilities. n343 The Court reasoned that a "professional" was "a person competent, whether by education, training or experience, to make the particular decision at issue." n344 The Court deferred because "judges or juries are [not] better qualified than appropriate professionals in making such decisions." n345 Deference, according to this reasoning, respects the judgments of those who are ensconced in the necessary empirical knowledge to make certain decisions.

Deference

Courts Defer

3. The court defers to the military

Diane **Mazur**, Prof. of Law, University of Florida, Fall **2002**
(Indiana Law Journal, p. lexis)

The Court wanted no part of Dynes's challenge to his confinement. By virtue of legislative power to "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces," n70 Congress had the authority to provide for trial and punishment of military offenses by court-martial. That power arose under Article I of the Constitution, not under the judicial function of Article III; the two powers were "entirely independent of each another." n71 Congress had designated the Secretary of the Navy as Dynes's sole source of appeal from conviction by court- martial, and, therefore "civil courts have nothing to do, nor are [court-martial convictions] in any way alterable by them." n72 "[N]o appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts." n73 Only when the court-martial itself was convened without jurisdiction could civilian courts interfere. The Court stated:

milit controls punish

When confirmed [within the military chain of command], it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject-matter or charge, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. n74

The Court's choice to defer to an exercise of military discretion in Dynes made sense, not only with respect to the text of the Constitution, but also in terms of more pragmatic considerations. Article I, Section 8, Clause 14 authorizes Congress to "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces," expressly intending the military to be controlled by a system of discipline that is separate and distinct from the criminal prohibitions that control conduct in civilian society. The military may criminally prosecute acts of desertion, for example, based on the military's particular need to compel performance of duty under the most arduous circumstances, even though civilian criminal law fails to prohibit any analogous offense. n75 Furthermore, civilian courts enjoy no special expertise in [*714] evaluating whether, under what circumstances, or to what degree, an instance of desertion affects military discipline. Neither do they have any practical means of determining the degree or the method of punishment necessary to compel attention to military duty. The Court recognized there was little to gain in condoning a practice of judicial review under which "the civil courts would virtually administer the rules and articles of war." n76

Defer to milit enforce.

ctd . . .

Deference

Courts Defer

Subsequent decisions by the Court followed the same standard of deference to military discretion. Typically, these cases declined to review specific factual determinations related to court-martial or other military administrative procedure, weight of the evidence, severity of punishment, or the quality and worthiness of an individual's record of military service. Over the next century the Court upheld, without any substantive review, the following military determinations: fraudulent manipulation of naval contracts constituted "scandalous conduct, tending to the destruction of good morals"; n77 a conviction for desertion was warranted despite an allegation of invalid enlistment; n78 nonpayment of indebtedness constituted conduct unbecoming an officer and a gentleman; n79 a naval paymaster's clerk had been served [*715] with a copy of the charge and specification against him in a timely fashion; n80 additional or alternate jurors in a court-martial could not have been appointed "without manifest injury to the service"; n81 evidence of fraud and embezzlement was sufficient to support a verdict; n82 an artillery officer was not entitled to medical retirement pay for nervous exhaustion; n83 an infantry captain was in fact a member of the armed services, although that fact did not appear in the original trial record; n84 certain officers were eligible to sit as members of a court-martial jury; n85 and a particular servicemember should be discharged as part of the peacetime reduction in force following World War I. n86

The common factor in this mass of seemingly trivial detail is the Court's tremendous reluctance to manage the infinite number of individualized decisions necessary to govern and regulate military personnel. The Constitution provides for rules of military discipline that operate independently of the laws that "discipline" civilian life, and Article III courts have not been granted any direct supervisory or appellate role concerning this exercise of military discretion. The Court has consistently declined to second-guess the intensely factual and contextual determinations that inevitably arise in the administration of these separate rules of military discipline:

cts of alter enforc by mil.

Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject-matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals, constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. n87

Counterpizzle Shizzle
DJW '03
Your Mom Courts Deference ____/____

(U) = Deference in SQ

1. Courts defer now.

Diane **Mazur**, Prof. of Law, University of Florida, Fall **2002**
(Indiana Law Journal, p. lexis)

(✓) Defer now

The idea of a politically neutral military now seems somewhat out of place, two years after a presidential election in which the military was portrayed to be-and tended to portray itself as-a political force in clear alignment with the Republican Party's candidate. n13 The 2000 election capped a decade in which the exercise of military discretion increasingly dovetailed with the interests of social conservatism, particularly with respect to issues concerning sexual morality and the advancement of women. Significantly, these questions have been treated as political questions, subject to the judgment of the military or of Congress on the military's behalf, but not as judicial questions. Courts have increasingly deferred to assertions of military necessity, adjusting constitutional expectations as necessary to meet military expectations. The bedrock premise underlying this judicial deference to the military has been that the military's purpose to fight and win wars was so singular and so fundamentally important to the nation's security that standard judicial review of military-based decisions imposed unacceptable risk. The military was simply a different constitutional animal, an institution that, by necessity, required a generous deference to discretionary choice. There now seems to be an accepted understanding that the military is not bound by constitutional requirements in the same way that other governmental institutions are bound, and the principle itself, if not its application, is relatively uncontroversial. n14 Consequently, legal scholarship on military issues, a [*704] strong component of all the best law reviews a generation ago, n15 has dwindled in quantity and quality. That loss of academic focus should be no surprise, as law professors will quickly lose interest when courts no longer see themselves as playing much of a role in evaluating the constitutionality of military decisions. n16

2. Courts practice military deference in the status quo.

John **O'Conner**, University of Georgia, Fall **2000**
(Georgia Law Review, p. lexis nexis)

Part III n11 of this Article examines the Court's military jurisprudence since the advent of the **military deference** doctrine. This Article argues that the **military deference** doctrine is alive and well [*165] and has neither expanded nor receded in scope or influence throughout the 1980s and 1990s. Any nuance the Court has added over the last twenty years is directly traceable to the four **military deference** cases decided by the Burger Court between 1974 and 1976. Thus, although legal commentators, litigants, and even the occasional district court judge might suggest that the **military deference** doctrine is on the wane, n12 nothing in the case law suggests that this is so. This Article concludes that the **military deference** doctrine remains as viable today as when first invoked by the Court. Where applicable, the doctrine continues to present a formidable barrier to proving that a military practice runs afoul of the Constitution.

Counterpizzle Shizzle
DJW '03
Your Mom Courts Deference ____/____

⊙ = Deference in SG

3. ~~Court~~ Status quo courts defer.

Karen **Ruzic**, Chicago-Kent Law Review, **1994**
(p. lexis nexis)

Traditionally, the Supreme Court has displayed a "hands off" attitude toward military matters, n199 and the Weiss decision is certainly no exception. Seldom has the Court found a military practice unconstitutional. n200 Although the Court has shown reluctance toward unlimited military power, n201 its decisions have also reflected a great deal of deference to the military's authority over its personnel. n202 In Rostker v. 8131*290 Goldberg, n203 for instance, the Court denied a challenge that President Carter's reinstatement of the draft constituted gender discrimination. The Court in Goldberg specifically stated that when dealing with military affairs, "the Court [has] accorded Congress [great] deference." n204 This tradition of deference also reflects the Court's belief that they are ill-equipped to understand military needs, and thus should leave such questions to Congress and the military. n205 The Weiss Court blindly followed that tradition. Taking the easy way out, the Court gave mere lip service to the requirement that the military abide by the Fifth Amendment, but then proceeded to apply an artificially elevated level of deference to Congress' determination of the military's individual brand of due process.

The Weiss Court's misconception is based on an inaccurate view of the military's role in modern society. Today's military establishment constitutes a large part of our nation's economy. It is, in fact, a business, with the majority of its members serving in noncombat support roles. n206 No specialized knowledge is necessary to understand the basic workings of the modern military. Thus, in light of today's enormous and bureaucratic military, the Court's "unthinking deference ... is misplaced" n207 and outdated.

The Supreme Court's highly deferential standard of judicial review, and subsequent refusal to extend constitutional rights doctrine to the military, n208 has had some other disturbing repercussions. Of particular interest are the Court's virtual removal of a remedy in cases where a servicemember's constitutional rights have been assailed, and its expansion of court-martial jurisdiction.

4. Supreme Courts defer to military.

John **O'Conner**, University of Georgia, Fall **2000**
(Georgia Law Review, p. lexis nexis)

As stated previously, the **military deference** doctrine that exists today is largely a creation of four military decisions issued by the Supreme Court between 1974 and 1976. n566 To be sure, the Burger Court of 1974-76 borrowed heavily from the Court's earlier military case law in fashioning this **military deference** doctrine. Nevertheless, no neutral reader could review the Court's pre- 1974 military case law and contend that the Court's **military deference** doctrine was an obvious product of that prior precedent. During the 1980s and 1990s, the Burger and Rehnquist Courts considered several military cases and rendered many decisions explaining their vision of the **military deference** doctrine. During that time, however, the Court's **military deference** doctrine remained largely static, frequently invoked by the Court, but never really expanded or contracted from the doctrine announced in those four Burger Court [* 262] decisions. n567 Indeed, unlike the military cases decided by the Court between 1974 and 1976, the Court's military decisions in the 1980s and 1990s clearly are derived from the Court's prior case law. It is difficult to identify an argument, concept, or nuance in the Court's 1980s and 1990s **military deference** cases that was not previously raised by the Court in the four cases that first established the **military deference** doctrine. Thus, although some commentators have suggested that the **military deference** doctrine is "outdated" n568 or "eroding," n569 and although "scholarly" criticism of the doctrine is undoubtedly "robust," n570 there is little doubt that the **military deference** doctrine remains an enduring aspect of the Supreme Court's constitutional jurisprudence.

127

Counterpizzle Shizzle
DJW '03
Your Mom

Courts Deference

Courts + Const.

1. Courts don't Strike down unconstitutional policies.

John **O'Conner**, University of Georgia, Fall **2000**
(Georgia Law Review, p. lexis nexis)

In fact, as mentioned above, the primary reason why there have been so few **military deference** cases decided by the Rehnquist Court is that by now the **military deference** doctrine is so firmly established that the federal courts of appeals hardly ever rule against the armed forces in a case challenging the constitutionality of military regulations. During the 1990s, literally dozens of cases decided by federal courts of appeals n780 and federal district courts n781 have applied [*299] the **military deference** doctrine in siding with the military in a constitutional challenge. Moreover, in those instances where a federal district court finds the military's interests to be outweighed by other constitutional concerns, those decisions typically are reversed on appeal by the courts of appeals. n782 f 99

Counterpizzle Shizzle
DJW '03
Your Mom Court Deference ____/____ Courts always defer

1. Courts always defer decisions to the military.

Daniel **Solove**, Iowa Law Review, August **1999**
(p. lexis nexis)

Currently, although fundamental rights are protected by strict scrutiny, when they arise in the contexts of the bureaucratic state, the deference principle remains the dominant force. Today, even when important freedoms and liberties are implicated, courts defer [*961] in cases involving the commerce clause as well as cases involving social and economic regulation. n92 Courts frequently accord deference to the judgments of numerous decisionmakers: Congress, n93 state legislatures, n94 agencies, n95 military officials, n96 prisons, n97 government health institutions, n98 prosecutors, n99 defense attorneys, n100 government employers, n101 and practically any other decisionmaker in a position of authority or expertise. n102

Courts readily defer to administrative agencies -- to the fact-finding of administrative tribunals and the factual conclusions underlying agency regulations n103 as well as to agency interpretations of federal law. n104 Even when faced with infringements to rights typically protected by heightened scrutiny, courts often defer when reviewing the factual judgments made by officials in institutions or by [*962] persons with expertise. Courts frequently defer to the judgments of employers who fire employees for expressing their political views. n105 Courts also defer to the judgments of officials at government mental health institutions. For example, in *Youngberg v. Romeo*, n106 the Court held that individuals involuntarily committed to treatment facilities had "liberty interests in safety and freedom from bodily restraint." n107 The Court determined that the proper level of necessity to "justify use of restraints or conditions of less than absolute safety" was "reasonable" rather than "compelling" or "substantial." n108 However, the Court also articulated an additional standard of deference: "In determining what is 'reasonable' . . . we emphasize that courts must show deference to the judgment exercised by a qualified professional." n109 Thus, the Court held that because "judges or juries are [not] better qualified than appropriate professionals in making such decisions," the official's decision would be "presumptively valid." n110

Courts readily defer to legislatures when a statute involves forecasts and predictions, n111 and complex factual data based on technical and scientific expertise. n112 For example, in *Turner Broadcasting System, Inc. v. FCC*, n113 the Court upheld against a First Amendment [*963] challenge "must-carry" regulations that required cable operators to carry broadcast stations. The Court determined that the regulations were content-neutral restrictions on free speech requiring intermediate scrutiny but then then stated that the review of Congress' factual predictions should be accorded "substantial deference." n114

129

Counterpizzle Shizzle ____/____
DJW '03
Your Mom Deference and CMR (2)

1. Deference destroys CMR.

Diane **Mazur**, Prof. of Law, University of Florida, Fall **2002**
(Indiana Law Journal, p. lexis)

How should we identify constitutional abuses against civilian-military relations? Fundamentally, all such abuses share a single feature. In each instance, they cross a line that limits the collateral consequences of military judgment. Whenever military judgment imposes consequences on civilian society, or alters the nature of the relationship between the military and civilian society, then judicial deference is inappropriate. The pre-Rehnquist understanding of constitutional civilian-military relations, which extended back before the Civil War, consistently recognized a narrow and defined core of military discretion to be exercised under the Article I military powers. Military choice within its proper sphere was protected; military choice exceeding its proper sphere was subject to judicial review. Post- Rehnquist, there have been two particular circumstances, the second more pernicious than the first, in which judicial deference to the military has been applied in ways abusive of civilian-military relations under the Constitution. First, courts should not defer to military judgment when its effect is to isolate the military from civilian society or to protect the military from disagreement. Second, and much more significant, courts should not defer when military judgment is employed to establish caste among members of civilian society.

