

4-1-1983

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Recommended Citation

Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution*, 61 N.C. L. REV. 587 (1983).Available at: <http://scholarship.law.unc.edu/nclr/vol61/iss4/1>

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HOW WELL DOES CONGRESS SUPPORT AND DEFEND THE CONSTITUTION?†

ABNER J. MIKVA‡

Recent attempts to curtail the jurisdiction of the federal courts demonstrate congressional dissatisfaction with judicial resolution of certain difficult constitutional issues. This assault on the federal judiciary highlights a recurrent issue presented by the doctrine of separation of powers: whether Congress or the courts are the final arbiters of the constitutionality of legislative enactments. In this article, Judge Mikva examines congressional sensitivity to the constitutional issues often raised in the exercise of legislative power. Using three recent congressional enactments as illustrations, Judge Mikva demonstrates that Congress has neither the institutional nor political capacity to engage in effective constitutional deliberation. He concludes that Congress should make more of an effort to screen legislation for possible constitutional shortcomings and to clarify its motives, but that even if Congress does so, the courts must continue to examine fully the constitutional implications of all legislation.

In January of every odd-numbered year, all the newly elected members of the United States Congress stand in their respective chambers and take an oath to "support and defend the Constitution of the United States against all enemies foreign and domestic."¹ The importance of this ceremony is underscored by the fact that each member's term of office begins only upon the taking of this oath.² Just what this commitment means, and what extra responsibilities each legislator assumes at his swearing-in, however, is unclear. For the most part, legislative debate does not explore the constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts.

To some extent, Congress' mixed performance is due to the fact that its proper role in making constitutional judgments has never been firmly defined. Thomas Jefferson envisioned each of the three branches of government as an independent guardian of the Constitution, having "the right to decide for itself what is its duty under the Constitution, without any regard to what the others

† This article was first delivered as the William T. Joyner Lecture on Constitutional Law at the University of North Carolina School of Law on April 8, 1982.

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1. The oath of office is constitutionally required of all members of both the House and Senate. U.S. CONST. art. VI, § 3. The form of the oath is prescribed by 5 U.S.C. § 3331 (1976).

2. When a person is elected or appointed to public office he is usually required by law to do some act preparatory to assuming its duties, as well as to signify its acceptance, and this is usually termed *qualification*. [In this case the taking of an oath to support the Constitution.] When this is done he is invested with the office . . .

Poore v. United States, 49 Ct. Cl. 192, 196-97 (1914) (citation omitted) (emphasis in original).

may have decided for themselves under a similar question."³ Alexander Hamilton, on the other hand, was not as sanguine about the legislature's ability to adjudge the constitutional limitations of its own powers. Unlike Jefferson, he was motivated by a fear that with a limited constitution, reservations of rights and privileges would "amount to nothing" unless courts assumed the duty to exercise the power of judicial review. To Hamilton, the judiciary was a necessary bulwark against legislative aggrandizement and majority tyranny.⁴

More recently, the debate has focused on the deference due congressional judgments of constitutionality. Dean John Hart Ely argues that the courts should intervene only when a statute directly conflicts with a constitutional proscription or when the legislative process fails to ensure adequate participation in democratic decisionmaking.⁵ In so doing, he accords constitutional preeminence to the decisions of a legislature that neither insulates identified minorities nor denies them the rights necessary for full political participation, while restricting the courts' role to that of policing process.⁶

Professor Owen Fiss questions this reliance on the ability of the legislature to engage in constitutional reasoning, arguing that the courts must play the predominant role in articulating constitutional values against the new forms of tyranny implicit in the modern bureaucratic state.⁷ Like Hamilton, Fiss is not as optimistic that constitutional requirements will be met merely through adherence to the majoritarian process. In a contemporary echo of Hamilton, he questions the legislature's sensitivity to constitutional constraints upon its powers:

If the legislative process promised to get us closer to the meaning of our constitutional values, then the theory of legislative failure would be responsive to this puzzlement. But just the opposite seems true. Legislatures are entirely of a different order. They are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people—what they want and what they believe should be done.⁸

Regardless of the rhetoric that emanates from Congress, the legislature has for the most part fulfilled the prophecy of Hamilton and left constitutional judgments to the judiciary. This willingness to step aside has been due in part to institutional pressures and in part to political convenience. The dangers inherent in this deference, however, are two-fold. First, by passing the hard

3. 1 THE JEFFERSON ENCYCLOPEDIA 190 (J. Foley ed. 1900).

4. THE FEDERALIST No. 78, at 492-95 (A. Hamilton) (B. Wright ed. 1961).

5. J. ELY, DEMOCRACY AND DISTRUST (1980).

6. In addition, although Ely's theory accords Congress the prime responsibility for articulating constitutional requirements—or admits that all majoritarian decisions are equally constitutional—it provides no guidance to Congress beyond the basic insistence upon a majoritarian process. See, e.g., Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

7. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1980).

8. *Id.* at 9-10.

questions to the courts, Congress is able to divert political pressure from itself. As a result, Congress invites the courts either to follow the election returns⁹ or to face political attack, including the ultimate attack—restriction or removal of subject matter jurisdiction.¹⁰ The second danger is more subtle, and hence more worrisome. To the extent the judiciary operates under the assumption that an independent constitutional determination has been made by the legislature, it may reduce the level of scrutiny it gives to a problem. Reduced judicial scrutiny, however, enhances the possibility that constitutional rights may be abridged.

The existence of these dangers, however, is not lost on Congress. Congressman Eckhardt of Texas, in speaking against a trend in Congress to “press as far as [it] can toward the general objective of the statute and let the Supreme Court worry about unconstitutionality,”¹¹ argued that

[t]here is a grave and important difference and result if the constitutional language is stricken at the court level, particularly in the field of criminal law. In order to correct the constitutional defect the court must take action in a specific case by reversing a conviction of a person who is at least potentially a dangerous criminal.¹²

Twelve years later, Senator Schmitt, arguing that the Senate should decide for itself the constitutionality of the legislative veto, stated that the role of consti-

9. Consider the aphorism of Finley Peter Dunne, better known as Mr. Dooley, which states: “No matter whether the Constitution follows the flag or not, the Supreme Court follows the election returns.” F. DUNNE, MR. DOOLEY AT HIS BEST 77 (E. Ellis ed. 1969).

10. In the first session of the 97th Congress several bills were introduced restricting, or in some cases removing, jurisdiction from the federal courts, primarily in the areas of school prayer, abortion, and integration. Those bills concerned with integration limited the availability of busing as a remedy. See S. 1147, 97th Cong., 1st Sess., 127 CONG. REC. S4636-37 (daily ed. May 8, 1981); H.R. 3332, 97th Cong., 1st Sess., 127 CONG. REC. H1674 (daily ed. Apr. 30, 1981); S. 1005, 97th Cong., 1st Sess., 127 CONG. REC. S3953 (daily ed. Apr. 27, 1981); S. 528, 97th Cong., 1st Sess., 127 CONG. REC. S1480 (daily ed. Feb. 24, 1981); H.R. 2047, 97th Cong., 1st Sess., 127 CONG. REC. H624 (daily ed. Feb. 24, 1981); H.R. 1180, 97th Cong., 1st Sess., 127 CONG. REC. H174 (daily ed. Jan. 22, 1981); H.R. 1079, 97th Cong., 1st Sess., 127 CONG. REC. H172 (daily ed. Jan. 22, 1981); H.R. 869, 97th Cong., 1st Sess., 127 CONG. REC. H116 (daily ed. Jan. 16, 1981); H.R. 761, 97th Cong., 1st Sess., 127 CONG. REC. H73 (daily ed. Jan. 6, 1981); H.R. 340, 97th Cong., 1st Sess., 127 CONG. REC. H60 (daily ed. Jan. 6, 1981); H.R. 327, 97th Cong., 1st Sess., 127 CONG. REC. H59 (daily ed. Jan. 6, 1981). The bills dealing with abortion prevented the courts from restraining or enjoining anti-abortion laws. See H.R. 3225, 97th Cong., 1st Sess., 127 CONG. REC. H1483 (daily ed. Apr. 18, 1981); S. 583, 97th Cong., 1st Sess., 127 CONG. REC. S1624-25 (daily ed. Feb. 26, 1981); S. 158, 97th Cong., 1st Sess., 127 CONG. REC. S287-94 (daily ed. Jan. 19, 1981); H.R. 900, 97th Cong., 1st Sess., 127 CONG. REC. H128 (daily ed. Jan. 19, 1981); H.R. 867, 97th Cong., 1st Sess., 127 CONG. REC. H116 (daily ed. Jan. 16, 1981); H.R. 73, 97th Cong., 1st Sess., 127 CONG. REC. H33 (daily ed. Jan. 5, 1981). The voluntary prayer bills simply removed all federal court jurisdiction over prayer cases. See H.R. 2347, 97th Cong., 1st Sess., 127 CONG. REC. H808 (daily ed. Mar. 5, 1981); S. 481, 97th Cong., 1st Sess., 127 CONG. REC. S1281-84 (daily ed. Feb. 16, 1981); H.R. 1335, 97th Cong., 1st Sess., 127 CONG. REC. H213 (daily ed. Jan. 27, 1981); H.R. 989, 97th Cong., 1st Sess., 127 CONG. REC. H132 (daily ed. Jan. 20, 1981); H.R. 865, 97th Cong., 1st Sess., 127 CONG. REC. H116 (daily ed. Jan. 16, 1981); H.R. 408, 97th Cong., 1st Sess., 127 CONG. REC. H61 (daily ed. Jan. 6, 1981); H.R. 326, 97th Cong., 1st Sess., 127 CONG. REC. H59 (daily ed. Jan. 6, 1981); H.R. 72, 97th Cong., 1st Sess., 127 CONG. REC. H33 (daily ed. Jan. 5, 1981). For a more detailed description of the same, see Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 18 n.3 (1981).

