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Congress in Court

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ABSTRACT

Congress rarely participates in litigation about the meaning of federal law. By contrast, the executive branch joins in federal litigation on a regular basis as either a party or amicus curiae. Congress simply assumes that the president's lawyers adequately represent its interests save in those rare instances when the two branches have a direct conflict. This Article questions that assumption.

The federal judiciary's approach to statutory and constitutional interpretation diminishes Congress's influence, often to the benefit of the executive branch. The rise of textualism, the canon of constitutional avoidance, the reliance on *Chevron* deference, and the courts' reluctance to second-guess the executive branch on issues of national security and foreign affairs all lead to judicial decisions that favor the president's preferences over those of Congress. Furthermore, Congress rarely challenges executive encroachment on its most basic institutional prerogatives, such as the executive's use of intrasession recess appointments to avoid Senate confirmation. Congress remains silent even when the executive branch takes positions in ideologically charged cases that are at odds with the preference of the majority of its members. Congress's poor track record in all these areas should come as no surprise in an adversarial system in which the executive is well represented and Congress is not.

Congress can and should change this dynamic by becoming a more active participant in federal litigation. By speaking on its own behalf in court, Congress could both protect its institutional interests against executive encroachment and open direct lines of communication with the executive and judiciary that may improve the quality of judicial decisions about the meaning of federal law.

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INTRODUCTION

On February 23, 2011, the Obama administration announced that it would no longer defend the constitutionality of the Defense of Marriage Act.[1] Shortly thereafter, the leader of the Republican-controlled U.S. House of Representatives declared that the "constitutionality of this law should be determined by the courts—not by the president unilaterally," and announced that the House would intervene in litigation to support the Act.[2] Although not unprecedented, it is rare for a president to refuse to defend a federal statute against constitutional challenge, and similarly unusual for either chamber of the U.S. Congress to join in litigation, which is why these developments were widely reported by the press.[3] But in fact the incident is just a particularly blatant example of a more common problem: The executive branch often fails to represent Congress's interests in court.

U.S. Department of Justice (DOJ) attorneys claim to argue cases "on behalf of the United States,"[4] but in truth these lawyers articulate the views of the executive branch, which are often at odds with those of Congress. DOJ attorneys work for the political appointees who serve at the pleasure of the president, and their mission includes promoting the ideological and institutional goals of the current administration.[5] Not only do Congress and the president sometimes disagree on their preferred results in specific cases, they also have different perspectives on

1. *See* Letter From Attorney Gen. to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.
2. *See* Press Release, John Boehner, Speaker of the House, House Will Ensure DOMA Constitutionality is Determined by the Court (Mar. 9, 2011) ("House General Counsel has been directed to initiate a legal defense of [the Defense of Marriage Act].").
3. *See, e.g.*, Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1 ("[I]t is rare for an administration not to defend the constitutionality of a statute . . . ."); Jennifer Steinhauer, *House Republicans Move to Uphold Marriage Act*, N.Y. TIMES, Mar. 5, 2011, at A16.
4. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Applications for a Stay at 1, Garcia v. Texas, 131 S. Ct. 2866 (2011) (Nos. 11A1, 11A2), 2011 WL 2630156 ("The Solicitor General, on behalf of the United States, respectfully files this brief as amicus curiae in support of the applications for a stay of execution."); Brief for the United States as Amicus Curiae Supporting Petitioner at 2, Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 551 (2010) (No. 09-529), 2010 WL 3426282 ("In response to this Court's invitation, the Solicitor General filed a brief at the petition stage on behalf of the United States as amicus curiae . . . .").
5. *See* LUTHER A. HUSTON, ARTHUR S. MILLER, SAMUEL KRISLOV & ROBERT D. DIXON, JR., ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 52 (1968) ("The president expects his Attorney General . . . to be his advocate rather than an impartial arbiter."); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 512–13 (2008) (describing presidential control over both political appointees and line attorneys at the U.S. Department of Justice (DOJ)).

methodological issues, such as deference doctrines, standards of scrutiny, and the place of legislative intent in statutory interpretation.

The executive is least likely to represent Congress's interests during periods of divided government. Republicans and Democrats often disagree about the best results in ideologically charged cases, such as those concerning abortion rights, open government, and government-mandated health insurance. And divided government is now the norm; at least one of the two houses of Congress has been controlled by a party that differs from the president in thirty-two of the last forty-four years, or 73 percent of the time.[6] Particularly during such periods, Congress cannot rely on the president's lawyers to represent its interests in court.

As matters stand today, however, the executive branch plays the dominant role in federal litigation. The DOJ participates in more than one-third of all cases in the federal courts, where it actively lobbies for its favored interpretations of federal law.[7] Its highly skilled lawyers shape the courts' agendas and frequently prevail on the merits, particularly in the U.S. Supreme Court. DOJ attorneys have established a reputation as trustworthy sources of information, and federal judges rely on these lawyers to guide them through complex disputes about the meaning of federal law.[8] No other institution appears before the federal courts so frequently, or is as influential, as the executive branch of the federal government.[9] By contrast, Congress mostly sits on the sidelines save in a few rare cases in which its institutional interests are directly at stake[10] or in which the executive refuses to defend the constitutionality of a federal statute.[11]

Constitutional challenges to the president's exercise of his recess appointment power illustrate the problem. Executive branch lawyers regularly defend such appointments, even when the president pushes constitutional boundaries by placing officials in office when the U.S. Senate adjourns only for a few days during an

6. That percentage has decreased over the last decade. Between 1969 and 2000, government was divided 81 percent of the time. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2330–31 (2006).

7. The DOJ participated in 36.5 percent of all civil, criminal, and appellate cases commenced in the federal courts in fiscal year 2009 (October 1, 2008–September 30, 2009). The data were gathered from the Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts, Tables C-1, D-1, and B-1A. I am grateful to Mark Motivans at the DOJ's Bureau of Justice Statistics for generating a spreadsheet with the relevant data to assist me with this project.

8. *Cf.* Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 570 (2003).

9. *See supra* Part II.A.

10. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983).

11. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

ongoing session.[12] Although individual senators publicly criticize such intrasession recess appointments,[13] the Senate has never participated in litigation challenging the practice, allowing the executive branch's defense of its actions to go uncontested by the very institution whose constitutional role is at risk.[14] For example, although individual senators publicly criticized President Obama's recess appointment of Richard Cordray to lead the new consumer protection agency, the Senate has thus far not joined in legal challenges to the constitutionality of his appointment.[15]

Bartlett v. Strickland,[16] decided in spring 2009, is another example of a case in which Congress would have benefitted from separate representation. In *Bartlett*, the Republican Bush administration filed an amicus brief arguing that the Voting Rights Act (VRA)[17] did not prohibit dilution of "crossover districts"—that is, districts in which a minority group made up less than 50 percent of the population but was of large enough size to join with crossover voters to elect the minority's preferred candidate. Democrats have traditionally taken a broader and more aggressive view of the VRA's restrictions than Republicans,[18] and Democratic candidates are presumed to benefit from an interpretation of the VRA that protects crossover districts from dilution.[19] Even though Democrats controlled both the House and the Senate at the time *Bartlett* was briefed and argued, neither chamber participated in the litigation. The Supreme Court ultimately issued a 5–4 decision concluding that the Act did not protect crossover districts, adopting much of the

12. *See, e.g.*, Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004).
13. *See, e.g.*, Robert Pear, *Baucus Objects to Recess Appointment*, N.Y. TIMES BLOG—THE CAUCUS (July 7, 2010, 3:33 PM), http://thecaucus.blogs.nytimes.com/2010/07/07/baucus-objects-to-recess-appointment.
14. A few senators have filed amicus briefs on their own behalf challenging the constitutionality of appointments that come during periods when the U.S. Senate has adjourned but is not in recess. *See, e.g.*, Response Brief of Plaintiffs-Appellees and Amicus Curiae Edward M. Kennedy, Pro Se, in Support of Plaintiffs-Appellees' Motion to Disqualify a Member of the Court on the Ground That His Recess Appointment Is Invalid, Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (No. 02-16424), 2004 WL 3589829. Briefs filed on behalf of individual members of Congress have had little influence over judicial decisions, as is discussed in more detail in Part II.B.
15. *See* Amanda Frost, *Power of Attorneys*, SLATE, Jan. 18, 2012, http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/why_congress_needs_effective_in_house_counsel_to_protect_its_own_interests_in_court_.html.
16. 556 U.S. 1 (2009).
17. Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973 (2006).
18. *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 22 (2008) (discussing the "conventional perception" that Democrats benefit from the VRA and that granting relief to VRA plaintiffs "benefits the Democratic Party in addition to minority voters"); *id.* at 24 (finding that judges appointed by Democrats were twice as likely to hold defendants liable under the VRA than judges appointed by Republicans).
19. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1504–05 (2008) (describing how majority-minority districts can "waste" Democratic votes, while crossover districts can maximize the number of Democrats elected to office).

Bush administration's reasoning. Of course, Congress's participation might not have made a difference in the outcome, but Congress could have at least provided the Court with the benefit of its perspective on the hard questions at issue in the case.

In addition to differing from the executive on substantive questions about the meaning of federal law, Congress naturally has a distinct perspective on a number of important interpretive issues. For instance, Congress has an institutional interest in promoting the use of legislative history and legislative sources of authority on questions of statutory interpretation.[20] It also has good reason to dislike substantive canons, such as constitutional avoidance and other clear statement rules.[21] And it is questionable whether Congress would, or should, support powerful deference doctrines that give the executive branch considerable leeway when implementing federal statutes.[22] Although Congress is a multimember body whose members will not always see eye-to-eye, these are all questions of institutional power about which most senators and representatives should agree.[23] Yet Congress rarely shows up to argue for its interests in court.

The first goal of this Article is to discuss the effect that the executive's presence, and Congress's absence, has on the judiciary's interpretation of federal law.[24] Turning from the descriptive to the prescriptive, the Article then proposes that Congress take a more active role in federal litigation, both to provide the courts with the legislative perspective on interpretive questions and to counter executive influence.[25] Legal scholars have catalogued the myriad ways in which Congress can seek to affect judicial decisions, such as through manipulation of federal jurisdiction, rigorous confirmation hearings, and adjustments to court size and voting procedures.[26] Oddly, none have examined in any detail the most basic and straightforward method for Congress to influence the outcome of judicial decisions: by participating in litigation about the meaning of federal law.

20. *See infra* Part I.A.
21. *See infra* Part I.A–I.B.
22. *See infra* Part I.A.
23. See *infra* Part I for further discussion of Congress's institutional interests in interpretation.
24. *See infra* Part I.
25. *See infra* Part III.
26. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.1 (4th ed. 2003) (describing congressional efforts to strip the federal courts of jurisdiction); Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons From the Past*, 78 IND. L.J. 73 (2003) (advocating for legislation that would bar the U.S. Supreme Court from invalidating an act of Congress absent a supermajority of at least six Justices in favor of doing so); Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154 (2006) (describing President Roosevelt's court-packing plan and Congress's reduction of the court from ten to seven in 1866).

By adding its voice in court, Congress would open a direct line of communication among all three branches of the federal government. Briefs filed on behalf of the House and the Senate would provide judges with a vital source of information from democratically accountable institutions that could assist them in interpreting vague constitutional provisions and applying outdated statutes to new circumstances. Congress's point of view may also upend many of the presumptions that underlie deference doctrines and canons of interpretation, forcing courts to reexamine interpretive rules that are based on inaccurate assumptions about what Congress prefers. Furthermore, the mere possibility that Congress might speak for itself could encourage the executive and legislative branches to work together to adopt joint litigating positions that serve both branches' needs.[27]

Admittedly, however, the idea of Congress regularly participating in litigation raises practical, constitutional, and theoretical concerns that have thus far prevented Congress from doing so.

First, it is not clear that Congress is capable of generating uniform preferences regarding the outcomes of specific cases. Scholars of statutory interpretation have long argued that congressional intent is an oxymoron because, as a multimember institution, Congress cannot be said to possess a single perspective on the meaning of the laws it enacts. All Congress can do is vote into law a text that reflects the horse trading, compromises, interest-group influence, arcane procedural rules, and irrational decisionmaking that defines the legislative process. If Congress cannot form a discernible intent about statutory meaning at the time it votes on the text, it will be equally incapable of generating a vision of how a statute or constitutional provision should be interpreted and applied in litigation.[28]

Second, encouraging Congress to play an active role in shaping the interpretation of its laws dangerously blurs the line between law declaration and law exposition—two activities that the U.S. Constitution carefully separates.[29]

Finally, Congress has a more effective way to shape federal law, at least on questions of statutory interpretation—it can simply amend the law to resolve the interpretive problem. In light of Congress's constitutional authority to legislate and the constitutional prohibition against congressional interpretation embodied in the separation of powers doctrine, skeptics would argue that Congress has no role to play in litigation about the meaning of federal law.

27. For a more detailed discussion of these benefits of increased congressional participation in litigation, see *infra* Part III.
28. *See infra* Part III.C.
29. *See infra* Part III.E.

Although each of these problems is worthy of further discussion, none are insuperable. As explained in more detail below, although congressional intent is a thorny concept, Congress nonetheless has identifiable interests when it comes to the interpretation of federal law. Furthermore, Congress is capable of making decisions and taking action despite inevitable differences of opinion among its members. After all, Congress manages to enact legislation through procedural devices that aggregate individual members' preferences. Congress can employ similar methods—such as setting rules, voting on resolutions, or delegating authority to congressional leadership or specific committees—to weigh in on cases about the meaning and application of federal law. Indeed, both houses already do so on occasion, the most recent being the House's decision to participate in litigation challenging the constitutionality of the Defense of Marriage Act (DOMA). Admittedly, the hierarchical executive branch is better than Congress at collective decisionmaking. But it is worth noting that the executive branch also comprises many different actors who have to work through disagreements, and yet it has overcome these hurdles in the interest of maintaining a credible and persuasive presence in court.[30] Congress should strive to do the same.

Nor does the Constitution bar Congress from participating in litigation over the meaning of federal law. Certainly, Congress cannot control judicial decisionmaking, but it can try to convince judges that its position is correct. When the House or the Senate files a brief, neither institution can purport to speak for the enacting Congress nor bind courts to its view of a statute or constitutional provision. Like any other party, however, Congress can attempt to persuade the courts to adopt its reading of the law or to employ its preferred interpretive methods.[31] The executive has long benefitted from its role as an institutional litigant; there is no constitutional reason for Congress to pass up the opportunity to be heard as well.

