

METADEMOCRATIC INTERPRETATION AND SEPARATION OF POWERS

*Bernard W. Bell**

Judicial independence has once again come under attack.¹ The torrent of criticism that greeted a 1996 ruling by Federal District Judge Harold Baer² evokes thoughts of the periodic political attempts to influence the Judiciary, from the court-packing plan in the 1930s, to the movement to impeach Chief Justice Earl Warren in the 1960s.³ Judge Baer suppressed narcotics seized from a car trunk based on his conclusion that the search violated the Fourth Amendment.⁴ Several prominent political figures, including then-Senator Robert Dole, called for

* Associate Professor of Law, Rutgers Law School (Newark). I wish to thank Evan Caminker, Carlos Gonzalez, and George Thomas for their helpful comments on prior drafts and Robert Heym for his assistance in checking citations. All errors remain mine.

1. See *Judicial Misconduct and Discipline: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 15-19 (1997) (statement of Rep. Tom DeLay); 143 CONG. REC. H1411 (daily ed. April 10, 1997) (statement of Rep. DeLay); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 429-34 (1997); Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, 36 JUDGES' J., Winter 1997, at 4; Symposium, *Politicians on Judges: Fair Criticism or Intimidation*, 72 N.Y.U. L. REV. 294 (1997); Neil A. Lewis, *Impeach Those Liberal Judges! Where Are They?*, N.Y. TIMES, May 18, 1997, at E5.

2. See Ian Fisher, *Gingrich Asks Judge's Ouster for Ruling Out Drug Evidence*, N.Y. TIMES, March 7, 1996, at B4; Clifford Krauss, *Giuliani and Bratton Assail U.S. Judge's Ruling in Drug Case*, N.Y. TIMES, Jan. 27, 1996, at A1; Don van Natta Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, April 2, 1996, at A1.

3. Attempts to remove judges who render politically unpopular decisions have been a recurrent theme in United States history, including the barely defeated "court-packing" plan of President Franklin D. Roosevelt in 1937, see JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 291-315 (1956); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing Plan,"* 1966 SUP. CT. REV. 347, the movement to impeach Earl Warren, see BERNARD SCHWARTZ, SUPERCHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 250, 280-81 (1983), and the successful effort in 1986 to recall Chief Justice Rose Bird of the California Supreme Court, see Edward A. Hartnett, *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 977 n.372 (1997); Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at A1.

4. *United States v. Bayless*, 913 F. Supp. 232, 237 (S.D.N.Y. 1996), *vacated on reh'g*, 921 F. Supp. 211 (S.D.N.Y. 1996).

Baer's impeachment or resignation.⁵ The outcry led Judge Baer to take the unusual steps of granting a rehearing and then reversing his own decision.⁶ A similar reaction met New York State Supreme Court Judge Lorin Duckman's decision to grant bail to a man who killed his former girlfriend while awaiting trial on charges that he had assaulted her.⁷ After politicians, including the Mayor of New York City and the Governor of New York, criticized Duckman's bail decision, the judge was ultimately reassigned to civil court.⁸ The legal community is justifiably concerned about such events.⁹

Ironically, however, scholars and some jurists increasingly have advocated methods of statutory interpretation that inject the courts into political controversies; such methods require courts to act strategically to affect both the agenda of the other branches of government as well as their chosen mode of operation. These advocates also suggest resolving certain issues of political philosophy regardless of the views of the political branches of government. Jane Schacter has cataloged a variety of such approaches in the *Harvard Law Review*, referring to them as "metademocratic theories."¹⁰ This article examines whether judicial use of statutory interpretation to alter the legislative process is a practice consistent with a constitutionally permissible distribution of powers between the three branches of government, and whether judicial determination of issues of political philosophy without deferring to the political branches of government is appropriate.

5. See Hartnett, *supra* note 3, at 975-76.

6. *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996), *vacating* 913 F. Supp. 232 (S.D.N.Y. 1996).

7. See David M. Halbfinger, *Official Recommends Judge's Removal From Bench*, N.Y. TIMES, July 21, 1997, at B1.

8. See Joseph P. Fried, *Duckman is Returning, but to Civil Court*, N.Y. TIMES, Apr. 26, 1996, at B1. A state panel voted to remove Judge Duckman from the bench in part due to a perceived general bias against vigorous prosecution of domestic violence cases. The panel did not, however, fault Duckman for the decision that led to his reassignment. See Joseph P. Fried, *State Panel Removes Judge From Bench*, N.Y. TIMES, Oct. 25, 1997, at B1.

9. See generally Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997); Michael A. Cardozo, *Address on Judicial Independence to the Association Reception in Honor of New York Supreme Court Judges* (March 24, 1997), in 52 REC. ASS'N B. N.Y. 264 (1997); Mario M. Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U. L. REV. 298 (1997).

10. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

I

METADEMOCRATIC THEORIES AND THE JUDICIAL FUNCTION

A. *Metademocracy, Essentialism, and Instrumentalism*

Metademocracy is a conception of the proper functioning of the legislative process. A metademocratic theory is a normative theory about how the legislative process should operate. For example, one could believe that, in a democracy, all policy should be embodied in the text of statutes enacted by a majority of both houses of the legislature and presented to the Chief Executive. One could also believe that, at base, democracy means rule by the views of a majority of elected representatives and, thus, those views, to the extent that they can be discerned, should be honored whether or not properly transcribed into statutory text. Then again, one might argue that the proper operation of the legislative process can be defined by results rather than method—that the legislative process should produce actions or statutes that treat citizens fairly or protect certain values. Under this view, the legislative process should be judged by whether it fairly considers the concerns of discrete minorities that are generally treated unfavorably.

Such normative theories regarding democracy can affect a jurist's or scholar's normative approach to statutory interpretation in at least two ways. These theories can lead the courts to use their power to interpret statutes to move the actual legislative process toward a normative ideal. Alternatively, metademocratic theory can help courts determine which interpretive approach is most legitimate, i.e., most consistent with a particular philosophy of government, regardless of whether the adoption of that technique will affect the actions of participants in the legislative process.

The first approach can be described as “instrumentalist,” the second as “essentialist.” To be sure, instrumentalist and essentialist justifications can be advanced for the same interpretive position and distinguishing the two kinds of justifications can sometimes be quite difficult.¹¹ Identifying core differences between the two perspectives is useful nonetheless.

11. Indeed, Dean Harry Wellington makes a similar observation about the confluence of decisions which reflect values and decisions designed to influence the political process. See HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 135, 138 (1990). At least one scholar separates instrumentalist and essentialist approaches to statutory interpretation and suggests that courts often do the same. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Judge Calabresi acknowledges several competing interpretive approaches focused upon producing the most legitimate interpretation of

Instrumentalists use statutory interpretation to achieve certain goals with respect to the operation of the legislative process. Essentialists seek to develop a theory to determine which interpretive approach is most legitimate given our conception of a coequal tripartite government.¹² Thus, some scholars and courts, placing a premium on legislative supremacy, conclude that legislative intent should be the focus of statutory interpretation. This conclusion is supported by appeal to majoritarian principles of representative government.¹³ Other essentialists conclude that textualism is the most legitimate interpretive approach—the rule of law means that only those sentiments embodied in statutory text understandable to the populace can constitute law. They argue that to accord significance to majority intent not ex-

statutes, but ultimately refuses to choose between them. *See id.* at 38 n.30. Instead, Judge Calabresi recommends that courts construe statutes to maximize the likelihood that the Legislature will revisit obsolete or outdated statutes. He suggests that Justice Frankfurter took this approach in cases arising under the Jones Act, 46 U.S.C. app. § 688 (1994) (original version at ch. 250, 41 Stat. 1007 (1920)), to force congressional reevaluation of statutes governing compensation for injured seamen, terming it “judicial blackmail.” *See Calabresi, supra*, at 33-34; *see, e.g.,* *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 538-40 (1957) (Frankfurter J., dissenting). *See generally* *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 170 (1987) (Scalia, J., concurring); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 129-31 (1964) (discussing the “trap-pass” strategy through which courts interpret statutes “so narrowly as to render them ineffective in the hopes of forcing fresh legislative action”); Lawrence C. Marshall, “*Let Congress Do It*”: *The Case For an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 233 & n.267 (1989). Judge Calabresi seems to disapprove of the Frankfurter “judicial blackmail” approach for reasons similar to those advanced in this essay. *See CALABRESI, supra*, at 154-55.

12. *See* Schacter, *supra* note 10, at 608.

13. *See* Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. (forthcoming 1999) (manuscript at 50 & n.178, on file with the *New York University Journal of Legislation and Public Policy*) [hereinafter Bell, *Legislative History*]; Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 243-44, 249 (1997). This is, of course, the view that the federal courts have traditionally taken. *See* *Marcus v. Hess*, 317 U.S. 537, 542 (1943) (“Rules of statutory construction must be examined in light of their utility in determining legislative intent because, ultimately, sound rules of statutory interpretation exist to discover and not to direct the Congressional will.”); *see also* *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 53 (1942); *United States v. American Trucking Ass’n*, 310 U.S. 534, 542 (1940); *Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). *See generally* JAMES WILLARD HURST, *DEALING WITH STATUTES* 32 (1982) (“[T]he standard criterion for proper interpretation of a statute is to find the ‘intention of the legislature.’”); NORMAN J. SINGER, *2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 45.05, at 22 (5th ed. 1992) [hereinafter *SUTHERLAND STAT. CONST.*]; Bell, *Legislative History, supra* (manuscript at 69 n.258); Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential “Signing Statements,”* 40 ADM. L. REV. 209, 218 n.56 (1988).

pressed in statutory text is lawless.¹⁴ For textualists, the rule of law takes precedence over majority rule.¹⁵ Some essentialists focus on the importance of candor and publicity in the legislative process and thus accord binding effect to the text of the statute and great weight to certain aspects of legislative history.¹⁶ Others argue that legitimacy should not be defined by method, but by result. These essentialists regard the most legitimate interpretation to be that which promotes certain values or group interests.¹⁷ Statutes should be interpreted to protect racial minorities, for instance, because democracy is least le-

14. This best reflects the view of new textualists, the most noted of whom is Justice Antonin Scalia. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”); *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1351 (D.C. Cir. 1985) (Scalia, J.); see also Bell, *Legislative History*, *supra* note 13 (manuscript at 52 & nn.186-88).

15. When the text of a statute does not reflect majority desires because of imprecision of language or because the Legislature fails to consider explicitly the nuances of the problem it seeks to address, the rights of individuals are not governed by majority policies, but by policies which randomly result from the Legislature’s poor statutory drafting. Focusing on the text of the statute, despite convincing evidence that the words used unintentionally fail to reflect the majority’s decision, elevates form over substance. The words exist to reflect the majority’s intent, and if for some reason they do not, a textualist approach privileges the form of expression over the substantive principles the majority favored. See Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 111-15, 117-18 (1989).

Of course, privileging statutory text over the enacting majority’s true intent may reduce the arbitrariness of law—majority denial of a privilege or imposition of a burden might reflect an attitude toward the individual unrelated to the majority’s overall desires. In addition, privileging statutory text may give citizens better notice of the law. See Bell, *Legislative History*, *supra* note 13 (manuscript at 46-47). The concern about arbitrariness becomes insignificant when the Legislature has expressed its intent in advance and in terms of broad policies (even if not in the text of the statute). The concern about notice is also less significant when the statutory text is so vague as to arouse further inquiry regarding the statute’s meaning and there is a somewhat authoritative source, such as legislative history, that can provide more specificity. See *id.* (manuscript at 43-48).

