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CONSTITUTIONAL INTERPRETATION BY MEMBERS OF CONGRESS

LOUIS FISHER†

In an article published in this Review in 1983, Judge Abner Mikva contended that Congress lacks the political incentive and the institutional capacity to perform a meaningful constitutional analysis of pending legislation. Mr. Fisher disagrees with that contention and attempts to refute it in this Article. He argues that Congress has ample resources to perform effective constitutional analysis. Congress not only has its own sizable staff to assist with such analysis, but it also can turn to outside experts and counsel for advice. Mr. Fisher examines historical and contemporary examples of constitutional debate conducted by Congress to demonstrate that Congress can analyze difficult constitutional questions effectively. Congress, in Mr. Fisher's view, is fulfilling the duty it shares with the judiciary and the chief executive to uphold the Constitution.

In a recent article Judge Abner J. Mikva of the United States Court of Appeals for the District of Columbia Circuit examined Congress' duty and ability to consider constitutional questions.¹ He concluded that Congress has neither the institutional nor the political capacity to engage in effective constitutional interpretation. Although each member of Congress takes an oath to support and defend the Constitution, Mikva contended that legislative debate, for the most part, "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."²

Judge Mikva criticized Congress for "pass[ing] over the constitutional questions, leaving the hard decisions to the courts."³ Constitutional issues, he said, become "subsidiary to the desire to crack down on crime or bring administrative agencies under control . . ."⁴ Because constitutional issues "often present the most difficult value conflicts in society," it is tempting for members to sidestep these issues and leave them to the courts, "the ultimate nay-sayers."⁵ "Such behavior by Congress is both an abdication of its role as a constitutional guard-

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1. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587 (1983).

2. *Id.* at 587.

3. *Id.* at 609.

4. *Id.*

5. *Id.* at 610.

ian and an abnegation of its duty of responsible lawmaking."⁶ Building on three case studies, he advised Congress to limit its role to screening the easy cases, rejecting patently unconstitutional legislation, providing a different viewpoint on the Constitution, and clarifying its motivation when legislating.⁷

These passages leave Congress with a mixed message. On the one hand, it should not abdicate its responsibilities by leaving the tough constitutional issues to the courts. On the other hand, Judge Mikva contends that it is institutionally and politically incapable of considering the constitutional questions before them. What is a member of Congress to do? Should Congress decide only the "easy" constitutional issues while passing the remaining issues to the courts?

This Article pursues the issues that Judge Mikva so ably has raised. From his unique vantage point as a federal appellate judge and former congressman, he has identified extremely important questions about a legislator's duty to determine constitutional questions. Additional facts, placed in a broader context, are needed to understand the scope of Congress' responsibility and ability to interpret the Constitution.

Section I reviews the doctrine of "coordinate construction" to demonstrate that Congress, by the very nature of our political system, shares with the executive and the judiciary the duty of constitutional interpretation. Congress makes significant contributions by participating in that constitutional dialogue. Section II discusses the authority and competence of Congress to engage in constitutional interpretation. The oath of office, the finding of facts for constitutional law, the resolution of "political questions," and the congressional staff reforms of recent decades are some examples that reinforce both congressional authority and competence. Finally, section III reexamines the three case studies offered by Judge Mikva. Despite institutional and political limitations shared with the President and the courts, the Article concludes that Congress can perform an essential, broad, and ongoing role in shaping the meaning of the Constitution.

I. COORDINATE CONSTRUCTION

"Even from the earliest years of the Republic," Judge Mikva writes, "the Congressional Record casts little light on the great constitutional debates that have periodically divided the country."⁸ The historical record, however, demonstrates that Congress deliberated for years on such constitutional issues as judicial review, the Bank of the United States, congressional investigative power, slavery, internal improvements, federalism, the war-making power, treaties and foreign relations, interstate commerce, the removal power, and the legislative veto long before those issues entered the courts.⁹ Congressional debate was in-

6. *Id.*

7. *Id.* at 608.

8. *Id.* at 609.

9. See W. ANDREWS, *COORDINATE MAGISTRATES: CONSTITUTIONAL LAW BY CONGRESS AND THE PRESIDENT* 1-20 (judicial review), 21-43 (Bank), 44-64 (slavery), 65-95 (interstate commerce), 109-30 (removal power), 131-44 (war powers) (1969). For early debate on internal improvements, see A DOCUMENTARY HISTORY OF AMERICAN ECONOMIC POLICY SINCE 1789 53-84 (W. Letwin ed. 1961). See also J. HART, *THE AMERICAN PRESIDENCY IN ACTION* 78-111 (treaties and

tense, informed, and diligent. Indeed, it had to be, given the paucity of direction at that time from the Supreme Court and the lower courts. This section discusses the concept of coordinate construction from different perspectives: the debates in 1789 on the President's removal power; the concept of coordinate construction as understood by Thomas Jefferson, Andrew Jackson, and Abraham Lincoln; and the judicial doctrines that present the Supreme Court as the "ultimate interpreter."

A. "The Decision of 1789"

The 1789 debate on the President's removal power occupies several hundred pages of the *Annals of Congress* and constitutes an exceptionally penetrating examination of the doctrine of implied powers. Although some members argued that the Senate had to be included with the President in the removal of executive officials, others believed that these officials could be removed only through the constitutional process of impeachment. A third camp concluded that since Congress creates an office, it may attach to that office any condition it deems appropriate for tenure and removal. A fourth school insisted that the power of removal belonged exclusively to the President as an incident of his executive power.¹⁰

Should Congress have submitted this constitutional question to the judiciary for resolution? Nine days before the House debate on the removal power James Madison defended a list of constitutional amendments known collectively as the Bill of Rights. He predicted that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive."¹¹ When it came to the question of the removal power, however, he refused to defer to the judiciary and rejected the advice of those who said that "it would be officious in this branch of the Legislature to expound the Constitution, so far as it relates to the division of power between the President and the Senate."¹² To Madison it was

incontrovertibly of as much importance to this branch of the Government as to any other, that the Constitution should be preserved entire. It is our duty, so far as it depends upon us, to take care that the powers of the Constitution be preserved entire to every department of Government . . .¹³

Madison continued:

foreign relations), 152-248 (removal power) (1948); C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 52-70, 205-10 (removal power) (1969); D. MORGAN, *CONGRESS AND THE CONSTITUTION* 49-57 (removal power), 101-118 (investigative power), 140-59 (interstate commerce), 184-203 (legislative veto) (1966); A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* (1976) (discussing constitutional deliberations by Congress from 1789 to 1829).

10. See L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 60-66 (1985).

11. 1 *ANNALS OF CONG.* 439 (J. Gales ed. 1789).

12. *Id.* at 500.

13. *Id.*

But the great objection drawn from the source to which the last arguments would lead us is, that the Legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of Government, that the exposition of the laws and Constitution devolves upon the Judiciary. But I beg to know, upon what principles it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments? The Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.¹⁴

In the leading case of *Myers v. United States*,¹⁵ Chief Justice Taft turned to the congressional debate of 1789 to determine the scope of the President's removal power. Following the discussion in the House of Representatives day by day and vote by vote, he concluded that "there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone . . ."¹⁶ He noted that Madison was "then a leader in the House, as he had been in the Convention. His arguments in support of the President's constitutional power of removal independently of Congressional provision, and without the consent of the Senate, were masterly, and he carried the House."¹⁷

Taft relied both on the legislative discussion and the decision of the First Congress, not because a congressional determination on a constitutional issue is conclusive, but, first, because of our agreement with the reasons upon which it is avowedly based; second, because this was the decision of the First Congress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification; and, third, because that Congress numbered among its leaders those who had been members of the Convention.¹⁸

Taft concluded that the power of removal "must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering."¹⁹

While Taft based his decision on the congressional debates of 1789, the

14. *Id.*

15. 272 U.S. 52 (1926) (Congress may not regulate President's removal of officers appointed with Senate confirmation.).

16. *Id.* at 114.

17. *Id.* at 115.

18. *Id.* at 136.

19. *Id.* at 161. For Justice Sutherland's reliance on a statement by Congressman John Marshall in 1800 and a Senate report in 1816 to define the President's foreign affairs powers, see *United States v. Curtiss-Wright*, 299 U.S. 304, 319 (1936).

dissenters in *Myers* looked to that same record and other congressional actions to support their conclusions. Justice McReynolds, reviewing an 1835 Senate debate, described the danger of placing unrestrained power in the Executive to remove officials.²⁰ He also pointed to the struggle for civil service reform, as a method of ensuring some security of official tenure, and to the many statutes enacted by Congress restricting the President's removal power.²¹ His reading of the debates of 1789 did not produce the same impression of unrestrained executive power that Taft had discovered.²²

Practices after 1789 also helped to reinforce "the right of Congress to impose restrictions."²³ Justice Brandeis' dissent itemized the numerous statutes that had allowed Congress to restrict the President's removal power. That record convinced him that a "persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary."²⁴

Taft's doctrinaire decision was undermined repeatedly by Congress' decision to place statutory limits on the President's power to remove administrative officials who exercised quasi-legislative and quasi-judicial powers. In time, the Supreme Court took account of these congressional actions and limited the scope of *Myers v. United States*.²⁵ The Court's orientation toward the removal power was shaped and reshaped by these congressional interpretations.

B. Thomas Jefferson

Judge Mikva attributes part of the "mixed performance" of Congress "to the fact that its proper role in making constitutional judgments has never been firmly defined."²⁶ Thomas Jefferson, he notes, envisioned that each branch of government would act as an independent guardian of the Constitution and each would have "the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question."²⁷ Following this Jeffersonian model, Judge Mikva advises Congress not to "engage in the same kind of constitutional reasoning that is performed by the judiciary," because this approach "forces Congress to act as a lower federal court, reading and interpreting Supreme Court precedent."²⁸ Acting like a lower federal court, he says, "is certainly not what Jefferson envisioned

20. *Id.* at 179-81 (McReynolds, J., dissenting).

21. *Id.* at 181 (McReynolds, J., dissenting).

22. *Id.* at 193-99 (McReynolds, J., dissenting).

23. *Id.* at 202 (McReynolds, J., dissenting).

24. *Id.* at 283 (Brandeis, J., dissenting) (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915)).

25. See *Wiener v. United States*, 357 U.S. 349 (1958) (President lacked authority to remove a member of an adjudicatory commission); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (Congress may restrict President's power to remove officers performing quasi-judicial and quasi-legislative duties).

26. Mikva, *supra* note 1, at 587.

27. *Id.* at 587-88 (citing 1 THE JEFFERSON ENCYCLOPEDIA 190 (J. Foley ed. 1900)).

28. *Id.* at 607.

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.”²⁹

Although Congress should be able to make its own decisions rather than merely anticipate Supreme Court decisions, Jefferson’s solution was much more radical. He made his own decisions on constitutional issues even *after* the other branches had announced their positions. Believing the Alien and Sedition Acts to be unconstitutional, Jefferson and his followers were appalled when the federal courts failed to strike them down.³⁰ Once in office as President, Jefferson “discharged every person under punishment or prosecution under the sedition law.”³¹ He believed

that law to be a nullity, as absolute and as palpable as if Congress had ordered [the people] to fall down and worship a golden image; and that it was as much [his] duty to arrest its execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image.³²

Thus, Jefferson did more than envision the three branches as “co-ordinate and independent of each other.”³³ Acts by one branch were not to control later considerations by another branch.³⁴ Writing to Judge Spencer Roane, Jefferson stated that each branch was “truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal.”³⁵ Jefferson’s theory could produce as many meanings of the Constitution as there are branches of government, and possibly more, given the freedom of each new Congress and each new President to discard interpretations of their predecessors. The country would face a plethora of conflicting, shifting interpretations, all of equal weight. Under this theory, for example, President Nixon might have been at liberty to insist that his view of executive privilege had the same merit and authority as that of the Supreme Court.³⁶

C. Andrew Jackson

Andrew Jackson’s view of coordinate construction was less threatening to

29. *Id.*

30. See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 215 (1937).

31. 11 *THE WRITINGS OF THOMAS JEFFERSON* 43 (Bergh ed. 1904) (letter to Mrs. John Adams, July 22, 1804).