11. 116 CONG. REC. 35,288 (1970) (statement of Rep. Eckhardt).

12. *Id.*

tutional interpreter should not be exclusive to the courts.¹³ He noted, for instance, that under the political question doctrine there exist constitutional issues whose resolution is committed to the political branches to the exclusion of the judiciary.¹⁴ He added,

Moreover, courts often accord a challenged law a "presumption of constitutionality" based upon the assumption that the legislature has previously passed upon the constitutional questions presented. Even where judicial deference is attenuated, the courts may lack the institutional capacity to review all aspects of legislative decisions, such as the subjective motivations of the lawmakers. Here, if the Constitution is to be applied at all, it must be applied by ourselves as lawmakers.¹⁵

The focus of this article is the extent to which these dangers are a reality and what, if anything, should be done about them. The article begins by examining three separate instances of congressional constitutional deliberation: (1) the 1974 extension of the minimum wage provisions of the Fair Labor Standards Act to employees of state and local governments;¹⁶ (2) the adoption of a legislative veto provision by the Senate in the currently pending amendments to the Administrative Procedure Act;¹⁷ and (3) the provision of the 1970 Organized Crime Control Act allowing for increased sentences for dangerous special offenders upon appellate review.¹⁸ These examples raise questions concerning Congress' ability to make constitutional judgments and its role as guardian of the Constitution. Although the potential for Congress to play an important role in constitutional decisionmaking exists, that potential has not been realized. This article concludes that Congress should make more of an effort to screen legislation for possible constitutional shortcomings and to clarify its motives as an aid to the courts, but that even if it does so, the courts should examine to the fullest extent the constitutional implications of every piece of legislation.

I. CONGRESS CONFRONTS THE CONSTITUTION

The three examples of congressional constitutional debate show Congress legislating in three different areas of legislative concern with varying levels of constitutional implications. In the first, the consideration of the Fair Labor Standards Amendments of 1974, Congress invoked the commerce power in an

13. 128 CONG. REC. S2581 (daily ed. Mar. 23, 1982) (statement of Sen. Schmitt).

14. *Id.*

15. *Id.*

16. Pub. L. No. 93-259, § 6, 88 Stat. 55, 58-62 (1974) (codified at 29 U.S.C. §§ 203-204, 207, 213, 216, 255, 260 (1976)).

17. The "Regulatory Reform Act," S. 1080, 97th Cong., 1st Sess., 127 CONG. REC. S4228-43 (daily ed. Apr. 30, 1981), is a series of proposed amendments to the Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-06, 1305, 3106, 3344, 4301, 5335, 5362, 7521 (1976 & Supp. IV 1980)). The Senate added the legislative veto provision to S. 1080 with the adoption of amendment 847. S. 1080, 97th Cong., 1st Sess., 127 CONG. REC. S2713 (daily ed. Mar. 24, 1981); *see infra* note 56.

18. 18 U.S.C. § 3576 (1976).

area it considered free of constitutional doubt. In the second, the consideration by the Senate of a legislative veto provision, Congress chose to redefine the separation of powers doctrine in a manner that seems counter to the dictates of the Constitution. In the third, the discussion of the appellate review of sentencing provision in the Organized Crime Control Act, Congress dealt with individual rights, and its determination of constitutionality was later reviewed by the Supreme Court. While these examples are not exhaustive, they are good illustrations of Congress' relationship with the Constitution.

A. *The Fair Labor Standards Amendments of 1974*

After two years of debate and one presidential veto, Congress enacted the Fair Labor Standards Amendments of 1974,¹⁹ extending the breadth of coverage and the minimum wage level set by the Fair Labor Standards Act²⁰ so as to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers."²¹ Among the provisions adopted by these amendments was one bringing employees of state and local governments within the purview of the Act.²² The reasons for this extension were threefold: Congress felt (1) that the government should be subject to the same standards as private employers; (2) that employees of state and local governments should not subsidize their employers by working for less than the minimum wage; and (3) that since these workers were already subject as public employees to wage ceilings, fairness dictated that they also be protected by a wage floor.²³ Two years later the Supreme Court held this extension unconstitutional in *National League of Cities v. Usery* because it "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions."²⁴

The result came as a complete surprise to Congress. What little constitutional discussion there had been in Congress had centered on whether it was appropriate to invoke the commerce power to extend the Fair Labor Standards Act to governmental employees. The Senate Committee on Labor and Public Welfare, responsible for reporting out the bill, found an explicit link between the wages paid to state and local government employees and interstate commerce. In its words,

The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore

19. Pub. L. No. 93-259, 88 Stat. 55 (codified at 29 U.S.C. §§ 202-08, 210, 212-14, 216, 255, 260 (1976)).

20. 29 U.S.C. §§ 201-19, 255, 260 (1976 & Supp. IV 1980).

21. *Id.* § 202(a) (1976).

22. Prior to 1974, federal law defined "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State." 29 U.S.C. § 203(d) (1976). The 1974 Amendments struck the language beginning with "but shall." Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55, 58 (1974).

23. SENATE COMM. ON LABOR AND PUBLIC WELFARE, FAIR LABOR STANDARDS AMENDMENTS OF 1974, S. REP. NO. 690, 93d Cong., 2d Sess. 24 [hereinafter cited as FLSA-SENATE].

24. 426 U.S. 833, 852 (1976).

that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well.²⁵

The opponents of the extension protested that it represented an "unjustified intrusion upon areas of state sovereignty."²⁶ Yet the opponents' arguments did not rise to the level of constitutionality; rather, they argued that the extension was merely "unwarranted."²⁷

The reason for the lack of constitutional debate was the assumption on the part of Congress that the Supreme Court's 1968 decision in *Maryland v. Wirtz*²⁸ had settled the issue. In *Wirtz* Justice Harlan, writing for an eight-member majority, upheld an earlier extension of the Fair Labor Standards Act to employees of hospitals and schools operated by state and local governments against challenges based on federalism and separation of powers. In holding that the commerce power provided a constitutional basis for the extension of the Act, the Court stated that (1) Congress had interfered with state functions only to the point of subjecting the state to the same limitations as other employers whose activities affected commerce; (2) labor conditions in schools and hospitals could affect commerce; and (3) if a state engaged in economic activities that could be validly regulated if engaged in by a private person, the federal government could require a state to conform to those same regulations.²⁹ In its report on the 1974 Amendment, the House Committee on Education and Labor quoted liberally from the syllabus of the case and cited the holding in full.³⁰ While the Senate Report did not mention the case explicitly, the links it drew between state wages and interstate commerce demonstrate that the Senate committee had the case in mind.³¹ In fact, the only challenge to the constitutionality of the amendments came from Senator Taft, who stated,

I . . . question the constitutionality of extending the requirements of the act to such employees, although the theories of the Supreme

25. FLSA-SENATE, *supra* note 23, at 24.

26. HOUSE COMM. ON EDUCATION AND LABOR, FAIR LABOR STANDARDS AMENDMENTS OF 1973, H.R. REP. NO. 232, 93d Cong., 1st Sess. 94 (minority views) [hereinafter cited as FLSA-HOUSE]. The Fair Labor Standards Amendments of 1973 were the same amendments as those enacted in 1974. The 1973 Amendments, enacted by Congress in August 1973, were vetoed by President Nixon on September 6, 1973, on the ground that they would add to unemployment and inflation. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 147, 93d Cong., 1st Sess. 2 (1973).

