## \*\*\*Courts CP\*\*\*

### 1NC Courts CP

#### The United States Supreme Court should rule that [ ]

#### is constitutional under Equal Protection grounds.

#### Equal protection clause allows courts to solve for education

Superfine, associate professor in the Department of Educational Policy Studies at the University of Illinois at Chicago, 2016  
(Benjamin M., “Interest Groups, the Courts, and Educational Equality,” *University of Illinois*, Volume: 53,p581, DS).

Despite the power and importance of Brown, it was only a starting point for the kinds of equal educational opportunity claims plaintiffs would bring. As desegregation cases appeared before the Supreme Court in the 1960s, plaintiffs continued to argue that school districts were failing to adhere to the requirements of the Equal Protection Clause. Throughout these cases and into the mid-1970s, the Supreme Court sharpened its definition of what an ‘‘equal’’ education means and crafted increasingly specific remedies for violations. For example, the Court precisely articulated what elements of schooling must be desegregated in Green v. County School Board (1968) and approved busing plans and the use of precise mathematical ratios of a school’s demographics to characterize educational equality in Swann v. Charlotte-Mecklenburg Board of Education (1971).

### Courts solvency – Equal Protection

#### The Supreme Court has the power in the fourteenth amendment, and as well should act to check legislative overreach

Martin, Associate Attorney. NYU School of Law, 2014

(Holly, "Legislating Judicial Review: An Infringement on Separation of Powers." New York University Journal of Legislation and Public Policy, Volume 17 Issue 4, 2014, 1112-1113, HeinOnline, ATH)

The Supreme Court has also used other modes of interpretation beyond the text, such as looking to judicial precedent and legislative history, to interpret limits of congressional power. An influential decision that applied this approach was the Court's 1883 judgment in The Civil Rights Cases. There, the Court invalidated parts of the Civil Rights Act of 1875 that dealt with private action. 9 2 It cabined congressional authority, limiting it to correcting discriminatory state action and prohibiting it from regulating private conduct.93 This interpretation severely restrained what Congress could do under the Fourteenth Amendment and affirmed the Court's authority to limit that power. The legislative history of the Fourteenth Amendment also influenced the Supreme Court's decision in Boerne. In that decision, the Court considered that the writers of the Fourteenth Amendment were wary of enacting an overbroad grant of authority to the legislative branch, specifically at the expense of the judiciary (with respect to separation of powers)94 and the states (with respect to federalism). 9 5 The fact that the Supreme Court has relied on several canons of interpretation beyond analyzing constitutional text demonstrates how a law may violate a background norm such as separation of powers even if it does not violate a specific constitutional clause. Based on the above analysis, if Congress tried to enact a law asserting that gun ownership is a fundamental right subject to strict scrutiny by the judiciary, that law could be challenged by bringing a separation of powers claim. Such a law compromises the independence of the judicial branch and interferes with its ability to properly function. Boerne provides support for the contention that an attempt by Congress to step outside of the scope of its authority and obstruct the duties of the courts will be struck down. As in the case of Congress's Section 5 enforcement power, the Supreme Court has evaluated the extent to which Congress can exercise authority that is usually delegated to the judiciary-such as the authority to interpret constitutional provisions-and has ruled that it is limited.96

### Courts solvency – 4th amendment

#### The Supreme Court must make a clarification ruling of the Fourth Amendment to guarantee compliance and student rights

Yearout, lawyer in Washington D.C., 2002

(Jason, “Individualized School Searches and the Fourth Amendment: What’s a School District to do?” 2002, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1339&context=wmborj>, accessed 07/04/2017, AMS)

As illustrated supra, the lack of constitutional clarity in these areas is precisely why the Supreme Court needs to intervene and clear up the constitutional standards in these increasingly complex fact situations. State courts are striving to answer these concerns, but they can only provide limited guidance. Some legislative and executive solutions may present themselves in certain cases, but the Supreme Court possesses the best vantage point from which to help school districts by providing the necessary guidance in formulating adequate guidelines for school searches. Not only would a uniform explication of T.L. 0. potentially reduce the number of state judicial challenges to questionable school searches, but a clearer standard would also allow school districts from different states to accurately collaborate regarding school search policies and ultimately arrive at policies that serve the goals of the school and protect student rights. Sixteen years have passed since the Court decided T.L.O., and many significant constitutional questions remain open. Now is the time for the Court to grant certiorari and resolve some of these pressing questions before the thicket of state and federal decisions becomes too unworkable to sort out. Should the Court endeavor to clarify what T.L.O. 's "reasonableness under all the circumstances" test actually means, it needs to begin by outlining which factors are most important in the two-part balance. The three commonplace fact scenarios this note outlines all encounter the same fundamental problem: different courts emphasize wildly different factors. Some courts place heavy weight on the locus of the search; others focus on who completes the search; still other courts examine who initiates the investigation leading up to the search; and a significant number of state courts (and state legislatures) rely heavily on the provision of notice to students that searches may occur at any time. Surely this wide spectrum of analysis is not the kind ofjurisprudential result the T.L. 0. court envisioned when it decided that case. As the title of this note suggests, the existence of such dissonant state decisions has led to mass confusion for schools themselves, which feel pressure to both adopt overzealous search policies to ward off threats of violence and hesitate in applying these policies for fear of legal action. At least one state's judicial system (Washington) has substantially answered many of these concerns by iterating what factors are relevant in a school search.2 "' The Court has a unique opportunity to clarify and revisit its analysis from sixteen years ago in the same manner, and should do so quickly. The welfare of school districts, as well as of schoolchildren themselves, may hang in the balance.

### Courts solvency – Education

#### Judicial deference is limited on education policy because inequalities have existed this long – the court is forced to step in

Elder 07

[Sonja Ralston, professor at Duke University School of Law, “STANDING UP TO LEGISLATIVE BULLIES: SEPARATION OF POWERS, STATE COURTS, AND EDUCATIONAL RIGHTS”, 2007, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1344&context=dlj>, accessed 7/8/17, NW]

At the state court level, there is widespread agreement that judicial deference reaches its limits when the other branches of government enact policies that violate people’s constitutional rights or, conversely, fail to enact policies needed to protect those rights. Section A demonstrates such agreement in school financing and educational adequacy cases, and Section B examines why it is justified under public choice theory A. The Infringement of Constitutional Rights is the Limit of Deference It is precisely because each branch of government is charged with different duties that the courts’ deference to the legislative and executive branches must have limits: without such limits, the courts could not fulfill their function as the ultimate protector of the people’s rights.59 Education adequacy cases are some of the most political, policy-heavy issues dealt with by state courts. Yet throughout the canons of education adequacy law, courts have found that judicial deference is limited, even when they have refused to act on such findings.60 For example, the abundantly cautious New Jersey Supreme Court stated in 1997, after more than twenty years of deferential judicial involvement in the state’s education financing policy,61 that a judicial remedy was finally needed to “vindicate the constitutional rights of the school children in the poverty-stricken urban districts.”62 As the New Jersey court suggested, the limits of judicial deference are reached when the other branches of government fail (sometimes repeatedly) to remedy unconstitutional situations that violate people’s rights.63 In education adequacy cases, courts should begin their enforcement of students’ rights with deference to and trust in the coequal branches of government, but they should always be on the lookout for evidence that “[their] trust was misplaced” and a more active remedy has become necessary.64 In fact, many courts recognize that the limits to their deference are not discretionary. The New Jersey Supreme Court has held that a court “must use power equal to its responsibility” as the last-resort protector of the people’s rights.65 The New Hampshire Supreme Court has required that when the other branches fail to act, “a judicial remedy is not only appropriate but essential.”66 The chief judge of the New York Court of Appeals, Judith Kaye, proclaimed that when the state failed to bring the school funding statute into constitutional compliance, the court was “compel[led]” to act in its stead.67 The Wyoming Supreme Court found that the scope of its “duty to protect individual rights include[d] compelling legislative action.”68 The Arkansas Supreme Court also found that it had a “duty . . . to assure constitutional compliance” when it gave the legislature less than a year to fix its failing education system or have the solution mandated by the court.69 The list goes on. Although these limits apply to all state constitutional cases, they are reached frequently in cases regarding educational rights because such rights are positive in nature and can be infringed by legislative inaction. Indeed, when enforcing negative rights, deference to the legislature is more easily justified because the court’s action in striking down the offending law ends the constitutional violation; no further legislative action is needed to remedy the situation. With positive rights, on the other hand, the legislature’s inaction is the very source of the constitutional violation and deference allows that violation to persist.70 Thus judicial deference should be most limited in cases that concern positive rights.

#### The judiciary branch incubates great educational strategies and can shape the future of the education system

Edgar Fuller 1968, executive secretary of the Council of Chief State School Officers, December 1968 (“The Impact of Court Decisions on Educational Strategies” [Page 227-228], *Association for Supervision and Curriculum Development,* Accessed Online at: <http://www.ascd.org/ASCD/pdf/journals/ed_lead/el_196812_fuller.pdf>, Accessed Online on 07-06-2017 SI)

Most leaders in education are well acquainted with the legislative and administrative branches of governments and their local, state, and federal relationships to public education. The judicial branch is different. It seldom benefits from their understanding and participation. To all but a few, the courts seem remote, mysterious in making their surprising impacts on the schools, too technical to be understood, and too independent to be amenable to the views of most citizens.

On the basis of such mixed reasons and suppositions, most citizen and professional leaders in education seldom interest themselves in the making of public policy in education through the courts. The judiciary incubates great educational strategies and shapes the future by its mandates while most educational leadership busily pursues less demanding routines.

Important court decisions surprise the leaders who habitually fail to participate in judicial planning in ways to entirely appropriate for any citizen. Too often educators and other friends of public education avoid being plaintiffs, or defendants, or policy makers, or planners, or professional, political, and financial supporters of judicial action to uphold what they privately profess to believe in education. Fearful of criticism, this ostrich like, vital concern of their lives is too often spent in isolation from the judiciary. There is massive unwillingness to synthesize and express principles in written or spoken forms, to contribute personal learning time and financial resources, or to work quietly and wait for a few years to achieve fundamentally important judicial results.

Courts are not remote from education. They are important determiners of some of its most basic strategies. Public education is a part of government at all levels, and private education is also subject to the minimum educational and institutional standards prescribed by local, state, and federal laws within the fundamental constitutional limitations that apply.

The most important legal questions in education involve how the First Amendment to the Constitution will be applied to public and private institutions of education. In tax-supported public institutions the questions is usually whether denominational religion is present. The Supreme Court has defined the constitutional limitations of religion in public schools in considerable detail in recent years. This has been due to the fact that taxpayers have had standing to sue in these cases, as they have in most other instances involving civil rights.

A different line of constitutional litigation deals with use of tax-raised funds for individual benefits to pupils or teachers. The First Amendment question here is whether there is unconstitutional direct or indirect aid to sectarian institutions when the funds have been directed primarily to their pupils or teachers. Health, welfare, and safety benefits, such as those which fall within the Welfare Clause and the reserved police powers of the states under the Tenth Amendments, are general rights of all people. These constitutional rights become involved with First Amendment application to education in ways that require judicial determinations. Some prevailing judicial guidelines can be illustrated. Tax – raised funds for health services and school lunches for private school pupils, and for scholarships under the so-called GI Bills, are not issues under the First Amendment. Public tax funds for pupil transportation, textbooks, library materials, and some types of remedial instruction are constitutionally controversial. Use of tax-raised funds for regular salaries of sectarian school teachers or for sectarian school facilities or equipment is unconstitutional.

#### Courts essential to education policy for 3 reasons: 1) children can’t vote, 2) children in low-income families are electorally underrepresented, 3) education in legislature is susceptible to political capture

Elder 07

[Sonja Ralston, professor at Duke University School of Law, “STANDING UP TO LEGISLATIVE BULLIES: SEPARATION OF POWERS, STATE COURTS, AND EDUCATIONAL RIGHTS”, 2007, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1344&context=dlj>, accessed 7/8/17, NW]

B. Educational Rights in Peril The sheer volume of educational rights lawsuits attests to the fact that the positive right to education is often underprovided. A marketbased model like public choice theory is apropos to the problems surrounding the provision of educational rights, because it provides an explanation for why legislatures have so frequently failed to adequately fund the education of impoverished children. Public choice theory explains that one can conceive of democratic institutions, such as legislatures, as a type of political market.71 In the political market, politicians act to maximize their chances for reelection, and one gains election by accumulating more votes (political capital) than one’s opponent.72 To maximize efficiency, the politician will seek capital with a low marginal cost, from interest groups who control large numbers of votes and are easy to please.73 When they function properly and there are no externalities such as disenfranchisement, political markets, like economic markets, provide an efficient allocation of resources.74 Like economic markets, however, political markets can fail.75 Such failures are most likely to occur, almost by definition, when the rights of the powerless are at stake because the majority is making the laws. When there is a political market failure in the legislative branch, the courts can frequently step in and “jump-start” the process by declaring that someone’s rights have been violated.76 Public school financing is particularly susceptible to political market failure because children cannot vote, children in low-income families are especially underrepresented in statehouses, and voters generally resist attempts to send locally raised revenues to other localities. First, the right to education is uniquely vulnerable to majoritarian attack because very few of the right holders are members of the electorate.77 Given that children cannot vote, they must rely on others to value a quality education on their behalf either out of altruism or because they see some personal benefit in so doing, like reducing their need for private child care, improving the economy, or stabilizing their own retirement by preparing future workers.78 Long-term investments, however, are notoriously difficult in political bodies because they involve short-term sacrifices.79 This differential could also be explained as a time-based, or “vertical,” political externality because “[present] constituents obtain benefits at the expense of other [future] constituents.”80 Here, the present voters gain lower taxes at the expense of educating future voters. A second reason the right to education is unusually predisposed to political market failure is that the children for whom the right matters the most, at-risk students,81 are concentrated in a few legislative districts82 and command fewer votes per child than their non-at-risk peers.83 For example, in a low-income area, single-parent families are more common.84 Data from the U.S. Census Bureau help quantify the differences. In 2005, an average single-earner household had roughly $30,000 in income and contained 2.3 people.85 Recognizing that a substantial number of those households were single adults, those low-income households that contain children would contain more people than the average: it is reasonable to say the ratio of voters to children in a lower-income household is roughly one voter to 1.3 children. In contrast, an average dual-earner household earned around $80,000 and contained three people.86 Because a dual-earner household almost invariably requires two adults, the ratio in that case is closer to two voters to one child. Therefore, approximately 2.6 times as many votes represent each non-at-risk child as do each at-risk child.87 This analysis is necessarily imperfect because the data are only available in aggregated form. In its rough sketches, however, it demonstrates a discrepancy in the political voice of children from different backgrounds. This imbalance is further exacerbated by the fact that eligible voters in low-income areas are less likely to vote in general.88 With that kind of imbalance, it is not surprising that at-risk children face an uphill battle in the legislature for adequate funding for their schools. Third, school funding decisions are susceptible to legislature capture. Professor Clayton Gillette provides an excellent depiction of how this process applies to school funding decisions: [P]ublic choice theory tells us that the very fact that local representatives are making these decisions will frustrate reform efforts. . . . [S]tate legislators from wealthy areas will be reluctant to engage in substantial redistribution of local school dollars. Even well-meaning legislators will fear electoral redress should they spend local dollars on non-local functions. One can readily appreciate the dilemma of the state legislator who agrees that some redistribution is appropriate, but who fears informing constituents that he or she has voted to send their tax dollars to a neighboring locality.89 This is an example of a horizontal political externality90 because the benefits would accrue to people in the poorer areas who could not vote for the representatives from the wealthier areas whose support would be needed to pass the law—there is no electoral payoff to the suburban legislator for supporting improvement of the urban schools. Taken together, these factors counsel courts to limit their deference to the legislature when adjudicating cases regarding school financing in particular, and educational adequacy in general. For the reasons discussed in this Part, the political branches are often unwilling to uphold educational rights, and this “political voicelessness” creates a political market failure because it produces an “inefficient underinvestment” in the education of future generations.91 This market failure, however, could be “particularly susceptible to judicial resolution” because judicial involvement would provide political cover for legislators who would like to allocate resources more equitably but do not for fear of electoral reprisals.92 Although most state judges operate in some type of political market, few if any are in the same type of market as legislators: judicial retention elections are rarely contested,93 judges usually do not run as members of political parties,94 some judges face political review by the legislature or the governor rather than the voters,95 and even those state high court judges who face electoral review do so on a statewide rather than a districted basis.96 These factors, combined with the overarching difference in the job description of a judge,97 indicate that they are in a better position than legislators to withstand electoral pressures on their decisions. In addition to political cover, when courts frame issues in terms of rights rather than policy preferences, legislators can be encouraged to adopt a more rights-based approach to lawmaking, making fair and just decisions rather than those that are merely self-serving in the political marketplace.98 Unfortunately, as Part IV.A explains, some legislators need more encouragement or cover than others, and the market failure in those cases requires more than a jump start. In those cases, the courts should see their more aggressive involvement as merited—if not required—by their ultimate duty to the people.99

### Courts solvency – Desegregation

**Dunn, professor of political science at the University of Colorado–Colorado Springs, 2017**   
(Joshua, *Education Next*, “Strictly Discrimination,” 7/7, DS).