Defer CMR (L)

130

Counterpizzle Shizzle
DJW '03
Your Mom

Banning Deference (5)

1. A ban on judicial deference solves.

Daniel **Solove**, Iowa Law Review, August **1999**
(p. lexis nexis)

Def. ban (5)

Can the existing practice of deference be abandoned? The conception that justifies deference is certainly accurate in some respects. In its current form, the adjudicatory process provides far from an efficient and capable method for judges to engage in sound critical analysis of the laws and policies of the bureaucratic state. Given the existing practices and structures of the judicial process, judicial review as critical inquiry would be quite difficult to achieve in practice. In order to achieve judicial review as critical inquiry, the processes of constitutional adjudication must be transformed. Theorists of judicial review should turn to examining creative methods of evaluating empirical evidence. The answer is not to repudiate the deference principle, but to abandon the practice of deference currently associated with the principle and to transform judicial review so that it more adequately deals with facts.

Judicial balancing is a vast improvement in constitutional adjudication over late nineteenth century formalism. In its virtues, [*1021] judicial balancing conceives of law as an instrument to achieve human purposes, not as an end unto itself; it remains deeply concerned with the consequences of laws; and it assesses each situation as it arises rather than categorically restricting the exercise of state power in the name of absolute rights. With its greater focus on empirical evidence in issues of constitutional interpretation, it brings law more in tune with contemporary science, social science, economics, and other fields of human knowledge.

Counterpizzle Shizzle
DJW '03
Your Mom Deference

—/—

~~Deferm~~ Deference (5)

1. Judicial deference solves

Barry **Kellman**, Prof. of Law, Depaul University, December **1989**
(Duke Law Journal, p. lexis nexis)

There is a difference between **deference** and abdication. Judicial **deference** is a reasonable accommodation of the judiciary's limited role as one of three branches of the federal government. For a court to be deferential implies that some other branch of government has greater expertise over the matters in question, and the costs of constant judicial oversight far outweigh the benefits. **Deference** is thus a cornerstone of administrative law grounded in the judiciary's essential conservatism about the extent of its own expertise. In the context of weapons testing and national security, it is hard to disagree that the judiciary should be deferential about the need for weaponry, the best method of testing and developing such weaponry, or the allocation of risks associated with such weaponry.

Even in this context, judicial **deference** should be based on a showing that (1) authority for the activity causing the injury was delegated from either Congress or senior Executive officials; (2) the agent responsible for the injury acted within the scope of that authority; and (3) the decision to place persons at risk of harm was reasonable in light of the evidence that a prudent administrator would consider under the circumstances. **Deference** is not *carte blanche*. It is not so much an immunity afforded to government agents as it is a concept built of the respect that the judiciary must have for the legitimate exercise of authority by the coordinate branches of the government. n198 A decision that reflects the weight of the evidence, undertaken by properly authorized officials within the scope of their delegate authority, should not be overturned [*1650] simply because a court, in hindsight, would have made a different decision. 1

2. Deference key to bureaucracy.

Daniel **Solove**, Iowa Law Review, August **1999**
(p. lexis nexis)

Although the deference principle hovers over constitutional jurisprudence, it is explicitly invoked and practiced in a particular group of cases involving a common set of contexts: (1) experts or professionals with a particular expertise in making certain factual judgments; or (2) institutions such as administrative agencies, prisons, schools, and the military that envelop much of contemporary life. n83 I refer to these contexts collectively as the "bureaucratic state." Typically, courts defer to decisionmakers (often located in an institutional setting) who, by virtue of their day-to-day activities or professional training, have specialized knowledge or expertise.

One of this century's most profound developments in the American social and political structure was the rise of the bureaucratic state. Throughout human history, large institutions (feudal, ecclesiastical, and monarchical) have often existed in societies. The defining characteristic of the modern institution is its highly developed bureaucratic structure with hierarchies of power and established standards and processes. These institutions have their own special politics, practices, cultures, and traditions. According to Max Weber, bureaucracy consists of fixed areas of specialty, a carefully controlled distribution of authority to act, a system of hierarchical levels of authority, and a set of general rules and procedures to govern the behavior of persons operating within the system. n84 Today, American bureaucracy is characterized by highly specialized systems of controlled expertise. These systems are designed to process immense amounts of complex factual and empirical data. Thus, Weber observes that the bureaucratic state depends heavily on expertise:

> The more complicated and specialized modern culture becomes, the more its external supporting apparatus demands [*960] the personally detached and strictly 'objective' *expert*, in lieu of the master of older social structures, who was moved by personal sympathy and favor, by grace and gratitude. n85

The complexity of modern regulation demands specialized knowledge and large sophisticated public institutions. Although our entire society is not structured in these massive conglomerates of associated expertise, a very large part of our lives comes under the influence of these entities. While humankind has always been subject to the power of various institutions, the bureaucratic state employs a distinct structure of power with distinct possibilities for and impediments to individual self-definition. 3

132

Delegation C/P
DJW '03
Skills/Varoon

INC Shell

Text

Congress will broadly delegate authority to _____ (agency) to enact _____ (plan mandates)

Observation 1: Competition

[A] Counterplan and plan are mutually exclusive because congress has the power to delegate authority to enact the plan.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, 99 (David, Sharyn, 20 Cardozo L. Rev. pg)

[Our institutional analysis begins with the observation that there are two alternative modes for specifying the details of public policy. Policy can be made through the typical legislative process, in which a committee considers a bill and reports it to the floor of the chamber, and then a majority of the floor members must agree on a policy to enact. Alternatively, Congress can pass a law that delegates authority to regulatory agencies, allowing them to fill in some or all of the details of policy. The key is that, given a fixed amount of policy details to be specified, these two modes of policymaking are substitutes for each other. To the degree that one is used more, the other will perforce be used less.]

Delegation C/P
DJW '03
S Kills / Varoon

1NC Shell

B. **Net Benefits**: Both the president and Congress avoid blame while still reaping the political benefits of the plan.

David Schoenbrod, Law, , New York Law School, '93, Power Without Responsibillity, P.____, [Kyle Warneck]

Congress and the president delegate for much the same reason that they continue to run budget deficits. With deficit spending, they can claim credit for the benefits of their expenditures yet escape blame for the costs. The public must pay ultimately of course, but through taxes levied at some future time by some other officials. The point is not that deficits always have bad economic consequences, but that they have the political consequence of allowing officials to duck responsibility for costs.

Likewise, delegation allows legislators to claim credit for the benefits which a regulatory statute promises yet escape the blame for the burdens it will impose, because they do not issue the laws needed to achieve those benefits. The public inevitably must suffer regulatory burdens to realize regulatory benefits, but the laws will come from an agency that legislators can then criticize for imposing excessive burdens on their constituents. Just as deficit spending allows legislators to appear to deliver money to some people without taking it from others, delegation allows them to appear to deliver regulatory benefits without imposing regulatory costs. It provides "a handy set of mirrors—so useful in Washington—by which a politician can appear to kiss both sides of the apple."[13] /0

Delegation 4P
PJW '03
Skills/Vasoon

1NC Shell

Observation II: Solvency

A. Delegation solves better and is more effective than the plan.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

[This theme of congressional oversight-at-a-distance was also the subject of an article by McCubbins and Schwartz, which examined the question of how a relatively uninformed Congress could possibly control bureaucrats much more knowledgeable about their particular policy area.[27] True, they could go out and gather their own information or force the agent to disclose information at oversight hearings ("police patrol" oversight), but this would quickly become prohibitively costly, consuming legislators' scarce time and energy. On the other hand, legislators have access to a cheap source of information, namely, those interest groups affected by the agency's decisions. These groups are generally well-informed about the relevant issue area and are more than willing to let their representatives know when an agency is acting contrary to their interests. Thus, legislators would be able to control agencies simply by sitting back and waiting to see if any groups come to their doors with complaints ("fire alarm" oversight). As in Weingast and Moran, if the fire alarm system works perfectly, then bureaucrats will never step out of line and no fire alarms will actually be sounded.[28]]

B. Delegation solves just as well as the plan.

Jerry Mashaw, Professor of Law at Northwestern School of Law, 1997
(Greed, Chaos, and Governance: p. 145) <Kyle>

[Let's review the bidding. We seem to have no strong reason to believe that broad delegations of authority either deterministic governance or produce systematically negative welfare effects. In theory, at least, legitimacy may flow from general statutory principles implemented by administrative rulemaking decisions as well as from precise statutory rules. Nor is there a cogent a priori argument that broad delegations of authority sever the electoral connection. Moreover, to the extent that disbeneficial legislation results from unrestrained vote trading across issues, broad delegations have no determinate welfare effects. Viewing broad delegations as a way of self-paternalism by legislators constraining further disbeneficial deals, seems as plausible as the notion that vague delegations somehow facilitate logrolling. The most critical thing that might be said about vague delegations producing policy lotteries is that the outcome may satisfy the "winning coalition," to use McNollgast's terminology only ex ante, that is, until the administrative delegate "spins the wheel" and chooses a determinate policy. The case against broad delegations thus seems quite weak. But is there anything that can be said that would tend to favor broad delegations of authority to administrators? Or is this perhaps a debate in which whoever has the burden of persuasion loses?]

Del C/P
DJW '03
Skills

Separation of Powers Add On

Delegation is necessary for the Separation of Powers.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev.

This Article provides three responses to this requirement. First, our data show that Congress does not delegate wholesale to the Executive. Even on important policy issues, some of which, like the budget and tax policy, require considerable time and expertise, Congress takes a major role in specifying the details of policy. Second, when Congress does delegate, it also constrains executive discretion with restrictive administrative procedures. In fact, legislators carefully adjust and readjust discretion over time and across issue areas so as to balance the marginal costs and benefits of legislative action against those of delegation. Congress is not free from particularistic legislation, but neither does it devote its energies solely to narrow, individually tailored policy at the expense of larger issues.

Third, delegation is not only a convenient means to allocate work across the branches, but it is also a necessary counterbalance to the concentration of power in the hands of committees.

Del C/P
DDW '03
Skills

Liberty Add On

Delegation is key to liberty while not delegating leads to tyranny.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

According to these arguments, LIVA was just the tip of the iceberg of unconstrained, unconstitutional delegation to the Executive. Advocates of an enhanced nondelegation doctrine fear that the concentration of power in one branch of government inevitably leads to tyranny and a loss of individual liberty, citing *The Federalist No. 47* as affirmation: "The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[14] One way that power can come to reside within a single branch is by the practice of Congress delegating the details of policymaking to executive agencies. As Justice Kennedy stated in his concurring opinion in *Clinton*, "Liberty demands limits on the ability of any one branch to influence basic political decisions. . . . Abdication of responsibility is not part of the constitutional design."[15] Therefore, the argument goes, to ensure liberty it is necessary to limit such delegations of authority.

Del C/P
DJW '03
Skills

Politix - Popularity

Delegation only boosts President popularity

Harold J. Krent. Associate Professor Kent-College, March '94, "Book Review: Delegation and it's discontents". Yale University Law Review. P. Lexis

Through delegation Congress shirks responsibility for some of the most fundamental political questions affecting our society - for example, how to balance the risk of toxic agents in the workplace against jobs. n16 or how to compare the gravity of drug offenses to espionage activities. n17 Congress has failed to agree upon which military bases to close, n18 and which organizations merit broadcast licenses. n19 Yet members of Congress can claim credit for attempting to solve the problems of the environment and the economy by authorizing agencies to tackle the problems, and then distance themselves from the ensuing regulation if unfavorable to their constituents. Delegation permits legislators to "look good" to their constituents without necessarily providing tangible benefits (pp. 8687). n20 Congress may too readily distribute rights without imposing {*715} commensurate obligations, ameliorating the tradeoffs that must necessarily follow (p. 9).

Indeed, Schoenbrod further observes that members of Congress might try to benefit politically by excoriating an agency's performance before some constituents while taking credit for the agency's efforts before others (pp. 8894). Schoenbrod explains that "just as deficit spending allows legislators to appear to deliver money to some people without taking it from others, delegation allows them to appear to deliver regulatory benefits without imposing regulatory costs. It provides "a handy set of mirrors ... by which a politician can appear to kiss both sides of the apple.'" (p. 10). n21 Citizens are confused by the game and fail to hold legislators accountable for the resulting policy choices by administrators. In short, delegation permits members of Congress to maximize credit while minimizing blame for legislation, and the less that legislators appear to make the important policy choices that govern the nation, the more estranged from politics citizens may become (pp. 13031).

Delegation has no effect on President's popularity

David Schoenbrod, Prof. Of Law, Yale, Winter '87, "The Uneasy Status of the Administrative Agencies", The American University Law Review, P. Lexis.

At the presidential level, electoral responsibility for a decision is far weaker. Issues of local interest are diluted. Questions about the behavior of the President's role in domestic lawmaking must take their place along with other factors that voters consider, including foreign affairs. Also,

PAGE 63

36 Am. U.L. Rev. 355, *385

personality may well be a bigger factor at the presidential level. Finally, a legislative representative must accept responsibility for a vote, the President need not accept responsibility for someone else's action, even though that someone was appointed by the President. Presidents have disentrenched themselves from the decisions of their appointees.

138

Del C/P
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Skills

Del Helps Congress Politically

Delegation allows Congress to maximize credit and minimize blame. The Counter Plan only makes them look good.

David **Schoenbrod**, Law, , New York Law School, '93, Power Without Responsibillity, P.____, [Kyle Warneck]

[Second, in considering the probability that the public will identify benefit and harm with a legislator, Fiorina assumes this connection is beyond the legislator's control.[37] But delegation allows legislators to better pursue one of the goals assigned to them by Fiorina: either to identify with the government action or to distance themselves from it, depending upon how the action affects their district. A legislator whose district will benefit from an action will identify with what the agency does, thus increasing the public's sense that the legislator is responsible for the benefits (and also the losses) from the action. Another legislator, whose district will be hurt, will say that the agency has botched the job, thus diminishing the public's sense that the legislator is responsible for harms (and benefits).[38] If Congress could not delegate, legislators could not choose so readily whether to identify with or dissociate themselves from government action. The Clean Air Act illustrates this phenomenon; politicians variously distanced themselves from the legislation or identified with it, as political considerations made each course worthwhile.]92

Congress always wins with delegation

David **Schoenbrod**, New York Law School, January '99 , Cardozo Law Review, P. Lexis [Kyle Warneck]

[Schuck distrusts legislators to make laws but trusts them in deciding whether to delegate. I distrust them when they make laws and distrust them more when they delegate. Legislators have selfish interests in deciding whether to delegate and so have a conflict of interest. Through delegation, they can claim credit, shift blame, and increase the demand for casework as a means for them to exact campaign contributions and other favors. The stake-holders from the private sector, in contrast, aim to get the law they want, wherever it is made. For them, delegation is only a possible means to that end. The balance on delegation that might be produced by the tugging and hauling between the competing private stakeholders is knocked out of wack by the heavy hands of those with the biggest stakes in delegation and the power to do it, the legislators.]