Finally, Congress's greater power to override judicial decisions regarding the meaning of federal statutes is no reason for it to forgo participating in such litigation. Enacting legislation is notoriously difficult, time consuming, and requires the cooperation of the president (or a two-thirds majority to override his veto).[32] Congress should not have to follow the same convoluted process when it seeks

30. *See infra* Part II.A.

31. *See* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008) (describing how experienced and highly skilled advocates shape the Supreme Court's docket and influence the Court's rulings on the merits).

32. *Cf.* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1405–09 (1988) (noting similar reasons to doubt that Congress's failure to override a judicial interpretation of a federal statute implies that Congress acquiesces in the court's view of that statute).

merely to share with judges its views on a previously enacted law. Furthermore, Congress cannot override decisions about the meaning of the Constitution, making it all the more important that it have an opportunity to influence the courts before final judgment.

The Article proceeds as follows. Part I lays out the problem, describing the interpretive theories and doctrines that have diminished Congress's influence over statutory and constitutional interpretation and concomitantly amplified the executive's voice. Part II contrasts the executive's extensive participation in litigation with Congress's near-total absence. Part III describes how Congress could become more actively involved in litigation and responds to obstacles and objections to Congress's participation in litigation. This Part concludes by noting the many collateral benefits that could come from more direct communication between courts and Congress.

I. CONGRESS'S WANING INFLUENCE OVER STATUTORY AND CONSTITUTIONAL INTERPRETATION

By almost any measure, Congress is losing influence in court. Most notable is the newfound frequency with which the Supreme Court invalidates statutes on constitutional grounds, leading some to question whether the Court continues to apply the traditional "presumption of constitutionality"[33] to its enactments.[34] Also significant are newly established constitutional obstacles to Congress's power to legislate,[35] as well as the judicially created doctrines and theories of interpretation that diminish Congress's role in statutory interpretation.[36]

If advocacy matters, then Congress's near-total absence from litigation has undermined its influence, particularly in those cases in which the executive branch takes positions at odds with Congress's interests. Whatever the cause, the trend is hard to deny: Congress's influence over constitutional and statutory interpretation is waning, even as the courts grant the executive greater discretion and broader deference to interpret and apply the law.

33. United States v. Morrison, 529 U.S. 598, 607 (2000).

34. *See, e.g.*, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 40 (2004) (reporting that from 1995 to 2003, the Supreme Court struck down an average of 3.67 federal statutes per year, more than double the average for the Warren Court); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001) (criticizing the Court for "repeatedly . . . invalidat[ing] federal legislation"). Of course, the Supreme Court may invalidate more federal laws today both because there are more federal statutes on the books and because Congress may take less care to enact constitutionally sound legislation.

35. *See infra* Part I.B.

36. *See infra* Part I.A.

This Part describes how the courts' current approach to statutory and constitutional interpretation undermines legislative interests, often to the benefit of the executive, and explains why Congress should join in litigation more often to promote interpretive theories and doctrines that take legislative preferences into account.

A. Statutory Interpretation

1. Textualism

Through the first half of the twentieth century, legislative intent guided judicial interpretation of statutes.[37] Although the text of the statute has always been an important indicator of intent, a judge's interpretation was also informed by the statute's historical context, its relationship to other statutes and common law, as well as the accompanying committee reports, hearings, and floor debates.[38] If these other sources contradicted or clarified the language of the statute, the court would ignore the text in favor of implementing Congress's intentions.[39]

Beginning in the 1980s, textualists mounted a sustained attack on intent-based theories of interpretation. Led by Justice Scalia on the Supreme Court and Judge Frank Easterbrook on the Seventh Circuit, textualists disclaim the notion that there is such a thing as legislative intent, declaring that a multimember institution like Congress cannot form a specific intent about the legislation

37. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 & n.1 (2005).

38. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 671 (3d ed. 2001).

39. *See, e.g.*, United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."); Bos. Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.) ("It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.").

In response to legal realist attacks on intentionalism in the 1930s, legal scholars moved away from a pure search for legislative intent, arguing in favor of "purpose-based approaches" to interpretation instead. ESKRIDGE ET AL., *supra* note 38, at 671. Purposivism is a variation on intentionalism that calls for judges to interpret statutes in light of public-minded purposes that motivated (or should have motivated) the legislature to enact the law at issue. *See, e.g.*, Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 247–50 (1992) (describing the evolution of statutory interpretation in the twentieth century). Although purposivists are willing to deviate from the enacting legislature's specific intent, the theory nonetheless remains tied to legislative preferences and includes examination of legislative history.

it enacts.[40] Textualists argue that interpretation should instead be guided by the words of the statute as a reasonable person would read and understand them—an objective person's intent—which, they argue, limits judicial discretion and better accords with the rule of law.[41] For many of the same reasons, textualists eschew congressionally generated, extrinsic sources of statutory interpretation, such as committee reports, floor debates, hearings, and the like. According to textualists, these sources of congressional intent are irrelevant and unreliable,[42] and in any case are not the law as enacted pursuant to Article I, Section 7 of the Constitution.[43]

Although textualists have not entirely carried the day,[44] they have nonetheless succeeded in shifting the judicial focus away from legislative intent. Judges now care less about figuring out what motivated Congress to take action and how Congress hoped its law would be applied in the future. Opinions are more likely to begin and end with discussions of statutory text. Judges and litigants rely on legislative history less often, and its use is more highly contested. If the text of a statute is clear, most judges feel obligated to apply the statute as written even when it contradicts equally clear legislative intent, which on its own marks a significant change in statutory interpretation.[45]

40. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable.").

41. *In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) ("The process is objective; the search is not for the content of the authors' heads but for the rules of language they used."); Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997) ("[Textualists] look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law . . . .").

42. *See* Scalia, *supra* note 41, at 17–18.

43. *See, e.g.*, Zedner v. United States, 547 U.S. 489, 509–10 (2006) (Scalia, J., concurring) ("I believe that the only language that constitutes 'a Law' within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute." (citation omitted)); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696–99 (1997) [hereinafter Manning, *Textualism as a Nondelegation Doctrine*] (describing the constitutional arguments against reliance on legislative history in statutory interpretation).

44. Courts still refer to legislative intent when interpreting statutes, and a majority of the Justices continues to use legislative history as an interpretive aid. In Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991), for example, eight Justices joined in affirming that judges may look to legislative history to determine statutory meaning.

45. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 625 (1990) (noting that textualism has led the Court to be "more critical of the legislative history it uses"); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1973 (2005) ("[T]he effect of the new textualism on the Court has been more subtle. The Court has tempered its use of legislative history and purposive interpretation, without completely abandoning them."); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994) (noting that the Court is less likely to rely on legislative history than it once was).

As textualists concede, Congress would prefer that courts rely on legislative history because doing so enables Congress to retain some control over interpretation.[46] John Manning, one of the leading defenders of textualism, has observed that "[f]rom a congressional perspective, [delegating legislative history to a committee] is surely preferable to more traditional delegations to agencies or courts" since it allows Congress to retain control of "law elaboration."[47] Congressional staffers who were interviewed on the subject report that, despite general awareness of the textualist critique, legislative history remains an essential method by which Congress addresses issues left unresolved or unclear in the text.[48] As one staffer put it, it is necessary for courts to rely on legislative history to elaborate on statutory meaning because "you cannot say it all in [textual] language."[49] While serving as a judge on the D.C. Circuit, Patricia Wald argued in favor of using legislative history on the ground that it is Congress's preferred method of communication:

> For all its imperfections, legislative history, in the form of committee reports, hearings, and floor remarks, is available to courts because Congress has made those documents available to us . . . . [L]egislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation, and it represents the way Congress communicates with the country at large.[50]

Some textualists argue that Congress is better off when courts refuse to rely on legislative history, since those documents do not always accurately portray the

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Some textualists, however, may argue that their method of interpretation will improve Congress's performance in the future. These theorists argue in favor of applying a statute as written, despite universal agreement that no one thinks the text can mean what it says, in the hope that this will inspire Congress to be more careful in the future. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 618–36 (1995) (referring to proponents of such methods as the "disciplinarians" of the political process).

46. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 62 (1994) ("If Congress thought that reliance on legislative history threw judges off the scent too often, it would desist, or tell us not to use the stuff."); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994) (arguing that textualism undermines Congress's role).

47. Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 43, at 719 & n.201.

48. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 606 (2002).

49. *Id.* at 607.

50. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306 (1990).

views of the majority who voted for a bill.[51] But that logic does not necessarily follow. Legislative history contains the preferences of those members powerful enough, or who were paying enough attention, to draft those documents. Congress has long chosen to empower a few at the expense of pure majority rule, and thus Congress's tendency to allow committee chairs and bill sponsors to craft legislative history is consistent with the way Congress operates across the board.[52] Members of Congress would rationally prefer that the committee chair or party leader who oversaw a law's creation retain interpretive power rather than delegate that power to another branch of government.[53] In fact, one of the primary reasons that textualists oppose judicial reliance on legislative history is that it allows Congress to aggrandize its powers by delegating interpretive authority to itself.[54]

The point of this discussion is not to prove that intentionalism is a better interpretive approach than textualism, but rather to demonstrate that Congress has an institutional interest in promoting intentionalism generally and reliance on legislative history specifically. Yet Congress has failed to advocate for this position before the courts and instead has stood by as courts have steadily diminished the role of legislative intent in statutory interpretation.

2. Substantive Canons of Statutory Construction

Substantive canons of statutory construction also weaken Congress's control over the interpretation of statutes. Substantive canons are rules of interpretation inspired by values drawn from common law, statutes, and the Constitution.[55] In contrast to the linguistic canons, which rely on rules of grammar and syntax to aid

51. Kenneth Starr criticized legislative history on the ground that "[l]egislative materials . . . at best can shed light only on the 'intent' of that small portion of Congress in which such records originate . . . ." Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375.

52. *See* Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276–77 (1996) (Stevens, J., concurring) ("[T]he intent of those involved in the drafting process is properly regarded as the intent of the entire Congress."); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 24 (1994) (asserting that committee chairs and floor managers have authority to explain legislative intent in their role as "appointed agent[s] of the legislative majority that passed the chamber's version of the statute").

53. *See* Spence, *supra* note 46, at 588 (arguing that legislative history is "an integral part of how Congress chooses to exercise its constitutionally mandated role"); *see also* Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 43, at 719; Wald, *supra* note 50, at 306–07.

54. *See* Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 43, at 694 ("[L]egislators vote for statutes with the expectation that ambiguities will be resolved by reference to the explanations recorded in committee reports or sponsors' statements.").

55. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 (1992).

courts in interpreting statutes, substantive canons "are not policy neutral" but rather "represent value choices by the Court."[56] They usually take the form of clear statement rules or background presumptions that can only be overcome by clear evidence in the statutory text that Congress so intended. To give a few examples, courts will interpret legislation to avoid interfering with state sovereignty or limiting federal jurisdiction unless Congress has been "unmistakably clear" on those questions.[57] Although clear statement rules are not new, courts have deployed them with increasing frequency over the past few decades.[58]

Defenders of these canons contend that they are an effective method of protecting subconstitutional values and promoting legislative transparency, deliberation, and accountability.[59] They claim that a clear statement rule is more deferential to Congress than simply striking down the offending law as unconstitutional.[60] Indeed, proponents assert that such canons assist Congress by providing background principles against which to draft legislation; if Congress and the courts have a shared understanding of these background interpretive principles, then Congress will find it easier to communicate with the courts.[61]

Substantive canons also have many critics who note that they distort statutory meaning to promote a set of somewhat arbitrary, judicially created values.[62]

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56. *Id.* at 595–96; *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) ("While courts and commentators sometimes seek to rationalize . . . substantive canons as proxies for congressional intent, it is generally recognized that substantive canons advance policies independent of those expressed in the statute.").

Courts also sometimes employ "referential canons," which require judges to refer to outside sources to aid in determining statutory meaning (such as preexisting statutes). *See* Eskridge & Frickey, *supra* note 55, at 595. Referential canons are also policy neutral, though of course, like any canon, they can be applied in outcome-determinative ways.

57. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 290 (1994) (holding that a statute will not be applied retroactively absent a clear statement); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

58. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406–07 (2010) [hereinafter Manning, *Clear Statement Rules and the Constitution*].

59. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1588–93 (2000).

60. Manning, *Clear Statement Rules and the Constitution*, *supra* note 58, at 403.

61. The Supreme Court "presum[es] that Congress legislates with knowledge of [the] basic rules of statutory construction" and thus assumes that such canons help courts to ascertain legislative intent. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 699 (1979) (stating that it is "not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . unusually important precedents" establishing rules of interpretation and that Congress "expect[s] its enactment[s] to be interpreted in conformity with them").

62. *See, e.g.*, Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 89; *see also* Eskridge & Frickey, *supra* note 55, at 629–40.

The academic consensus is that "[m]ost of the substantive canons are hard if not impossible to defend on ordinary-use-of-language or this-is-what-the-legislature-would-want grounds."[63] In a case study of the legislative drafting process, Victoria Nourse and Jane Schacter interviewed congressional staffers to determine how courts' interpretive rules affected the drafting process. Staffers reported general familiarity with the courts' interpretive doctrines but did not necessarily draft or vet legislation with these canons in mind.[64] Nourse and Schacter concluded that "clarity in drafting . . . is important to staffers . . . [b]ut delving deeply into interpretive law as a way to maximize clarity does not seem to be part of what staffers do on a regular basis."[65] Thus, they doubted that clear statement rules and canons of construction could be rationalized as mechanisms for realizing congressional intent.[66] Furthermore, although clear statement rules purport to give Congress the leeway to reenact the offending legislation using more precise language, legislative gridlock means that more often than not the end result is the same as if the court had simply invalidated the law. And when government is divided, Congress may have to muster a two-thirds majority in both houses to override a presidential veto—a nearly insurmountable hurdle.[67]

Accordingly, for most members of Congress, clear statement rules are obstacles, not aids, to attaining their goals. At the very least, such rules create more work for harried members and their staffs.[68] At their worst, these interpretive rules change the meaning of Congress's enactments, resulting in judicial

63. William N. Eskridge, Jr., *Norms, Empiricisms, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676 (1999); *see also* Barrett, *supra* note 56, at 120 (noting that most commentators reject the notion that substantive canons can be defended on the ground that they reflect legislative preferences).

64. Nourse & Schacter, *supra* note 48, at 598.

65. *Id.* at 600. Nourse and Schacter also interviewed attorneys in the Senate Legislative Counsel office to see if they paid more attention to interpretive rules. The attorneys they spoke to were generally familiar with interpretive rules but did not vet the language of statutes to ensure that the interpretive conventions were followed. One of the attorneys interviewed specifically disclaimed any focus on clear statement rules. *Id.* at 603–04.