32. *Id.* at 43-44.

33. *Id.* at 213 (letter to George Hay, June 2, 1807).

34. *Id.* at 213-14. For further insight into Jefferson’s position on the nullity of the Alien and Sedition Act, see 12 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 31, at 288-90 (letter to Wilson C. Nicholas, June 13, 1809); 14 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 31, at 116 (letter to Gideon Granger, Mar. 9, 1814); 15 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 31, at 214 (letter to Judge Spencer Roane, Sept. 6, 1819).

35. 15 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 31, at 214 (letter to Judge Spencer Roane, Sept. 6, 1819).

36. See J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 83 (1984). *But see* *United States v. Nixon*, 418 U.S. 683 (1974) (separation of powers doctrine cannot justify an absolute unqualified Presidential privilege of immunity from judicial process in all circumstances).

the rule of law. Although Jackson inherited the Jeffersonian criticism of the judiciary, he realized that the federal courts were an important source of political authority for turning back the nullification doctrine. He realized that it might be necessary to form an alliance between the presidency and the judiciary to keep the nation intact.³⁷

Jackson's theory of coordinate construction was announced in his message vetoing the bill that would have rechartered the Bank of the United States in 1832. Although the Supreme Court had upheld the constitutionality of the Bank,³⁸ and advocates of the Bank maintained that "its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court," Jackson did not agree with this view.³⁹ He concluded that "mere precedent" should not be decisive in questions of constitutional power "except where the acquiescence of the people and the States can be considered as well settled."⁴⁰ The legislative record on the Bank, he pointed out, was full of contradictions. Congress favored the Bank in 1791, but voted against it in 1811. Congress again rejected the Bank in 1815, but supported it a year later. Moreover, sentiment from the states was generally hostile to the Bank.⁴¹

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.⁴²

Jackson's theory of coordinate construction therefore embodied a number of constraints not found in Jefferson's model. Judicial precedents could govern other governmental bodies' actions only if those bodies acquiesced to them. The authority of the Supreme Court could not control Congress or the Executive

37. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341 (1956). Despite Jackson's well-known animosity for some members of the judiciary, particularly Chief Justice John Marshall, and political conflict between Jackson and the courts, Jackson was a firm believer in the importance of a vigorous and powerful court system and the principles of judicial review. *Id.* at 364.

38. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315 (1819).

39. 3 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1144 (J. Richardson ed. 1897).

40. *Id.* at 1145.

41. *Id.*

42. *Id.*

"when acting in their legislative capacities," and the influence of the Court in such instances would depend on "the force of their reasoning." Jackson believed that each public officer should support the Constitution "as he understands it, and not as it is understood by others." He did not embrace, however, the Jeffersonians' unyielding hostility toward the courts. Rather, he viewed the courts as potential allies in building a stable political order.

D. Abraham Lincoln

Abraham Lincoln's July 17, 1858 speech at Springfield, Illinois also is compatible with democratic principles and the rule of law. Stephen Douglas, Lincoln's opponent in the 1858 Senate race, had announced his support of the year-old Supreme Court decision in *Dred Scott v. Sandford*.⁴³ Lincoln limited his support of that decision by saying that "in so far as it decided in favor of Dred Scott's master and against Dred Scott and his family, I do not propose to disturb or resist the decision."⁴⁴ Lincoln, however, did not agree with Douglas' wholehearted endorsement, which Lincoln characterized as having "the citizen conform his vote to that decision; the Member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the government."⁴⁵ By resisting the decision "as a political rule," he said he would "disturb no right of property, create no disorder, excite no mobs."⁴⁶

What Lincoln challenged was the inference in *Dred Scott* that the nation should remain divided between those free and those enslaved. He opposed the spread of slavery to the new territories, rejecting the Court's decision as a basis for nationalizing Negro slavery. His philosophy of government looked not to Chief Justice Taney's opinion in *Dred Scott* but to the principles incorporated in the Declaration of Independence. He asked Douglas and his adherents if they wanted to amend the Declaration to read that "all men are created equal except negroes."⁴⁷

My declarations upon this subject of negro slavery may be misrepresented, but can not be misunderstood. I have said that I do not understand the Declaration to mean that all men were created equal in all respects. They are not our equal in color; but I suppose that it does mean to declare that all men are equal in some respects; they are equal in their right to "life, liberty, and the pursuit of happiness." Certainly the negro is not our equal in color—perhaps not in many other respects; still, in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black. In pointing out that more has been given you, you can not be justified in taking away the little which has been given him. All I ask for the

43. 60 U.S. (19 How.) 393 (1857).

44. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 516 (R. Basler ed. 1953) (speech at Springfield, Ill., July 17, 1858).

45. *Id.*

46. *Id.*

47. *Id.* at 520.

negro is that if you do not like him, let him alone. If God gave him but little, that little let him enjoy.⁴⁸

Lincoln refused to defer to *Dred Scott* and to allow it to set the moral tone and political direction of the United States. At stake was not an abstract or technical question of law but rather the future of the country. Every citizen had a duty to express opinions and help shape the contours of constitutional structures and rights. "Like politics, with which it was inextricably joined, the Constitution was everybody's business."⁴⁹ To Lincoln, the Supreme Court was a coequal, not superior, branch of government. The Court existed as one branch of a political system, subject to a combination of checks and balances, including the force of public opinion. Thus, in his inaugural address in 1861, he denied that constitutional questions could be settled solely by the Supreme Court. If government policy on "vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers . . ."⁵⁰ Congress and the President were free to reach their own constitutional judgments, even if at odds with past Court rulings, and then let the Court decide again.

E. Judicial Doctrines

Beginning with Chief Justice Marshall's declaration in *Marbury v. Madison* that "[it] is emphatically the province and duty of the judicial department to say what the law is,"⁵¹ the Supreme Court has insisted that it alone delivers the "final word" on the meaning of the Constitution. *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . ."⁵² The Court reasserted this principle in 1962:

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.⁵³

Being "ultimate interpreter," however, is not the same as being exclusive interpreter. The courts expect other branches of government to interpret the Constitution in their initial deliberations. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."⁵⁴ Congressional interpretations are given substantial

48. *Id.*

49. H. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 6 (1975).

50. 7 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 39, at 3210.

51. 5 U.S. (1 Cranch) 137, 177 (1803).

52. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

53. *Baker v. Carr*, 369 U.S. 186, 211 (1962). The notion that the Supreme Court is the "ultimate interpreter" was repeated in *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

54. *United States v. Nixon*, 418 U.S. 683, 703 (1974).

weight in some circumstances, even to the point of becoming the controlling factor.⁵⁵

Congressional and executive practices over a number of years can be instrumental in fixing the meaning of the Constitution.⁵⁶ The Supreme Court, upholding the President's removal power in a 1903 decision, based its ruling largely on the "universal practice of the government for over a century."⁵⁷ Presidential action in which Congress has acquiesced can become a justification for the exercise of power.⁵⁸ Courts also will defer to agency interpretations if they consistently are construed and made a repeated matter of public record.⁵⁹ The weight of these customs has transformed the Constitution over time.⁶⁰

Moreover, being the "ultimate interpreter" does not grant the judiciary superiority in the sense that final judgments are unreviewable. Eight years before writing *Dred Scott*, Chief Justice Taney wrote a dissenting opinion in which he noted that the Court's opinion "upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."⁶¹ Referring to Taney's dissent, Justice Frankfurter spoke about the need for "judicial exegesis" in interpreting broadly phrased charters like the Constitution. To Frankfurter, "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."⁶²

These comments by Jefferson, Jackson, Lincoln, Taney, and Frankfurter demonstrate that the Supreme Court is the "ultimate interpreter" only when its decisions have been accepted as reasonable and persuasive by the people and other governmental units. This test does not require deference to the judiciary because of its purported technical ability and political isolation. Each decision is subject to scrutiny and rejection by private citizens and public officials. If courts indeed did have the last word, we could not justify our efforts in law reviews and other forums to evaluate recent decisions and doctrines.

55. See *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (In the context of a challenge to male-only registration for military service, the Court noted: "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the Act's constitutionality.").

56. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (Dismissing a challenge that the Judiciary Act of 1789 was unconstitutional, the Court stated that "practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and had indeed fixed the construction. It is a contemporary interpretation of the most forcible nature.").

57. *Shurtleff v. United States*, 189 U.S. 311, 316 (1903).

58. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (Presidential decisions over a period of years "clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands.").

59. See *Udall v. Tallman*, 380 U.S. 1 (1965) (when an executive officer's interpretation is not unreasonable and has been made a repeated matter of public record, courts must respect it).

60. For an effective critique of court doctrines on custom and acquiescence, see Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109 (1984).

61. *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

62. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939).

What is "final" at one stage of our political development may be reopened at some later date, leading to fresh interpretation and overruling of past judicial doctrines. Courts are the ultimate interpreter of a particular case, but not of the larger issue of which that case is a part. Disagreement with a particular decision can lead to new litigation testing the same issue. Although Judge Mikva stated that the constitutional system "was designed to give the courts the final say,"⁶³ he also described the Constitution as "a living document that evolves over time; pressure on the Court from Congress to reevaluate the meaning of the Constitution is not always detrimental."⁶⁴ Courts are at liberty to review prior holdings and reverse or distinguish cases that seem wrongly decided. The Court is especially prone to abandon the doctrine of *stare decisis* when the Court discovers errors of constitutional doctrine.⁶⁵ Executives, legislators, and the general public also should be free to participate in periodic reexaminations; the process of reconsideration should not be the exclusive province of judges.

II. AUTHORITY AND COMPETENCE

Although acknowledging that "there is a role for Congress to play in making constitutional judgments," Judge Mikva noted that the "ability of Congress to do so is less certain."⁶⁶ He concluded that both institutionally and politically, Congress "is designed to pass over the constitutional questions, leaving the hard decisions to the courts."⁶⁷

[B]oth [H]ouses 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. Often a vote is determined by a thumbs up-or-down sign by the party leader, or by a political debt that needs to be repaid. While it is true . . . that a majority of the members of Congress are lawyers, they have not kept up-to-date on recent legal developments. In fact, most Supreme Court opinions never come to the attention of Congress. Unlike judges, the Representatives and Senators are almost totally dependent on the recommendations of others in making constitutional judgments.⁶⁸

Judge Mikva further noted that Congress is a "reactive body" unable to pass legislation until problems reach "crisis proportions"; under such pressure to enact a bill, Congress "is not primarily concerned with the law's details."⁶⁹

63. Mikva, *supra* note 1, at 610-11.

64. *Id.* at 608.

65. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

66. Mikva, *supra* note 1, at 609.

67. *Id.*

68. *Id.*

69. *Id.*

Moreover, constitutional interests affected by a bill "are generally abstract, unpopular, and fail to capture the imagination of either the media or the public."⁷⁰ Judge Mikva finds constitutional debate by members of Congress "superficial and, for the most part, self-serving."⁷¹ The "most likely place for constitutional dialogue is in the committees."⁷² Even with the advantages of committee size and format, however, "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."⁷³

Congress certainly suffers from these and other problems. Even when members debate a constitutional issue it may be for purely tactical reasons—such as trying to deep-six a bill—rather than for genuine and sincere concerns about protecting the Constitution. For all its structural weaknesses, however, Congress can find virtues among its vices. Constitutional law often turns on factfinding and the balancing of conflicting values. Members of Congress can make important contributions in both areas. Reforms of recent decades also have increased the capability of members to participate in constitutional debate and to honor their commitment to support the Constitution.