27. FLSA-HOUSE, *supra* note 26.

28. 392 U.S. 183 (1968).

29. *Id.* at 193-99.

30. FLSA-HOUSE, *supra* note 26, at 6-7.

31. See *supra* text accompanying note 25.

Court decisions of *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Maryland v. Wirtz*, 392 U.S. 183 (1968) may be arguably extended to include coverage of such employees under the act.³²

What is clear from the legislative history is that the line of reasoning in *National League of Cities v. Usery*³³—that the federal government may not interfere with integral governmental functions in areas of traditional state concern—was not anticipated. Congress had assumed on the basis of *Maryland v. Wirtz* that it had the power to act as it did. It did not conduct an independent constitutional review on its own, largely because it probably did not see the need. *Maryland v. Wirtz* seemed directly on point, and the imposition on state and local governments did not seem to raise a constitutional issue.³⁴

B. The Legislative Veto

The second example, the Senate's review of a legislative veto provision in amendments to the Administrative Procedure Act, involves a situation in which the constitutionality of the legislative proposal was, at the very least, suspect. Employed to review both adjudicatory and rulemaking decisions of administrative agencies, the legislative veto allows either house of Congress, or in some cases both houses, to veto a decision by the executive branch. While it may be an effective means of controlling agency discretion, the legislative veto is subject to four basic constitutional challenges. The first involves the doctrine of separation of powers.³⁵ By retaining direct control over delegated administrative power, Congress intrudes upon the executive branch and begins to exercise administrative discretion. Because the veto procedure circumvents the executive, Congress, in effect, makes the President a subordinate. The second challenge concerns section 7 of article I of the Constitution,³⁶ which re-

32. 120 CONG. REC. 5268 (1974) (statement of Sen. Taft).

33. 426 U.S. 833 (1976).

34. Congress decided the imposition would be too burdensome if applied to policemen and firemen and consequently enacted a special overtime exemption provision. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(c)(1)(A), 88 Stat. 55, 60 (codified at 29 U.S.C. § 207(k) (1976 & Supp. IV 1980)). This was not done, however, for constitutional reasons, but rather, "to minimize any adverse effects of overtime requirements by providing for a phase-in of those public employees who are most frequently required to work more than forty hours per week." FLSA-SENATE, *supra* note 23, at 24.

35. The most recent Supreme Court opinion discussing this doctrine is *Buckley v. Valeo*, 424 U.S. 1, 118-43 (1976) (per curiam). The principle behind the doctrine is that diffusion of authority prevents abuses of power by any one branch of government. As Justice Brandeis noted:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

36. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined

quires that any law promulgated must be passed by both houses of Congress. A legislative veto procedure that allows one house of Congress to make a final determination seems to run afoul of this requirement. A third possible challenge involves the "presentation" requirement of article I, section 7 that a bill must be presented to the President before it can become a law, a mandate that is not met by a legislative veto provision.³⁷ The fourth challenge involves the doctrine of undue delegation, a theory occasionally resurrected by the Supreme Court to combat any standardless delegation of powers from Congress to the executive or to administrative agencies.³⁸ The doctrine is implicated by the legislative veto because the guidance Congress provides the executive branch comes after rather than before the powers have been delegated.

Given these challenges and congressional enactment of a wide range of legislative veto and review procedures over the last fifty years,³⁹ it is surprising

by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2. The "bicameralism requirement" is designed to prevent the promulgation of legislation unless both houses concur. See, e.g., THE FEDERALIST No. 51, at 356-57 (J. Madison) (B. Wright ed. 1961); 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 336-38 (1911).

37. The purpose of the presidential veto, as set forth in the "presentment" clause, see *supra* note 36, was ably outlined by Alexander Hamilton in *The Federalist*:

The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense.

THE FEDERALIST No. 73, at 468-69 (A. Hamilton) (B. Wright ed. 1961). Any legislative veto provision encroaches on the President's ability to protect his authority and to check unwise legislation.

38. The heyday of the doctrine of undue delegation is well past. See *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). It has not yet been removed from the Supreme Court's arsenal. See, e.g., *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting); *id.* at 91-93 (Brennan, J., dissenting); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974). Recently a number of commentators have called for the doctrine's revival. See, e.g., J. ELY, *supra* note 5, at 131-34; Gewirtz, *The Courts, Congress, and Executive Policy-Making*, LAW & CONTEMP. PROBS. Summer 1976, at 46, 49-65; McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-30 (1977).

39. In the 96th Congress alone, 32 laws were enacted containing some form of a legislative review or veto procedure: Veterans Health Care Amendments of 1979, Pub. L. No. 96-22, 93 Stat. 47; Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, 93

that the Supreme Court has not yet addressed their constitutionality.⁴⁰ The final word may not be long in coming, however, as the Supreme Court has already heard argument in a case involving this issue.⁴¹

Both of the circuit courts of appeals that have considered legislative veto provisions have found them to be unconstitutional.⁴² In *Chadha v. Immigra-*

Stat. 395 (1979); Energy and Water Development Appropriation Act, Fiscal Year 1980, Pub. L. No. 96-69, 93 Stat. 437 (1979); Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503; Treasury, Postal Service and General Government Appropriations Act, Fiscal Year 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979); Health Planning Amendments of 1979, Pub. L. No. 96-79, 93 Stat. 592; Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979); Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102, 93 Stat. 749; District of Columbia Retirement Reform Act, Pub. L. No. 96-122, 93 Stat. 866 (1979); Department of Interior and Related Appropriations Act, Fiscal Year 1980, Pub. L. No. 96-126, 93 Stat. 954 (1979); Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, 93 Stat. 1040 (1979); Veterans Health Programs Extension and Improvement Act of 1979, Pub. L. No. 96-151, 93 Stat. 1092; Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339; United States Insular Areas Appropriations Authorizations, Pub. L. No. 96-205, 94 Stat. 84 (1980); Crude Oil Windfall Profit Tax of 1980, Pub. L. No. 96-223, 94 Stat. 229; Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980); Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374; Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980); Marine Protection, Research, and Sanctuaries Act Appropriations Authorization, Pub. L. No. 96-332, 94 Stat. 1057 (1980); Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208; Energy and Water Development Appropriations Act of 1981, Pub. L. No. 96-367, 94 Stat. 1331 (1980); Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367; Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060; Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334; Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767; Department of Interior and Related Agencies Appropriations, 1981, Pub. L. No. 96-514, 94 Stat. 2957 (1980); National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987; Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1981, Pub. L. No. 96-526, 94 Stat. 3044 (1980); International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, 94 Stat. 3131; Federal Insecticide, Fungicide and Rodenticide Act, Pub. L. No. 96-539, 94 Stat. 3194 (1980); Farm Credit Act Amendments of 1980, Pub. L. No. 96-592, 94 Stat. 3437.

40. In *Buckley v. Valeo*, 424 U.S. 1 (1976), Justice White expressed his view that the legislative veto is constitutional. *Id.* at 257 (White, J., concurring in part and dissenting in part). He compared the one house veto to disapproval of proposed legislation and argued that the purpose of the Presidential veto is not implicated by a review of agency rulemaking because such rulemaking is legislative in nature. Further, Justice White stated:

I would be much more concerned if Congress purported to usurp the functions of law enforcement, to control the outcome of particular adjudications, or to pre-empt the President's appointment power; but in the light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto.

Id. at 285-86. Justice White was the only Justice to address this issue, with the majority disposing of the case on other grounds. *Id.* at 140 n.176 (per curiam).

41. On October 5, 1981, the Supreme Court granted certiorari in *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 454 U.S. 812 (1981). The Court heard argument on February 22, 1982. See 50 U.S.L.W. 3687, 3687-89 (U.S. Mar. 2, 1982). The *Chadha* case was reargued on Dec. 7, 1982. See 51 U.S.L.W. 3453, 3453-55 (U.S. Dec. 14, 1982).