According to Oliver Wendell Holmes Jr., the law is nothing more than “the prophecies of what the courts will do in fact.” If that is so, then opponents of race-based classifications in K–12 education have cause for concern. Two recent U.S. Supreme Court opinions, both written by Justice Anthony Kennedy, indicate that a majority of the justices approve of policies that the court’s equal-protection jurisprudence would seem to forbid as unconstitutional racial discrimination. For K–12 education, the consequences of these two new decisions could be significant. For example, challenges to racially driven school assignment and discipline policies are not likely to meet with success in the Supreme Court. In the 2015 case Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Kennedy’s reasoning was characteristically opaque. The result was not. The opinion held that under the Fair Housing Act, plaintiffs can bring “disparate impact” claims of discrimination even when the alleged discrimination is unintentional (see “Disparate Impact Indeed,” legal beat, Fall 2015). Critics of disparate impact have long pointed out that the doctrine actually compels discrimination, since remedying any disparities caused by neutral policies requires racial quotas and classifications.

### Courts solvency – Special education

#### Courts for special education

Mckenna, contributing writer for The Atlantic based in New Jersey, 2017  
(Laura, The Atlantic, “How a New Supreme Court Ruling Could Affect Special Education,” 3/23/2017, https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/, 7/6/17, DS).

In a stunning 8-0 decision in the case Endrew F. v. Douglas County School District, the U.S. Supreme Court ruled in favor of a higher standard of education for children with disabilities. Advocates and parents say the case dramatically expands the rights of special-education students in the United States, creates a nationwide standard for special education, and empowers parents as they advocate for their children in schools. But critics say the decision will not have any impact on schools, arguing that the vast majority already provide a good education for those kids. As I explained in January, the parents of Endrew F. removed him from his local public school, where he made little progress, and placed him in a private school, where they said he made “significant” academic and social improvement. In 2012, Drew’s parents filed a complaint with the Colorado Department of Education to recover the cost of tuition at the school, which is now about $70,000 per year. The lower courts ruled on behalf of the school district on the grounds that the intent of the Individuals with Disabilities Education Act (IDEA) is to ensure handicapped kids have access to public education—not to guarantee any particular level of education once inside. But the parents appealed, with the case eventually landing at the Supreme Court.

### Courts solvency – Rights

#### Individual rights cases should be within the power of the judiciary

Varol, Associate Professor of Law at Lewis & Clark Law School, 2017

(Ozan O., “Structural Rights,” Georgetown Law Journal, Volume 105 Issue 4, 2017, 1019-1021, HeinOnline, ATH)

The comparatively lackluster nature of the judiciary's textual powers is somewhat misleading. The textual powers in Article III do not fully capture the complete set of tools available to the judiciary to wield and expand its authorities. That set of tools also includes provisions that protect individual rights and liberties. In wielding the power of judicial review over individual-rights provisions, the judiciary can not only defend individual rights, but also use that authority to protect and expand judicial power. The judiciary is commonly singled out as the institution responsible for expounding and enforcing individual constitutional liberties and serving as a check on the political branches of government. The enforcement of individual rights projects the appearance of a judiciary doing what it is supposed to do: review laws to ensure constitutional conformity. That, in turn, can increase the ability of the judiciary to persuade and ensure compliance with its decisions. Thus understood, individual-rights provisions also serve a secondary structural function of distributing authority to the judicial branch. I define judicial power as the authority of courts to secure compliance with their decisions. 1 13 So defined, judicial power is distinct from the more nebulous concept of judicial legitimacy.1 1 4 Judicial legitimacy is often conceptualized as a form of judicial currency that the judiciary can develop over time by issuing popular decisions, and deplete through unpopular, partisan, or otherwise controversial decisions. 1 5 But the judiciary can be powerful without being popular.1 6 Put differently, courts can secure compliance with their decisions and coordinate behavior on the outcomes they announce, even where their decisions foment controversy. 117 The relationship developed here between individual rights and judicial power is not meant to be a causal one. In other words, I do not argue that the codification of individual rights causes the expansion of judicial authority. Judicial power can be influenced by numerous factors, including the structure and composition of the judiciary and the sociopolitical environment in which it operates. And in some cases, the addition of constitutional rights can actually weaken the judiciary by overriding court decisions or insulating statutes from constitutional challenges." For example, provisions guaranteeing labor and education rights were codified in several state constitutions in part to protect controversial statutes from constitutional challenges.11 9 I also separate the normative from the positive and refrain from discussing whether the expansion of judicial power is desirable. 12 0 Rather, my claim here is more modest: Individual rights can provide a strategic judiciary with a set of structural tools to increase its institutional powers and wield those powers against the other branches.

#### Courts check against over-powerful governments and protect minority rights the most effectively

Somin 16

[Ilya, professor at George Mason University School of Law, “The Supreme Court is a Check on Big Government, Protection for Minorities”, 2-15-2016, <https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-a-check-on-big-government-protection-for-minorities?mcubz=0>, accessed 7/6/17, NW]

The Supreme Court gets many things wrong. Yet America would be a far worse society without it. If judicial review were seriously curtailed, the executive and legislative branches of government could ignore most constitutional limits on their powers. This is a particularly grave danger in a world where government is as large and powerful as it is today – spending nearly 40% of our gross domestic product, and regulating almost every aspect of human activity. Without an independent judiciary to check their vast powers, federal and state governments would often be free to use their full might to censor opposition speech, confiscate property and otherwise persecute those they disapprove of. Avoiding that is well worth the price of putting up with a good many flawed judicial rulings. Public opinion imposes some constraints on oppressive policies. But with a government as large and complex as ours, many of its abuses are little-known to voters, who generally pay scant attention to public policy. Moreover, some of the worst abuses target groups disliked by mainstream public opinion, such as unpopular ethnic and religious minorities. Absent judicial protection for political rights, political incumbents could even use their powers to insulate themselves against future electoral competition – as has happened in some other countries that lack strong judicial review. The court’s historical record is mixed. But it has had a major beneficial impact in helping protect the rights of racial minorities – not only in iconic cases like Brown v. Board of Education, but in lesser-known decisions, like Buchanan v. Warley, an underappreciated 1917 ruling that struck down laws preventing blacks from moving into majority-white neighborhoods. There is also little doubt that unpopular speech and religious worship has far greater protection than would exist in the court’s absence. The same is true of the rights of criminal defendants, another vulnerable group that tends to get short shrift from the political process. In recent years, the court has done much to curtail uncompensated takings of private property by both federal and state officials. This June, it struck down a program that seized large quantities of raisins from their producers to facilitate a cartel that raises prices for the benefit of politically connect agribusiness interests. Many Americans have reason to be grateful for this little-known aspect of the court’s work. Historically, many of the court’s worst decisions were cases where it chose not to strike down an oppressive unconstitutional policy – cases like Plessy v. Ferguson, which permitted racial segregation, and Korematsu v. United States, which permitted the expulsion of Japanese-Americans from the West Coast during World War II. Weakening the court would increase the incidence of such outrages. In a world of enormously powerful government, we need an independent check on its power to control our lives. Despite its flaw, the court often serves that role well.

### Courts solvency – Search and seizure

#### The Supreme Court has been indecisive—a decision is crucial to creating a brightline for searches and seizures in public schools—Supreme Court key

Yearout, lawyer in Washington D.C., 2002

(Jason, “Individualized School Searches and the Fourth Amendment: What’s a School District to do?” 2002, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1339&context=wmborj>, accessed 07/04/2017, AMS)

Now more than any time in recent history, both educational administrators and parents of schoolchildren are concerned greatly about the safety of students in public schools at all levels of K-12 education.' Indeed, the recent school shootings at high schools in Santee, California and El Cajon, California, in March of 2001, have once again heightened these grave concerns.2 As statistics differ on the proximity between the perceptions of danger in American schools and the relatively safe reality,' school boards and administrators concomitantly fear the legal ramifications of overzealous preventative tactics in response to the "perceived" threat, particularly in the area of search and seizure. In theory, the concerns for student safety and prevention of litigation might make for a workable counterbalance in which a prototypical school district could function rationally, inevitably settling on the individual search policy that works best for that school or district. In practice, however, many school districts are left out on a limb to develop their own guidelines due to the Supreme Court's continued lack of specific guidance in this area of the law. To date, the Court has rendered only two decisions concerning the Fourth Amendment's application in the school search setting: New Jersey v. T.L.O. and Vernonia School District 47Jv. Acton.5 The latter case held that a random drug testing policy for students engaged in an extracurricular activity did not violate the Fourth Amendment;6 the former case will be analyzed in detail infra. While one court has construed this pair of cases to establish a dichotomy of analysis between school searches of individuals, as in T.L.O., and more random, broad "sweeps" akin to a DUI roadblock,7 this note will focus primarily on the individually-oriented issues on which the T.L. 0. Court did not rule. Some states have attempted to fill the jurisprudential void not within the judicial branch, but via executive action from the governor, the state department of education, or select statewide task forces.8 Other states have attempted to tackle the problem through the legislative process.9 However, solutions such as broad recommended guidelines, although well-meaning, suffer from the same critical problem as the current lack of judicial clarity regarding school searches: their generality and "one size fits all" approach to the Fourth Amendment rights of students fails to give each school district adequate direction, particularly in light of several commonplace fact scenarios on which lower courts currently disagree. Indeed, in the vast majority of cases, "school security, like security for other applications, is not simple and straightforward."'0 "No two schools will have identical and successful security programs - hence, a security solution for one school cannot just be replicated at other schools with complete success."" The Supreme Court has further complicated the situation by consistently denying certiorari to subsequent cases that could clarify the Court's stance on this increasingly troublesome, and frequently complex, quandary. 2 This Note will argue that the Supreme Court should examine any of several factual scenarios that school districts regularly confront and establish per se rules or, at the very least, articulate more specific factors to consider before undertaking individual searches within public schools.

### School to prison pipeline

#### Current systems of search and seizure have created a school-to-prison pipeline for minority and discriminated students

Coker, Assistant Professor at the University of New Haven in the Departments of Criminal Justice, Health Sciences, Psychology, and Sociology, 2011

(Kendell, “The Application of the Fourth Amendment in the School Context May Create a Safe Learning Environment for Some but Creates the School-to-Prison Pipeline for Others: The Challenges of Inner City School Violence,” 2011, <http://www.luc.edu/media/lucedu/law/centers/childlaw/childed/pdfs/2011studentpapers/coker_fourth_amendment.pdf>, accessed 07/04/2017, AMS)

The Inner City School Violence Problem In T.L.O., Justice White commented, “[T]he difficulty of maintaining discipline in the public schools today…is not so dire…[t]he prisoner and the schoolchild stand in wholly different circumstances.”32 However, it seems as though much has changed since Justice White made this statement in T.L.O. School violence has become so much of a problem that schools have taken drastic measures to protect their students.33 Ironically, the measures taken by school administrators have given some schools a striking resemblance to prison. In what appears to be acts of desperation to combat violence and protect students, school officials have instituted metal detectors and broad searches of weapons. These are sometimes referred to as administrative searches in that the search is aimed at a group or class of people rather than a particular person under the theory that a member of that group or class might pose a threat to safety. 34 The application of these types of searches (typically used at airports, border patrols, DUI checkpoints, jails) to the school context raises an interesting point of irony and makes Justice White’s comment in T.L.O. seemingly a distant memory and a legal fiction. Despite challenges to the constitutionality of these searches, they have frequently been upheld. Several cases illustrate the courts’ deference to schools in developing policies to protect their students and uphold them on constitutional grounds. In a 1995 case, In the Interest of F.B., the Pennsylvania Superior Court upheld a school-wide search of students for weapons where the school was faced with a general problem of school violence.35 The Philadelphia school district employed police officers to conduct metal detector scans and bag searches on school grounds at a local school.36 Because signs were posted on the front door and around the school regarding the policy, student’s expectation of privacy was greatly reduced.37 Perhaps the most fascinating part of this decision was the court’s agreement with the trial court that under a T.L.O. analysis, the search was justified at its inception. “Because of the high rate of violence in the Philadelphia public schools…[the search] was reasonable…because there is no way to know which students are carrying weapons.”38 Here the Court is acknowledging that when there is a general problem (i.e., violence), which pose a threat to student safety and interferes with student learning, a search may be deemed justified at its inception under T.L.O.’s analysis. A similar decision was passed down in New York in 1992. In People v. Dukes, a New York City high school adopted a metal detector search pursuant to guidelines established by the Board of Education in 1989.39 Like the Pennsylvania case In the Interest of F.B., signs were posted outside the building announcing the search.40 In balancing the government interest against privacy interest, the Court held that the search was reasonable and the decision was informed in part by the need to maintain security in schools.41 Judge Allen wrote, “It is unfortunate that we have reached the point where so many of our great public institutions resemble medieval fortresses.”42 Addressing the issue of violence in schools can be further complicated and challenging due to systemic barriers outside of the school’s control. For instance, ethnic minority students report more fear at school and low income areas have significantly higher incidence rates of violence.43 Under the rationale of the above mentioned cases, many schools, particularly inner city schools that have the harsh reality of violence within its borders can resort to “prison-like” search procedures that will withstand constitutionally scrutiny. Unfortunately while creating an environment that is safe, one might argue that the presence of metal detectors does not create a “comfortable” environment conducive to learning. Moreover, as mentioned earlier, many commentators argue that these prison like atmospheres that currently exists in schools do not foster learning, but rather a pipeline-to-prison.44 This has a greater impact on youth who attend such dangerous schools and the burden that must be met to implement these searches are likely always reasonable because the need for these searchers to enhance safety in these schools is greater.45 Some commentators argue that there should be a requirement for individualized suspicion prior to searching a student.46 However, requiring individualized suspicion may not provide school officials working in high crime schools with the broad disciplinary powers they need to adequately protect their students. Although I echo the concerns raised by Judge Allen, I applaud Judge Allen’s opinion47 and many similar decisions to err on the side of safety in the school context. In the context of schools, children do not have a choice to attend school and there must be a safe learning environment for educational goals to be met. Therefore, courts have and must continue to defer to school officials by considering the prevalence and seriousness of violence in their respective school and the need for administrative action to further the goal of maintaining school discipline and order.48 Re-Thinking the Problem The real dangers of violence in schools, particularly inner city, predominately minority schools, have caused school officials to use “prison-like” search procedures.49 The challenging issue is that students must feel safe in school, but common sense also dictates that it can be psychological distressing for a young child to have to walk through a metal detector to enter school every day. As mentioned earlier, commentators argue that these tactics help facilitate the pipeline to prison. One expert noted that “administering carceral treatment on students, such as subjecting students to search and seizures…and socializing students into acting defiantly through exposure to carceral school environments and treatment.”50 Moreover, not every student who brings a weapon to school is looking to engage in predatory violence. Some students may feel compelled to bring weapons to school to “defend” themselves from the potential dangers that lurk in the school hallways.51 Sometimes the violence that is seen in the school setting may be the result of an escalating conflict between rivals or retaliation.52 Although this does not excuse the behavior, it may shed light on how the problem and solution are viewed. In other words, sometimes when a student brings a weapon into school, that student may be crying for help or merely need some sort of guidance. 53 Though school safety should not be compromised, teachers, school officials, and trained professionals can collaborate to develop strategies to attenuate violence in schools.54 Currently zero-tolerance policies have been one popular solution to combat violence and weapons in school. Zero-tolerance policies typically mandate the expulsion of students who fight or are found to be in possession of weapons on school grounds.55 These students are often referred to the justice system where there is substantial evidence of existing racial/ethnic disparities in juvenile case processing.56 Zero tolerance policies have not proven to be effective, do not improve school safety, and only push students, especially minorities, out of school and into incarceration. 57

#### Searches and seizures have created an environment of fear and terror, destroying students’ ability to learn and resulting in psychological attacks

Beger, instructor at Georgia State University, 2003

(Randall, *Georgia State University*, “THE “WORST OF BOTH WORLDS”: SCHOOL SECURITY AND THE DISAPPEARING FOURTH AMENDMENT RIGHTS OF STUDENTS,” Autumn 2003, <http://youthjusticenc.org/download/education-justice/due-process/The%20%E2%80%9CWorst%20of%20Both%20Worlds%E2%80%9D:%20School%20Security%20and%20the%20Disappearing%20Fourth%20Amendment%20Rights%20of%20Students.pdf>, accessed 07/04/2017)