16. See Bell, *Legislative History*, *supra* note 13 (manuscript at 6-32, 82-91).

17. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION*, 153 (1994); WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 162-64 (2d ed. 1997); Schacter, *supra* note 10, at 618-26. Eskridge argues, “In close cases the legal process interpreter ought to consider, as a tie-breaker, which party or group representing its interests will have effective access to the political process if it loses the case, and to decide against the party (if any) with significantly more effective access.” Eskridge, *supra*, at 153. Eskridge also provides a list of the groups that, according to his research, are most successful in securing legislative revision of judicial decisions. See *id.* The research appears in William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

gitimate when it restricts the effective political participation of permanent minorities or others who experience prejudice.¹⁸

Scholars who pursue an instrumentalist approach seek to develop a theory of statutory interpretation based on the likely effect their interpretive methodology will have on the political process. Instrumentalists can embrace textualism because it reduces the influence of interest groups and legislative staff and also requires legislatures to draft more precise statutes.¹⁹ On the other hand, Jonathan Macey argues that courts should honor legislative history because doing so will probably reduce the number of “special interest” statutes.²⁰ Judge Guido Calabresi has recommended ruling against particular interests to encourage the legislature to reexamine obsolete statutes.²¹ Cass Sunstein develops an elaborate set of interpretive canons to encourage legislative deliberation.²² Sunstein views deliberation as a key to ef-

18. The key is determining which groups should have their losses described as pathologies—some groups’ losses will reflect a “pathology” of the political system, while others will not. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 152-53 (1980). Because of the different consequences attendant to such categorization, there must be a principled distinction between the two. One such attempt, which has been severely criticized, was made by John Hart Ely based on footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 (1938). See ELY, *supra*, at 135-80; POPKIN, *supra* note 17, at 162-64.

19. Bernard W. Bell, R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory 8-13 (1997) (unpublished manuscript, on file with the *Journal of Legislation and Public Policy*) [hereinafter Bell, R-E-S-P-E-C-T]; Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can it Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 110-12 (1997) [hereinafter Bell, *Using Statutory Interpretation*].

20. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). Macey suggests that courts can use interpretive methods to reduce legislation designed to further special interests. Although Macey’s argument would thus appear to be instrumentalist, we can view Macey’s approach as “essentialist” if he believes that, all other things being equal, interpretation in accordance with the general public interest is the most legitimate method of reading statutes. Indeed, Macey’s article suggests that judicial transformation of special interest statutes into general interest statutes is good regardless of whether such an approach changes legislative behavior. However, Macey also seems to view the Judiciary’s role as encouraging the passage of general interest laws and discouraging the enactment of “rent-seeking” laws. See *id.* at 226, 233, 238, 253-57, 267. Indeed, Macey says that he is asking the Court to adopt an approach similar to one that he calls “judicial blackmail,” choosing a legislatively unpalatable interpretation of a statute to force the Legislature to revisit the statute. See *id.* at 256-57; see also CALABRESI, *supra* note 11, at 33-34 (describing Justice Frankfurter’s approach in Jones Act cases as “judicial blackmail” because Frankfurter chose “a narrow, harsh interpretation of those laws on the ground that such a reading would break the log jam of interests and force the legislative hand”).

21. See CALABRESI, *supra* note 11, at 124-129.

22. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 437-41, 454-60 (1989) [hereinafter Sunstein, *Interpreting Statutes*];

factive democracy, and thus believes courts should encourage deliberation by the manner in which they interpret statutes.²³ Such instrumentalist approaches seem increasingly popular among scholars.²⁴

This article argues that, despite this trend, instrumentalist arguments generally are at best makeweight and that the essentialist basis of an interpretive approach must be persuasive before much weight can be placed on its instrumentalist benefits.

B. A Critique of Instrumentalism

1. Instrumentalism Interferes with the Primary Function of Courts

Instrumentalist approaches are problematic because they reflect a strategy of inducing the two other branches of government to conform their behavior to judicially-created standards. There is, of course, something of a problem with this approach at the start. First, the Judiciary may possess little expertise regarding the manner in which the political branches of government should operate.²⁵ Second, each branch of government deserves the autonomy necessary to carry out its functions within the constitutional scheme. While the Founders rejected a pure separation of powers in favor of a checks and balances

Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1581-89 (1988).

23. Sunstein's interpretive principles seem to be based both on how interpretation can improve the governmental process and on what should be viewed properly as law, given his conception of government. Thus, it is not clear that he would abandon his proposed canons even if they would not change legislative behavior. However, he does suggest that the most important aspect of his theory is the prospect of using interpretive principles to improve the manner in which government functions. See Sunstein, *Interpreting Statutes*, *supra* note 22, at 408-13.

24. See Schacter, *supra* note 10; see also Bell, *Using Statutory Interpretation*, *supra* note 19, at 108-16, 128-32 (noting current prevalence of agency interpretations of statutes and deference courts give to those interpretations, precluding these canons of interpretation from influencing legislative process).

25. See, e.g., *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1181-82 (D.C. Cir. 1983) ("Appellants' complaint invites federal courts to participate extensively in the internal processes of Congress. . . . There is the very real problem of a lack of judicial competence to arrange complex, organic, political processes within a legislature so that they work better."). For additional discussion, see Bell, R-E-S-P-E-C-T, *supra* note 19, at 30-31 & nn.123-27.

approach,²⁶ each branch of government must nevertheless retain sufficient autonomy to function effectively.²⁷

However, the most fundamental problem with the Judiciary using statutory interpretation to influence the other branches' behavior is that such an effort conflicts with the primary function of courts—resolving disputes by determining individual rights.²⁸ The Judiciary is

26. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 244-45 (1995) (Breyer, J., concurring) (stating that separation of powers doctrine does not absolutely divide the branches); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 442-43 & n.5 (1977) (reaffirming Court's rejection of complete division between branches); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring) (“[The Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”); *United States v. Brainer*, 515 F. Supp. 627, 635 (D. Md. 1981) (quoting *Youngstown*); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 525 (3d ed. 1858); JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 53-54 (1977); THE FEDERALIST No. 47 (James Madison).

27. See, e.g., U.S. CONST., art. I, § 5, cl. 2; *Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935) (“[E]ach of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others. . . . The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.”); *French v. Senate*, 80 P. 1031, 1032 (Cal. 1905) (reasoning that inherent capacity of a legislative body to control its own proceedings is so basic that “[i]f this [express state constitutional] provision were omitted, and there were no other constitutional limitations on the power, the power would nevertheless exist, and could be exercised by a majority”); THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) (“It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.”).

28. The Supreme Court has noted that courts could not be given the power to appoint federal officials to the extent that the exercise of such power conflicts with its judicial functions. See *Morrison v. Olson*, 487 U.S. 654, 675-76 (1988); *Ex parte Siebold*, 100 U.S. 371, 398 (1879). With respect to the issue at hand, the attempt to supervise the legislature is incompatible with the Court functioning as the primary forum for the resolution of rights. See *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) (“Courts to determine the rights of parties are an integral part of our system of government.”); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 49-50, 173 (2d ed. 1986) (noting lower federal courts “sit as primary agencies for the peaceful settlement of disputes”); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 4-7 (1988); 1 MONTESQUIEU, THE SPIRIT OF LAWS 151 (T. Nugent trans. 1900) (“By the third [department of government], he punishes criminals, or determines the disputes that arise between individuals. The latter power we shall call the judiciary power.”); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 177 (1964); Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 21, 25 (1964) (“A vital Court task . . . is the interpretation of legislation . . . free from ulterior purposes . . . [and] constitutional problems. Will the faithful execution of that task not be impaired if additional demands are made on the Court to invoke an often spurious legislative intent to promote the Court-Congress colloquy?”).

the branch that authoritatively determines individual citizens' entitlements under the law.²⁹ Indeed, the justification for judicial independence,³⁰ including salary and tenure protection, is the need to ensure the Judiciary's ability to properly execute that function.³¹ At the federal level, Article III's "case or controversy" requirement³² ensures the primacy of the Judiciary as a dispute-resolving forum and an arbiter of individual entitlements. The rigid prohibition on legislative revision of court judgments also reflects the Judiciary's primacy in bringing finality to individual disputes.³³

This vision of courts' primary function and the instrumentalist conception of statutory interpretation conflict because the instrumentalist conception requires a court to subordinate the determination of individual litigants' interests and entitlements to its institutional strategies regarding other branches of government.³⁴ These strategies may

29. Indeed it is arguably illegitimate for legislatures to pursue individual justice. See U.S. CONST., art. I, § 9, cl. 3 (Bill of Attainder Clause); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 720 (1995); Chadha v. INS, 634 F.2d 408, 424, 429-31 (9th Cir. 1980) (Kennedy, J.) (arguing that with legislative veto, Judiciary's duty to decide cases is improperly subject to review by Congress), *aff'd*, 462 U.S. 919 (1983). However, while some state constitutions impose limitations on special legislation, the federal Constitution does not. In fact, Congress has traditionally enacted private bills resolving individual claims against the Government or determining individuals' immigration status. An interesting example of a private bill is the recently enacted proposal to provide permanent resident status to Christoph Meili, the Swiss bank guard who refused to shred records of transactions between Swiss banks and Nazi Germany. See S. 768, 105th Cong. (1997); see also *Plaut*, 514 U.S. at 239 & n.9 (Scalia, J.) (stating bill that deals with individual permissible).

30. See *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) (Norris, J., dissenting); Cardozo, *supra* note 9, at 264-65; Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 690 (1979) (quoting Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 698 (1969)); Redish, *supra* note 29, at 701, 707, 708-12 (stating decisional independence is sine qua non).

31. See U.S. CONST., art. III, § 1; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60 (1982); *United States v. Will*, 449 U.S. 200, 217-20 (1980); THE FEDERALIST NOS. 78, 79 (Alexander Hamilton).

32. U.S. CONST., art. III, § 2, cl.1.

33. See, e.g., *Plaut*, 514 U.S. at 218-19 ("The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.).

34. Implicit in my argument is the premise that litigants' primary interest is securing a court judgment in their favor. However, sometimes litigants prefer establishing certain legal principles to obtaining a favorable judgment, and thus have a greater

reflect a desire to force legislatures to change legislative practices or to revisit a particular area of the law. Under such approaches, courts do not enter judgment to express conclusions about litigants' individual rights, but rule in order to force a legislature's hand.³⁵

The tension between the instrumentalist approach and the Judiciary's obligation to decide individual entitlements is seen in *United States v. University Hospital*,³⁶ a case that involved interpretation of the Rehabilitation Act of 1973 ("Act").³⁷ Incorporating language from Title VII, Congress provided, "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of

interest in the reasoning adopted by the court than the judgment it enters. For example, litigants who bring "impact" litigation, and litigants who can expect to be a party to a number of similar cases, are likely more interested in the legal principles endorsed by a court than in the disposition of a particular case. Accordingly, such litigants may not object to strategic actions by courts that may produce an "erroneous" final disposition. I am indebted to Professor Evan Caminker for raising this point. Nevertheless, rarely will the legal principle that such litigants wish to establish relate to the manner in which the political branches of government conduct their business—the types of principles courts seek to promote by metademocratic interpretation. Moreover, metademocratic interpretation can lead to the establishment of "erroneous" legal principles as often as it can lead to "erroneous" dispositions.