42. The Court of Claims has also addressed this issue and reached the opposite result. In *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), the court upheld a Senate veto of the President's salary recommendations for federal judges, a procedure provided for in the Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 644 (current version at 2 U.S.C. § 359 (Supp. IV 1980)). Focusing narrowly on the one-house veto provision in the Salary Act, the court held the veto neither conflicted with Congress' constitutional powers and obligations nor intruded on the constitutional sphere of the President. 556 F.2d at 1059. The court noted that the power to fix appropriations is lodged in Congress under U.S. CONST. art. I, § 9, cl.

tion & Naturalization Service⁴³ the Ninth Circuit held unconstitutional the one-house veto of a decision by the INS under 80 U.S.C. § 1254(c)(2) (1976) to suspend deportation because of hardship. To decide when one branch unconstitutionally invades powers implicitly committed to another, the court formulated the following test: The doctrine of separation of powers is violated when one branch assumes powers that are central or essential to the second, provided that this assumption of power disrupts the second branch's performance of its duties and is unnecessary to implement a legitimate governmental policy.⁴⁴ Noting that deportation proceedings, including suspension proceedings, are subject to administrative safeguards set out by statute and to judicial review, the court delineated three possible justifications for and interpretations of the veto: (1) it is an effort by Congress to correct judicial or executive misapplication of the statutory criteria for suspension of deportation; (2) it represents an ongoing effort by Congress to share administration of the immigration statute with the executive; or (3) it is an exercise by Congress of its residual powers to define substantive rights by statute. Addressing the first interpretation, the court found that the veto unconstitutionally interfered with the judiciary's power to review executive action and to engage in statutory interpretation.⁴⁵ Focusing on the second justification, the veto was held to be an unnecessary interference with the executive function—unnecessary because Congress can and should articulate statutory criteria for suspension of deportation and leave implementation of the criteria to the executive.⁴⁶ Finally, responding to the third interpretation, the court found the veto to be a legislative action that failed to meet constitutional requirements of bicameralism and presentation to the President under article I, section 7.⁴⁷

Most recently, in *Consumer Energy Council of America v. Federal Energy Regulatory Commission*⁴⁸ the District of Columbia Circuit Court of Appeals held unconstitutional the legislative veto provision in the Natural Gas Policy Act of 1978.⁴⁹ The Act directed the Federal Energy Regulatory Commission (FERC) to implement an incremental pricing program, shifting costs arising due to deregulation from residential to industrial users. FERC's rules were to take effect, however, only if neither house of Congress adopted a resolution disapproving the rule, and, in fact, the House of Representatives vetoed one

7; that the veto could be authorized under the necessary and proper clause as a means chosen by Congress to supervise presidential exercise of delegated powers; that bicameralism is not required because rejection of salary recommendations is analogous to the refusal to pass a statute, rather than to the adoption of a new law; and that the veto did not infringe upon the President's own veto power because the President can simply fail to recommend increased salaries, thereby forcing Congress to pass a new salary statute. 556 F.2d at 1060-65.

43. 634 F.2d 408 (9th Cir. 1980); *cert. granted*, 454 U.S. 812 (1981); see *supra* note 41.

44. *Id.* at 425.

45. *Id.* at 429-33.

46. *Id.*

47. *Id.* at 433-34.

48. 673 F.2d 425 (D.C. Cir. 1982).

49. 15 U.S.C. §§ 3301-3342 (Supp. IV 1980). The legislative veto provision is found at § 3342(c).

rule. The reasons given in the House for such action were several.⁵⁰ Those who had originally supported the program argued that circumstances had changed and that the veto provision had been included to give Congress a second look.⁵¹ Those who had opposed the incremental pricing policy in 1978 again argued that it was unwise.⁵² Others merely noted that the rule was either too broad or too narrow.⁵³ The court held that the veto cast by the House was an unconstitutional exercise of the legislative power, violating both the bicameralism and presentation requirements of article I, section 7.⁵⁴ It added that while agencies may, of course, exercise rulemaking power pursuant to congressional delegation, Congress may not set forth an initial policy determination in the form of legislation and then reevaluate it and issue a new policy determination via the exercise of the legislative veto.⁵⁵

It is against this background that the Senate in March of 1982 undertook consideration of Amendment 847 to S. 1080, a series of proposed amendments to the Administrative Procedure Act. Amendment 847 provides that no final rule of an agency shall become effective until forty-five days of continuous session after it is submitted to Congress, provided, however, that both houses do not pass a resolution of disapproval.⁵⁶ In the words of its author, Senator Schmitt:

The amendment would add elements of deliberation, compromise, and consensus that are the hallmark of a representative policymaking body that is directly accountable to the people they serve and on whom the subject rules will directly impact. . . . Thus the legislative veto provides for a measure of control and accountability over administrative lawmaking that is totally absent from S. 1080.⁵⁷

In presenting the amendment, Senator Schmitt criticized the opinion of the D.C. Circuit in *Consumer Energy Council of America v. FERC* as reflecting "an idealized conception of the separation of powers that is neither historically

50. 673 F.2d at 437 & n.31.

51. *Id.* at 438 & n.32.

52. *Id.* at 438 & n.33.

53. *Id.* at 438 & n.34.

54. *Id.* at 448-70.

55. *Id.* at 466-70.

56. Amendment 847 to S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. S2572-73 (daily ed. Mar. 23, 1982), provides in pertinent part:

Notwithstanding any other provision of law, no recommended final rule of an agency may become effective until the expiration of a period of 45 days of continuous session of Congress after the date on which the rule is received by the Congress under paragraph (4) of this subsection. If before the expiration of such 45-day period, either appropriate committee orders reported or is discharged from consideration of a resolution of disapproval with respect to such rule, such rule may not become effective if within 30 days of continuous session of Congress after the date on which such committee orders reported or is discharged from further consideration of such resolution, one House of Congress agrees to such resolution of disapproval of the rule and within 30 additional days of continuous session of Congress after the date of transmittal of the resolution of disapproval to the other House such other House agrees to such resolution of disapproval.

See also *supra* note 17.

57. 128 CONG. REC. S2578 (daily ed. Mar. 23, 1982) (statement of Sen. Schmitt).

accurate nor has, until now, been actually applied to overturn an act of Congress."⁵⁸ He called upon his fellow senators to uphold their constitutional duty to consider the constitutional implications of their actions and reminded them that "the rulings of [the D.C. Circuit] have not achieved an especially inspiring record of approval before the High Court of late, particularly when it has dealt with issues concerning disputes over the constitutional prerogatives between the Congress and the executive."⁵⁹ In Senator Schmitt's opinion, Congress' ability to make a constitutional judgment was in no way diminished by the fact that it was a legislative rather than a judicial body.⁶⁰ The reasons he gave for this were several: legislation is drafted and reviewed by lawyers; the bills are subject to comment by interested parties and views of legal experts may be solicited; the reporting committee can call on the research talents of its own staff or the attorneys at the American Law Division of the Library of Congress; and the debate on the floor may center on constitutional questions, a task not unfamiliar to the various members, as a majority are lawyers.

A number of Schmitt's colleagues were not as convinced of the propriety of the amendment, however. Senators Leahy and Danforth spearheaded an effort to table the amendment. They argued that the pendency of the issue before the Supreme Court, as well as the D.C. Circuit decision in a very similar case that resolved the constitutional doubts against the veto provision, mandated against joining the uncertain provision to a bill that had taken a number of years to put together.⁶¹ Senators Ford and Cannon went even fur-

58. *Id.*

59. *Id.* at S2580.

60. *Id.* at S2581.

61. See 128 CONG. REC. S2588 (daily ed. Mar. 23, 1982) (statement of Sen. Leahy):

I think these proposals [for a legislative veto] place regulatory reform in an arena of constitutional doubt.

As I said, this proposal speaks volumes about the frustration that virtually every one of us in Congress has felt when executive agencies have failed to follow our legislative mandates. But I think the two-House veto, especially as presented, without a Presidential veto, raises substantial questions about the maintenance of separation of powers under the Constitution.

I suggest, if we were to have such a decision, whether it is in the Chadha case or whenever it might be, that that is the time for us to sit down. When we have the Supreme Court decision in hand, that will be the time to write a piece of legislative veto legislation.

See also 128 CONG. REC. S2596 (daily ed. Mar. 23, 1982) (statement of Sen. Danforth):

Mr. President, there could not conceivably be a worse time for the Congress of the United States to put in place a Government-wide legislative veto than is the case today.

The timing is so bad for this amendment that it is as though a computer had been asked what is the worse conceivable time to proceed full-speed ahead with a Government-wide legislative veto. Surely, any computer that was asked that question would come up with the answer, "Right now, in early 1982. This is the worst conceivable time for a legislative veto."