66. *Id.* at 618; *see also* ESKRIDGE ET AL., *supra* note 38, at 824 (observing that canons of statutory construction "assume that the legislature thinks through statutory language carefully, considering every possible variation," but concluding that "[t]his is clearly not true, for the legislature often omits things because no one thinks about them or everyone assumes that courts will fill in gaps"); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 282 (1985); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987) (declaring that during his multiple terms as a member of the U.S. House of Representatives, the "only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight").

67. *See* Eskridge & Frickey, *supra* note 55, at 639.

68. John Manning stated that such clear statement rules impose a "clarity tax" on Congress that prevents it from being able to realize its goals without jumping through additional, court-created hurdles. *See* Manning, *Clear Statement Rules and the Constitution*, *supra* note 58, at 403, 409–10.

interpretations that Congress did not foresee or intend when it enacted the bill into law.[69] Whatever one thinks of the benefits of the canons, they come at a significant cost to Congress.

As other scholars have noted, textualist judges are particularly fond of clear statement rules, which aid them in interpreting ambiguous statutes without the need to resort to legislative history.[70] Thus, where judges once looked to legislative intent as expressed through legislative history to resolve statutory ambiguity, they now turn to clear statement rules for the same guidance. Combined, these interpretive doctrines shift the judicial focus away from Congress and thus undermine the legislature's influence over the meaning of its enactments.

3. Deference Canons

At the same time that textualism and clear statement rules diminish the legislature's control over the interpretation of federal law, courts developed deference canons that expand the executive's influence.

a. *Chevron* and *Skidmore* Deference

Chevron U.S.A. v. Natural Resources Defense Council[71] and *Skidmore v. Swift & Co.*[72] require that courts defer to the executive's interpretations of ambiguous statutes under certain circumstances. *Chevron* deference applies to agency interpretations of their implementing statutes adopted pursuant to a congressional delegation of lawmaking authority.[73] Under the now-familiar *Chevron* two-step, judges must first determine whether the statute is ambiguous; if so, they must defer to the agency's reasonable interpretation, even if the court would have reached a different interpretation if left to resolve the question on its own. Moreover, even when Congress has not delegated lawmaking authority to an agency—or an agency has not acted pursuant to that authority—the agency's

69. *See* James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1209 (2010) (describing how clear statement rules "frustrate . . . congressional policy preferences").

70. Barrett, *supra* note 56, at 122–23 (describing how textualists "embrace" many substantive canons, including the canon of constitutional avoidance and other clear statement rules); John F. Manning, *Deriving Rules of Statutory Construction From the Constitution*, 101 COLUM. L. REV. 1648, 1655 (2001) (describing textualists' use of "constitutionally inspired clear statement rules").

71. 467 U.S. 837, 865–66 (1984).

72. 323 U.S. 134, 140 (1944).

73. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

interpretation of its implementing statute will still merit *Skidmore* deference for its "power to persuade."[74]

Before *Chevron*, judges filled the gaps in ambiguous statutes. At first glance, then, *Chevron* deference appears to diminish the judiciary's interpretive authority and not Congress's. Indeed, *Chevron* has been referred to as "the counter-*Marbury*" for the administrative state because it is understood as taking interpretive authority away from the courts, rather than Congress.[75]

When *Chevron* deference is combined with textualism, however, Congress's role in statutory interpretation suffers. Textualists eschew reliance on legislative history and other evidence of legislative intent. At least in theory, then, a textualist will conclude that a statute is ambiguous even when legislative history or context would have clarified the meaning in accordance with Congress's preferences. Since textualism has influenced even avowed intentionalists, those judges who once would have looked beyond the text to ascertain the preferences of Congress are now less willing to do so. By disregarding legislative history, judges are more likely to decide a statute is ambiguous and defer to an agency's interpretation. Therefore, post-*Chevron*, the executive branch takes the lead in interpreting ambiguous statutes, displacing Congress's power to clarify its meaning through legislative history.[76]

One justification for *Chevron* deference is that Congress delegated interpretive authority to agencies, and thus such deference is what Congress would have wanted.[77] Yet Congress has been hesitant to delegate unchecked authority to agencies. Even when it speaks clearly, Congress can never be sure that the executive will administer and interpret the law as Congress prefers, and thus Congress

74. *Id.* at 234. For a more detailed discussion of the distinction between *Chevron* and *Skidmore* deference, see Michael P. Healy, *Reconciling* Chevron, Mead *and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1 (2011).

Some scholars have questioned whether courts do, in fact, defer more often as a result of *Chevron* and other deference doctrines. The results of empirical studies are mixed. *See, e.g.*, Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1026–38 (finding that agencies were more likely to prevail in the D.C. Circuit immediately following *Chevron* but noting that the effect diminished over time); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010) (arguing that various standards of review employed in administrative law cases do not affect outcomes).

75. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).

76. Interestingly, however, Justice Scalia is less likely to apply *Chevron* deference than his intentionalist colleagues and thus defers less often to an agency's interpretation than they would. Even though his methodology does not lead him to adopt the agency's views as often as might be expected, it nonetheless keeps him from closely tracking Congress's preferences. *See* ESKRIDGE ET AL., *supra* note 38, at 1211–12.

77. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843–44, 865–66 (1984).

expends considerable energy on agency oversight.[78] Until the Court struck down the legislative veto in *INS v. Chadha*,[79] Congress attempted to retain control of its delegations of legislative power by maintaining the authority to review and reject executive implementation of statutes. Despite the Court's clear holding in *Chadha*, Congress stubbornly continued to enact laws containing such provisions,[80] suggesting that Congress is not in favor of broad deference to agency interpretations of its laws. At least in some cases—and particularly during periods of divided government—Congress would prefer that courts follow its statutory preferences over an agency's.[81]

b. National Security and Foreign Affairs Deference

The executive branch has also convinced the courts that its views merit "super-strong" deference when judges construe statutes touching on national security and foreign affairs.[82] In *United States v. Curtiss-Wright Export Co.*,[83] the Court rejected the argument that a broadly worded statute authorizing the president to place an embargo on arms sales to certain countries violated the nondelegation doctrine. Courts interpret this decision as giving the president significant leeway when implementing statutes concerning foreign affairs and national security. For example, in *Department of the Navy v. Egan*,[84] the Court upheld the president's revocation of security clearances on the ground that "courts traditionally [are] . . . reluctant to intrude upon the authority of the Executive in military and national security affairs."[85] *Curtiss-Wright* deference goes beyond

78. Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 43, at 712–13 & n.164.
79. 462 U.S. 919 (1983).
80. U.S. GOV'T ACCOUNTABILITY OFFICE, B-308603, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS 16–19 (2007), *available at* http://www.gao.gov/decisions/appro/308603.pdf (listing statutes in which Congress included legislative veto provisions long after the Supreme Court's decision in *INS v. Chadha*).
81. *Cf.* Eskridge & Frickey, *supra* note 55, at 645 (describing *Chevron* deference as a preference for executive rulemaking over lawmaking by Congress and calling it "normatively questionable"); Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2639–41 (2003) (questioning whether Congress currently has the institutional capacity to determine when and whether courts should apply *Chevron* deference).
82. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 325 (1994) (describing these cases as establishing a "[s]uper-strong rule against congressional interference with the president's authority over foreign affairs and national security").
83. 299 U.S. 304 (1936).
84. 484 U.S. 518 (1988).
85. *Id.* at 530.

Chevron; it does not depend on a delegation to the executive from Congress, and it applies not only when a statute is ambiguous but in any case in which the legislation does not clearly conflict with the executive branch's interpretation.[86]

Defenders of *Curtiss-Wright* deference cannot justify it on the grounds that Congress intended to delegate interpretive power to the executive or that Congress failed to speak clearly, and thus it is an even clearer transfer of power from Congress to the executive than *Chevron* deference. Instead, its defenders assert that the president needs leeway to manage foreign affairs and national security and that Congress must take a backseat in those areas. Its critics argue that even if the president's unique ability to act quickly to protect the nation justifies deference in emergencies, the doctrine is applied in contexts that are far removed from such exigent circumstances.[87] Supporters and opponents agree, however, that it expands executive authority at the expense of Congress.[88]

Together, *Chevron*, *Skidmore*, and *Curtiss-Wright* deference transfer power from Congress to the executive branch, particularly when those canons of deference are coupled with textualism. Instead of referring to legislative history to resolve statutory ambiguity or relying on their own best reading of the text, courts now adopt the executive branch's preferred interpretation. In short, these doctrines give the executive branch a more active role in fleshing out the meaning of statutes and simultaneously undermine Congress's influence.

B. Constitutional Interpretation

1. Undermining the Presumption of Constitutionality

Traditionally, the Supreme Court has been reluctant to strike down federal statutes, choosing to approach acts of Congress with a "presumption of

86. *See* ESKRIDGE ET AL., *supra* note 38, at 1270; *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098–1100 (2008) (describing *Curtiss-Wright* deference as the most deferential of all the courts' deference canons).

87. *See, e.g.*, Charles A. Lofgren, United States v. Curtiss-Wright Export Corp.*: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

88. *See, e.g.*, Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 354 (2006) (stating that the executive has discretion to broadly interpret and apply statutes that grant it enforcement authority); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (describing the president's growing influence over agency action); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (describing broad judicial deference to executive action post-9/11).

constitutionality."[89] In recent years, however, the Court has shown Congress less deference, striking down more legislation and questioning whether Congress's views on a statute's constitutionality should carry much weight.

In their aptly titled article, *Dissing Congress*, Ruth Colker and James Brudney chronicle these developments, observing that the Supreme Court held that Congress exceeded its constitutional authority in twenty-nine cases between 1994 and 2001,[90] a significantly higher rate than in the past.[91] They argue that the Court has "diminish[ed] the proper role of Congress," treating it as akin to a lower court or agency rather than as a coequal branch of government.[92] Likewise, Larry Kramer declared that the Supreme Court "has systematically been cutting back on the degree of deference due Congress in implementing its powers."[93] Even a Supreme Court Justice questioned whether a presumption of constitutionality should apply to Congress's enactments: In 2000, Justice Scalia publicly suggested that the "presumption of constitutionality" may be "unwarranted" given that Congress is "increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution . . . ."[94]

In short, the Supreme Court defers less to Congress's views on the meaning of the Constitution. The obvious result is that federal statutes are more likely to be struck down as unconstitutional, or interpreted in ways that Congress did not intend, to avoid what the Court views as constitutional problems, undermining Congress's authority to legislate.

89. United States v. Morrison, 529 U.S. 598, 607 (2000); *see also* Blodgett v. Holden, 275 U.S. 142, 148 (1927) (describing judicial review as "the gravest and most delicate duty that this Court is called upon to perform").

90. Colker & Brudney, *supra* note 34, at 80–81.

91. *See* Caminker, *supra* note 26, at 74. Caminker noted that in the first 207 years following the U.S. Constitution's ratification, the Supreme Court invalidated portions of federal statutes in 135 cases; between 1995 and 2002, the Court invalidated portions of federal statutes in 33 cases. That is, between 1995 and 2002, the Supreme Court invalidated 19.6 percent of the total number of statutes in just 3.7 percent of the time.

92. Colker & Brudney, *supra* note 34, at 83; *see also* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 363 (2003) ("Over the last decade, a five-Justice majority of the United States Supreme Court has adopted new limits on congressional power as the grounds for invalidating an extraordinary number of federal laws."). John Ferejohn contends that the Supreme Court's treatment of Congress is part of a broader, global phenomenon of judges usurping legislative power. *See* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41 (2002).

93. Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 151 (2001).

94. Editorial, *A Shot From Justice Scalia*, WASH. POST, May 2, 2000, at A22.

2. Legislative Record Review

In a related development, recent Supreme Court rulings require Congress to provide specific information in the legislative record to support the constitutionality of its enactments.

For example, the Supreme Court scrutinizes the legislative record when reviewing prophylactic legislation enacted pursuant to Section 5 of the Fourteenth Amendment. Section 5 grants Congress "the power to enforce, by appropriate legislation" the substantive provisions of that Amendment.[95] The Court will strike down legislation enacted pursuant to Section 5 unless Congress establishes a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[96] The Court looks to the legislative record to determine whether Congress gathered sufficient evidence to satisfy this standard. In a number of recent cases, the Court concluded that the statutes at issue fell short of that mark and struck them down.[97] Although the Supreme Court has denied that it is imposing legislative record requirements on Congress,[98] in practice these decisions force Congress to hold hearings, obtain documents, and write committee reports with the aim of satisfying these criteria.[99]

Nor is Section 5 the only area in which the Court has engaged in a searching review of the legislative record. In *United States v. Lopez*,[100] which struck down the Gun-Free School Zone Act of 1990[101] as exceeding Congress's power under the Interstate Commerce Clause, the Court noted the absence of any congressional findings to support the nexus between the legislation and interstate commerce.[102] Although the Court also stated that legislative findings were not required, its discussion of the legislative record strongly suggested that Congress should provide them in the future to support legislation lacking an

95. U.S. CONST. amend. XIV, § 5.
96. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).
97. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999); *Flores*, 521 U.S. at 520.
98. *Fla. Prepaid*, 527 U.S. at 646.
99. *See* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 386 (2008) (accurately predicting that the "recently reauthorized Section 5 provision [of the Voting Rights Act] will withstand constitutional scrutiny in no small part due to the voluminous and extensive legislative record amassed during the 2005–2006 reauthorization process.").
100. 514 U.S. 549 (1995).
101. Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45 (codified as amended at 18 U.S.C. § 922(q) (2006)).
102. *Lopez*, 514 U.S. at 562–63.

obvious connection to commerce.[103] Likewise, legislative findings have been cited as a near necessity for legislation raising First Amendment and equal protection concerns.[104]

William Buzbee and Robert Schapiro coined the term "legislative record review" to describe this "intensive and skeptical review of legislative materials,"[105] which they argue has "no support in precedent or in constitutional text or structure."[106] When engaging in legislative record review, courts are not simply reviewing the hearings and reports to determine if evidence supports its enactment; rather, legislative record review demands that Congress produce specific data and, if it does not, leads courts to strike down a law as invalid without regard to whether outside sources of information might support it.[107] Other critics describe the Supreme Court as "micromanaging the work of Congress by specifying how Congress should construct a proper legislative record."[108]

Buzbee and Schapiro contend that this method of review reflects a "judicial suspicion of congressional motives" and appears to be "designed to smoke out illegitimate purposes."[109] Colker and Brudney declare that they are "disturbed by the Court's emerging vision in which Congress has substantially diminished powers to conduct its internal affairs or to engage in factfinding and lawmaking that the judicial branch will respect."[110] In sum, the Supreme Court's focus on the legislative record places new burdens on Congress and demonstrates a diminished respect for Congress's constitutional decisionmaking.

