IS CONGRESS CAPABLE OF CONSCIENTIOUS, RESPONSIBLE CONSTITUTIONAL INTERPRETATION?

SOME NOTES ON CONGRESSIONAL CAPACITY TO INTERPRET THE CONSTITUTION

MARK TUSHNET[*]

INTRODUCTION

Speaking before he cast his vote in favor of the adoption of the Military Commissions Act, Senator Arlen Specter expressed his strongly-held view that the statute's provisions denying the federal courts power to issue writs of habeas corpus to those determined to be unlawful combatants by military commissions operating at the facility at Guantanamo Bay were unconstitutional.[1] And after casting his vote in favor of the Act, Senator Specter told reporters that he was sure that "the courts would 'clean it up.'"[2] This episode certainly does not inspire confidence that Congress will exercise whatever capacity it has to interpret the Constitution. Politics, it might be said, overwhelmed Senator Specter's constitutional judgment.

Or did it? After all, Senator Specter had no real need to act on his constitutional views in light of his confidence about what the courts would do.[3] Whether Congress has the capacity to engage in serious constitutional

[*] William Nelson Cromwell Professor of Law, Harvard Law School. Thanks to Adrian Vermeule and Jeffrey Tulis for comments on a draft of this Essay.

[1] For a full account of the events, see Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 316-25 (2008) (providing legislative history of the Military Commissions Act including Senator Specter's hearings on the constitutionality of habeas-stripping).

[2] *Id.* at 323.

[3] His confidence was well-placed. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) (holding the denial of habeas corpus unconstitutional).

interpretation is a question the answer to which is compounded by a number of conceptual problems and institutional features. This Essay identifies some of those problems and features in support of the conclusions that congressional capacity: (a) is larger than one might think (and is not really cast into question by statements like Senator Specter's); (b) may not be as large as one would like; and (c) may not be possible to increase by simple institutional innovations. Those conclusions, though, need to be set against an important background – the mistaken assumption that the default of judicial constitutional interpretation is optimal. It may be – though I express no view on the question – that the imperfect congressional capacity to interpret the Constitution is nonetheless better than the perhaps more imperfect judicial capacity to do so.

I. CONCEPTUAL PROBLEMS

To determine whether Congress has the capacity to interpret the Constitution well, we have to have some benchmark of "good interpretation" against which to measure congressional capacity and performance. Unfortunately, coming up with such a benchmark is quite difficult.[4]

Two obvious and common benchmarks should be ruled out from the start.[5] The first is that Congress performs well when it reaches the conclusion that the courts reach (or would reach were they to be presented with the question).[6] So, for example, Congress has performed well if it enacts a statute that the courts uphold against constitutional challenge, and similarly if it refuses to enact a statute on the ground that its members are confident the courts would strike it down.[7] One difficulty with this approach is that sometimes the courts will uphold enacted statutes because they believe that they ought to defer to congressional policy judgments in circumstances where such judgments have some bearing on the underlying constitutional question. The (mere) fact that a deferential court upholds a statute should not be taken as an indication that the court has found Congress's implicit constitutional interpretation correct.

But this is only a minor difficulty, swamped by a more serious one: there is no a priori reason to take the courts' interpretations of the Constitution as the

[4] For a more extended discussion, see MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 83-85 (2008) (considering three such interpretive theories – textualism, moral standards, and an "eclectic," "good judgment" model – as evidence of variety in interpretive method).

[5] *See* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1292-95 (2001) (introducing two criteria for judging constitutional interpretation: congressional deviation from (1) Supreme Court interpretation; and (2) "outcomes dictated by whatever particular constitutional theory the interpreter holds").

[6] *Id.* at 1292.