Why so? Because, Mr. President, I believe it is fair to say that never in the history of the country has the concept of the legislative veto been more in flux than it is today.

We have heard many Senators today talk about the question of the constitutionality of the legislative veto. When the Senator from New Mexico called up this amendment, at the very outset he discussed the question of constitutionality. Why did he discuss the constitutionality of the legislative veto?

The answer to that question is that this is a live matter right now before the

ther, arguing that the amendment should be tabled because it was unconstitutional.⁶²

In pointing to the practical problems of a generalized use of the veto, the opponents echoed the analysis of Judge McGowan,⁶³ who argued that Congress cannot possibly review all administrative regulations thoroughly, that to insist upon congressional review might delay the implementation of regulations unnecessarily, and that inconsistent use of the veto by the House and the Senate may frustrate the regulatory enterprise. Even more importantly, the use of the veto might increase Congress' tendency to pass the hard issues onto agencies, to propose increasingly standardless legislation, and then to join the public in deriding the results.⁶⁴ It would be far better, Judge McGowan concluded, for each branch of government to function within its own constitutional sphere and for a "Congress genuinely concerned about delegated power

Supreme Court of the United States. The District of Columbia Court of Appeals has held the legislative veto unconstitutional. That case is on appeal to the U.S. Supreme Court. The Ninth Circuit Court of Appeals has held the legislative veto unconstitutional. That case is on appeal to the U.S. Supreme Court, and in fact has been argued before the Supreme Court Despite the fact that constitutionality is now a real case in controversy before the Supreme Court of the United States, the Senate of the United States today considers whether this precise time is the time to barge full speed ahead by putting in place a specific form of the legislative veto, Government-wide, for all rules and regulations, whether they were major rules or minor rules.

Mr. President, the question of constitutionality of the legislative veto has been debated back and forth in the Senate today This is not the forum for debating the issue of constitutionality of the legislative veto. The fact of the matter is that it is irrelevant whether we debate it in the Senate; the issue is going to be decided one way or another by the Supreme Court of the United States.

My view is that while the case is before the Supreme Court, pending a determination by the Supreme Court of the issue that is before it, let us wait for the Supreme Court to speak. Then, if we want to have a legislative veto, let us fashion a form of legislative veto which complies with the decision of the Supreme Court of the United States.

62. See 128 CONG. REC. § 2593 (daily ed. Mar. 23, 1982) (statement of Sen. Ford):

I say today we are not only flying in the face of the courts, but we are saying to the general public. We want this legislative veto, and that legislative veto will restrain the agencies.

What in the world are we restraining? Nothing. Those bureaucrats downtown, or wherever they are, are developing these regulations. They spend their time, they spend their money, and then they send them up here and then we override them we veto them.

Why do we not go the other end and regulate the agencies by law so that they will know where they are going, what bounds they have to operate in? Then we will not have to worry about a legislative veto that will create havoc.

It is unconstitutional and yet we sit here and say we are going to have a legislative veto, we are going to look over their shoulders.

See also 128 CONG. REC. S2593-94 (daily ed. Mar. 23, 1982) (statement of Sen. Cannon):

My opposition to the legislative veto as a substitute for effective congressional oversight has been vigorous and longstanding.

Two years ago, I argued against imposing a legislative veto on rules of the Federal Trade Commission. At that time, I stated that the veto appeared to violate the Constitution. Two U.S. circuit courts, the ninth circuit and the D.C. Circuit Courts of Appeal, recently decided that the veto is indeed unconstitutional

I share Senator Schmitt's concern about regulatory excesses, and I, too, believe Congress must get Federal agencies under control. The way to do this is not through an elaborate process of vetoing each and every Federal regulation, but through changing specific statutory mandates.

63. McGowan, *supra* note 38.

64. *Id.* at 1146-47.

[to make the] one effective contribution that it, and only it, can make—the identification and definition, as precisely as possible, of that power, and of the standards to be observed in its exercise.”⁶⁵ Both the policy and the constitutional arguments went unheeded, however, and the amendment passed 69-25.⁶⁶

The debates on this issue took place against a backdrop of constitutional uncertainty. Those Senators in favor of the legislative veto provision went to great lengths to assert the need for Congress to make its own judgment of constitutionality. Opponents of the provision stressed the timing of that judgment, arguing that the most sensible approach was to await the Supreme Court decision on the merits. On the matter of constitutionality, the debates, to the extent they took place, are filled with self-serving conclusory congressional discussion, the value of which is not easy to determine. What is clear, however, is that the constitutionality of the provision was only one factor that was considered in the Senate's vote on the amendment and that it may not have been the most important.

C. *Section 3576 of the Organized Crime Control Act*

Joining with President Nixon in a nationwide war against crime, Congress enacted the Organized Crime Control Act of 1970.⁶⁷ The Act was designed to strengthen the legal tools in gathering evidence, to establish new penal provisions, and to provide new remedies to deal with the unlawful activities of those engaged in organized crime.⁶⁸ Among these reforms was Title X, designed to counter the tendency on the part of some trial judges to mete out light sentences in cases involving organized crime personnel.⁶⁹ It authorized extended sentences of up to twenty-five years for dangerous special offenders and included in section 3576 a provision for appellate review of those sentences, allowing the government to seek an increased sentence.⁷⁰ Despite

65. *Id.* at 1174.

66. 128 CONG. REC. S2604 (daily ed. Mar. 23, 1982).

67. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 U.S.C. (1976 & Supp. IV 1980)).

68. 116 CONG. REC. 35,191 (1970) (statement of Rep. Sisk).

69. The Senate Committee on the Judiciary stated:

For such offenders and for professional and habitual criminals, the most applicable purpose of punishment is protection of the public against further criminal conduct by incapacitation through incarceration or long-term close supervision. The failure to serve that purpose, when a prison term suitable for an ordinary offender is imposed upon an organized crime leader, is obvious. The source of that failure lies, in large part, in inadequate maximum terms for special offenders, lack of standards for identifying them, and unavailability of appellate power to increase inadequate individual sentences.

SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 87 (1969) [hereinafter cited as OCCA-SENATE]. The Committee argued that “[t]he primary purpose of title X, therefore, is to see to it that convicted felons prone to engage in further crime are imprisoned long enough to give to society reasonable protection.” *Id.* at 83.

70. This particular provision was an amendment to Title 18 of the U.S. Code, establishing a new § 3576. It provides in pertinent part:

[A] review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were

the controversy over this last provision in both the House and the Senate, it was enacted and later upheld by a 5-4 majority in the Supreme Court.⁷¹ Thus, the Act provides an example of Supreme Court review of a piece of legislation that had been the subject of congressional constitutional debate.

The bill that eventually passed was first introduced in the Senate.⁷² After testimony from various law professors and legal organizations, including the American Bar Association, the American Civil Liberties Union, and the Department of Justice, the Committee on the Judiciary, without any constitutional hesitations,⁷³ reported the bill to the floor and recommended its passage. In adopting the bill, the Committee had relied heavily on the testimony of the Department of Justice and Professor Peter Low of the University of Virginia Law School, which centered on the relevance of the then recent Supreme Court opinion in *North Carolina v. Pearce*.⁷⁴ In *Pearce* the Court held that an increase in the term of a sentence after a reversal of conviction did not constitute double jeopardy. Those in favor of the bill stressed the fact that a sentence increase procedure had been validated.⁷⁵ Those opposed emphasized that the sentence could only be increased if the original conviction had been overturned,⁷⁶ arguing that the review provision in section 3576 allowed

clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing.

18 U.S.C. § 3576 (1976).

71. *United States v. DiFrancesco*, 449 U.S. 117 (1980).

72. S. 30, 91st Cong., 1st Sess. (1969).

73. OCCA-SENATE, *supra* note 69. None of the Senators who spoke on S. 30 objected to any of the provisions on constitutional grounds. Senator Scott felt it necessary to expound on the evils of organized crime but concluded that the bill was "a careful attempt to accommodate the public interest in effective law enforcement with individual rights in a specific and complex area of criminal law." *Id.* at 211, 214 (Additional views of Mr. Scott). Senators Kennedy and Hart stated that "the reach of this bill goes beyond organized criminal activity. Most of its features propose substantial changes in the general body of criminal procedures," but did not elaborate. *Id.* at 215 (Individual views of Messrs. Hart and Kennedy).

74. 395 U.S. 711 (1969); OCCA-SENATE, *supra* note 69 at 93-100 (specifically discussing constitutionality of appellate review with power to increase sentences).