Del C/P
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Skills

Del only Helps Congress

Delegation allows congress to shift the blame but still get credit.

David Schoenbrod, Law, , New York Law School, '93,
Power Without Responsibillity, P.____, [Kyle Wanieck]

The public also misperceives the effects of legislative behavior when delegation shifts some of the credit for benefit and blame for harm from the legislators to the agency. Fiorina assumes that some of the responsibility that belongs to Congress will fall on the involved agency even if Congress does not delegate, but that delegation will shift more of the responsibility.[26] As Douglas Arnold observes:

> Sometimes legislators know precisely what the executive will decide, but the process of delegation insulates them from political retribution. When Congress was unable to approve any of the standby gasoline rationing plans submitted by President Carter, presumably for fear [that voters would blame them for any resultant costs], the procedural solution was for Congress to delegate authority to the president to draft and implement a plan *without* the need for specific congressional approval. Everyone knew the president would simply affirm one of the previously rejected plans; but by delegating authority, legislators insulated themselves from any political repercussions, should a plan ever be implemented and produce unpopular effects.[27]

Delegation often does not shift credit and blame equally. For example, a statute that delegates power to an agency to set prices to the advantage of an industry may succeed in shifting almost all the blame for the costs to the agency, because consumers do not understand the legislature's role in authorizing the price-fixing; yet a sophisticated industry will still credit legislators for a substantial share of its benefit.

Delegation is key to legislators and their effectiveness

David **Shoenbrod**, Law, New York Law School, Delegation and Democracy: A Reply To My Critics, 1993

With delegation, legislators can escape being ejected from office except upon grounds that would oust a minister from the pulpit—scandal. In those exceptional cases when incumbents do lose an election, their defeat is far more likely to be caused by some escapade or chicanery than by how they shaped the law.[57] Entrenched encumbency is a marker for what is a profound problem—that legislators have rewritten the ground rules of government to evade responsibility.

Del C/P
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Skills

Del Helps Legislators

Delegation is Key to legislators.

David **Shoenbrod**, Law, New York Law School, Delegation and Democracy: A Reply To My Critics, 1993

The problem that legislators have with the Constitution is that they must take responsibility for both the benefits and costs of new laws. However they vote, they will offend some constituents. Rivals for reelection can easily search the *Congressional Record* to discover their opponent's voting record. The incumbents do not know in advance which of their votes will come back to haunt them at the next election and therefore have to worry about the wishes of their constituents on every vote.

Delegation has allowed legislators to rewrite the ground rules of democracy to help entrench themselves in office. They can pretend to deliver the best of everything to everyone by commanding agencies to promulgate laws to achieve popular statutorily prescribed goals.[54] The statutes are framed so that legislators can skirt the hard choices. This permits legislators to claim much of the credit for the benefits of the laws but shift to the unelected agency officials much of the blame for the inevitable costs and disappointments when the agency fails to deliver all the benefits promised. Come the next election, rival candidates will search the *Congressional Record* in vain for evidence on where the incumbent stood on the hard choices.

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Skills

Del Avoids Blame and Gets Credit

DELEGATION INSULATES LEGISLATORS FROM POLITICAL REPERCUSSIONS - IT'S EMPIRICALLY PROVEN

David Schoenbrod, prof. Law @ NY Law School, '93,
Power Without Responsibility, p. 89-90

The public also misperceives the effects of legislative behavior when delegation shifts some of the credit for benefit and blame for harm from the legislators to the agency. Fiorina assumes that some of the responsibility that belongs to Congress will fall on the involved agency even if Congress does not delegate, but that delegation will shift more of the responsibility.[28] As Douglas Arnold observes:

> Sometimes legislators know precisely what the executive will decide, but the process of delegation insulates them from political retribution. When Congress was unable to approve any of the standby gasoline rationing plans submitted by President Carter, presumably for fear [that voters would blame them for any resultant costs], the procedural solution was for Congress to delegate authority to the president to draft and implement a plan *without* the need for specific congressional approval. Everyone knew the president would simply affirm one of the previously rejected plans; but by delegating authority, legislators insulated themselves from any political repercussions, should a plan ever be implemented and produce unpopular effects."

Del Avoids Blame

DELEGATION ENABLES CONGRESS TO TAKE ALL THE CREDIT OF AN ACTION, BUT NONE OF THE BLAME

David Schoenbrod, prof. Law @ NY Law School, '93,
Power Without Responsibility, p. 10

Del → Cred & Blame

"Likewise, delegation allows legislators to claim credit for the benefits which a regulatory statute promises yet escape the blame for the burdens it will impose, because they do not issue the laws needed to achieve those benefits. The public inevitably must suffer regulatory burdens to realize regulatory benefits, but the laws will come from an agency that legislators can then criticize for imposing excessive burdens on their constituents. Just as deficit spending allows legislators to appear to deliver money to some people without taking it from others, delegation allows them to appear to deliver regulatory benefits without imposing regulatory costs. It provides "a handy set of mirrors—so useful in Washington—by which a politician can appear to kiss both sides of the apple."[13]

Del C/P
DJW '03
Skills

Del- No Link To Bush

DELEGATION ENABLES CONGRESSPEOPLE TO DROP COMPLETELY OFF THE POLITICAL RADAR- BLAME AND CREDIT ARE IMPOSSIBLE TO ASSOCIATE TO CONGRESS

David Schoenbrod, prof. Law @ NY Law School, '93,
Power Without Resonsibility, p. 102

"Without delegation, legislators undoubtedly would do all they could to obscure their responsibility for controversial rules. For example, they might ask agencies to recommend statutory laws or to frame statutory rules in terms difficult for the public to understand. But, in the end, legislators would still have to vote for the statutory laws. Rivals for reelection would be able to discover their responsibility for laws that harm the public and explain to constituents how their representatives had hurt them. With delegation, however, rival candidates search the congressional records in vain for any evidence of where the incumbent stood on the laws. The incumbent's ability to deny responsibility for most hard choices—with the exception of Supreme Court confirmations, tax increases, declarations of war, and a few other issues[13]—helps to make for political campaigns that have little to do with the merits of public policy and a lot to do with slogans and scandals." p. 102

LEGISLATORS CAN USE DELEGATION TO AVOID BLAME ENTIRELY

David Schoenbrod, prof. Law @ NY Law School, '93,
Power Without Resonsibility, p. 9

"Delegation can shield our elected lawmakers from blame for harming the public not only when a regulatory program, such as the navel orange marketing order, serves no legitimate public purpose, but also when a regulatory program should serve an important public purpose. Then the consequences of delegation for the public can be even greater because lawmakers can use delegation to escape blame both for failing to achieve that purpose and for imposing unnecessary costs.

Understanding how such pervasive consequences flow from a seemingly technical change in the lawmaking process requires defining the fine but fundamental difference between a statute that makes law and one that delegates. According to the *Oxford English Dictionary*, a law is "a rule of conduct imposed by authority"; therefore, a statute makes law when it states a rule of conduct. For example, a statute that prohibits power plants from emitting pollution above a certain rate or that prohibits orange growers from shipping more than a certain proportion of their crop makes law because the statute itself defines what conduct is illegal. In contrast, a statute delegates when it empowers an agency to state the rules governing such emissions or shipments, even if the statute instructs the agency in some detail about what goals to achieve or what procedures to follow in making the rules." p. 9

Del c/p
DJW 03
Skills

Bush Avoids Blame

EVEN BUSH CAN AVOID BLAME BY SHIFTING IT ONTO OTHERS THROUGH DELEGATION

David Schoenbrod, prof. Law @ NY Law School, '93,
Power Without Resonsibility, p. 95

PRES AVOIDS BLAME W/ DEL

> Second, presidents must take personal responsibility for laws embodied in statutes that they sign, but they can shift some of the blame for agency laws to the agency. Shifting blame is easy when an independent agency has made the law, because the leaders of such agencies do not serve at the president's pleasure. Presidents also often avoid substantial political losses they might sustain for the unpopular actions of appointees who do serve at the president's pleasure by taking no position on what the agency has done or even by expressing some disagreement. Indeed, even incumbent presidents try to "run against the government." President George Bush tried to distance himself from agency laws promulgated during his administration by declaring a ninety-day moratorium on new agency laws before the 1992 elections."[2] p. 95

Delegation c/p
DJW 03
Skills

Separation of Powers

Delegation is a complement to SOP

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

[If our theory of delegation as a balancing of competing inefficiencies is correct, the balance of power between the branches will be continuously recalibrated to reflect changing contingencies of the day. As political factors—such as constituent demands, legislators' policy goals, and partisan control of the branches of government—change, so too will the terms of delegation. In our view, this state of affairs is a testament to the health of our political system, allowing neither committees nor agencies to dominate policymaking. Congressional delegation is, therefore, a self-regulating system, and any attempts to revive the nondelegation doctrine would merely strengthen the hands of congressional committees, sub-committees, and interest groups at the expense of agencies, thereby reducing accountability and forcing Congress to make policy in exactly those areas that it handles least effectively relative to executive agencies. Delegation should, thus, be seen as a complement to, rather than a substitute for, the separation of powers.]

Congress only uses constrained delegation which is effective

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

[We agree that unconstrained delegation does pose a threat to individual liberties. We disagree, however, with the assumption that Congress does in fact delegate, either *de jure* or *de facto*, unrestrainedly. Legislators delegate authority in those areas—such as pork barreling in appropriations bills, military base closings, and trade policy—where the legislative process produces inefficient outcomes. Congress is also wary, though, of ceding too much authority to executive branch actors who may pursue their own policy goals rather than those of the enacting legislative coalition. Legislators therefore set the limits of executive branch discretion so that these costs and benefits of delegation balance at the margin. Thus, legislators may well delegate authority to executive actors, but they will rarely, if ever, do so without constraints. Moreover, legislators will delegate those issue areas where the normal legislative process is least efficient relative to regulatory policymaking by executive agencies.]

Del c/p
DJW 03
Skills

AT: SOP Turn

T/ Invalidations of Congressional delegations will simply produce a more oppressive judicial branch destroying the SOP.

Richard **STEWART**, Asst. Attorney General, US Department of Justice, **1990** (University of Chicago Law Review, Spring, p. lexis)

< Another possible constitutional cure for Madison's Nightmare is invalidation of broad congressional delegations of regulatory authority to federal administrative agencies. 34 Advocates claim that forcing Congress to make detailed policy choices would restore political accountability, reinvigorate the political safeguard of federalism, and ensure more responsible decisions in the general interest. But such a step would also amount to a constitutional counterrevolution. The Supreme Court has only twice invalidated national statutes as unconstitutional delegations of legislative power. 35 These decisions, rendered early in the New Deal period, were soon abandoned. The Court concluded that it should not, save in the most extreme and improbable circumstances, second-guess congressional decisions that broad delegations are necessary and proper means of realizing regulatory and welfare goals. 36 Resurrecting the doctrine against delegation of legislative powers would force the courts to make essentially subjective and standardless judgments about which delegations are constitutionally permissible [*351] and which are not. Similar difficulties would attend judicial efforts to impose strict limits on Congress's transfer of adjudicatory authority from courts to agencies.

Even if the courts did enforce the non-delegation doctrine rigorously and in doing so invalidated many current federal programs, it seems likely that Congress would react by passing the writing of detailed measures on to its own legislative subcommittees. Experience with Congress's use of the legislative veto of agency regulations suggests the hazards inherent in this approach. 37 Subcommittees are subject to the same interest group influences as administrative agencies. Moreover, the safeguards of public hearings and judicial review that apply to federal administrative agencies do not apply to Congress or its subcommittees. Increased internal delegations by Congress could well have the effect not of ending but of prolonging Madison's Nightmare. >

Del C/P
DJW '03
Skills

AT: Sop turn

SOP does not justify eliminating delegation.

Sotirios A. Barber, U. of Chicago. '75. The Constitution and the Delegation of Congressional Power. P. ____

"The separation of powers, the common-law maxim of agency, the ideas of due process and the rule of law, the legislature as repository of popular trust, and the idea of republican representation—each of these norms sometimes can supply a measure of support for the rule of nondelegation. But each in turn brings values and problems which serve at other times to weaken the rule. The lines defining the concepts of "legislative," "executive," "judicial," and "administrative" power are difficult to describe, and, in any case, the Founders deliberately and openly rejected the strict separation of powers. The common-law origins and formulations of the maxim in the law of agency are uncertain and variable. The standards and rules which are requisites of due process need not be supplied by legislators alone. The consent-trust version of the representative principle is not incompatible with delegations downward, and the republican-government theory is not incompatible with delegations upward.

Our analysis shows, moreover, that none of these doctrines can provide the rule of nondelegation with an adequate logical foundation. While expressing the same thought in different areas of law, the rule of nondelegation and the common-law maxim of agency do not derive from each other. No necessary connection is apparent between the value of governing individual conduct by general and stable rules of law and the question of who retains or transfers the power to formulate such rules. Unless there is a requirement for preserving a given system of representation, delegations can be justified by the very values which the system was designed to serve. The nondelegability of congressional power does not seem implicit in the fact that it is termed "legislative power," or in the fact that the power of government is separated in some sense. And, by abstracting from the separation of powers the expectation that the particular arrangement of power will be preserved, we see that a principle of nondelegation is a presupposition of the separation of powers, not a rule derived from the separation of powers."

Del C/P
DJW03
Skills

AT: Del → Loss of Liberty

1 Delegation does not harm liberty or democracy

David **Shoenbrod**, Law, New York Law School, Delegation and Democracy: A Reply To My Critics, 1993

[The Supreme Court's final rationale is that delegation does no real harm to democracy because Congress retains the power to enact a statute, repealing whatever agency-made laws that it does not approve.[45] This rationale reverses the burden that the Constitution places on those who want to expand the powers of government by imposing a new law. Under the constitution, the proponents of the new law must bear the burden of getting it approved by the House, the Senate, and the President.[46] Under the last rationale, inaction by either House is sufficient for the agency-made law to stay in effect. There are, of course, many ways to prevent a controversial bill from coming to the floor for a vote, and legislators are only too willing to avoid controversial votes. As a result, laws are sustained without any legislative accountability.]