A. Oath of Office

Members of Congress are constitutionally required to take an oath "to support th[e] [C]onstitution."⁷⁴ As specified by statute, members

solemnly swear . . . [to] support and defend the Constitution of the United States against all enemies, foreign and domestic; . . . [to] bear true faith and allegiance to the same; . . . [to] take this obligation freely, without any mental reservation or purpose of evasion; and . . . [to] well and faithfully discharge the duties [of their office].⁷⁵

The assertion in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is"⁷⁶ does not relieve members of Congress of the duty to debate constitutional questions at the time a bill is under consideration. The duty and oath to support and defend the Constitution are not cancelled by claims of institutional incompetence or personal uncertainty. Members swear or affirm to defend the Constitution "without any mental reservation or purpose of evasion."⁷⁷ As Paul Brest has written: "Many legislators are not lawyers; the legislative process is not structured to allow constitutional questions to be examined systematically or dispassionately; and many constitutional problems arise only as legislation is implemented. Although these points may argue for judicial review, they do not argue against an initial legisla-

70. *Id.* at 609-10.

71. *Id.* 610.

72. *Id.*

73. *Id.*

74. U.S. CONST. art. VI, cl. 3.

75. 5 U.S.C. § 3331 (1982).

76. 5 U.S. (1 Cranch) 137, 177 (1803).

77. 5 U.S.C. § 3331 (1982).

tive examination.”⁷⁸

Some provisions of the Constitution are addressed explicitly to members of Congress and cannot be evaded by the anticipation of judicial review. The Constitution mandates, for example, that “No Bill of Attainder or ex post facto law *shall be passed*.”⁷⁹ Accordingly, members should make a constitutional determination on this issue prior to, not after, a bill’s passage. Similarly, the first amendment commands that “Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁸⁰ It would be unseemly for members to legislate blindly, expecting the judiciary to correct the constitutional problem at some future date.⁸¹ Furthermore, members of Congress must scrutinize a bill for constitutional defects because it is the practice of courts not to pass on the constitutionality of a statute if it can be construed solely on statutory grounds.⁸² As Justice Brandeis noted in 1936, the Court has developed a series of rules “under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”⁸³ When the validity of a congressional statute is questioned, “and even if a serious doubt of constitutionality is raised,” the Court first will determine whether the statute can be construed to avoid the constitutional question.⁸⁴ “It is well settled that if a case may be decided on either statutory or constitutional grounds, [the] Court, for sound jurisprudential reasons, will inquire first into the statutory question.”⁸⁵

Legislative precedents in the House of Representatives do not permit the Speaker or the Chair to rule on questions of constitutionality. Points of order raising the issue of unconstitutional provisions are referred to the House for resolution.⁸⁶ Under Senate practices whenever a member raises a question of constitutionality the Chair submits the question to the Senate for decision.⁸⁷ A fascinating example of this custom occurred in 1984 after Senator Mack Mattingly offered an amendment to give the President item-veto authority over appropriations bills. He proposed an override vote of a majority of each chamber

78. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 588 (1975).

79. U.S. CONST. art. I, § 9, cl. 3 (emphasis added).

80. U.S. CONST. amend. I (emphasis added).

81. Brest, *supra* note 78, at 587.

82. See *United States v. Clark*, 445 U.S. 23, 27 (1980).

83. *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

84. *Id.* at 348 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

85. *Harris v. McRae*, 448 U.S. 297, 306-07 (1980).

86. 2 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 1255, 1318-1320, 1322, 1490-1491 (1907) [hereinafter cited as A. HINDS' PRECEDENTS]; 4 A. HINDS' PRECEDENTS, *supra*, at § 3507; see 8 C. CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 2225, 3031, 3071, 3427 (1936) [hereinafter cited as C. CANNON'S PRECEDENTS]; 94 CONG. REC. 5817 (1948); 93 CONG. REC. 9522-23 (1947).

87. SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 2, 97th Cong., 1st Sess. 538-39 (1981).

rather than the two-thirds required by the Constitution.⁸⁸ After Senator Lawton Chiles expressed concern about "rewriting the Constitution" by statute,⁸⁹ Senator Alan Dixon admitted that "as a lawyer, I have some difficulty about the constitutional viability of this approach."⁹⁰ Dixon nevertheless attempted to dispose of the constitutional issue by stating that "it is for the courts, not the Senate. Nobody knows, because the courts have never ruled It comes down, then, to the question of whether this is a good idea."⁹¹

Senator Pete Domenici, however, regarded the amendment as unconstitutional; he disagreed "that something as patently unconstitutional as this ought to be passed" and then transferred to the courts for resolution.⁹² Senator John Stennis also opposed the amendment, stating that it failed to touch the "top, side, or botton [sic] of the real Constitution that we have and live under,"⁹³ Senate Majority Leader Howard Baker concluded that the amendment attempted "to deal with a constitutional issue in a statutory form."⁹⁴

Senator Chiles then raised a point of order "that the bill is legislation which changes the Constitution of the United States."⁹⁵ Following Senate precedents, the Chair submitted the question to the Senate. Before the question could be debated, however, Senator Mattingly moved to table the point of order. That tactic failed by the vote of forty-five to forty-six.⁹⁶ During debate on the point of order, Senator Baker said that just as the Supreme Court could review and pass on the enactments of Congress, "it is equally true, and the precedent is just as old, that the Senate of the United States must first exercise its own judgment as to whether a matter before it conforms with or violates the Constitution."⁹⁷ With regard to prior statements that courts had not yet ruled on the statutory grant of item-veto power to the President, Chiles remarked that the question "is so clear that no court, from a justice of the peace on, has ever had to rule on it."⁹⁸ Dixon responded that the law "is unsettled" and that the "only question is whether we have the courage to let the Supreme Court of the United States decide. This Senate is not the place where 100 separate Senators make that kind of judicial decision" ⁹⁹ He admitted that as a lawyer he had "doubts and reservations about whether [the Congress could] do it. But I want to do something to reduce our budget deficits."¹⁰⁰

Senator Slade Gorton found the arguments in favor of the amendment

88. 130 CONG. REC. S5297 (daily ed. May 3, 1984).

89. *Id.* at S5304.

90. *Id.* at S5305.

91. *Id.* Senator Mattingly also noted that he was "willing to let the constitutional questions be decided in their proper judicial forums." *Id.* at S5307.

92. *Id.* at S5310.

93. *Id.* at S5311.

94. *Id.* at S5312.

95. *Id.*

96. *Id.*

97. *Id.* at S5313.

98. *Id.*

99. *Id.*

100. *Id.* at S5314.

"profoundly disturbing" because none of the proponents seemed to believe that the proposal was constitutional. He chided Senators Dixon and Mattingly, stating:

[Y]ou swore an oath, as I did, when you became Members of this body to uphold the Constitution of the United States. You cannot hide behind the fact that the Supreme Court of the United States has final authority on constitutional questions. You cannot hide behind that proposition to ignore your own duty properly to interpret the Constitution, which you have inherited after 200 years of history. It is your duty to make a judgment as to whether or not this amendment is constitutional.

If you can in good faith say you believe that it is, you can vote in the way which the Senator from Illinois has made a claim. But to duck your responsibility on the ground that sometime, at some future date, the Supreme Court will have final authority over the question is to ignore the oath which you swore when you became a Member of this body.¹⁰¹

Senator Paul Sarbanes, siding with Gorton and Chiles, agreed that there had been no prior litigation on the proposal because it was "patently unconstitutional."¹⁰² He offered this analogy:

Suppose someone submitted a legislative proposal to change the term of the President to [two] years, or the Senate to four, or the House to three. Suppose I put in that legislative proposal; then say, well, the Supreme Court has never ruled on this question. . . . What happens to our own responsibility to make a judgment to uphold the Constitution, and make a judgment with respect to whether a proposition before us has any slim claim to constitutional validity?¹⁰³

The Senate rejected the Mattingly Amendment, voting fifty-six to thirty-four in favor of Chiles' point of order.¹⁰⁴ It is impossible to determine which Senators debated the constitutional issue because it was the simplest way to defeat an amendment they opposed on policy grounds. Clearly a constitutional issue was present, particularly the balance of power between the executive and legislative branches, and it is important to note that Senate rules allow a member to make a point of order solely on constitutional grounds. It also is significant that some of the Senators viewed their oath of office as a requirement that they

101. *Id.*

102. *Id.*

103. *Id.* at S5314-15. Senator Dale Bumpers supported Sarbanes' thesis with the following comments:

Each one of us held up our hand, took the oath of office, and said we will uphold the Constitution of the United States.

There was no caveat. You did not say, "I will uphold the Constitution of the United States only on those cases where precedent is well established." You did not say, "I will uphold the Constitution unless something is presented to the Senate that the Court has never ruled on, in which case I will vote for it so the Supreme Court can rule."

Id. at S5315.

104. *Id.* at S5323.

determine the constitutionality of pending bills and amendments instead of deferring those questions to the courts for disposition.

B. *Legislative Facts in Constitutional Law*

The Supreme Court recognizes that much of constitutional law depends on factfinding, which is a particular strength of Congress. After decades of applying substantive due process to economic regulation, which allowed the courts to strike down efforts by Congress and state legislatures to regulate such economic areas as minimum wages, maximum hours, prices, and working conditions, the Supreme Court decided that it no longer would sit as a superlegislature.¹⁰⁵ Since 1937 the Court has been content to leave the broad area of economic rights and government regulation to congressional judgment. Unless the actions of Congress and its delegated agents can be shown clearly to be arbitrary or beyond the limits of due process, judicial inquiry "is at an end."¹⁰⁶ When the judiciary determines that legislators have chosen a "rational basis" for carrying out the commerce power, for example, the Court's investigation ceases.¹⁰⁷

In 1966 the Court adopted a broad interpretation of the power of Congress "to enforce, by appropriate legislation," the provisions of the fourteenth amendment. At issue in *Katzenbach v. Morgan*¹⁰⁸ was the power of Congress to prohibit New York's literacy requirement as a precondition for voting. Section 4(e) of the Voting Rights Act of 1965¹⁰⁹ provided that no person who had completed the sixth grade in Puerto Rico could be denied the right to vote in any election because of an inability to read or write in English. Although important constitutional issues of federalism were at stake, the Court concluded that section 4(e) was "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment"¹¹⁰ Factfinding was a legislative, not a judicial, responsibility.

It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional

105. *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941) ("We are not concerned, however, with the wisdom, need, or appropriateness of the legislation."); see also *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (same; quoting *Olsen*, 313 U.S. at 246).

106. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

107. See *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964). For a discussion of the capacity of courts to engage in factfinding, see Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

108. 384 U.S. 641 (1966).

109. Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b(e) (1982)).

110. *Morgan*, 384 U.S. at 646.

resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.¹¹¹

Even Justice Harlan acknowledged in his dissent that section five of the fourteenth amendment "does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action" ¹¹² Decisions on equal protection and due process, he said, "are based not on abstract logic, but on empirical foundations. To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect."¹¹³ Harlan nevertheless dissented because he believed that the question was whether the New York law was "so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine."¹¹⁴ The majority opinion, however, held that a construction of section five that "would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."¹¹⁵ The issue was not simply a factual determination by Congress that was better resolved by the legislature than the judiciary. It also was a factual dispute between the national legislature and a state legislature. To Harlan, the majority read section five "as giving Congress the power to define the *substantive* scope of the Amendment."¹¹⁶

Katzenbach v. Morgan spawned a burgeoning literature on the power of Congress to invoke section five of the fourteenth amendment. One commentator claimed that the *Morgan* Court suggested that "to some extent at least, § 5 exempts the Fourteenth Amendment from the principle of Court-Congress relationships expressed by *Marbury v. Madison*, that the judiciary is the final arbiter of the meaning of the Constitution."¹¹⁷ This assertion goes too far. Although the Court treats congressional determinations under section five with respect and a substantial degree of deference, it still must "perceive a basis upon which the Congress might resolve the conflict as it did."¹¹⁸ The *Morgan* Court also noted that congressional power under section five

is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing

111. *Id.* at 653.

112. *Id.* at 666 (Harlan, J., dissenting).

113. *Id.* at 668 (Harlan, J., dissenting).