103. *Id.* at 563 ("[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.").
104. *See, e.g.*, Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 43–48 (2008).
105. William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 89 (2001); *see also* Colker & Brudney, *supra* note 34, at 83 ("[T]he Court has undermined Congress's ability to decide for itself how and whether to create a record in support of pending legislation.").
106. Buzbee & Schapiro, *supra* note 105, at 90.
107. *See id.* at 111 ("The *Lopez* and *Morrison* duet established that [congressional] findings might be necessary, but were certainly not sufficient.").
108. Colker & Brudney, *supra* note 34, at 85.
109. Buzbee & Schapiro, *supra* note 105, at 91.
110. Colker & Brudney, *supra* note 34, at 86–87.

3. Canon of Constitutional Avoidance

Yet another unhappy development, from Congress's perspective, is the expanding role of the canon of constitutional avoidance.[111] Although the canon is sometimes described as deferential to Congress because it enables courts to avoid striking down statutes as unconstitutional, its critics note that it allows judges to skew statutory meaning away from Congress's intent, and it undermines Congress's efforts to define constitutional limits.[112]

In its initial incarnation, dubbed by Adrian Vermeule as "classical avoidance," the canon required courts first to find unconstitutional the most straightforward interpretation of statutory language before adopting the less obvious reading.[113] As so configured, the canon was deferential to Congress, combining the assumption that Congress did not intend to violate constitutional limits with a desire to avoid invalidating its enactments. The Supreme Court eventually modified the classical avoidance canon out of concern that it led to advisory opinions on the constitutionality of statutes.[114] As applied today, the modern avoidance canon requires courts to reject any interpretation that is constitutionally questionable, without definitively deciding that issue, and instead to adopt the most constitutionally conservative reading.[115] The canon thus leads courts to adopt nonobvious readings of statutes to avoid potentially nonexistent constitutional problems.[116]

Modern avoidance serves a number of important purposes: it protects underenforced constitutional norms, avoids conflicts with Congress, and ensures that members of Congress give constitutional issues careful consideration. But it serves these purposes largely at the expense of, rather than in fidelity to, congressional

111. This canon has been described as a "generic clear statement" rule. Manning, *Clear Statement Rules and the Constitution*, *supra* note 58, at 405. Unlike other clear statement rules, however, the Court may strike down as unconstitutional a future law clarifying Congress's intent. For a discussion of how clear statement rules generally pose an obstacle to the realization of congressional intent in the realm of statutory interpretation, see *supra* notes 55–70 and accompanying text.

112. *See* ESKRIDGE ET AL., *supra* note 38, at 919–20.

113. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

114. United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366 (1909). Like many others, *see, e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1205 (2006), I do not believe the Court issues an improper advisory opinion when engaging in classical avoidance.

115. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

116. *See, e.g.*, Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957).

intent.[117] As many commentators have complained, the doctrine allows judges to ignore the clear wishes of Congress as expressed in a statute's text without any constitutional justification.[118] For that reason, many commentators have suggested that Congress would prefer the classical avoidance canon (or none at all) to the modern version.[119] The canon is yet another example of the judiciary's diminished respect for Congress's constitutional determinations.

* * *

The interpretive doctrines described above are applied regularly by courts grappling with ambiguity in statutes and constitutional provisions, and thus they shape the meaning of federal law. As a close look at these doctrines shows, judges today are less focused on determining how Congress would prefer that its statutes be interpreted and less willing to defer to Congress's constitutional judgments. Concomitantly, these doctrines favor the executive branch's views in close cases. In short, the judiciary is now more likely to disregard Congress and defer to the executive on questions about the meaning of federal law.

II. THE POLITICAL BRANCHES IN COURT

As described in Part I, the federal judiciary has steadily undermined Congress's role in statutory and constitutional interpretation while simultaneously expanding the influence of the executive branch. There are many possible explanations for these developments. Ideological alignment between the executive and judicial branches, judicial preferences for a strong executive, and frustrations with poor legislative drafting may all play a role. The academic literature surveying trends in statutory and constitutional interpretation focuses on more abstract influences, such as theories of democracy and the relative institutional competence

117. *See* Morrison, *supra* note 114, at 1207–08; Schauer, *supra* note 62, at 74 ("[I]n interpreting statutes so as to avoid 'unnecessary' constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred.").

118. *See, e.g.*, HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 211–12 (1967) (describing the rule as having "almost as many dangers as advantages" because of its potential for abuse); POSNER, *supra* note 66, at 285; Schauer, *supra* note 62, at 74.

119. *See* FRIENDLY, *supra* note 118, at 210 (expressing doubts "that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them"); Young, *supra* note 59, at 1580 ("[A] rational legislator familiar with both the modern and classical versions of avoidance . . . might have little use for the former.").

of the three branches.[120] Seldom mentioned, however, is the fact that the executive is a frequent and influential litigant, while Congress rarely appears in court. As described in more detail below, the executive has thousands of lawyers to pursue its interests in litigation, while the House and the Senate each have only a handful of lawyers capable of representing those institutions in court. If lawyers have any influence on the outcome of cases, this mismatch pushes courts to reach results, and to adopt interpretive methods, that favor the executive over the legislative branch.

A. The Executive Branch

The executive branch is exceptionally well represented in litigation before the federal courts. An army of lawyers across the country brings and defends cases against the United States and frequently participates as amicus curiae when federal interests are at stake. The approximately 10,000 lawyers at the DOJ take the lead role in defending lawsuits against the federal government and suing to enforce the law at the trial level.[121] The solicitor general's office is particularly effective at coordinating the executive's participation in appellate litigation. Thousands of agency attorneys provide further support.

By federal statute, the attorney general has nearly complete discretion to manage litigation on behalf of the United States.[122] That centralization is useful, as it enables the executive branch to adopt a single position on numerous important legal questions and then consistently pursue its chosen agenda at all levels of the

120. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that the Constitution should be interpreted to protect the democratic process); WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES (2010) (arguing that our constitutional values are located in statutes that supplement or supplant the Constitution); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (contesting the idea that the Supreme Court is countermajoritarian and describing the dialogue between the Court and the public over the meaning of the Constitution).

121. As of September 24, 2011, there were 9792 attorneys working for DOJ agencies whose primary responsibilities included litigation. The source of this data is the DOJ's Justice Management Division. *See* Email From Mark Motivans, DOJ's Bureau of Justice Statistics, to author (Jan. 5, 2012) (on file with author).

122. 28 U.S.C. § 516 (2000) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *see also* Devins & Herz, *supra* note 8, at 560–68 (describing how the DOJ generally serves as litigator for the United States, though acknowledging that other entities—such as Congress itself—have also been vested with that power on occasion).

federal court system.[123] Furthermore, DOJ lawyers can be selective when deciding which cases to bring and to appeal, abandoning those with poor facts or procedural problems in favor of cases presenting a better vehicle for the presentation of the executive's position.[124] As repeat players, DOJ attorneys have good reason to tend carefully to the institution's reputation before the courts, and they have established a level of credibility that gives them a sizeable advantage in litigation.[125]

The executive branch is particularly influential before the Supreme Court, where the Office of the Solicitor General has established a near-symbiotic relationship with the nine Justices. Inundated with approximately ten thousand petitions for writs of certiorari a year,[126] the Court relies on the solicitor general to guide its case selection, often inviting that office to weigh in on the cert-worthiness of particular cases and usually following its advice.[127] A recent study found that in cases in which the Court had called for the solicitor general's views, the Court followed the office's recommendation to grant certiorari 75 percent of the time, and its recommendation to deny review 80 percent of the time.[128] The executive is also extremely effective when petitioning the Supreme Court on its own behalf: The Court grants 70 percent of the solicitor general's petitions for certiorari,

123. *See, e.g.*, Edward N. Beiser, *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 480 (1990) (quoting former Solicitor General Kenneth Starr on the solicitor general's role in "bringing greater consistency to the government's litigating positions by controlling the government's participation in the appellate process"); Devins & Herz, *supra* note 8, at 563 ("Under this standard arrangement, DOJ has two key powers: it decides whether or not a case goes to court and, if it does go to court, it handles the lawyering."); Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1313 (2000) (describing the strategic role of solicitors general in coordinating appellate litigation).

For example, for thirty years the executive branch refused to cite or rely on 18 U.S.C. § 3501, a federal statute purporting to overrule the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), on the ground that it believed the statute to be unconstitutional. The Court only addressed the statute after an amicus curiae raised the issue. *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 466–69 (2009) (describing the litigation that led to the Supreme Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000)).

124. *See* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1337 (2010); *see also* REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 112–13 (1992).

125. *See* Devins & Herz, *supra* note 8, at 570–74 (describing the benefits of consolidating litigation in the DOJ).

126. *See Frequently Asked Questions*, SUPREMECOURT.GOV, http://www.supremecourt.gov/faq.aspx (last visited Mar. 12, 2012).

127. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 245, 280–81 (2009).

128. *See id.* at 276 (providing the statistics for the 1998–2004 terms).

compared to only 3 percent of the petitions from other litigants.[129] In short, the solicitor general helps shape the Supreme Court's docket.

The solicitor general also does well at the merits stage. The United States wins 60–70 percent of the cases in which it is a party.[130] More important is its uniquely active role as amicus curiae. The Supreme Court's rules permit the solicitor general to file amicus briefs without first obtaining the consent of the parties and leave from the Court, as most others must do.[131] The Court routinely grants the solicitor general's requests to participate at oral argument—an opportunity it rarely provides to other amici.[132] The solicitor general is even more effective as amicus than as a party; it is on the winning side of 70–80 percent of those cases. When the solicitor general weighs in on behalf of a party, the petitioner's chances of winning increase by 17 percent and the respondent's by 26 percent.[133] Today, the Office of the Solicitor General dominates the Supreme Court bar: It participates in over 75 percent of the Supreme Court's merits cases as either a party or amicus.[134]

The executive has an even more important role to play before the lower federal courts. In 2009, the executive was a party in more than one-third of all the cases heard in federal court.[135] The DOJ chooses the best cases to bring, crafts

129. *See* Cordray & Cordray, *supra* note 124, at 1333. Interestingly, the Cordrays found that over the last few decades the solicitor general has decreased its role at the certiorari stage, diminishing its influence over the Court's case selection. *Id.* at 1325.

130. *See id.* at 1335. The Cordrays' numbers are based on the results of multiple studies of the solicitor general's win rate since the 1950s. The studies showed that the solicitor general wins approximately 70–80 percent of the time as petitioner (as compared to a 60 percent average win rate for petitioners) and approximately 50–60 percent of the time as respondent (as compared to a 40 percent average win rate). *Id.* at 1334–35.

131. *See* SUP. CT. R. 37.4. That Rule makes an exception for briefs presented

> on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town or similar entity when submitted by its authorized law officer.

Id. Thus, the Rule allows for almost any governmental entity other than Congress to submit an amicus brief without the consent of the parties. In previous filings, the House of Representatives has taken the position that it is not required to obtain the permission of the parties, though it has nonetheless chosen to do so. *See* Brief of the Speaker and Leadership Group of the House of Representatives, Amici Curiae, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87-1279), 1988 WL 1031594, at *2 n.2.

132. *See* Lazarus, *supra* note 31, at 1494 n.32 (observing that during the 2005 and 2006 terms, the Supreme Court granted seventy-nine out of eighty requests by the solicitor general to participate as amicus at oral argument).

133. Cordray & Cordray, *supra* note 124, at 1335. The solicitor general's high win rate may be due in part to its decisions to take positions with which it thinks the Court is likely to agree.

134. *See id.* at 1338.

135. *See supra* note 7.

its positions carefully, and sends its lawyers across the nation to defend those positions before trial and appellate courts.[136]

Executive branch lawyers claim to speak for the United States, but in fact those lawyers represent the institutional interests of the executive branch and the ideological interests of the party controlling the presidency. The president appoints the top DOJ officials, who serve at the pleasure of the president and are thus advocates for the ideological and policy interests of that administration.[137] Although the solicitor general, attorney general, and other high-level DOJ officials have an interest in appearing independent, these actors—like most political appointees—usually follow the marching orders, and internalize the values, of the current administration.[138] For example, the solicitor general's amicus participation noticeably shifts with each new administration; Democratic administrations participate in more civil rights cases, and Republican administrations participate in more criminal matters.[139]

Of course, most cases do not divide the political branches, allowing the executive to be a perfectly adequate representative of Congress. Moreover, relatively neutral line attorneys play an important role in the DOJ's litigation choices, tempering the political influences on their politically appointed supervisors.[140] Finally, appointees will sometimes push back against pressure by the executive

136. *See supra* notes 124–125 and accompanying text. The solicitor general is responsible for determining in which cases the federal government may appeal an adverse trial court decision and whether the federal government will intervene or file an amicus brief in appellate litigation. *See* 28 C.F.R. § 0.20 (2011).

137. *See* Cordray & Cordray, *supra* note 124, at 1330 (describing solicitors general as "advocates for the policies and priorities of the administrations in which they serve, and ideology thus inevitably plays a role as they set the government's litigation agenda, select cases, and frame arguments"); Devins & Herz, *supra* note 8, at 570 (describing how "centralization" of litigation authority in the DOJ "will ensure that representation is consistent with the broader policy concerns of the Administration"); Bruce E. Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FED. B. NEWS & J. 406, 406 (1983) (arguing that government attorneys have an ethical obligation to provide "unremitting assistance through [nonfrivolous] legal argument to the incumbent Administration in furtherance of the policies championed by the President").

138. *See, e.g.*, Neal Devins, *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 260 (1994) (describing the solicitor general as engaged in a "brilliant juggling act, rooted in tradition and a desire to maximize influence, which is responsive to the competing demands of the White House, agencies and departments, and the Supreme Court," but concluding that the solicitor general's "loyalty properly belongs to the Attorney General and the President"); Roger Clegg, *The Thirty-Fifth Law Clerk*, 1987 DUKE L.J. 964 (reviewing LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987)) (arguing that the Office of the Solicitor General has never been politically independent).

139. *See, e.g.*, SALOKAR, *supra* note 124, at 166–73; Cordray & Cordray, *supra* note 124, at 1332.

140. *But see* Marshall, *supra* note 5, at 512–13 (explaining why "the ability of line lawyers at DOJ to effectively check executive branch power may be more illusory than real").

to take a legal position they think is unjustified.[141] The point here is simply that the DOJ's litigation positions are sometimes influenced by the ideological preferences of the current administration, which can make it a poor representative of Congress in those cases.