75. See, e.g., *Measures Relating to Organized Crime: Hearings Before the Special Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 544 (testimony of Professor Low) ("the double jeopardy and equal protection arguments that could be made against an increased sentence on appeal are weakened if not completely destroyed [by the decision in *Pearce*]") [hereinafter cited as *Measures Relating to Organized Crime*]; OCCA-SENATE, *supra* note 69, at 96 ("The *Pearce* decision has significance here because it rejected the commonly held broad view that under the double jeopardy clause any sentence pronounced in a case sets a ceiling which cannot be exceeded except by traditional trial court revision during the term of court."); 116 CONG. REC. 593 (1970) (statement of Sen. McClellan) ("Supreme Court decisions rendered last term [*Pearce*], and lengthy and detailed hearings into the legal and constitutional aspects of appellate review of sentences, have indicated that the concept can be implemented as title X does within constitutional bounds.").

76. "In the recent case of *North Carolina v. Pearce*, . . . the Supreme Court held that due process barred a judge from increasing a presentence *after a new trial* unless the defendant's identifiable conduct subsequent to the original sentencing supports the more severe sentence as is

the appellate court to increase the sentence on the same set of facts that the trial court had used in determining the sentence. The Committee had been particularly taken with Professor Low's argument that, although the focus was different, section 3576 substantively resembled other available constitutional alternatives that Congress could have chosen and therefore should be constitutional.⁷⁷

The debate on the floor was one-sided, and it is safe to say that most members would have agreed with Senator Mansfield, when he said,

[S]ometimes I wish I were a lawyer. At other times I am very glad that I never entered that profession.

We have now spent 3 days on this bill, with the lawyers, by and large, arguing over the fine points of the proposed legislation which has been a year in the making.

Undoubtedly there are bugs in this bill, as there are in almost any bill which the Senate passes. But I think the issue is so important that, insofar as the bugs are concerned, we might well consider resolving our doubts in favor of the legislation, so that we can attack a menace which is becoming more and more difficult to cope with in this city and in this Nation.

Therefore, I hope that the Senate will go on record today with a solid vote and support for this legislation, so that we can indicate that we are ready to cope with the growing criminality which is becoming so prevelant [sic] and so hard to control throughout the Nation, and do it with a big bang today.⁷⁸

The bill passed 73-1.⁷⁹

The bill faced a stiffer test in the House, although the outcome was the same. There, Representatives Conyers, Ryan, and the author of this article, then a Representative from Illinois, wrote a dissenting report to the House

made part of the record." 116 CONG. REC. 855 (1970) (statement of Sen. Young) (ALCU report entered into record by Sen. Young).

77. Professor Low had made these observations:

[T]here would seem to be ways of putting the increase [sic] power so that it would be very difficult to suggest constitutional infirmity. One would be to permit the sentencing court only to "recommend" a sentence to the appellate court, the "recommendation" to become final if neither side appealed within so many days. If an appeal were taken by either side, the issue could then be resolved *de novo* by the appellate court. A second way would be to analogize the situation to 18 U.S.C. § 4208(b) (commitment for study) and have the trial court impose a sentence that would be "deemed" to be for the maximum, with a recommendation that the appellate court "reduce" the sentence to a certain level, a recommendation that would become the sentence if neither side appealed, but which would not bind the appellate court if an appeal was taken.

Both of these devices are clearly artificial, and in substance obviously involve no more than would be involved if a direct appeal of the sentence were allowed to the Government. But the fact that they can be suggested with some plausibility, and that it would be difficult to say that they offended any principles rooted in the double jeopardy clause, is suggestive of the fact that the proposal here may well be constitutional.

Measures Relating to Organized Crime, *supra* note 75, at 196 (testimony of Professor Low). "The committee agree[d] with Professor Low that no such artificial technique should be or need be employed." OCCA-SENATE, *supra* note 69, at 98.

78. 116 CONG. REC. 971 (1970) (statement of Sen. Mansfield).

79. *Id.* at 972.

Committee on the Judiciary's endorsement of the Act.⁸⁰ Citing *North Carolina v. Pearce*⁸¹ and the recommendations of the advisory committee on the American Bar Association's Project on Minimum Standards of Justice,⁸² we argued:

Title X, were it not such a dangerous special offender itself, would be ludicrous, the product of a caveman's course on the Constitution. As it is, it contravenes the Constitution, it substitutes revenge for reason, and it flaunts the concept of fair treatment. It is [a] parody of justice made tragic by the damage it will do—to individuals, and more important, to our system of rule by law.⁸³

We carried our fight to the floor,⁸⁴ where, for the most part, these arguments were met with indifference, for as Congressman Yates stated, "It is hard to vote against a bill which states in its title that it seeks to control organized crime."⁸⁵ A sample response was made by Congressman Ichord, who addressed the following question to this author: "I agree with the gentleman that we are setting up extraordinary measures and vehicles to solve the problems created by organized crime, but does the gentleman not believe that organized crime within the Nation does present a problem of sizable proportions?"⁸⁶ The supporters of the bill, armed with the finding of a Gallup poll that 75% of those interviewed thought the courts did not deal harshly enough with criminals,⁸⁷ flatly stated,

The appellate review provisions of title X have been drawn with great care so as to avoid infringing individual rights under the due process and double jeopardy clauses. Supreme Court decisions rendered last term, and lengthy and detailed hearings into the legal and constitutional aspects of appellate review of sentences, have indicated that the concept can be implemented at [sic] title X does with constitutional bounds. Appellate review under title X will not only permit correction of unjust sentences in particular cases, it will also promote the evolution of sentencing principles and enhance respect

80. HOUSE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1970, H.R. REP. NO. 1549, 91st Cong., 2d Sess. 181-96 (1970) (dissenting views of Rep. John Conyers, Jr., Rep. Abner Mikva, Rep. William F. Ryan).

81. 395 U.S. 711 (1969).

82. The existence of such a power could well have the effect of preventing the defendant from appealing even on the merits of his conviction. The ability to seek an increase could be a powerful club, the very existence of which—even assuming its good faith use—might induce a defendant to leave well enough alone. ABA Standards on Appellate Review of Sentences 57 (1967).

H.R. REP. NO. 1549, 91st Cong., 2d Sess. 193 (1970) (dissenting views of Rep. John Conyers, Jr., Rep. Abner Mikva, Rep. William F. Ryan).

83. *Id.*

84. The bill was reported to the floor on October 6, 1970. 116 CONG. REC. 35,191 (1970) (statement of Rep. Sisk). Congressman Poff then spoke in defense of the bill, in opposition to the dissenting views outlined in the House Report. *Id.* at 35,191-95 (statement of Rep. Poff). The debates quickly turned to the subject of increased sentences on appellate review. *See, e.g., id.* at 35,207 (statements of Rep. Ryan); *id.* at 35,213 (statement of Rep. Bingham); *id.* at 35,301, 35,349-50 (statement of Rep. Dennis); *id.* at 35,305 (statement of Rep. Railsback); *id.* at 35,350 (statement of Rep. Poff); *id.* at 35,351 (statement of Rep. Conyers).

85. *Id.* at 35,353 (statement of Rep. Yates).

86. *Id.* (statement of Rep. Ichord).

87. *Id.* at 35,194 (statement of Rep. Poff).

for our system of justice. It promises a major improvement in the administration of justice.⁸⁸

The bill passed 341 to 26,⁸⁹ despite the author's remonstrance that:

Those who have been here for the debate in the committee are aware that even the proponents of this bill find it less than perfect. I am sure some Members will [salve] their consciences by saying that, after all, the constitutionality of some of these disputed provisions can be determined by the courts. It seems to me a little unfair to dump that whole burden on the courts, since they are less able to protect themselves and their forum is less efficacious than ours. We, too, take an oath to protect and uphold the Constitution, and we have a burden equal to theirs, if not greater.⁹⁰

Section 3576 came before the Supreme Court in 1980 in the case of *United States v. DiFrancesco*.⁹¹ Writing for a five-man majority, Justice Blackmun noted that section 3576 was "a considered legislative attempt to attack a specific problem in our criminal justice system,"⁹² and held that the increase of sentence on review violated neither the guarantee against multiple punishment nor the guarantee against multiple trials. It is not possible to know whether the Court relied on the fact that Congress had, in its mind, already considered the issue carefully. It is interesting to note, however, that Justice Blackmun adopted Professor Low's argument before the Senate,⁹³ writing:

The exaltation of form over substance is to be avoided. . . . Congress could have achieved the purpose of § 3576 by a slightly different statute whose constitutionality would be unquestionable. Congress might have provided that a defendant found to be a dangerous special offender was to receive a specified mandatory term, but that the trial court then could recommend a lesser sentence to the court of appeals, which would be free to accept the recommendation or to reject it. That scheme would offer no conceivable base for a double jeopardy objection. Yet the impact on the defendant would be exactly the same as, and possibly worse than, the impact under § 3576 as written. No double jeopardy policy is advanced by approving one of these procedures and declaring the other unconstitutional.⁹⁴

88. *Id.* Congressman Eckhardt's response to Congressman Poff's statement was as follows: [T]he gentleman from Virginia [Mr. Poff] is a man who is very learned in the law, as I have frequently observed in colloquy on the floor. But he has exercised his great expertise frequently to walk with exquisite precision on the very outside borders of the Constitution. I think he has in this case overstepped.