114. *Id.* at 667 (Harlan, J., dissenting).

115. *Id.* at 648.

116. *Id.* at 668 (Harlan, J., dissenting); see Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656 (1977); Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265 (1980).

117. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 84.

118. *Morgan*, 384 U.S. at 653.

the States to establish racially segregated systems of education would not be—as required by § 5—a measure ‘to enforce’ the Equal Protection Clause since that clause of its own force prohibits such state laws.¹¹⁹

As an example of judicial line-drawing, in 1970 the Court ruled that section five did not empower Congress to lower the voting age to eighteen in state elections.¹²⁰ Congress responded by passing the twenty-sixth amendment.

A contemporary dispute concerns the effort of some members of Congress to use section five to alter the jurisdiction of federal courts to deal with abortion. Hearings in 1981 explored the use of section five as a vehicle for overturning the Supreme Court’s 1973 *Roe v. Wade* abortion decision.¹²¹ Advocates of the “Human Life Bill” proposed that the word “person” in the fourteenth amendment be defined to include life beginning at conception. They argued that Congress would be exercising a judgment over “facts,” not “law.”¹²² The *Roe* Court, however, based its decision not on a factual or philosophical determination of when life begins, but rather on a legal interpretation of the meaning of “person” under the fourteenth amendment. The Court decided that a fetus was not a person in a constitutional sense.¹²³ It therefore announced a constitutional, not a legislative, finding.

Although congressional use of section five is subject to limitations and remains a topic of controversy, the application of the equal protection clause or the due process clause in the fourteenth amendment depends heavily on congressional factfinding and judgments. The problems of application “quite genuinely involve investigation and evaluation of facts. These are areas in which Congress has at least some claims to superior competence while the Court has none.”¹²⁴

Similarly, the fifteenth amendment, which prohibits states from restricting voting on account of race, color, or previous condition of servitude, grants Congress the power to enforce its provisions by appropriate legislation.¹²⁵ The Supreme Court has deferred to congressional interpretations so long as Congress uses “any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”¹²⁶ Congress is “chiefly responsible” for implementing the rights created in the fifteenth amendment.¹²⁷

Just as Judge Mikva can raise questions about the capacity of Congress to

119. *Id.* at 651-52 n.10; see also *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (judicial deference to congressional interpretations of § 5 of fourteenth amendment).

120. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

121. 410 U.S. 113 (1973).

122. 1 *The Human Life Bill: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 197-233 (1981) (testimony and article by Stephen H. Galebach).

123. *Roe*, 410 U.S. at 157-58.

124. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 255 (1971).

125. U.S. CONST. amend. XV, § 2.

126. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

127. *Id.* at 326; see also *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (“It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are ‘appropriate’ . . .”).

engage in effective constitutional interpretation, in part because of institutional deficiencies, judicial activism has been challenged on the ground that federal judges lack both the authority and the capacity to decide questions of broad social policy. Donald Horowitz has identified some of the characteristics of adjudication that limit the reliability of judicial decisions. Among those limitations is the difficulty of determining social facts through the judicial factfinding process.¹²⁸ The issue, therefore, is not simply one of measuring the competence of Congress against an ideal standard, but of comparing legislative to judicial competence. Because both branches have their strengths and their weaknesses, an open dialogue between Congress and the courts is a more fruitful avenue for constitutional interpretation than simply believing that the judiciary possesses certain superior skills. If we count the times that Congress has been "wrong" about the Constitution and compare those lapses with the occasions on which the Supreme Court has been "wrong" by its own later admissions, the results make a compelling case for legislative confidence and judicial modesty.

C. *Political Questions*

Members of Congress must deal with a number of constitutional issues that are never decided by the courts because of such threshold issues as standing, jurisdiction, and "political questions." Courts have stated their reluctance to decide an issue when there has been "a textually demonstrable constitutional commitment . . . to a coordinate political department."¹²⁹ Although this "territory" of political questions varies over time and gives ground on occasion to permit greater judicial involvement,¹³⁰ the scope of congressional and presidential responsibility for constitutional interpretation remains substantial.

The Constitution empowers Congress

[t]o provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.¹³¹

When this clause was interpreted in the Kent State University decision, the Supreme Court regarded the supervision of the National Guard as a matter vested solely in Congress. The Court noted that "it is difficult to conceive of an area of governmental activity in which the courts have less competence."¹³²

Courts also defer to Congress in cases that lack "judicially discoverable and manageable standards for resolving" a dispute.¹³³ Is thirteen years too long a

128. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 45-51 (1977); see also Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing nature of adjudicatory processes).

129. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

130. See, e.g., *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962).

131. U.S. CONST. art. I, § 8, cl. 16.

132. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

133. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

time to allow states to ratify a constitutional amendment? The Supreme Court decided that it lacked statutory and constitutional criteria for a judicial determination of this issue. The question of a reasonable time involved "an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice" ¹³⁴

Courts are loath to adjudicate when it is impossible to decide a controversy "without an initial policy determination of a kind clearly for nonjudicial discretion." ¹³⁵ Did President Reagan violate the War Powers Resolution by sending military advisers to El Salvador? The factfinding necessary to resolve this dispute rendered the case nonjusticiable because that question was "appropriate for congressional, not judicial, investigation and determination." ¹³⁶

Other constitutional questions are denied judicial resolution because the plaintiffs are unable to establish standing. The Constitution provides an explicit safeguard for financial accountability: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." ¹³⁷ The failure of Congress to publish the expenditures of the Central Intelligence Agency prompted a lawsuit by William Richardson, but a series of rulings from 1969 to 1974 ended with the Supreme Court's decision that Richardson lacked standing to maintain his suit. ¹³⁸ The interpretation of the statement and account clause therefore is left to Congress. Thus far, Congress has concluded that publication of the expenditures of the intelligence community, even in aggregate, poses too much risk to national security. ¹³⁹

Standing also has barred adjudication of the incompatibility clause, which states that no officer of the United States "shall be a Member of either House during his Continuance in Office." ¹⁴⁰ Efforts to litigate this clause have been turned back by the courts on the ground of standing. ¹⁴¹ Instead, the boundaries of this clause of the Constitution have been defined by various House and Senate precedents. ¹⁴²

Moreover, the courts have done little to clarify the meaning of the ineligibility clause, which prohibits Senators and Representatives from being appointed "to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such

134. *Coleman v. Miller*, 307 U.S. 433, 453 (1939) (Congress had final determination on number of years needed to ratify the Child Labor Amendment).

135. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

136. *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

137. U.S. CONST. art. I, § 9, cl. 17.

138. *United States v. Richardson*, 418 U.S. 166 (1974).

139. L. FISHER, *supra* note 10, at 249-51.

140. U.S. CONST. art. I, § 6, cl. 2.

141. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (class action challenging the Reserve membership of members of Congress as violating the incompatibility clause dismissed for lack of standing).

142. 6 C. CANNON'S PRECEDENTS, *supra* note 86, §§ 60-65; 2 L. DESCHLER'S PRECEDENTS 124-39 (1977); 1 A. HINDS' PRECEDENTS, *supra* note 86, §§ 485-506.

time.”¹⁴³ As Judge Mikva knows from his own experience, the courts punt this constitutional issue back to Congress. Because of Mikva’s longtime advocacy of gun control, the National Rifle Association (NRA) spent an estimated \$700,000 to block his nomination to the United States Court of Appeals for the District of Columbia Circuit. When that effort was unsuccessful, the NRA went to court and raised the issue of ineligibility. With Senator McClure serving as plaintiff, the NRA argued that the salaries of federal judges had been increased during Mikva’s term in Congress.¹⁴⁴ A three-judge court ruled that McClure lacked standing to challenge the validity of an appointment of a federal judge. The court stated that McClure and his colleagues had had their opportunity to vote against Mikva’s confirmation in the Senate. Senators on the losing side could not then ask the judiciary to reverse the Senate’s action.¹⁴⁵

A member’s ability to gain standing does not mean that courts will decide a constitutional question. After passage of the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, twenty members of the House of Representatives filed suit to contest what they regarded to be the Senate’s violation of the origination clause.¹⁴⁶ The House had passed a bill reducing tax revenues and the Senate had added amendments to increase revenues by more than \$98 billion over three years.¹⁴⁷ A motion by Congressman Rousselot to return the bill to the Senate to correct what he considered a contravention of the origination clause was tabled by the House.¹⁴⁸ Although the United States Court of Appeals for the District of Columbia Circuit concluded that the congressional appellants had standing to challenge the constitutionality of the tax bill under the origination clause, it dismissed the case as an exercise of its discretion to withhold declaratory relief for prudential reasons.¹⁴⁹ The court stated that it was “reluctant to meddle in the internal affairs of the legislative branch, and the doctrine of remedial discretion properly permits us to consider the prudential, separation-of-powers concerns posed by a suit for declaratory relief against the complainant’s colleagues in Congress.”¹⁵⁰

D. Institutional Capability

Judge Mikva claims that “most Supreme Court opinions never come to the attention of Congress. Unlike judges, the Representatives and Senators are almost totally dependent on the recommendations of others in making constitu-

143. U.S. CONST. art. I, § 6, cl. 2; see *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam); 42 Op. Att’y Gen. 381 (1969); 33 Op. Att’y Gen. 88 (1922).

144. Benenson, *A Well-Armed NRA Draws a Bead on High-Calibre Judge*, NAT’L L.J., October 13, 1980, at 15, 40.

145. *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), *aff’d sub nom. McClure v. Reagan*, 454 U.S. 1025 (1981).

146. “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.” U.S. CONST. art. I, § 7, cl. 1.

147. *Moore v. United States House of Representatives*, 733 F.2d 946, 948-49 (D.C. Cir. 1984).

148. *Id.* at 949.

149. *Id.* at 956.

150. *Id.*

tional judgments.”¹⁵¹ His first sentence is footnoted to a study published in 1965.¹⁵² The author of that study, Samuel Krislov, did not offer documentation or support for his claim, and there is reason to doubt the sweeping nature of the statement. More significantly, the institutional capability of Congress has improved markedly since 1965.

The Legislative Reorganization Act of 1970¹⁵³ explicitly recognized the need within Congress for a more systematic and continuing review of court decisions that affect legislative prerogatives. Congress had been represented in court by the Department of Justice and the occasional appearances of Senators, Representatives, and attorneys acting as *amici curiae*, but this sporadic effort was unsatisfactory. A Senate committee in 1966 concluded that the effect of court decisions on Congress “should be a matter of continuous concern for which some agency of the Congress should take responsibility.”¹⁵⁴

The 1970 statute created a Joint Committee on Congressional Operations and made it responsible for identifying “any court proceeding or action which, in the opinion of the Joint Committee, is of vital interest to the Congress, or to either House of the Congress, as a constitutionally established institution of the Federal Government”¹⁵⁵ Congress directed the Joint Committee to make periodic reports and recommendations to the Senate and House.¹⁵⁶

Starting in 1971, the Joint Committee began publishing a series of reports on legal proceedings of interest to Congress. After the Joint Committee’s tenure expired in 1977, the task of publishing the report fell to a newly created House Select Committee on Congressional Operations, working in conjunction with the Senate Committee on Rules and Administration. Senate Rule XXV charges the Senate committee with the duty of identifying “any court proceeding or action which, in the opinion of the Committee, is of vital interest to the Congress as a constitutionally established institution of the Federal Government and [of] call[ing] such proceeding or action to the attention of the Senate.”¹⁵⁷

When the House decided to discontinue the Select Committee, the House Judiciary Committee inherited the responsibility for producing *Court Proceedings and Actions of Vital Interest to the Congress*. These reports are extraordinarily helpful in following litigation on such issues as the speech or debate clause, the congressional investigative power, disputed elections, constitutional qualifications of members of Congress, and congressional access to executive branch information, as well as the litigation efforts of individual members of Congress. In addition to providing a history of legal disputes that reach the courts, *Court Proceedings and Actions of Vital Interest to the Congress* reprints the full decisions, many of which are not reported elsewhere.