2 T/Del is Key to liberty because it allows the separation of power.

3 T/ Not delegating threatens liberty

David **Shoenbrod**, Law, New York Law School, Remarks To The Board Of Trustees Of The Natural Resources Defense Council, 1993

As it now works, the system of delegation allows legislators to play off committees against agencies, dividing the labor across the branches so that no one set of actors dominates. Given this perspective, a resuscitated non-delegation doctrine would not only be unnecessary, but also would threaten the very individual liberties that it purports to protect.

Delegation C/P
DJW '03
Skills

Agencies Solve- Generic

Executive agencies solve better than courts.

John F. Manning, assistant professor of law at Columbia University, 4-96, Columbia Law Review, l/n[Li Zhu]

> Third, Skidmore nevertheless acknowledges that by virtue of its expertise and experience, an agency may have superior insights into regulatory meaning. Legal texts, like all language, derive meaning from a "linguistic and cultural" environment. n359 Skidmore alerts courts to the possibility that a regulatory text may draw upon technical words or terms of art that have "a special meaning within the field regulated" by the text in question. n360 As Felix Frankfurter once put it:
>
> Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of federalism.... The peculiar idiom of business or of administrative practise often modifies the meaning that ordinary speech assigns to language. n361
>
> When confronted with a technical term "drawn by specialists," an agency's "expertness comes into play" in explaining specialized terms to a generalist court whose strong suit is ordinary meaning. n362 Skidmore thus [*689] recognizes that an expert agency may be better positioned than a generalist court to understand and explain the specialized way in which a regulatory community uses and understands its terms of art. It reminds courts that regulations often incorporate legal technicalities, and that a court should be open to an agency's expert testimony that particular terms were not used in the layperson's sense.
>
> In this regard, important differences between the regulatory and legislative processes offer agencies the opportunity to produce explanatory materials that courts may consult in ascertaining regulatory meaning. Where statutes are concerned, it is at least debatable whether the most commonly used explanatory material - the legislative history - represents a legitimate source of legislative meaning. Since a legislator can create such material without majority approval, it is impossible to know if legislative history enjoys the assent of those who voted for a statute. n363 In addition, well-accepted constitutional doctrine provides that Congress has no duty to supply any explanation for its economic or social legislation; so a lack of relevant legislative history will not be fatal to the statute's validity. n364

Del c/p
DJW '03
Skills

Agencies Solve - Generic

AGENCY ACTIONS ARE THE MOST RATIONAL AND EFFECTIVE WAY OF IMPLEMENTING POLICIES

William F. West, assistant prof. of political science @ Texas A&M University, 1985, Administrative Rulemaking: Politics and Processes, p. ____

In addition to arguments that rules promote formal justice and accountability in administration, rulemaking is widely advocated as a more rational means of implementing policy. Adjudication is unique as a form of case-by-case implementation in that it may create formal criteria for future application decisions through precedent. Thus, it constitutes an alternative to rulemaking as a tool for developing regulatory policy in many contexts. In this sense, rulemaking is frequently endorsed as a process which leads to better decisions in several respects.

A popular argument for using rulemaking to articulate standards is that it is more effective or forceful than adjudication. One reason for this is that it allows administrators to formulate and to enforce policy more quickly and with smaller expenditures of resources. Advocates of rulemaking frequently contend that standards must be developed incrementally through a series of proceedings under adjudication, in which the scope of policy making tends to be limited to the facts presented by particular cases. Beyond this, they point out that it may be necessary to bring separate enforcement proceedings against many individuals for a given precedent to have its intended effects under adjudication, since orders, like court decisions, only have direct legal bearing on named parties. They argue that these same limitations are not present under rulemaking, which enables agencies to establish broad and generally applicable standards in a single stroke. Even if those covered by a rule fail to comply voluntarily with its provisions, an agency will be faced merely with factual issues in subsequent enforcement proceedings and will not have to defend its interpretation of statutory law in each new case. The advantages of rulemaking as a more expedient way of achieving desired policy results are considered to be especially great in cases where the industry being regulated is large, since the expense and time required to bring enforcement proceedings against many firms may prove to be excessive.) 49-50 LE.

Delegation C/P
DJW '03
Skills

Agencies Rule Better Than Congress

1. Agency rule making is more comprehensive than Congressional decisions.

West, Assistant Professor of Political Science at Texas A&M University, 1985 (William F., Administrative Rulemaking: Politics and Processes, p53)

In sum, then, rulemaking is widely advocated as a more rational means of making policy than adjudication in several respects. It is arguably more comprehensive, since rules have greater breadth and since rulemaking allows for the consideration of a broader range of decisional criteria. Rulemaking is perceived to facilitate planning and coordination in this sense, whereas adjudication is seen as a reactive and potentially disjointed approach to policy making. Rulemaking is also considered to be more rational because it is a more effective (quicker and less costly) means than adjudication for agencies to achieve policy goals, once established. 53

2. Delegating authority is key to best policy implementation.

West, Assistant Professor of Political Science at Texas A&M University, 1985 (William F., Administrative Rulemaking: Politics and Processes, p20)

Finally, Congress may delegate broad policy-making authority because it lacks knowledge about the problem it is attempting to confront. With advancing technology, this has become increasingly important as an explanation for regulatory discretion. Sometimes knowledge is not available because the problem is new, as when the Federal Communications Commission (FCC) was established to regulate a nascent broadcast industry in the "public interest, convenience, or necessity."[12] Alternatively, relevant knowledge may exist, but may not reside in the legislature. Congress may articulate general goals in such instances with the expectation that administrative experts will fill in the policy details. In fact, this has occurred often. Since the New Deal, the notion that bureaucratic expertise will provide efficient solutions to problems has often served as a justification for expansive delegations. To quote James Landis, a leading "New Deal intellectual,"

with the rise of regulation the need for expertness became dominant: for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the conditions of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to

Delegation C/P
DJW '03
Skills

Agencies Rule Better Than Congress

3. Agencies solve better than Congress- Greater authority and stability.

Robert A. Anthony, foundation professor of law at George Mason University school of law, 8-11-98, CATO policy analysis, www.cato.org/pubs/pas/pa-312[Li Zhu]

The supine posture of the courts has created a dangerous opportunity for agencies to impose unlegislated compulsion upon citizens. An agency can impose a practical binding effect on the public whenever it sets forth a new requirement in a memorandum or other informal document that it declares to be an interpretation of an existing regulation. Affected private parties will have to live with the document unless they believe that they can persuade a court that it is not really an interpretation, or that it is plainly erroneous or inconsistent with the regulation. It is probably even harder to overturn an informal document on those grounds than it is to overturn a procedurally proper legislative rule, promulgated in accordance with the statutory authorities and procedures established by Congress and having the force of law. [11]

Obviously, this is upside down. Not only does it give binding force to informal documents that Congress has not authorized, but it gives them greater force than formal documents that Congress has authorized. In sum, the courts' toothless review standard enables the agencies to dictate to the public, with near-complete binding force, without authority from Congress.

Delegation C/P
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Agencies Solve Better Than Courts

FEDERAL AGENCIES SOLVE BETTER THAN THE COURTS BECAUSE THEY HAVE FACT FINDING RESPONSIBILITIES.

Eskridge and Frickey-(Professors of Law at Georgetown University and the University of Minnesota)-1994
William N. and Philip P., Harvard Law Review, "The Making of the Legal Process", Vol. 107:2013, 1994, pp 2038)

> Like Hurst, Hart explored the comparative advantages that legislatures and agencies have vis-à-vis courts. The function of legislatures should be to ascertain "legislative facts" about society in order to determine general rules. Courts should defer to the legislature's findings and policy judgments. Agencies have comparative institutional advantages over both courts and legislatures in applying rules or principles to problems, because they have the legislature's ability to engage in ambitious fact-finding and the courts' option of focusing on one problem at a time.[40] Hart discussed the various factors that should determine the mode of action agencies should take in particular situations: Should the agency proceed through legislature-like rule-making or through court-like adjudication? 2033

FEDERAL AGENCIES CAN SOLVE FOR THE COURTS' FAILURES

Neal Devins, Associate Professor of Law at William and Mary, 92 (California Law Review, July, ln, jlux)

Ironically, what makes Rosenberg's recommendation of political reform especially appealing is that Rehnquist Court's rulings increasingly speak of the need to defer to elected government, and not because elected government disregards activist decision-making. "federal agency interpretations of vague statutory language are to be upheld because substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it." n208 SJL

Del C/P
DJW '03
Skills

EPA Solves

In the past, the epa has used delegated authority effectively, and thus can solve the case.

Rich Fetzer, U.S. Environmental Protection Agency, Philadelphia, 2001
http://www.house.gov/kanjorski/trang.fetzer.htm

Concern has been raised that the EPA is acting too slowly to address gasoline vapors in people's homes. Some would ~~like the resi~~dents to believe that the threat is more severe than it is and so are suggesting that EPA's actions are not timely. However, the truth is that the gasoline vapors do not pose an acute risk to anyone in the community, and the work being done by EPA is effective. Therefore drastic or disruptive measures such as evacuation are simply not necessary. EPA has handled similar situations in the past, and in every case, whenever gasoline vapors are found in basements, the first and most fitting step is to install a vent system to reduce the vapors to safe levels and thus protect the health of residents for both the short and long term. The installation of these systems at residential properties is on schedule and meets the requirements of the Pennsylvania Department of Health.

Del CP
DJW '03
skills

AT: Del ø Constitutional

1 Delegation is widely accepted as necessary. The constitution doesn't preclude it.

Sotirios A. Barber. U. of Chicago, '75. The Constitution and the Delegation of Congressional Power. P. ____

However, Roche does not actually say that Marshall said that plenary jurisdiction includes the power to give power away. Roche says rather that this conclusion can be established by an argument "drawn from" Marshall. At that point Roche refers his readers to a thirty-four page article on the subject of executive prerogative in domestic emergency written by Roche himself.[37] Early in his article he states that

> most of the President's powers in domestic emergencies have grown out of congressional delegations of power. Nevertheless, there seems to be little point to an elaborate examination of these delegated powers because there are no existent criteria of limitation. In fact, when the President and Congress coordinately and cooperatively recognize the existence of an emergency, there appear to be no limits to the power that the legislature can constitutionally confer upon the executive to cope with the problem.[38]

He cites the Japanese-American "relocation" during World War II and the Court's decision in the *Korematsu* case as an example.[39] Later he states that the Court will "rarely if ever frustrate the exercise of real political power," that "real political power normally is shared between the President and Congress," and that "however the process of adjustment may be justified, the Constitution will be found flexible enough to authorize almost any conceivable congressional delegation of emergency power to the executive."[40] With this comment Roche excludes from his inquiry into executive prerogative that portion of executive power which results directly from congressional delegations. And this appears to be the extent of the support for his argument that "plenary jurisdiction includes power to give power away."

2-1 Empiracally it has been proven that Congress has the power to delegate

Douglas H. **Ginsburg,** Power Without Responsibility, David Schoenbrod, Yale University Press, 1993

Schoenbrod's reading of the first clause of our Constitution has long, but not strong, bloodlines. As he acknowledges, while the nondelegation doctrine seems to have been the unarticulated premise of a few Supreme Court decisions rendered in the 19th century, in none of them did the Court actually find an unconstitutional delegation. In *United States v. L. Cohen Grocery Co.* (1921), when the Court did strike down a statute that made it a crime to charge "unjust or unreasonable" prices for "any necessaries," it did so on the somewhat narrower ground that "Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country." In the next case clearly on point, *J.W. Hampton, Jr. & Co. v. United States* (1928), the Court upheld Congress's delegation to the president of the authority to impose tariffs to the extent necessary to offset differences in the cost of production between domestic and foreign producers. The Court thought it enough that Congress had stated an "intelligible principle" to guide, and presumably to confine, the discretion of the president in accord with the intent of the legislature.

Del C/P
DJW '03
Skills

AT: Del ø constitutional

13.1 The constitution doesn't preclude delegation to the executive branch.

Harold J. Krent. Associate Professor Kent-College. March '94, "Book Review: Delegation and it's discontents". Yale University Law Review, P. Lexis

"... Nonexclusivity of Constitutional Powers - Instead of allocating functions, the Constitution may prescribe a framework governing the branches. n140 For instance, in vesting "legislative powers" in Congress, n141 the Constitution plausibly refers to the power to initiate policy by passing laws to regulate commerce, raise and support armies, or establish post roads. n142 In this light, the Constitution does not claim for Congress the exclusive function of rule-making, but merely the authority to start the ball rolling by passing a law. It is up to Congress to enact a no-discrimination rule and then various agencies or the courts can exercise further rule-making through enforcement and interpretation. Absent the Civil Rights Act, however, the President presumably could not issue an Executive Order establishing the no-discrimination principle in the [*744] first place, at least to govern conduct in the private sector. n143 Although Congress has the exclusive power to initiate policy through legislation, the executive branch has a role in fleshing out that policy, and the judiciary has a role in resolving challenges to that policy as enacted by Congress n144 and applied by the agencies. n145 Congress in turn retains ultimate authority to change the evolving policy, subject to presidential veto. n146 Thus, rather than releasing distinct powers to each branch, the Constitution may instead provide a framework of interdependent responsibilities."

14.1 C/A Epstien and O'Halloran, congress has the power to delegate authority.

[redacted]-del
DJW '03
Skills

AT: Non Del Key to Policy

T/ Non delegation hurts political policy; delegation is key to the political process.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

Note that our theory, if correct, contradicts the key predictions of the nondelegation forces. Rather than portraying Congress as delegating ever-increasing authority to executive actors, we assert that levels of delegation will rise and fall over time in response to changing external factors. Instead of assuming that legislators have no interest in monitoring delegated authority, we assert that they will empower interest groups, the courts, and other actors to challenge agency actions through administrative procedures as well as direct oversight. Finally, a revitalized nondelegation doctrine would have the effect of shifting back to Congress precisely those policy areas, such as the reduction of pork barrel benefits, that it handles poorly relative to the Executive, so limits on delegation would only tend to diminish the efficacy of the political process.