[7] I put aside here the problem of determining whether Congress refused to enact the statute because of these constitutional concerns or for some other reason(s).

benchmark we are looking for. Courts make interpretive mistakes too – or so at least virtually everyone thinks. Perhaps both Congress and the courts have made a mistake when the courts uphold an enacted statute. Or, more strikingly, perhaps the courts erroneously invalidate an enacted statute. In that case Congress interpreted the Constitution "correctly" and the courts erred. We cannot even begin this sort of analysis without some external standard for determining what a mistaken interpretation is – "external" in the sense that it is not coextensive with the actual performance of either Congress or the courts.[8]

The second benchmark provides such a standard, but equally unhelpfully: a constitutional interpretation is correct when it accords with the substantive views of the person doing the evaluating. Using this benchmark we would ask how often Congress gets the Constitution "right," how often it gets it "wrong," how often the courts correctly invalidate statutes and how often they erroneously do so.[9] Such inquiries are difficult in practice, but pose no conceptual problems. What does pose conceptual problems is disagreement among evaluators over when a constitutional interpretation is correct. This benchmark is fine for each of us individually, but it cannot provide the basis for some overall judgment about congressional capacity for a group of evaluators who may disagree about the Constitution's meaning and therefore about when and how often Congress comes up with the right answer.[10]

Jeffrey Tulis offers a historical baseline.[11] Examining congressional debates in the nineteenth century, Tulis observes that many members of Congress articulately discussed constitutional questions in two ways.[12] They asked whether a proposed policy was consistent with the Constitution properly

[8] One such view defends judicial supremacy – or, in the present context, using judicial interpretation as the benchmark – on the ground that coordination among lawmaking institutions is a paramount value. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362-63 (1997) ("[W]e are concerned first with the basic posture of deference – with taking someone else's decision, simply because it has been made and not because of its merit . . . ."). But, even if that is so (I am skeptical), they do not explain why Congress should defer to judicial interpretation rather than the courts deferring to congressional interpretation.

[9] See WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 107-25 (2005), which provides the best analysis I know of on this question.

[10] For a similar analysis, see Garrett & Vermeule, *supra* note 5, at 1294 ("Substantive approaches intended to improve congressional deliberation must be addressed to a Congress whose members do not all subscribe to that account, and who would deliberate about the proposals themselves under diverse standards of constitutional evaluation that the members hold.").

[11] *See* Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. REV. 515, 521-24 (2009) (illustrating historical contrast with three episodes: removal controversy, rhetoric of reply, and executive privilege).

[12] *Id.* at 524 (contrasting the nineteenth-century Congress with today's, which is "feeble" and "unwilling to stand up for itself").

interpreted,[13] and whether a proposed policy would conduce to the development of a people infused with the spirit of constitutionalism. Tulis then notes that today we see nothing of the latter and almost nothing of the former type of argument.[14] Tulis's jeremiad resonates with me, but getting us closer to this historical baseline would take a cultural transformation about which I have no competence to offer an opinion.

I wonder, though, whether the historical standard might be too demanding in asking for personal participation by members of Congress in constitutional deliberations. Congress has changed since the nineteenth century. It has a more robust committee structure and, perhaps more important, members of Congress and congressional committees have staffs that can provide members with information about the relevant constitutional arguments and can even evaluate them for the members.[15] Perhaps the availability of these resources is enough to show today's Congress has a decent capacity to develop constitutional arguments when they are needed.[16]

Another problem associated with evaluating congressional capacity and, to a degree, performance lies on the border between conceptual and institutional. When enacting a statute Congress has no obligation to address constitutional questions directly, and, as noted below, may not even notice the presence of such questions. In addition, many members of Congress are not lawyers, and even the lawyers among them may not know much about constitutional law.[17] The record on which to base an evaluation of congressional capacity and

[13] My favorite example of personal involvement in constitutional argument, though not an example of congressional argument, comes from DAVID CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861, at 20-22 (2005) (describing a constitutional argument made in an undelivered veto message by president James K. Polk, supported by a holograph of the remarks in Polk's own hand). Currie's work taken as a whole certainly confirms Tulis's readings of the nineteenth-century record.

[14] Tulis, *supra* note 11, at 522-24.

[15] A cautionary note, though not about Congress in the nineteenth century: Important presidential constitutional arguments were sometimes written by "staffers." For a discussion of one such case, see Lynn Marshall, *The Authorship of Jackson's Bank Veto Message*, 50 MISS. VALLEY HIST. REV. 466, 474 (1963) (describing the bank veto message written by Andrew Jackson Donelson, the President's private secretary, and Amos Kendall, with some assistance from Levi Woodbury and Roger Taney, both of whom later served on the Supreme Court).

