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Legal Scholarship in the Age of Legislation

Elizabeth Garrett

LEGAL SCHOLARSHIP IN THE AGE OF LEGISLATION

Elizabeth Garrett†

> "We live in an age of legislation," observes Justice Antonin Scalia, and most new law is statutory law.... Every issue of law resolved by a federal judge involves interpretation of text – the text of a regulation, or of a statute, or of the Constitution.... By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations.[1]

Notwithstanding the importance of the legislative process to complete, sophisticated legal analysis, the legal academy focuses very little of its attention on Congress and state legislatures.[2] Moreover, despite the publication of a number of excellent casebooks on the legislative process,[3] few schools offer students the opportunity to study the legislative process other than as part of a substantive course in an area of statutory law.[4] Even the Legal Process materials, which continue to influence the study of institutions and statutory interpretation, evince little interest in the actual dynamics of lawmaking.[5] Similarly, Judge Edwards' critique of legal

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† Assistant Professor of Law, University of Chicago Law School. I appreciate the helpful comments of Bernard Bell, William Eskridge, Barry Friedman, Jack Goldsmith, Dennis Hutchinson, Dan Kahan, Cass Sunstein, and Adrian Vermeule, and the excellent research assistance of Veronica Spicer. I also appreciate the financial support of the Robert B. Roesing Faculty Fund and the Unrestricted Faculty Fund at the University of Chicago Law School.

1. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13-14 (1997).

2. *See* Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510, 518 (1998) (reviewing ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996) and discussing Unger's critique of the academic preoccupation with courts rather than political institutions).

3. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1998); ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS (1995); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS (1998); WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS (2d ed. 1997)

4. *See* Deborah Jones Merritt & Jennifer Cihon, *New Course Offering in the Upper-Level Curriculum: Report of an AALS Survey*, 47 J. LEGAL EDUC. 524, 563-564 (1997) (noting that between 1994 and 1997, "law schools [in the survey of over eighty schools] initiated only 9 new courses on legislation, statutory interpretation, or the legislative process. Only 3 of these courses drew upon the tenure-track faculty.").

5. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 164 (William N. Eskridge, Jr., & Philip P. Frickey eds. 1994):

> The legislature has a primary, first-line responsibility to establish the institutions necessary or appropriate in the everyday operation of government.... But in relation to the body of general directive arrangements which govern private activity in the society its responsibility is more accurately described as secondary in the sense of second-line. The legislature characteristically functions in this relation as an intermittently intervening, trouble-shooting, back-stopping agency.

See also text accompanying notes 21-22 (discussing the legal process approach to statutory interpretation); ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 107 (1996) (arguing that the legal process scholars relegated the legislature "to a residual statue, a last-ditch instrument to be used when the powers of rational deliberation

scholarship, the source for the topic of this symposium, virtually ignores legislators and regulators as consumers of legal scholarship and teaching. He devotes only one page of his original article to discussing the kind of scholarship that might be most helpful to legislators.[6] He mentions lawmakers and regulators in passing in one of his "postscripts" on this topic.[7] His brief treatment of the issue gives the reader no concrete sense of the kind of scholarship that he believes would benefit policymakers and lawyers working with statutes and regulations.

In this essay, I hope to suggest some questions for legal scholars to explore that would expand our understanding of the legal system in this age of legislation. Given the occasion of this symposium, to honor Professor Bernard Schwartz whose work in constitutional law continues to inform the legal profession, I will focus on the intersection between constitutional law and statutory interpretation. Constitutional principles are relevant to statutory interpretation in at least two ways. First, methods of interpretation are often defended on separation-of-powers grounds and thus relate to the Constitution's division of authority among the branches.[8] Textualists, for example, claim that constitutional considerations affect the legitimacy of extrinsic sources of meaning used to decode statutory text.[9] Second, courts use some substantive canons of construction, particularly requirements of clear statements, to protect constitutional norms that they may be unwilling to protect in a more aggressive fashion by striking down the law.[10] These canons are not only the method by which the judiciary chooses to resolve some constitutional challenges; they also allocate among the branches the primary responsibility for enforcing the Constitution.[11] For example, Cass Sunstein justifies nondelegation as a canon of construction because it allows courts to signal "Congress that any intrusion will have

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fail").

6. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 55 (1992) (arguing that although they may benefit more than judges from "theoretical, prescriptive" scholarship, legislators also need what Edwards terms "practical" scholarship). *See also* Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1926 (1993) (noting Edwards' silence "on the growing literature informed by philosophy and literary theory, on the interpretation of constitutions and statutes, even though interpretation is the major function of the court on which Judge Edwards sits").

7. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2207 (1993) (quoting a letter from a lawyer with a lobbying practice for the proposition that "practical" scholarship would be helpful to regulators and legislators). I found no discussion of legislators or regulators in Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession"*, 69 WASH. L. REV. 561 (1994) [hereinafter, *Another Postscript*].

8. *See* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. (forthcoming 1999).

9. *See, e.g.*, Scalia, *supra* note 1, at 25 (using rule of law concerns and the separation of powers as justifications for textualism); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (explaining the textualist's decision to eschew reliance on legislative history as compelled by the bicameralism and presentment requirements).

10. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) [hereinafter Eskridge and Frickey, *Quasi-Constitutional Law*].

11. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) [hereinafter Eskridge and Frickey, *Quasi-Constitutional Law*].

to be supported by a focused legislative judgment."[12]

As these justifications reveal, much of our constitutional and statutory structure is designed to influence the behavior of policymakers and citizens, and thus it involves predicting reactions to particular incentives. Accurate predictions rely on observations of past behavior and current capacities. More generally, those searching for ways to implement constitutional values effectively through methods of statutory interpretation or otherwise must develop realistic assessments of the institutions that play a role in such implementation.[13] Accordingly, legal scholarship in this area of legislative process and constitutional law must be grounded more firmly in empirical study and testing than it has been so far. Empiricism – or the use of knowledge based on observation and practical experience – should play a role in any effort to develop and test workable institutional structures and interpretive approaches.[14] This essay will suggest some promising avenues for empirical work, particularly through interdisciplinary scholarship that draws on the insights of political science, political philosophy, and economics, as well as on traditional doctrinal analysis.[15]

I

When judges select an interpretive method or canon of construction to use in a particular case, they make assumptions – often not articulated explicitly – about the legislative process. For example, judges may choose a rule of construction because they believe that it accurately accounts for the way legislators behave. Many of the linguistic canons – e.g., *expressio unius est exclusio alterius*, the canon against

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12. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 88 (1996). *See, e.g.*, Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (using the canon to protect values of nondelegation doctrine).

13. *See* Richard H. Fallon, *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (arguing that "identifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully") (emphasis added); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 11 (1998) (advocating a shift in constitutional theorizing so that scholars focus on the "task of exploring the operation and consequences of constitutionalism").

14. *See, e.g.*, Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992) (analyzing 413 Supreme Court cases with issues of statutory interpretation to determine the sources of authority used in decisions). On the basis of his empirical work, Professor Zeppos concluded that dynamic theories of interpretation best described Supreme Court practice, in particular, the theory of practical reasoning developed by Professors Eskridge and Frickey. *See id.* at 1115 (referring to William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990)). In addition to this relatively systematic work, empirical studies can be more casual in nature, based on discussions with relevant actors, close studies of particular cases or laws, and experience in the decisionmaking environment. *See, e.g.*, James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994); Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113 (1997).

15. *See* George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929, 1933 (1993):

> To the extent that it is important to understand the legal system as one of society's political institutions, it is important to invoke broader learning about politics and political institutions, for example, with the study of political science. Again, a focus on legal doctrine alone will be insufficient since legal doctrine, on its face, is unlikely to reveal political influence or consequence.

surplusage, *ejusdem generis* – are justified on the ground that they capture the enactor's linguistic understandings. They are analogous to default rules in contract law that are designed to mimic the practices and intentions of the parties.[16] If the reality of lawmaking diverges from the theories of lawmaking that support these canons, their use seems questionable and unjustified.[17] Such canons should closely match the behavior and linguistic conventions of lawmakers.

Other methods of statutory interpretation and substantive canons of construction that relate to constitutional norms similarly rely on assumptions about the legislative process. Methods of statutory interpretation that have constitutional aspects can be divided into two types on the basis of their emphasis. First, some theorists focus on the constitutional role of the courts in perfecting flawed legislative *output*. Second, other theorists do not employ interpretive strategies primarily to improve particular examples of legislative output; instead, they seek to improve the legislative *process* itself in the hope that better structures of decisionmaking will result in laws that judges do not have to fix.[18] I will focus primarily on this second group of theories - which include textualism and some clear statement rules - but let me first address the need for legal scholars to examine critically the approaches taken by the first group.

A

Interpreters in the first group see judicial interpretation of statutes primarily as a mechanism to improve or perfect the laws, which may not represent wise policies because of failures in the political process. They argue that judges should work to devise interpretive strategies that will ameliorate the effects of such failures. For example, those who believe that most legislation represents the outcome of inefficient rent-seeking by special interest groups might adopt interpretive approaches designed to minimize the economic losses caused by such activity or to broaden the scope of the legislation so that more share in the federal benefits.[19] Others argue that certain groups in society are systematically denied access to the political process, or inevitably lack clout in the legislature, and they advocate interpreting statutes in ways

16. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 97-100 (1989); *see also* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 555-57 (1997) (drawing the analogy between rules of statutory construction and default rules in contract law) [hereafter Sunstein, *Justice Scalia's Democratic Forum*]; Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 221, 230 (1998) (using the analogy in analyzing the role of legislative history in statutory interpretation).