151. Mikva, *supra* note 1, at 609.

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

153. Pub. L. No. 91-510, 84 Stat. 1140 (1970).

154. S. REP. NO. 1414, 89th Cong., 2d Sess. 47 (1966).

155. Pub. L. No. 91-510, § 402(a)(2), 84 Stat. 1140, 1187 (1970).

156. *Id.* § 402(c).

157. S. DOC. NO. 1, 98th Cong., 2d Sess. 35 (1984).

In recent years members of Congress have become concerned about the refusal of the Justice Department to defend the constitutionality of certain statutory provisions. The Department has taken this position in cases in which it believed that a statute infringed on presidential power¹⁵⁸ or was so patently unconstitutional that it could not be defended.¹⁵⁹ As a result of language placed in authorization acts for the Justice Department, the Attorney General now must report to Congress whenever the Department does not intend to defend the constitutionality of a law passed by Congress.¹⁶⁰ These reports must specify the statutory provision and explain why the Department regards it as unconstitutional.

Congress always has been able to hire private counsel to defend itself, as it did in the civil action brought against it by Congressman Adam Clayton Powell in the 1960s.¹⁶¹ There was no established procedure for Congress to defend its statutes, however, when the Justice Department chose not to. The institutional interests of Congress, as noted by the Senate Committee on Governmental Affairs in 1977, made it "inappropriate as a matter of principle and of the constitutional separation of powers for the legislative branch to rely upon and entrust the defense of its vital constitutional powers to the advocate for the executive branch, the Attorney General."¹⁶² The committee recalled that in both *Doe v. McMillan*¹⁶³ and *Eastland v. United States Servicemen's Fund*,¹⁶⁴ which involved investigative powers of Congress, the Justice Department withdrew its representation of Congress just as the litigation reached the Supreme Court.¹⁶⁵

As part of the Ethics in Government Act of 1978,¹⁶⁶ the Senate established the Office of Senate Legal Counsel.¹⁶⁷ The Senate Legal Counsel and the Deputy Legal Counsel are appointed by the President pro tempore of the Senate from recommendations submitted by the Senate Majority and Minority Leaders. Appointments become effective upon approval by resolution of the Senate.¹⁶⁸ The principal duty of the Counsel is to defend the Senate or a committee, subcommittee, member, officer, or employee of the Senate when so directed by either a two-thirds vote of the members of the Joint Leadership Group or by the adoption of a Senate resolution. The Joint Leadership Group consists of the Majority and Minority Leaders of the Senate, the President pro tempore, and the chairman and ranking minority member from the Judiciary and the Rules

158. See, e.g., *Myers v. United States*, 272 U.S. 52 (1926). The Supreme Court invited Senator George Wharton Pepper to represent Congress as amicus curiae. *Id.* at 56-57.

159. See, e.g., *United States v. Lovett*, 328 U.S. 303 (1946); *Representation of Congress and Congressional Interests in Court, Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 6 (1976).

160. Pub. L. No. 96-132, §21, 93 Stat. 1040, 1049-50 (1979) (codified at 18 U.S.C. § 519 note (1982)).

161. *Powell v. McCormack*, 395 U.S. 486 (1969).

162. S. REP. NO. 170, 95th Cong., 1st Sess. 11 (1977).

163. 412 U.S. 306 (1973).

164. 421 U.S. 491 (1975).

165. S. REP. NO. 170, 95th Cong., 1st Sess. 12 (1977).

166. Pub. L. No. 95-521, 92 Stat. 1824, 1875 (1978) (codified at 2 U.S.C. § 288 (1982)).

167. The Office of Senate Legal Counsel consists of four attorneys and a small support staff.

168. 2 U.S.C. § 288(a)(3)(A) (1982).

and Administration Committees of the Senate.¹⁶⁹ When directed by Senate resolution, the Counsel may bring a civil action to enforce a subpoena issued by the Senate, or by a Senate committee or subcommittee, or intervene or appear as amicus curiae in cases involving the powers and responsibilities of Congress.¹⁷⁰ In the House of Representatives, the office of the Clerk of the House handles litigation that involves House members, officers, and staff. Decisions to litigate are made by a bipartisan leadership committee.¹⁷¹ Legal work is done by three attorneys in the office of the Clerk of the House, and is supported by outside consultants.

Members of Congress also have access to other sources of legal assistance. Congressional hearings attract testimony from administration witnesses, constitutional scholars, and representatives of various private organizations. Committee staff can analyze constitutional questions and call on the American Law Division of the Library of Congress, which is staffed with approximately fifty attorneys specializing in different subject areas. The Office of the Legislative Counsel of the House and the Office of the Legislative Counsel of the Senate, established to assist members in drafting bills and resolutions, also provide constitutional advice.¹⁷² The General Accounting Office (GAO) has approximately 140 attorneys in its Office of General Counsel, but the GAO generally regards it as inappropriate to question the constitutionality of a statute unless the Supreme Court already has ruled on the constitutionality of a similar piece of legislation.¹⁷³

Another striking development over the past decade is the frequency with which members of Congress have turned to the courts for assistance. During the impoundment disputes of the Nixon Administration, members submitted an amicus curiae brief on behalf of plaintiffs suing the Administration.¹⁷⁴ In the abortion funding case eventually decided by the Supreme Court in 1980, the district court permitted Senators James Buckley and Jesse Helms and Congressman Henry Hyde to intervene as defendants.¹⁷⁵ The United States Court of Appeals for the Ninth Circuit invited both the House and the Senate to submit briefs concerning a legislative veto used by Congress in deportation matters.¹⁷⁶ When the case reached the Supreme Court, both Houses of Congress had intervened to protect their institutional interests and fully participated before the Court. The attorneys for Congress defended the legislative veto, but in a separate brief nine members of the House urged the Supreme Court to declare the

169. *Id.* § 288a.

170. *Id.* §§ 288b-288e.

171. See 2 *Legislative Branch Appropriations for 1985: Hearings Before the House Comm. on Appropriations*, 98th Cong., 2d Sess. 225 (1984).

172. 2 U.S.C. §§ 271-282e (1982). There are approximately 17 attorneys in the Senate office and approximately 35 in the House office.

173. UNITED STATES GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-7 (June 1982); Letter from Charles A. Bowsher, Comptroller General, to Congressman Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, July 26, 1984.

174. *State Highway Comm'n of Mo. v. Volpe*, 479 F.2d 1099 n.1 (8th Cir. 1973).

175. *Harris v. McRae*, 448 U.S. 297, 303 (1980).

176. *Chadha v. INS*, 634 F.2d 408, 411 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983).

legislative veto unconstitutional.¹⁷⁷

Senator Edward Kennedy was successful at both the district court and the appellate court level in challenging President Nixon's attempt to use the "pocket veto" during brief recesses of the House and Senate.¹⁷⁸ Kennedy succeeded because his prerogative to vote to override a presidential veto had been denied by the pocket veto. Other members of Congress, however, have been unsuccessful when they have tried to achieve political goals in the courts rather than through the regular legislative process. In such cases the members have been told by the courts that they lack standing to sue, the issue is not ripe for adjudication, or the matter is a "political question" to be decided by Congress and the President.¹⁷⁹ A legislator must overcome those standing hurdles—faced by any litigant—by showing that (1) he has suffered injury, (2) the interests are within the zone protected by the statute or constitutional provision, (3) the injury is caused by the challenged action, and (4) the injury can be redressed by a favorable court action.¹⁸⁰ Legislators, however, face an additional obstacle: if they suffer from an injury that can be redressed by their colleagues acting through the regular legislative process, a court may exercise "equitable discretion" and dismiss the action.¹⁸¹

These cases reflect a general wariness on the part of judges that the controversy actually is not between Congress and the President, but instead is a dispute between opposing groups of legislators. Federal judges may suspect that members of Congress turn to the courts because they have been unable to attract enough votes to pass a bill. Thus, when legislators fail to make use of the remedies available within Congress, they have been denied standing to resolve the issue in court.¹⁸²

III. THREE CASE STUDIES

Judge Mikva examined three recent efforts by Congress to engage in constitutional deliberation: the 1974 extension of minimum wages to employees of state and local governments, the Senate's adoption in 1982 of a legislative veto for agency rulemaking, and the provision in the 1970 Organized Crime Control Act allowing increased sentences for dangerous special offenders on appellate

177. *Motion for Leave to File and Brief of Certain Members of the United States House of Representatives, amicus curiae*, INS v. Chadha, 103 S. Ct. 2764 (1983) (Nos. 80-1832, 80-2170, 80-2171, filed January 8, 1982).

178. Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), *aff'g* 364 F. Supp. 1075 (D.D.C. 1973).

179. Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977).

180. See C. WRIGHT, THE LAW OF FEDERAL COURTS § 13 (4th ed. 1983).

181. See, e.g., Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); Harrington v. Bush, 553 F.2d 190, 204-05 (D.C. Cir. 1977); Goldwater v. Carter, 481 F. Supp. 949, 951 (D.D.C. 1979).

182. See, e.g., Reuss v. Balles, 584 F.2d 461, 468 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1978); Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Public Citizen v. Sampson, 379 F. Supp. 662 (D.D.C. 1974); see also McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981) (Supreme Court also relies on ripeness and political question doctrines; author suggests expansion of use of discretion as alternative).

review. According to Judge Mikva, the three examples "raise questions concerning Congress' ability to make constitutional judgments and its role as guardian of the Constitution."¹⁸³ While admitting that the three examples are not "exhaustive," Judge Mikva views them as "good illustrations of Congress' relationship with the Constitution."¹⁸⁴ A review of the three case studies reveals that they do not call into question Congress' ability to make constitutional judgments. Rather, the record suggests that Congress was reasonably informed and careful in its deliberations. Its judgments compare favorably to those announced by the courts.

A. *The Fair Labor Standards Amendments of 1974*

The Fair Labor Standards Amendments of 1974¹⁸⁵ extended the minimum wage level set by the Fair Labor Standards Act,¹⁸⁶ bringing employees of state and local governments within the reach of the Act. Before 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"¹⁸⁷ The 1974 Amendments deleted the language beginning with "but shall."¹⁸⁸ Two years later the Supreme Court in *National League of Cities v. Usery*,¹⁸⁹ a case it has since overruled,¹⁹⁰ invalidated the extension as unconstitutional because it "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions"¹⁹¹

The Court's decision, Judge Mikva noted, "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."¹⁹² The Senate Labor and Public Welfare Committee concluded that the activities of public sector employees affected interstate commerce and therefore justified the extension of minimum wages to state and local employees.¹⁹³ Congress also assumed that the Supreme Court had settled the issue in *Maryland v. Wirtz*,¹⁹⁴ a case which had upheld by an eight-to-one vote an extension of the Fair Labor Standards Act to employees of hospitals and schools operated by state and local governments.

Judge Mikva is correct that *National League of Cities* came as a "complete

183. Mikva, *supra* note 1, at 590.

184. *Id.* at 591.

185. Pub. L. No. 93-259, 88 Stat. 55 (1974) (codified at 29 U.S.C. §§ 202-208, 210, 212-214, 216, 255, 260 (1982)).

186. 29 U.S.C. §§ 201-219, 255, 260 (1982).

187. Pub. L. No. 75-718, § 3(d), 52 Stat. 1060, 1060 (1938).

188. Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55, 58 (1974).

189. 426 U.S. 833, 852 (1976).

190. *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985).

191. *National League of Cities*, 426 U.S. at 852.