In addition to representing a particular political party, executive branch lawyers serve the institution of the presidency. It is no coincidence that Democratic and Republican presidents alike support the state secrets privilege,[142] defend recess appointments,[143] and attempt to influence the courts through presidential signing statements.[144] These positions benefit all presidents, and thus executive branch lawyers will seek to defend and expand these forms of executive power and influence.[145] Again, in such cases, the executive is not an adequate representative of Congress's interests.

Executive branch lawyers also take positions on the merits of specific pieces of litigation that benefit executive branch interests. For example, because the federal government is often in the position of a creditor, its amicus briefs on bankruptcy matters favor creditors.[146] Noting this problem, William Eskridge and Lauren Baer have suggested that courts seek out amicus briefs from other interested parties to ensure balance.[147] The most obvious source for this competing perspective is Congress.

B. The Legislative Branch

Congress has no institution comparable to the DOJ to represent it in court, and it only rarely joins in litigation that does not directly affect its specific members. The House and the Senate have each established their own counsel's

141. *See, e.g.*, JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 141–76 (2007) (describing author's decision to withdraw Office of Legal Counsel opinions on torture that he concluded were flawed, despite pressure by administration officials not to do so).

142. Both the Bush and Obama administrations defended the state secrets privilege in *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).

143. *See, e.g.*, Evans v. Stephens, 387 F.3d 1220, 1225 n.8 (11th Cir. 2004) (upholding President George W. Bush's intrasession recess appointment of William Pryor to the Eleventh Circuit, citing similar intrasession recess appointments by President Clinton).

144. *See* Charlie Savage, *Obama's Embrace of Bush Tactic Criticized by Lawmakers From Both Parties*, N.Y. TIMES, Aug. 9, 2009, at A16.

145. *See* Eskridge & Baer, *supra* note 86, at 1092 (noting that the executive's litigating positions are "potentially biased" by executive branch interests); Marshall, *supra* note 5, at 512 (describing DOJ line attorneys' predisposition to favor the executive branch).

146. Eskridge & Baer, *supra* note 86, at 1092.

147. *Id.*

office, however, which occasionally represent those bodies in cases in which Congress's institutional interests are at stake.

Congress first contemplated establishing a Legislative Attorney General in 1926, after the solicitor general chose not to defend the constitutionality of a federal statute restricting the president's power to remove a postmaster.[148] The Supreme Court appointed Senator George Wharton Pepper to argue on behalf of Congress that the law in *Myers v. United States*[149] was constitutional, but the Court ultimately sided with the executive and struck it down.[150] Although *Myers* demonstrated that the executive could not always speak for Congress, the frequency of such disagreements remained rare, and thus Congress felt no pressing need to employ its own counsel. It was not until the end of the 1970s, after the substantial interbranch friction of the Watergate era, that both the House and the Senate established offices of legal counsel to represent their institutional interests in court.[151]

Title VII of the Ethics in Government Act of 1978[152] created the Office of the Senate Legal Counsel "to serve the institution of Congress rather than the partisan interest of one party or another."[153] The president pro tempore of the Senate appoints the Senate legal counsel and deputy counsel upon recommendation of the majority and minority leaders, which is made effective upon approval by a resolution of the Senate.[154] The Senate legal counsel is "directly accountable" to the Joint Leadership Group, which comprises members from the leadership of the majority and minority parties.[155] The Office is permitted to intervene or appear as amicus curiae on behalf of the Senate as a whole, or on behalf of an officer,

148. Myers v. United States, 272 U.S. 52 (1926).
149. *Id.* at 176.
150. *Id.*
151. *Oral History of Chuck Ludlum, Interview 1: The Senate Legal Counsel*, U.S. SENATE ORAL HISTORY PROJECT 24 (Dec. 2, 2003), http://www.senate.gov/artandhistory/history/resources/pdf/Ludlam_Interview1.pdf [hereinafter *Oral History*].
152. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 701, 92 Stat. 1824, 1875–76 (codified as amended at 2 U.S.C. § 288 (2006)).
153. S. REP. NO. 95-170, at 84 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4300; *see also* Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONGRESS & PRESIDENCY 131, 131–37 (1993) (describing the history of the offices); Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS. 47, 48 (1998).

Although the Ethics in Government Act initially provided for a single counsel's office that would represent the House and the Senate jointly, the House declined to join forces with the Senate. *See* Salokar, *supra*, at 136.
154. 2 U.S.C. § 288(a)(2), (a)(3)(A).
155. *Id.* § 288a.

committee, subcommittee, or chairman of a committee or subcommittee of the Senate, in any pending legal action "in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue,"[156] but "only when directed to do so by a resolution adopted by the Senate."[157] The Senate legal counsel is instructed to notify the Joint Leadership Group of any cases in which "Counsel is of the opinion that intervention or appearance as amicus curiae . . . is in the interest of the Senate."[158]

The general counsel to the clerk of the House of Representatives serves an equivalent role for the House, but that office is established by a House rule, not a statute.[159] The Speaker appoints the general counsel and deputy general counsel, and they serve at his or her pleasure, making the position a partisan one. Thus, whereas the Senate legal counsel remains in office after control of the Senate changes hands, it is customary for the general counsel to offer his or her resignation to an incoming Speaker. The general counsel participates in litigation on behalf of the House, but the chamber as a whole does not vote on that question, as is required in the Senate. The Bipartisan Leadership Advisory Group—consisting of the Speaker, majority leader, majority whip, minority leader, and minority whip—authorizes the general counsel to bring or to join litigation as a party or as amicus.[160] On occasion, however, the general counsel acts under the authority of just the majority leadership or even the Speaker alone. As a result of this streamlined process, the House participates in litigation more frequently than the Senate.

INS v. Chadha,[161] which addressed the constitutionality of the legislative veto, is a good example of how these two offices get involved in litigation to defend Congress's institutional interests when the executive is unwilling or unable

156. *Id.* § 288e(a).

157. The relevant statute provides:

> The Counsel shall intervene or appear as amicus curiae under section 288e of this title only when directed to do so by a resolution adopted by the Senate when such intervention or appearance is to be made in the name of the Senate or in the name of an officer, committee, subcommittee, or chairman of a committee or subcommittee of the Senate.

Id. § 288b(c).

158. *Id.* § 288e(b).

159. *See* RULES OF THE HOUSE OF REPRESENTATIVES FOR THE 112TH CONGRESS R.II.8 (as adopted in H.R. Res. 5, 112th Cong. (2011)); *see also* SALOKAR, *supra* note 124, at 132 (noting that the Senate "has established a more formal and structured office of counsel," while the general counsel for the House has "evolve[d] with few constraints").

160. *See, e.g.*, Brief of the Speaker and Leadership Group of the House of Representatives, Amici Curiae, *supra* note 131, at *2 n.2 ("Participation by the Speaker and Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation.").

161. 462 U.S. 919 (1983).

to do so.[162] The DOJ challenged Congress's use of the veto during the Carter administration, when Democrats controlled both branches, and the litigation continued into the Reagan administration, when the presidency but not Congress was in Republican hands. Republican and Democratic members of Congress agreed that the veto was constitutionally permissible and a legislative prerogative that they did not want to give up. Thus, they authorized the House and the Senate counsels' offices to litigate on behalf of their respective houses. Indeed, Congress's participation was essential to ensure an adversarial exchange on an issue in which the executive was challenging congressional action and therefore could not speak for Congress.[163]

Neither the Senate legal counsel nor the general counsel for the House is a frequent participant in litigation. These offices intervene or submit amicus briefs in the relatively rare cases in which the executive refuses to defend the constitutionality of a federal law or in which a legislative prerogative—such as a member's immunity under the Speech and Debate Clause—is directly implicated.[164] In addition to *INS v. Chadha*, these offices represented Congress in cases challenging the line-item veto,[165] the independent counsel statute,[166] and qui tam provisions of the False Claims Act,[167] among others. As suggested by their subject matter, these are unusual cases that often involve explicit conflicts of interest between the president and Congress. Neither office has the resources to participate in more than a handful of cases per year, and neither has taken on cases involving more run-of-the-mill questions of statutory or constitutional interpretation.[168]

162. *See* Tiefer, *supra* note 153, at 50.

163. *See id.* at 52.

164. The Senate legal counsel and House general counsel play a proactive role in defending members of Congress against lawsuits related to their work in Congress. For example, both offices will participate in litigation to argue in favor of an expansive interpretation of the Speech and Debate Clause and will represent a member sued for statements made in conjunction with their work as a senator or representative.

165. *See* Raines v. Byrd, 521 U.S. 811 (1997).

166. *See* Morrison v. Olson, 487 U.S. 654 (1988).

167. 31 U.S.C. §§ 3729–3733 (2006); *see* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993); United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993). The DOJ has also defended the statute.

168. In July 2011, the Office of the Senate Legal Counsel provided me a list of the 106 reported decisions in cases in which it has participated since its creation, including fourteen Supreme Court cases. The House general counsel's office maintains no such list.

It is not clear whether the Senate legal counsel is statutorily authorized to argue in favor of a particular interpretation of a statute or more generally to argue for courts to adopt one set of interpretive rules over others. The statute permits the counsel to intervene or participate as amicus curiae in cases "in which the *powers and responsibilities of Congress* under the Constitution of the United States are placed in issue." 2 U.S.C. § 288e(a) (2006) (emphasis added). Although that language allows the

Occasionally, individual members of the House and the Senate file amicus briefs on their own behalf written by staffers or by private counsel. Members of Congress file these briefs for any number of stated (and unstated) reasons. Sometimes, members cite their policy expertise, often based on their committee or subcommittee membership. Occasionally, a member of Congress files the brief on behalf of his or her constituents.[169] Oftentimes, a member actively involved in enacting the statute at issue—for example, a sponsor of the legislation—submits a brief that argues in favor of a particular interpretation on the ground that the author is a reliable source as to what Congress intended when it voted the bill into law.[170] Every so often, a larger group of members will join together to file a brief defending the institutional interests of the body as a whole, as sixteen senators and thirty-four representatives did in *United States v. Lopez*.[171]

Eric Heberlig and Rorie Spill conducted one of the few empirical studies of amicus briefs authored by members of Congress. Focusing on the period between 1990 and 1997, Heberlig and Spill found that such briefs were both rare and ineffective. During that seven-year period, only fifty-six amicus briefs were filed by members of Congress—averaging eight briefs each term.[172] These briefs did not prove to be particularly persuasive: Congress participated on the winning side only 48 percent of the time—a substantially lower win rate than the solicitor general's.[173] Oddly enough, the more members of Congress that signed on to an amicus brief, the less likely the Court was to vote in favor of Congress's preferred result. The fact that a bipartisan coalition of members, or members from both houses of Congress, supported the brief was also negatively correlated with

counsel to defend constitutional challenges to legislation, it does not clearly cover litigation about whether and how the canon of constitutional avoidance should apply, or whether legislative history should be considered, or even how a particular statutory term should be interpreted.

169. *See, e.g.*, Rorie L. Spill Solberg & Eric S. Heberlig, *Communicating to the Courts and Beyond: Why Members of Congress Participate as* Amici Curiae, 29 LEGIS. STUD. Q. 591, 607 (2004) (describing the amicus brief submitted in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), on behalf of Representatives Bill Baker and Richard Pombo, which stated that their interest in the case arose from their positions as "elected representatives of farmers, business people, landowners, and others" (quoting Brief of Congressman Bill Baker (R-CA), Congressman Richard Pombo (R-CA), and the Building Industry Association of Northern California as Amici Curiae in Support of Respondents, Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687 (No. 94-859), 1995 U.S. S. Ct. Briefs LEXIS 231, at *1)).

170. *See* Eric Heberlig & Rorie Spill, *Congress at Court: Members of Congress as Amicus Curiae*, 28 SE. POL. REV. 189, 198–200 (2000) (describing members' stated rationales for signing on to a brief).

171. Brief of 16 Members of the United States Senate and 34 Members of the United States House of Representative as Amici Curiae in Support of Petitioner, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007614.

172. Heberlig & Spill, *supra* note 170, at 194.

173. *Id.* at 195.

success—though this may simply be a statistical anomaly arising from the small numbers involved.[174]

This poor track record is not surprising. Congressional amicus briefs are usually filed on behalf of only a handful of members,[175] and thus they lack the impact of a brief authorized to speak for the entire legislative branch of government. Their individualized, ad hoc nature prevents a careful vetting of the arguments made and positions taken, in contrast to the multiple levels of review for DOJ briefs. Indeed, many such briefs may be more attentive to the members' ideological commitments than the soundness of the legal arguments, undermining their credibility.[176] Heberlig and Spill further speculate that the sporadic nature of such briefs prevents members of Congress from establishing a reputation for reliability and credibility with the Court, putting Congress at a disadvantage when compared to the solicitor general.[177]

C. The Absent Adversary in an Adversarial System

Our adversarial system relies upon the parties to present their competing views to an impartial decisionmaker, who can reach the correct result only after hearing from all interested persons.[178] Indeed, our constitutional commitment to due process requires that any party with a concrete stake in the matter be given notice and an opportunity to be heard before being bound to the result.[179] The federal judiciary liberally allows nonparties to share their views through amicus briefs, and occasionally even oral argument, because judges recognize the benefits of hearing from all interested stakeholders.[180]

As described above, the executive branch has taken full advantage of its opportunities to participate in litigation as both party and amicus, while Congress has

174. *Id.* at 202–03. Heberlig and Spill are careful to state that "[g]iven the small number of cases, caution must be exercised regarding the robustness of these findings." *Id.* at 202.

175. *Id.* at 200 (stating that a mean of twenty-three members of Congress signed on to amicus briefs filed between 1990 and 1997).

176. *See id.* at 205 ("To the extent that political position-taking does motivate the amicus participation of members of Congress, or the Court believes it does, the credibility of the members' legal statements would be further cast into doubt in the eyes of the Court."); *see also* Spill Solberg & Heberlig, *supra* note 169, at 593 (concluding that the primary reason that members of Congress participate as amici is "to share their ideological stances on issues relevant to their committee work to an outside audience").

177. Heberlig & Spill, *supra* note 170, at 205.

178. *See, e.g.*, STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989).

179. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

180. *See, e.g.*, SUP. CT. R. 37; FED. R. APP. P. 29.

been conspicuously absent, for the most part content to let the executive branch speak on its behalf. The doctrines and theories of interpretation described in Part I suggest that Congress's decision to cede the field to the executive has led the courts to overlook and ignore congressional interests. Because decisionmakers usually benefit from hearing the views of all interested parties, and because an absentee will often suffer for its silence, Congress should consider participating more actively in litigation concerning federal law.