35. Some have suggested that strategic behavior by courts is appropriate. See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28-29, 36-38 (1994). Eskridge and Frickey do, however, acknowledge the tension between strategic behavior and the Judiciary's prime function of dispute resolution. See *id.* at 34.

Interestingly, strategic judicial behavior obliterates one of the distinctions between courts and agencies. The courts' primary goal is conflict resolution—"[t]he traditional goal of the adjudicatory process is to resolve disputes about rights, about the allocation of burdens and benefits." See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY CLAIMS 29-31 (1983). The "legitimizing values" of judicial adjudication are fairness and independence of the decision maker. Agencies have a positive political agenda—their determinations are part of an overall scheme to implement their programs and are thus considered in that light. See JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS 373 (3d ed. 1992); Bell, *Using Statutory Interpretation*, *supra* note 19, at 143. However, courts have ensured that even agencies do not decide cases based on extraneous strategic considerations, at least not at the behest of Congress. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 408-10 (D.C. Cir. 1981); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1237 (D.C. Cir. 1971); *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966). See generally PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 505-10 (1996). For instance, in *D.C. Federation*, the D.C. Circuit held improper the Secretary of Transportation's decision to approve the construction of a bridge in the face of a threat by a congressional committee chair to deny funding needed to establish a subway for the District of Columbia. The D.C. Circuit ruled that the Secretary had to make decisions based on the merits without regard to extraneous considerations, such as congressional threats to deny funds for unrelated projects.

36. 729 F.2d 144 (2d Cir. 1984).

37. 29 U.S.C. §§ 701-94 (1994 & Supp. II 1996).

his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.”³⁸

The United States brought suit under the Act on behalf of an infant suffering from multiple birth defects, including spina bifida, microcephaly, and hydrocephalus.³⁹ After consulting with physicians, nurses, religious advisors, and other family members, the infant’s parents decided not to authorize an operation to correct the spina bifida and hydrocephalus. The parents concluded that, while the procedure might have prolonged the infant’s life, it would not have addressed her other birth defects and might have worsened her condition in other respects.⁴⁰ The Government sought the child’s medical records, acting on the theory that the failure to operate due to the infant’s permanent handicaps constituted discrimination under the Act.⁴¹ The Second Circuit concluded that the Government’s right to the medical records turned on whether refusal to treat one handicapping condition because of the presence of other handicapping conditions violated the Act.⁴² The case was clearly important to the parents because it implicated their legal right to exercise the authority mothers and fathers customarily possess with respect to their children’s medical treatment.⁴³

Judge Winter argued in dissent that the court should construe the statute literally to discipline Congress for failing to consider thoroughly all aspects of a problem before passing symbolic legislation, even though Congress probably did not envision such a restrictive application.⁴⁴ One could believe that “legislative intent” is the touchstone of interpretation, based on the essentialist majority-rule argument, yet entirely agree with Judge Winter that Congress acted irresponsibly in drafting the Rehabilitation Act and often acts irresponsibly in enacting other symbolic legislation. One could also agree

38. 29 U.S.C. § 794 (1994).

39. *University Hospital*, 729 F.2d at 146.

40. *Id.*

41. *Id.* at 150.

42. *Id.* at 149-50.

43. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 9.3, at 335, 339-41 (2d ed. 1988). Indeed, the New York State Appellate Division had concluded that the “concededly concerned and loving parents have made an informed, intelligent, and reasonable determination based upon and supported by responsible medical authority,” and that it should not interfere with the parents’ decision. See *University Hospital*, 729 F.2d at 147.

44. See *University Hospital*, 729 F.2d at 163. For a discussion of such symbolic legislation, see John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233 (1990).

that strict construction might lead Congress to exercise more care in the future (i.e., that Congress would respond to “tough love” from the Judiciary).⁴⁵ However, if, as a result, one concluded that the statute should be strictly construed and that a court should require the hospital to operate on the infant in order to discipline Congress, one would sacrifice the parents’ entitlement to a determination of their rights in order to pursue larger strategic goals unrelated to the parents’ rights.⁴⁶

Indeed, this type of debate has arisen before in response to Alexander Bickel’s proposal that the Supreme Court employ various jurisdictional doctrines to avoid deciding constitutional questions when the political branches of government might defy the Court or when the Court would expend too much “political capital” if it decided the case.⁴⁷ Bickel argues that doctrines like standing, desuetude, vagueness, ripeness, and nondelegation⁴⁸ should be used in an expedient, discretionary fashion to avoid constitutional issues when resolution by the Supreme Court might prove dangerous.⁴⁹ For instance, Bickel

45. See Dwyer, *supra* note 44, at 302-04.

46. Such an approach would also subordinate the interests of the infant, who might have been subjected to a medical procedure that may have worsened her condition and not substantially improved the quality of her life (given her other birth defects), so that the Court could emphasize to Congress the need for clarity in statutory drafting.

47. See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 169 (1980). Much of Jesse Choper’s argument in *Judicial Review and the National Political Process* also relies on a concern about preserving limited “judicial capital.” Choper argues that the Court should decide constitutional questions only in areas where the Court alone can protect the constitutional values (namely cases involving individual rights as opposed to those involving separation of powers or federalism). See CHOPER, *supra*; see also ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 104-05 (1987).

48. See BICKEL, *supra* note 28, at 144 (standing), 147-49, 153-54, 155 (desuetude), 149-54 (vagueness), 143-47, 164 (ripeness), 161 (nondelegation).

49. See *id.* at 113-33; see also MURPHY, *supra* note 11, at 195. Gunther argues employing legitimate jurisdictional doctrines to avoid constitutional decisions destroys their usefulness. Gunther, *supra* note 28, at 24. He advocates preserving jurisdictional doctrines for two reasons. First, some jurisdictional doctrines, such as vagueness, serve important purposes and their distortion through use as avoidance devices may mean they can no longer serve their original purpose. See *id.* at 21; see generally Anthony G. Amsterdam, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Second, Gunther argues that jurisdictional doctrines based on statutory or constitutional text deserve non-strategic interpretation because, like the underlying substantive statutes and constitutional provisions, they are the legitimate commands of a higher sovereign, namely Congress or “the people.” See Gunther, *supra* note 28, at 12, 15, 19; Herbert Wechsler, Book Review, 75 YALE L.J. 672, 675 (1966) (reviewing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962)). The second argument applies equally to non-jurisdictional statutes, as Gunther himself notes. See Gunther, *supra* note 28, at 21. Thus, instrumentalist statutory interpretation suffers from the same problem Gunther identified with respect to the passive

contends that the Supreme Court properly avoided deciding the constitutionality of Connecticut's birth control statute in 1961.⁵⁰ Bickel notes that the statute had been enacted long ago, and had long remained unenforced. Thus, Bickel argues, the Connecticut legislature should have revisited the birth control issue before the Judiciary addressed the constitutionality of limitations on birth control.⁵¹ Bickel concludes that the Court could have invoked the doctrine of desuetude to refuse to adjudicate the issue based on the legislature's failure to address the question, which, he suggests, reflected the equipoise of clashing political forces.⁵²

Bickel himself acknowledges that the use of "passive virtues," such as jurisdictional doctrines, to avoid adjudicating cases would interfere with the Judiciary's function as an arbiter of individual entitlements.⁵³ Bickel's work suggests two possible limitations when using an instrumentalist approach in interpreting statutes. First, an instrumentalist approach could be limited to the Supreme Court, which must, out of necessity, function as a political actor as well as an adjudicator of rights, thus requiring lower courts to eschew such instrumentalist considerations.⁵⁴ Second, a court could devise a strategic

virtues—such interpretation embodies the refusal of courts to honor legitimate legislative commands.

50. See BICKEL, *supra* note 28, at 144-56 (discussing *Poe v. Ullman*, 367 U.S. 497 (1961)). Of course, the Supreme Court did decide the merits of Connecticut's birth control statute four years later in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

51. See BICKEL, *supra* note 28, at 147-48.

52. See *id.* at 155-56. Bickel also notes that the Court, using the same reasoning, could also have invoked doctrines of ripeness, vagueness, and nondelegation to resolve the case without adjudicating the merits. *Id.* at 143. (In a somewhat novel "ripeness" argument, Bickel suggests that even though the *case* was ripe, the *issue* raised by the case was not.) Recently, Judge Calabresi made a similar argument in his concurrence in *Quill v. Vacco*, 80 F.3d 716, 738-43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 117 S. Ct. 2293 (1997), regarding New York State's law prohibiting assisted suicide.

53. See BICKEL, *supra* note 28, at 172-75. Bickel notes:

Unripe cases. . . are attempts to deprive the Court of its authority to select; they are attempts to force the Court's hand. In law suits of this ilk, the moving party takes a calculated risk, and there is no need to spill many tears over its fate when the case is lost through outright dismissal. In a well-tempered case, however, the moving party has a much stronger claim to individual justice, and this claim must be balanced against the Court's judgment that the issue as such is not ripe, owing to conditions over which the parties have no control. *The pressure for individual justice is, of course, all the stronger when one may fairly surmise that the tendency of the Court, if pushed to the wall of principled judgment, would likely be to vindicate the moving party's constitutional claim.*

Id. at 172 (emphasis added); see also *id.* at 173 ("[T]he policy of avoidance. . . must prevail. . . despite hardship to the litigant. . .").

54. Herbert Wechsler criticized this argument. Wechsler, *supra* note 49, at 675.

interpretation of the statute that furthers its instrumentalist goals, while ensuring that such strategic behavior does not affect the individual case being adjudicated by finding an alternative ground on which to rule in favor of the party that should prevail (absent the court's strategic considerations).

The first approach is workable in the jurisdictional context, perhaps, if the lower courts simply ignore a few quirky Supreme Court opinions that employ standard jurisdictional doctrines for the distinct task of avoiding politically difficult decisions.⁵⁵ However, such an approach will more likely fail with respect to statutory interpretation jurisprudence because it would be troubling for the Supreme Court and the lower courts to employ different interpretive approaches. Different jurisdictional approaches merely mean that the lower courts will adjudicate cases that the Supreme Court will not.⁵⁶ Divergent interpretive approaches, however, mean that the various levels of courts will systematically differ in their conclusions about governing substantive law and, thus, the substantive rights of the parties before them. Such judicial schizophrenia would be especially counterproductive because many instrumentalist arguments require all federal courts to employ a uniform approach. If the Supreme Court focused on text and disregarded legislative history, while the lower courts freely referred to legislative history without being reversed, the instrumentalist objectives in adopting a textualist approach would be compromised. Under such circumstances, it is unlikely that the Supreme Court's systematic attempts to promote improvement in the precision of statutory language, or to reduce the influence of congressional staffers and lobbyists, will be successful. Such salutary changes would occur only if all courts were uniform in their approach.⁵⁷

55. The virtual elimination of the Supreme Court's mandatory appellate jurisdiction in 1988 has largely obviated the need for the Supreme Court, as opposed to lower federal courts, to use avoidance techniques. See 28 U.S.C. §§ 1254, 1257 (1994); see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.4, at 27-28 (5th ed. 1995); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 2.6-2.9 (7th ed. 1993); Bennett Bosky & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 99 (1988). However, mandatory appellate jurisdiction does remain under 28 U.S.C. § 1253 (1994), for appeals from three-judge courts. See RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1670-71 (4th ed. 1996).