192. Mikva, *supra* note 1, at 591.

193. S. REP. No. 690, 93d Cong., 2d Sess. 24 (1974).

194. 392 U.S. 183 (1968).

surprise" to members of Congress. It also came as a surprise to constitutional scholars and to the four dissenting Justices. Justice Brennan, joined by Justices White and Marshall, stated that "[i]t must . . . be surprising that my Brethren should choose this bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall" ¹⁹⁵ Justice Brennan could not recall

another instance in the Court's history when the reasoning of so many decisions covering so long a span of time has been discarded in such a roughshod manner. That this is done without any justification not already often advanced and consistently rejected, clearly renders today's decision an *ipse dixit* reflecting nothing but displeasure with a congressional judgment. ¹⁹⁶

Justice Stevens' separate dissent remarked that the "principle on which the [majority's] holding rests is difficult to perceive." ¹⁹⁷

In reviewing the legislative history of the Fair Labor Standards Amendments of 1974, Judge Mikva stated that it is clear that the line of reasoning in *National League of Cities* "was not anticipated" by Congress. ¹⁹⁸ It also may not have been anticipated by anyone else. *National League of Cities* has not strengthened the cause of federalism when Congress acts under its enforcement powers pursuant to the fourteenth and fifteenth amendments, ¹⁹⁹ and it appears that the decision was little more than an aberrant holding that since has been reversed.

The important issue is not the failure of Congress to anticipate *National League of Cities*, but rather the subsequent decisions that foretold that the rule in *National League of Cities* would be overturned and Congress' initial constitutional interpretation would prevail. In *EEOC v. Wyoming*, ²⁰⁰ a federal district court held that the Age Discrimination in Employment Act violated the tenth amendment theory articulated in *National League of Cities*. ²⁰¹ Justice Brennan, writing for a majority of the Supreme Court, reversed the judgment of the district court. In a concurring opinion, Justice Stevens stated that the only basis for questioning the age discrimination statute

is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*. Neither the Tenth Amendment, nor any other provision of the Constitution, affords any support for that judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause. ²⁰²

Justice Stevens' opinion implied that *National League of Cities* deserved to be

195. *National League of Cities*, 426 U.S. at 857 (Brennan, J., dissenting).

196. *Id.* at 871-72 (Brennan, J., dissenting).

197. *Id.* at 880 (Stevens, J., dissenting).

198. Mikva, *supra* note 1, at 593.

199. See *City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

200. 460 U.S. 226 (1983).

201. *EEOC v. Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981), *rev'd*, 460 U.S. 226 (1983).

202. *EEOC v. Wyoming*, 460 U.S. at 248 (Stevens, J., concurring).

placed in the same category as other decisions repudiated by the Court. Notwithstanding his respect for the doctrine of stare decisis, he advised that "the law would be well served by a prompt rejection of *National League of Cities*' modern embodiment of the spirit of the Articles of Confederation."²⁰³

Shortly thereafter, the Supreme Court accepted a case that eventually reversed *National League of Cities*.²⁰⁴ In *Garcia v. San Antonio Metropolitan Transit Authority*,²⁰⁵ the Court asked the parties to brief and argue the following question: "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery* . . . should be reconsidered?"²⁰⁶ On February 19, 1985, a five-to-four decision by the Supreme Court overturned the ruling in *National League of Cities*.²⁰⁷ Justice Blackmun authored the Opinion of the Court in *Garcia* that negated the *National League of Cities* majority opinion, with which he had concurred less than ten years before.

B. The Legislative Veto

Judge Mikva cited four constitutional challenges to the reliance by Congress on legislative vetoes: the doctrine of separation of powers, the requirement of bicameral action by Congress, the presentment clause of the Constitution, and excessive delegation of legislative power.²⁰⁸ With regard to the first point, he argued that through the use of the legislative veto to control delegated 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."²⁰⁹ This latter statement does not take into account several features of the legislative veto that make Congress, in effect, subordinate to the President. A review of the origin of the legislative veto reveals its many-sided character.

The legislative veto emerged in the 1930s as a technique for reconciling two conflicting needs. Executive officials wanted to broaden their discretionary authority and avoid the limitations of the full statutory process. Members of Congress consented only on the condition that they could retain a control mechanism that would not require passage of a public law. Both branches wanted shortcuts. The resulting accommodation permitted Presidents and administrators to make proposals that would become law within a stated period unless Congress disapproved by a one-house or two-house veto. Because Congress would be acting by a simple resolution or a concurrent resolution, the

203. *Id.* at 250 (Stevens, J., concurring).

204. The Supreme Court noted probable jurisdiction on October 3, 1983. 52 U.S.L.W. 3261 (1983), the same year in which the EEOC v. Wyoming decision was rendered. The Court accepted the case directly from the district court. *San Antonio Metropolitan Transit Auth. v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983), *rev'd sub nom. Garcia v. San Antonio Metropolitan Auth.*, 105 S. Ct. 1005 (1985).

205. 105 S. Ct. 1005 (1985).

206. 52 U.S.L.W. 3937 (1984). For oral argument on reconsideration of *National League of Cities*, see 53 U.S.L.W. 3255 (1984).

207. *Garcia*, 105 S. Ct. at 1007.

208. Mikva, *supra* note 1, at 593-94.

209. *Id.* at 593.

resolution would not go back to the President for his signature or veto. As it evolved, the legislative veto included requirements for congressional approval as well as disapproval and vested some of the controls in congressional committees.²¹⁰

This procedure obviously departed from the customary procedure of having Congress pass a bill and present it to the President.²¹¹ It is not true, however, that Congress arbitrarily imposed an unconstitutional process on a reluctant President in an effort to make him a subordinate. Congress never claimed that it could exercise control over the President simply by passing one-house and two-house vetoes. Such a procedure clearly violates the presentment clause. A different issue arises, however, when the use of legislative vetoes is sanctioned by a prior public law. As far back as 1854, the Attorney General had recognized that the legislative effect of simple or concurrent resolutions would be changed fundamentally if authorized by law. Attorney General Cushing stated that a simple resolution could not coerce a department head

unless in some particular in which a law, duly enacted, has subjected him to the direct action of each [House]; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House.²¹²

In the view of the Attorney General, there was nothing unconstitutional about departing from a strict reading of the legislative procedure if both branches agreed. The departure had to be mutually satisfactory, and for much of our history it was.

The record of the legislative veto is replete with such accommodations. The early forms of the legislative veto clearly favored the President. Congress gave President Hoover authority to reorganize executive agencies; his proposals would take effect as law within sixty days unless either house disapproved.²¹³ Although the House of Representatives subsequently rejected all of Hoover's reorganization proposals,²¹⁴ the procedure was highly beneficial to the President. Hoover did not have to secure the support of both Houses as required by the regular legislative process. Instead, the burden was placed on Congress to prevent his plans from taking effect. Although the constitutional process was turned on its head, the advantage fell essentially to the President, not to Congress. Moreover, other expedited features served the interests of the President. Hoover's proposals could not be buried in committee, filibustered, or amended by Congress, either in committee or on the floor. Members of Congress were limited to a yes-or-no vote.²¹⁵

210. See L. FISHER, *supra* note 10, at 162-64.

211. U.S. CONST. art. I, § 7.

212. 6 Op. Att'y Gen. 680, 683 (1854).

213. Pub. L. No. 72-212, 47 Stat. 382, 413-15 (1932).

214. See 76 CONG. REC. 2125-26 (1933). For details on the history of reorganization authority, see Fisher & Moe, *Delegating With Ambivalence: The Legislative Veto and Reorganization Authority*, in STAFF OF HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO 164-247 (Comm. Print 1980).

215. See Pub. L. No. 72-212, § 407, 47 Stat. 382, 413 (1932).

The prohibition on congressional amendments demonstrates that Congress was sensitive to constitutional requirements. If Congress had been able to amend Hoover's proposals without returning the amended versions to the President for his signature or veto, the legislative process would have been subverted. Congress could have made "new law" without presidential participation. Under the reorganization statutes, however, Presidents retained exclusive control over the content of reorganization plans.²¹⁶

Constitutional issues also were debated carefully in the late 1930s after President Roosevelt asked Congress to renew the authority to reorganize executive agencies. He insisted that the only constitutional form of congressional disapproval would be by bill or joint resolution. Action by simple or concurrent resolution, he believed, would not be legally binding.²¹⁷ Members of the House of Representatives refused to delegate reorganization authority if they could maintain control only by passing a bill or joint resolution, either of which the President could veto. They did not want to be required to produce extraordinary majorities in each House to override vetoes and maintain control over delegated power.

Both branches then sought an accommodation that respected the needs of the President and Congress. To receive the authority he wanted, Roosevelt accepted congressional action by concurrent resolution. Both branches agreed that any attempt by Congress to use concurrent resolutions to control past laws would be unconstitutional. It would be permissible, however, for Congress to use a two-house disapproval over a reorganization proposal, which was called a law "in the making."²¹⁸ Defeat of a reorganization proposal would merely preserve the status quo, leaving the structure of government unchanged. This compromise satisfied both branches until 1982, when the Justice Department advised the Supreme Court that it no longer accepted as constitutional the legislative veto in reorganization statutes.²¹⁹ It took fifty years for the Justice Department to oppose the legislative veto in all its forms, and then only under the realization that it was intellectually inconsistent to support the legislative veto in the reorganization statutes²²⁰ while condemning all others.

Whatever legal misgivings Presidents may have had about the legislative veto in reorganization acts, they did not acquiesce in the spirit of subservency. They acquiesced because it was to their advantage. Presidents who wanted the authority took the conditions that went with it. The Nixon Administration, for example, never uttered a word of protest when the Impoundment Control Act of

216. Legislation passed in 1977 allowed amendments to reorganization plans, but only those amendments submitted by the President. Pub. L. No. 95-17, § 903(c), 91 Stat. 29, 31 (1977) (codified at 5 U.S.C. 904 (1982)).

217. 83 CONG. REC. 4487 (1938).

218. *Id.* at 5004-05.

219. Brief for the Immigration and Naturalization Service at 58 n.37, *INS v. Chadha*, 103 S. Ct. 2764 (1983).

220. See 43 Op. Att'y Gen. No. 10 (Jan. 31, 1977) (Attorney General Griffin Bell's strained effort to distinguish the legislative veto in the reorganization statute from other types of legislative vetoes).

1974²²¹ authorized the President to defer the spending of funds subject to a one-house veto. It wanted the authority and accepted the condition, in part to avoid the dreary round of defeats it had suffered in the federal courts. No one in the Ford, Carter, or Reagan Administrations ever suggested that the one-house veto over deferrals was in any sense unconstitutional.

Congress added a legislative veto to the War Powers Resolution of 1973.²²² To argue that this statutory provision made the President subservient to Congress would overlook the series of unilateral actions taken by Presidents Johnson and Nixon to widen the war in Southeast Asia. While a member of Congress, Mikva wrote a law review article in which he urged Congress to place statutory constraints on the President's ability to make war.²²³ As a tool for reining in the President, he looked with particular hope to the power of the purse as embodied in the Cooper-Church Amendment.²²⁴ His article appeared in 1971, before Congress had begun to consider seriously a legislative veto to accommodate legislative-executive interests in the war power area.

The legislative veto was adopted after Congress met frustration in its power-of-the-purse efforts. Members tried to stop the war in the spring of 1973 by cutting off funds, but they discovered that a majority in each House was insufficient leverage to control the President. President Nixon vetoed the bill and Congress failed to override.²²⁵ Did this inability to override the veto constitute implicit approval of the President's policy? District Judge Judd said that "[i]t cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized."²²⁶ Thus, the purpose of the legislative veto in the War Powers Resolution was to prevent Presidents from conducting wars with only minority backing from Congress.

Arms sales, subject to a two-house veto, represent another area that relied on a legislative veto to accommodate the competing interests of Congress and the President. During a briefing in 1978, Attorney General Griffin Bell was asked if President Carter would feel bound if Congress, by concurrent resolution, vetoed his Mideast arms sales package. Bell replied:

He would not be bound in our view, but we have to have comity between the branches of government, just as we have between nations. And under a spirit of comity, we could abide by it, and there would be nothing wrong with abiding by it. We don't have to have a confrontation every time we can.²²⁷

221. Pub. L. No. 93-344, 88 Stat. 332 (1974).

222. Pub. L. No. 93-148, 87 Stat. 555 (1973).

223. Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 485-97 (1971).