Id. at 35,287 (statement of Rep. Eckhardt). Congressman Eckhardt's opinion that the attempt to attack crime had overstepped constitutional boundaries was shared by the opponents to S. 30.

89. *Id.* at 35,363.

90. *Id.* at 35,353 (statement of Rep. Mikva).

91. 449 U.S. 117 (1980). For a discussion of the *DiFrancesco* decision, see Note, *Constitutional Law—United States v. DiFrancesco: "Continuing Jeopardy"—An Old Concept Gains New Life*, 60 N.C.L. Rev. 425 (1982).

92. 449 U.S. at 142.

93. See *supra* note 77 and accompanying text.

94. 449 U.S. at 142. That the majority viewed both alternatives as having the same double jeopardy implications is surprising. Under § 3576 the defendant, after having faced the rigors of a

In addition, like the congressional proponents of section 3576, Justice Blackmun avoided the argument that in evaluating the double jeopardy claim *Pearce* was concerned "not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials."⁹⁵

This example reveals much about legislative and judicial behavior. Like the 93d Congress, which enacted the Fair Labor Standards Amendments of 1974, the 91st Congress was quick to cite Supreme Court precedent, albeit questionably on point, for support. As with the Senate discussion of the legislative veto, those in favor of acting in the face of court decisions or against the will of the majority stressed the need for Congress to make its own determinations as to constitutionality. Similarly, just as the need to bring the administrative agencies under control was paramount, so was the need to enact a law combatting organized crime—constitutional issues, while important, were not given top priority. The effect these deliberations had on the Court is more difficult to determine. Perhaps because both institutions agreed that section 3576 was constitutional, Justice Blackmun saw fit to mention the congressional debates. The possibility exists, however, that the Court decided in part that its work had been done already. What was at stake, of course, was an individual's right to be free from double jeopardy.

In each of these examples Congress, for whatever reasons, decided that its legislative agenda was in accord with the Constitution. In rethinking the issues, the Supreme Court was faced not only with the task of deciding a constitutional question, but also with the problem of confronting Congress if it disagreed with the legislation. In assessing the Fair Labor Standards Amendments, the Court overruled both its own prior decision and the legislative determination. With section 3576 the Court narrowly upheld Congress'

trial and having had his sentence pronounced, can have his sentence increased or decreased upon review. The double jeopardy problem exists if the sentence is increased because the defendant is being given an extra punishment on the same set of facts. In Justice Blackmun's hypothetical, such a risk does not exist because the sentence can only be decreased.

The dissent also criticizes this reasoning, but from a different angle. Justice Brennan wrote:

[T]he Court argues that Congress could have provided that dangerous special offenders be sentenced to a specified mandatory term that could then be reduced on appeal by the court of appeals. *Ante*, at 142. The Court thus concludes that striking down § 3576 would elevate "form over substance" since Congress could have obtained the same result sought by § 3576 "by a slightly different statute whose constitutionality would be unquestionable." *Ante*, at 142. This is a strange conclusion, for we must review statutes as they are written, not as they might have been written. In any event, the Court's hypothetical legislation is not "slightly different," but substantially different from § 3576: it would create a wholly unprecedented change in the relationship between trial and appellate courts. As long as Congress retains the present court structure in which the sentences of trial courts are final judgments, the "form" as well as the "substance" of the law militate against Government appeals in this situation.

Id. at 148 (Brennan, J., dissenting).

95. *North Carolina v. Pearce*, 395 U.S. 711, 722 (1969). The court's decision in *DiFrancesco* is even more surprising in light of *Bullington v. Missouri*, 451 U.S. 430 (1981), decided five months later. In *Bullington* the Court decided, again 5-4, that the government may not seek an increase in the defendant's penalty at a separate trial, even if that trial would have been held anyway. For an analysis of the double jeopardy issue and a criticism that the Court's opinions are inconsistent, see Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980); Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

determination. The Court's decisions in *Chadha* and (if it decides to hear the case) *CECA* will shed greater light on whether the Court looks to Congress (under pressure) or the lower courts for a reading of the Constitution and the question as to what, if any, importance the Court places on the congressional constitutional deliberations themselves. While it is not possible to state that injustice occurred in any of these situations, at the very least, one can say that the oath to support and defend the Constitution is read differently by a member of Congress than by a Justice of the Supreme Court.

II. CAN CONGRESS DO BETTER?

The examples in the previous section demonstrate that constitutional decisions, if they are being made at all, are being made by the Supreme Court. While constitutional rhetoric occasionally finds its way into the legislative history of a statute and may even convince some members of Congress to act in a certain manner, for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment. If congressional supporters can draw on the Constitution to bolster their case or to create the appearance of a reasonable decision, so much the better. To conclude, however, that Congress has failed in its duty to "think constitutionally" is not enough, for one must first determine whether the legislature is able to engage effectively in constitutional debate and, assuming that it is, what that debate might add to the one already undertaken by the Supreme Court. I address the second question first.

A. *Is There a Role for Congress?*

In our republican form of government, the judiciary is the one branch that is not able to set its own agenda. Restricted to deciding only live cases or controversies,⁹⁶ the courts are dependent upon the executive and the legisla-

96. The Constitution gives jurisdiction to the judiciary in the following manner:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2. The courts are not empowered to give advisory opinions or entertain abstract questions. As the Supreme Court noted in 1892,

Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ulti-

tive branches for framing their disputes. To a large extent, Congress serves as a screen for the Supreme Court—if Congress only passes constitutional laws, the Court's role is reduced to that of statutory interpreter. For Congress, the task is relatively easy when the constitutional issues are clear. In considering the Fair Labor Standards Amendments of 1974, Congress acted with reference to the perceived mandate of the Supreme Court.⁹⁷ When the constitutionality of an act is undetermined, the task is harder. It is in these instances that Congress has a tendency to decide the issue in favor of the legislation's constitutionality. The question that arises is how Congress should make this determination.

In making constitutional judgments, Congress has four alternatives: it can engage in the same kind of constitutional reasoning that is performed by the judiciary; it can try a doubtful constitutional theory on the assumption that if the constitutional experiment is wrong, the courts can be relied upon to set Congress right; it can identify one particular constitutional principle and protect that principle on the theory that the legislature determines the constitutional framework within which the courts must adjudicate; finally, it can err on the side of constitutional conservatism and construe its own powers narrowly. While it is not within the scope of this discussion to determine when each alternative should be used, it is helpful to understand the advantages and disadvantages of each.

The first approach forces Congress to act as a lower federal court, reading and interpreting Supreme Court precedent. In the easy cases, congressional review aids the Court by obviating the need to hear the case, except, of course, if the Court wishes to make a change in the law. In the harder cases, however, if Congress has resolved the issue in favor of constitutionality, the Court cannot avoid confronting the issue directly. Acting like a lower federal court is certainly not what Jefferson envisioned for Congress; Congress should be able to make its own decisions rather than having to predict what the Supreme Court would do—a function that is presumably already being performed by the judicial system.

The second option, testing doubtful constitutional theories, can work only if Congress considers in advance what it will do if the Court resolves the issue against constitutionality. Because of the co-equal relationship between Congress and the courts, any experimentation by Congress places great pressure on the courts to follow the election returns or face a loss of jurisdiction. That pressure only increases if Congress asserts and insists on, rather than merely suggests, doubtful theories.⁹⁸ If Congress explicitly states that it is testing a

mate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892).