This is not to say that Congress needs to join in every case. Oftentimes, the executive's interests align with the legislative branch's, and the executive is therefore an able representative of both branches. When the constitutionality of a federal statute is challenged, for example, the executive branch usually does an admirable job of defending the statute against attack. Although it would not hurt for Congress to add its voice to such cases—illustrating that both branches agree on the constitutionality of the challenged enactment and putting greater pressure on the courts to uphold it —its participation is not essential. As described in Part I, however, there are many disputes over the meaning of federal statutes and constitutional provisions in which the executive does not sufficiently take into account Congress's institutional interests, and it is in these cases that Congress suffers for its absence from the judicial process.

III. CONGRESS AS LITIGANT

Part I described how the judicial approach to statutory and constitutional interpretation benefits the executive at the expense of Congress. To change this dynamic, Congress needs to become an advocate for its interests in court and, in the process, develop the level of credibility and respect that has made the executive branch such an influential litigant. Although there are hurdles to doing so, none are insuperable, as demonstrated by the fact that the House and the Senate already participate occasionally as parties or amici in federal litigation.

This Part begins by describing Congress's institutional and ideological interests in joining litigation. It then addresses the obstacles that have thus far hindered Congress from becoming a more active litigant—such as its tendency to allow partisanship to interfere with its institutional interests and its difficulty reaching consensus—and describes methods by which Congress can overcome those obstacles. This Part further explains that advocacy is perfectly compatible with Congress's constitutional role. Finally, this Part concludes by discussing the collateral benefits of increased communication between the branches. Accordingly, this Part engages with the interrelated questions of institutional choice and

institutional design. That is, it describes why Congress should take on a more active role in litigation and then addresses the internal structures and decision rules Congress must create to do so effectively.

A. Congress's Institutional and Ideological Interests in Litigation

As a threshold matter, it is worth asking if Congress has any desire to expand its influence over the meaning of federal law. After all, Congress sometimes intentionally enacts vague statutes because its members cannot reach consensus or because the institution lacks the time, resources, or expertise to resolve the question.[181] In such cases, Congress apparently prefers that another entity, such as a court or agency, make those choices for it.[182] If Congress lacks the will or ability to clarify a statute when enacting it into law, it might similarly pass up the opportunity to advocate for a specific interpretation when the issue comes before a court.

Furthermore, members of Congress may not be interested in maximizing the institution's influence over the interpretation of federal law. At least in recent years, members have shown little concern for protecting the institution's prerogatives from executive encroachment, preferring instead to focus on partisan battles. As Daryl Levinson and Richard Pildes have observed, the political branches are more frequently aligned (or divided) along party, rather than institutional, lines.[183] Accordingly, some members of Congress take positions that favor their political party, even when they undermine their institution. For example, Democrats in Congress support giving the president deference to interpret laws affecting foreign affairs when that president is a Democrat and oppose that same deference for Republican presidents; Republicans members exhibit the same party loyalty.[184] In short, members of Congress often sacrifice their long-term institutional interests in an attempt to win partisan battles.

Further complicating matters is the fact that Congress is bicameral and thus internally divided, making it difficult for the two houses to work together on goals common to Congress as a whole. Indeed, they are often in direct conflict. As

181. *See, e.g.*, Nourse & Schacter, *supra* note 48, at 615 (stating that legislative staffers informed them that sometimes "deliberate ambiguity was necessary to 'get the bill passed'").

182. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 261 (1994) ("It is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue . . . Congress viewed the matter as an open issue to be resolved by the courts."); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 2, 20–22 (1997) ("Some compromises . . . result in clear statutory language purposely being made unclear.").

183. *See* Levinson & Pildes, *supra* note 6.

184. *See id.* at 2344.

legendary Speaker of the House Tip O'Neill told his fellow House members: "The House Republicans are not the enemy, they're the opposition. The Senate is the enemy."[185] Thus far, Congress has not been able to overcome those divisions to join forces in court. The House and the Senate have separate legal counsels and rarely file joint briefs, even when participating on the same side in the same case. The House rejected attempts to create a single counsel's office to represent the entire body because it feared its interests would suffer if it gave up its own counsel and joined with the Senate's.[186]

Despite these obstacles, Congress has recognized the need to involve itself in litigation in some circumstances—such as when the executive branch refuses to defend the constitutionality of a statute or when an important institutional prerogative is at stake.[187] The Watergate scandal convinced both chambers that they need their own lawyer to make their case during serious interbranch disputes. A Senate Report addressing this question explained:

> [T]he vital interests of Congress will be affected whether or not Congress chooses to advocate its position to the court. Because our judicial system relies on adverse parties to sharpen the issues in order for the court to make the best decision, it is essential that the courts have the opportunity to evaluate congressional interests based upon the vigorous and effective presentation of those interests to the court by an attorney representing the Congress.[188]

Charles Ludlum, a congressional staffer who spearheaded the effort to establish the Office of the Senate Legal Counsel, described the necessity for establishing such an office: "The Executive Branch, represented by the Justice Department, is in conflict with the Congress on many subjects. . . . If one believes that the separation

185. Jeffrey H. Anderson, *House Democrats Know Their Enemy: Channeling the Ghost of Tip O'Neill*, WKLY. STANDARD (Mar. 4, 2010, 2:02 PM), http://www.weeklystandard.com/blogs/house-democrats-know-their-enemy.

186. *See* Salokar, *supra* note 153, at 136–37. In his oral history describing his role in the creation of the Office of the Senate Legal Counsel, Charles Ludlum explained that he hoped that Congress would enact legislation creating a joint counsel's office that would represent both the House and the Senate:

> My idea was that the Congress as an institution rises or falls as a whole, and the Senate and the House should come together to defend congressional powers, bringing the full weight of the entire institution, with the prestige of both houses, to bear in defending the Congress. These are congressional powers, not just Senate powers. I wanted the Congress to appear in court as a coequal branch of government.

Oral History, *supra* note 151, at 24. But Ludlum explained that because the House already had a system for handling litigation (through its general counsel), it was not interested in combining forces with the Senate—a decision he found "very short-sighted." *Id.*

187. *See supra* Part II.B.

188. S. REP. NO. 95-170, at 4224 (1977).

of powers is fundamental to our freedoms, as I do, then having the Congress represented in litigation by the Justice Department is totally unacceptable."[189] These same concerns justify expanding Congress's limited role in litigation to protect its interests.

Congress has at least two distinct interests in litigation about the meaning of federal law: ideological and institutional. First, Congress may want to advocate for a specific result in a pending case that accords with its ideological preferences. For example, Congress may want courts to adopt a broad interpretation of the VRA[190] or a narrow reading of the Food, Drug, and Cosmetic Act.[191] Second, even when Congress does not have a preference regarding a case's outcome, it should advocate in favor of its institutional interests, such as the use of legislative history to assist in statutory interpretation. These two types of litigation are discussed in more detail below.

1. Congress's Ideological Interests

Oftentimes, Congress and the executive will agree on the best outcome in litigation. In such situations, Congress may reasonably choose to let the executive handle the case on its own, although Congress still may want to weigh in on how that issue gets decided, and judges may also benefit from being made aware that Congress concurs with the executive.

When different parties control Congress and the presidency, however, they are likely to prefer different outcomes in at least a few cases because of the ideological divide between the two parties, and thus there is greater need for separate representation. One example, discussed previously, is *Bartlett v. Strickland*,[192] which concerned the scope of the VRA.[193] In 2008, the Bush administration filed an amicus brief in that case arguing for a narrow interpretation of the Act—a position consistent with the ideology of the Republican party that would lead

189. *Oral History*, *supra* note 151, at 15.
190. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); *see supra* notes 16–19 and accompanying text (describing the parties' differing views on the interpretation of the VRA).
191. 21 U.S.C. §§ 301–399 (2006); *see* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (holding that the Food, Drug, and Cosmetic Act (FDCA) did not permit the Food and Drug Administration to regulate tobacco); *see also* ESKRIDGE ET AL., *supra* note 38, at 828 (speculating that the Supreme Court rejected the Clinton administration's argument in *Brown & Williamson* that it had the authority under the FDCA to regulate tobacco because pro-tobacco Republicans controlled both houses of Congress when the case was decided, and thus they knew that Congress would not override the decision).
192. 556 U.S. 1 (2009).
193. 42 U.S.C. § 1973 (2006).

to drawing electoral lines in ways that that would likely benefit Republican candidates.[194] The solicitor general prevailed, as is often the case:[195] A bare majority of five Justices sided with the executive's view of the statute and wrote an opinion that closely tracked the reasoning of the solicitor general's amicus brief. This was a case in which a Republican administration could not represent the interests of the Democrat-controlled Congress for ideological, as well as political, reasons.[196]

Likewise, Republicans and Democrats can be expected to take different positions regarding open government, abortion rights, labor laws, and limits on campaign finance. If those types of cases arise during periods of divided government, Congress has good reason to represent itself rather than rely on the leader of the opposing party to speak for it in court.[197]

Significantly, Congress has long recognized the necessity of obtaining separate representation in the small number of cases in which the executive refuses to defend the constitutionality of federal legislation—a situation that is most likely to arise when the president opposes the statute on ideological, as well as constitutional, grounds. For example, a Democrat-controlled Congress stepped in to defend rules prohibiting crossownership of newspapers and broadcast media[198] and to support laws restricting candidate endorsements by public broadcasters[199] when a Republican administration declined to do so. Today, the Republican-controlled House of Representatives is defending the constitutionality of DOMA[200] in the wake of the Democratic president's conclusion that the executive could not do so. Such cases are merely extreme examples of a more common phenomenon: The executive often has a different set of ideological preferences than Congress and thus cannot represent it in cases that divide the political parties. In such

194. *See supra* notes 18–19 and accompanying text.

195. *See supra* notes 126–134 and accompanying text (describing the solicitor general's success rate in the Supreme Court).

196. That is not to say that the result in *Bartlett* would necessarily have changed had the House and the Senate filed amicus briefs in that case. Nonetheless, if Congress were to establish itself as a credible and influential litigant, its participation would make a difference in some close cases, just as the executive branch does now.

197. *See* Levinson & Pildes, *supra* note 6 (describing how checks and balances in the U.S. system of government are more likely to come from differences between the two parties than disagreements between the political branches).

198. News Am. Publ'g Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

199. League of Women Voters v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The executive branch did step in to defend this statute on appeal, however.

200. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C.

situations, Congress should speak up on its own behalf rather than cede the judicial forum to a president from the opposing party.

2. Congress's Institutional Interests

Congress also has an interest in participating in litigation to protect its institutional prerogatives, as it has recognized in a handful of cases. For example, both the House and the Senate filed briefs defending the constitutionality of the legislative veto in *INS v. Chadha* and argued in favor of Congress's power to terminate the comptroller general in *Bowsher v. Synar*.[201] Thus far, however, Congress has taken a narrow view of the cases that merit its attention and has not participated in litigation about many of the issues raised in Part I—such as whether courts should rely on legislative history when interpreting statutes or the degree of deference to grant the executive branch's views on the meaning of federal law. These are issues on which Congress has interests at odds with the executive branch and yet on which it has remained silent.

The House and the Senate may find it easier to join in litigation to protect their institutional, as opposed to ideological, interests. As just discussed, views on the merits of specific cases will vary depending on which party is in power. By contrast, Congress's opinions regarding its abstract institutional interests should remain fairly stable over time and across the two parties. For example, Democratic and Republican members of Congress alike should recognize the benefit of a narrow interpretation of the president's recess appointment power or of less judicial deference to the executive's interpretation of statutes affecting national security, just as presidents from both parties fight in court to defend these prerogatives. Admittedly, Congress often disregards its own interests in the heat of partisan battles, but occasionally Congress manages to see beyond such short-term goals—as it did in defending the legislative veto.[202] Congress would be well served to start asserting its institutional interests in court, particularly as the executive is regularly doing the same.

B. Framing Politics as Law

Even if the House and the Senate want to become more active litigants, some may argue that those institutions are incapable of generating legal arguments

201. 478 U.S. 714 (1986).

202. *See* Tiefer, *supra* note 153, at 51–52 (noting that congressional support for the legislative veto transcended party lines).

in individual cases. Perhaps Congress is too political and opportunistic to engage in the kind of legalistic analysis required to participate effectively in court. The majority of members are not lawyers and many are career politicians, and so they lack the professional training needed to translate political beliefs into a set of legal arguments appropriate for a brief rather than a stump speech. In fact, briefs filed by individual members have proven ineffective in court in part because they often contain political arguments disguised as law rather than persuasive advocacy.[203]

Nonetheless, there are good reasons to think that Congress is up to the challenge. After all, the executive branch is also deeply political, and yet it has proven capable of translating its political goals into legal arguments that are acceptable to courts. The president of the United States is not just the leader of the country; he is also the leader of his party. Political appointees at the DOJ are loyal to party and president, and their litigation decisions reflect those allegiances.[204] When a new party takes over the presidency, the DOJ shifts its priorities and alters its tactics.[205] In the most extreme cases, the new administration will disavow its predecessor's positions in a pending case—as just occurred when the Obama administration announced that it would no longer defend the constitutionality of DOMA.