17. *See, e.g.*, Richard Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 810-813 (1983) (attacking some of the linguistic canons because they rest on unrealistic assumptions of congressional omniscience).

18. The line between the two kinds of theorists is not always distinct; some who focus primarily on improving the legislative output, regardless of the process used to enact it, also hope to improve the legislative process in the future. *See infra* footnotes 23 and 24.

19. *See, e.g.*, Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991) (critiquing such approaches based on notions of pernicious interest group activity).

that will empower such groups.[20]

The legal process approach to statutory interpretation, where interpreters assume that legislation is the product of "reasonable persons pursuing reasonable purposes reasonably"[21] may be best understood as an attempt to construct a view of the legislature that allows courts to improve the laws. Rather than seeing legal process scholars as naively optimistic about legislatures, one should view them as self-consciously using a particular description of a idealized legislative process to produce interpretations that can better serve the public interest.[22] Or, as Ronald Dworkin puts it in his theory of "law as integrity," judges should read statutes "in whatever way follows from the best interpretation of the legislative process as a whole."[23] Some of these theorists do not specifically argue that the legislative process is flawed, nor do they always identify particular failures of the process. The tone of their discussion of legislatures, however, is not one of empiricists, nor of people convinced that the description they offer accurately portrays the dynamics that characterize Capitol Hill.[24]

At first, this kind of interpretation seems unconcerned with any empirical inquiry. If a legal process scholar is inventing an idealized legislature, why does he need to concern himself with the details of the actual legislative process?[25] If a judge conversant with public choice theory suspects that rent-seeking pervades the legislative process, why must she confirm that intuition before embarking on a strategy to infuse public-regarding perspectives into statutory interpretation?[26] If she is wrong in her assumptions about the real world, she might nonetheless believe that

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20. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 101-04 (1980); *see also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 618 (1995) (terming such approaches ones that attempt to reconstruct the political process so that the effects of failures are mitigated) [hereinafter Schachter, *Metademocracy*].

21. HART & SACKS, *supra* note 5, at 1378. Other approaches that are similar to the legal process school in their use of interpretation to improve the legislative product include Professor Eskridge's dynamic interpretation, *see* WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994) [hereinafter ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION], and Ronald Dworkin's cooperative venture between the legislature and the judge to yield the best answer, *see* RONALD DWORKIN, LAW'S EMPIRE (1986).

22. *See* Peter Strauss, *Legal Process and Judges in the Real World*, 12 CARDOZO L. REV. 1653, 1659-60 (1991) ("Hart and Sacks were not naïve enough to think they were describing an actual legislature; they were *prescribing* an attitude toward legislation that would be appropriate for a judge, despite the contrary reality such sophisticated observers knew even a half-hearted observer would quickly discover."). *But see* William N. Eskridge, Jr., & Philip P. Frickey, *supra* note 14, at 334 ("Whether Hart and Sacks thought this assumption [of reasonableness] reflected the realities of the legislative process is unclear. . . . [I]t appears that at least some of the legitimacy of their approach depends upon the empirical accuracy of these assumptions.").

23. DWORKIN, *supra* note 21, at 337.

24. Indeed, Eskridge's work relies on the insight of public choice and decision theory that would cast doubt on the reasonableness of both legislators and their output. *See, e.g.*, ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 21, at 34-38.

25. However, some who advocate employing the standard of the reasonable legislator argue that their method would also have positive effects on future legislative activity. *See, e.g.*, James J. Brudney, *supra* note 14, at 81.

26. Such a judge may hope that her interpretive strategies will improve the legislative process in the future, as well as improving the law before her in the particular case. For example, Jonathan Macey's approach would not only result in public-regarding interpretations of statutes, but it might also reduce the amount of interest group rent-seeking in the future because the payoff for such activity would be reduced. *See* Macey, *supra* note 19. I argue, however, that the goal of improving the political process is a secondary one for this group of interpreters. Moreover, if the process proves resistant to the incentives these rules attempt to construct, the theoretical framework still envisions that judges will work to improve the legislative product so that the interpretation represents the best policy.

a strategy of interpretation that tries to implement the "best" outcome would only improve the statute.