Most school violence and serious injuries at school are rare events (Lawrence, 1998). Nevertheless, many schools have adopted new forms of security without fully appreciating the impact on students and the educational environment. According to the nation's newspapers, school districts have introduced stricter dress codes (Santillanes, 1997), banned book bags and pagers (Hollingsworth, 1999), installed lockless lockers (Olivo, 2000), added computer-coded ID badges (Richey, 1998), instituted SWAT team rehearsals (Loyd, 2000), implemented "lock down" drills (Fitzgerald, 2000), and adopted student drug testing (Chaddock, 1999). Many public schools have also hired school resource officers (SROs), also known as school liaison officers, to patrol campuses (Dunn, 1999; O'Leary, 2001). SROs are certified law enforcement officials whose duties include chaperoning school dances, breaking up fights, searching the person and property of students, and making sure that no outsiders are on campus (Gips, 2002; Johnson, 1999; Mulqueen, 1999). In 1997, there were 9,446 SROs in police departments who were assigned to public schools in the United States (Bureau of Justice Statistics, 2000). The numbers of SROs have increased as a result of additional funding at the federal level. According to one source, "school-based policing programs are now one of the, if not THE, fastest growing areas of law enforcement" (Lavarello, 2000, p. 6). A number of social scientists claim that policies created to reduce violence in public schools have "criminalized" a broad range of student conduct that presents no real threat to school-wide safety (Ayers, 1997/1998; Giroux, 2001; Noguera, 1995). Dohrn asserts that, because of exaggerated safety concerns, schools have become more dependent on the police to intervene in a wide range of situations that used to be managed informally by teachers. "Decisions to call a shouting match, a no-harm tussle, or locker graffiti a crime, to arrest rather than see a teachable moment, to prosecute rather than resolve disputes-these practices are turning schools into policed territory" (Dohm, 2001, p. 164). Similar to Dohm's account, a joint report released by the Justice Policy Institute and Children's Law Center cites numerous examples of school children facing criminal charges for such minor infractions as pouring soapy water into a teacher's cup, threatening students in a lunch line not to "eat all the potatoes," and allegedly stealing two dollars from a classmate (Brooks et al., 2001). Equally worrisome to many educators is the overrepresentation of minority youth among the ranks of students suspended or expelled from school under zero tolerance initiatives (Peden, 2001; Reed & Strahan, 1995; Skiba & Peterson, 2000). A Harvard University Civil Rights Project reports that African-American children comprise only 17 percent of the students enrolled in public schools yet represent 33 percent of out-of-school suspensions for zero tolerance (Advancement Project/Civil Rights Project, 2000). RESEARCH EVALUATING SCHOOL SECURITY MEASURES Little hard evidence evaluating school security measures exists. What data are available suggest that heavily layered security in public schools (e.g., unannounced locker inspections, police searches, surveillance cameras) may not be effective in reducing the risk of student disorder. For example, using a structural equation methodology, Mayer and Leone (1999) analyzed the relationship between school safety operations and rates of victimization and disorder reported by 9,000 students. They found that student disorder and victimization were higher in schools with restrictive physical security (metal detectors, locked doors) than in schools where physical security was not so pervasive. The authors of this study assert that a "cycle of disorder" may be operating in heavily secured schools: "Viewed in the context of a reciprocal relationship, the data suggest that disorder and restrictive management of the school premises go hand in hand and may feed off of each other" (p. 12). Mayer and Leone recommend that "less attention be paid to running schools in an overly restrictive manner and rather, schools should concentrate more on communicating individual responsibility to students" (p. 14). Other studies demonstrate that aggressive security measures produce alienation and mistrust among students (Anderson, 1998; Easterbrook, 1999; Noguera, 1995). Hyman and Perone (1998) surveyed evidence from multiple sources and found that intrusive forms of security increase rather than inhibit student misbehavior. They note that "get tough" security practices such as school-wide locker searches and police searches have "negative effects on student morale [including] the development of, or increase in, oppositional behavior" (p. 13). Strict security measures can disrupt the learning environment and create an adversarial relationship between school officials and students. Indeed, the nation's newspapers have published stories about students organizing petition drives and boycotting classes to protest unannounced locker inspections, police searches, and other forms of intrusive security (Chiang, 1997; Gendar, 1999; Smith, 1999). Some civil libertarians and academics worry that metal detector screening in public schools may deprive students of valuable learning time (Imbriani, 1995; Watkins & Hooks, 2000). One example of this, published in the CQ Researcher, can be found in a high school in Brooklyn, New York, where it takes almost three hours to "funnel all 3,000 students into the gym, where they are frisked with hand-held metal detectors and their book bags are probed" (Glazer, 1992, p. 790). Zirkel (2000) points out that installing metal detectors in schools that are relatively free of trouble could increase fear and insecurity rather than help students feel safe. At a deeper level, the overarching presence of police and security hardware in public schools may actually interfere with student learning. Devine (1996) encountered this in his fieldwork on "lower tier" public schools in New York City. Devine interviewed teachers who complained of not being able to teach "because of loud noises coming from the walkie-talkies in the corridors" patrolled by security guards (p. 89). A school principal whom Devine interviewed admitted, "I have no control over security guards, they don't report to me" (p. 77). Devine acknowledges that nonfatal violence among students is a serious problem in large, inner-city public schools (see also Howell, 1997). However, he concludes that fortress-like security is bad for students, for teachers, and for the educational process.3 Although Devine studied schools that serve New York City's poorest and most violent communities, his observations about the destructive impact of repressive security have wider application. Education research affirms that the most important ingredient that schools need in order to build and maintain a safe and supportive learning environment is interpersonal trust (Cook-Sather, 2002; Kaplan & Owings, 2000). On this point, Silva and Macklin (2002, p. 29) assert, "Children learn to think best, to use their mind well, to express themselves in a learning environment where they feel trusted, respected, and encouraged." Other research indicates that schools with committed and caring teachers who work with students to set clear, fair, and consistently enforced rules are less likely to experience violence and disorder (Anderson, 1998; Gottfredson, 1986; Gottfredson, Gottfredson, & Hybl, 1993). A climate of heightened security seems to work against a cooperative learning environment by producing hostility and fear (Edwards, 200

### Courts solvency – Fiat

#### Courts can do stuff

Krauthammer, former Oxford University Scholar in Politics and Washington post column writer, 2017  
(Charles, Register-Guard, “Senate court fight is about raw power, not high principle,”4/7/2017, http://registerguard.com/rg/opinion/35456516-78/senate-court-fight-is-about-raw-power-not-high-principle.html.csp, 7/6/17, DS).

A major reason these fights over Supreme Court nominations have become so bitter and unseemly is the stakes — the political stakes. The Supreme Court has become more than ever a superlegislature. From abortion to gay marriage, it has appropriated to itself the final word. It rules — and the normal democratic impulses, expressed through the elected branches, are henceforth stifled. Why have we had almost half a century of massive street demonstrations over abortion? Because the ballot box is not available. The court has spoken, and the question is supposedly settled for all time. This transfer of legislative authority has suited American liberalism rather well. When you command the allegiance of 20 to 25 percent of the population (as measured by Gallup), you know that whatever control you will have of the elected branches will be fleeting (2009-2010, for example). So how do you turn the political order in your direction? Capture the courts. They are what banks were to Willie Sutton, who said he robbed banks because that’s where the money is. The courts are where you go for the right political outcomes. Note how practically every argument at the Gorsuch hearings was about political outcomes. Where would he come out on abortion? Gay marriage? The Democrats pretended this was about principle, e.g. the sanctity of precedent. But everyone knows which precedents they selectively cherish: Roe vs. Wade and, more recently, Obergefell vs. Hodges. Liberalism does not want to admit that the court has become its last reliable instrument for achieving its political objectives. So liberals have created a great philosophical superstructure to justify their freewheeling, freestyle constitutional interpretation. They present themselves as defenders of a “living Constitution” under which the role of the court is to reflect the evolving norms of society. With its finger on the pulse of the people, the court turns contemporary culture into constitutional law.

### Courts net benefit – Politics

#### Court action avoids the politics link

Whittington 5- Professor of Politics, Princeton University (Keith, "Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, [The American Political Science Review](http://proquest.umi.com.proxy.lib.umich.edu/pqdweb?RQT=318&pmid=28600&TS=1245862067&clientId=17822&VInst=PROD&VName=PQD&VType=PQD), Nov., (99)4, p. 583)

There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician's own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

### A2 Perm do both

#### Explain how the inclusion of the plan in the perm still links to the net benefit

### A2 Perm do the counterplan

\*\*This block works for both Court and Cong

#### Perm severs the agent –

#### The is a "definite article used as a function word before a noun to indicate reference to a group as a whole" from :

#### Merriam Webster's Dictionary in 2002.

The United States Federal Government is defined as "the executive and legislative and judicial branches of the federal government of the US" from the Princeton University WordNet in 1997

#### This is a voting issue:

#### stable plan text is the determining factor of all disads and counterplans

#### reject the team not the argument – rejecting the argument makes the perm a no risk issue for the AFF

#### at the very least bar perms

#### Our counterplan must compete to unlock 90% of education and ground

Elmore, Prof. Public Affairs at University of Washington, Candidate for GOAT ev, PolySci Quarterly 79-80, p. 605, 1980

The emergence of implementation as a subject for policy analysis coincides closely with the discovery by policy analysts that decisions are not self-executing. Analysis of policy choices matter very little if the mechanism for implementing those choices is poorly understood in answering the question, "What percentage of the work of achieving a desired governmental action is done when the preferred analytic alternative has been identified?" Allison estimated that in the normal case, it was about 10 percent, leaving the remaining 90 percent in the realm of implementation.

### A2 Court doesn’t have education jurisdiction

#### Courts’ role in education policy development is crucial

Reid, Director of Communications at University of Michigan, 2016  
(Dave, *MSU College of Education*, “The Role of Courts in Shaping Educational Policy,” 4/20/17, http://edwp.educ.msu.edu/green-and-write/2016/the-role-of-courts-in-shaping-educational-policy/, 7/7/17, DS).

Local, state, and federal courts have a long history of involvement in educational policy issues. These issues have ranged from desegregation and school finance to bilingual education and special education. Most recently, teacher rights, such as teacher tenure laws, have been brought to the courts. While historically courts have been hesitant to make educational policy decisions, (instead allowing local decision makers, such as elected legislatures or school boards to take on this responsibility), more recently courts have played an increasingly prominent role interpreting federal and state constitutions. As the role of courts continues to increase in the educational policy shaping arena, much of the commentary centers on the danger of courts, specifically appointed judges, making educational policy decisions, which are traditionally made by elected legislators and local constituencies, such as elected school boards. Much of the time people, including courts themselves, argue elected officials should be making these decisions, as they represent the interests of local constituents. However, other people argue elected officials seldom prioritize the concerns of those not of the majority and courts are better suited to protect the rights of marginalized groups. As is historically evident, courts play a crucial role in making sure student educational rights are realized. There will always be a role for the courts in shaping educational policy and this role is likely to expand as more student rights’ cases, like Vergara v. California are brought to the forefront of educational debates. As legal scholar Jay Heubert states, “Law driven school reform efforts, while falling short of their full potential, have produced important educational improvements…. For those who seek to use law to improve education, it has always been important to communicate effectively with judges. Conflict over rights is inherent in a constitutional system that authorizes, indeed commands, judges to give certain values and interests priority over the preferences of political majorities.”

#### Judicial activism is key to circumvent Congressional overreach

Roberts, Law Professor at West Virginia University, 2007

(Caprice L., “IN SEARCH OF JUDICIAL ACTIVISM: DANGERS IN QUANTIFYING THE QUALITATIVE,” Tennessee Law Review, Volume 74 Issue 4, Summer 2007, 576-578, HeinOnline, ATH)

Given the recurring (mis)usage of "judicial activism" as an epithet, some law professors feel compelled to reclaim, debunk, clarify, and perhaps reconstruct the term to protect the judiciary, or at least some wing of the judiciary. Unfortunately, many discussions of judicial activism do not involve clear definitions of the term. Although legal academia has reached no consensus, several thoughtful treatments by law professors include definitions and categorizations that are useful guides in this arena.4 ° Some commentators wish to provide content as a purely descriptive tool, while others seek to provide content as a normative statement. Professor Cass Sunstein, Judge Easterbrook, and others have sought narrow, "neutral" definitions, such as the overturning of federal statutes or constitutional avoidance.41 The phrase "judicial activism" has had so many iterations that many have knowingly and unknowingly honored Jacques Derrida by deconstructing the term and calling for its banishment. One set of scholars recognizes the flaws stemming from the term's misuse, but wants to retrieve the phrase as a useful descriptor. For example, Professor Kmiec has landscaped prior descriptions in order to bring the public into a preexisting intellectual framework of discussion. 44 Still, some scholars purposefully decline to provide a definition with precise limitations. They instead broadly characterize judicial activism through the use of "dimensions" (Professor Canon),45 "indices" (Professor Marshall),46 or "common threads" (Professor Young)47 that, as applied to cases or controversies, may be underinclusive, overlapping, and contradictory. Scores of other articles and opinions discuss judicial activism, but very few rigorously attempt to define it. Even more journalists, activists, and members of Congress sweepingly hurl the phrase without providing content, which distorts its meaning. As Professor Young has noted, commentators may be reluctant to define the phrase because the task is so difficult.48 Perhaps "we know it when we see it.' 9 In fact, how one defines and uses "judicial activism" often says more about the speaker than the judicial target. Even in its most simple formulation, the phrase ma<y cause confusion rather than clarity. For example, if one uses the common definition of "judicial activism" as "judicial action that overturns congressional statutes," then the Supreme Court engages in activism quite often, as evidenced by votes tracked in the Spaeth Database.50 But assume that Congress passes legislation that is patently unconstitutional. Overturning the statute would be considered an act ofjudicial activism under this definition; yet, it would also be an instance of the Court properly exercising its role as protector and interpreter of the Constitution (if one views Marbury v. Madison5' as nonactivist). Is it not possible for an opinion to be an example of both activism and restraint? 52 Is it not equally possible that Congress has engaged in congressional activism by passing legislation that it knows to be constitutionally suspect?

#### The Supreme Court’s quintessential role is to check the legislature

Roberts, Law Professor at West Virginia University, 2007

(Caprice L., “IN SEARCH OF JUDICIAL ACTIVISM: DANGERS IN QUANTIFYING THE QUALITATIVE,” Tennessee Law Review, Volume 74 Issue 4, Summer 2007, 583-584, HeinOnline, ATH)

The Lopez majority opinion represents a textbook counter-majoritarian exercise of court power and is what some call "conservative activism," in that it advances federalism and states' rights by encroaching upon federal congressional power.8 5 Whether this constitutes an improper exercise of judicial authority depends on whether Congress underperformed its institutional role by passing a federal statute that was incapable of withstanding constitutional scrutiny.86 If so, then the Court's act of invalidation is not a judicial usurpation of legislative power; rather, it is the Court exercising its quintessential role within the constitutional order. Ironically, had the Court upheld the federal statute, it might have been considered "activist" for allowing Congress to encroach on state sovereignty through continued expansion of the Commerce Clause. Again, this indeterminacy is the heart of the matter reasonable minds can disagree on this issue. Even if Justice Souter's interpretation of the majority's usurpation of congressional prerogative is persuasive, the dissent does little to address how jurists should go about filling in the gaps of legislative acts where no explicit findings are present. How can the Court institutionally defer to Congress where Congress has failed to provide any guidance about its legislative judgments? Could one argue that an opinion following the dissent's logic would have the Court underplaying its proper role?

### A2 Court Legitimacy – not unique

#### The credibility of the Supreme Court is plummeting—the plan creates a signal to pull it from the backwaters

Davidson, senior correspondent at The Federalist, 2016

(John, The Federalist, “American Are Losing Confidence In The Supreme Court,” 06/29/2016, <http://thefederalist.com/2016/06/29/americans-are-losing-confidence-in-the-supreme-court/>, accessed 07/04/2017, AMS)

Americans are beginning to lose confidence in the Supreme Court. Traditionally, the court has been unique among our political institutions in that Americans tend to have more confidence in it than they do in Congress or the presidency. Indeed, for decades the judiciary as a whole has [enjoyed greater public](http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx?g_source=position2&g_medium=related&g_campaign=tiles) trust than the other branches of government.

That’s beginning to change. Last fall, the court’s disapproval rating hit a [new high of 50 percent](http://www.gallup.com/poll/185972/disapproval-supreme-court-edges-new-high.aspx), continuing a long decline from favorable opinion ratings [as high as 77 percent](http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/) in the 1990s. Such ratings have of course always been somewhat partisan. Republican views of the court plummeted after recent decisions on same-sex marriage and the Affordable Care Act, while Democrats’ opinion of the court improved.

But something beyond mere partisanship is at play. Americans increasingly view the Supreme Court not as a revered body of judges considering questions of law, but as ideologues engaged at the front lines of America’s culture wars. Last year, a Pew poll [noted a major shift](http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/7-29-2015-12-42-28-pm/) in how Americans view the Supreme Court’s ideology, with nearly as many respondents saying the court is liberal (36 percent) as it is middle-of-the-road (39 percent). At the same time, the number of those who say the court is conservative (18 percent) declined sharply to its lowest point since 2007.

Monday’s raft of contradictory opinions helps explain why this is happening. If Americans increasingly don’t believe the Supreme Court cares all that much about matters of law, perhaps it’s because the court’s rulings increasingly appear to be motivated by politics and preferred policy outcomes rather than the rule of law or even consistent legal reasoning. Taken together, the Monday decisions make clear that the court’s liberal majority favors some rights over others, and will say just about anything to achieve the outcome it desires.