224. *Id.* at 487. The Cooper-Church Amendment established a number of restrictions on the use of American military force in Cambodia. See *id.* at 486 n.107 (text of amendment).

225. L. FISHER, *PRESIDENTIAL SPENDING POWER* 114-17 (1975).

226. *Holtzman v. Schlesinger*, 361 F. Supp. 553, 565 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

227. Office of the White House Secretary, *Briefing by Attorney General Griffin B. Bell*, Stuart E.

White House adviser Stuart Eizenstat added:

I think the point the Judge [Bell] is making is that we don't concede the constitutionality of any of [the legislative vetoes] yet, but that as a matter of comity with certain of these issues where we think the Congress has a legitimate interest, such as the War Powers Act, as a matter of comity, we are willing to forego the specific legal challenge and abide by that judgment because we think it is such an overriding issue.²²⁸

The legislative veto began as an accommodation between the branches. There was never any question of one branch becoming subservient to another. When the basis for that accommodation started to erode in the 1970s, the legislative veto had run its course. The collapse of the agreement, however, does not justify the sweeping language of the decisions of the courts of appeals²²⁹ and the Supreme Court.²³⁰ Apparently Judge Mikva would agree. In one of the decisions of the United States Court of Appeals for the District of Columbia Circuit, decided about six months before the Supreme Court's ruling in *INS v. Chadha*,²³¹ Judge Mikva expressed concern about the broad nature of his court's rulings on the legislative veto. In a joint statement with Judge Wald, he asked the court to rehear a legislative veto case en banc:

[V]itally important issues of executive-legislative relations are articulated too broadly and explored inadequately in the panel opinion. We are especially concerned that the panel's opinion lumps together for automatic rejection under the rubric of "legislative vetoes" several different kinds of statutory provisions, each entailing a distinct accommodation between the executive and legislative branches. Such black-and-white treatment of these statutes ignores a largely gray area that has existed for 200 years in our constitutional scheme. . . .

We write separately to underscore our concern that language in the panel's opinion not be read to foreclose careful consideration in subsequent cases of historical experience, practical working relationships, and the deference due Congress when it establishes its own procedures under the Constitution. . . . We are convinced that [the one-house vetoes in the Reorganization Act and the Impoundment Control Act] cannot simply be invalidated under the reasoning of our prior opinions without detailed examination of how such arrangements operate and what they are designed to accomplish.²³²

After the Supreme Court decided *Chadha*, Judge Mikva testified before a Senate

Eizenstat, Assistant to the President for Domestic Affairs and Policy, and John Harmon, Office of Legal Counsel, June 21, 1978, at 4.

228. *Id.*

229. *AFGE v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); *Consumers Union, Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (per curiam); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982).

230. *INS v. Chadha*, 103 S. Ct. 2764 (1983).

231. *Id.*

232. *AFGE v. Pierce*, 697 F.2d 303, 308 (D.C. Cir. 1982) (Mikva, J., statement concerning denial of rehearing en banc).

committee on the virtues of the legislative veto and the defects of the Court's ruling:

I understand and respect the need for the legislative veto, and I am here to extoll its virtues rather than to criticize its excesses, although I must say that I saw both while I was in the Congress.

. . . I think that the Supreme Court decision is unfortunate I think that the Supreme Court overwrote *Chadha*. I think that they used their pen too broadly in trying to reach at the excesses and took away not only a necessary tool to the legislative process, but, indeed, wrote in a way that simply cannot be enforced. . . . [T]he court restrained the form in which the Congress may exercise the legislative veto, but the Court did not and cannot get at the substance, not unless it strikes down all of article I as unconstitutional.²³³

This Article is not the place for a detailed critique of the Supreme Court's ruling in *Chadha*. The author is unaware of any law review article that could be considered complimentary of the Court's reasoning or its understanding of modern government and the legislative process.²³⁴ Over a period of decades, the level of debate within Congress was far more sophisticated and insightful on the constitutional issue than the simplistic and formalistic position of the Supreme Court. The level of constitutional analysis in *Chadha* scarcely overshadows the efforts of Congress over the preceding fifty years. Congress may have gone too far with the legislative veto—especially with the determination to apply it to all agency rules and regulations—but the underlying arguments in favor of this congressional tool were responsible and well informed. Congress took into account, far better than the Court, the complex factors involved in governing an administrative state, the large-scale delegations of legislative power to the executive branch, and the need for executive-legislative cooperation.

The *Chadha* Court's misreading of history and congressional procedures will yield some strange results; its theory of government is too much at odds with the practices developed over a half century. Few administrators or legislators will want the static model advanced by the Court. The conditions that spawned the legislative veto in the 1930s have not disappeared. Executive officials still want substantial latitude in administering delegated authority; legislators still insist on retaining control without having to pass another law. After *Chadha*, congressional committees will continue to use informal and nonstatutory methods to control administrative actions by the executive branch. Agencies are allowed some flexibility to shift funds through the "reprogramming" process, provided they obtain the approval of designated committees.²³⁵ Because these "gentlemen's agreements" generally are not placed in statutes, they

233. *Constitutional Amendment to Restore Legislative Veto: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 40-41 (1984).

234. For some detailed critiques, see L. FISHER, *supra* note 10, at 178-83; Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125; Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

235. L. FISHER, *supra* note 225, at 75-98.

are unaffected by the Court's decision. They are not legal in effect; they are, however, in effect legal.

Not surprisingly, Congress has continued to place legislative vetoes in bills presented to the President. Despite *Chadha*, they are signed into law.²³⁶ In the first sixteen months after *Chadha*, Congress enacted eighteen bills incorporating fifty-three legislative vetoes.²³⁷ Because of the accommodations needed for contemporary government, agencies can be expected to comply with these legislative vetoes, which are generally of the committee variety. One unfortunate result of the Court's decision is that it promises a form of government that does not and cannot prevail.

Judge Mikva objects to the Senate's adoption in 1982 of the Schmitt Amendment, which would have applied the legislative veto to all agency rules. Senator Schmitt, however, did what Judge Mikva apparently would like all members to do. Schmitt made his own judgment—a favorable one—on the constitutionality of the legislative veto, notwithstanding contrary rulings by the United States Court of Appeals for the District of Columbia Circuit.²³⁸ As Judge Mikva noted, the Senators in favor of the Schmitt amendment "went to great lengths to assert the need for Congress to make its own judgments of constitutionality."²³⁹

On the other hand, Senators Leahy and Danforth opposed the Schmitt Amendment by arguing "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. . . ." ²⁴⁰ Both Senators wished to defer to the courts for a resolution. Senator Danforth stated that Congress

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. . . . [L]et us wait for the Supreme Court to speak.²⁴¹

The positions taken by Senators Leahy and Danforth seem contrary to Judge Mikva's model of a responsible Congress. First, the two Senators were willing to pass the issue to the courts, which "is both an abdication of [the congressional] role as a constitutional guardian and an abnegation of its duty of responsible lawmaking."²⁴² Second, they based their conclusions not on independent analysis but on what courts had done or were likely to do. As Judge Mikva advised, "[a]cting like a lower federal court is certainly not what Jefferson envisioned for Congress; Congress should be able to make its own decisions

236. Rothman, *Despite High Court Ruling, Legislative Vetoes Abound*, CONG. Q. WEEKLY REP., July 21, 1984, at 1797-98.

237. The author's survey of this legislation is on file with the North Carolina Law Review.

238. *AFGE v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); *Consumers Union, Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (per curiam); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982).

239. Mikva, *supra* note 1, at 600.

240. *Id.* at 598.

241. *Id.* at 599 n.61 (citing 128 CONG. REC. S2596 (daily ed. March 23, 1982)).

242. *Id.* at 610.

rather than having to predict what the Supreme Court would do"²⁴³

C. Section 3576 of the Organized Crime Control Act

As part of an effort to counter the tendency of some trial judges to mete out light sentences in cases involving organized crime, Congress passed Title X of the Organized Crime Control Act of 1970.²⁴⁴ Section 3576 allowed appellate courts to review and increase sentences.²⁴⁵ According to Judge Mikva, the Senate Committee on the Judiciary reported the bill to the floor "without any constitutional hesitations."²⁴⁶ It is difficult to probe the minds of committee members to discover whether they harbored any doubts or misgivings, but the committee report contains extensive analysis of the constitutional question of appellate review of sentences.²⁴⁷ The committee considered both due process and double jeopardy. Based on available court decisions, the Justice Department concluded that "it would seem that if these cases are still good law today then the Government should be able to seek an increase in sentence on appeal without violating either due process or the Fifth Amendment ban on double jeopardy."²⁴⁸

The Senate committee therefore was aware that authority existed to support both sides of the question, but that, on balance, section 3576 appeared to be constitutional. To avoid due process problems, the committee adopted a number of procedural limitations on the right of the government to appeal a sentence.²⁴⁹ That left the question of double jeopardy. Judge Mikva noted that the committee relied heavily on the testimony of the Department of Justice and Professor Peter Low.²⁵⁰ Professor Low was not merely an academic; he was the reporter of the American Bar Association study on sentencing.²⁵¹ Moreover, in 1964 the United States Judicial Conference had "discussed fully and approved a bill to empower Federal appellate courts to increase or decrease lawful but inadequate or excessive sentences."²⁵²

Judge Mikva recalled his opposition to the bill during his service as a congressman from Illinois. He and two colleagues wrote dissenting views in the report issued by the House Judiciary Committee. Among their arguments, reprinted in Judge Mikva's article, were the following comments:

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,

243. *Id.* at 607.

244. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of Title 18 of the United States Code).

245. 18 U.S.C. § 3576 (1982) (appellate courts may increase a sentence only if the United States "takes review").

246. Mikva, *supra* note 1, at 601.

247. See S. REP. NO. 617, 91st Cong., 1st Sess. 92-100 (1969).

248. *Id.* at 93.

249. See *id.* at 166-67.

250. Mikva, *supra* note 1, at 601.

251. S. REP. NO. 617, 91st Cong., 1st Sess. 98 (1969).

252. *Id.* at 99.

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.²⁵³

A review of the Senate and House reports²⁵⁴ does not support the image of a caveman's course on the Constitution; legal authorities are cited and analyzed. In contrast, the comments by Congressman Mikva and his two colleagues seem too rhetorical:

This bill is another dreary episode in the ponderous assault on freedom. . . . [I]t is more likely to catch poachers and prostitutes than it is to catch pushers and pimps. . . . [I]t rips off large chunks of the Constitution. . . . [I]t is a repressive shotgun which shoots down innocent and guilty with equal diffidence.²⁵⁵

If the House and Senate Judiciary Committees behaved like cavemen, the Supreme Court apparently belongs in the same category. In *North Carolina v. Pearce*,²⁵⁶ decided a year before Congress enacted the Organized Crime Control Act, the Court decided that there was no constitutional bar to imposing a more severe sentence on reconviction. The guarantee against double jeopardy, however, would be violated "when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction of the same offense."²⁵⁷ *Pearce* dealt with the imposition of sentences after a new trial and reconviction;²⁵⁸ section 3576 involved increases in existing sentences.²⁵⁹

The precise features of section 3576 came before the Court in *United States v. DiFrancesco*,²⁶⁰ which upheld the provision by a five-to-four vote. Although the constitutional protection against double jeopardy prohibits a second trial following an acquittal,²⁶¹ the double jeopardy clause "is not a complete barrier to an appeal by the prosecution in a criminal case."²⁶² The Court stated that, historically, "the pronouncement of sentence has never carried the finality that attaches to an acquittal."²⁶³ The Court cited studies indicating that sentencing is one of the areas of the criminal justice system most in need of reform, referring to Judge Frankel's observation that the basic problem of the present system is "the unbridled power of the sentencers to be arbitrary and discriminatory."²⁶⁴ Justice Blackmun, writing for the Court, pointed out that appellate review "creates a check upon this unlimited power, and should lead to a greater degree of

253. Mikva, *supra* note 1, at 603 (citing H.R. REP. NO. 1549, 91st Cong., 2d Sess. 193 (1970)).

254. H.R. REP. NO. 1549, 91st Cong., 2d Sess. (1970); S. REP. NO. 617, 91st Cong., 1st Sess. (1969).

255. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 181 (1970).