56. In some circumstances the differing jurisdictional approaches could have greater significance. If a lower court decision were reviewed by the Supreme Court and found non-justiciable, the lower court would have to vacate its judgment.

57. Somewhat analogously, I noted in a previous article, statutory interpretation approaches are not likely to affect the legislative process unless they are adopted by administrative agencies as well as by courts. See Bell, *Using Statutory Interpretation*, *supra* note 19 at 128.

Bickel's second approach to protecting the rights of individual litigants while allowing courts to pursue strategic goals is also unworkable. Bickel, of course, develops his arguments in the jurisdictional context, and does not focus on statutory interpretation. He suggests that jurisdictional arguments can be deployed without denying litigants their individual rights to justice.⁵⁸ For example, he argues that in certain contexts, aggressive and unconventional use of the "vagueness" doctrine allows the Supreme Court to administer individual justice while strategically avoiding controversial issues.⁵⁹ Bickel uses *Garner v. Louisiana* to illustrate his point.⁶⁰ In *Garner*, defendants challenged their convictions for disorderly conduct, which resulted from their participation in a sit-in to protest racial segregation at a privately-owned lunch counter.⁶¹ The Court avoided the larger issue of the constitutionality of police enforcement of private racial segregation and held that the convictions could be sustained only if the State proved that other lunch counter patrons reacted to the defendants' protest in a disturbed manner because the disorderly conduct statute's vagueness foreclosed any other result.⁶² The Court thus reversed the convictions without having to resolve an intellectually difficult and politically charged "state action" question.

Courts have crafted at least one canon of statutory interpretation that allows them to avoid difficult issues while appearing to protect individual litigants. Under the doctrine directing courts to construe statutes to avoid constitutional questions, when an "ambiguous" statute raises a constitutional question, courts will select a reasonable interpretation that does not raise the constitutional issue rather than an

58. BICKEL, *supra* note 28, at 175.

59. *Id.*

60. *See id.* at 175-78 (discussing *Garner v. Louisiana*, 368 U.S. 157 (1961)).

61. The case was politically charged because of Southern resistance to desegregation. A ruling that discrimination in privately-owned public accommodations was unconstitutional might have sparked even more resistance to the Supreme Court's authority than previous civil rights rulings had produced. Bickel argues that the politically sensitive nature of the issue would ordinarily have made denial of certiorari appropriate. However, denial of certiorari would have resulted in detention of the individual protesters even though the Court might well have believed their imprisonment unconstitutional. Rather than deny certiorari, the Court heard and decided the appeal. *See id.* at 177.

62. Bickel suggests the holding was not dispassionately interpretive and would not be followed outside the context of sit-ins held in Southern states to protest racial discrimination. Bickel argues instead that the Court appropriately used the vagueness avoidance technique to protect the rights of the protesters (rights which the Court would have declared had it not been inexpedient to do so) while avoiding decision on a complex, politically-charged constitutional issue. *See id.* at 179.

interpretation that does.⁶³ The doctrine clearly involves subordinating the need for unbiased interpretation of statutes to strategic considerations.⁶⁴ Courts refuse to determine which interpretation of the statute is most legitimate (whether one takes a textual, intentionalist, or other approach). Instead, they depart from the interpretive method they would otherwise employ for fear that if they do not, they will have to render a difficult or unpopular constitutional decision. However, individuals rarely appear to be harmed when courts adopt such strategic behavior, because judicial interpretation of statutes to avoid substantial constitutional questions nearly always produces a ruling in favor of the individual who is adverse to the Government.

Unfortunately, Bickel's second proposal does not eliminate the problem of sacrificing the individual and produces other undesirable consequences.⁶⁵ The problem remains because a court will often be unable to find plausible alternative grounds for ruling in a litigant's favor when it interprets a statute adversely to the litigant's interest.⁶⁶ Moreover, a court might well sacrifice candor by purporting to base its

63. See, e.g., *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989); see also RICHARD A. POSNER, *THE FEDERAL COURTS* 285 (1985) (criticizing the avoidance canon); 2A SUTHERLAND STAT. CONST., *supra* note 13, § 45.11, at 48.

64. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (1996).

65. For example, beneficiaries of a regulatory statute may be harmed by an unnecessarily restrictive interpretation of the statute. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court construed the National Labor Relations Act ("NLRA") narrowly so as to find that the National Labor Relations Board lacked jurisdiction over church-operated schools. The Court reasoned that subjecting sectarian schools to the Board's jurisdiction would raise a serious Free Exercise Clause question (to date the Court has successfully avoided resolving the constitutional issue. NOWAK & ROTUNDA, *supra* note 55, at § 17.15). The school, it is true, was not hurt. However, those teachers who wanted the protection of the labor laws may have been harmed by the Court's decision to avoid the constitutional issue of whether the NLRA could have been read to apply to sectarian schools. Pro-union parochial school teachers may have lost the NLRA's protection because the Court sought to avoid a confrontation with the political branches of government, rather than because the NLRA could not most legitimately be construed in their favor.

The view that construing statutes to avoid constitutional questions does not harm individuals is another manifestation of the fallacy, often noted by Cass R. Sunstein, of viewing the common law as a lack of regulation rather than as a type of regulatory scheme. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 17-51 (1993); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 69-75 (1993); CASS R. SUNSTEIN, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

66. In addition, the interpretation of a statute will color non-litigants' views of their legal rights and obligations under the statute, and may thus affect their behavior. Some people may be discouraged from filing suit, leaving a court no opportunity to find an alternative ground to relieve these would-be plaintiffs of the statute's perceived harsh reach.

decision on an alternative ground. In particular, the grounds on which a court claims reliance would be a subterfuge, the real reason for the decision being the court's view that the statute should have been read in the litigant's favor (but could not be for some strategic reason).⁶⁷

Contemporary instrumentalist arguments are more problematic than the arguments made by scholars such as Bickel. Bickel and others recommend that courts employ avoidance devices or refuse to adjudicate certain types of issues to protect their ability to vindicate individual rights.⁶⁸ One could argue that courts must act strategically when their very ability to continue rendering neutral judgments is at risk, i.e., when the executive and legislative branches threaten to undermine the Judiciary.⁶⁹ That is a difficult proposition and, ultimately, the other branches of government should ensure that courts need not face such a dilemma.⁷⁰ The new instrumentalist approaches suggest that judicial strategizing go beyond mere defensive measures. These approaches require courts to subordinate the rights of individual liti-

67. Thus, in *Garner* there is a lack of candor. The decision's purported rationale is the vagueness of the disturbance of the peace ordinance, but the real reason for the decision is the Court's belief that the First Amendment protected those protesting racial discrimination in privately-owned public accommodations in the South.

68. Choper is an example. See *CHOPER*, *supra* note 47.

69. See *BICKEL*, *supra* note 28, at 173; *CHOPER*, *supra* note 47, at 129-70; *MURPHY*, *supra* note 11, at 193-95; *ROBERT A. BURT*, *THE CONSTITUTION IN CONFLICT* 120, 129, 190 (1982); *Korematsu v. U.S.*, 323 U.S. 214, 244-48 (1944) (Jackson, J., dissenting). Indeed, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), itself involved the strategic refusal to grant relief. The Supreme Court arguably adopted an unduly liberal interpretation of the statute authorizing judicial issuance of writs of mandamus, Act of September 24, 1789, § 13, 1 Stat. 73, so as to put itself into a position to hold the statute unconstitutional. The Court could then assert the power to invalidate a federal statute without producing a judgment that a hostile President and Congress could defy. See *ROBERT McCLOSKEY*, *THE AMERICAN SUPREME COURT* 42 (1960); *NOWAK & ROTUNDA*, *supra* note 55, at § 1.4, at 4 & n.8; see generally, *BURT*, *supra*, at 119-32.

Perhaps there is little reason to believe that courts' power to render neutral judgments will be at risk in the foreseeable future. Frederick Schauer suggests that the acceptance of judicial review is not as tenuous as it has been in past generations. Schauer, *supra* note 64, at 96 ("All of this is only to suggest that the legitimacy of judicial review is, plausibly, a less controversial and less socially contested matter than it was several generations ago, and certainly less than it was in the previous century.").

70. See *MURPHY*, *supra* note 11, at 186 ("Compromise with the other branches of government or with public opinion creates the most difficult kinds of practical and ethical problems For a Justice to weigh current political reactions or to anticipate future political reactions in his decision-making would seem to defeat the very purpose of judicial independence."); *id.* at 182-97; Letter from Abraham Lincoln to A.G. Hodge (April 4, 1864), reprinted in *ARTHUR B. TOURTELLOT*, *THE PRESIDENTS ON THE PRESIDENCY* 399 (1964) (quoting Abraham Lincoln) ("I felt measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation.").

gants to promote judicial efforts to force other branches to change their modes of operation or to place certain issues on their agendas.

2. *Instrumentalism Conflicts with the Law-Generating Function of Courts*

Although the implications are less serious, one can argue that metademocratic strategic approaches conflict with a second function of courts—the law-generating function.⁷¹ Legislatures prescribe the rights and duties of citizens, while interpreting laws setting forth those rights and duties is the province of the courts.⁷² Congress must rely on the Judiciary to breathe life into statutes by construing them. Strategic judicial action conflicts with a legislature's right to prescribe rules and duties. Instead of ruling on the basis of rights and duties the legislature has prescribed, a court renders a decision designed to change legislative behavior or put an issue on the legislative agenda. Thus, a court might refuse to adopt an interpretation that, on the whole, is most consistent with the text and the legislative history of the statute because the court wants to encourage congressional reconsideration of that policy, or because Congress's policy decision took the form of an appropriations rider rather than an amendment of substantive legislation, or because the policy decision appears in a committee report rather than expressly in the text of the statute. Thus, Congress's policy decision is disregarded and a different one substituted in an effort to secure some change in legislative procedure or to encourage reconsideration of the issue.

3. *Instrumentalism Imposes an Undue Burden on Congress*

Finally, some instrumentalist doctrines impose an undue burden on Congress, particularly when Congress is forced to retrace its steps. Legislative reconsideration of a statute is costly.⁷³ Considering any

71. EISENBERG, *supra* note 28, at 4-7.

72. See *Plaut v. Spendthrift Farms*, 514 U.S. 211, 222 (1995) (quoting THE FEDERALIST No. 78, at 523, 525 (Alexander Hamilton) (J. Cooke ed. 1961)):

The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated," but the power of "[t]he interpretation of the laws" would be "the proper and peculiar province of the courts."

73. See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 38-39 (1994). Brudney recounts the twenty-three year dialogue between Congress and the Supreme Court regarding the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1994 & Supp. II 1996). The ADEA prohibited private employers from discriminating against workers between the ages of forty and sixty-five in the

particular issue is time consuming.⁷⁴ Indeed, congressional procedure is designed to slow the promulgation of legislative proposals and to condition enactment on the concurrence of a supermajority.⁷⁵ Developing such a high level of support requires time and effort.⁷⁶ Revisiting a statute invariably requires expending a great deal of resources.⁷⁷

terms and conditions of employment. The ADEA permitted any bona fide employee plan “which is not a subterfuge to evade the purposes of” the ADEA. *Id.* § 623 (1994 & Supp. II 1996). It is this subterfuge provision that spawned two Supreme Court decisions and two statutory revisions.