The Non-Logic of the Court’s Abortion Decision

Consider the big abortion ruling in Whole Woman’s Health v. Hellerstedt, which blocked parts of a Texas law designed to impose more stringent regulations on abortion clinics. Specifically, it blocked two provisions of the 2013 Texas law, one that required abortion clinics to meet the standards of an ambulatory surgery center and one that required physicians performing abortions to have admitting privileges at a nearby (within 30 miles) hospital.

These requirements no doubt held abortion clinics to a higher standard of care than previous state regulations did. But of course that was the point, even if it meant some clinics would have to close, as some subsequently did. The Texas legislature passed the law in the wake of the trial of [Kermit Gosnell](https://en.wikipedia.org/wiki/Kermit_Gosnell#Defendants.2C_related_charges.2C_verdicts_and_sentencing), the Philadelphia abortionist who ran a veritable house of horrors, severing the spines of infants after they were born, clogging toilets with human remains, operating on women with dirty instruments, and actually butchering mothers and children alike. In May 2013, a jury convicted Gosnell on three counts of murder, one count of involuntary manslaughter, and numerous lesser counts. He was sentenced to life in prison without the possibility of parole.

The timing of his conviction is important. The Texas law was introduced in a special legislative session called after Gosnell’s trial and conviction, in June 2013. Lawmakers explained at the time that the new regulations were to ensure something like Gosnell never happened in Texas. That of course is the entire point of a lawmaking body, to decide how best to protect the lives and liberties of the people in its jurisdiction.

In its ruling Monday, the [majority opinion](http://www.supremecourt.gov/opinions/15pdf/15-274_p8k0.pdf) by Justice Breyer conceded “Gosnell’s behavior was terribly wrong.” But then Breyer made an astonishing claim that seemingly repudiates every regulatory scheme from gun control laws to speed limits. As bad as Gosnell was, Breyer wrote, “there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations.”

With legal reasoning like that, it’s hard to believe the Supreme Court would uphold state regulations on just about anything. Yet the majority justified its position on the basis that the Texas rules amounted to an “undue burden” on women exercising their right to an abortion. In a blistering dissent, Justice Clarence Thomas attacked the very basis of the majority’s logic:

The majority’s furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court’s tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it ‘rational basis,’ intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.

Thomas also noted that “the majority’s undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion.” The logical consequence of “second-guessing medical evidence and making its own assessments of ‘quality of care’ issues,” Thomas added, is that “the majority reappoints this Court as ‘the country’s ex officio medical board with powers to disapprove medical and operative practices and standards throughout the United States.’”

The Second Amendment Is Now A Second-Class Right

The court would apply no such “undue-burden balancing approach” to Second Amendment rights in a 6-2 decision involving two Maine men who were barred from owning firearms under federal law because they were convicted of misdemeanor assault under state law. Both petitioners argue the Maine law did not require prosecutors to show that they intentionally used force, and that because their crimes were reckless in nature, their convictions should not bar them from owning firearms.

Thomas, joined by Justice Sotomayor, argued that reckless behavior doesn’t rise to the level of malicious intent meant to trigger the federal weapons ban. In a sole dissent, Thomas noted that the majority’s reasoning “expands [the federal ban]’s sweep into patently unconstitutional territory.” He then gave some poignant examples:

We treat no other constitutional right so cavalierly. At oral argument the Government could not identify any other fundamental constitutional right that a person could lose forever by a single conviction for an infraction punishable only by a fine.

In enacting [the federal firearms law], Congress was not worried about a husband dropping a plate on his wife’s foot or a parent injuring her child by texting while driving. Congress was worried that family members were abusing other family members through acts of violence and keeping their guns by pleading down to misdemeanors… Instead, under the majority’s approach, a parent who has a car accident because he sent a text message while driving can lose his right to bear arms forever if his wife or child suffers the slightest injury from the crash.

Religious Liberty Isn’t Worth the Supreme Court’s Time

Treating some rights as more equal than others is now endemic among Supreme Court justices. Consider a case the court declined to hear this week, about a Washington state law that makes it illegal for pharmacies to refuse to dispense medications for religious reasons. Justice Samuel Alito, joined by Chief Justice John Roberts and Thomas, wrote [a dissenting opinion](http://www.supremecourt.gov/opinions/15pdf/15-862_2c8f.pdf) warning that the court’s refusal to hear the case was an “ominous sign” for religious liberty.

At issue in the case is whether privately owned pharmacies can opt out of providing services or medicines that conflict with the owner’s religious beliefs, such as contraceptives or emergency abortifacients. In fact, the state regulation requiring pharmacies to provide “morning-after” contraception is what the challengers in the case, a group of Christian pharmacy owners, say violates their religious freedom. A federal appeals court said the regulations rationally further the state’s interest in “patient safety,” and left it at that, which was apparently good enough for five Supreme Court justices.

“Circuit held that the regulations do not violate the First Amendment, and this Court does not deem the case worthy of our time,” Alito wrote. “If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.”

The Court Is Sinking to the Level of Congress and the White House

So no wonder Americans are beginning to lose confidence in the highest court in the land. Like our other branches of government, the Supreme Court increasingly doesn’t take its duties and responsibilities seriously. President Obama has accustomed us to such behavior. What are Americans to conclude about their government when they see, in the aftermath of a terrorist attack by an avowed follower of the Islamic State, that the president will barely admit it was an “attack” at all, let alone an attack inspired by and carried out in the name of ISIS.

Or when the best response congressional Democrats could muster to the Orlando attack was to stage a campus-style “sit-in” on the floor of the House—not to demand more robust action against ISIS, but to insist on gun-control legislation that would undermine Americans’ constitutional rights under the Second, Fifth, and Fourteenth amendments.

So it is now with the Supreme Court. On major, hot-button social issues like gun control, Obamacare, abortion, and gay marriage, a growing share of Americans don’t really believe the liberal justices of the Supreme Court—and even some supposedly conservative justices—are all that interested in the U.S. Constitution anymore.

#### The Constitution is outdated and neglected—the aff is key to creating American legitimacy Liptak, covers United States Supreme Court and studied in law at Yale Law School, 2012

(Adam, *The New York Times*, “’We the People’ Loses Appeal With People Around the World,” 02/06/2012, <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?mcubz=1>, accessed 07/04/2017, AMS)

WASHINGTON — The Constitution has seen better days.

Sure, it is the nation’s founding document and sacred text. And it is the oldest written national constitution still in force anywhere in the world. But its influence is waning.

In 1987, on the Constitution’s bicentennial, [Time magazine calculated](http://www.time.com/time/magazine/article/0,9171,964901,00.html) that “of the 170 countries that exist today, more than 160 have written charters modeled directly or indirectly on the U.S. version.”

A quarter-century later, the picture looks very different. “The U.S. Constitution appears to be losing its appeal as a model for constitutional drafters elsewhere,” according to [a new study](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923556) by [David S. Law](http://law.wustl.edu/faculty_profiles/profiles.aspx?id=6629) of Washington University in St. Louis and [Mila Versteeg](http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/2301734) of the University of Virginia.

The study, to be published in June in The New York University Law Review, bristles with data. Its authors coded and analyzed the provisions of 729 constitutions adopted by 188 countries from 1946 to 2006, and they considered 237 variables regarding various rights and ways to enforce them.

“Among the world’s democracies,” Professors Law and Versteeg concluded, “constitutional similarity to the United States has clearly gone into free fall. Over the 1960s and 1970s, democratic constitutions as a whole became more similar to the U.S. Constitution, only to reverse course in the 1980s and 1990s.”

“The turn of the twenty-first century, however, saw the beginning of a steep plunge that continues through the most recent years for which we have data, to the point that the constitutions of the world’s democracies are, on average, less similar to the U.S. Constitution now than they were at the end of [World War II](http://topics.nytimes.com/top/reference/timestopics/subjects/w/world_war_ii_/index.html?inline=nyt-classifier).”

There are lots of possible reasons. The United States Constitution is terse and old, and it guarantees relatively few rights. The commitment of some members of the Supreme Court to interpreting the Constitution according to its original meaning in the 18th century may send the signal that it is of little current use to, say, a new African nation. And the Constitution’s waning influence may be part of a general decline in American power and prestige.

In an interview, Professor Law identified a central reason for the trend: the availability of newer, sexier and more powerful operating systems in the constitutional marketplace. “Nobody wants to copy Windows 3.1,” he said.

In a[television interview](http://www.youtube.com/watch?v=vzog2QWiVaA) during a visit to Egypt last week, Justice Ruth Bader Ginsburg of the Supreme Court seemed to agree. “I would not look to the United States Constitution if I were drafting a constitution in the year 2012,” she said. She recommended, instead, the [South African Constitution](http://www.info.gov.za/documents/constitution/), the [Canadian Charter of Rights and Freedoms](http://laws.justice.gc.ca/eng/charter/) or the [European Convention on Human Rights](http://www.hri.org/docs/ECHR50.html).

The rights guaranteed by the American Constitution are parsimonious by international standards, and they are frozen in amber. As [Sanford Levinson](http://www.utexas.edu/law/faculty/svl55/)wrote in 2006 in [“Our Undemocratic Constitution,”](http://www.utexas.edu/law/faculty/slevinson/undemocratic/) “the U.S. Constitution is the most difficult to amend of any constitution currently existing in the world today.” (Yugoslavia used to hold that title, but Yugoslavia did not work out.)

Other nations routinely trade in their constitutions wholesale, replacing them on average every 19 years. By odd coincidence, Thomas Jefferson, in [a 1789 letter to James Madison](http://teachingamericanhistory.org/library/index.asp?document=2220), once said that every constitution “naturally expires at the end of 19 years” because “the earth belongs always to the living generation.” These days, the overlap between the rights guaranteed by the Constitution and those most popular around the world is spotty.

Americans recognize rights not widely protected, including ones to a speedy and public trial, and are outliers in prohibiting government establishment of religion. But the Constitution is out of step with the rest of the world in failing to protect, at least in so many words, a right to travel, the presumption of innocence and entitlement to food, education and health care.

It has its idiosyncrasies. Only 2 percent of the world’s constitutions protect, as the Second Amendment does, a right to bear arms. (Its brothers in arms are Guatemala and Mexico.)

The Constitution’s waning global stature is consistent with [the diminished influence of the Supreme Court](http://www.nytimes.com/2008/09/18/us/18legal.html?ref=americanexception), which “is losing the central role it once had among courts in modern democracies,” Aharon Barak, then the president of the Supreme Court of Israel, [wrote in The Harvard Law Review in 2002](https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=116+Harv.+L.+Rev.+16&srctype=smi&srcid=3B15&key=0bacc7c7026c426ae19a031de806c331).

Many foreign judges say they have become less likely to cite decisions of the United States Supreme Court, in part because of what they consider its parochialism.

“America is in danger, I think, of becoming something of a legal backwater,” Justice Michael Kirby of the High Court of Australia said in [a 2001 interview](https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=4+Green+Bag+2d+287&srctype=smi&srcid=3B15&key=27e2ae15f94c08a6f86b86181db67a34). He said that he looked instead to India, South Africa and New Zealand.

Mr. Barak, for his part, identified a new constitutional superpower: “Canadian law,” he wrote, “serves as a source of inspiration for many countries around the world.” The new study also suggests that the Canadian Charter of Rights and Freedoms, adopted in 1982, may now be more influential than its American counterpart.

The Canadian Charter is both more expansive and less absolute. It guarantees equal rights for women and disabled people, allows affirmative action and requires that those arrested be informed of their rights. On the other hand, it balances those rights against “such reasonable limits” as “can be demonstrably justified in a free and democratic society.”

There are, of course, limits to empirical research based on coding and counting, and there is more to a constitution than its words, as Justice Antonin Scalia[told the Senate Judiciary Committee in October](http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8bbe59e76fc0b6747b22c32c9e014187). “Every banana republic in the world has a bill of rights,” he said.

“The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours,” he said, adding: “We guarantee freedom of speech and of the press. Big deal. They guaranteed freedom of speech, of the press, of street demonstrations and protests, and anyone who is caught trying to suppress criticism of the government will be called to account. Whoa, that is wonderful stuff!”

“Of course,” Justice Scalia continued, “it’s just words on paper, what our framers would have called a ‘parchment guarantee.’ ”

#### Trump relentlessly attacks courts—undermines the power of checks and balances

Jawando and Corriher; Vice President for Legal Progress at American Progress, Deputy Director of Legal Process at American Progress; 2017

(Michel and Billy, *American Progress*, “President Trump’s Attacks on the Courts Show the Need for an Independent Supreme Court Nominee with Bipartisan Support,” 02/08/2017, <https://www.americanprogress.org/issues/courts/news/2017/02/08/313785/president-trumps-attacks-on-the-courts-show-the-need-for-an-independent-supreme-court-nominee-with-bipartisan-support/>, accessed 07/04/2017, AMS)

In his first two weeks in office, President Donald Trump has shown an alarming disregard for the courts and the constitutional limits on his power. He has [banned](http://www.cnn.com/2017/02/06/opinions/muslim-ban-unconstitutional-opinion-pate/) refugees and Muslims from certain countries; [fired](http://thehill.com/homenews/news/317029-nixon-white-house-lawyer-trumps-firing-of-acting-ag-yates-a-new-low) an attorney general; [possibly](https://thinkprogress.org/trump-ownership-of-trump-organization-emoluments-303b647061a1#.nyfwcsqhu) [profited](https://thinkprogress.org/melania-trump-reveals-plan-to-leverage-presidency-to-ink-multi-million-dollar-endorsement-deals-1999314fb8f1#.4nyswz274) from his presidency; threatened to [block](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.3e7f87c02477) funding to jurisdictions that limit entanglement between local police and federal immigration enforcement; and [questioned](https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html) the legitimacy of U.S. District Court Judge James Robart, who temporarily halted his Muslim ban.

The president [referred](http://www.nbcnews.com/news/us-news/experts-trump-undermines-judiciary-twitter-attack-judge-robart-n717626) to Judge Robart, appointed by President George W. Bush, as a “so-called judge.” Trump [suggested](http://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts) Judge Robart would be responsible if a terrorist attack were to occur: “If something happens blame him and court system.” There were also [reports](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/trump_is_violating_the_court_orders_against_his_muslim_ban.html) of federal officials refusing to obey earlier court orders pertaining to the Muslim ban, including an order protecting the right to counsel for lawful permanent residents.

President Trump’s attacks on judges undermine judicial independence—the very foundation of a coequal branch of government. Under the Constitution’s separation of powers, the courts define the constitution and its limits on the authority of the other branches of government. Since the president’s party controls Congress, the courts will be crucial to ensuring that Trump does not violate the Constitution.

In these circumstances, the American people may have a hard time trusting President Trump to make a lifetime appointment to the U.S. Supreme Court. Senate Minority Leader Chuck Schumer (D-NY) [warned](https://talkingpointsmemo.com/livewire/schumer-trump-judge-executive-order-scotus) that Trump’s attack on Judge Robart “shows a disdain for an independent judiciary that doesn’t always bend to his wishes and a continued lack of respect for the Constitution, making it more important that the Supreme Court serve as an independent check on the administration.”

President Trump has a pattern of questioning the legitimacy of judges whose rulings he does not like. For example, Trump [claimed](http://www.newyorker.com/news/news-desk/trump-and-the-truth-the-mexican-judge) that a Mexican American judge could not be unbiased in a case involving him, due to his ethnic heritage.

How would President Trump’s Supreme Court nominee, Judge Neil Gorsuch, respond to attacks on judicial independence? A blogger for the American Constitution Society recently [asked](http://www.acslaw.org/acsblog/why-trumps-attacks-on-the-judiciary-should-worry-us-about-judge-gorsuch-and-other-nominees), “If Trump is so easily angered by a judicial ruling … what is likely the most important criterion Trump has for his judicial nominees? Loyalty.” Trump advisor Roger Stone similarly [said](http://www.politico.com/story/2017/01/trump-supreme-court-gorsuch-234474) that the president needs “a supportive court … Not a conservative court, not a right-wing court—a Trump court.”

So many legal questions have been raised about President Trump’s earliest actions that the president should expect at least some court rulings against his administration. Legal [experts](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/what_happens_if_donald_trump_refuses_a_federal_court_order.html) are [asking](http://www.nbcnews.com/news/us-news/experts-trump-undermines-judiciary-twitter-attack-judge-robart-n717626) how Trump might react.

The framers of the Constitution understood that the president and Congress may not like some court rulings, so they set up a system that mostly insulates federal judges from political pressure. But President Trump could find ways to lash out at the courts, if Congress goes along. In several states, politicians have recently tried to [defund](http://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court) [courts](http://gaveltogavel.us/2015/05/19/kansas-upcoming-yesno-floor-vote-calls-for-judiciarys-entire-budget-to-be-eliminated-if-courts-rule-against-2014-law/) or [pack](http://talkingpointsmemo.com/muckraker/arizona-state-supreme-court) [them](https://thinkprogress.org/north-carolina-supreme-court-33e0873acb30#.g6nik2l1g) with conservative judges. The president and Congress could change the number of judges on the Supreme Court or lower courts.