T/ To create the most effective policy some delegation must be allowed so as to reap the expertise of agencies.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

The conclusion is that Congress does oversee agency actions, but it must still resolve the principal-agent problem of oversight and control by delegating the appropriate amount of authority to agencies in the appropriate way. Delegation that is too limited or tightly constrained will deny Congress the benefits of agency expertise and reduced workload that motivated the initial delegation of authority. On the other hand, by delegating too much power to an agency, Congress runs the risk of allowing policies to be enacted that are contrary to the wishes of legislators and their constituents. It is this trade-off between expertise and control informational gains and distributive losses that lies at the heart of this view of administrative procedures.

Del C/P
DJW '03
Skills

AT: Non Del Key to Policy

Policy making is decided by personal preferences and motives, a balance and SOP is essential.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

[We now juxtapose the legislative organization literature with the delegation literature to address our central questions of how much authority Congress delegates to the executive branch, and why Congress delegates more authority in some policy areas than in others.[38] The starting point for our analysis, as with all political analyses, is the equation that preferences are filtered through institutions to produce policy. That is, individuals and their preferences are the fundamental building blocks for political outcomes, but they do not, in and of themselves, predict a particular policy; one must also know the institutions that aggregate these preferences, as well as how they operate in a given circumstance. When predicting the outcome of a legislative election, for instance, one must not only know the partisan preferences of the electorate, but also the electoral system being used, e.g., proportional representation or plurality-winner elections, district-based or at-large, primaries or no primaries, and so on.]

Del C/P
DJW03
Skills

Non del → is bad

[1] Read card in Loss of liberty section, #3, that non delegation threatens liberty.

[2] Non delegation is not enforcable

Federalist Society, Administrative Law and Regulation, 1999
http://www.fed-soc.org/publications/practicegroupnewsletters/administrativelaw/sdebates

Indeed, not only has the doctrine never existed, but, according to Pierce, it should not exist. First, in his view, it is not "justiciable." There is no standard that can be applied to the doctrine to implement it because judges would be incapable of distinguishing between non-delegable "fundamental" policy decisions and other, delegable policy decisions. In summary, because the non-delegation doctrine is not enforceable under any coherent standard, its enforcement would not be guided by any standards at all, other than by the rule of ipse dixit. Further, actually enforcing the version of the non-delegation doctrine that holds that Congress cannot constitutionally delegate its policy-making powers would require deleting eighty percent of the United States Code, which simply is "not going to happen."

Professor Pierce also argued against enforcing the non-delegation doctrine because specifically drawn legislation is undesirable. Pierce cited the "Delaney clauses" as an example of Congress legislating with too much specificity. There, because of legislation prohibiting the marketing of food additives and drugs that posed any risk of causing cancer, thousands of beneficial and desirable substances would not have been marketed but for "a bunch of legal subterfuges" implemented by "clever" regulating agencies to avoid the restrictions imposed by the specifically-drafted legislative clauses.

[3] Non delegation is not necessary

Federalist Society, Administrative Law and Regulation, 1999
http://www.fed-soc.org/publications/practicegroupnewsletters/administrativelaw/sdebates

Finally, Professor Pierce argued that development of other administrative law doctrines has made the non-delegation doctrine unnecessary. For example, the Chevron doctrine eliminated the judicial lottery by resolving ambiguities in legislation to confer broad discretion in agencies. Before Chevron (Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)), Congress would grant broad discretion to the agencies, take credit for the legislation, and gamble that it could win in court if and when the agency went too far. Chevron's, doctrine of upholding administrative action in cases of legislative ambiguity, however, gave Congress a "very powerful incentive" to limit the discretion given to the agencies, particularly when the legislative and executive branches are divided between the political parties.

Del C/P
DJW '03
Skills

Congress Delegates Now

Congress regularly delegates to executive agencies.

Marci A. **Hamilton,** Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, 1999

The Court has intoned pragmatic reasons for its refusal to draw such a line, saying that delegation of the details is a practical necessity.[8] In fact, the Court has given Congress considerably more latitude than practical realities require. Under the Constitution's lax rendering of Article I, Congress has had wide latitude to delegate its obligations and need only provide an "intelligible principle" to guide the executive branch's lawmaking.[9] Having started down this path in the 1930s, the cases have slid down the proverbial slippery slope. We have reached the point where Congress regularly delegates its lawmaking responsibilities to the executive branch, whether it be to the President or to an executive agency.[10]

Del C/P
PJW '03
Skills

AT: ø Accountable

①T/ Congressional oversight makes delegation accountable and increases efficiency.

David Epstein and Sharyn O'Halloran, Both, Poli Sci. Stanford, January '99 , Cardozo Law Review, P. Lexis [Kyle Warneck]

Arguments in favor of strengthening the nondelegation doctrine rest on the assumption that congressional policymaking is centered around the provision of particularized benefits to favored constituents, leaving legislators too little time to consider important pieces of public policy. A stronger interpretation of the nondelegation doctrine would, therefore, force Congress to take up major issues that it had been leaving to the executive branch, thus restoring accountability to public policy and curbing a runaway bureaucracy.

This Article provides three responses to this requirement. First, our data show that Congress does not delegate wholesale to the Executive. Even on important policy issues, some of which, like the budget and tax policy, require considerable time and expertise, Congress takes a major role in specifying the details of policy. Second, when Congress does delegate, it also constrains executive discretion with restrictive administrative procedures. In fact, legislators carefully adjust and readjust discretion over time and across issue areas so as to balance the marginal costs and benefits of legislative action against those of delegation. Congress is not free from particularistic legislation, but neither does it devote its energies solely to narrow, individually tailored policy at the expense of larger issues.

Third, delegation is not only a convenient means to allocate work across the branches, but it is also a necessary counterbalance to the concentration of power in the hands of committees. In an era where public policy becomes ever more complex, the only way for Congress to make all important policy decisions internally would be to concentrate significant amounts of authority in the [*986] hands of powerful committee and subcommittee leaders, once again surrendering policy to a narrow subset of its members. From the standpoint of floor voters this is little better than complete abdication to executive branch agencies. As it now works, the system of delegation allows legislators to play off committees against agencies, dividing the labor across the branches so that no one set of actors dominates. Given this perspective, a resuscitated nondelegation doctrine would not only be unnecessary but also would threaten the very individual liberties that it purports to protect.

Nondel C/P
DJW '03
Skills

1NC Shell

Text

Congress will strip the authority from the _____ (agency) to enact the _____ (plan mandates)

Observation 1: Competition

[A.] Non-Delegation is alive and well

Federalist Society, Administrative Law and Regulation, 1999
http://www.fed-soc.org/publications/practicegroupnewsletters/administrativelaw/sdebates

The first panelist, David Schoenbrod of the New York Law School, argued that the non-delegation doctrine is alive and well. First, Professor Schoenbrod described the evils of broad delegations, arguing that delegation by Congress of its legislative authority to the executive branch vastly increases the amount of Federal regulation. He explained that Congress is able, through broad delegations, to take credit for bestowing rights but simultaneously is able to avoid the blame for imposing duties. Consequently, Congress has an incentive to launch more sweeping federal regulatory programs than if it were held strictly responsible for the laws enacted.

Second, Professor Schoenbrod argued that "life could go on without delegation." Without broad delegations by Congress, Schoenbrod asserted that "more would be done through private ordering, common law, and state and local rules." Schoenbrod cited as a means of achieving such a decentralized world the Congressional Responsibility Act introduced in 1997 by Senator Brownback and Representative Hayworth which calls for congressional enactment of agency rules.]

Non del C/P
DJW '03
Skills

1NC Shell

B.1 Net Benefits: Non-Delegation is key to the Separation of powers; without it liberty is destroyed.

Marci A. **Hamilton,** Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, 1999

The Constitution sets into play a competing set of institutions intended to share and check national and state power. It rests on the presupposition that no entity can be trusted with too much power, because any "concentration of power in the hands of a single branch is a threat to liberty."[84]

The plasticity of power makes it necessary to craft mechanisms to meet the inevitable abuses of power that arise despite the constitutional structure. The line item veto was one attempt, but misguided. Such mechanisms must be monitored to ensure the constitutional structure is not doubly offended by abuses of power cured by unconstitutional means. The principles underlying the nondelegation doctrine, which keep congressional, presidential, and bureaucratic power cabined and are drawn from each structure's peculiar characteristics, are valuable weapons in the courts' separation of powers arsenal.

The nondelegation doctrine could move the constitutional balance of power back toward the balance envisioned by the Framers by forcing legislators to make the law and by rendering it more difficult for the executive branch to enlarge its sphere of power. By threatening laws that are made by the executive branch, rather than the legislative, the nondelegation doctrine encourages the executive branch to move closer to the one-man show envisioned by the Framers. If properly functioning, the nondelegation doctrine leads to representation of factions, the people, *and* the Zeitgeist.

Non-del C/P
DJW '03
Skills

1NC Shell

Observation II: Solvency

A.1 Non-delegation would restore accountability to public policy and would solve better than delegation.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharvn. 20 Cardozo L. Rev. pg)

Arguments in favor of strengthening the nondelegation doctrine rest on the assumption that congressional policymaking is centered around the provision of particularized benefits to favored constituents, leaving legislators too little time to consider important pieces of public policy. A stronger interpretation of the nondelegation doctrine would, therefore, force Congress to take up major issues that it had been leaving to the executive branch, thus restoring accountability to public policy and curbing a runaway bureaucracy.

B.1 Non-delegation is key to public policy, first because executive agencies are unable to undertake policies, and 2nd because once delegated legislators show no interest in the policy.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

Attacks on delegation rest on three assumptions: first, legislators delegate many important policy decisions to executive agencies; second, once authority has been delegated, legislators show little interest in overseeing its exercise; and third, restricting Congress's ability to delegate will improve the quality of public policy. Hence, delegation is equivalent to the abdication of Congress's legislative duties under Article I of the Constitution, resulting in policy detrimental to the public good.

Non-del
DJW '03
Skills

1NC Shell (liberty add on)

Non-delegation is crucial to liberty; delegation violates the constitution destroying liberty.

Marci A. **Hamilton,** Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, 1999

[These agencies comprise a bureaucracy, which makes them less likely to take decisive action—the advantage offered by the President on certain issues. Yet, they are so removed from accountability that the branch's size does not generate the deliberative advantages provided by the structure of the legislature. Agencies are prone to be arbitrary and unaccountable as they spin in their self-executed bureaucratic orbits. The nondelegation doctrine in this scenario is crucial to liberty, because it prohibits general lawmaking from occurring in a structure both capable of arbitrary action and removed from the national scrutiny to which both Congress and the President are exposed by the constitutional structure. From a constitutional, structural perspective, delegation to agencies is even worse than delegation to the President.[79]]

Non-del
DJW '03
Skills

Non Delegation → SOP

Non delegation is key to SOP; delegation puts too much power in one source destroying SOP

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev.

Professors David Schoenbrod and Marci Hamilton, for instance, argue in their *amicus curiae* brief for *Raines v. Byrd*[9] (an earlier version of *Clinton v. City of New York*) that, in delegating authority to the Executive, "Congress generally avoids accountability by leaving the hard policy choices to unelected and unaccountable agencies."[10] Delegation thus leads to a dangerous concentration of power in one branch of government, hidden from public scrutiny and operating at the expense of the public good for the benefit of a few well-placed individuals.

Delegation places too much power in one person or agency.

Marci A. **Hamilton,** Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, 1999

When lawmaking is delegated to the President, the deliberative possibilities and the many ports of entry available through the legislature are quelled.[67] The President can take unilateral action, which is less likely to be filtered through the society's various interests that affect the law under consideration.[68] The principle of nondelegation meets the Framers' concern that the presidency would be the "fetus of a monarchy" by prohibiting the President from taking over decisions structurally more appropriate to the legislature.[69] It is a critical check on the Executive's likely abuses of power forecast by the Framers.

Non-del
DJW '03
Skills

Non-Del Key To Liberty

The legislative or non-delegation process is essential to the protection of liberty; delegation is worthless in protecting liberty.

Nadine **Strossen**, Professor of Law at the New York Law School; President, American Civil Liberties Union, Delegation As A Danger To Liberty, 19**99**.

My point is not that administrative procedure and judicial review of agency action are worthless in protecting liberty. Rather, my point is that the legislative process is more effective than the administrative process in doing so. The United States Supreme Court apparently agrees. Consider, for example, its 1958 ruling in *Kent v. Dulles*.[22] In *Kent*, the Court chose to construe narrowly a statute that gave the Secretary of State discretion to issue or deny passports. Specifically, the Court held that the statute did not authorize the Secretary's regulations denying passports to people affiliated with th Communist Party.[23] The Court's opinion, written by the great civil libertarian, Justice William O. Douglas, well describes delegation's adverse impact on liberty. He wrote:

> [T]he right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the lawmaking functions of the Congress.... Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.[24]

The cornerstone of the Court's conclusion was that the legislative process offers a protection for liberty for which the administrative process is not an adequate substitute. Unfortunately, despite *Kent's* broad wording, later Supreme Court decisions have not so strictly limited delegated lawmaking, even when it entrenches upon First Amendment rights.

Non-del
DJW '03
skills

Del Destroys Liberty

It is empiracally proven that delegation destroys liberty; when delegated authority, the FDA obstructed liberty.

Nadine **Strossen**, Professor of Law at the New York Law School; President, American Civil Liberties Union, Delegation As A Danger To Liberty, 1999.

For a second specific example of delegation's anti-liberty impact, consider the regulations designed to curb smoking th were proposed by the Food and Drug Administration ("FDA" in 1995.[39] These regulations included restraints on tobacco advertising in the print media and on billboards,[40] raising very serious First Amendment problems.[41]

Congress has not outlawed such advertising. Rather, the FDA claimed authority to enact the regulation under a broadly worded delegation.[42] The FDA said that it would withdraw the proposed regulation only if Congress were to enact a similar statute.[43] Therefore, even if both houses of Congress passed a bill barring FDA regulation of tobacco advertising, the presidential veto that would likely follow[44] and the probable lack of congressional supermajorities to override it[45] would mean that the FDA could still regulate this speech. Once again, as in the gag rule situation, thanks to delegation, the hurdles that were built into the legislative process to protect liberty ironically end up obstructing its protection.

