## Amendments CP

### Political Question Doctrine 2NC/A2: Perm

#### Waiting until the amendment process is completely over is key – the plan and perm have the Court act without authorized sovereignty

Wilson 95 (James G., Professor of Law – Cleveland State University, “Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum,” Arizona State Law Journal, Fall, 27 Ariz. St. L.J. 773, Lexis)

B. Limited Supreme Court Sovereignty and the Art of Overruling

Applying the concept of "sovereignty" to the American legal system is one of the more difficult American jurisprudential problems. There are no obvious answers to determining who has the last word; how they can exercise it; and when they have it. Is the President sovereign during a time of Civil War? The average soldier when ordered to fire upon rebellious citizens? The people? The electorate? The amendment process under Article V? Doesn't Congress have some form of majoritarian legislative sovereignty? The Tenth Amendment cases reflect judicial disagreements over the meaning of state sovereignty. John Stuart Mill claimed individuals also have a sphere of sovereignty: "Over himself, over his own body and mind, the individual is sovereign." n294 This complexity constitutes another virtue of the American legal system, exemplifying its divide and conquer approach to power. n295

[\*834] This section shall focus on yet another example of limited sovereignty: Supreme Court sovereignty. On one level, the ever-changing majorities on the Supreme Court have **limited sovereignty**, because they are not absolutely bound by prior Supreme Court decisions. Supreme Court majorities cannot "entrench" their opinions to protect them from future Supreme Court majorities. For example, no doctrine or rule can preclude five future Justices from adopting Judge Learned Hand's argument that Marbury v. Madison n296 was wrongly decided, because the constitutional text **does not authorize** Supreme Court review over congressional legislation, n297 or from overruling McCulloch v. Maryland, perhaps by aggressively using Dean Choper's argument that all federal-state issues are nonjusticiable. n298 The Court could legitimately **withdraw from all constitutional judicial review** until the country **passed an appropriate amendment**. Only **the populace** can use the amendment process either to entrench or to repudiate permanently Supreme Court doctrine.

#### Independently – the process of amendment is a political question – judicial involvement wrecks the doctrine

Chemerinsky 94 (Erwin, Professor of Law – University of Southern California, “Guaranteeing a Republican Form of Government: Cases Under the Guarantee Clause Should Be Justiciable,” University of Colorado Law Review, Fall, 65 U. Colo. L. Rev. 849, Lexis)

Despite these arguments, the political question doctrine is clearly here to stay. Therefore, in this article, my focus is not on whether there should be such a doctrine, but instead, accepting its existence, what should be its content?

Matters should be deemed to be a political question only if there is reason to believe that the judiciary is ill-suited to enforce a particular constitutional provision and a likelihood that the other branches of the federal government will do a superior job at interpreting and enforcing the provision. In other words, the political question doctrine should be reserved for instances where there is a special reason for the judiciary not to be involved and a reason for confidence that the provision will be interpreted and enforced by Congress and/or the President. I suggest that this approach to the political question doctrine is descriptively consistent with most of the cases and that it is normatively the best approach to the political question doctrine.

Initially, it should be noted that most of the areas where the Court has used the political question doctrine fit these criteria. In addition to the Guarantee Clause, the Supreme Court has approved the use of the political question doctrine in only five other areas: the process for ratifying constitutional amendments; impeachment and removal of officials from office; foreign policy decision-making; training of state national guards; and decisions by national political parties.

In Coleman v. Miller, n15 a plurality of the Court declared that Congress has "sole and complete control over the amending process, [\*854] subject to no judicial review." n16 Coleman involved the question of whether a state could approve a proposed constitutional amendment twelve years after having rejected it. The Supreme Court denied review, and Justice Black, writing for a plurality, said that the process of amending the Constitution is a political question: "Article V . . . grants power over the amending of the Constitution to Congress alone. . . . The process itself is 'political' in its entirety, **from submission** until **an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference** at any point." n17

There is a strong reason for the judiciary to refuse to become involved in the amendment process. Constitutional amendments are the only way for the political process to directly overturn a Supreme Court decision interpreting the Constitution. Therefore, courts should not become involved in the primary mechanism for checking the judiciary. n18 The proposed amendment at issue inColeman was intended to overturn an earlier Supreme Court decision denying Congress the power to regulate child labor. n19

### Theory

#### 5. Even if the amendment isn’t ratified it will change culture and THE COURT WILL FOLLOW IT- Smokes their arg

Brannon P. Denning\* and John R. Vile+ \* Assistant Professor of Law, Southern Illinois University School of Law. B.A., University of the South; J.D., University of Tennessee; LL.M., Yale University. + Chair, Department of Political Science, Middle Tennessee State University. B.A., College of William and Mary; Ph.D., University of Virginia. Tulane Law Review 11-02