[16] Of course the attentive public will not get the kind of education in constitutionalism that might have occurred in the nineteenth century because members of Congress now rely on constitutional arguments developed by their staffs and do not articulate them on the chamber floor. One can wonder, though, about the extent to which floor debates in the nineteenth century reached the public to any greater extent than staff advice does today.

[17] Chadd K. Kraus & Thomas A. Suarez, *Is There a Doctor in the House? . . . Or the Senate?: Physicians in U.S. Congress, 1960-2004*, 292 J. AM. MED. ASS'N 2125, 2126 (2004) (reporting that from 1960 to 2004, 44.6% of all members of Congress were attorneys).

performance will almost necessarily be thin and probably will be skewed by the comments of a handful of participants in the legislative process.

I believe there are two decent candidate responses to this problem. We could examine whatever constitutional analysis we can find in the record, and evaluate *it*. Of course, for reasons already sketched, we cannot evaluate it according to a court- or correctness-oriented criterion. What is left, I think, is something like this: congressional performance is adequate, and congressional capacity to engage in good constitutional analysis is demonstrated, when those who refer to constitutional questions speak in "constitutionalist" terms – connect their constitutional concerns and analyses to some broader ideas about constitutionalism, the separation of powers, and the rule of law, make reference to relevant constitutional provisions, and the like. The criterion, that is, is whether those participants who deal with constitutional questions appear to be thinking about those questions in the right way, with the Constitution and constitutionalism in mind.[18]

We might be concerned, though, that this criterion focuses on a subset of participants in the enactment process. The alternative is to evaluate the product itself, but again without using a criterion of correctness. Rather, the criterion would be whether the statute as enacted is consistent with some plausible constitutional interpretation, or is instead inconsistent with the Constitution on any reasonably available construal. This is obviously an extremely "weak" measure, in the sense that we will almost certainly conclude that Congress has and exercises a reasonably robust capacity to engage in good constitutional interpretation, where "goodness" is defined as generously as it is under this approach.[19]

---

[18] *See* TUSHNET, *supra* note 4, at 84-85 (describing this "constitution-based" standard in somewhat more detail). Garrett and Vermeule propose a criterion of "overlapping consensus," by which they mean "improvements that are attractive to proponents of all views." Garrett & Vermeule, *supra* note 5, at 1294-95. They observe that this approach "might turn out to be too restricted, too banal" because it would "only bar[] actions that no well-functioning legislature would take anyway." *Id.* at 1296. They assert that "constitutional history provides contrary examples," of which they provide one. *Id.* My judgment is that, while accurate, the statement that "the example shows that the domain of overlapping constitutional consensus is neither empty nor filled solely by banalities" will not support any reasonably broad conclusion about the usefulness of the criterion generally. *Id.* at 1296-97. A benchmark that would find congressional constitutional interpretation "good enough" if it is consistent with some reasonable theory of constitutional interpretation would be equally weak.

[19] I am reasonably sure, for example, that the Military Commissions Act would be placed in the "Congress has a reasonably good capacity" column, particularly given the fact that four Justices would have held it to be constitutional. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2239 (2008) (identifying Roberts, Scalia, Thomas, and Alito in dissent). More generally with respect to statutes whose constitutionality is actually evaluated by the courts, the criterion would be satisfied whenever some significant number of judges votes to uphold the statute's constitutionality – at least if they do so without strongly relying on a principle of deference to congressional constitutional interpretations (although they could rely on a

II. INSTITUTIONAL PROBLEMS

Senator Specter's comments illustrate what is probably the most serious institutional problem associated with efforts to identify and evaluate congressional capacity to engage in good constitutional interpretation: the existence of what I have called the "judicial overhang."[20] Knowing the courts are available to correct (some of) their constitutional errors, legislators have little incentive to expend great effort in enacting only constitutionally permissible statutes.[21] The judicial overhang sharply constricts the number of real-world examples we can use to evaluate congressional capacity and performance.[22]

Other institutional characteristics of Congress raise another set of difficulties. Elizabeth Garrett and Adrian Vermeule proposed revisions in Congress's committee structure to bring focused congressional attention to constitutional issues.[23] They would have a chamber's parliamentarian identify proposals raising non-frivolous constitutional issues, flagging them for the

principle of deference to congressional policy judgments even if those judgments were relevant to the constitutional analysis).