Arizona’s two Republican senators have introduced [legislation](http://www.flake.senate.gov/public/_cache/files/a9b76036-3474-47c0-9110-a0a273deaffd/02022017-flake-9th-circuit.pdf) to create a 12th Circuit Court by breaking up the 9th U.S. Circuit Court of Appeals, based in California. The bill would move Washington state, which includes Judge Robart’s court, into the new circuit, along with more conservative states. A previous bill [kept](http://www.reviewjournal.com/news/politics-and-government/nutty-9th-circuit-court-appeals-hear-challenge-trump-s-ban-tuesday) Washington in the 9th Circuit. President Trump would, of course, be responsible for appointing judges to the new court.

A president who has shown little respect for the courts should not be granted broad deference on lifetime judicial appointments. Senators must demand an independent Supreme Court justice, and if a supermajority—at least 66 senators—agrees that Judge Gorsuch satisfies this test, then the American people can be assured that the legislative and judicial branches can serve as a check on a president intent on testing the limits of his power.

Millions of people have flooded the [streets](https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/30/why-the-womens-march-may-be-the-start-of-a-serious-social-movement/?utm_term=.5e7b0e1f48cf) and [airports](http://www.vanityfair.com/news/2017/01/airport-protests-anti-trump-movement) to oppose President Trump’s lawless, discriminatory agenda. Trump won [only](https://fivethirtyeight.com/features/trump-is-doing-what-he-said-hed-do/) 46 percent of the popular vote in November, and a recent poll [found](http://www.gallup.com/poll/203264/half-americans-say-trump-moving-fast.aspx) that 55 percent of respondents oppose a Muslim ban. Republican senators paid no political price for their obstruction of President Barack Obama’s Supreme Court nominee, and we cannot now let Trump use the still-vacant seat to ensure a Court that rubber-stamps his administration’s unconstitutional actions.

## \*\*2AC Courts CP ev\*\*

### AFF – Courts no solvency

#### The Supreme Court acts a super-legislature – it’s too powerful and rarely actually protects minority rights in education

Ford 16

[Richard Thompson, professor of law at Stanford University, “On Rights, the Supreme Court has Done More Harm than Good”, 5-10-2016, <https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/on-rights-the-supreme-court-has-done-more-harm-than-good>, accessed 7/6/17, NW]

The Supreme Court decision in Obergefell v Hodges struck a blow for equality and justice. But there are reasons to worry when the courts interfere with democratic politics, even when you like the result. To be sure, complaints about judicial activism have become a predictable and hypocritical ritual for the losing side in an ideologically polarized court. The same justices complaining that a right to same sex marriage undercut democratic process were perfectly happy to overturn laws they disagreed with, including important provisions of the Voting Rights Act, campaign finance reform and the Affordable Care Act. But given the vagueness and malleability of constitutional law, few disputes have clear answers. So when the Supreme Court invalidates legislation, it basically acts as a super-legislature of nine. And the Supreme Court uses this power to defend the status quo and the powerful much more often than to defend the weak and powerless. When it comes to championing the rights of vulnerable minorities, the Supreme Court rarely does more than anticipate popular opinion. On the question of same-sex marriage, the Supreme Court stepped in at the last minute to take the credit after grass roots activitss already did the hard and crucial work of changing hearts and minds. Polls before Obergefell showed that a majority of Americans supported same-sex marriage. Arguably, Obergefell was neither heroic nor overreaching: it was a validation of an emerging national consensus. When the court does get too far ahead of public opinion, it can produce unintended consequences. We still don’t know whether Obergefell will produce an enduring backlash, as did the abortion rights decision in Roe v. Wade did. Even some of the Supreme Court’s most celebrate civil rights decisions have been a mixed bag. Brown v Board of Education is widely seen as ending Jim Crow segregation with a strike of the judge’s gavel. But in fact, real desegregation didn’t start until Congress threatened to deny federal funding to schools that refused to desegregate. And when white flight from inner cities made desegregation impossible in many school districts, the Supreme Court eventually relented and allowed many suburbs to avoid desegregation in 1971’s Milliken v Bradley decision. In 2007, the Supreme Court cited Brown as a precedent when it blocked democratically endorsed school desegregation plans. Today, many public schools are more racially segregated than they were in the early 1980s. If – as Winston Churchill believed – democracy is the worst form of government save all the alternatives, perhaps judicial review is an important corrective. But overall, the Supreme Court’s interventions in the democratic process have probably done more harm than good for civil rights.

#### The courts’ presence in education is just unwanted intrusion

Donald N. Jensen 1983, research associate at Stanford University's Institute for Research on Educational Finance and Governance, January 12, 1983 (“The Role of the Courts in Education: Just Arbiters and Unwarranted Intruders?”, *Education Week,* Accessed Online at: http://www.edweek.org/ew/articles/1983/01/12/03030001.h02.html, Accessed Online on 07-06-2017 SI)

Courts have played a major role in social-policy issues in the past generation: in civil rights, prison reform, reform of mental institutions, increased access to the political process, and, importantly, education.

In California, for example, one-fourth of all appellate education cases heard since 1858 were decided between 1969 and 1979. And largely through the efforts of organizational plaintiffs such as the American Civil Liberties Union, there has been a tremendous growth in the number of suits concerning desegregation, school finance, and other rights issues in education.

This legal activity has had a significant effect on the politics of education. It has centralized education policymaking at the state level, as individuals and groups look there with greater frequency for the redress of injustices in local school districts. And the courts have upheld as constitutional the educational preferences of many groups--the handicapped and certain racial and ethnic minorities, for example--whose interests traditionally have been ignored by policymakers in education.

Court activity also has influenced the process of policymaking in education. Hearings, compliance reports, and other legal devices have been mandated by courts to circumscribe the discretion historically possessed by educators. Organizational plaintiffs have bargained with defendant state agencies and judges over the content of remedial plans, sometimes aiding the court in their implementation.

The courts have also helped minority groups and others seeking change in the schools to gain direct access to the policymaking process by mandating community involvement through such vehicles as parent-advisory councils.

Yet some educators claim, despite the justice of many of these legal demands and some notable salutary outcomes, that the involvement by the courts is an unwarranted intrusion on their legitimate professional authority. They contend that lawsuits in education are increasingly an outgrowth of the dissatisfaction voiced by those who lose at the polls. In fact, there are problems associated with court participation in education, problems that make the job of state educators much more difficult.

Courts are inclined to ignore costs and practicality, and often do not weigh competing public values. In an era of diminishing fiscal revenues for all levels of government, court decisions require legislators, who must make difficult choices from among competing claims on the same public purse, to give preference to court-ordered priorities.

Court participation in education policymaking has caused bureaucratic chaos. The court becomes one more center of decision making in a system already subject to overlapping sources of authority and rules. Moreover, court orders take much time, expense, and labor to implement. It is one thing for courts to mandate how things ought to be; it is quite another for education officials to achieve them in actual practice.

In too many cases, lawyers with little or no grounding in education issues, and not professional educators or even elected school leaders, end up making education policy when the courts get involved. This is the reason. The education decision-making body in school-related lawsuits is usually a state board of education, whose public stances are determined by a majority vote. Too often, the members of these boards, who usually have other full-time jobs, lack the time to involve themselves in the details of education lawsuits--leaving state lawyers to decide legal positions on their own. The problem is compounded by the need for the state to coordinate its position with that of local school boards, who also must reconcile competing fiscal, political, and educational concerns.

Although attorneys for the state board of education formulate positions on legal disputes after a lawsuit is filed, the state board of education is represented in court by a deputy attorney general who has not participated in formulating the policy under legal challenge, and who sometimes is inexperienced in education litigation.

More important, the state attorney general is a constitutional officer independent of the state board of education. In California, for example, the attorney general has taken the position that his responsibilty to the people of the state transcends his allegiance to a particular client--even if that client is an important state agency, such as the department of education.

State-level court action is often resolved through consent decrees--settlements that are the result of negotiation. These decrees, though useful for plaintiffs, often place a heavy burden on the states being sued because they too often disregard the feasibility of putting a settlement into effect. In addition, because settlement negotiations are conducted in private, the public discussion and testimony that accompany the formulation of education policy by the state legislature or by the state board of education is often absent. The state board does not even participate in negotiations on the terms of the consent decree. Those are conducted by lawyers who are rarely well versed in education policy.

Use of consent decrees also prevents an assessment by public officials of the political and social costs of proposed courses of action. This balancing can be accomplished only when negotiations are carried out in public, when competing political constituencies are alerted to the details of proposed settlements, and when the attorneys working on behalf of the state are made aware of all relevant policy implications of a proposed course of action.

The complaints of many school administrators around the country about the growing importance of the courts in education are correct, but the role of the courts in education policy soon may expand. The Reagan Administration's New Federalism upsets many of the old patterns of state involvement in education. It reverses the trend toward more detailed federal regulatory rules and close federal scrutiny of program administration. Consequently, there will be more room for discretion at the state and local levels, as federal programs become fewer in number and less rigid in their requirements.

The New Federalism will likely encourage even more court activity in education. Groups that had their demands for equitable treatment recognized by the federal courts even before Congress acted to secure them may once again return to the judiciary. The state courts may play a more prominent role as more responsibility for school programs devolves upon the states. And the courts--both state and federal--may act to shape state regulatory activity as the states move to pick up the regulatory "slack" left by the withdrawal of the federal government.

#### Supreme Court can’t solve – no federal fundamental right to education in US Constitution

National Constitution Center 13

[Institution established by Congress to disseminate information about the United States Constitution on a non-partisan basis in order to increase the awareness and understanding of the Constitution among the American people, “Why there isn’t a constitutional right to an education”, 8/22/2013, <https://constitutioncenter.org/blog/why-there-isnt-a-constitutional-right-to-an-education>, accessed 7/6/2017, NW]

A new push by President Barack Obama may bring attention back an old debate about the lack of a national constitutional right to have an education. The White House said on Thursday that President Obama will barnstorm this week about his plan to make colleges more accountable and affordable. The two-day bus campus bus tour features the President speaking about tying funds for colleges to performance, according to a fact sheet released by the White House on Thursday. The tour started Thursday morning in Buffalo, New York. The plan is based on rating colleges and universities on measures such as tuition, rate of graduation, earnings and the debt level of graduates, and linking those ratings to financial aid. The challenge of gaining bipartisan support in Congress for the plan reflects a legal reality that doesn’t come up often in national discussion about education these days: The Constitution doesn’t mention education and the Supreme Court has concluded that education is not a fundamental right under it. The Supreme Court resolved this issue 40 years ago in a case about the means of financing the public elementary and secondary schools in San Antonio, Texas, called San Antonio Independent School District v. Rodriguez (1973). By a 5-4 decision, with Justice Lewis Powell writing for the majority, the court found that “the Texas system does not operate to the peculiar disadvantage of any suspect class” and that education “is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” In dissent, Justice Thurgood Marshall warned that “the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.” The San Antonio ruling shifted the emphasis in education litigation to state courts, since a majority of state constitutions guarantee a right to education. In contemporary times, revisions to those guarantees have transformed some into specific and sophisticated ones. But Justice Marshall’s dissent proved prescient. Since 1980, the quality of American public elementary and secondary education has dropped considerably compared to public education in other leading nations. The opportunity gap has dramatically widened between public schools in wealthy and in poor American districts. Whenever a president presents a major reform in education, like the Obama plan for a change in financial aid, the effort is clearly handicapped by education being treated as a political matter—and not as a matter of right guaranteed by the Constitution. And the state-level right to education battle has taken some odds turns that touch on constitutional issues from the 1950s and the battle for civil rights. In the state of Alabama, for instance, there is still language requiring separate schools for black and white students in that state’s constitution. (The 1950s Supreme Court rulings nullify that language in practice.) A referendum to delete the Jim Crow-era language from Alabama’s constitution was defeated last fall at the polls because the change would have also removed a requirement for the state to fund education at public schools. A state commission is now working on another amendment that may decouple the two issues, with the approval of voters in Alabama.

#### The courts are not the ultimate education policymaker

Harvard Law Review, 15

[Harvard Law, “Education Policy Litigation as Devolution: How a new approach to vindicating educational rights mitigates the judicial concerns that plagued past efforts”, 1-12-15, <https://harvardlawreview.org/2015/01/education-policy-litigation-as-devolution/>, accessed 7/7/17, NW]

In the sixty years since Brown, advocates have sought to vindicate educational rights in state and federal courts under a variety of legal theories. While this litigation has achieved enormous successes, it has struggled in its later stages as courts raised concerns for the separation of powers, local control, and judicial competence to shy away from wading into the minutiae of education policy. The Vergara wave of litigation offers a new approach to vindicating state constitutional educational rights, one which may avoid the traps that have plagued desegregation and school-funding suits. This approach also addresses a concern held outside the judiciary. Many education commentators argued in the wake of the Vergara decision that, regardless of the policy considerations, they were uneasy with the courts refereeing the political fight over teacher tenure.125 This analysis does not entirely quiet such concerns — this litigation does ask courts to evaluate state laws against constitutional guarantees. But it does not make courts the ultimate policymaker, instead devolving policy questions to districts. Such an approach may better balance the need to vindicate state constitutional rights with respect for the proper roles of each branch and level of government.

### AFF – Courts no solve rights

#### Court action on social issues is problematic for three reasons: judges aren’t elected, the 14th amendment wasn’t intended to authorize the courts to regulate social issues and the court has an awful history of protecting minority rights – prefer the legislature instead

Spann 05

[Girardeau A, professor of law at Georgetown University Law Center, “Neutralizing Grutter”, 2005, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1227&context=facpub>, accessed 7/7/17, NW]

Grutter is premised on the belief that the political branches of government must ask the Supreme Court for permission to solve the longstanding problem of racial discrimination in the United States. That is a curious premise for at least three reasons. First, the institution of judicial review cannot plausibly be understood to give the Supreme Court the countermajoritarian power to formulate racial policy in a democratic society. Second, the Fourteenth Amendment gives Congress-not the Supreme Court-the power to remedy discrimination against racial minorities, thereby making it anomalous for the Supreme Court to invalidate majoritarian affirmative action programs on the grounds that the Court knows better than the political branches what will satisfy the equal protection demands of the Fourteenth Amendment. Third, the Supreme Court has such a dismal record in the protection of racial minority rights that it is difficult to see why anyone with a genuine interest in promoting racial justice would believe that the Court could do a better job than the political branches in protecting minority rights.

The existence of judicial review in a democratic society has always been problematic. It poses the countermajoritarian danger that unelected judges, who are intentionally insulated from political accountability, will have the ability to formulate social policy in ways that trump the policy preferences of the representative branches of government. 7 Although the constitutional legitimacy of judicial review is now widely accepted, it is difficult to imagine that the Framers envisioned anything like the role that the Supreme Court has come to play in the debate over controversial social issues such as abortion, school prayer, and affirmative action.8 A species of judicial review that limited Supreme Court involvement in the political process to the enforcement of determinate norms that were clearly expressed in the Constitution could perhaps be reconciled with the process of democratic self-governance.9 However, it is difficult to deem democratic the Supreme Court's substitution of judicial policy preferences for political policy preferences in the interpretation of constitutional norms that are inherently political in nature. The Constitution, of course, says nothing about affirmative action, and the Supreme Court's only constitutional basis for regulating the content of affirmative action programs stems from the Equal Protection Clause. 10 But it is hard to find in the phrase "equal protection" any justification for Supreme Court invalidation of affirmative action burdens that the political majority has chosen to impose upon itself to "equalize" the status of those racial minorities whom American culture has historically treated as inferior. One could, of course, vigorously dispute what it takes to promote racial "equality" in contemporary culture. However, it is difficult to see why the Supreme Court should be viewed as institutionally more competent than the political branches of government to resolve that dispute. 11 Things get worse when one remembers that the equal protection guarantee used by the Supreme Court as the basis for regulating affirmative action is contained in the Fourteenth Amendment. 12 The Fourteenth Amendment was not intended to authorize the Supreme Court to formulate racial policy. Rather, it was adopted in order to authorize Congress to enhance the status of racial minorities, and to protect such congressional "affirmative action" from Supreme Court invalidation. After the Civil War, Congress passed the Civil Rights Act of 1866, which was designed to end discrimination against former black slaves in places of public accommodation. However, federalism doubts about the constitutionality of the Act prompted adoption of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment contained the substantive equal protection guarantee, 13 and Section 5 authorized Congress to enforce the provisions of Section 114 precisely so that the Supreme Court would not invalidate such remedial efforts on constitutional grounds. The Fourteenth Amendment, therefore, was designed to authorize political remedies for racial discrimination, and to give federal remedies primacy over state "Black Codes" that had officially legislated the inferiority of blacks. 15 Nothing in the history of the Fourteenth Amendment can plausibly be read to authorize the Supreme Court to invalidate state or federal political enactments that are designed to enhance the status of racial minorities. Rather, Section 5 of the Fourteenth Amendment establishes that questions about the policy prudence and the constitutional validity of affirmative action are questions that, in Marbury terms, are "in their nature political."16