Following the rejection of the Amendment**,** however, the Supreme Court began to subject sex-based classifications to a standard of review - under the Fourteenth  **Amendment,** mainly - that has become virtually indistinguishable from strict scrutiny. n86 Strauss thus concludes that the norms embodied in the ERA have become the law of the land without an amendment - in fact, in spite of the rejection of a formal amendment**.** This seeming anomaly, he argues, is easily explained by the fact that constitutional protection against [\*267] gender discrimination was a goal that, the ERA's rejection notwithstanding, a majority of people supported. n87 Thus, with that kind of widespread public support, the result was small-c-constitutional change. n88

#### Comparative institutional analysis refers to comparisons between the three branches of government

**Schuck, 05**  (Peter, professor of law at Yale, Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts, ed: Timothy Lytton, <http://www.press.umich.edu/pdf/gun_litigation-ch9.htm>)

Institutional comparison is rooted historically in the legal process school of jurisprudence strongly identi‹ed with the work of Henry Hart and Albert Sacks at Harvard Law School in the 1950s.18 The methodological premises of the legal process approach are well established in a rich literature with linkages to work in political science, public administration, and economics. At the most foundational level, this approach is concerned with the structure and behavior of institutions. Political theorists have recently elaborated a deep conceptual understanding of the nature of institutions,19 but such abstraction is unnecessary for my purposes. The institutions of chief interest here are the **three standard structures** of political governance and policy development—legislatures, courts, and administrative agencies—as well as the less formal institutions that surround them: the plaintiffs’ and defense bars, the media, the gun industry, gun control groups, and the market.

#### Advocacy: comparative insitutional analysis is vital to participatory activism for social justice

**Komesar, 94** (Neil, professor of law at the University of Wisconsin, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy, p. 41-42)

Even the constitutions of totalitarian states have contained high-sounding announcements of rights. The welfare of the populace depends on the presence of institutions capable of translating high-sounding principles into substance. Issues of institutional representation and participation seem especially important for the least advantaged, who almost by definition have had difficulties with representation and participation in existing institutional processes. If representation and participation are important for resolving the simpler version of the difference principle, they would seem even more important in confronting the more complicated standard that Michelman derives from Rawls. They would seem more important yet when society faces the immense task of fulfilling a measure of justice that seeks to integrate this difference principle with the concepts of equal opportunity and liberty. Determining the character of the legislature or agency given the task of this integration seems **central** here. The real content of Rawlsian justice depends on such a determination. Any theory of justice capable of even minimally capturing our basic sensibilities has many loosely defined components. Because such loosely defined elements and complicated standards are inherent in goal choice and articulation, the character of institutions that will define and apply these goals becomes an essential – perhaps ***the* essential** – component in the realization of the just society. The more complex and vaguely defined the conception of the good, the more central becomes the issue of who decides – the issue of instiutional choice. The discussion of *Boomer* showed that these questions of institutional choice dominate issues of resource allocation efficiency—a definition of the social good more confined and better defined than broader conceptions of the good such as Rawls’s theory of justice. The lessons about the importance and complexity of institutional choice derived from *Boomer* are even more appropriate with more complex definitions of the good.

### Solvency 2NC

#### Third – is coherence – amendments are key

Vermeule 4 (Adrian, Professor of Law – Harvard Law School, “Constitutional Amendments and the Constitutional Common Law,” Public Law and Legal Theory Working Paper No. 73, University of Chicago Law School, September, <http://www.law.uchicago.edu/files/files/73-av-amendments.pdf>)

I shall not question (iii) here, although there is much to be said in praise of incoherence in law, especially in constitutional law. Good coherence is better than incoherence, but bad coherence is worse than incoherence; coherence raises the stakes of constitutional decisionmaking by propagating either good or bad decisions through the legal system. Nor shall I question the dubious historical premise of the argument—that the framers designed a coherent constitutional scheme, as opposed to aggregating competing values and preferences, through horse-trading, into a patchwork document. Those issues aside, the rationale offered in (ii) exemplifies the nirvana illusion that underpins the generic case against amendments. The comparison between the framers’ globally coherent design, on the one hand, and piecemeal amendment on the other is not the right comparison to make. The principal substitute for formal amendment is not formal constitutional conventions, but judicial updating of constitutional law through flexible interpretation. The question, then, is whether piecemeal amendment produces greater incoherence than piecemeal judicial updating, carried out in particular litigated cases, by judicial institutions whose agenda is partly set by outside actors.