Yet, despite the political motivations at the core of executive branch decisionmaking, its lawyers know the difference between legal and political arguments and are careful to avoid the latter in court. To preserve its credibility, the DOJ often continues to litigate cases at odds with the new president's ethos and his or her party's politics. The solicitor general, in particular, strives to be above politics, taking care to avoid undermining the office's credibility in court and, on rare occasions, even refusing to file a brief defending an administration position when there is no reasonable legal argument to be made.[206] DOJ appointees know that they must negotiate the line between politics and law in ways that are acceptable to a judicial audience. Furthermore, most of the DOJ's cases are briefed and argued by line attorneys who may have no allegiance to the administration in which they serve and who are less political than the appointees they serve.[207]

If Congress becomes a regular participant in litigation, it too may learn to translate its political aspirations into legal arguments. Admittedly, the task would be harder for Congress. Career attorneys at the DOJ have job security that their

203. *See supra* note 176 and accompanying text.
204. *See supra* notes 5, 137–139 and accompanying text.
205. *See supra* note 139 and accompanying text.
206. *See* FRANCIS BIDDLE, IN BRIEF AUTHORITY 97–98 (1962).
207. See *supra* Part II.A for a more detailed discussion of a presidential administration's influence over DOJ litigating positions.

counterparts on Capitol Hill lack, and they are less partisan than Hill staffers; this makes it easier for them to frame legal arguments about the meaning of statutes and constitutional provisions in ways that at least appear to put law above politics. Nonetheless, Congress could establish mechanisms to promote its effective participation in litigation. For example, Congress could staff a nonpartisan office of lawyers responsible for crafting reasonable arguments to defend Congress's preferred outcomes, and that office could push back against attempts to transform litigation into another forum for partisan bickering.[208] In addition, the fact that briefs would be filed on behalf of the House, the Senate, or Congress as a whole—rather than on behalf of an individual member—would naturally temper their content. Finally, it is worth noting that an elected official can be political and ideological without eschewing the rule of law, and constituents may appreciate a representative who draws that line. In other words, the fact that members of Congress are political actors who strive to be reelected does not mean that they are incapable of taking principled positions on questions of law.[209]

If Congress were to join litigation with greater frequency and develop the institutional mechanisms to aid it in doing so, it might also adopt some of the cultural norms that now pervade the DOJ. Lawyers at the DOJ understand that the arguments they make to courts are bound by objective constraints of law. That same understanding has seeped into the mindset of other political actors and the press, making it uncomfortable for the executive to refuse to defend the constitutionality of legislation or to abandon a litigation position taken by a previous administration for primarily ideological reasons.[210] If Congress established an independent counsel's office staffed with nonpartisan lawyers, it might become an institution that could regularly represent Congress's political interests in a legally palatable way, just as the DOJ does for the executive branch today. Furthermore, if the House and the Senate participated more frequently in litigation, they might come to see the benefit of acting in unison, particularly when taking a position at odds with the executive branch. A brief joined by both chambers will carry more

208. For a more detailed discussion of the mechanisms Congress could employ to litigate effectively, see *infra* Part III.C.

209. *See* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1286–90 (2001) (arguing that "some constituents might desire a representative who takes constitutional arguments seriously, and might punish a representative who appears wholly opportunistic about the Constitution," and noting that, in any case, legislators wish to implement their understanding of good public policy, which includes adhering to the Constitution).

210. Some commentators criticized the Obama administration's refusal to defend the constitutionality of DOMA in part because they viewed the administration as putting politics above its obligation to defend even those laws with which it disagrees. *See* Savage & Stolberg, *supra* note 3 (reporting that "conservatives denounced the shift" in the administration's policy).

weight than a brief representing just one, and thus it would be to the House and the Senate's mutual advantage to work together when possible. Of course, there will be times when the two houses do not see eye-to-eye, which may happen when they are controlled by different parties. But in cases in which their interests align, they should speak with one voice to maximize their influence.

C. Mechanisms of Participation: Getting From a "They" to an "It"

As the previous discussion suggests, Congress's ability to participate effectively in a wider range of litigation turns, in significant part, on institutional design. That is, Congress must establish procedures for making litigation decisions that are not blatantly political and yet accurately reflect the institution's perspective on the meaning of federal law. Furthermore, Congress will have to generate more institutional support for litigation, and find ways to encourage the two houses to join forces with greater frequency.

As scholars have long noted, Congress is a "they," not an "it."[211] As a bicameral, multimember body without a clear hierarchy, Congress does not speak with one voice. Furthermore, Congress does not have stable preferences. With each new Congress comes a new set of legislators whose views may vary widely from the Congress before it. If Congress has no discernible intent when enacting a statute, as many have argued,[212] how can it put together a coherent argument as to what a statute should mean in the context of a specific case that may come years later?

Yet the executive branch also comprises many individuals who sometimes clash over the best position to adopt in litigation. When formulating a litigating position, DOJ lawyers consult with (or are lobbied by) all the interested parties, and often there is no way to satisfy everyone.[213] The DOJ must mediate such disputes on behalf of the entire executive branch. Former Solicitor General Seth Waxman described how in some cases "as many as a dozen different agencies and components would express views" that "differ[ed] widely" from each other, requiring him to try to "reconcile differences and fashion a single coherent position."[214] Although he found it possible to reach a consensus in many cases, Waxman

211. *See, e.g.*, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

212. *See, e.g.*, Easterbrook, *supra* note 46, at 68; Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

213. *See, e.g.*, Devins & Herz, *supra* note 8, at 579 & n.82 (describing the DOJ's obligation to reconcile conflicting agency interests in litigation).

214. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1077 (2001).

acknowledged that "[s]ometimes it just cannot be done."[215] In short, the executive also struggles to manage multiple perspectives on legal issues.[216]

Like the executive, Congress can find ways to develop a single position on questions regarding the meaning of federal law. Although Congress is not particularly good at resolving its fundamental disagreements on broad policy questions, it is "skilled at reaching specific agreements that allow all parties to preserve their abstract commitments"[217]—indeed, it does that multiple times every session when it votes bills into law. Congress could choose one of several different procedural paths to work out its differences. A few possibilities are outlined briefly below, but this list is meant only to give a sense of Congress's options and thus is far from an exhaustive description of the means by which Congress could become a more active litigant.

1. One option would be for the House and the Senate to establish a joint counsel's office staffed with nonpartisan lawyers who do not work for any particular member but rather serve the institution itself. The office would monitor litigation, identify cases in which Congress has an interest, and then advise the House and the Senate regarding the best position to take in a pending case on the meaning of federal law. Members could also bring specific cases to the counsel's attention, and leadership could request that the counsel take on litigation in which the executive is not an adequate representative because of an ideological or institutional conflict between the branches.

After the counsel's office develops a proposed litigating position, the question could then be put to a vote—perhaps by the relevant committees in the House and the Senate or by the leadership of each institution. An affirmative vote would authorize the counsel's office to write and file an amicus brief in support of that position on Congress's behalf.[218]

This arrangement would differ from the status quo in a number of important ways. First, a joint counsel's office could identify cases in which the two houses have shared interests and could craft litigating positions that would appeal to the members

215. *Id.*

216. On rare occasions, the executive will actually take conflicting positions in the same litigation. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), for example, the solicitor general's office permitted the FCC lawyers to defend the agency's preferences for minority broadcasters but filed an amicus brief in support of the petitioner arguing that the preferences were unconstitutional.

217. Garrett & Vermeule, *supra* note 209, at 1294.

218. In the vast majority of cases, Congress would participate as amicus curiae, but it is possible that Congress could intervene as a party in cases in which it had standing to do so. Assuming that Congress established a respected and influential counsel's office, the distinction would not make much difference. After all, the solicitor general's office is highly effective whether participating as a party or as amicus. *See supra* notes 126–134 and accompanying text.

of both chambers. Second, this joint counsel's office would define Congress's interests in litigation more broadly than the current House general counsel and Senate legal counsel do and thus take a more active role in litigation. Third, and relatedly, the joint counsel would have more resources to devote to litigation than do the current House and Senate counsels' offices. And fourth, the lawyers would be nonpartisan, which today is the case only for the Office of the Senate Legal Counsel.

This joint counsel's role would thus be akin to that of the Congressional Research Service or the Congressional Budget Office—two independent agencies that Congress relies on for impartial advice, which it then uses to improve its decisionmaking.[219] Assuming that Congress would usually follow its counsel's advice, this method would give members of Congress an active role in developing litigating positions while at the same time ensuring that the briefs filed on its behalf contain persuasive legal arguments developed by lawyers with a stake in building their credibility as repeat players before the courts.

2. Alternatively, Congress could delegate litigation more broadly to a joint counsel's office, leaving itself significantly less control over the process of generating its legal positions. The counsel could identify cases, develop litigating positions, and file briefs on Congress's behalf after providing sufficient notice to the leadership of both houses. To ensure that Congress retains some measure of control over such an office, Congress could require regular consultations between the counsel's office, the relevant committees, and the party leaders, and Congress could exercise veto power over the filing of a legal brief with which the majority of members disagree.

The role of counsel would thus be analogous to that of the parliamentarian—the nonpartisan official responsible for interpreting and applying Congress's internal rules.[220] Congress has delegated this authority to the parliamentarian to ensure those rules are applied fairly and consistently to members of both parties.[221] Although congressional leadership can overrule the parliamentarian's decisions, it almost never does. For the most part, this system has worked well. Congress, as a whole, abides by the decisions of the parliamentarian even when they are at odds with the interest of the party controlling Congress because its members recognize the benefit of allowing an independent official to interpret

219. *See* Garrett & Vermeule, *supra* note 209, at 1317.

220. *See* DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 80–85 (1997) (describing the role of the parliamentarian).

221. *See* VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RS200544, THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE (2010), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BPLO%3F%23P%20%20%0A.

and apply the rules fairly and consistently.[222] Similarly, if Congress wants to become an effective advocate for its interest, it should be willing to delegate litigation decisionmaking to a nonpartisan counsel's office.

This institutional arrangement would maximize adherence to the rule of law and prevent legal briefs from becoming vehicles for overt partisanship. Perhaps most importantly, the joint counsel's office would have the ability to participate in a wide range of cases without having first to obtain the members' approval.[223] However, such a broad delegation of authority would come with its own problems. It is somewhat anomalous to let an unelected group of lawyers tell courts what Congress thinks about the meaning of federal law without requiring the express approval of at least some subsection of Congress. Moreover, the very fact that members of Congress are removed from the process would undermine the persuasive power of the brief, which courts might not view as truly representing the views of the institution. Finally, a nonpartisan and independent counsel's office might be incapable of participating effectively in cases involving Congress's ideological interests, which by their very nature would divide Congress along party lines.

3. A more modest proposal would be for Congress to become more actively involved in litigation without fundamentally changing the institutional structures currently in place. The House and the Senate would each maintain separate counsel, and each counsel's office would respond to the same procedural mechanisms that facilitate their involvement today. The important difference being that the House and the Senate would expand their definitions of cases in which they have an interest and thus turn to their counsel more frequently; in turn, this would require providing these offices with additional funding and manpower to handle the additional workload. Although the current institutional arrangements have their flaws, as discussed in Part II, the benefit of this proposal is a pragmatic one: It is easier to turn to existing institutional structures than to create new ones.

* * *

222. *Cf.* Garrett & Vermeule, *supra* note 209, at 1315 (describing how members did not fire the staff of the nonpartisan Joint Tax Committee or require them to use different methodology, even when they did not like their results, because "legislators understood that, on balance, it served members' interests to rely on projections produced by competent and respected economists, rather than solely on information emanating from political operatives").

223. Today, the Office of the Senate Legal Counsel participates infrequently in litigation because it is so difficult to win permission from the Senate as a whole. The House general counsel's office is more active because it need only obtain approval of the party leadership, though even that requirement limits its ability to take action. *See supra* Part II.B.

As these thumbnail sketches suggest, Congress has experimented with different procedural mechanisms for reaching decisions on questions that divide the institution. Because it does not trust itself, Congress has established the Congressional Budget Office, the Congressional Research Service, and the parliamentarian to assist in the legislative process. Congress could set up similar mechanisms to help it take positions in cases important to the institution or in which the executive is not an adequate representative. The goal would be to allow Congress to reap the benefits of its unique institutional characteristics. Today, courts give the executive branch deference as a democratically accountable and uniquely knowledgeable litigant; Congress deserves some of the same respect, and it may obtain similar influence if it can find a means to express a majority of its members' views in a legally persuasive fashion.

Of course, a minority of members would be unhappy with the final result under any set of procedures, just as some executive branch officials are displeased with the executive's litigating positions. But Congress need not be unanimous to take action—whether that action is enacting legislation, conducting oversight hearings, pursuing subpoenas, or participating in litigation.[224]

D. Litigation Versus Legislation

If Congress wants a court to adopt its interpretation of federal statutes, it arguably has a better method of doing so than writing an amicus brief: Congress can simply enact a new piece of legislation that resolves the issue. On occasion, Congress has gone that route, sometimes even explicitly noting that it intends the newly enacted law to address the question in a pending case.[225] Congress can speak through legislation, so why should it bother trying to persuade the courts through briefs and oral argument?

Enacting new legislation is not always an option for Congress, however. As a threshold matter, there are due process limits on Congress's ability to enact retroactive legislation, although those limits are modest.[226] Of greater significance, Congress must either obtain presidential approval for any new legislation

224. Unhappy members might be tempted to file amicus briefs on their own behalf that take positions opposing the briefs filed by the House and the Senate as institutions. Although Congress could conceivably forbid courts from accepting such briefs, the better course would be to allow these dissenters to be heard, just as Congress currently permits those members of a committee who vote against a bill to list their objections to it in the minority views section of the committee report.

225. *See* Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61 (2001).

226. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994).

or override a presidential veto by a two-thirds majority vote of both houses. The threat of a veto is greatest when government is divided, which is also when Congress would be most interested in representing itself rather than relying on the executive branch to speak for it. In addition, enacting new legislation is exceedingly difficult and time consuming, and often a small minority—even a single senator—can derail legislation favored by a majority of both houses.[227] Congress has established procedures that allow a minority to block passage of legislation for many good reasons, including a preference for the status quo, but Congress should not have to clear the same hurdles when it seeks merely to share its views on previously enacted law with judges. Finally, anytime that Congress amends a law, it opens up that law to reexamination by the body as a whole. Because the amendment process can easily get out of control and lead to a significant redrafting of the statute at issue, members might prefer to address a minor interpretive matter in a brief rather than through the blunderbuss of amendment. Amending a law is overkill when Congress's primary purpose is to have the courts adopt what it believes is the best interpretation of an existing statute.

After all, the executive can participate in litigation without jumping through the procedural hoops it has established for its most formal actions. Agencies need not engage in notice-and-comment rulemaking before taking a litigating position. Similarly, the president is not obligated to issue an executive order before the DOJ can participate in a case. Likewise, Congress should be able to authorize its counsel to participate in litigation on its behalf unconstrained by the bicameral passage and presidential presentment requirements of Article I, Section 7.

Furthermore, amending a specific statute does nothing to improve Congress's influence over the doctrines and theories of statutory interpretation. In other words, the courts lack Congress's perspective on how to interpret laws generally—not just how to interpret the specific law at issue in a particular case. Again, a critic might respond that Congress's best option is to legislate rules of statutory interpretation rather than litigate about them. As Nicholas Rosenkranz recommended a decade ago, Congress could enact a federal statute establishing general interpretive rules for courts to follow.[228]

227. *See* ESKRIDGE ET AL., *supra* note 38, at 24–38 (describing the multiple "vetogates" throughout the legislative process).

228. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). Interestingly, a number of state legislatures have chosen to enact such statutes to guide their courts, though state courts often resist the application of these interpretive codes. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

Certainly, if members of Congress are unhappy with the trend in statutory interpretation described in Part I, they should enact rules to guide judicial interpretation of federal statutes. Such legislation could abolish the clear statement rules, presumptions, and canons Congress dislikes and establish new ones in their places. It could list the extrinsic materials that courts should consider when construing federal statutes and bar courts from relying on other sources.[229] Congress's power to legislate in this area is not entirely unbounded, however. For example, courts might invalidate legislation mandating that judges use one interpretive philosophy over another as an attempt to wrest judicial power from Article III judges, and thus as a violation of the separation of powers. Nonetheless, Congress could have a significant effect on statutory interpretation were it to take advantage of its ability to enact a statute on the subject.

That Congress can enact legislation governing statutory interpretation, however, does not imply that Congress must forgo the power to appear in court as a party or as amicus. The two are not mutually exclusive. The executive branch does not view its influence over statutory interpretation in such either/or terms and neither should Congress.

Finally, Congress cannot enact legislation that establishes the meaning of the Constitution, and thus participating in litigation is one of the primary methods by which it can share its views on constitutional questions. Interestingly, legislation sometimes alters constitutional meaning, and Congress can take steps to try to maximize its influence over constitutional boundaries through legislation.[230] But none of that legislative activity can take the place of a well-written brief on a constitutional question—such as a brief arguing that the Recess Appointments Clause should not apply to intrasession recesses or that the Commerce Clause permits legislation protecting intrastate activity.

E. Constitutional Objections

Congressional participation in litigation about the meaning of federal law also raises constitutional concerns. Congress is assigned the power to legislate, while the president must "take Care that the Laws be faithfully executed."[231] Arguably,

229. *Cf.* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(2), 120 Stat. 2600, 2632 (2006) ("No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of [18 U.S.C. §]2441.").

230. *Cf.* ESKRIDGE & FEREJOHN, *supra* note 120, at 1 (describing how some statutes have become "entrenched . . . to the point of molding the Constitution itself").

231. U.S. CONST. art. II, § 3.

Congress's job is complete once it has enacted legislation, and thus it has no role to play in interpretation. By contrast, the executive's enforcement role requires it to pursue cases applying federal law before the courts. Under this view, executive branch participation in litigation is appropriately a part of the executive's "take care" function but not a legitimate legislative activity.

In addition, the framers of the Constitution intentionally separated the responsibility for lawmaking from law exposition and sought to keep Congress from engaging in the latter activity.[232] For that reason, they rejected the English model of having the upper house of the legislature serve as the nation's highest court, guaranteed judicial independence through life tenure and salary protection, and included the Bill of Attainder Clause as a "general safeguard against legislative exercise of the judicial function."[233] The framers had good reason to do so. If lawmaking and law exposition were vested in the same branch, it might lead to the enactment of vague and inconsistently applied laws. As one legal scholar put it, "when a lawmaker controls the interpretation of its own laws, an important incentive for adopting transparent and self-limiting rules is lost because any discretion created by imprecise, vague, or ambiguous laws inures to the very entity that created it."[234] To avoid this possibility, the Constitution denies Congress the authority to interpret its own laws.

The Constitution does not bar Congress from expressing its views on the meaning of the laws it enacts, however, as long it assists, rather than displaces, the judiciary. A brief filed on behalf of Congress would attempt to persuade, but it would not be binding on the courts. Furthermore, Congress already aids the interpretive process through statements of purpose, interpretive rules, and legislative history, and many jurists accept these sources as guides to their interpretation. Of course, textualists object to legislative history in part because it allows Congress to delegate interpretive power to itself.[235] Even assuming that textualists are correct that courts err when they give authoritative weight to legislative history, however, there is no reason to think that Congress crosses similar constitutional

232. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 2–3 (1998) ("Traditionally, most academics and judges have viewed the legislative role as quite separate and distinct from the judicial role: judges are not to exercise directly legislative powers and legislators are not to mandate the outcome of particular cases or controversies pending before the federal courts.").

233. United States v. Brown, 381 U.S. 437, 442 (1965).

234. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 647–48 (1996).

235. *See* Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 43, at 718.

boundaries by participating as an amicus or as a party in litigation over the meaning of federal statutes. Although textualists oppose giving legislative history special status, many textualists agree that courts may allow themselves to be persuaded by explanations in committee reports as long as they do not give legislative history more weight than they would the arguments in a brief or law review article.[236]

To be clear, any brief filed on behalf of Congress about the meaning of a statute would contain only the current Congress's views and could not claim to represent those of the enacting Congress. Rather, the value of such a brief is that it would allow the court to hear from a respected and knowledgeable institution about how the law should reasonably be interpreted—just as courts now benefit from briefs filed on behalf of executive branch agencies, the military, or by regular amici such as the Chamber of Commerce, Washington Legal Foundation, and the American Civil Liberties Union. The current Congress might be able to illuminate the enacting Congress's intentions, just as it could discuss how the court should interpret the statute in light of its text, structure, context, and place in the U.S. Code, but its views would have no special authority. Even in rare cases in which the same Congress that enacted the law also participated in litigation about its meaning, Congress's views should carry no more weight than would any subsequently generated legislative history.[237] Congress's influence as a litigant would come from its institutional knowledge, expertise, and democratic accountability—in other words, the same qualities that lead courts to listen carefully to the executive.[238]

Finally, any constitutional concerns are allayed by the fact that the House and the Senate have participated in litigation intermittently for decades. The House general counsel and Senate legal counsel have joined in litigation to defend the constitutionality of legislative enactments, and individual members of the House and the Senate sometimes file amicus briefs in cases of interest to them. No court has

236. *See id.* at 731–32; *see also In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).

237. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (stating that subsequent legislative activity is "'a hazardous basis for inferring the intent of an earlier' Congress" (quoting United States v. Price, 361 U.S. 304, 313 (1960))).

238. There is a rough equivalence between Congress submitting briefs to a court and the executive's modern practice of drafting legislation in the hope that it will be introduced by a member of Congress. Neither falls squarely within the constitutional role originally envisioned for these two branches, and yet just as the executive is constitutionally permitted to take a more active role in the legislative process, Congress should be allowed to expand its influence over interpretation.

ever held that these activities are out of bounds.[239] Accordingly, the constitutionality of congressional participation in litigation is well established.[240]

F. Collateral Benefits

Thus far, this Article has argued that Congress will benefit from joining in litigation when its ideological and institutional interests differ from those of the president. But it is also worth noting that Congress's presence in court would have advantages that extend beyond Congress's parochial interests.

Most importantly, judges will reach better decisions if they hear Congress's perspective before deciding cases in which Congress has an interest. The premise of the adversarial system is that judges make the best decisions when they have heard all voices. The federal judiciary's permissive amici and intervention policies are premised on the pluralistic principle that judges should be exposed to a wide range of views before making a decision.[241] Courts would particularly benefit from hearing from Congress, a representative body that is the best positioned to speak to its own institutional and ideological interests. The views of the nation's elected representatives will improve the democratic legitimacy of judicial decisions about the meaning of federal law and give courts a new perspective on how the law affects these legislators' constituents. Judges should welcome Congress's participation, just as they now benefit from (and sometimes ask for) the executive's views.

In addition, by participating in litigation, Congress will open a direct line of communication between the legislative and judicial branches. A number of commentators promote the idea of an ongoing dialogue between the branches.[242] Indeed, commentators often defend clear statement rules on the ground that the back-and-forth between Congress and the courts improves the final result. As many have noted, however, the claimed dialogue is in some sense a fiction when

239. Although there is no constitutional obstacle to the House and the Senate participating as amicus curiae in such cases, both entities are limited by the standing doctrine if they try to participate as a party. *See* Newdow v. U.S. Congress, 313 F.3d 495 (9th Cir. 2002) (holding that the Senate lacked standing to intervene to defend the constitutionality of a school district's policy requiring recitation of the pledge of allegiance).

240. *See* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 178 (1993) (observing that "'[t]radition' . . . has been an important source of authority for almost all schools of constitutional interpretation").

241. *See, e.g.*, Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 643 (1993).

242. *See, e.g.*, Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 48–49 (1990); Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 30–31 (2003).

Congress's only method of responding is to amend the legislation at issue—a difficult task made even harder during periods of divided government.[243] Congress should be encouraged to weigh in as courts decide tough cases, rather than waiting until after they do so,[244] when it is too late to change the judge's mind about how a particular statute or constitutional provision should be interpreted.

Congressional participation in litigation could also serve an important signaling function for the courts. William Eskridge and Philip Frickey posit that the three branches of government act strategically, each anticipating the reactions of the others.[245] Accordingly, they conclude that judicial decisions are affected by judges' sense of whether they will be overridden by an unhappy Congress or ignored by a hostile executive.[246] A court's ability to calibrate its decisions so that they appeal to Congress and the executive branch is limited, however, by its own imperfect information about the nature and strength of these branches' preferences. A strongly worded amicus brief supported by a majority of both houses of Congress can provide the Court with much-needed data about the likelihood of a congressional override.[247]

Of course, a court may choose to ignore or reject Congress's preferences, either because it does not think that Congress has the ability to override its decision (perhaps because of a likely presidential veto) or because it does not care if Congress intends to do so. But the information provided by Congress's participation in litigation would allow judges to better gauge whether they wish to devote their limited resources to writing a potentially short-lived opinion and whether they want to expend political capital by picking a fight with another branch of government.[248]

243. *See* Eskridge & Frickey, *supra* note 55, at 639.

244. *Cf.* ROBERT A. KATZMANN, COURTS AND CONGRESS 7–8 (1997) (describing the ongoing interactions among the three branches in lawmaking and law interpretation and advocating for more communication among the branches).

245. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term: Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28–29 (1994).

246. *See id.* at 36–38.

247. *See id.* at 40. Although Eskridge and Frickey did not address the possibility that amicus briefs could serve such signaling functions, they did discuss other methods by which the branches could signal their preferences—such as through legislative history—and noted that such "[s]ignals contribute to the efficient operation of an institutional system." *Id.* They noted that efforts by individual members of Congress to signal preferences to courts were often ineffective because courts recognized them as "bluffs" that did not reflect the preferences of the majority. *Id.* at 41 n.55. An amicus brief filed on behalf of the House or the Senate would presum-ably carry more weight as a reflection of a majority of each chamber's preferences.

248. *See id.* at 40 ("Compared with formal overrides, signaling is also a less conflictual way for lawmaking institutions to communicate with one another."); Heberlig & Spill, *supra* note 170, at 191 (noting that amicus briefs by members of Congress can signal to the Court the risk of a congressional override).

Similarly, Congress's involvement in litigation can also provide judges with useful information about how to apply ambiguous laws to unforeseen circumstances. Some commentators have argued that courts should (and do) interpret statutes "dynamically" to accord with contemporaneous values.[249] Critics complain that courts have no authority to do this and, in any case, have no basis for determining modern values. Scholars addressing this problem have come up with myriad ways in which courts can discern popular preferences when updating statutes, such as by looking to subsequently enacted legislation (and its legislative history), agency interpretations, and public opinions polls. Eskridge, a leading proponent of dynamic theory, has argued that courts "should be attuned to the legislature's current policies, its reliance on prior statutes and judicial interpretation of those statutes, and its shifts in policy direction" to assist in updating statutes to better accord with modern preferences.[250] A brief from Congress would seem to be the best possible source of information from a democratically accountable branch of government on the question of how to apply an ambiguous and outdated statute to an unforeseen situation.[251]

Congressional participation in litigation would improve Congress's communication with the executive branch as well as with the courts. At present, Congress does not regularly play a role in shaping the executive's litigating positions, even when the same party controls both branches. The solicitor general considers the views of agencies and even private parties when formulating litigating positions, but Congress has established no regular means of influencing those positions. If Congress were to play a more active role in litigation, the two branches might be inspired to confer in the hope of filing a joint brief or at least limiting their areas of disagreement. In other words, if Congress became a player in federal litigation, the executive would have an incentive to take Congress's views into account when deciding on its own litigating position.

Finally, regular participation by Congress could have an interesting effect on deference doctrines. One of the rationales for *Chevron* deference is that because

249. *See, e.g.*, Eskridge & Frickey, *supra* note 245, at 56–57.

250. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 343 (1989).

251. Indeed, dynamic theorists contend that a rational legislator would prefer to influence courts' reading of statutes being interpreted while they are in office rather than be given interpretive authority over only those statutes that they had a role in enacting. *See* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 10 (2008) (arguing that a "rational legislator" would prefer "*present* influence (while it exists) over *all* the statutes being interpreted, rather than *future* influence (when it no longer exists) over the *subset* of statutes it enacted"); *see also* Eskridge & Frickey, *supra* note 245, at 56 ("[A] rational legislator, ex ante, might well prefer judicial interpretation to accommodate changed circumstances and to avoid frustrating statutory purposes.").

agencies are democratically accountable for their decisions, they are the more appropriate institution to fill gaps in ambiguous statutes. Congress is more directly accountable than agency decisionmakers, however, and thus if Congress files a brief at odds with the agency it would undermine this justification for *Chevron*.[252]

CONCLUSION

The executive branch regularly joins in litigation over the meaning of federal law; Congress almost never does. Although the executive claims to speak for the entire United States, it often fails to represent Congress's ideological and institutional interests. Therefore, it is not surprising that Congress's influence over statutory and constitutional interpretation is at its nadir, even as the executive has won new degrees of deference from the courts.

Congress could counter this interpretive trend by joining in litigation about the meaning of federal law when it questions whether executive branch lawyers adequately represent its interests. Congress could influence judicial decisions on specific issues, such as the best interpretation of Section 2 of the VRA, as well as shape the courts' approach to broader methodological questions, such as whether courts should rely on legislative history or the constitutional avoidance doctrine when interpreting statutes.

To participate effectively, Congress would have to adopt procedural mechanisms to work through inevitable differences of opinion among its members. But Congress has overcome similar collective action problems when enacting legislation, and this Article suggests methods by which it could do so in the litigation context as well. Indeed, both the House and the Senate already employ legal counsel that, on rare occasions, represent the institutions' interests in court, and thus both chambers have demonstrated that they are capable of participating in litigation when moved to do so.

Congress's oddly passive approach to litigation has both undermined its own interests and deprived the judiciary of an important perspective on the meaning of federal law. By ceding litigation to the executive's lawyers, Congress has forgone an opportunity to speak directly to courts, and perhaps influence the executive branch as well, on important questions about the meaning of federal law. For all these reasons, Congress should establish the institutional framework that would enable it to become a more active participant in federal litigation.

252. I am grateful to Professor Kevin Stack for this insight.