[20] *See* TUSHNET, *supra* note 4, at 81 ("The judicial overhang sometimes promotes legislative disregard of the constitution."). I introduced the concept in Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

[21] A legislator who understands (a) that the courts will not in fact evaluate every statute on its merits, either because of justiciability concerns or because the courts will defer to congressional judgments (that might not actually have been made), and (b) that the courts themselves make constitutional errors, some of which might involve upholding statutes they should invalidate, would invest some effort to ensure enacted legislation is constitutional according to the legislator's own criteria.

[22] The Netherlands, for example, lacks a judicial overhang because its courts are not authorized to enforce purely domestic constitutional constraints. *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 715 (2001) ("Currently, within western Europe, only the Netherlands and Luxembourg have not changed their constitutions to depart from the traditional model of legislative supremacy and do not permit any form of judicial review of legislation."). Other constitutional systems may have smaller overhangs because they use "weak form" judicial review. *See* Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R-C.L. L. REV. 1, 2 (2006) (defining "weak-form judicial review" as "a form of judicial review in which judges' rulings on constitutional questions are expressly open to legislative revision in the short run"). While those systems might offer some provocative insights into possibilities for constitutional design, their other institutional features differ so substantially from those of the U.S. Congress that I doubt they can provide even a modest basis for drawing conclusions about congressional capacity to engage in constitutional interpretation.

[23] Garrett & Vermeule, *supra* note 5, at 1317-26 (advocating the creation of a new congressional office, the "Office for Constitutional Issues," and the efficacy of the congressional committee system).

committee with jurisdiction over the proposal.[24] If the committee moves the proposal to the floor, it would have to provide the chamber with a "constitutional impact statement."[25] They suggest focused committee deliberation on constitutional questions, but are ambivalent about whether the committee should be the substantive committee dealing with the proposal, or the chamber's judiciary committee.[26] Reference to a committee, whether the substantive committee or a specialized "Committee on the Constitution," might well have some advantages. One suggestive study indicates that the general quality of deliberation is higher in open forums than in closed or secret ones,[27] and committee processes might be more open than closed (although perhaps not as open as debates on the chamber's floor).

Implementing this proposal would be difficult, of course. Sometimes constitutional issues lurk in the details of a complex statute, and particularly in interactions among apparently unrelated provisions. Even an astute parliamentarian might miss a fair number of non-trivial constitutional issues that arise in these ways. Further, Congress often acts under time constraints that make it difficult first to identify these issues, and then to refer them to the committee identified by Garrett and Vermeule, whether it be the substantive committee or the judiciary committee.[28] Sometimes constitutional issues arise

[24] *Id.* at 1309-10 ("[T]he parliamentarian may want to rely on a nonpartisan group of constitutional experts to provide guidelines for this process and to update the list of issues that receive very little or no judicial scrutiny.").

[25] *Id.* at 1310 (detailing the function of a "constitutional impact statement," which includes summaries of "constitutional implications," reference to other studies, and dissenting views written in non-legal terms).

[26] *Id.* at 1320-26. To keep the discussion focused on congressional capacity, in what follows I refer to a committee that specializes in providing constitutional evaluations as a "Committee on the Constitution," although on one version of Garrett and Vermeule's proposal the committee would be the existing (relatively specialized) judiciary committees. *Id.* at 1319-21 (identifying judiciary committees because of their inherent constitutional expertise).

[27] JÜRG STEINER ET AL., DELIBERATIVE POLITICS IN ACTION: ANALYZING PARLIAMENTARY DISCOURSE 128-31 (2004) (arguing that publicity changes the character of debate by increasing the quality of argument and the type of justification). I thank Adrian Vermeule for directing me to this study. I should note that the authors define "deliberation" more broadly than a person focusing solely on deliberation about constitutional questions would like, and that the "open v. closed" dimension is the only one in their study that is subject to alteration without major constitutional change. *Id.* at 19-24 (characterizing "ideal type of deliberative politics" as having "participation by all citizens," expression of "views in a *truthful* way," "*logical justification* of assertions and validity claims," "merits of the arguments . . . expressed in terms of the *common good*," genuine listening and respect, and "willingness on the part of all participants to yield to the force of the better argument"). Other dimensions are, for example, whether the governmental system is presidential or parliamentary.