There is little reason to believe the latter process more conducive to coherence than the former, and much evidence to suggest that judicial decisionmaking produces a great deal of doctrinal incoherence. We should disavow any implicit picture of judgemade constitutional law as an intricately crafted web of principles whose extension and weight has been reciprocally adjusted. Precisely because judicial updating requires overrulings, reinterpretations, and other breaks in the web of prior doctrine, a system that relies on judicial updating to supply constitutional change—the system that the generic case tends to produce—generates internal pressures towards incoherent doctrine. Constitutional adjudication in America, let us recall, has produced both Plessy v. Ferguson and Brown v. Board, both Lochner v. New York and West Coast Hotel v. Parrish, both Myers v. United States and Humphrey’s Executor, both Dennis v. United States and Brandenburg v. Ohio, both Wickard v. Filburn and Lopez v. United States, both Bowers v. Hardwick and Lawrence v. Texas. Whatever else can be said about this judicial work-product, and whatever other justifications can be given for judge-made constitutional law, deep inner coherence does not seem either a plausible description of the terrain or even a plausible regulative ideal for the system.

### Solvency – Lawsuits 2NC\*

#### **The CP causes enforcement lawsuits – that reigns in deference and results in judicial enforcement. That solves every court advantage** and avoids the political question doctrine DA

Goldstein 88 (Yonkel, J.D. – Stanford Law School, “The Failure of Constitutional Controls over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment,” Stanford Law Review, July, 40 Stan. L. Rev. 1543, Lexis)

IV. THE PROPOSED AMENDMENT

None of the proposals to control nuclear weapons discussed above provide the kind of clarity and definitiveness which one would hope would characterize the rules governing the initiation and prosecution of a nuclear war. These proposals are grounded not in a line of clear precedent, but in a soggy morass of conflicting principles. Equally important, there is the perception, by people who regard themselves as hardened realists, that to adhere religiously to orthodox principles of congressional war declaration would be to render the entire nuclear defense deterrence system virtually worthless. [\*1587] Because of these considerations, a constitutional amendment concerning the appropriate distribution of war powers should be adopted. More than any other legislative or rulemaking device, a constitutional amendment has a chance of commanding sufficient authority to be credible, especially in time of crisis. Because the constitutional problems associated with the control of nuclear weapons are so closely related to the war powers in general, the amendment must deal with war powers generally. Because technical capabilities of weapons and defense systems can change relatively rapidly, it is important that the amendment does not rigidly lock the nation into any specific procedure which is sure to become obsolete. Finally, the amendment ought to account for the recent congressional tendency to avoid taking stands on controversial issues until public opinion has clearly been discerned. Although the desire of members of Congress to see how their constituencies regard an issue is understandable, following massive public sentiment is not a viable option in many nuclear scenarios. Analogous to this congressional hesitancy is the Judiciary's reluctance to involve itself in questions of this kind. If my characterization of the problem is correct, namely that the Executive, aided by judicial acquiescence, has expanded its powers at the expense of congressional power, only one additional source of power on the federal level remains -- that is, of course, the people. The amendment proposed below attempts to take all of the above considerations into account. Congress shall be required to supervise and oversee military planning, capabilities, and readiness. Congress, as part of its ordinary legislative powers and its extraordinary power to declare war, shall have absolute authority to govern, control, and direct all aspects of the structure and functioning of the armed forces. This power includes the right to issue orders to the Commander in Chief, as well as subordinate civilian and military authorities. This power shall be delegable in whatever way Congress sees fit including, but not limited to, congressional committees and subcommittees, the Executive department, or to technical systems. The failure of Congress to provide adequate oversight to war-planning shall be a justiciable cause of action against Congress as a whole. If the court hearing such a complaint finds that Congress has not adequately discharged its responsibility to consider fully all the requisite factors related to military planning, capabilities, and readiness, the court may grant an injunction directing Congress to consider the particular factors at issue and to come to a rationally based plan. No substantive outcome may be ordered by the court. The court's final order shall be appealable through normal judicial channels. The first paragraph of this amendment clarifies that Congress is the highest authority in the military chain of command. Inasmuch as the President has a role in the "normal" legislative process, the President continues to have an important voice, subject to Congressional veto. For [\*1588] most purposes the first paragraph returns to the original constitutional distribution of war powers. It potentially infringes on the presidential power to retaliate, however, should Congress enact restrictive legislation. Likewise, the presidential ability to present Congress with faits accomplis might potentially be restricted. Neither of these situations, however, is very likely, absent some overwhelming crisis which would motivate Congress to take such action. Under this proposal Congress will be motivated to design a system that allows for realistic military responses by the Executive, lest it face the threat of lawsuits.