97. See *supra* text accompanying notes 28-32.

98. The seminal example of this phenomenon is the Supreme Court's consideration of President's Roosevelt's New Deal programs. Although the programs were enacted under constitutional

new theory, the Court is able to be more objective. While the courts should accord congressional determinations their due respect, constitutional experimentation should not be given the same deference as that accorded Congress in "one step at a time" cases,⁹⁹ in which Congress is also engaged in the process of testing. Doubtfulness aside, the congressional theory is either constitutional or it is not—there is no middle ground. Nevertheless, it should be remembered that the Constitution is a living document that evolves over time; pressure on the Court from Congress to reevaluate the meaning of the Constitution is not always detrimental.

The third approach for Congress, protecting one particular constitutional principle, such as individual rights, state sovereignty, or separation of powers,¹⁰⁰ is helpful to the courts because it clarifies congressional motive and may also determine the contours of a constitutional right. Congressional motivation is often hard to assess, however, because the members frequently cannot agree on which principle is paramount, or they see the Constitution as embodying several co-equal principles. Because the structure of legislation can dictate the shape of challenges to it and frame the issues before a court, the clearer the terms of what Congress is trying to do, the better.

The fourth method is really not a viable option because it places Congress in a role subsidiary to the courts. Were Congress to interpret the Constitution narrowly at every instance it would not be an innovative force in government and would block the will of the majority from becoming known. By completely eliminating the tension between Congress and the courts over who decides what is constitutional, Congress would, in effect, place the courts in an even worse position; political forces for change that formerly operated on Congress would be refocused on the courts.

Thus, it appears that Congress can make a difference. It can screen the easy cases by rejecting unconstitutional bills; it can provide a different viewpoint on the Constitution and become an innovative force; and it can help frame the constitutional issues by clarifying its motivation and structuring the legislation to take account of that motivation. While the extent to which it fills these roles varies greatly, the potential for congressional input into constitutional judgments remains.

theories that were new at the time, both the President and Congress thought these theories were viable. When the Court disagreed, Roosevelt proposed packing the Court. Many historians believe that as a result of this threat the Court backed down and accepted Roosevelt's theories. This change in heart also signaled the demise of the doctrine of substantive due process. For an historical account, see FRANKLIN D. ROOSEVELT AND THE SUPREME COURT (A. Cope & F. Krinsky eds. 1952).

99. For an interesting discussion of the Court's approach to these cases and a suggestion for reform, see Note, *Reforming the One Step at a Time Justification in Equal Protection Cases*, 90 YALE L.J. 1777 (1981). This method differs from proposed constitutional experimentation because although classifications that are timebound are involved, they are not yet unconstitutional. *Id.*

100. This approach has been adopted by Justice Rehnquist; in his opinions the principle of state sovereignty is protected above all else. See Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982).

B. Can Congress Fill that Role?

While it is clear that there is a role for Congress to play in making constitutional judgments, the ability of Congress to do so is less certain. Both institutionally and politically, Congress is designed to pass over the constitutional questions, leaving the hard decisions to the courts. Congress' hesitancy to tackle these issues can be seen in a quick reading of any volume of the Congressional Record. Even from the earliest years of the Republic, the Congressional Record casts little light on the great constitutional debates that have periodically divided the country.

The paucity of constitutional dialogue in Congress is due to many factors. Structurally, both houses are large, making the process of engaging in complex arguments during a floor debate difficult. For the most part, the speeches made on the floor are designed to get a member's position on the record rather than to initiate a dialogue. Because of the volume of legislation, the time spent with constituents, and the technical knowledge required to understand the background of every piece of legislation, it is infrequent that a member considers the individual merits of a particular bill.¹⁰¹ Often a vote is determined by a thumbs up-or-down sign by the party leader,¹⁰² or by a political debt that needs to be repaid. While it is true, as Senator Schmitt observed, that a majority of the members of Congress are lawyers,¹⁰³ they have not kept up-to-date on recent legal developments. In fact, most Supreme Court opinions never come to the attention of Congress.¹⁰⁴ Unlike judges, the Representatives and Senators are almost totally dependent on the recommendations of others in making constitutional judgments.

Congress is a reactive body unable to enact legislation until the problem at hand reaches crisis proportions.¹⁰⁵ Because of this, the legislature has an "often unstated but [very] real need to deal with each issue that comes before it in as timely a fashion as possible," even at the expense of developing thorough and accurate legislation.¹⁰⁶ Driven by a need to get a law on the books, Congress is not primarily concerned with the law's details. Constitutional issues are subsidiary to the desire to crack down on crime or bring administrative agencies under control, for example. In addition, the constitutional principles involved in a bill, unlike its merits, are generally abstract, unpopu-

101. See, e.g., J. HARRIS, CONGRESS AND THE LEGISLATIVE PROCESS 162 (1972) ("Congress is not organized to formulate a broad, consistent, national legislative program dealing with the problems of the time."); Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 801 (1963) (because members of Congress spend at least half of their time on constituents, they can give full attention only to a limited number of issues); Schwarz, *Legislation and Legislatures*, 47 SOC. INQUIRY 234, 236 (1977) ("legislators have little time to discuss and consider legislation").

102. Rep. John Brademas, former Democratic Whip in Congress, was famous for standing in the doorway as the members entered from the cloakroom for a vote and, in this manner, signaled the proper way to vote.

103. 128 CONG. REC. S2581 (daily ed. Mar. 23, 1982) (statement of Sen. Schmitt).

104. S. KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 144 (1965).

105. See J. HARRIS, *supra* note 101, at 19; Note, *supra* note 99, at 1786.

106. Note, *supra* note 99, at 1781; see also Morse, *Theories of Legislation*, 14 DE PAUL L. REV. 51, 53 (1964).

lar, and fail to capture the imagination of either the media or the public. The Constitution is often portrayed as an obstacle to a better society by Congressmen forced to confront its limitations.

In addition to the institutional pressures on the Congress to pass the constitutional problems to the courts, the political incentives to do so are great. Constitutional issues often present the most difficult value conflicts in society. The very knowledge that the courts are there, as the ultimate nay-sayers, increases the tendency to pass the issue on, particularly if it is politically controversial. Such behavior by Congress is both an abdication of its role as a constitutional guardian and an abnegation of its duty of responsible lawmaking. Nonetheless, the fact remains that Congress has only infrequently demonstrated a concern for constitutional limitations.

III. CONCLUSION

The recent spate of bills seeking to remove jurisdiction from the federal courts indicates that Congress is not completely happy with the Supreme Court's handling of certain constitutional matters.¹⁰⁷ Congress, however, has not been a model of constitutional decisionmaking itself. Its hallmark has been superficial and, for the most part, self-serving constitutional debate. What then can be said of Congress and the Constitution?

As a decisionmaking body Congress is not designed to consider adequately the constitutional implications of every bill before it. While the dangers inherent in such a situation are great, they have not been realized. The most helpful task that Congress can perform is to clarify its intentions and its perception of the problem. If Congress is operating against a constitutional background, it should note how that background accords with the statutory scheme. If it ducks the issue, it should be honest and say so. The most likely place for constitutional dialogue is in the committees; committee size and format are more conducive to debate. Even so, the urgency of the issues, the reliance of members on others for guidance, and the complexity of the problems presented often prevent meaningful congressional constitutional analysis.

While congressional constitutional debate aids the courts by identifying issues and motivation, it is not a substitute for the judgment of the courts. The courts must play their unique apolitical role and make the hard decisions. Congress could be more cognizant of the fact that many times it backs the courts into a corner and should not be so quick to point an accusing finger in the courts' direction. On the other hand, the courts need to remember that confrontation with the policy-makers puts the delicate nature of the separation of powers to great stress. An independent judiciary can remain that way only if the other branches accept the importance of its independence.

Members of Congress should strive to be Jefferson's independent guardians but should remember that the system was designed to give the courts the

107. See *supra* note 10.

final say. At the very least, however, they should remember that their constitutional oath is not just a ceremonial ritual but an entrusting to their care of a document that gives this republic its unique longevity. As Judge Bryce said almost a century ago,

The people are profoundly attached to the form which their national life has taken. The Federal Constitution is, to their eyes, an almost sacred thing, an Ark of the Covenant, whereon no man may lay rash hands This conservative spirit, jealously watchful even in small matters, sometimes prevents reforms, but it assures to the people an easy mind, and a trust in their future which they feel to be not only a present satisfaction but a reservoir of strength.¹⁰⁸

108. 2 J. BRYCE, *THE AMERICAN COMMONWEALTH* 433 (abr. 1959).