The FCC also abused its delegated power showing how delegation destroys liberty

Nadine **Strossen**, Professor of Law at the New York Law School; President, American Civil Liberties Union, Delegation As A Danger To Liberty, 1999.

A third example of delegated lawmaking that undermined liberty involved the 1975 sanction by the Federal Communications Commission ("FCC" of Pacifica Radio for broadcasting George Carlin's famous "Seven Dirty Words' monologue.[46] The FCC based its decision on statutory language prohibiting the broadcast of "obscene, indecent, or profane language."[47] The Supreme Court ultimately upheld the FCC on the ground that the broadcast, while not *obscene*, was *indecent* under the statute.[48] But the term *indecent* is so open-ended as to confer on the FCC virtually unlimited lawmaking authority.[49] Indeed, the United States Court of Appeals for the District of Columbia Circuit had reversed the FCC's opinion on the ground that it was rulemaking in disguise and that the resulting rule was overbroad.[50] The upshot of this delegation was that the FCC got to be both lawmaker and law enforcer over the content of constitutionally protected speech to boot.

The Supreme Court has seen fit to tolerate most delegation.

Whether or not this tolerance is justified,[51] Congress has an independent duty to protect liberty by exercising its responsibility to make the law.

Non del
DJ 4 03
Skills

Del Destroys Liberty

Delegation threatens liberty because Congress alone is responsible for protecting liberty; not agencies

Nadine **Strossen**, Professor of Law at the New York Law School; President, American Civil Liberties Union, Delegation As A Danger To Liberty, 1999.

In significant respects, liberty is threatened when the law-making function of government is delegated to unelected, unaccountable bureaucrats. In his pivotal opinion in the landmark case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] Justice John Marshall Harlan reminded us that members of Congress, along with state legislatures, are "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[2] Justice Harlan's statement prompts this question: What exactly *is* Congress' essential constitutional role as a guardian of liberty? And this question, in turn, triggers another: What is the relevant concept of liberty?

Agencies cannot protect liberty; only Congress can

Nadine **Strossen**, Professor of Law at the New York Law School; President, American Civil Liberties Union, Delegation As A Danger To Liberty, 1999.

The fourth respect in which delegation threatens liberty is consolidation of lawmaking and law enforcement power in the same hands.[16]

I do not mean to suggest that agencies can make whatever laws they want, whenever they want. The constraints on agency lawmaking that do exist, however, do not adequately protect individual liberty. First, agencies must comply with the Administrative Procedure Act.[17] As the name suggests, though, those requirements are simply procedural in nature. They merely slow down agency lawmaking and do not necessarily weed out laws that violate liberty or lack an important public purpose.

Non-del
DJW '03
Skills

Agencies ø Solve

Agencies are unable to perform the tasks of delegation and legislators only delegate to save time.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

In making this institutional choice, legislators face costs either way. Making explicit laws requires legislative time and energy that might be profitably spent on more electorally productive activities. After all, one of the reasons bureaucracies are created is for agencies to implement policies in areas where Congress has neither the time nor expertise to micro-manage policy decisions, and by restricting flexibility, Congress would be limiting agencies' ability to adjust to changing circumstances. This tradeoff is captured well by Terry Moe in his discussion of regulatory structure:

> The most direct way [to control agencies] is for today's authorities to specify, in excruciating detail, precisely what the agency is to do and how it is to do it, leaving as little as possible to the discretionary judgment of bureaucrats—and thus as little as possible for future authorities to exercise control over, short of passing new legislation. . . . Obviously, this is not a formula for creating effective organizations. In the interests of public protection, agencies are knowingly burdened with cumbersome, complicated, technically inappropriate structures that undermine their capacity to perform their jobs well.[40]

Executive agencies can never solve because of their own personal interests.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

Congressional control over executive agencies, however, will always be imperfect. Although legislators may try to influence agency actions through administrative procedures, these controls can only ameliorate, but never completely resolve, the basic problem of trying to oversee better-informed executive actors. As Moe states:

> Experts have their own interests—in career, in autonomy—that may conflict with those of [legislators]. And, due largely to experts' specialized knowledge and the often intangible nature of their outputs, [Congress] cannot know exactly what its expert agents are doing or why. These are problems of conflict of interest and asymmetric information, and they are unavoidable.

Non-del
DJW'03
Skills

Agencies ø Solve

The problem with delegation is that agencies can enact policies against congress's wishes.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

[According to the administrative procedures literature, the basic problem that Congress faces when delegating authority is one of *bureaucratic drift*, or the ability of an agency to enact policies different from those preferred by the enacting coalition. This phenomenon, illustrated in Figure 1 below, occurs because agencies can make regulations that can only be overturned with the combined assent of the House, Senate, and the President. Let the ideal points of these three actors be *H*, *S*, and *P*, respectively, and assume that Congress passes and the President signs legislation designed to implement policy *X*. Then the Pareto set, or the set of outcomes for which no improvement for one actor is possible without disadvantaging any other actor, is the triangle joining the three ideal points. Now assume that the agency has policy preference *A*. The agency maximizes its utility by setting policy equal to *X'*, the point in the Pareto set closest to its ideal point. Even though this policy is not what Congress and the President originally intended for it to be, the necessary coalition to overturn agency decisions cannot be formed.]

Legislators dislike delegation because of the fear that agencies are influenced by the president.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

[However, delegation implies surrendering at least some control over policy, and legislators will be loathe to relinquish authority in politically sensitive policy areas where they cannot be assured that the executive branch will carry out their intent. To the extent that legislators delegate to the executive branch, they face principal-agent problems of oversight and control since agencies will be influenced by the President, by interest groups, by the courts, and by the bureaucrats themselves. If agencies are so influenced, they may abuse their discretionary authority and enact policies with which Congress is likely to disagree.]

Nondel
DJW03
Skills

Agencies ∅ Solve

Agencies lack the political muscle that Congress has, the EPA proved this when it failed to stop the environmental danger posed by leaded gasoline.

David **Shoenbrod**, Law, New York Law School, Delegation and Democracy: A Reply To My Critics, 1993

While the problem is often too much regulation, sometimes it is too little regulation. Because legislators also escape blame for the resulting disappointments when agencies fail to deliver on statutory promises, Congress is insensitive to the delay and uncertainty that frequently results when the agency lacks the political muscle needed to make, expeditiously, the hard choices that Congress ducked.[74] What first alerted me to the dangers of delegation was that the Environmental Protection Agency ("EPA") was years too late in exercising its delegated power to stop the danger posed to young children from leaded gasoline. I am convinced that the national government would have dealt with leaded gasoline as a health hazard years earlier if Congress could not have delegated that responsibility to the EPA in 1970.[75]

Nondel
DJW '03
Skills

Agencies Easily Influenced

To save time, legislators just delegate authority to agencies who are easily influenced by organized groups who pressure them.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, 99 (David, Sharyn, 20 Cardozo L. Rev. pg)

This point was also argued vigorously by Lowi, who accused legislators of abandoning their duties by delegating power to unelected bureaucrats and omnipotent congressional committees.[23] Lowi believed that the original delegations of power, as in the Interstate Commerce Commission, were well-conceived and structured so as to make agencies adhere to congressional intent. But, over time, delegation became less and less tied to specific mandates and more open-ended, allowing agencies an illegitimate amount of discretion. Legislators had abdicated responsibility for the execution of public policy, to be replaced by "interest group liberalism," meaning that agencies reacted to the wishes of those organized groups that pressured them for favorable policy decisions.[24] This, in turn, was wont to devolve into agency capture—public power exercised for the benefit of a few private interests against the public good, and unsupervised by democratically elected legislators. Similarly, iron triangles or subgovernments may form, in which congressional committees, interest groups and bureaucrats combine in an unholy trinity to deliver benefits to an interest group's members at the public's expense.

Legislators and the president both have personal preferences while the agencies are easily influenced.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, 99 (David, Sharyn, 20 Cardozo L. Rev. pg)

The key actors in this situation are legislators, the President and executive agencies. We assume the preferences of legislators and the President to be, first and foremost, reelection. They may have other concerns as well, such as the desire for power, rewarding friends, and good government, but to satisfy any of the above they must first retain public office. The preferences of bureaucrats are more difficult to specify, as they lack any direct electoral motivation. The bureaucracy literature suggests that they may be controlled by their political superiors, driven by the desire to expand their budgets, seek to protect their professional reputation, or angle for lucrative post-agency positions.[39]

1-73

Non-del
DJW '03
Skills

Agencies ø Accountable

Agencies may act arbitrarily and officials would be less accountable to voters because agencies are unchecked.

Marci A. **Hamilton,** Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, 1999

A different, though equally compelling justification for application of the nondelegation doctrine can be found when Congress delegates its lawmaking power to administrative agencies. The dangers posed by the administrative state are not only that it may act arbitrarily and capriciously, but also that such officials are less accountable to the voters.[78] The President is checked to some degree by the voting booth and public opinion, but the administrative agency suffers little deterrence from either. There is no constitutional structure that ensures deliberation or accountability, and the agencies are not constitutionally required to report their activities.

Non-del
PJW '03
Skills

Delegation ø Solve

Delegation allows legislators to shift blame causing unpopular policies to be passed; In addition delegation makes it too easy to pass new laws.

Nadine **Strossen**, Professor of Law at the New York Law School; President, American Civil Liberties Union, Delegation As A Danger To Liberty, 1999.

Second, delegation allows legislators and the President to shift much of the blame for unpopular government policies to the agencies. Therefore, an important deterrent to enacting unpopular *laws* does not deter unpopular *regulations*.[12]

Third, delegation makes it far easier to impose new laws. In James Madison's words, Article I was meant to curb the "facility and excess of lawmaking" by requiring that statutes go through a bicameral legislature and the President.[13] Madison's view that the legislative process would tend to discourage narrowly partisan laws — though not eliminate them — has been borne out by much recent political science literature.[14] The differing constituencies of representatives, senators, and the President — and the differing lengths of their terms in office — make it likely that they will be partial to varying interests. This diversity of viewpoint, coupled with the greater difficulty of prevailing in three forums rather than one, means that popular support sufficient to produce a bare majority in a unicameral legislature would probably fail to get a statute through the Article I process.[15]

Non-del
DJW '03
Skills

Delegation ∅ Solve

Congress cheats when it delegates because they get the benefits of lawmaking while shifting the blame upon agencies; 1970 Clean air act proves

David **Shoenbrod**, Law, New York Law School, Remarks To The Board Of Trustees Of The Natural Resources Defense Council, 1993

1. *Pollution control works best when the legislature makes the law.* The clear successes have come from legislatures: for example, the clean up of new cars and the legislated standards on toxic pollutants and acid rain in the 1990 Clean Air Act.[5] No one thinks the legislature is perfect. Environmentalists worry that industry's money counts for too much. Industry worries that voters will not realize that they too pay for pollution control. In the end, environmentalists have done well when Congress has faced the hard choices. For example, a Brookings Institution study argues Congress has reduced new car emissions too much.[6]

2. *When Congress delegates, it cheats.* It cheated by pretending to decide how much to clean up, but covertly leaving this tough choice to EPA. For example, the authors of the 1970 Clean Air Act officially instructed EPA to protect health without regard to cost but wanted the agency to consider costs without implicating them.[7] EPA has done so under Republicans and Democrats alike. Now, with the battle raging over revisions of the ozone and particulate standards, EPA is not being entirely forthright in claiming that it cannot consider cost. The "regulatory reform" bills that would put environmental protection on a cost-benefit standard also cheat, because that standard is so malleable.

Congress also cheated by claiming to do the states a favor by letting them apportion the clean up burden among polluters. This was no favor. Congress gets to take credit for promising a perfectly clean environment; states get to take the blame for imposing the costs.

Non-del
DJW 03
Skills

Del Is Not Constitutional

Liberty and democracy rest on a legislators vote on a law, delegation destroys this and thus is not constitutional

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev.

Elsewhere, David Schoenbrod argues forcefully that Congress oversteps its constitutional bounds when delegating broad discretion to executive agencies; that Congress could find the time and resources necessary to write detailed laws if it really wanted to; and that, in practice, delegation creates perverse incentives that lead to such nonsensical policies as burning oranges during the Great Depression.[12] "Delegation allows Congress to stay silent about [regulatory costs and benefits], so it severs the link between the legislator's vote and the law, upon which depend both democratic accountability and the safeguards of liberty provided by Article I."[13]

Non delegation, however, is constitutional.

Marci A. **Hamilton,** Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, 1999

This Article concludes that the nondelegation doctrine is consistent with the Constitution's intended structure and that it serves important constitutional ends. The Supreme Court's recent warming to its fundamental principles is a salutary development, whether applied to the President or to administrative agencies.

Non-del
DJW '03
Skills

Delegation is ø Constitutional

Non delegation is rooted in the Constitution; delegation destroys the effectiveness of public policy and is unconstitutional b/c of the concentration of power.

Marci A. **Hamilton,** Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, 1999

There are those who view the nondelegation doctrine as a dead letter.[1] Some even go so far as to celebrate its passing.[2] Me-thinks they doth protest too much. The nondelegation doctrine is rooted in the structure of the Constitution, which distinguishes between legislative and executive power. Lawmaking power is given to Congress and enforcement power to the President.[3] In its simplest terms, it is a rule that prohibits Congress from "forsaking its [lawmaking] duties" by handing them off to the executive branch.[4] Rather, Congress must embrace its particular responsibilities, while the Executive does the same. In Justice Kennedy's memorable words, "[a]bdication of responsibility is not part of the constitutional design."[5]

Nondel
DJW '03
Skills

AT: Del C/P → Political Advantage

Congress only delegates authority to agencies when they are unable to exercise policy making effectively, thus congress avoids blame.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

So, when deciding where policy will be made, legislators will trade off the internal costs of policymaking in committees against the external costs of delegating authority to regulatory agencies. We can think of Congress's decision of where to make policy as equivalent to a firm's make-or-buy decision—legislators can either produce policy internally, or they can subcontract it out (delegate) to the Executive. In making this decision, legislators face a continuum of possibilities: Congress can do everything itself by writing specific legislation and leave nothing to the Executive; it can give everything to the Executive by writing very general laws and do nothing itself; or it can choose any alternative in between. So, Congress will choose the point along this continuum—how much discretionary authority to delegate—that balances these two types of costs at the margin.]