### Solves

#### Lack of clarity is inevitable with the plan – only a constitutional amendment solves

Omestad 8 (Thomas, Senior Writer – U.S. Institute of Peace, “Clearing Up a President's War-Making Powers,” US News, 7-9, <http://www.usnews.com/news/articles/2008/07/09/clearing-up-a-presidents-war-making-powers>)

The report represents one of the more practical attempts to deal with the accumulation of **presidential power**—at Congress's expense—that started with the Cold War and the nuclear age. It actively shuns the deal-breaking big questions that would tip power in either direction on Pennsylvania Avenue: "We do not resolve the ambiguity of the Constitution," says former Democratic Rep. Lee Hamilton, a commission member. Adds Baker, "What we have designed here is a practical solution to a debate that is not going to be resolved unless the Supreme Court of the United States decides to resolve it or unless we have a constitutional amendment."

The current system is **marked by confusion**—and de facto disregard for the law. The War Powers Resolution of 1973 was written in the bitter aftermath of escalation and deception by administrations of both parties during the Vietnam War. But its provisions are essentially ignored. No president has ever formally complied with its requirement to report on a conflict in a way that would trigger its time limits on military action. "There was always a feeling that it was unconstitutional," said Edwin Meese, an attorney general in the Reagan years and a commission member.

Yet many in Congress have been reluctant to press their role in deciding on war, even as they score partisan points about putting soldiers in harm's way or incompetent war planning.

Though a constant of recent decades, the lack of clarity over war powers could well shoot back to the fore in times of crisis. The House and Senate are considering hard-hitting resolutions on Iran that critics contend could be cited by the Bush administration as providing legal standing for initiating a war.

The latest effort to bring reform to the war powers question wouldn't block a president from acting, but it would demand that he or she consult—and that Congress take a clear stand—on future wars.

#### The system is inherently confusing – ONLY amendments solve, the aff CAN’T

Goldstein 88 (Yonkel, J.D. – Stanford Law School, “The Failure of Constitutional Controls over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment,” Stanford Law Review, July, 40 Stan. L. Rev. 1543, Lexis)

CONCLUSION

The control of nuclear weapons is an issue of paramount importance. This control is grounded in the United States system of civilian control over the military. Historically, **confusion has existed about precisely how the system works**. The system of civilian control virtually broke down during the Truman Administration, although it had shown signs of strain even before that time. The Vietnam War and events in the post-Vietnam era substantiate the conclusion that the original constitutional system for controlling the country's war powers is defunct. It is past time to develop a new control system.

The amendment I propose attempts to develop such a system in the context of the nuclear age. Any legal solution less drastic than a constitutional amendment will not have sufficient force to overcome the conflicting past practice. Any proposal which just focuses on one or two particular nuclear scenarios will provide inadequate control. Although my proposal leaves a great number of specific questions to be answered, it provides a solid framework in which answers to those questions can begin to take shape.

#### Amendments institutionalize US position on war powers – solves the signal

White 4 (William W., Lecturer in Public and International Affairs and Senior Special Assistant to the Dean at Woodrow Wilson School of Public and International Affairs – Princeton University, “Human Rights and National Security: The Strategic Correlation,” Harvard Human Rights Journal, Spring, 17 Harv. Hum. Rts. J. 249, Lexis)

C. Addressing Aggressor States: Human Rights and Interstate Signaling

A foreign policy which accounts for the linkage between human rights and interstate aggression would view a state's human rights record as a potential signaling device for its international intentions. Traditionally, it is very difficult for a state to send a signal to other states that it does not have aggressive international intentions. Asymmetric information in any international negotiation presents a significant challenge. One side rarely fully understands the interests and intent of the other. n118 Signaling offers a means by which states can overcome the problems of incomplete information by revealing their intentions to others. The difficulty with signaling, however, is that states often send misleading signals or they are misinterpreted by their audiences. n119 For signaling to be effective it is necessary to identify a clear indicator that can not easily be manipulated by the sending state or misinterpreted by the receiving state. Lasting institutionalized changes in human rights policy can provide such a signaling mechanism.

Significant improvements in a previously repressive state's human rights policy can signal an intent not to engage in international aggression. For such a signal to be credible the state must clearly do more than release a few political prisoners or offer pro-human rights rhetoric. But institutionalized changes in human rights policies--such as new legislation or **constitutional amendments** that are actually practiced, genuine limits on police and military power over citizens, or the independence of the judiciary to review the executive's human rights policies--offer credible signals that the state is less likely to engage in international aggression. n120 States of concern can utilize the linkage between human rights and international aggression as a means to send unambiguous signals of the lack of aggressive intent through institutionalized improvements in human rights practices. A foreign policy informed [\*273] by human rights would closely monitor human rights developments so as to properly read such signals and potentially improve relations with states that institutionalize human rights protections.