In *United Air Lines v. McMann*, 434 U.S. 192 (1977), the Supreme Court addressed the issue of whether pension plans that imposed mandatory retirement prior to age sixty-five could be legal under the ADEA. While the Court concluded that the retirement plans could impose mandatory retirement, whether or not the plan predated the ADEA, the Court went on to hold that the particular plan before it could not be a “subterfuge” to evade the Act because the plan predated the ADEA and thus could not have been adopted with an intent to evade the purposes of the Act. *Id.* at 198-203. In doing so, the Court disregarded the legislative history indicating that the statute applied to both “new and existing” employee benefit plans and to the “establishment and maintenance” of such plans. *See* Brudney, *supra*, at 12 & n.38. Congress then amended the ADEA to expressly provide that employee benefit plans would not qualify for exemption under the ADEA if they required or permitted the involuntary retirement of any individual because of age. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189. Moreover, the Conference Committee, in its explanation of the amendments, stated that it disagreed with the Supreme Court’s reasoning that plan provisions may be exempt from the ADEA merely because they predate the ADEA. H.R. CONF. REP. NO. 95-950, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 529.

In 1989, the Court addressed the question of the ADEA’s restrictions on an employer’s disability retirement plan. *See* *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989). In *Betts*, the disabled employee, who had become disabled at age sixty-one, was unable to qualify for the plan because only those employees who became disabled before age sixty could participate in the plan. The Court held that because the disability retirement plan had been adopted before the enactment of the ADEA, it could not be a subterfuge, following its approach in *McMann*. *See id.* at 166-68. The Court disregarded the legislative history disapproving its subterfuge reasoning in *McMann*, because, it said, Congress did not amend the text of the “subterfuge” provision so as to modify its ordinary meaning. *See id.* at 168.

In 1990, Congress enacted the Older Workers Benefit Protection Act, 29 U.S.C. §§ 621, 623, 626, 630 (1994 & Supp. II 1996), which overturned both the holding and the reasoning of *Betts*. Congress not only required that disability retirement be available to all older workers, but it also removed the term “subterfuge” from the provision involving bona fide employment benefit plans. *Id.* at § 623(f)(2) (1994 & Supp. II 1996).

74. *See* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 22-23 (4th ed. 1996).

75. *See id.* at 22-23; Brudney, *supra* note 73, at 26.

76. *See* OLESZEK, *supra* note 74, at 23 (quoting Senator Sam Nunn).

77. The U.S. House of Representatives has recently established the Corrections Calendar. *See* John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267 (1996); *see also* Charles W. Johnson, *How Our Laws Are Made*, § IX, subsec. 4 (last modified Nov. 12, 1997) <<http://thomas.loc.gov/home/lawsmade.toc.html>> (describing Corrections Calendar); OLESZEK, *supra* note 74, at 127-29 (same). However, this

Moreover, Congress is a busy institution; with responsibility for enacting laws in myriad areas, Congress cannot address all the issues that must be addressed.⁷⁸ Thus, court-mandated reconsideration of one issue will claim congressional time that could be devoted to other issues.

In sum, judicial strategizing comes with a downside. Effective use of instrumentalist doctrines to change the legislative process or to encourage legislative reconsideration of long-ignored issues interferes with a legislature's law-generating function and may unnecessarily drain legislative resources. Most significantly, instrumentalism requires courts to subordinate the rights of individuals to judicial pursuit of legislative or governmental reform. Courts cannot ignore such a compromise of individual rights, given their primary function of deciding competing claims of individual entitlement.

II

METADEMOCRATIC THEORIES AND DEFERENCE

A. *The Problem of Competing Metademocratic Theories*

As shown above, essentialist theories are more consistent with courts' dispute-resolution and lawmaking functions than are instrumentalist theories. Nevertheless, judges who take an essentialist approach to interpretive methodology unavoidably adopt some conception of the legislative process. All interpretive methodologies reflect certain metademocratic commitments.

A jurist needs a theory about the legislative process to determine whether to rely heavily on the text of statutes and syntax canons,⁷⁹ whether to consider legislative history (and the weight to be accorded various elements of legislative history),⁸⁰ whether to adopt certain

surely does not significantly ameliorate the problem noted by Brudney. Corrections Calendar legislation will presumably also require time. Moreover, the Senate has no such calendar and the Senate ordinarily acts more slowly than the House. Indeed, Nagle acknowledges this fact. See Nagle, *supra*, at 1318.

78. See Brudney, *supra* note 73, at 21-26; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548-49 (1983).

79. This is the new textualist approach. See Bell, *Legislative History*, *supra* note 13 (manuscript at 60); Bell, *Using Statutory Interpretation*, *supra* note 19, at 112.

80. The question of whether legislative history should be considered at all is the major issue between new textualist and traditional interpreters. Meanwhile there are various theories regarding the elements of legislative history that should receive the most weight and the kinds of issues with respect to which it is most appropriate to rely on legislative history. For instance, William D. Popkin asserts that courts should rely upon legislative history only if the issue did not spark controversy when the legislature considered the relevant statute. See William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301, 315-16 (1990).

substantive canons or “clear statement” rules,⁸¹ whether to accord any weight to the President’s interpretation of a statute,⁸² or whether to adopt a type of “dynamic” interpretive method.⁸³ For example, the conventional approaches to interpretation and textualism are grounded in competing conceptions of the legislative process. The conventional approach to statutory interpretation—discerning legislative intent—is grounded on a conception of majoritarianism in which the policies chosen by a majority of elected representatives should govern society.⁸⁴ Textualism also requires a legislative theory, namely, one in which the key to democracy is the rule of law, necessitating adherence to only those policies embodied in text (that is itself created by certain procedures).⁸⁵ Many of these procedures erect obstacles to legislation which effectively produce a supermajority requirement.

The forthright discussion of metademocratic assumptions is salutary, as Schacter herself argues.⁸⁶ Statutory interpretation should reflect, rather than conflict with, our conception of a well-functioning democracy. However, scholars advocate adopting such metademocratic theories while simultaneously ignoring the metademocratic views of the political branches of government. Scholars appear to consider the metademocratic views of legislators irrelevant when metademocratic issues arise in the context of interpretation because

81. “Clear statement” rules provide that a statute shall not be interpreted in a certain manner unless the statute expressly requires such an interpretation. For instance, a clear statement rule may provide that a statute will not be interpreted to apply to actions that occur outside the United States unless the statute clearly provides for such liability. *See* Equal Employment Opportunity Comm’n v. Arabian American Oil Co., 499 U.S. 244, 258-59 (1991). Clear statement rules are generally established by courts. *See generally* Bell, *Using Statutory Interpretation*, *supra* note 19, at 135-37; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Bell, R-E-S-P-E-C-T, *supra* note 19, at 39.

82. *See generally* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential “Signing Statements,”* 40 ADM. L. REV. 209 (1988); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987); Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239 (1994); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991).

83. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); *see* T. Alexander Alienikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

84. *See supra* text accompanying note 13.

85. *See supra* text accompanying notes 14-15.

86. *See* Schacter, *supra* note 10, at 648-49, 654, 655-59, 661.

interpreting statutes is viewed as a judicial function.⁸⁷ The new textualists' normative conception of the legislative process conflicts with legislators' conceptions of the process, at least insofar as legislative practices reflect those conceptions. Thus, certain aspects of the current federal legislative process that textualists consider pathologies (and which they think courts should correct through interpretive methodology) are not viewed as pathologies by legislators.⁸⁸ Judge Cala-

87. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATT'Y GEN.: USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 5, 33-34, 39-40 (1989) [hereinafter USING AND MISUSING LEGISLATIVE HISTORY]; see also *Pierce v. Underwood*, 487 U.S. 552, 556 (1988) (Scalia, J.) ("[I]t is the function of the courts and not the Legislature, . . . to say what an enacted statute means."); Bell, *Legislative History*, *supra* note 13 (manuscript at 45 & n.161); Felix Frankfurter, *Foreword to a Symposium on Statutory Construction*, 3 VAND. L. REV. 365, 366 (1950) ("[D]ivorce of the functions of authorship and interpretation" is "one of the great safeguards of a free society."); Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 394-95 (1942).

88. New textualist disdain for the vagueness of statutes and the influence of legislative staff clearly conflicts with Congress's views on those subjects. Congress regularly enacts vague statutes for various reasons. See Bell, R-E-S-P-E-C-T, *supra* note 19, at 45-46 & n.213. Congress has also repeatedly given consideration to the size and role of staff and continues to fund large staff, without restraining congressional staff's role in the legislative process. See, e.g., H.R. REP. NO. 91-1215, at 15 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4417, 4431 ("The staffs of the committees of the House make vast contributions to the legislative, investigative, and oversight work all committees perform each Congress. But while the quality of the staffs is high, their numbers are insufficient to meet the increasing workload of the committees they serve."); FINAL REPORT OF THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, S. REP. NO. 103-215(II), at 72-75 (1993); Memorandum from Richard C. Sachs to the Joint Committee on the Organization of Congress 4-5 (April 8, 1993), *reprinted in* BACKGROUND MATERIAL: SUPPLEMENTAL INFORMATION PROVIDED TO THE MEMBERS OF THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, S. REP. NO. 103-55, at 1462-63 (1993).

The new textualists' ultimate conclusion is also opposed by Congress. Legislative history is heavily used by many members of Congress and a wide range of Senators and Representatives believe legislative history should be used. See, e.g., Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43 (1988); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 385; *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 2 (1990) (statement of Rep. Kastenmeier) ("It is safe to say that most of us in Congress assume committee reports, colloquies on the floor and other sources of legislative history can explain and amplify statutory language in ways that are instructive to the courts."); *id.* at 2, 3, 65 (statements of Rep. Moorhead); *Hearings on the Nomination of Judge Antonin Scalia To Be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary*, 99th Cong. 65-68 (1986) (colloquy between Senator Grassley and Judge Scalia). Moreover, if Congress disapproved of courts' use of legislative history it could enact statutes precluding the use of legislative history. Congress has not, however, attempted to do so. There is no suggestion in the new

bresì suggests that courts should treat statutes like judicial precedents, under the theory that they can be revised or overruled like case law. However, Judge Calabresi makes this suggestion without seriously considering whether such an approach conflicts with legislative conceptions of the proper role of courts.⁸⁹

The Supreme Court's adoption of an interpretive approach deferential to agency constructions of statutes in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*⁹⁰ provides yet another illustration of the disregard of legislators' metademocratic views.⁹¹ Under the *Chevron* doctrine, when text is ambiguous, any reasonable agency construction of the statute must be upheld.⁹² The Court adopted the doctrine without examining the political branches' views of the roles of courts and agencies. Indeed, it appears the Court's conception of those roles in *Chevron* conflicts with the Administrative Procedure Act, which provides that courts "shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions."⁹³

textualist writings that Congress's view on these issues merits consideration. Indeed, the new textualists' lack of respect for congressional judgment is the subject of a future article. See Bell, R-E-S-P-E-C-T, *supra* note 19.

89. CALABRESI, *supra* note 11, at 116-17 (discussing whether judicial adoption of his proposal requires specific legislative approval). Judge Calabresi suggests courts assert the power to overrule statutes. In the one state in which a statute conferring upon courts the power to "overrule" statutes has been proposed, it has not been enacted. See Minn. Senate File 557, House File 1437, reprinted in Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203, 204 n.7 (1979). Judge Calabresi bases his argument on his view that courts already overrule or modify statutes, but do so by using various subterfuges. See CALABRESI, *supra* note 11, at 16-43. Thus, Judge Calabresi sees himself as seeking judicial candor, not a change in the power courts actually assert. See *id.* at 167-81.