### AFF – 4th Amendment no solve

#### The Fourth Amendment is constantly adapted until states erupt in confusion—a Supreme Court ruling is crucial to provide guidance

Yearout, lawyer in Washington D.C., 2002

(Jason, “Individualized School Searches and the Fourth Amendment: What’s a School District to do?” 2002, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1339&context=wmborj>, accessed 07/04/2017, AMS)

Despite its facially-broad applicability, the Court in T.L. 0. expressly declined to rule or provide guidance on a number of issues related to the reasonableness test. First, the Court specifically refused to consider whether the exclusionary rule is the appropriate remedy for a search conducted by school officials.4' The focus of this Note is more concerned with impacts on school districts, however, so this open question will not be addressed.4 " Second, the Court Similarly avoided deciding "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies[.] 42 With the proliferation of police officers, private security, and other "resource officers" in public schools in recent years, the regular interaction between school officials and law enforcement (actual, defacto, or otherwise) has increased greatly, thus creating a larger constitutional dilemma for schools than the Court likely anticipated in 1985. Third, no decision was rendered as to whether students have reasonable expectations "of privacy in lockers, desks, or other school property provided for the storage of school supplies." '3 Some school districts attempt to dodge this concern by affirmatively declaring in their student handbooks that no privacy rights exist in lockers and that lockers may be searched at any time without notice." While certainly innovative, it remains unclear whether providing students with notice of this type is enough to make reasonable what otherwise might be considered unreasonable. Fourth, as the search of T.L.O. was based on individualized suspicion that she had been smoking, the Court did not have occasion to "decide whether individualized suspicion is an essential element of the reasonableness standard" it adopted for these types of searches.45 However, the increased prevalence of "sweeps" through classrooms or schools as a deterrent to disruptive or unlawful activity in public schools has created numerous constitutional concerns. 46 The Supreme Court recently attempted to address some of these concerns in Vernonia School District 47Jv. Acton."7 At issue in the case was a school district policy of performing random urinalysis drug tests on students who participated in the schools' athletic programs, motivated by the discovery that athletes were "leaders of the drug culture" and the concern for increased risk of sports-related injury as a result of drug use.48 The Court found that, unlike TL.O., this type of search was not based on individual suspicion of wrongdoing, even though the Fourth Amendment carries "no irreducible requirement of such suspicion[.]' ' 9 Characterizing the search policy as both a school search and a categorical drug test, the Court balanced three factors in declaring the district's policy constitutional: the individual expectation of privacy, the character of the intrusion, and the governmental interest in conducting the search.5 " Whereas Acton attempted to answer several interesting questions (and raises others) regarding the application of the Fourth Amendment in schools, this Note will explore those areas of the quandary more closely related to searches of individuals that the Court has not addressed at all, instead of concentrating on concerns that the Court has recently attempted to clarify. Not only did the T.L. 0. Court expressly pass on the four topics discussed supra, but it also left open (and continues to ignore) another situation that regularly frustrates school districts and their administrators. The potential legality of searching students' cars that are parked on school grounds presents equivalent, if not greater, constitutional headaches. Indeed, state courts currently are split on the issue of whether a comparable privacy interest arises in cars as compared to a student's person, her backpack, or her locker.5 Additionally, courts seem quite uncertain as to whether the relevant inquiry in these types of cases concerns where the search occurs (on or off campus) or who conducts the search (i.e. school officials, campus police, or outside officers).

### AFF – SOP link

#### The Supreme Court itself has deferred policymaking to the legislature – separation of powers

Elder 07

[Sonja Ralston, professor at Duke University School of Law, “STANDING UP TO LEGISLATIVE BULLIES: SEPARATION OF POWERS, STATE COURTS, AND EDUCATIONAL RIGHTS”, 2007, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1344&context=dlj>, accessed 7/7/17, NW]

The idea of separation of powers has always been an integral part of the federal government and national constitution.14 It plays a central role in the United States’ unique experiment with democracy as it serves to “implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty.”15 At the federal level, it is generally accepted that there are solid distinctions between the powers of each branch.16 Based on these structural features, the Supreme Court has recognized that the federal courts should generally defer to the legislative and executive branches regarding policymaking.17 Even at the federal level, however, judicial deference has its limits because the very purpose of the judiciary is to uphold the people’s constitutional rights and to provide a check on the power of the other branches.18 Separation of powers is therefore a good starting point for the courts, but by no means absolute. In Rodriguez, 19 the Supreme Court explained that “the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.”20 Concluding that the problems of funding and implementing education are complex, the Court decided that the legislature’s judgments were “entitled to respect.”21 Judicial deference based on the separation of powers doctrine continues to rule in federal courts, but deference should not be an end in itself, only a means of enforcing the structural balance of power established by the Constitution. If the underlying structural reasons for deferring are absent in a particular case, deference should not be mandated. In the federal system, separation of powers arguments for deference of Article III courts are rooted in three key structural aspects of the Constitution: (1) the federal constitution that federal courts uphold is primarily one of negative rights,22 (2) the federal government is one of limited powers,23 and (3) the federal courts are beyond popular review.24 A fourth and more practical reason is also sometimes cited by the courts as a rationale for deference: they consider the federal courts largely incompetent in making policy.25 Each of these four issues does not apply in the same way to state courts.26 This Part explores these rationales and their application to state courts in turn.

### AFF – Congressional rollback

#### Congress has the power over the judiciary—empirics prove that they will strike down more judiciary decisions

Emenaker, Lead Faculty for Political Science Department at the College of the Redwoods, 2013

(Ryan, “Constitutional Interpretation and Congressional Overrides: Changing Trends in Court-Congress Relations,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243912>, February 28, 2013, ATH)

National policy in the United States is shaped through a complex process involving frequent interaction between the Supreme Court and Congress. The Court devotes the largest portion of its work to applying and interpreting congressional statutes.1 Congress carefully considers these interpretations in future legislative action. The Court’s use of judicial review to nullify acts of Congress is one of the most contentious and discussed aspects of this relationship. However, the interaction that occurs after judicial review is often ignored. When trying to understand Court-Congress relations, it is important to note that Congress often overrides Court decisions that hold federal laws unconstitutional. This post judicial review activity is an increasingly important component to maintaining an equilibrium between judicial and legislative powers. From a historical perspective the Court rarely rules against Congress. For example, from 1803-2010 the Supreme Court declared just 167 acts of Congress unconstitutional—an average of less than one per year.2 With so few examples, it is not surprising that few quantitative studies have examined on Congress’s rate of response to these decisions. However, this interaction between the two branches has rapidly increased. Nearly 60 percent of all federal laws struck down by the Court have occurred in the last fifty years. The Rehnquist Court alone is responsible for nearly 25 percent of all nullified federal laws.3 Understandably, the rapid acceleration in judicial activity has renewed fears of an imperial judiciary. However, these fears are partly based in the incorrect assumption that the complex process of policy development suddenly ends with judicial review. Surprisingly, this recent flurry of Court activity has not spurred increased quantitative scholarship into the area of congressional overrides of constitutional-interpretation-decisions. The results of this study indicate that as the Court has become more active in striking down congressional acts, Congress has increasingly resorted to overriding these decisions. In fact, this study identified that 29.3 percent of the acts of Congress that were struck down by the Rehnquist Court were later overridden (at least in part) by future congressional legislation. This is a significantly higher percentage of overrides then found in previous studies examining constitutional-interpretation-overrides. These results indicate that increased judicial activity nullifying federal law is suggestive of changing trends in CourtCongress relations, rather than a signal of judicial finality. Ultimately this paper argues that judicial finality—the theory that the Supreme Court has the final word in constitutional interpretation—is incorrect. Congress and the Court interact in the policy making process even after judicial review; this increase in post judicial review activity shows that an equilibrium in Court-Congress relations is still being maintained, however, this maintenance emanates from a evolved process from previous decades. This paper first examines some theories of Court-Congress relations. I argue that theories of judicial finality, the countermajoritarian nature of the Court, and “rational choice,” 3 Ibid. 5 as well as studies on court-curbing and decision reversals would all benefit from more fully considering constitutional-interpretation-overrides. Since judicial review and constitutionalinterpretation-overrides are becoming increasingly common, the lack of study in this area limits understanding of modern Court-Congress relations. In order to assist scholarship in this area, this study generates a dataset of all acts of Congress nullified during the Rehnquist Court (see appendix I). This dataset is then compared with the frequency of nullified federal law between the Rehnquist, Brennan, and Warren Courts to identify emerging trends. The dataset is also examined for presence of congressional overrides to Rehnquist Court decisions overturning federal law. The resulting data is used to add to current Court-Congress theories and assist in understanding the changing nature of this relationship.

### AFF – No jurisdiction

#### The judiciary should not promote activism by reaching into Congressional jurisdiction

Roberts, Law Professor at West Virginia University, 2007

(Caprice L., “IN SEARCH OF JUDICIAL ACTIVISM: DANGERS IN QUANTIFYING THE QUALITATIVE,” Tennessee Law Review, Volume 74 Issue 4, Summer 2007, 580-582, HeinOnline, ATH)

Institutional external activism describes judicial conduct exceeding purported judicial power constraints that are grounded in institutional sources outside the judicial branch. For example, power limitations imposed by federal separation-of-powers principles would constitute horizontal institutional external constraints, while federalism principles constitute vertical institutional external constraints. Other examples include the improper assertion of jurisdiction or the abdication of jurisdictional responsibility. 67 Thus, inaction may be activism. In fact, regarding a federal court's creation of jurisdiction where not provided by Congress, one jurist emphatically asserted: "Surely there can scarcely be a more pernicious species of judicial activism than to find it desirable that one should have jurisdiction of a case and therefore reach out to create the jurisdictional basis. A judge must resist such an assumption of power. ''68 Accordingly, judicial activism occurs when a federal court improperly asserts jurisdiction, thus violating separation-of-powers principles because the Constitution renders such authority to Congress rather than the federal judiciary. Scholars describe this method as "the failure of the courts to adhere to jurisdictional limits on their own power'69 or inappropriate relaxation of justiciability requirements.70 The paradigmatic example of the use of the term "judicial activism" in the institutional external activism sense equates "activism" with the overturning of federal (horizontal) or state (vertical) statutes enacted by the legislative branches. In a more limited construction, it may only be activist when a court strikes down "policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit."7 ' Professor Marshall views this dimension of activism as "counter-majoritarian" and defines it as "the reluctance of the courts to defer to the decisions of the democratically elected branches. 72 This definition is an underlying assumption of Professor Ringhand's research.73 She describes this definition as "'activist judges' replacing legislative choices with their 'personal preferences."'' 74 Professor Young describes judicial activism, in part, as "second-guessing the federal political branches or state governments.

#### Courts can evaluate the constitutional value of an amendment—not its substance

Martin, Associate Attorney. NYU School of Law, 2014

(Holly, "Legislating Judicial Review: An Infringement on Separation of Powers." New York University Journal of Legislation and Public Policy, Volume 17 Issue 4, 2014, 1119-1120, HeinOnline, ATH)

Though constitutional amendments are subject to some level of procedural review by the judiciary, there is general agreement that courts should not be able to weigh in on the substance of such amendments.13 2 The argument is that allowing courts to strike down a constitutional amendment would subvert the democratic process.' 3 3 It also raises concerns that the judiciary would overreach and violate separation of powers principles. 13 4 It has been argued that because the judiciary is not an elected body, it should not serve as the final arbiter of decision-making, capable of defeating the will of the people.135 On the other hand, even though constitutional amendments are much harder to pass than pieces of legislation, the same concerns that underlie ordinary judicial review are also present with respect to amendments. There is just as much potential for a majority of voters to approve of a discriminatory constitutional amendment as there is for voters to approve an unconstitutional law. One way for courts to exercise substantive review is to compare a constitutional amendment to some principle of natural law that is binding on the community outside of the constitution in question.' 36 Typically, the Supreme Court evaluates the constitutionality of a law by determining whether that law violates any given provision of the Constitution. However, in some ways, constitutional amendments by nature "violate" the Constitution by permanently changing its meaning. Thus, in order to review the substance of an amendment there must be some extra-constitutional basis for evaluating its validity.' 37 In this way, reviewing a constitutional amendment is to natural law what reviewing a law is to the constitution. The problem with this approach is that there is no consensus regarding the content of natural law.' 38 Further, there is no particular reason to believe judges or courts ought to be the ones determining the content of natural law and whether any given amendment comports with that law. Judges already frequently disagree amongst themselves when deciding issues that are clearly addressed in the Constitution and even more so in cases involving unenumerated rights. Thus, pinning the evaluation of constitutional amendments to some legal structure outside of the text and principles underlying the government in general is not likely to succeed.

### AFF – politics link turns legitimacy

#### Other branches and the public can leverage unpopularity against court legitimacy and the viability of their decisions

Ammori, Information Society Project fellow at Yale Law, 2006

(Marvin, “Public Opinion and Freedom of Speech,” Yale Law School, 7-14-06, p. 11-12, <https://law.yale.edu/system/files/documents/pdf/Public_Affairs/ISP_PublicOpinion_fos.pdf>, MM).

Public opinion affects the Supreme Court in other ways besides the appointments process; often these mechanisms also work through effects on median or swing Justices. First, members of the Supreme Court may share the same values and opinions as others in society, merely by being part of the same culture. 46 Second, the Court may share the same general policy goals as the political branches and the public (at a general or particular level), and render decisions that support these goals. Recent appointees in particular are more likely to consider themselves as part of the then -reigning political coalition. Third, Justices may be concerned about their own power and the power of the Court. 47 If Congress is sufficiently opposed to Court actions, it could attempt to take this power from the Justices, in subtle or overt ways. 48 Fourth, Justices may seek to advance their agendas and preferences through good relations with the public and other government institutions. This means that they may be particularly sensitive to questions of backlash and public discontent. Although Justices express their views about the law in their opinions, they rely on other institutions to carry out those views. 49 Not only must the Court rely on the political branches for enforcement and implementation, it must also rely on lower court judges, who can often thwart what the Court wants through manipulating legal analysis, erecting procedural roadblocks, limiting remedies, or in various other surreptitious ways. 50 For the Court to succeed in its tasks, other institutions must feel the Court is legitimate; agreement with the dominant political coalition and public opinion helps confer legitimacy.

## \*\*\*Congress\*\*\*

### 1NC Congress CP

#### The United States Congress should

#### Social change in education should be reserved to Congress—the Supreme Court can’t get the ball rolling.

Rhinesmith, Professor at University of Virginia School of Law, 2010

(David, “DISTRICT COURT OPINIONS AS EVIDENCE OF INFLUENCE: GREEN V. SCHOOL BOARD AND THE SUPREME COURT'S ROLE IN LOCAL SCHOOL DESEGREGATION,” Virginia Law Review In Brief, August 19, 2010, Lexis/Nexis, ATH)

[\*1138] Several decades ago, the conventional wisdom was that the Supreme Court was among the leading forces in the civil rights movement and was capable of generating significant social change. School desegregation cases were considered prime examples of this capacity to drive major social change. Of these, the most significant was Brown v. Board of Education (Brown I), n3 arguably "the most important political, social, and legal event in America's twentieth-century history." n4 As this quote from Judge Wilkinson makes clear, the then-dominant view gave courts the central role in the historical framework. Roughly two decades later, however, the Court and the impact of its decisions have been relegated to a secondary role. Today, legal historians posit that judicial decisions are significantly less important for generating social change than major legislative initiatives. n5 Arguments about the limited influence of courts rely heavily on statistical trends in school desegregation. According to these accounts, major increases in the number of students attending desegregated schools are attributable primarily to legislative and executive actions--for example, the Civil Rights Act of 1964--and not to earlier judicial decisions. Specifically, this view focuses on the fact that the Supreme Court issued its desegregation order in 1955, yet most meaningful school desegregation in the deep South did not occur until the mid- or late 1960s. A decade after the Court held segregation unconstitutional in Brown I, roughly two percent of black children living in the South attended school with white children. By the early 1970s, that same figure was over ninety percent. n6 While the statistical evidence itself demonstrates clear increases in integration, the forces driving these changes remain the subject of historical debate. What is agreed on is that the integration of Southern schools was a slow-moving and uneven process, reflecting the ongoing federal efforts to end school segregation in the South in the face of widespread [\*1139] resistance from state and local institutions. Immediately following the Court's decision in Brown II--mandating school desegregation "with all deliberate speed" n7-- school districts used a variety of tactics to prevent or delay meaningful integration. Local leaders quickly learned to avoid the overt racial mandates of the previous era, instead using tactics that included school closure, student placement based on "objective academic testing," and "school choice" programs. These choice programs, which gradually became the preferred method for perpetuating de facto segregation, ostensibly satisfied desegregation orders by allowing students the "choice" to attend any school in their district. However, as anticipated by advocates of this approach, apparent freedom of choice had little to no effect on the racial composition of schools. The reality was that few black students could or would transfer to previously all-white schools, as black students were often deterred by communal pressure or denied transfer requests due to dubious space constraints. On the other side of the racial divide, white students simply refused to transfer to previously black schools. As a result, school choice programs were "favored overwhelmingly" by Southern school districts. n8 Achieving significant progress in school desegregation thus required careful monitoring or foreclosing the future use of choice programs. The current dominant historical account explains the rejection of school choice programs and coinciding increases in desegregation that took place in the mid- to late 1960s as the product of congressional initiatives. According to this view, the most important triggers were the 1964 Civil Rights Act ("CRA"), which made segregated public schools ineligible for federal funds, and the 1965 Elementary and Secondary Education Act ("ESEA"), which significantly increased the amount of federal funding available to public schools. These two acts--implemented primarily by the Department of Health, Education, and Welfare ("HEW")--were [\*1140] designed specifically to end the use of school choice programs. Accordingly, these legislative acts are now credited with generating the desegregation that failed to follow Brown. By attributing school desegregation to the CRA and the ESEA, such an account argues the Supreme Court is ineffective in generating significant social change. Because by presenting this theory Professor Rosenberg, Professor Klarman, and others "revised" the earlier understanding of the Court's central role in school desegregation, this now-dominant interpretation is referred to as the "revisionist" account. This Note reexamines the revisionist explanation and suggests that legal historians should consider alternative data in evaluating the influence of the judiciary on Southern school desegregation. n9 Indeed, as will be shown, historians already have access to a potentially more accurate basis for evaluating causal forces, one that could help avoid the post hoc ergo propter hoc fallacy, a problem common with such statistical analysis. The revisionists' overreliance on school desegregation statistics generates an impoverished view of causal linkages, while the alternative data proposed here offer potentially stronger causal indicators.