The institutionalization of human rights protections is not only a means of signaling benign intent, but is also inversely correlated with a state's ability to engage in aggressive conduct. As a state embeds human rights protections in its domestic system--even without democratization--a number of structural changes occur within the society that limit aggressive potential. First, as Thomas Risse and Kathryn Sikkink have argued, a culture of human rights may develop within the population and become institutionalized domestically. n121 Such a human rights culture would reject international aggression as a threat to the human rights of citizens in other states. Second, institutionalization of human rights protections expands the ability of citizens to voice opposition to aggressive state policy through freedoms of belief, speech, and assembly. Third, institutionalization erodes the ability of the state to coerce its citizens into providing the resources and human capital necessary for aggressive war. n122

A brief example is illustrative of the use of human rights policy as a signaling device. Iran is currently a state of considerable concern to U.S. foreign policy because of alleged WMD programs and links to terrorists. n123 Obviously, it is difficult for Iran to show that it does not seek WMD or links with terrorist organizations. One powerful means for Iran to escape its current categorization as a member of the "axis of evil" is to signal benign international intent through institutionalization of human rights protections. If Iran, for example, were to greatly expand its de jure and de facto freedoms of speech, assembly, and belief, the United States should read that as a signal of potentially benign international intent and seek to improve bilateral relations. This is not to say that WMD and terrorism should be ignored, but where allegations are hard to prove and impossible to falsify, human rights policy offers a good proxy of a state's international intentions and should be responded to as such. If, on the other hand, significant denigration of human rights policy, such as the January 2004 disqualification of nearly half the parliamentary candidates by the Guardian Council, were to continue in Iran, [\*274] that would signal a greater likelihood of international aggression and provide sound reason for a firmer U.S. policy. n124

The **institutionalization** of human rights protections **also provides a way for a current government to prevent future governments from aggressive international behavior**. By locking in human rights protections now through **constitutional changes** or judicial review, a present government can limit the hand of future governments, denying them the institutional or political ability to engage in aggressive war or impinge on human rights.

#### Amendments send a GLOBAL signal

Herlihy 6 (Sarah P., J.D. – Chicago-Kent College of Law, “Amending the Natural Born Citizen Requirement: Globalization as the Impetus and the Obstacle,” Chicago-Kent Law Review, 81 Chi.-Kent L. Rev. 275, Lexis)

7. The Signal this Amendment Would Send to the Rest of the World

Americans may oppose a Constitutional amendment because of the international perception that it would create. Even though the increase of globalization dictates that America should amend the natural born citizen requirement, Americans may oppose a Constitutional amendment because this type of change would signal to the rest of the world that America is willing to be one country of many and that Americans are interested in becoming part of a global world culture. Commentators refer to the **symbolic nature of the law** as the "expressive function of law" and recognize that Constitutional amendments may have a dual effect. n78 For example, a Constitutional amendment to ban flag burning may not only deter people from burning American flags but also signal how important patriotism is to America. n79 Similarly, opponents of a Constitutional amendment to amend the natural born citizen clause may believe that such an amendment would have dual effects. In addition to allowing naturalized citizens to become president, this amendment would signal to the global community that Americans want to become **integrated with the rest of the world** and that Americans no longer feel the need to be the leading country in the world but are content in being on equal footing with every other country. Although some Americans may believe that the expressive function of a Constitutional amendment is a **positive signal to send**, United States foreign [\*296] policy indicates otherwise. Specifically, the United States government, led by the President who is elected by the people, takes great care in preserving its position as the world's only superpower. n80 In light of this consistent policy, it is doubtful that Americans will support an amendment to the presidential eligibility clause because this could send the wrong signal to the rest of the world.

### Solvency

#### Prefer our evidence –

#### Court politics – judges recognize political constraints to unpopular decisions in wartime – so the aff might fiat the plan, but they can’t fiat adherence to precedent by subsequent courts – who have strong reasons not to conform – the history of court crisis politics proves

**Posner and Vermeule, 7** – \*Kirkland and Ellis Professor of Law at the University of Chicago Law School AND \*\*professor at Harvard Law School (Eric and Adrian,Terror in the Balance: Security, Liberty, and the Courts p. 56)

Finally, to the extent that the critics of executive power envision judicial review as the solution, they are whistling in the wind, especially during times of emergency. The critics envision an imperial executive, who is either backed by a sustained national majority or else has slipped the political leash, and who enjoys so much agency slack as to be heedless of the public’s preferences. In either case, it is not obvious what the critics suppose the judges will or can do about it. As we will recount in more detail in later chapters, the judges proved largely powerless to stem the tide of the New Deal, in conditions of economic emergency, or to stop Japanese internment during World War II, or to block aggressive punishment and harassment of communists during the cold war. What is more, many of the judges had no desire to block these programs. Judges are people too and share in national political sentiments; they are also part of the political elite and will rally ’round the flag in times of emergency just as much as others do.83