As a result, Congress delegates to the Executive in those areas which it handles least efficiently, where the committee system is most prone to over-logrolling and/or the under-provision of expertise. Conversely, it retains control over those areas where the political disadvantages of delegation—loss of control due to the principal-agent problem—outweigh the advantages. Just as companies subcontract out the jobs that they perform less efficiently than the market, legislators subcontract out the details of policy that they produce at a greater political cost than executive agencies.]

Delegation is based upon legislators' personal political ambitions.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

Note also that it is Congress who chooses where policy is made. Legislators can either write detailed, exacting laws, in which case the executive branch will have little or no substantive input into policy, they can delegate the details to agencies, thereby giving the executive branch a substantial role in the policymaking process, or they can pick any point in between. Since legislators' primary goal is reelection, it follows that policy will be made so as to maximize legislators' reelection chances. Thus, delegation will follow the natural fault lines of legislators' political advantage.]

Nondel
DJW'03
Skills

AT: Del C/P → Political Advantage

Congress only delegates authority so that the agencies recieve the blame; legislators use delegation to further their own political interests.

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn. 20 Cardozo L. Rev. pg)

[Peter Aranson, Ernest Gellhorn, and Glen Robinson similarly construe delegation as a means of delivering private benefits to favored constituents.[11] They pose the problem as one of having legislation spelled out in statutes, in which case it will be enforced by the courts or by delegating legislative power to agencies. By having the executive branch fill in the regulatory details, Congress can shift some degree of both the credit and blame to the agency. If delegation helps Congress shift to the agency a preponderantly large part of the blame, then it will prefer agency regulations to judicially enforced statutes, and vice-versa if delegation would shift more credit to executive agents.]

Congress only delegates on high risk issues to avoid political blame

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David, Sharyn, 20 Cardozo L. Rev. pg)

Table 4 shows the acts with the highest levels of executive discretion. These laws are obviously quite different in nature from those above. High-delegation laws tend to concern issues of defense and foreign policy (the National Aeronautics and Space Act of 1958[61] and the Selective Service Amendments Act of 1969[62]), environmental policy (the Air Quality Act of 1967,[63] the Water Quality Improvement Act of 1970,[64] and the Clear Air Act Amendments of 1966[65]), and health and general social policy (the Maternal and Child Health and Mental Retardation Act of 1963,[66] the Health Research Facilities Amendments of 1965,[67] and the Stewart B. McKinney Homeless Assistance Act of 1987[68]). Traditionally, Congress has willingly ceded the Executive great leeway in these areas, as the results of ill-formed policy are often drastic and the political advantages of well-formulated laws are not nearly as evident—they have only a political downside.

Non-del
DJW'03
Skills

AT: Del C/P → Political Advantage

legislators use committees to increase their status

Epstien and O'Halloran, Political science professor at Columbia and professor at Stanford Graduate School of Business, The Nondelegation Doctrine and The Separation of Powers: A Political Science Approach, **99** (David. Sharvn. 20 Cardozo L. Rev. pg)

To understand policymaking through the committee system, it is convenient to begin with David Mayhew's book, *The Electoral Connection*,[16] which lays out a vision of congressional organization as a rationally constructed, conscious choice made by reelection-seeking individuals. Mayhew emphasized the importance of the committee system as a basis for members to pursue their electoral goals through the activities of advertising, position taking, and credit claiming. Legislators, thus, use committees as platforms to translate their constituents' preferences into policy outcomes. Mayhew's study remains influential mainly due to its methodological focus: it took a ground-up view of legislative organization and built upon this edifice a theory of public policy.

A1

Counterpizzle Shizzle
DJW '03
Your Mom

____/____

1NC Executive Order Shell

Text: The President of the United states, acting through an Executive Order, should (insert Aff plan)

Observation One: Solvency

The president is in control of enviromental goals

David **Driessen**, project attorney, Natural Resources Defense Council, **1991** (Boston College Environmental Affairs Law Review, p. lexis)

[*295] The President has used his foreign affairs power to promote international environmental goals -- indeed, diplomatic activity, ranging from informal dispute resolution to the negotiation of treaties, remains the most important means of resolving international environmental problems. n46 The Montreal Protocol, n47 limiting the worldwide production of ozone-destroying CFCs, represents just one prominent example of the importance of executive negotiations in international environmental affairs. n48 The President's custom of active participation in international environmental affairs provides another source of law supporting presidential power in this area, despite the lack of specific textual support in the Constitution.

pres control int env

Counterpizzle Shizzle
DJW '03
Your Mom INC Executive Order Shell ____/____

Observation two: Net benifits

The President doesn't have to publisize Executive orders to avoid politics

Ruth **Morgan**, Southern Methodist University, **1970**
(~~The Pros~~ and ~~Cons of~~ Civil Rights)
The president

[Weighing the considerations listed above, the President may select the Executive order as the instrument for action in four types of situations. First, he may issue an order when Executive, rather than legislative, action is being demanded. This was the case with Roosevelt's FEPC orders. Second, he may select the Executive order when he can carry out the policy administratively and wants to avoid involving it in congressional controversy. Truman did this with regard to military desegregation. Third, if a politically important segment of the American public is demanding legislation, and if the President considers the risk of congressional defeat or reprisal to be too great, he may issue an Executive order rather than use his leadership to secure congressional action. President Kennedy's order to establish the Committee on Equal Employment Opportunity illustrates this point. Finally, the President may request legislation and then issue an Executive order if Congress does not respond with a law. President Truman's Executive orders on fair employment practices are an example of this situation.

A President will not attempt to publicize an Executive order if he wishes to avoid controversy that might create public resistance or might cause congressional reprisal against other programs. This was clearly the case when President Kennedy issued the fair housing order. On the other hand, if political party advantage is an important factor in issuing the order, then the President will announce it at a time and in a manner to attract attention. President Truman followed this course with the military desegregation and government fair employment practices orders.]

183

Counterpizzle Shizzle
DJW '03
Your Mom E

___/___

President Key to action

Ruth Morgan, Southern Methodist University, 1970
(~~The Pres~~ and ~~Cons of~~ Civil Rights)
the president

In addition to a consideration of political ramifications, the inaction of other policy-makers frequently forces an issue to the President's desk. The reluctance of others to act may be at the administrative level: a program's executives may be unwilling or unable to put a policy into effect. This was true with regard to housing, for the few antidiscrimination rules and regulations adopted by the housing agencies had little effect. Furthermore, without a Presidential or congressional directive, some administrators showed a reluctance to interfere with the local control of occupancy patterns. In the case of the armed services, the Selective Service Act of 1940 stipulated nondiscrimination in the selection and training of men. Yet this was not interpreted as forbidding segregated units, but rather as requiring that Negroes be inducted in a proportion equal to their distribution in the general population. Therefore, further governmental action was needed to desegregate the military in the 1940's, especially since the "separate-but-equal" doctrine was not overturned by the Supreme Court until 1954.

On the other hand, it may be congressional failure to enact legislation that prompts Presidential decision. This can be noted in the history of fair employment practices. For a period of more than two decades Congress refused to legislate on employment practices, even though members of both political parties introduced a steady flow of bills in both houses.

Prez K

184

Counterpizzle Shizzle
DJW '03
Your Mom He's a lawmaker ____/____

The president Makes Laws

Ruth Morgan, Southern ~~University~~ Methodist University, 1970 (The president and civil Rights)

[As lawmakers, Congress and the President are not passive vehicles equally accessible to all citizens. If a strong want or need gets clogged in the congressional machinery, a safety valve is a necessity in a viable political system. In ours, this function is sometimes performed by the courts and sometimes by the President. What is clear is that when a policy void exists because of congressional inaction, the system can provide law for the nation if the President does not hesitate to move in advance of Congress and if he has sufficient national support. The President, therefore, not only plays an important role in transforming interests and demands into laws, but on occasion also makes those laws.]

President makes laws

The Supreme Court interprets the president as a law maker

Ruth **Morgan**, Southern Methodist University, **1970**
(~~The Pros and Cons of~~ Civil Rights)
The president

[On the other hand, a Supreme Court decision in 1899 interpreted this clause as a grant of authority to make policy. Justice Miller, writing for the Court, said that the President's constitutional duty to "take care that the laws be faithfully executed" is not "limited to the enforcement of acts of Congress or of treaties according to their express terms," but includes "the rights, duties, and obligations growing out of the Constitution itself . . . and all the protection implied by the nature of the government under the Constitution."[15] Presidents have claimed broad powers under this clause on many occasions.]

Supreme Court interprets the president as a law maker

Executive orders have the force of law

Ruth **Morgan**, Southern Methodist University, **1970**
(~~The Pros and Cons of~~ Civil Rights)
The president

[The Federal Register Act of 1935 also specifies that the contents of the *Federal Register* be judicially noticed. This reinforced an earlier Supreme Court ruling that Executive orders are "public acts of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect."[5]

The Supreme Court also has ruled that Executive orders have "the force of public law,"[6] and that the violation of provisions of an Executive order may be made a crime punishable by sanctions and penalties, if Congress so provides.[7] Even though the President may not define crimes, there are sanctions—such as the refusal of benefits and punitive publicity—that may be imposed without court action.]

ex (5)

0=> Public white is Punishable

Counterpizzle Shizzle
DJW '03
Your Mom law maker ____/____

Not just Congress Makes laws

Ruth **Morgan**, Southern Methodist University, **1970**
~~(The Pros and Cons of~~ Civil Rights~~)~~
The president

Although it may be objected that policy-making by Executive order is a dangerous usurpation of legislative power in the American governmental system, this does not seem to be the case. Unless "law" is defined as all enactments of Congress, then the other branches of government also make law. If one defines according to function rather than structure, then whoever makes policy is legislating—Congress through statutory law, the Supreme Court through decisional law, the President through executive law, and the departments and agencies through administrative law. The framers of the Constitution used the principle of separation of powers and the intricately contrived system of checks and balances to prevent the concentration of power in any one place. The overlapping of function that permits each branch to check and balance the tyrannical tendencies of the other is not endangered by the Presidential use of the Executive order. Rather, the use of the Executive order is confined to an area bounded by the judgement of the President and the support of the American public. Furthermore, an Executive order may be invalidated by Congress or overruled by the Supreme Court.

law — Not just congress makes

Counterpizzle Shizzle
DJW '03
Your Mom EO = Policy ____/____

Executive Orders make policies

Ruth **Morgan**, Southern Methodist University, **1970**
~~(The Pros and Cons of~~ Civil Rights)
The president

The future of the Presidential Executive order as an instrument for policy-making lies in its use as a tool for solving complex policy problems. The Executive order provides a more flexible, adaptive framework than the relatively permanent molds of statutory law. This is evident from the successive Executive orders that broadened and strengthened the national government's program for enforcing fair employment practices.

Counterpizzle Shizzle
DJW '03
Your Mom Private Sector

Executive Orders influence the private sector

Ruth **Morgan**, Southern Methodist University, **1970**
~~(The Pros and Cons of~~ Civil Rights)
The president

[The authority of the President, as Chief Executive and as Commander in Chief, to issue the orders banning discriminatory practices in government employment and in the armed forces is constitutionally incontestable. However, the President's authority to prohibit discriminatory practices in private enterprise operating under government contract and in federally aided housing is less clear. In these instances the President, under his interpretation of his responsibility to "take care that the laws be faithfully executed," established nondiscrimination requirements for receiving funds that had been appropriated by Congress. The fact that Congress had refused to pass legislation on these two subjects raises the question of whether or not it was proper for the President, under his implied constitutional authority, to have adopted such policies. In the Steel Seizure Case, in which a Presidential action by Executive order was declared unconstitutional, the Supreme Court relied heavily on congressional intent. However, in that instance Congress had provided alternate means for dealing with the type of emergency which the President met by issuing his order. This was not the case with regard to employment and housing discrimination. Congress had rejected legislation; but rejection is not necessarily equivalent to enactment of legislation of a different nature.]

EOs can influence the Private Sector

Counterpizzle Shizzle
DJW '03
Your Mom Fopo

The president dominates Fopo

Michael **Nelson**, Advising editor, Rhodes College, **1998**
(The Presidency A-Z)

[The Constitution specifically grants few foreign affairs powers to the president. Although it gives the president authority to make treaties and appoint ambassadors, it allots Congress a range of powers in the area that are at least equal to those of the president. Indeed, the constitutional division of foreign affairs power has been described as "an invitation to struggle."

Nevertheless, presidents in recent decades have won interbranch struggles for primacy in foreign relations. Although Congress sometimes can block or modify presidential foreign policy initiatives, the president has dominated the formulation and initiation of foreign policy.]

Pres dominates FP

The president makes treties

Michael **Nelson**, Advising editor, Rhodes College, **1998**
(The Presidency A-Z)

[Nevertheless, the executive branch has established itself as the dominant branch in treaty making. As the sole organ of communication with foreign countries, commander in chief, and head of the foreign policy bureaucracy, presidents have been equipped with the means necessary to control most phases of the treaty-making process. Presidents can stop the process at any time, if they think the pact would be voted down on a full Senate vote, or if they dislike any changes the Senate has made. In 1980, for example, Jimmy Carter withdrew the SALT II treaty with the Soviet Union from Senate consideration after Soviet troops invaded Afghanistan.]

Pres makes treats

Counterpizzle Shizzle
DJW '03
Your Mom Reach the citizen

Executive orders are for government agencies but they often reach the common citizen

Michael **Nelson**, Advising editor, Rhodes College, **1998**
(The Presidency A-Z)

An offshoot of the implied powers doctrine is the EXECUTIVE ORDER. This critical instrument of active presidential power is nowhere defined in the Constitution but generally is construed as a presidential directive that becomes law without prior congressional approval. It is based either on existing statutes or on the president's other constitutional responsibilities. Executive orders usually pertain specifically to government agencies and officials, but their effects often reach to the average citizen. For example, Lyndon Johnson in 1965 (Executive Order 11246) required companies that win federal government contracts to create programs for hiring more minorities, significantly affecting private-sector employment practices. For the most part, presidents issue executive orders to establish executive branch agencies, to modify bureaucratic rules or actions, to change decision-making procedures, or to give substance and force to statutes.

EO's are for gov agency but they often reach average citizen.