Congress seeks to deal with this problem of statutory obsolescence not by granting courts the authority to overrule legislation, but by enacting sunset laws, as Judge Calabresi recognizes. See *id.* at 59-61. Judge Calabresi concludes that sunset laws are insufficient. See *id.* at 61-62.

90. 467 U.S. 837 (1984).

91. See Schacter, *supra* note 10, at 613-18 (highlighting *Chevron* doctrine as one of four new metademocratic approaches).

92. See *Chevron*, 467 U.S. at 842-44.

93. 5 U.S.C. § 706 (1994). Moreover, before the *Chevron* decision, a series of bills were introduced by Senator Dale Bumpers to reverse the trend toward judicial deference to agency interpretations. Though none of the bills were ultimately enacted, they generally received majority support. See Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 2-3 & n.10, 5-9 (1985); James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 747-67 (1980). Indeed, in 1982, two years prior to the decision in *Chevron*, the Senate passed one bill by a vote of 94-0. See Levin, *supra*, at n.10. For a description of later congressional efforts to address the issue which are more sympathetic to *Chevron*, see Mark Burge, Note, *Regulatory Reform and the Chevron Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 TEX. L. REV. 1085, 1103-23 (1997).

This failure to consider and give deference to the views of the political branches of government with respect to issues of political philosophy is problematic. Each branch of government has separate but overlapping functions. Although there is a separation of powers, the separate branches of government must often coordinate their activities. As Justice Robert Jackson observed, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."⁹⁴

As a result, sometimes the branches have coordinate responsibilities and may each be required to address the same question. This often occurs with respect to constitutional questions.⁹⁵ For instance, both courts and the President may have to determine whether the United States is at war.⁹⁶ Courts and the political branches of government may have to determine the appropriate level of executive privi-

94. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

95. The general philosophy is that each branch can, at least to some extent, determine constitutional questions for itself. See generally DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 47 (1966); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 23-44 (1990); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-4, at 32-42 (2d ed. 1988); Alexander Hamilton, *Letter of Pacificus No. 1*, at 11, reprinted in ALEXANDER HAMILTON & JAMES MADISON, THE LETTERS OF PACIFICUS AND HELVIDIUS (1845) WITH THE LETTERS OF AMERICANUS (1976); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-22 (1990) (quoting John Marshall, Thomas Jefferson, James Madison, and James Wilson). Though historical evidence suggests that the Founding Fathers believed that each branch would have to resolve constitutional problems for themselves in performing their duties and that no branch would be supreme, many currently question this view. For instance, when former Attorney General Edwin Meese III criticized the view that courts are the final arbiters of constitutional issues, he was widely attacked. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977 (1987). See generally Gant, *supra* note 1. Interestingly, in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Court suggested that Congress had no duty to follow court precedent in interpreting the Constitution, but that as a matter of practicality Congress was likely to be impeded if it did not, because of courts' power of judicial review. *Id.* at 2172.

96. See, e.g., Hamilton, *supra* note 95, at 11:

It may be said, that this inference would be just, if the power of declaring war had not been vested in the legislature; but that this power naturally includes the right of judging, whether the nation is or is not under obligations to make war. The answer is, that however true this position may be, it will not follow, that the Executive is in any case excluded from a similar right of judgment, in the execution of its own functions.

lege to which the President is entitled.⁹⁷ Even with regard to questions of individual rights, the political branches of government may address the same question courts have addressed, and act on the basis of a different conclusion. For instance, Congress may forbid some governmental actions as invasions of citizens' constitutional rights even if a court found those actions to be constitutional.⁹⁸

When issues of overlapping responsibilities arise, one branch of government will sometimes defer to another because circumstances make a decision by that other branch particularly appropriate. For instance, courts sometimes defer to legislatures with respect to the need for certain measures enabled by constitutionally enumerated powers⁹⁹ or with regard to the appropriate level of statutory specificity.¹⁰⁰ Courts also defer to executive decisions in cases regarding military and foreign policy,¹⁰¹ turning to the executive branch when called

97. See *United States v. Nixon*, 418 U.S. 683, 703-13 (1974) (holding that determining scope of President's privilege is province and duty of court); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 446-55 (holding Act of Congress to archive Presidential materials from Nixon administration did not violate executive privilege on its face). See generally LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 209-13 (1985) (describing Congress's power to hold officials in contempt as a method of defeating executive privilege); PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 318-35 (1996) (containing materials regarding congressional-presidential confrontations over provision of information by administrative officials Ann Gorsuch and James Watt).

98. Generally the Supreme Court is viewed as setting the floor for constitutional requirements, not the ceiling. That is, the political branches of government are prohibited from acting in a manner that is less protective of constitutional rights, they may only act in a manner that is more protective of constitutional rights. See Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017, 1019 (1987). Moreover, the Fourteenth Amendment powers to enforce civil rights allow Congress to act when it ordinarily lacks power to do so, because it is attempting to pursue its conception of constitutional rights. See *Oregon v. Mitchell*, 400 U.S. 112, 131-34 (1970). But see *City of Boerne v. Flores*, 117 S. Ct. at 2162-72 (invalidating Religious Freedom Restoration Act because law exceeded Congress's power to enforce Fourteenth Amendment).

99. This has been the case where the Commerce Clause power is at issue. See NOWAK & ROTUNDA, *supra* note 55, at § 3.3; Gant, *supra* note 1, at 388, 414-18.

100. See *Yakus v. United States*, 321 U.S. 414, 425-26 (1944) ("Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.")

101. With respect to cases involving issues of foreign policy, the Court gives deference to the executive branch in part because a unified national voice is often required. See, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (stating courts should defer to express representation by executive branch that act of state doctrine should not be applied in particular judicial proceeding); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him,

upon to decide such questions as whether a regime is the legitimate government of a country,¹⁰² whether “act-of-state” immunity should apply,¹⁰³ or whether a state of war or domestic insurrection exists.¹⁰⁴

The Senate defers to the President with respect to the nomination of executive branch officials (and, albeit to a lesser extent, Supreme Court Justices).¹⁰⁵ While some contend the Senate merely rubber-

and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.”); *Dellums v. Bush*, 752 F. Supp. 1141, 1145 (D.D.C. 1990) (stating that in certain situations, courts should defer to determinations by other branches that hostilities qualify as war.); *cf.* *Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating the Judiciary must defer to other branches in cases involving a political question); *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952) (“[N]othing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require [the judicial branch] to equate [its] political judgment with that of Congress.”). *See generally* JONATHAN I. CHARNEY, *JUDICIAL DEFERENCE IN FOREIGN RELATIONS, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 98, 104-05 (Louis Henkin et. al. eds., 1990).

102. *See, e.g.*, *United States v. Pink*, 315 U.S. 203, 228-31 (1942); *United States v. Belmont*, 301 U.S. 324, 328 (1937); *The Maret*, 145 F.2d 431, 440-42 (3d Cir. 1944); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 cmt. a, § 205 note 3 (1987).

103. *See, e.g.*, *First Nat’l City Bank*, 406 U.S. at 768 (Rehnquist, J., plurality opinion) (“We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that the application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 note 8 (1987). The “act-of-state” doctrine prohibits courts from inquiring into the validity of acts of a foreign government within its own territory. *See generally* TRIBE, *supra* note 95, § 3-13 n.44 at 102-04.

104. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) at 670; *Dellums*, 752 F. Supp. at 1145 (“That is not to say that, assuming that the issue is factually close or ambiguous or fraught with intricate technical military and diplomatic baggage, the courts would not defer to the political branches to determine whether or not particular hostilities might qualify as a ‘war.’”).

105. *See* STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994); ROBERT A. KATZMANN, *COURTS AND CONGRESS* 12 (1997) (explaining deference on executive appointments). Congress has the power to “advise and consent” to nominations of Executive Branch officials as well as judges, and though many have said that the Court plays too passive a role in the process, at least some deference is clearly appropriate. *See* CARTER, *supra*, at 11-14, 31-37; JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 80-84, 377, 379-80, 381, 384 (1953); Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989); *Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146 (1988).

stamps presidential nominees,¹⁰⁶ few suggest the Senate should give no deference to the President when he nominates a candidate who falls within a broad range of acceptable character and ideology. The political branches of government may defer to the courts. Even some who argue that Congress and the President have the power to interpret the Constitution independently of the Supreme Court suggest that the political branches of government accord some deference to the Supreme Court's constitutional decisions.¹⁰⁷

Statutory interpretation is an area in which there is coordinate responsibility between courts and the political branches.¹⁰⁸ The task of interpreting statutes requires the interpreter to determine the interpretive principles it will employ. Thus, courts clearly have a role in shaping the principles of interpretive methodology. However, the text of the Constitution, in particular the clauses giving Congress the power to create inferior courts and to make all laws "necessary and proper" for carrying out expressly granted powers, allows Congress to prescribe the rules by which courts will decide cases.¹⁰⁹ This reading of the Constitution has been adopted by courts in other contexts.

106. See, e.g., CARTER, *supra* note 105; LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUDGES SHAPES OUR HISTORY* (1985).

107. See, e.g., Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585, 587-88 (1975); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 *GEO. L.J.* 347, 362-64 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *GEO. L.J.* 217, 331-37 (1994).

108. The responsibility for crafting interpretive doctrines is certainly not explicitly assigned to any particular branch of government in the text of the Constitution, as Schacter suggests. See Schacter, *supra* note 10, at 651.

109. See *Hanna v. Plumer*, 380 U.S. 460, 470-71 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (holding Congress has power to regulate practice and procedure of federal courts); S. REP. NO. 101-416, at 9-12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6811-15 (stating Congress has power to enact rules for courts); H.R. REP. NO. 99-422, at 5-7 (1985) ("Congressional power to regulate practice and procedure in federal courts has been acknowledged by the Supreme Court since the early days of the Republic and is now assumed without question by the courts."). Yet, such an argument is perhaps weaker with respect to interpretive method since interpretive method is to be applied by the Supreme Court, as well as by the lower federal courts. The Supreme Court, unlike the lower federal courts, is created by Article III of the Constitution, not by a statute enacted pursuant to Congress's power to create inferior courts.

The Court's opinion in *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871), contains a suggestive passage to the contrary—that Congress can pass laws but not specify judicial rules of decision. *Id.* at 146. However, that passage in *Klein* has not been broadly interpreted, and indeed, in the context of rebuttable presumptions, this concept has ultimately been rejected. See *Vlandis v. Kline*, 412 U.S. 441 (1973); NOWAK & ROTUNDA, *supra* note 55, at § 13.6; TRIBE, *supra* note 95, § 16-32, at 1609, § 16-34.

Moreover, interpretive principles influence the substance of statutes. Congress must retain some power to address issues of interpretive methodology in order to protect its ability to establish substantive policies.