## Deference Adv

### AT: Deference bad

#### The executive is superior to courts – expertise, accountability, and flexibility

**Ku and Yoo, 6 -** \*Associate Professor of Law, Hofstra University School of Law; Visiting Associate Professor of Law, William & Mary Marshall-Wythe School of Law AND \*\* Professor of Law, University of California at Berkeley School of Law (Boalt Hall); Visiting Scholar, American Enterprise Institute (Julian and John, 23 Const. Commentary 179, “HAMDAN v. RUMSFELD: THE FUNCTIONAL CASE FOR FOREIGN AFFAIRS DEFERENCE TO THE EXECUTIVE BRANCH” lexis)

B. Executive Branch Competence

If the judiciary is not the ideal institution for resolving ambiguities in foreign affairs laws, the deference doctrines may still not be worth following if the executive branch does not possess any advantages over the courts. We believe, however, that the executive branch has superior institutional competence that justifies the existence of the deference doctrines.

As Chevron recognized, n73 the executive branch possesses two institutional characteristics that make it superior to courts in the interpretations of certain kinds of laws. First, executive agencies usually possess expertise in the administration of certain statutes, particularly those in complex areas. Second, the executive branch is subject to greater political accountability than the judiciary, and the electorate could ultimately change unwanted interpretations. n74 As Justice Stevens himself explained in Chevron, "Judges are not experts in the field, and are not part of either political branch of the Government." n75 While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

[\*202] One way to think about the executive branch's comparative advantage is in terms of the likelihood of errors. Agencies which possess greater expertise over a complex and technical statute are less likely to depart from Congressional intent in their interpretations of those statutes, especially ambiguous provisions in those statutes. While agencies may well incur greater costs in making those decisions, such costs reflect the likelihood that they will seek a broader set of information about their legal interpretation than that presented to courts. Indeed, unlike courts, the executive branch is designed to develop specialized competence. In the area of foreign policy, the executive branch is composed of large bureaucracies solely focused on designing and implementing foreign policy.

The more common criticism of the executive branch is that it is likely to manipulate its expertise in the service of political goals. While this may seem like a criticism, it is actually a virtue in the context of resolving ambiguities in laws implicating foreign affairs. Such laws nearly always implicate broad policy decisions or political values and the political nature of the executive branch gives it advantages in making such decisions. If Congress leaves ambiguities in a foreign affairs statute, for instance, it is reasonable to assume it would prefer such ambiguities to be resolved by the more politically responsive institution. Indeed, it is doubtful that there is substantial popular support for transferring authority to the judiciary in cases where the law relates to how to deal with a serious external threat. n76

#### Limited judicial information during a crisis increases the risk of disastrous decisionmaking

**Posner and Vermeule, 7** – \*Kirkland and Ellis Professor of Law at the University of Chicago Law School AND \*\*professor at Harvard Law School (Eric and Adrian,Terror in the Balance: Security, Liberty, and the Courts p. 90-91)

As against this view, we suggest that the standard Carolene Products approach comes unglued during times of emergency. Judges face a risk of committing errors in two directions: they may erroneously validate policies that stem from democratic failure, or they may erroneously invalidate measures necessary for national security. The risks and costs of the first type of error are constant across both normal times and emergencies, but in emergencies the risks and costs of the second type of error spike upward. In times of emergency, the judges’ information is especially poor, their ability to sort justified from unjustified policies especially limited, and the cost of erroneously blocking necessary security measures may be disastrous. Included among those costs is the cost of delay, which amounts to a temporary blockage of new policies and which is especially serious during emergencies, where time is all. In general, the difference in the stakes between emergencies and normal times makes the limited capacities of judges decisive. Historically, the judges themselves have recognized this, remaining quiescent until the emergency decays and passes by. In times of emergency, judicial deference is both desirable and predictable, given the high stakes and the judges’ limited information and competence.

#### Err negative – the cost of a judicial mistake in a crisis is higher than in normal times

**Posner and Vermeule, 7** – \*Kirkland and Ellis Professor of Law at the University of Chicago Law School AND \*\*professor at Harvard Law School (Eric and Adrian,Terror in the Balance: Security, Liberty, and the Courts p. 94)

3. Judicial review should be less strict, more accommodating, or more deferential in emergencies than in normal times. Courts cannot systematically improve upon government’s first-order balancing of security and liberty. Whatever hope they have of doing so in normal times, as in ordinary criminal settings where security and liberty trade off against each other, is dramatically attenuated during times of emergency, because the judges’ information is especially poor and the costs of judicial mistakes are especially high.