[28] One can imagine rules that would attempt to slow down the enactment process, but I am quite certain that such rules would be subject to suspension, and would quite probably be

from amendments proposed on the floor of the House or Senate, after the standard committee processes have been completed.[29] Here too the committee might be unable to weigh in, at least in a timely manner.

A more interesting question, I believe, is this: Who would want to serve on a specialized committee?[30] Here it is helpful, I think, to distinguish between two kinds of questions.[31] Sometimes constitutional questions arise collaterally to the main policy goals of proposed legislation.[32] And sometimes it is almost the point of the proposal to raise constitutional questions, as with bills seeking to strip the federal courts of jurisdiction over some "hot" issues. The incentives members have to serve on a Committee on the Constitution differ, I believe, depending on which type of proposal we are dealing with.

Legislators ordinarily seek to serve on committees that give them the chance to provide some benefits to their constituents,[33] and a Committee on the Constitution would, I suspect, promise no such opportunities. Sometimes legislators are willing to serve on "thankless" committees because these committees are not, in fact, thankless; rather, willingness to serve helps the legislator build up credit with other legislators, which the legislator can cash in when necessary to secure electoral benefits. Yet, it is not clear that the Committee on the Constitution would have this credit-building feature, because its most visible function would probably be to tell some legislators that they cannot do what they want to do because doing so would violate the

suspended when the time pressures for enactment were substantial. Garrett and Vermeule argue that a rule from the House Rules Committee should not be allowed to waive constitutional points of order, but would allow such points of order to be waived by the chamber by majority vote. Garrett & Vermeule, *supra* note 5, at 1329-30.

[29] Again, one can imagine rules that would require referral to the "Committee on the Constitution" once a non-frivolous constitutional question is raised about a floor amendment. And, again, I suspect that such referrals would be quite rare, either because the rules would be suspended or because the chamber would determine that the constitutional question was in fact frivolous.

[30] Some of the considerations I identify come into play even if consideration of constitutional questions is committed to a substantive committee, because the time spent on dealing with such questions is time unavailable for the constituent-satisfying activities that attract members to substantive committees. Augmenting the substantive committee's jurisdiction lessens its attractiveness to members.

[31] The distinction is not a sharp one.

[32] An example might be the precise institutional design of the Public Company Accounting Oversight Board in the Sarbanes-Oxley Act, the constitutionality of which was upheld in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667, 685 (D.C. Cir. 2008).

[33] More precisely, committee service enhances their re-election prospects because such service gives them the opportunity to provide benefits to constituents, and constituents will repay the legislator with re-election.

Constitution.[34] Someone who has been told that is unlikely to harbor warm feelings toward the Committee members, and so is unlikely to be willing to come through for the Committee members when it matters to the latter. This suggests that Committee members would be those with safe seats. That same suggestion emerges from the possibility that some members would regard service on the Committee either as an institutional duty or as a way to advance good public policy without regard to the electoral benefits – or harms – from service.

But, it appears, members with safe seats tend to be more extreme ideologically than the chamber as a whole.[35] The Committee on the Constitution might then reproduce the experience in recent years of the Judiciary Committees, which have been sharply ideologically polarized, almost certainly because the only electoral benefit from serving on those committees comes from a member's ability to stake out (and publicize to her constituents) an ideological position. This tendency, if it exists, would only be reinforced by the Committee's jurisdiction over proposals whose point is to raise constitutional questions, because these proposals are, again, quite likely to be ideologically polarizing ones.

Yet, I find it quite unclear why ideological polarization should be troubling, in light of the general conceptual problems associated with determining whether Congress has the capacity to engage in decent constitutional interpretation.[36] Perhaps the difficulty is thought to be this: before a particular controversy arises, those who think in constitutionalist terms may regard some constitutional claims as "off the wall," that is, basically frivolous when

[34] Perhaps truly sophisticated legislators would understand that having a Committee on the Constitution tell *other* legislators they cannot get what they want can often be beneficial to the sophisticated legislator (who might thereby be given the chance to avoid voting on a proposal when both a favorable and an unfavorable vote is electorally costly, for example), and that benefit cannot be obtained unless the Committee has the power to, and occasionally will, tell the sophisticated legislator she cannot get what she wants. I am inclined to be skeptical about the existence of enough sophisticated legislators outside the congressional leadership to make service on a Committee on the Constitution attractive, although perhaps the leadership itself can provide sufficiently large rewards to make such service worthwhile.