### Congress solvency – Courts comparison

#### Only Congress has widespread effects on the population – the Supreme Court only applies to cases brought before them

Schwartz 92

[Edward, published author in Journal of Law, Economics, & Organization, “Policy, Precedent, and Power: A Positive Theory of Supreme Court Decision-Making”, April 1992, <http://www.jstor.org/stable/765079?seq=1#page_scan_tab_contents>, accessed 7/6/17, NW]

Although it can be argued that legislative and judicial decision-makers preside over similar issue areas, the effects of the rules emanating from the two types of policy-makers can differ dramatically. The absence of consideration of this difference represents a major shortcoming in the literature. When Congress passes a law, that law affects everyone in the same way. That is, any individual engaged in an activity regulated by the law is constrained in the same way. Any law that discriminates arbitrarily among individuals is considered to be unconstitutional. Judicial policy decisions, however, need not demonstrate this universalistic quality. The actual decision handed down in a particular case is binding only on the participants in the case. The effect that the ruling will have on other members of society depends on the precedent set by the case. Often the Supreme Court words its opinions in very case-specific terms precisely so as not to effect a large policy change. Because of the varying degrees of precedent associated with Supreme Court decisions, it is inappropriate to consider all such decisions in a uniform manner with respect to their effect on society. It is also important to recognize that the amount of precedent set by a particular case is very much at the discretion of the Court. Therefore, in addition to the outcome along the relevant policy dimension, the precedent level of the opinion must be considered a choice variable of the Court. I incorporate this precedent choice into a model of Supreme Court decision-making, thus expanding on the traditional one-dimensional approach. The result is a two-dimensional choice space for any case, where the two dimensions are policy and precedent.

#### Legislature in the best position to solve education reform

D’Arienzo 17

[Felix L., professor at St. John’s University School of Law, “Funding Public Education: A Need for Legislative Reform”, March 2017, <http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1887&context=tcl>, accessed 7/7/17, NW]

The importance of education in today's complex society cannot be overstated. The present school district approach to financing education, with its potential for inequities, presents a problem of first magnitude. However, inherent in the pursuit of reform of this system is the troublesome question of where such reform should originate. The Supreme Court has rejected the argument that the resolution to the problem is to be found in the equal protection clause of the Constitution. Expressing a sensitivity to the doctrine of separation of powers, the Court took cognizance of the complexities of the situation and the need for experimentation to achieve an equitable alternative. These factors, indicating the legislative quality of the problem, weighed heavily in the Court's decision to limit the judiciary's role. At the state court level, the question has assumed a different posture. The special treatment accorded education in state constitutions allowed the courts of California and New Jersey to strike down their respective state's school finance systems. Though the state courts presented an alternative judicial route, the effectiveness of these decisions in bringing about actual reform remains to be seen. It may prove impossible for a court to resolve problems of this nature without assuming a legislative role or inviting a confrontation with the legislative branch. The most viable source of reform, perhaps, is the legislature. Recent events in New York demonstrate how opposing political views and economic factors play a crucial role in molding reform. Indeed, the problem presents many elusive elements, such as the correlation of the quality of education with per pupil expenditures, and the details of a state supported system affording a maximum degree of local control. Such considerations require investigation and open debate, functions particularly adapted to the legislative process. As the public becomes increasingly aware of the responsibilities of government, courts will be asked to entertain actions asserting legislative neglect of educational financing. The educational finance reform issue will thus test the dimensions of judicial power. Whether a judicially "unmanageable" controversy is being asserted should be a primary consideration of the courts when reviewing such demands. It remains to be seen how effectively the courts of California and New Jersey have instituted reform. In sharp contrast to such judicial action is the new school financing system brought about by the New York Legislature. The success of this program should be carefully observed to evaluate the merits of legislative action free from judicial interference.

#### Congress does more to promote racial equality than Supreme Court – history proves

Griffin 02

[Stephen M. Professor of Law and Vice Dean for Academic Affairs at Tulane Law School, “JUDICIAL SUPREMACY AND EQUAL PROTECTION IN A DEMOCRACY OF RIGHTS”, 2002, <https://www.law.upenn.edu/journals/conlaw/articles/volume4/issue2/Griffin4U.Pa.J.Const.L.281(2002).pdf>, accessed 7/7/17, NW]

At the same time, no one doubts that the Supreme Court continues to stand ready to protect constitutional rights in a wide variety of contexts. In the course of his recent argument for 'judicial minimalism," Cass Sunstein provides a useful list of ten generally accepted core principles that constitute the foundation of contemporary constitutional law." Sunstein's principles include protection against unauthorized imprisonment, protection of political dissent, the right to vote, religious liberty, and protection against racial or sexual subordination. Sunstein is certainly correct that the Court stands ready in some sense to vindicate all of these rights. What he does not point out is that the political branches stand ready as well, and have taken numerous concrete actions to that end. Congress has a long and impressive record, now extending over nearly forty years, in protecting constitutional and legal rights. This record includes such famous laws as the Equal Pay Act of 1963,3 the Civil Rights Act of 1964,14 and the Voting Rights Act of 1965 ' (renewed on three separate occasions in 1970, 1975, and 1982).16 It also includes less famous but still important laws such as the Age Discrimination in Employment Act of 1967, Title IX of the Education Amendments of 1972,' the Rehabilitation Act of 1973," and the Voting Accessibility for the Elderly and Handicapped Act of 1984.2' When the Civil Rights Act of 196821 failed to reduce housing discrimination, Congress revisited the issue and passed a much stronger measure, the Fair Housing Amendments Act of 1988.22 When Congress saw that the Court's decision in Widmar v. Vincen25 was not being enforced, it approved the Equal Access Act,24 which made it unlawful for school administrators to deny access to facilities to students who wanted to participate in extracurricular religious activities. Congress also took a limited step to redress a severe violation of civil rights by compensating citizens of Japanese ancestry for their internment in concentration camps during World War II through the Civil Liberties Act of 1988.2 These examples show that Congress has acted to protect a number of different constitutional rights. In this Article, I will focus my attention on the right to vote and the rights against discriminatory treatment guaranteed by the Equal Protection Clause of the Fourteenth Amendment. Once attention is directed at rights against discrimination, it is even more apparent that Congress has created important new legal rights. Here, one of the most persuasive examples is the ADA.26 In enacting the ADA, Congress found that forty-three million Americans have physical or mental disabilities27 and that discrimination against the disabled persists in "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."28 In one of its findings, Congress tracked the famous language of the Carolene Products footnote,' saying that "individuals with disabilities are a discrete and insular minority who have been.. . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society ... resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." ° The ADA prohibited discrimination against the disabled by private employers and state and local governments." For my purposes, the key point to grasp about the ADA is that it is targeted at a form of discrimination for which there is no parallel federal constitutional right. The Supreme Court has never recognized the disabled as a "suspect class" under the Equal Protection Clause and thus there is no constitutional problem with state and local governments discriminating against them. Furthermore, the Civil Rights Act of 1964 and the ADA are similar in that they prohibit discrimination in private employment, an area unreachable by the terms of the Fourteenth Amendment. Clearly, there are forms of discrimination for which the statutory civil rights provided by Congress are superior to those provided by the Supreme Court. Anyone taking stock of the contemporary environment in which judicial review is exercised must therefore take notice of the phenomenon of Congress at times having greater solicitude for individual rights than the supposedly rights-conscious judiciary. In 1994 alone, Congress enacted the Freedom of Access to Clinic Entrances Act,32 the Violence Against Women Act,33 the Drivers' Privacy Protection Act,3 4 and certain rights-protective provisions of the Violent Crime Control and Law Enforcement Act. Showing that the political branches have protected rights does not advance my argument against heightened scrutiny very far. It simply demonstrates that Congress has joined with the judiciary, at least on occasion, as a partner in the creation of important individual rights. The story becomes more complex, however, once it is understood that Congress has also been a reliable defender of civil rights in response to decisions by the Supreme Court that have restricted the scope of rights against discrimination. In passing the Pregnancy Discrimination Act of 1978,36 for example, Congress dealt with a form of employment discrimination that the Court had failed to address." It restored the effectiveness of the Voting Rights Act by amending it in 1982" to negate the Court's decision in City of Mobile v. Bolden.s9 When the Court narrowed the scope of several anti-discrimination laws in Grove City College v. Bell,4 0 Congress responded with the Civil Rights Restoration Act of 1987.4 ' The Civil Rights Act of 199142 is the most consequential recent example of this congressional maintenance of civil rights. Wards Cove Packing Co. v. Atonio, 4a Price Waterhouse v. Hopkins, 4 and Martin v. Wiks' were prominent 1989 statutory decisions interpreting Tide VII of the Civil Rights Act of 1964 in which the Court seriously damaged the rights of litigants who were the victims of employment discrimination. Congress responded relatively quickly with the Civil Rights Act, which reversed the harmful effects of all of these decisions. Most remarkably, Congress attempted to reverse Employment Division v. Smith46 with the Religious Freedom Restoration Act (RFRA) .41 While RFRA did not implicate directly the kind of equal protection and discrimination issues with which I am concerned, the Court's decision in City of Boerne v. Flores,48 which ruled RFRA unconstitutional, most assuredly did have important implications for Congress' power to protect citizens against discrimination. City of Boerne astonished many scholars in that the Supreme Court chose to preserve its exclusive right to interpret the Constitution over an effort to protect an important individual right, the free exercise of religion. 9 In doing so, the Court invented a doctrine restricting Congress' power to enforce the provisions of the Fourteenth Amendment that appears to be having a radioactive influence on the Equal Protection Clause.50 In Kimel v. Florida Board of Regents,5' the Court used City of Boerne to immunize state governments against suits based on the Age Discrimination in Employment Act of 1967.52 The majority in Kimel reasoned that since the Court had never regarded classifications based on age as appropriate for strict scrutiny, Congress had no reason to do roughly the equivalent via statute.3 The majority did not address the question of why Congress could not, on its own, determine that age discrimination by state governments was a significant violation of the Equal Protection Clause. City of Boerne was also cited in United States v. Morrison,54 which struck down the civil remedy for gender-motivated violence provided in the Violence Against Women Act.55 In Board of Trustees of the University of Alabama v. Garrett,56 the Supreme Court extended the rationale of City of Boerne and Kimel by holding that states cannot be sued for money damages under Title I of the ADA. The Court noted that the disabled had never been held to be a suspect class for purposes of equal protection analysis and so states could not be required "to make special accommodations for the disabled, so long as their actions towards such individuals are rational."5 7 Congress could nonetheless subject the states to private actions if it could meet City of Boernds requirements of congruence and proportionality.58 Unfortunately, despite the massive record assembled by Congress, the Court found no sufficient evidence that the states themselves were systematically discriminating against the disabled. I will consider these cases in greater detail in Part II.C. For the moment, I hope two points are clear. First, regardless what one thinks of RFRA, it should be apparent that it is part of a larger pattern of Congress concerning itself with rights issues. This substantiates my point that in contemporary American democracy, all branches of government are concerned consistently with rights and, generally speaking, act to create, promote and enforce important constitutional rights. Second, my argument shows that the Supreme Court does not act solely to advance the rights of minorities. In fact, on numerous occasions the Court has destroyed their constitutional rights.65 I enumerated the relevant instances earlier, but a reminder is appropriate: the Court limited the effectiveness of the Voting Rights Act in City of Mobile," set back the effort against race and sex discrimination in Grove City College and Wards Cove,6 struck down RFRA in City of Boerne,6 hurt the effectiveness of the law against age discrimination in Kime465 damaged the ability of the legal system to fight gender-motivated violence in Morison,66 and dented the ADA in Garrett.

### Congress solvency – Fiat

#### Majoritarian legislative override on policies like education are good and key, because the judiciary fails to recognize canon

Elmendorf, Law Professor at UC Davis, 2010

(Christopher, “REDEFINING THE DEMOCRACY CANON,” Cornell Law Review, Volume 95, Issue 6, September 2010, Lexis/Nexis, ATH)

It has become commonplace to criticize substantive canons for their "hidden" antidemocratic costs. n59 Though statutory interpretations are, in principle, subject to a majoritarian legislative override, and therefore less vulnerable to the counter majoritarian critique often levied at controversial constitutional rulings, the costs of legislative action sometimes make this possibility of override more theoretical than real. In such circumstances, the argument goes, counter majoritarian statutory constructions are just as "antidemocratic" as counter majoritarian constitutional decisions. It is equally true, but much less emphasized in the literature, that judicial recourse to substantive canons has a democratic cost even if a legislative override ensues. The cost takes the form of agenda displacement. The energy that lawmakers devote to orchestrating the override - moving the issue onto the legislature's agenda, holding hearings, commissioning reports, sussing out the interests and views of fellow legislators, and forging an enactable compromise - is energy diverted from other pressing questions of the day. Do we really want Congress to be spending its time fixing strained judicial interpretations of, for example, HAVA, when Congress could instead be working on health care reform, national security, education policy, stabilization of the banking sector, or the long-term solvency of entitlement programs? n60 The problem of agenda-displacement costs is not unique to the Democracy Canon. To a first approximation, any principle of statutory interpretation that, across the run of cases, diminishes the number of judicial decisions aligned with the current enactable preferences of the legislature may be said to result in agenda-displacement costs. n61 That the problem of agenda-displacement costs is one [\*1067] that the Democracy Canon shares with other substantive canons does not immunize the former from critique. Courts that do not yet recognize the Canon (e.g., the federal courts) must weigh these costs when they consider its adoption. The costs must also be weighed when courts face questions about the meaning of the Canon or about whether it should be trimmed back in some respect. The law's partiality to tradition may be enough to preserve the existing substantive canons - even if they nowadays seem misguided - but it hardly follows that a new substantive canon should be recognized simply because it is no worse than the existing ones.