These arguments have received attention in debates regarding the authority to promulgate the rules of procedure and evidence that govern judicial proceedings. Most scholars believe courts and legislatures share authority over these rules.¹¹⁰ The manner in which litigation proceeds clearly affects the internal functioning of the courts and the courts must retain some power to control their own operations.¹¹¹ On the other hand, the theory noted above—based on the text of the Constitution—and the argument grounded upon the substantive impact of procedural and evidentiary rules have both generally been accepted as establishing the Legislature's right to participate in the promulgation of procedural and evidentiary rules.¹¹² In the absence of express statutory provisions, courts have the power to specify procedure; however, the political branches have the power to revise or supersede such procedural rules.¹¹³

110. See A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958); Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into Federal Rules of Evidence*, 57 TEX. L. REV. 167 (1979); WEINSTEIN, *supra* note 26, at 92. However, at least one noted scholar has also asserted that the Judiciary has exclusive authority over procedural rules. See John H. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). In addition, some courts have asserted exclusive control over judicial procedure. The New Jersey Supreme Court has held that rules promulgated by the Supreme Court are not subject to legislative revision. See *Winberry v. Salisbury*, 74 A.2d 406 (1950); see also *Lombardo v. Seydow-Weber*, 529 N.W.2d 702, 704-05 (Minn. App. 1995) (stating that while legislature creates law, it has no constitutional authority to modify or overrule court rules of procedure). But see *Crocker v. First Hudson Assoc.*, 569 F. Supp. 97, 103 (D.N.J. 1982) (noting that in no reported case had New Jersey courts applied *Winberry* to invalidate statute enacted following promulgation of court rule). Such state cases are based largely on the drafting history of the particular state constitution.

111. See generally FELIX F. STUMPF, *INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY* 6-9 (1994) (outlining inherent power of Judiciary). See, e.g., *Carter v. Commonwealth*, 32 S.E. 780, 785 (1899); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1319-22 (1993); *infra* note 131 and accompanying text.

112. See *Hanna*, 380 U.S. at 472 (stating constitutional provision for federal court system, augmented by "necessary and proper" clause, carries with it Congressional power to make rules governing practice and pleading in those courts); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (stating Congress has power to regulate practice and procedure of federal courts.).

113. See Levin & Amsterdam, *supra* note 110, at 3-4; Martin, *supra* note 110, at 182-83; Mullenix, *supra* note 111, at 1321-22; Redish, *supra* note 29, at 727-28 (stating courts have inherent power to develop rules by common law methods); Tyrell

B. Why Courts Should Defer to Legislatures

At least three considerations suggest that some deference is due legislatures with respect to principles of statutory construction. First, the concepts of democracy and majoritarianism extend not only to substantive issues, but also procedural ones. Procedural rules arguably should be subject to more control by a “disinterested” antimajoritarian institution like the Judiciary (or be established in a constitutive document that is difficult to amend, like a Constitution)¹¹⁴ to ensure that government will be responsive to the views of future majorities.¹¹⁵ Procedures can be employed to entrench substantive decisions and thus make them relatively immune to change by later majorities. In particular, if all citizens possess equal influence over legislative decisions, substantive decisions can be changed when majorities change. If current majorities can establish procedures that give them greater influence over legislative decisions than other citizens, a later majority may not be able to change substantive rules because of the inordinate influence that the procedures give to the citizens who once constituted the majority but have since become the minority. For example, new urban or suburban majorities in a state may not be able to change policies established by the old rural majority in a state whose legislature is as badly proportioned as the Tennessee legislature was prior to *Baker v. Carr*.¹¹⁶ Nevertheless, citizens do not lose the entitlement to decide an issue by majority rule merely because it is procedural, even though the procedure may change substantive results or give some citizens more influence than others. If a majority of elected representatives believes that courts should not have the power to overturn statutes unless those statutes contravene the Constitution, that judgment is surely entitled to some respect from the Judiciary, even when courts are considering how to exercise their power to interpret statutes. Refusing to respect such a judgment shows disregard for

Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 489, 493 (1937). Reliance on such inherent power to promulgate rules of procedure and evidence has been unnecessary because Congress has long granted the federal courts the power to promulgate procedural rules. See Mullenix, *supra* note 111, at 1323-27, 1330-1; WEINSTEIN, *supra* note 26, at 55-63. Currently, under the Rules Enabling Act, 28 U.S.C. §§ 2071-77 (1994), the Supreme Court promulgates adjective rules and Congress then reviews those rules before they take effect. See 28 U.S.C. §§ 2072, 2074 (1994).

114. Some procedural issues are resolved by the Constitution, but many remain undetermined. See Neil K. Komisar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 406-08 (1984). See generally ELY, *supra* note 18, at 87, 92.

115. See ELY, *supra* note 18, at 105-34.

116. 369 U.S. 186 (1962).

popular decisionmaking. Similarly, if a majority of legislators believes that legislative history is an integral part of statutory law, that judgment is entitled to substantial respect unless foreclosed by the Constitution. The Legislature's judgments regarding its own internal mode of operation are especially entitled to respect.¹¹⁷

Second, statutory interpretation affects the substantive rights and responsibilities established by Congress. As the institution responsible for specifying substantive law, Congress must have the power to exercise some control over interpretive techniques.¹¹⁸ Standard definitions clauses,¹¹⁹ legislatively-created "clear statement" rules,¹²⁰ and

117. See *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("[I]n the performance of assigned constitutional duties each branch of the government must initially interpret the Constitution, and the interpretation of its power by any branch is due great respect from the others."). Of course, in *Nixon* the Court ultimately rejected the President's views.

118. This argument is similar to the argument regarding the need to control civil procedure and evidence rules—rules of evidence and civil procedure are incidental to Congress's power to create a substantive right because such rules will greatly affect citizens' ability to vindicate such rights. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982); Levin & Amsterdam, *supra* note 110, at 13-14, 18-24, 36-37; Martin, *supra* note 110, at 193-95; WEINSTEIN, *supra* note 26, at 55; Williams, *supra* note 113, at 462-63.

119. Legislatures routinely define terms in statutes, and often provide generic dictionary acts. See, e.g., 1 U.S.C. §§ 1-7 (1994 & Supp. II 1996); N.J. STAT. ANN. § 1:1-2 (West 1992 & Supp. 1998). The definitions sections of statutes govern even if the definitions vary greatly from the ordinary meaning of the words used. POPKIN, *supra* note 17, at 210. In other words, the legislature may "create its own dictionary." *Commonwealth v. Massini*, 188 A.2d 816, 817 (Pa. Super. 1963); *accord* *Pathos v. Hobby*, 128 F. Supp. 151, 152 (D.D.C. 1955); *Northwest Ind. Educ. Ass'n v. School City of Hobart*, 503 N.E.2d 920, 921 (Ind. Ct. App. 1987); *Jackson Dist. Library v. Jackson County No. 1*, 380 N.W.2d 112, 115 (Mich. App. 1985); *State ex rel. Heck's Inc. v. Gates*, 141 S.E.2d 369, 379 (W.Va. 1965). Perhaps, however, judicial acceptance of legislative definitions can very easily be defended because the use of a definitions section is just one manner in which the legislature expresses its commands.

120. Examples appear in the Administrative Procedure Act (APA) and the Religious Freedom Restoration Act of 1993 (RFRA). The APA provides that a "subsequent statute may not be held to supersede or modify" several portions of the APA "except to the extent that it does so expressly." 5 U.S.C. § 559 (1994 & Supp. II 1996). Similarly, section 6(b) of the RFRA provides that: "Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act." Pub. L. No. 103-141, § 6(b), 107 Stat. 1488, 1489 (1993). See, e.g., TEX. GOV'T CODE ANN. § 311.022 (West 1998) (establishing clear statement rule that absent express indication to the contrary, statutes are presumed to operate prospectively); 50 U.S.C. § 1621(b) (1994) (establishing clear statement rule that absent express indication to contrary, statute shall not be superseded by subsequent law). See generally Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 220 (1994) (noting that legislatures may forbid courts from using clear statement rules, or may create their own clear statement rules). At least the examples from federal legislation seem to address questions of setting priorities between potentially conflicting statutes.

certain other interpretive provisions are intimately intertwined with substantive law. Interpretive provisions specifying parts of legislative history to be considered,¹²¹ instructing courts to accord executive construction of statutes no deference,¹²² or establishing the significance of a failure to enact a law disapproving an agency regulation,¹²³ relate less clearly to particular substantive legislative decisions. The concern to ensure that Congress can continue to exercise substantive control is most likely to affect those metademocratic theories that focus on substantive outcome rather than process.¹²⁴

Third, some legislative control over interpretation is essential to reserve sufficient autonomy for the legislature to fully exercise its role in the constitutional scheme. Central to the theory of separation of powers is the principle that each branch of government has the inherent power to ensure its continued existence, protect itself from other branches' encroachments, and control its own operations.¹²⁵ Courts have long recognized such inherent powers,¹²⁶ and each branch's interpretation of its own power is due great respect.¹²⁷

Thus, when litigants challenge congressional choices regarding the organization of Congress or legislative procedure, the Judiciary almost invariably refuses to adjudicate the claims.¹²⁸ Though invoc-

More generally, such statutes may be seen merely as a legislative indication of substantive policy values that have particular importance. In addition, such "clear statement" rules inevitably affect practical substantive rights. *See also supra* note 81.

121. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (setting forth aspects of legislative history that courts may refer to in deciding whether statute was retroactive).

122. *See* S. 1080, 97th Cong. § 5 (1982) (Bumpers Amendment); 128 CONG. REC. 5302 (1982).

123. *See* 5 U.S.C. § 801(g) (1994 & Supp. II 1996) (provision in legislative veto statute providing that courts may not draw any inference from Congress's refusal to veto statute).

124. I noted earlier that some metademocratic theories focus on legislative outcomes as opposed to process. *See supra* notes 17-18 and accompanying text.

125. *See* *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 209 (1821); FISHER, *supra* note 97, at 18-24; Mullenix, *supra* note 111, at 1283, 1319-22; THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961) ("No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.").

126. Indeed, with respect to Congress, the need for such autonomy is recognized in several clauses of the Constitution. *See* U.S. CONST., art. I, § 5, cl. 2 (Rulemaking Clause); U.S. CONST., art I, § 6, cl. 1 (Speech & Debate Clause and legislator immunity from arrest while attending legislative sessions).

127. *See* Gant, *supra* note 1, at 395, n.182.

128. *See, e.g.,* *Nixon v. United States*, 506 U.S. 224, 228 (1993) (involving Senate impeachment procedures); *Gregg v. Barrett*, 771 F.2d 539, 549 (D.C. Cir. 1985) (challenging practices of compiling the *Congressional Record*); *Moore v. U.S. House of*

ing several different doctrines,¹²⁹ at base these holdings reflect the courts' respect for Congress's power to organize itself. The Executive Branch also requires autonomy, as discussed in cases involving the President's ability to discharge subordinates and obtain advice.¹³⁰ The Judiciary likewise enjoys inherent powers to hold litigants in contempt,¹³¹ promulgate procedural rules governing litigation and trial

Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) (challenging constitutionality of Tax Equity and Fiscal Responsibility Act on grounds it improperly originated in the Senate); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1181 (D.C. Cir. 1983) (Bork, J., concurring) (challenging distribution of committee seats in U.S. House of Representatives); *Consumers Union v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1347 (D.C. Cir. 1975) (challenging refusal to accredit *Consumer Reports* to press gallery of U.S. House of Representatives); *Skaggs v. Carle*, 898 F. Supp. 1, 2 (D.D.C. 1995), *aff'd*, 110 F.3d 831 (D.C. Cir. 1997); *see also* Bell, R-E-S-P-E-C-T, *supra* note 19, at 16-17 & n.54.