[35] *See* Garrett & Vermeule, *supra* note 5, at 1320-21 (citing studies showing that "the Judiciary Committees are often more polarized than other committees and less representative of the body").

[36] Perhaps the concern is that an ideologically polarized committee might bring constitutional arguments out into the open, which is desirable, but would "resolve" them in an entirely partisan manner, with the message of its reports or votes being: "This proposal is constitutional because we are partisan Democrats [or Republicans]," not "because it is consistent with the following constitutional analysis." Again, without some substantive benchmark, we will be hard-pressed to explain why open discussion followed by entirely partisan votes is bothersome. *See supra* note 4 and accompanying text.

considered in the abstract.[37] Then, when such a constitutional claim becomes consequential in real-time politics, ideologues committed to a specific outcome will make "off the wall" positions constitutionally credible by the mere fact that those positions are articulated by people with some institutional authority. To which my response is basically: so what? This seems to me merely a description of one of many processes by which constitutional argument develops.[38]

Finally, I wonder about the circumstances under which Congress would develop institutions to augment its existing capacity to engage in constitutional interpretation, again given the conceptual difficulties I have described. Changes such as those sketched by Garrett and Vermeule are offered in the spirit of good government. But good-government reforms tend to be adopted either after spectacular failures – scandals over lobbying or campaign finance, for example – or as packages offered by political movements that organize support around a reasonably large reform agenda. I find it difficult to imagine the first condition arising, and, at least at the moment, congressional capacity to engage in constitutional interpretation seems more like a discrete good-government concern than a component of a general reform program.

CONCLUSION

The conclusions to be drawn from this Essay are quite modest. Whether one thinks congressional capacity to engage in constitutional interpretation is significantly less than optimal, that it is somewhat suboptimal, or that all things considered it is acceptable, it seems to me unlikely that much can – or perhaps better, will – be done to improve it. As I suggested at the outset, though, we should not overlook the comparative institutional question. For present purposes I am willing to assume that the judicial capacity to engage in constitutional interpretation should set the benchmark against which the *capacity* of other institutions should be measured. I am reasonably sure that

[37] An example may be Martin Lederman's recent suggestion that by enacting a statute specifying that body-builders born in Austria in July 1947 were natural born citizens of the United States, Congress could make Arnold Schwarzenegger eligible for the presidency. Posting of Martin Lederman to con law prof, http://www.mail-archive.com/conlawprof@lists.ucla.edu/msg16178.html (Nov. 1, 2008, 13:40:59) (attempting to provoke discussion in a controversial interpretation of the Natural Born Citizen Clause for presidential eligibility).

[38] A good recent example, in my view, is the rapid development during the *Bush v. Gore* litigation of the so-called "Article II" objection to the degree to which the Florida Supreme Court's interpretation of state election law amounted to a displacement of the assertedly central role of state legislatures in specifying how presidential electors are to be appointed. *See, e.g.*, Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 493, 533-34 (2001) (contending that without "the power to review the Florida Supreme Court's construction of state law . . . the Article II, Section 1 directive that state legislatures must select the manner in which presidential electors are chosen might become a dead letter").

congressional capacity is lower than the courts', and that we are unlikely to see institutional innovations that increase congressional capacity. But, capacity alone is not what we should be concerned with: performance is. It might well be the case – indeed, I think it is – that congressional and judicial *performance* of constitutional interpretation is of roughly equal quality (subject to the observation made earlier that we should not take what courts actually do as our benchmark for performance). Put another way, both Congress and the courts fall short of their capacity, but the courts' shortcomings might be greater than Congress's. Instead of attempting to devise institutional fixes that would increase congressional performance, perhaps we should spend our time on designing institutional fixes that would increase judicial performance levels.[39]

[39] Legal and political science scholarship on the judicial appointment process deals with such institutional fixes. And, in the broadest sense, so does normative legal scholarship on constitutional interpretation.