### A2 Supreme Court key

#### Congress can correct Supreme Court precedents

Spann 05

[Girardeau A, professor of law at Georgetown University Law Center, “Neutralizing Grutter”, 2005, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1227&context=facpub>, accessed 7/7/17, NW]

The Supreme Court can properly expect only the degree of deference to which it is legitimately entitled. When the Court exceeds the scope of its own constitutional power by usurping policymaking power from the representative branches, the system of checks and balances requires that the representative branches resist the Court's ultra vires actions to the extent that the Constitution gives the political branches the power to do so. If the representative branches cannot find ways to persuade the Supreme Court to adopt a more deferential approach to judicial review in the context of affirmative action, the representative branches should find ways to subvert the Court's efforts to upset the constitutional balance of powers. The idea that subversion can be a legitimate response to an illegitimate legal order is not a new one. 138 However, the idea has been given new vitality by Professor Paul Butler. Butler has argued, for example, that jury nullification can constitute an appropriate response by racial minority jurors to the forms of racial discrimination that are built into the criminal justice system. 139 He has also argued that it is praiseworthy for judges to circumvent a law that they believe to be immoral. 140 Butler is careful to limit his support of subversion to questions of morality, as opposed to mere political disagreements. 141 I am advocating subversion by the political branches, directed at the manner in which the Supreme Court has exercised judicial review under the Equal Protection Clause, because I believe the Supreme Court's actions to be unconstitutional, illegitimate, and immoral. I believe this because the Supreme Court's racial jurisprudence has a proven propensity to promote racial injustice. 142 Political subversion of Supreme Court decisions can be effective, as the aftermath of the Brown decisions demonstrates. 143 The massive resistance that followed the Supreme Court's desegregation decision was successful in delaying any meaningful desegregation of southern schools for a decade. 144 Presumably, that is because the Court so feared the political backlash that followed the issuance of Brown I, 145 that it felt compelled to retreat to the "all deliberate speed" formula of Brown Il. 146 This was a means of delaying implementation of the Court's desegregation requirement. 147 Moreover, the year after Brown I was decided, the post-Brown threat of massive southern resistance caused the United States Supreme Court to back down from a political confrontation with the Virginia Supreme Court over the issue of miscegenation. In its infamous Naim v. Naim148 decisions, the Court refused to invalidate a Virginia miscegenation statute that had been defiantly upheld by the Virginia Supreme Court, even though Brown I seemed to have made miscegenation laws clearly unconstitutional. 149 Perhaps similar massive resistance to the Supreme Court's intrusive judicial review of affirmative action would be similarly successful in marginalizing Supreme Court efforts to override the affirmative action policies adopted by the representative branches. And, of course, there is something appealingly symmetrical about using the a technique to promote racial equality that is the same as the technique

## \*\*2AC Congress CP\*\*

### AFF – Congress can’t solve

#### Children are unable to vote and their predecessors are too selfish to invest in the future – education in the legislature will always be undercovered

Stout 93

[Lynn A., Professor of Law, Georgetown University Law Center, “Some Thoughts on Poverty and Failure in the Market for Children's Human Capital”, 1993, <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2321&context=facpub>, accessed 7/8/17, NW]

The analysis presented above suggests that, left to their own devices, neither children nor their parents would invest an optimal amount of resources in children's human capital. A laissez-faire approach to child education and training consequently would appear to encourage inefficient underinvestment that increases the incidence of poverty. State regulation to encourage greater investment in children's human capital can improve the welfare of all, including the poor. State intervention in the decision to invest in children's human capital is in fact a common pattern. Most developed nations require children to attend school and provide free public schooling that follows a statedetermined curriculum emphasizing productive skills (reading) over wealthtransferring skills (burglary). Such arrangements presume that neither children nor their parents can be relied upon to invest optimal amounts in children's human capital, or to ensure that investment is directed towards acquiring productive rather than wealth-transferring skills. Yet, the widespread availability of public schools should not be accepted as conclusive evidence that government routinely or adequately corrects for the market failures likely to prevent unregulated individuals from investing optimally in children's human capital. At least in the United States, the popular perception that America's public schools are failing their students counsels against complacency.41 Merely investing in children is not sufficient; the state must invest enough and must invest wisely.42 While public education encourages more investment in children's human capital than would occur under a laissez-faire regime, the variant of economic theory known as social choice analysis43 suggests that the amount of public resources devoted to developing the productive skills of America's children still falls below the efficient level. Social choice theory applies the rational maximizer paradigm that traditional microeconomics applies to the individuals who make up markets to the individuals and groups who constitute political systems. A cursory social choice examination of public education in the United States suggests at least two forms of political "market failure" likely to prevent society from investing sufficiently in children's human capital.' A primary obstacle to optimal social investment in children is the fact that the principal beneficiaries of such investment are disenfranchised. Investing in children's human capital on a pay-as-you-go basis requires present voters to sacrifice in order to increase the returns enjoyed by a future generation.45 Unfortunately, that future generation lacks voting power at the time the decision to invest must be made. To some extent, members of the present generation of taxpayers may be willing to invest in the human capital of the next because they anticipate some personal benefit from doing so. For example, the parent of a school-age child may perceive public schools as a substitute for private schooling she would otherwise purchase altruistically for her offspring. Even a childless taxpayer might be willing to contribute towards the education of other people's children if doing so would help those children become productive adults who would pay the payroll and income taxes necessary to finance programs from which the taxpayer hopes to benefit in the future, such as Social Security or Medicaid. To a large extent, however, the benefits of investing in future generations accrue only to those latter generations. Unless the present generation displays perfect altruism towards the next, it will regard many of the benefits of investing in children as externalities, and will be unwilling to pay for them.

## \*\*\*State Courts CP\*\*\*

### 1NC State Courts solvency

#### Prefer state courts for 4 reasons: 1) state constitutions provide positive rights, 2) state governments aren’t as limited as the fed, 3) state judges are elected and 4) state courts are involved in the policymaking process as well

Elder 07

[Sonja Ralston, professor at Duke University School of Law, “STANDING UP TO LEGISLATIVE BULLIES: SEPARATION OF POWERS, STATE COURTS, AND EDUCATIONAL RIGHTS”, 2007, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1344&context=dlj>, accessed 7/7/17, NW]

State Constitutions Provide Positive Rights First and most importantly, state courts enforce state constitutions that are substantively different from the federal constitution. As the Supreme Court envisions it, the federal constitution is one of negative rights27—rights that prevent the government from doing something to people, like unreasonably searching their homes 28 and that cannot be violated by government inaction. In contrast, all state constitutions contain at least some positive rights29—rights that entitle people to some benefit or action from the state government;30 the right to education is a quintessential example of a positive right. By including these positive rights, state constitutions “explicitly engage state courts in substantive areas that have historically been outside the Article III domain.”31 With positive rights, the courts have to be more involved because it is more difficult to “ensure that the government is doing its job”32 than it is to prohibit certain behaviors.33 As Professor Helen Hershkoff puts it, “[t]he enforcement of positive rights thus requires a state court to share explicitly in public governance, engaging in the principled dialogue that commentators traditionally associate with the common law resolution of social and economic issues.”34 An appropriate application of the separation of powers doctrine to positive rights would “recognize that legislative action satisfying a constitutional obligation is extremely unlikely unless judicial rulings call for such action.”35 In the absence of the judicial requirement to provide the right and judicial threat to act in the stead of a recalcitrant legislature, legislative actors have little incentive to spend money raised in their own districts on constituents in other districts because there is no electoral return for the political risk.36 Judicial threats are a common means of enforcing constitutional rights; for example, Article III courts threaten through the exclusionary rule to suppress evidence gathered in violation of the Fourth Amendment.37Because state courts are charged with enforcing a different type of constitutional right, different types of judicial threats are appropriate. State Governments Are Not As Limited As the Federal Government One reason frequently given for the need for restraint and deference from the federal courts is that the federal government as a whole is one of limited powers.38 Article III courts were established in direct rejection of the English common law system of courts in which final appeal rested with the House of Lords, which frequently mixed policymaking with judicial determinations.39 On the other hand, states are sovereigns with legislative and judicial powers broader than those of the federal government,40 and state courts have inherent powers as well as statutorily granted ones.41 Article III courts are also subjected to substantial limits on their powers through the Constitution’s jurisdictional restraints.42 Many state courts are not similarly restricted.43 Moreover, nearly all state courts are common law courts, directly engaged in crafting the law as well as applying it.44 Common law jurisprudence is inherently a policymaking enterprise because the process of selecting a legal test for tort liability or good faith dealing, for example, rests in large part on what values the court decides to uphold and then on how such values can be promoted through rules, tests, and doctrines.45 It is therefore not out of place for state courts to engage in the policymaking decisions necessary to enforce and uphold constitutional rights. State Judges Are Not beyond Popular Review Another oft-cited reason for judicial restraint at the federal level is that the federal judiciary is beyond popular control: judges are appointed by the executive for life terms.46 In such a system, there is legitimate concern for those worried about a loss of democratic control if judges insert themselves too much into policymaking, which, by design, is to be carried out by the popularly elected branches of government. Thirty-eight states, however, engage in some form of judicial elections.47 Eleven of the remaining twelve states usually appoint judges for terms that are renewable by the state legislature; only Rhode Island appoints judges for life.48 Although the merits of judicial elections are debatable, the fact that nearly all state court judges are elected or subject to review by elected officials means that criticisms of so-called judicial activism based on life tenure are largely inapplicable to state courts. State Courts Are Competent Policymakers Finally, there is concern about the policymaking competence of Article III courts. These concerns come in two varieties: federalist and interbranch. The federalist concern, as the Supreme Court put it in Rodriguez, says that a key reason the federal courts should stay out of local policy issues like education is their incompetence regarding the policymaking that school funding inevitably requires.49 There is little question that crafting a constitutional school funding system, like the remedial phase of much public law litigation, is “essentially part of a process of policy design and implementation.”50 Yet that does not necessarily mean that courts should stay out; courts routinely deal with complex and controversial issues. In their continued struggle to desegregate American schools, even the federal courts made use of some unusual tools, such as special masters, that substantially improved the courts’ competence in designing remedies.51 Additionally, state courts have smaller jurisdictions and closer ties to the community, so their competence in crafting appropriate remedies in positive rights cases is arguably much greater than that of their federal counterparts.52 The interbranch concern pertains to the comparative competence of the branches; most state constitutions “do not reflect the same level of trust in state legislative decision making as does the federal Constitution in congressional decisionmaking.”53 This lack of trust is eminently reasonable. Some states have only part-time legislatures54 or ones that only meet biennially.55 Even in those states where serving as a representative is a full-time job, legislatures are often understaffed56 and rarely have the time to fully research national trends or best practices. Many states have constitutional provisions limiting the actions of the legislature such as bans on special legislation, which were enacted to combat legislative abuses and corruption.57 In sum, unlike the situation between Congress and the Article III courts, many state legislatures do not possess an institutional competency greater than that of their state courts; therefore, interbranch concerns about competence do not apply to the state courts in the same blanket way they are applied to the federal courts, and federalist concerns are, by definition, inapplicable to state courts dealing with state issues.

#### States courts have a unique role that allows them to protect educational rights far more than the Supreme Court

Elder 07

[Sonja Ralston, professor at Duke University School of Law, “STANDING UP TO LEGISLATIVE BULLIES: SEPARATION OF POWERS, STATE COURTS, AND EDUCATIONAL RIGHTS”, 2007, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1344&context=dlj>, accessed 7/7/17, NW]

More than three decades after Rodriguez, nine-year-olds in low income communities were still performing three grade levels behind their more affluent peers.212 Yet educating low-income students is not impossible; it simply takes more time, more effort, and more resources than the status quo provides.213 When students in every state have some form of constitutional right to education214 and the formula for educating all students is known, the achievement gap can only be attributed to a failure of will among those who control the resources. In such an environment, it is precisely the role of the courts to stand up for students, especially low-income students who are largely voiceless. Yet, in too many cases, the courts have restrained themselves out of an unnecessary devotion to a federal separation of powers doctrine developed for Article III courts. State courts are substantively and significantly different from federal courts in that they enforce state constitutional rights that are frequently positive in nature, they have broad and inherent powers, they almost universally depend on electoral or legislative review, and they are institutionally competent vis-à-vis state legislatures. Because of these differences, state courts should embrace their own state vision of what the separation of powers requires, and they should not hesitate to do their part in upholding students’ educational rights. As courts in these cases embark on the challenge of enforcing students’ rights, they should do so with deference to and trust in the coequal branches of government, but they should also remain vigilant for evidence that “[their] trust was misplaced” and that a more active remedy has become necessary.215

### 2AC State courts ev

#### Supreme Court leadership is key to uniformity.

Barry Friedman (Jacob D. Fuchsberg Professor of Law, New York University School of Law) December, 2005 The Politics of Judicial Review 84 Tex. L. Rev. 257

4. Implications for Normative Theory. - The idea of bottom-up influence is not entirely alien to normative theory, finding its expression in the idea of "percolation." n265 There is an established strand of scholarship that sees virtue in lower court divergence, in that it presents the Supreme Court with information and guidance regarding how novel issues should be decided. n266 At least one positive model suggests that the Supreme Court encourages some divergence in order to provide it with information as to where its intervention is needed. n267 [\*306] The problem, though, is that the idea of percolation is in substantial tension with the rule of law. n268 Thus, some question whether the percolation argument "at best ... is making a virtue of necessity." n269 As indicated above, the practice of stare decisis and a model of strong Supreme Court control typically are justified in order to assure that like cases are treated alike and out of a concern for uniformity. Under the most optimistic of views, however, there are going to be many cases that lower courts resolve with limited guidance. Less optimistically, positive scholarship suggests that there is enough play in the joints to allow lower court ideology to decide a significant number of cases. As Chief Justice Rehnquist himself recognized, the Supreme Court cannot hope to resolve many of these cases, and thus it is fairly certain that like cases are not always (or even nearly) treated alike. n270 Percolation may just be an appealing rationalization for sharp departure from the rule of law. n271

#### Anticipatory “underruling” undermines rule of law.

Michael C. Dorf (Associate Professor of Law, Rutgers University (Camden)) February, 1995 PREDICTION AND THE RULE OF LAW 42 UCLA L. Rev. 651

The prediction model requires lower court judges, as well as the lawyers and clients who appear before them, to conceive of law as a prediction of how the particular individuals sitting on the high court would resolve the issue presented. This conception is inconsistent with central specific practices of American law -- including the norm of the impartial adjudicator, the doctrine of stare decisis, and the institutional integrity of courts. More broadly, the prediction model is inconsistent with the overarching theme of the rule of law, of which these specific practices are manifestations.

## \*\*\*A States CP card\*\*\*

### Fed wack

#### The increasing federal government presence has been unwanted and its effectiveness is questionable

Marc Tucker 2013, president of the National Center on Education and the Economy, January 24, 2013 (“How the executive branch is reshaping education ― with little debate”, *Education Week,* Accessed Online at: http://hechingerreport.org/how-the-executive-branch-is-reshaping-education-%E2%80%95-with-little-debate/, Accessed Online on 07-06-2017 SI)

WASHINGTON ― In December, the application from the State of California for a waiver from the provisions of the No Child Left Behind Act (NCLB) was denied by the U.S. Department of Education. This, we were told, was because California disagreed with some items on the Department’s reform agenda—especially those having to do with teacher quality—and did not include them in its application. State officials said that it would have cost them $2 billion to implement these unwanted features of questionable effectiveness.

What’s going on here? The American education system is being reshaped before our very own eyes in a truly fundamental way―and with little debate. National and state policymakers behave as if both levels of government have much the same roles in education: to set goals and standards, for example, and to create accountability systems, define teacher quality, determine strategies for producing quality teachers and improve the performance of low-performing schools. Left unresolved, the conflicts this creates are likely to deepen and worsen over time.

It has not always been this way.

Historically, the federal government’s role had been to aid, assist, prod and push the schools, districts and states. But the key word was always “aid.” From the 1950s to the 1990s, there was no question who was in charge and it was never the federal government. The feds avoided interfering in any important way with the design of the larger system and the way it worked, except with respect to school desegregation, which was primarily the result of decisions made by the courts rather than executive or legislative branch decisions.

The last few decades, the federal role in education has undergone a massive transformation. This process began in the George H.W. Bush administration, gained steam in the Clinton administration, was propelled forward powerfully by the George W. Bush administration and then given a big push over the fence by the Obama administration.

Over time, federal education funds had increasingly been thrust at states with few policy levers to impose responsible spending. Building on the work of George H.W. Bush’s administration, President Bill Clinton started the states on the road to adoption of national standards for student academic performance—a radical departure from the status quo and aided by a reliance on standardized testing. President George W. Bush and a bipartisan coalition then followed by imposing the draconian NCLB accountability scheme. As the new design for American education emerged, it became clear that standards could be a driver of accountability and the tests developed to match the standards could be used to reward or punish schools based on student progress.

The Obama administration took the next logical step in this process by redesigning the accountability system to focus not on schools, as under NCLB, but largely on teachers. This provided the country with a national system for improving teacher quality—or so it was argued. Along with the embrace of charter schools, merit pay and other measures to inject more competition into the education system, this has been the main education policy thrust of this administration.

This process over the past two-plus decades constitutes a fundamental redesign of the American institutional system for elementary and secondary education. In some cases, it was accomplished with the enthusiastic participation of the states, but in others it was done despite their strong resistance. Some parts of this agenda, like the push for explicit standards and the need to focus on teacher quality, are supported by research, but there is no evidence to support other key components, such as the idea that teacher quality is best improved by tying teacher promotion and retention to student performance on standardized tests or the insistence on the expansion of charter schools. Some of these components have enjoyed the enthusiastic backing of a significant—and bipartisan—majority of Congress. But significant items now are being added to this agenda in a process in which Congress has played no part, including the last two items just mentioned.

How can the United States have a Constitution that assigns responsibility for vital public education policy matters to the states, when, without deciding that such delegation was a bad idea, the nation one day opts to create a national system of academic standards, curriculum and testing; a national system for school accountability; and a national system for ensuring teacher quality?

No nation that has reached the top ranks of education performance has a system of governance in which the roles of the national government and the state or provincial levels of government are as ill-defined and overlapping in education as is now the case in the United States. The process has gotten this far because, in a time of acute financial distress, the states will put up with almost anything to keep their budgets from completely disintegrating. So the federal government, in this case meaning almost exclusively the executive branch, has managed to get a phenomenal amount of leverage for the amount of money it has had to spend.

Is that how we want these decisions made? Do we really want the executive branch of the federal government to decide, pretty much by itself, what the aims of American education should be and how they should be achieved?

The solutions as to how the American education system should be governed are not obvious. But we ought to have a conversation about it before we wake up one day to find that the executive branch of the federal government has become our national school board.