Executive orders reach the average citizen

Ruth **Morgan**, Southern Methodist University, **1970**
(~~The Pros and Cons of~~ Civil Rights)
the president

It is sometimes said that Executive orders are ineffective in reaching the individual citizen. Certainly it is true that an Executive order does not direct a private citizen to cease a certain practice under penalty of fine or imprisonment. Executive orders are the President's directions to his subordinates. Nevertheless, if the President orders an agency to withhold contracts from private companies engaged in discriminatory employment practices, this has a direct effect upon the private citizen which is no different from a statutory prohibition of employment discrimination. Or if an individual purchases a home in a neighborhood of FHA housing, it makes little difference in its effect on him whether open occupancy was instituted by an Executive order or by a statute.

EOs affect the average citizen

Counterpizzle Shizzle
DJW '03
Your Mom ~~appeasing the public~~ _____/_____

Executive orders result in satisfaction of self-interest groups

Ruth **Morgan**, Southern Methodist University, **1970**
(~~The Pros~~ and ~~Cons of~~ Civil Rights)
The president

[These Executive orders studied were also effective to the extent that the special-interest groups directly concerned were at least partially satisfied by the Presidential efforts. No organized opposition to any of the programs developed. On the contrary, the protest over armed forces segregation ceased. The interest groups concerned with fair employment practices and with open occupancy in housing expressed, if not complete satisfaction, at least qualified approval of the orders and the programs established to implement them.]

Pros to Cons

Counterpizzle Shizzle
DJW '03
Your Mom (S) armed forces

—/—

Executive orders (S) the armed forces

Ruth **Morgan**, Southern Methodist University, **1970**
~~(The Pros and Cons of~~ Civil Rights~~)~~
The President

In another sense, "effectiveness" means the degree to which the policies established by Executive orders accomplish their purpose. Armed services desegregation was indeed achieved. The goals of fair employment practices and open housing were not fully accomplished during the span of this study. Nevertheless, Executive orders in these areas did lay the groundwork for subsequent legislation. It is true that fair employment practices and fair housing statutes were a consequence of historical and political factors and did not arise from the necessity of regularizing the Executive orders by other types of action. But they indicated that the policies established by Executive order were successful to the extent that both political parties endorsed them and desired to increase their coverage. The Civil Rights Act of 1964 prohibited employment discrimination in the greater part of the nation's work force, and the Civil Rights Act of 1968 covered most of the nation's housing with an open occupancy provision. Furthermore, the Equal Employment Opportunity Commission, created by the Civil Rights Act of 1964, benefited from the many studies conducted by Presidential committees and from the pool of government employees experienced in coping with the problems of minority employment.

Armed Forces EOs work

Counterpizzle Shizzle
DJW '03
Your Mom budget control

The president is in control of the budget

Michael **Nelson**, Advising editor, Rhodes College, **1998**
(The Presidency A-Z)

The Constitution does not clearly establish a budgetary process or spell out the presidency's role in such a process. Because of this ambiguity, presidents have been able to bring much of the process under their control. Article I of the Constitution gives Congress power over taxes and spending, while Article II, section 3, gives presidents the power to recommend fiscal policies.

President in control of budget

The power to control the BUDGET PROCESS is one of the most important administrative prerogatives of the presidency. Often, it is the president who decides where and how money should be spent. In the last part of the twentieth century, the presidency has assumed an increasingly important role in determining federal spending.

Counterpizzle Shizzle
DJW '03
Your Mom presidential power

No limit to presidential power for foreign affairs.

Ruth **Morgan**, Southern Methodist University, **1970**
~~(The Pros and Cons of~~ Civil Rights)
The president and

No limit of law for foreign affairs

[Nevertheless, Presidents throughout the history of the country have also exercised power, legislative in nature, on the basis of the independent grants of authority in the Constitution. The courts have interpreted the President's authority to make policy in matters of foreign relations as being virtually exclusive and without limit. The limits to Presidential prerogative in domestic affairs, however, are not made so clear by court interpretations.]

law making expands the presidential power

William **Olson and** Alan **Woll**, CATO Institute, 10-28-**1999**
(CATO Institute Policy Analysis)

[Nowhere is that transformation more clear, perhaps, than in the growth of presidential lawmaking, which is an obvious usurpation of both the powers delegated to the legislative branch and those reserved to the states. To warn against that prospect, James Madison, in *Federalist* 47, quoted Montesquieu on the peril of uniting in the same person legislative and executive powers. Yet, all too often in the modern era that conflation of powers has occurred—and the loss of liberty, against which Montesquieu warned, has followed.]

law making expands the presidents power

194

Counterpizzle Shizzle
DJW '03
Your Mom

____/____

Presidential power

Presidential directive is clearly authorized by Constitution

William **Olson and** Alan **Woll**, CATO Institute, 10-28-**1999**
(CATO Institute Policy Analysis)

> Where a presidential directive is clearly authorized by the Constitution or is authorized by a statute authorized by the Constitution and the delegation of power is in turn constitutional, the directive has the force of law. President Andrew Johnson's proclamation of December 25, 1868 ("Christmas Proclamation"), which granted a pardon to "all and every person who directly or indirectly participated in the late insurrection or rebellion," was clearly authorized by the Constitution. The Supreme Court declared the proclamation to be "a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect."[50] The authority for President Johnson's proclamation is found in Article II, section 2, clause 1 of the Constitution, which grants the president "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Executive power over FOPO is a separation of power

Jonathan **Wight**, Dayton Law Review, Spring **1994**
(p. lexis nexis)

> While recognizing the importance of comity in the international arena, n92 the Court rejected the notion that the act of state doctrine was compelled by either the inherent nature of sovereign authority or international law. n93 Instead, the Sabbatino Court noted that the doctrine, although not compelled by the Constitution, has constitutional underpinnings. n94 The act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." n95 Regarding the separation of powers, the Oetjen Court stated that the "conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative -- "the political' -- Departments of the Government, and the
>
> propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." n96 Similar to the political question doc [*1276] trine, the act of state doctrine reflects judicial deference to the executive branch. n97

Exec power
FOPO = exec CPR

Counterpizzle Shizzle
DJW '03
Your Mom National interest

_____/_____

The president does whats in the Netions interest

Michael **Nelson**, Advising editor, Rhodes College, **1998**
(The Presidency A-Z)

Although the Constitution does not explicitly grant the power to issue executive orders, it does require the president to "take care that the laws be faithfully executed." Occasionally presidents must act quickly and decisively to fullfill this directive, and the executive order is one way of doing so.

Pr does whats in nations interest

In addition, modern presidents have maintained that Article II of the Constitution grants them inherent power to take whatever actions they judge to be in the nation's best interests as long as those actions are not prohibited by the Constitution or by law. Presidents therefore view executive orders as perfectly acceptable exercises of presidential power, and the Supreme Court generally has upheld this interpretation.

Counterpizzle Shizzle
DJW '03
Your Mom

Court Defiance ____/____

The president can defy the courts.

Michael **Nelson**, Advising editor, Rhodes College, **1998**
(The Presidency A-Z)

Two factors contribute to the infrequency of Supreme Court rulings on the authority of the chief executive. First, the constitutional language describing the powers of the president is phrased in general terms: the president is vested with the executive power, is commander in chief, and is directed to take care that the laws are faithfully executed. That language leaves courts a great deal of latitude in determining whether presidents are exercising their powers appropriately.

Second, the aura that surrounds the office of the president tends to insulate its occupant from court challenges. The president is better able than the other two branches of government to capture the public eye and gain political support, which makes the task of curbing presidential power ever more difficult. In light of these characteristics, the Supreme Court has been cautious in locking horns with the chief executive.

President can defy the courts

Presidents themselves have held strikingly different views on the limits of presidential powers. William Howard Taft, the only president who also sat on the Supreme Court, viewed executive power as limited to the specific powers granted in the Constitution. "The President," Taft wrote, "can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such grant as proper and necessary."

Counterpizzle Shizzle
DJW '03
Your Mom

—/—

Executive Orders Bad

@ Executive Order Doesn't Solve

1. Executive orders aren't constitutionaly supported.

William **Olson and** Alan **Woll**, CATO Institute, 10-28-**1999**
(CATO Institute Policy Analysis)

"There is no constitutional or statutory definition of "proclamation," "executive order," or any other form of presidential directive.[38] Since 1935 presidents have been required to publish executive orders and proclamations in the *Federal Register*.[39] Yet even that requirement can be circumvented by the nomenclature used: "the decision whether to publish an Executive decision is clearly a result of the President's own discretion rather than any prescription of law."[40] As a result, many important decisions are issued informally, using forms not easily discovered by the public, while many trivial matters are given legal form as executive orders and proclamations.[41] Thus, several of President Clinton's major policy actions, for which he has been severely criticized, were accomplished not through formal directives but through orders to subordinates, or "memoranda." Those include his "don't ask, don't tell" rule for the military; his removal of previously imposed bans on abortions in military hospitals,[42] on fetal tissue experimentation,[43] on Agency for International Development funding for abortion counseling organizations,[44] and on the importation of the abortifacient drug RU-486;[45] and his efforts to reduce the number of federally licensed firearms dealers.[46]"

E.O.'s have to be constitutional

198

Counterpizzle Shizzle
DJW '03
Your Mom Executive Order Doesn't Solve ____/____

Exec. Order Bad

2. Executive order doesn't solve.

Ruth **Morgan**, Southern Methodist University, **1970**
(~~The Pres~~ and ~~Cons of~~ Civil Rights)
The president

The constitutionality of particular Executive orders poses a more difficult problem than the judicial review of statutes. While a statute may be held unconstitutional only if it contravenes some provision of the Constitution, an Executive order is held invalid if it conflicts with provisions either of the Constitution or of a statute,[8] or even with the implied intent of Congress.[9] The invalidation of an order found to conflict with a statute has occurred even in an area where the President has a special constitutional status, such as Commander in Chief.[10]

3. Executive order isn't subject to laws.

Ruth **Morgan**, Southern Methodist University, **1970**
(~~The Pres~~ and ~~Cons of~~ Civil Rights)
The president

Another question examined in this study was the effectiveness of the Executive order as an instrument for policy-making. In relation to other types of officially binding decisions, the Executive order is subordinate to statutory law and the decisional law of the Supreme Court. This, again, will be a factor that the President must weigh in considering whether to push Congress for legislation or to act on his own authority. The Executive order is subordinate, however, only if the other official policy-makers subsequently act. The President by Executive order can provide significant law in the void created by inaction.

4. The President isn't a law maker.

4.

Ruth **Morgan**, Southern Methodist University, **1970**
(~~The Pres~~ and ~~Cons of~~ Civil Rights)
The president

From the clause "he shall take Care that the Laws be faithfully executed," the President derives his role as Chief Administrator. This provision has also been argued along two different lines through the years. One view is that the clause requires the President to carry out the laws of Congress; the other is that the clause is an independent grant of authority. In the Court opinion in the Steel Seizure Case, Justice Black expressed the restrictive view, saying, "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Black argued that "the Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."

The Pres is not a lawmaker

199

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DJW '03
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____/____

Executive Order Doesn't Solve

Exec. ode ⇒ usurpation

1. Executive order increases the chance of usurpation.

William **Olson and** Alan **Woll**, CATO Institute, 10-28-**1999**
(CATO Institute Policy Analysis)

Exec. ord. usurp.

"A constitutional problem arises, however, when presidents use directives not simply to execute law but also to create it—without constitutional or statutory warrant. Such presidential usurpation of legislative authority has been largely unchecked by both the legislative and judicial branches. The Founding Fathers had clearly expected that each branch of government would defend its prerogatives from encroachment by the other branches, setting power against power.[35] Unfortunately, members of Congress have not been faithful to their oaths of office or their obligations to check the executive, despite the Constitution's clear direction that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States" (Article I, section 1).[36] Neither has the judicial branch checked such executive usurpations: only twice in the history of the nation have U.S. courts voided executive orders."

2. Usurpation is illegal.

William **Olson and** Alan **Woll**, CATO Institute, 10-28-**1999**
(CATO Institute Policy Analysis)

Usurpation = illegal

"The focus of this study is presidential usurpations of legislative authority—that is, the illegal exercise of legislative authority—not acts of tyranny—that is, the illegal exercise of power never delegated to the federal government at all. In the words of John Locke, one of the principal inspirations for the American Revolution, "As Usurpation is the exercise of Power, which another hath a Right to, so *Tyranny* is *the exercise of Power beyond Right*, which no Body can have a Right to."[37]

200

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Executives Order Doesn't Solve

—/—

Exec. order kills SOP

1. Executive order violates seperation of powers.

Ruth **Morgan**, Southern Methodist University, **1970**
~~The Pros and Cons of Civil Rights~~) the president and civil rights

Americans usually think of the President's function under the constitutional doctrine of separation of powers as one of executing the laws that Congress has passed. This view, combined with a strong tradition of mistrust of executive power, engenders cries of "Encroachment!" during the administrations of activist Presidents. Some critics view the issuance of Executive orders independently of an explicit command of Congress as an example of the President overstepping the proper bounds of separation of powers. Such orders "look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of Congress," observed Hugo L. Black, Associate Justice of the U.S. Supreme Court and former U.S. Senator. "And of course," he added, "the Constitution does not confer lawmaking power on the President."[1]

XO
X
SOP

Executive Orders are Controversial

Michael **Nelson**, Advising editor, Rhodes College, **1998**
(The Presidency A-Z)

Executive orders are often controversial because of their great potential for overuse by presidents who are unwilling to work with Congress, frustrated by opposition, or overeager to impose strict secrecy.

politix ☺

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NLO Executive Order perm

Perm: Congress and the president need each other.

Michael **Nelson**, Advising editor, Rhodes College, **1998**
(The Presidency A-Z)

Congress, for example, passes laws, but these laws cannot be enacted until they cross the president's desk for a signature or veto. The president sets his administration's policies, but to carry them out he almost always needs funding from Congress. The president chooses nominees to important administrative and judicial positions, but they must be approved by the Senate. The president has the power to negotiate treaties with other nations, but before treaties can be ratified they need the Senate's approval. The president serves as commander in chief of the military, but Congress declares war and regulates the armed forces.

In other words, Congress and the presidency need each other. No matter how divergent their views or how bitter the rhetoric, they will eventually have to reach some kind of compromise for the system to work.

Perm - Congress + Pres need each other