## Topicality

### limits good

#### Limits outweigh:

#### 1. Participation

**Rowland 84** (Robert C., Baylor U., “Topic Selection in Debate”, American Forensics in Perspective. Ed. Parson, p. 53-4)

The first major problem identified by the work group as relating to topic selection is the decline in participation in the National Debate Tournament (NDT) policy debate. As Boman notes: There is a growing dissatisfaction with academic debate that utilizes a policy proposition. Programs which are oriented toward debating the national policy debate proposition, so-called “NDT” programs, are diminishing in scope and size.4 This decline in policy debate is tied, many in the work group believe, to excessively broad topics. The most obvious characteristic of some recent policy debate topics is extreme breath. A resolution calling for regulation of land use literally and figuratively covers a lot of ground. Naitonal debate topics have not always been so broad. Before the late 1960s the topic often specified a particular policy change.5 The move from narrow to broad topics has had, according to some, the effect of limiting the number of students who participate in policy debate. First, the breadth of the topics has all but destroyed novice debate. Paul Gaske argues that because the stock issues of policy debate are clearly defined, it is superior to value debate as a means of introducing students to the debate process.6 Despite this advantage of policy debate, Gaske belives that NDT debate is not the best vehicle for teaching beginners. The problem is that broad policy topics terrify novice debaters, especially those who lack high school debate experience. They are unable to cope with the breadth of the topic and experience “negophobia,”7 the fear of debating negative. As a consequence, the educational advantages associated with teaching novices through policy debate are lost: “Yet all of these benefits fly out the window as rookies in their formative stage quickly experience humiliation at being caugh without evidence or substantive awareness of the issues that confront them at a tournament.”8 The ultimate result is that fewer novices participate in NDT, thus lessening the educational value of the activity and limiting the number of debaters or eventually participate in more advanced divisions of policy debate. In addition to noting the effect on novices, participants argued that broad topics also discourage experienced debaters from continued participation in policy debate. Here, the claim is that it takes so much times and effort to be competitive on a broad topic that students who are concerned with doing more than just debate are forced out of the activity.9 Gaske notes, that “broad topics discourage participation because of insufficient time to do requisite research.”10 The final effect may be that **entire programs** either **cease functioning** or shift to value debate as a way to avoid unreasonable research burdens. Boman supports this point: “It is this expanding necessity of evidence, and thereby research, which has created a competitive imbalance between institutions that participate in academic debate.”11 In this view, it is the competitive imbalance resulting from the use of broad topics that has led some small schools to cancel their programs.

#### 2. Innovation

Intrator, 10 [David President of The Creative Organization, October 21, “Thinking Inside the Box,” http://www.trainingmag.com/article/thinking-inside-box

One of the most pernicious myths about creativity, one that seriously inhibits creative thinking and innovation, is the belief that one needs to “think outside the box.” As someone who has worked for decades as a professional creative, nothing could be further from the truth. This a is view shared by the vast majority of creatives, expressed famously by the modernist designer Charles Eames when he wrote, “Design depends largely upon constraints.” The myth of thinking outside the box stems from a fundamental misconception of what creativity is, and what it’s not. In the popular imagination, creativity is something weird and wacky. The creative process is magical, or divinely inspired. But, in fact, creativity is not about divine inspiration or magic. It’s about problem-solving, and by definition a problem is a constraint, a limit, a box. One of the best illustrations of this is the work of photographers. They create by excluding the great mass what’s before them, choosing a small frame in which to work. Within that tiny frame, literally a box, they uncover relationships and establish priorities. What makes creative problem-solving uniquely challenging is that you, as the creator, are the one defining the problem. You’re the one choosing the frame. And you alone determine what’s an effective solution. This can be quite demanding, both intellectually and emotionally. Intellectually, you are required to establish limits, set priorities, and cull patterns and relationships from a great deal of material, much of it fragmentary. More often than not, this is the material you generated during brainstorming sessions. At the end of these sessions, you’re usually left with a big mess of ideas, half-ideas, vague notions, and the like. Now, chances are you’ve had a great time making your mess. You might have gone off-site, enjoyed a “brainstorming camp,” played a number of warm-up games. You feel artistic and empowered. But to be truly creative, you have to clean up your mess, organizing those fragments into something real, something useful, something that actually works. That’s the hard part. It takes a lot of energy, time, and willpower to make sense of the mess you’ve just generated. It also can be emotionally difficult. You’ll need to throw out many ideas you originally thought were great, ideas you’ve become attached to, because they simply don’t fit into the rules you’re creating as you build your box.