As Judge Bork explained in his concurring opinion in *Vander Jagt*, "Appellants' complaint invites federal courts to participate extensively in the internal processes of Congress. We should decline the invitation because of the consequences of accepting it. . . . There is the very real problem of a lack of judicial competence to arrange complex, organic, political processes within a legislature so that they work better." 699 F.2d at 1181-82.

129. Among them, standing, *see* *United States v. Richardson*, 418 U.S. 166 (1974); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), ripeness, *see* *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring), political question, *see* *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring), and deference to the Senate's interpretation of the Constitution, *see* *Nixon v. United States*, 506 U.S. at 224. *See generally* POPKIN, *supra* note 17, at 927. The United States Court of Appeals for the District of Columbia, which decides many of these cases, increasingly uses the doctrine of equitable discretion to dismiss claims involving the operation of the other two branches of government, particularly the Legislative Branch. *See, e.g.*, *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir. 1988); *Gregg v. Barrett*, 771 F.2d 539, 543-46 (D.C. Cir. 1985) ("Since *Riegle*, the [D.C. Circuit] has firmly established the doctrine of equitable discretion as the preferred method for coping with separation of powers concerns in suits by congressional plaintiffs where the ill in question could clearly be rectified by congressional action."); *Riegle v. Fed. Open Market Comm.*, 656 F.2d 873 (D.C. Cir. 1981).

130. *See* *United States v. Nixon*, 418 U.S. 683, 705-06 (1974); *Myers v. United States*, 272 U.S. 52, 117 (1926); *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993); *cf.* *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441-50 (1977) (discussing claim that potential disclosure of communications given to President in confidence would impede the "ability of future Presidents to obtain the candid advice necessary for effective decision-making").

131. *See* *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 793-96 (1987); *United States v. Hudson*, 11 U.S. (7 Cranch) 32-34 (1812); STUMPF, *supra* note 111, at 16-17; Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

conduct,¹³² secure adequate funding,¹³³ and invalidate legislative limitations on the manner in which courts conduct their business.¹³⁴

Metademocratic interpretive techniques could change the manner in which a legislature operates. New textualist interpretation could affect the specificity of statutes or the manner in which legislative records are compiled. Congress should clearly have power to combat judicial pressure to change legislative procedures. If Congress concluded that only statutory text should be considered authoritative, because of the salutary effects that would have on the legislative process, judicial adherence to a metademocratic theory that honored legislative history would frustrate Congress's attempt to change the manner in which it operates.¹³⁵ The *Chevron* doctrine has compelled over-inclusion of details in statutes, with some undesirable consequences.¹³⁶ Judge Calabresi's argument that statutes should be treated like case law threatens to diminish Congress's control of its agenda, because if courts can overrule statutes, they can also force legislative reconsideration of an issue.¹³⁷

132. See STUMPF, *supra* note 111, at 17-20. See generally *supra* note 111.

133. See Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993); see also STUMPF, *supra* note 111, at 49-50.

134. See Levin & Amsterdam, *supra* note 110, at 29-32; see, e.g., *Vaughan v. Harp*, 4 S.W. 751 (Ark. 1887) (legislature may not require court to produce written opinion); *Houston v. Williams*, 13 Cal. 24 (1859) (same); *State ex rel. Kostas v. Johnson*, 69 N.E.2d 592, 596 (Ind. 1946) (legislature cannot deny jurisdiction to a judge for a case that the judge has had pending for more than ninety days); *Burton v. Mayer*, 118 S.W.2d 547 (Ky. 1938) (legislature cannot specify time after decision during which mandate cannot be issued); *State ex rel. Watson v. Merialdo*, 268 P.2d 922, 924 (Nev. 1954) (legislature cannot require judge to file affidavit asserting that judge has no cases pending decision before getting paid); *Schario v. State*, 138 N.E. 63 (Ohio 1922) (legislature cannot specify the time in which a case is to be heard); *Atchison T. & S.F. Ry. Co. v. Long*, 251 P. 486 (Okla. 1926) (same).

135. Indeed, new textualists assert that the change in the Supreme Court's use of legislative history over the course of this century, from using it infrequently to using it regularly, had produced changes in the legislative process. See Bell, *Using Statutory Interpretation*, *supra* note 19, at 110-12.

136. See *id.* at 129 n.136; Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. REV. 175, 180 (1992) (discussing untoward consequences); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 825-27 (same).

137. At times a legislature's failure to take up an issue may be a symptom of lethargy, political cowardice, or undue preoccupation with other matters, and perhaps a nudge from the court is salutary. But just as there are reasons for courts to avoid issues, see *supra* pp. 46-62, it may be appropriate for a legislature to leave unresolved issues involving intense disagreement between roughly equal groups of people that consider the issues very important. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 4-10, 36, 39 (1996); Richard H. Pildes & Elizabeth S. Anderson,

C. *Why Courts Should Retain Some Interpretive Independence*

Although the Judiciary should remain mindful of the respect it owes coequal branches of government, courts must exercise some independent judgment. First, some metademocratic issues implicate constitutional values, which are entitled to greater weight than popular desires.¹³⁸ Courts can also help constrain democratic excesses, such as the entrenchment of ruling majorities who prevent the political system from responding to future majorities by adopting unfair procedural rules.¹³⁹

Second, metademocratic questions may not receive sufficient and dispassionate legislative attention.¹⁴⁰ Members of Congress focus more on concrete policy issues than abstract constitutional or metademocratic theories. Legislators are likely to treat constitutional issues as secondary to policy considerations and to view such constitutional considerations as useful primarily as tools to help the legislator prevail on a particular policy issue.¹⁴¹ Metademocratic arguments would likely reflect the same pattern.

Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 COLUM. L. REV. 2121, 2166-75 (1990). There is little reason that courts, rather than legislatures, should make such judgments.

Using Judge Calabresi's approach, a court can also deprive a congressional majority of the ability to entrench a statute, i.e., the ability to set the default rules in favor of the continued existence of the statute. A legislature could no longer establish a policy that would remain in effect until the current losing coalition amasses a supermajority to overturn the legislation. Rather, the Court can decide at some future point that the policy embodied in the current statute will remain in force only if today's victors again amass a supermajority to reenact the policy.

138. See Schacter, *supra* note 10, at 651-52. They reflect what Henry Monaghan would call a kind of "constitutional common law." For example, the interpretive issues will effect the position of the President, see Bell, *Using Statutory Interpretation*, *supra* note 19, at 152-53, the ability of majorities to prevail, see *id.* at 110, citizens' ability to hold electoral officials responsible for political choices, see Bell, R-E-S-P-E-C-T, *supra* note 19, at 10-13, 45 & n.211, and due process considerations regarding citizens' ability to ascertain the law, see Bell, *Using Statutory Interpretation*, *supra* note 19, at 109, 111-12, 154.

139. For John Hart Ely, this justifies constitutionalizing issues of political procedure. See ELY, *supra* note 18.

140. This, of course, has been a major argument with respect to rules of civil procedure. See John H. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928); Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 301-02; Levin & Amsterdam, *supra* note 110, at 10; Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 735-36 (1995); Mullenix, *supra* note 111, at 1336-37 (decrying prospect of greater interest group influence if Congress becomes involved in framing procedural rules).

141. See Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587-90, 609 (1983); see also Schauer, *supra* note 64, at 92 & n.61; Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95 (1992). *But cf.*

Third, interpretive issues go beyond institutional interests, affecting the rights and responsibilities of individuals who cannot depend on the political branches of government to fully protect those rights. For instance, perhaps the political branches' decisions with respect to the appropriate specificity of statutes should not be trusted, since vague statutes allow elected officials to avoid responsibility for deciding difficult issues. Such vague statutes may benefit legislators at the expense of the general public.¹⁴²

Fourth, the political branches' metademocratic judgments tend not to be enacted into law and thus are not authoritative in any conventional sense.¹⁴³ However, courts should give cautious deference to legislative customs and practices. Even though Congress has never formally voted to require that legislative history, or particular aspects of legislative history, be considered in interpreting statutes, it seems reasonably clear that, over a long period of time, a large majority of Congress has rejected the absolutist position that legislative history

Louis Fisher, *Constitutional Interpretation By Members of Congress*, 63 N.C. L. REV. 707 (1985) (response to Mikva article). See generally DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966) (chronicling congressional consideration of constitutional issues from early Republic to 1960s). Mikva argues that Congress is incapable of playing a role in making constitutional judgments. See Mikva, *supra*, at 609-10. He argues that over time Congress has not engaged in serious constitutional dialogue, nor is it likely to do so given the time constraints on members, which means they can afford to gain only a limited understanding of bills, and the pressure to address the substance of legislation as opposed to constitutional problems. See *id.*

Of course, courts may not be dispassionate either. See Fisher, *supra*, at 747 & n.309. Although many issues do not affect a court's own power, the interpretive approach chosen may affect the result in a particular case or range of cases in which the judges are more interested in results than in interpretive methodological rigor. That is, there may be many hard cases that make bad law. See *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law."). And, in fact, courts are rarely consistent in their interpretive methodology. See Bell, *Using Statutory Interpretation*, *supra* note 19, at 147 n.236.

142. See e.g., *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting) (criticizing OSHA for vague directions to administrative agency); *Industrial Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 685, 687-88 (1980) (Rehnquist, J., concurring) (same); ELY, *supra* note 18, at 131-34; THEODORE LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 126, 148-49, 155 (1969); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 84-94 (1993) (stating that Congressional delegation of authority amounts to responsibility shifting).

143. Indeed, Schacter sees a place for legislatures to "enter into dialogue" by setting forth their own metademocratic assumptions, and indeed suggests that they can largely supersede judicially-created metademocratic interpretive principles. Schacter, *supra* note 10, at 658 & n.331. But she recognizes the Legislature assuming preeminence only by the enactment of statutes, not by force of assumptions embodied in legislative custom and practice.

should never be used to interpret an ambiguous statute. Even though there has been no formal vote stating that statutes remain in effect until they are repealed or that they cannot be “overruled” by courts (as Judge Calabresi proposes), it seems fairly clear that a majority of Congress would reject Judge Calabresi’s approach. At least jurists and scholars should consider whether congressional practice and custom reflect certain metademocratic conceptions that conflict with the metademocratic conceptions they themselves propose.

In short, metademocratic theorists have erred in failing to consider the views of the political branches of government in proposing their theories. Interpretive approaches should reflect not only the Judiciary’s vision of how the political branches should do their jobs, but also executive and legislative ideas on those questions. There is a place for deference to legislative metademocratic judgments, as well as for independent judicial consideration of metademocratic issues.

CONCLUSION

The trend toward metademocratic interpretation is a mixed blessing. To the extent that it encourages courts to assume the task of reforming the behavior of legislative bodies through strategic construction of statutes, this movement threatens to deprive individual litigants of a forum intended to address their rights, frustrates legitimate legislative efforts to establish substantive policy, and imposes inappropriate burdens on Congress. However, judges should consider and enunciate more forthrightly the conception of democracy that underlies their interpretive theories, as metademocratic theorists suggest and as Schacter applauds. Ultimately, judges should accord some deference to legislators’ views of the legislative process (views which they will themselves no doubt influence by their interpretive methodology), to the extent they can be discerned. At the same time, courts must ensure that those views comport with some reasonable conception of the legislative process.