256. 395 U.S. 711 (1969).

257. *Id.* at 718.

258. *Id.* at 722.

259. 18 U.S.C. § 3576 (1982).

260. 449 U.S. 117 (1980).

261. *Id.* at 129.

262. *Id.* at 132.

263. *Id.* at 133.

264. *Id.* at 142-43 (quoting M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973)).

consistency in sentencing."²⁶⁵ When Congress passed legislation in 1984 to provide more systematic guidelines on sentencing,²⁶⁶ the Senate Judiciary Committee stated that it was "an anomaly to provide for appellate correction of prejudicial trial errors and not to provide for appellate correction of incorrect or unreasonable sentences."²⁶⁷ The committee reinforced Judge Frankel's views on the fairness issue:

It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government, on behalf of the public, to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient The unequal availability of appellate review, moreover, would have a tendency to skew the system, since if appellate review were a one-way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater consistency might well result in a gradual scaling down of sentences to the level of the most lenient ones. Certainly the development of a principled and balanced body of appellate case law would be severely hampered.²⁶⁸

Judge Mikva felt that the constitutional support of the Senate and the House for section 3576 may have convinced the Court that "in part . . . its work had been done already."²⁶⁹ He stated that in *DiFrancesco* the 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."²⁷⁰ What was the alternative? Would it have been better for members of Congress to remain silent on the constitutional issue, keeping the slate clean for calm and undistracted judicial deliberation? Such conduct would expose members to Judge Mikva's charge that they irresponsibly pass the tough constitutional issues to the courts. Furthermore, the development of constitutional law provides strong evidence that the judiciary derives essential guidance from interpretations previously adopted by the legislative and executive branches.

IV. CONCLUSION

The interests of constitutional law and the political process are served best when members of Congress form independent judgments on constitutional issues. Most of these issues are within the capability of members, whether they have legal training or not. Constitutional issues often turn not so much on technical legal points but on a balancing of competing political and social values. Collisions occur between congressional regulation and federalism, state rights

265. *Id.* at 143.

266. Pub. L. No. 98-473, § 213, 98 Stat. 1837, 2011 (1984).

267. S. REP. NO. 223, 98th Cong., 1st Sess. 147 (1983).

268. *Id.* at 148.

269. Mikva, *supra* note 1, at 605.

270. *Id.*

and civil rights, government regulation and individual privacy, free press and fair trial, congressional investigation and executive privilege, and other questions of priorities. Congress has adequate resources to analyze these constitutional issues. Although members should form their judgments with an awareness of what courts have decided, no need exists to follow those rulings in mechanical fashion. That a congressional interpretation or understanding of the Constitution may differ from the Court's is hardly reason to conclude that Congress ignores the Constitution—a charge that imputes legislative bad faith.

Even after courts hand down a decision, there are opportunities for Congress to test the soundness of the decision by passing new legislation and supporting further litigation. The history of child labor legislation offers a striking example. The first child labor law passed by Congress was based on the commerce power. The Supreme Court invalidated that statute in 1918.²⁷¹ The second congressional attempt, based on the taxing power, was invalidated in a 1922 decision.²⁷² Congress then passed a constitutional amendment in 1924, which would have given it the power to regulate child labor. By 1937, however, only twenty-eight of the necessary thirty-six states had ratified the amendment. On its final effort, Congress returned to the commerce power by including a child labor provision in the Fair Labor Standards Act of 1938.²⁷³ This time the Court upheld the statute.²⁷⁴

Another example of congressional independence concerns the Civil Rights Act of 1964.²⁷⁵ Basing this statute solely on the fourteenth amendment would have risked a head-on collision with *The Civil Rights Cases*²⁷⁶ of 1883, which never had been overruled. Congress chose the commerce power as an alternative constitutional foundation for the Civil Rights Act,²⁷⁷ and the Supreme Court upheld the Act by finding in the commerce power sufficient congressional authority.²⁷⁸

Congressional-Court dialogues need not consume decades before Congress alters the shape of a Supreme Court decision. Title II of the Omnibus Crime Control and Safe Streets Act of 1968²⁷⁹ modified three controversial Court rulings on criminal procedure. The first, *Mallory v. United States*,²⁸⁰ held that suspects must be taken before a magistrate for arraignment as quickly as possible.²⁸¹ Additionally, admissions obtained from the suspect during illegal detainment could not be used against him. The Court made room for congressional involvement by basing its decision not solely on constitutional grounds,

271. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

272. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

273. Pub. L. No. 75-718, § 12, 52 Stat. 1060, 1067 (1938).

274. *United States v. Darby*, 312 U.S. 100 (1941).

275. Pub. L. No. 88-352, 78 Stat. 241 (1964).

276. 109 U.S. 3 (1883).

277. D. MORGAN, *supra* note 9, at 292-330.

278. See *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

279. Pub. L. No. 90-351, 82 Stat. 197 (1968).

280. 354 U.S. 449 (1957).

281. *Id.* at 454.

but also on the Federal Rules of Criminal Procedure enacted by Congress.²⁸² The decision thus invited Congress to enter the arena and modify those rules. Congress did so: Title II established six hours as a reasonable period before arraignment.²⁸³ Congressional action was justified as a modification of the Federal Rules of Criminal Procedure even though constitutional issues clearly were present.

In the second case, *Miranda v. Arizona*,²⁸⁴ the Court held that confessions by criminal suspects could not be used unless the suspects had been informed of their rights by law enforcement officers.²⁸⁵ It is unclear whether the majority opinion was based on constitutional principles or statutory rules of evidence. The Court reviewed the history of the fifth amendment privilege against self-incrimination,²⁸⁶ spoke of the "constitutional issue we decide in each of these cases,"²⁸⁷ and stated that "the issues presented are of constitutional dimensions and must be determined by the courts."²⁸⁸ The Court also referred to the Federal Rules of Criminal Procedure²⁸⁹ and invited Congress to contribute its own handiwork.²⁹⁰ Congress did so again: Title II allowed for the admissibility of confessions if voluntarily given.²⁹¹ Trial judges would determine the issue of voluntariness after taking into consideration all the circumstances surrounding the confession, including five elements identified by Congress.²⁹²

In the third case, *United States v. Wade*,²⁹³ the Court decided that if an accused was denied the right to counsel during a police lineup, the identification would be inadmissible unless the in-court identifications had an independent source or the introduction of the evidence would be harmless error.²⁹⁴ The Court stated that "[l]egislative or other regulations, such as those developed by the local police departments, [might] eliminate the risks of abuse and unintentional suggestion at lineup proceedings," but that "neither Congress nor the Federal authorities have seen fit to provide a solution."²⁹⁵ Title II provided that eyewitness testimony would be admissible as evidence in any criminal prosecution, regardless of whether the accused had an attorney present at the lineup.²⁹⁶

Thus, what appears to be constitutional interpretation by the courts is sometimes "a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitu-

282. *Id.* at 451.

283. 18 U.S.C. § 3501(c) (1982).

284. 384 U.S. 436 (1966).

285. *Id.* at 467-79.

286. *Id.* at 439-44.

287. *Id.* at 445.

288. *Id.* at 490.

289. *Id.* at 463.

290. *Id.* at 467.

291. 18 U.S.C. § 3501(a) (1982).

292. *Id.* § 3501(b).

293. 388 U.S. 218 (1967).

294. *Id.* at 239-42.

295. *Id.* at 239.

296. 18 U.S.C. § 3502.

tional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress."²⁹⁷ When the courts announce these rules, such as the exclusionary rule or the *Miranda* rule, they invite Congress to become involved in the continuing process of defining the content of individual liberties. Congress assumes a coordinate role. These rules lie "at the margin of constitutional liberties [and] should not be disruptive of a productive Court-Congress relationship."²⁹⁸ Through this slow evolution of a constitutional common law, "[c]ongressional debate concerning the means of implementing new-found values may provide the Supreme Court with much-needed feedback as to the implications, and indeed the propriety, of its activism."²⁹⁹

No single institution, including the judiciary, has the final word on constitutional questions. All citizens have a responsibility to take a "hard look" at what judges decide. It is not true, as Justice Jackson once remarked, that Justices of the Supreme Court "are not final because we are infallible, but we are infallible only because we are final."³⁰⁰ The Court is neither final nor infallible. Judicial decisions rest undisturbed only to the extent that Congress, the President, and the general public find the decisions convincing, reasonable, and acceptable.

The courts therefore find themselves engaged in what Alexander Bickel once called a "continuing colloquy"³⁰¹ with political institutions and society at large, a process in which constitutional principle is "evolved conversationally not perfected unilaterally."³⁰² It is this process of give and take and mutual respect that permits the unelected Court to function in a democratic society. John Agresto argues persuasively that "the more the Court can be treated as a partner in the politics of American life and not as a superior external agent, the fewer will be our doubts about its contributions and the greater should be our willingness to see it exercise its functions without misgivings."³⁰³

The ability of Congress to participate effectively in constitutional interpretation depends in part on the strength of its committee system, as Judge Mikva noted.³⁰⁴ Responsible action also is more likely when Congress can resist precipitous action under the pressure of deadlines and public opinion. The historical record suggests that

public excitement and party contentiousness may force measures of dubious constitutionality or wisdom onto the floor in the last hectic days of a pre-election session. At such times those seeking immediate political advantage may overleap all the hurdles which reason, experi-

297. Monaghan, *The Supreme Court 1975 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

298. *Id.* at 34.

299. *Id.* at 45; see also Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975) (Congress should be able to draw the boundaries of civil rights protection, consistent with the Constitution.).

300. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

301. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 240, 244 (1962).

302. *Id.* at 244.

303. J. AGRESTO, *supra* note 36, at 152.

304. Mikva, *supra* note 1, at 610.

ence, and tradition have put up to assure deliberation. At such times, too, members may secure passage of measures which later prove highly questionable, without full awareness of their true character.³⁰⁵

Since legislators are subject to strong pressures and intense emotions, they might act on expediency "rather than take the long view."³⁰⁶ Even when legislators want to uphold constitutional values, facts are not always presented in an orderly manner that permits rational and responsible analysis. The last days of a Congress are a period of frenzy, forcing legislators to race against the clock and make last-minute accommodations. The risk of error and miscalculation is high. Nevertheless, a winnowing process occurs throughout the session that discards many unconstitutional proposals. Congress needs to be judged not merely by the ill-considered bills it passes, but by those that never survive because of conscientious review.

Judges are assumed to have "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."³⁰⁷ Those presumed traits, however, do not give judges a superior edge in balancing constitutional values or investigating facts that underlie such constitutional provisions as the commerce clause.³⁰⁸ Furthermore, judges cannot be expected to behave with model objectivity or wisdom. Justice Jackson once remarked that "[n]othing has more perplexed generations of conscientious judges than the search in juridical science, philosophy and practice for objective and impersonal criteria for solution of politico-legal questions put to our courts."³⁰⁹

No justification exists to defer automatically to the judiciary because of its technical skills and political independence. Each decision by a court is subject to scrutiny and rejection by private citizens and public officials. What is "final" at one stage of our political development may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Supreme Court doctrines. Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation. Their duty to support and defend the Constitution is not erased by doubts about personal or institutional competence. Much of constitutional law depends on factfinding and the balancing of competing values, areas in which Congress justifiably can claim substantial expertise.

305. D. MORGAN, *supra* note 9, at 360.

306. A. BICKEL, *supra* note 301, at 25.

307. *Id.* at 25-26.

308. See *supra* notes 105-07 and accompanying text.

309. Jackson, *Maintaining Our Freedoms: The Role of the Judiciary*, 19 VIT. SPEECHES DAY 759, 759 (1953). The claims of impersonal judgments by members of the judiciary have been dissected in a number of studies. See, e.g., Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571 (1948).

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