### 2nc prefer our interp

#### And that phrase is specifically linked to the WPR in judicial interpretation

**Friedman, 99 –** US District Court Judge (TOM CAMPBELL, et al., Plaintiffs, v. WILLIAM JEFFERSON CLINTON, President of the United States, Defendant. Civil Action No. 99-1072 (PLF) UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 52 F. Supp. 2d 34; 1999 U.S. Dist. LEXIS 8630 June 8, 1999, Decided, lexis)

Finally, the War Powers Resolution explicitly provides that authority to introduce forces into hostilities shall not be inferred "from any provision of law . . . including any provision contained in any appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of [the War Powers Resolution]," or "from any treaty . . . unless such [\*\*6] treaty is implemented by legislation specifically authorizing the introduction of United States [\*37] Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of [the War Powers Resolution]." 50 U.S.C. § 1547(a) (emphasis added).

#### Topic coherence – if their interpretation is correct, then including ‘offensive cyber operations’ in the topic would be redundant and unnecessary, since cyber command falls under the uniformed services – this means their interpretation isn’t predictable

**USSTRATCOM, 13** (“U.S. Cyber Command” current as of August, http://www.stratcom.mil/factsheets/Cyber\_Command/)

USCYBERCOM is a sub-unified command subordinate to U. S. Strategic Command (USSTRATCOM). Service elements include: Army Cyber Command (ARCYBER); Air Forces Cyber (AFCYBER); Fleet Cyber Command (FLTCYBERCOM); and Marine Forces Cyber Command (MARFORCYBER). The Command is also standing up dedicated Cyber Mission Teams to accomplish the three elements of our mission.

#### Restrictions on war powers could include restrictions on any weapons system – nuclear weapons, land mine bans, cluster bombs, chemical weapons – it’s why we need a ‘human’ limit

**Lobel, 8** - Professor of Law, University of Pittsburgh Law School (Jules, “Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War” 392 OHIO STATE LAW JOURNAL [Vol. 69:391, <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/04/69.3.lobel_.pdf>)

The third theory—based on the distinction between general rules and specific tactics—also has surface appeal, but is unworkable when applied to specific issues because the line between policy and tactic is too amorphous and hazy to be useful in real world situations. For example, how does one decide whether the use of waterboarding as a technique of interrogation is a policy or specific tactic? Even if it is arguably a specific tactic, Congress could certainly prohibit that tactic as antithetical to a policy prohibiting cruel and inhumane treatment. So too, President Bush’s surge strategy in Iraq could be viewed as a tactic to promote a more stable Iraq, or as a general policy which Congress should be able to limit through use of its funding power. Congress can limit tactical decisions to use particular weapons such as chemical weapons, nuclear weapons, or cluster bombs by forbidding the production or use of such weapons, or simply refusing to fund them.42 Congress could also, however, enact more limited and specific restrictions to prohibit the use of nuclear weapons or land mines in a particular conflict or even a particular theater of war. Indeed, most specific tactics could be permitted or prohibited by a rule. In short, the distinctions between strategies and tactics, rules and detailed instructions, or policies and tactics are simply labels which are virtually indistinguishable. Labeling an activity with one of these terms is largely a distinction without a difference. Accordingly, these labels are not helpful to the real problem of determining the respective powers of Congress and the President.43

### AT: WPR says “includes” not “exclude”

#### Statutory construction means the word “includes” should be read to be exclusionary

**Lorber, 13** - J.D. Candidate, University of Pennsylvania Law School, Ph.D Candidate, Duke University Department of Political Science (Eric, “Executive Warmaking Authority and Offensive Cyber Operations: Can Existing Legislation Successfully Constrain Presidential Power?” 15 U. Pa. J. Const. L. 961, January, lexis)

As is evident from a textual analysis, n177 an examination of the legislative history, n178 and the broad policy purposes behind the creation of the Act, n179 [\*990] "armed forces" refers to U.S. soldiers and members of the armed forces, not weapon systems or capabilities such as offensive cyber weapons. Section 1547 does not specifically define "armed forces," but it states that "the term "introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government." n180 While this definition pertains to the broader phrase "introduction of armed forces," the clear implication is that only members of the armed forces count for the purposes of the definition under the WPR. Though not dispositive, the term "member" connotes a human individual who is part of an organization. n181 Thus, it appears that the term "armed forces" means human members of the United States armed forces. However, there exist two potential complications with this reading. First, the language of the statute states that "the term "introduction of United States Armed Forces' includes the assignment of members of such armed forces." n182 By using inclusionary - as opposed to exclusionary - language, one might argue that the term "armed forces" could include more than members. This argument is unconvincing however, given that a core principle of statutory interpretation, expressio unius, suggests that expression of one thing (i.e., members) implies the exclusion of others (such as non-members constituting armed forces). n183 Second, the term "member" does not explicitly reference "humans," and so could arguably refer to individual units and beings that are part of a larger whole (e.g., wolves can be members of a pack). As a result, though a textual analysis suggests that "armed forces" refers to human members of the armed forces, such a conclusion is not determinative.