It would be unwise, however, for these theorists to dismiss the need for accurate understandings of the legislative process. Certainly, all the theories have normative and theoretical aspects that relate to empirical questions but do not depend on them. For example, what counts as "influence" in the political process? What characteristics must a group exhibit in order to prompt a concern about any under-representation or inability to give voice to their concerns? But, empirical questions are crucially implicated in any analysis. For example, is it accurate that certain racial minorities lack influence in the political process? Are there subgroups, such as those living in poverty, in rural areas, or in homes headed by a single parent, whose members are denied meaningful access to the political process, while those who are economically well-off have the same (or greater) influence as non-minorities? The answers to such questions affect the scope of the judicial protection that should be afforded by an interpretive strategy justified by any theory of legislative failure. If courts miscalibrate and empower the already powerful, then greater inequity in political outcomes may result. Or, to consider a different example, is it true that groups representing state and local governments are ignored, outspent and systemically defeated in the federal legislative process? Such an empirical understanding may be used to justify the clear statement rule in *Gregory v. Ashcroft*[27]; yet, it may not accurately portray a world where the intergovernmental lobby wields considerable political power at the national level.[28] Again, if the courts have miscalculated, then strengthening the power of state and local interests may come at the cost of important individual rights and economic reforms.

Second, notions of accountability suggest that citizens should be able to trace the source of rules back to the entity promulgating them. An idealized vision of the legislature acts as a justification, and in some ways as a disguise, for lawmaking by the judiciary.[29] Knowing the scope and nature of the divergence between the actual and the ideal can allow us to determine more precisely which rules are judicially constructed and which emanate primarily from the political branches. Understanding the source of rules enables the public to gauge their legitimacy and policymakers to determine how to modify them if necessary. Furthermore, it seems possible that some of the judicial strategies might be counterproductive in a number of ways that would be better understood with empirical testing. If the judiciary purposely and consistently favors one group over others in its statutory interpretation, might this approach cause a reaction in the political branches and the state governments? Such

27. Gregory v. Ashcroft, 501 U.S. 452 (1991).

28. *See* Elizabeth Garrett, *supra* note 14, at 1120-31 (describing strengths and weaknesses of intergovernmental lobby) [hereinafter Garrett, *Political Safeguards*]; DAVID S. ARNOLD & JEREMY F. PLANT, PUBLIC OFFICIAL ASSOCIATIONS AND STATE AND LOCAL GOVERNMENT: A BRIDGE ACROSS ONE HUNDRED YEARS (1994) (providing history and current status of the intergovernmental lobby).

29. *See also* Jane J. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 19 (1998) [hereinafter *Common Law Originalism*] (arguing that textualists, whom I have placed in the second group of interpreters, engage in significant amounts of "judicial lawmaking").

a reaction, in the form of broadly applicable laws, might impose more costs on the identifiable group than the burdens reduced by a few isolated court cases.

B

The second group of interpreters justify their methods in part because they offer the possibility of improving congressional decisionmaking, which may in turn lead to fewer laws that need to be fixed by imaginative and aggressive judicial construction. The use of interpretive methods like textualism and rules of clear statement are best understood as efforts to improve the quality of the decisionmaking in the politically accountable branches.[30] Justice Scalia succinctly explains the judiciary's role in encouraging lawmakers to act more responsibly: "I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process."[31] Textualism and clear statement rules are designed to provide Congress with incentives to deliberate transparently about important values, to provide satisfactory reasons for decisions, and to set forth clearly articulated laws so that the electorate can learn and follow them. If the legislature acts clumsily, textualists argue, judges have no choice (and no authority) to do more than enforce the imperfect product. As I have described it, textualists are primarily concerned with improving the conditions of deliberation. They hope to encourage lawmakers to discuss issues fully and publicly and to provide explanations for their decisions, whatever the substance of those decisions might be. One might also define deliberation in a way that includes a substantive component and requires that decisions reached by the politically accountable branches serve a normative conception of the common good. In this essay, I concentrate primarily on the first conception of deliberation, which is consistent with the explicit thrust of the interpretive methods.

To return to the contract analogy, clear statement rules and textualism are similar to information-forcing default rules because they are intended to change

30. *See, e.g.*, Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1637 (1991) ("Textualists may want to reform Congress, getting it to focus more attention on legislating as an entity rather than affecting the day-to-day implementation or execution of the law through fragmented centers of power.") [hereinafter Zeppos, *Justice Scalia's Textualism*]; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457-58 (1989) (describing clear statement rules as designed to promote better lawmaking); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 383 (2d ed. 1988) (noting that the use of clear statement rule in the federalism context "can thus increase the likelihood that Congress will give full attention to the interest of the states and those groups whose interests parallel the states"); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 722 (1996) (stating that *Gregory*'s clear statement rule "is a forthright judicial effort to influence congressional process"); William N. Eskridge, *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1549-50 (1998) ("Ultimately, the new textualism might be not only democratic, but also might induce Congress to change its way of writing statutes so that the democratic process actually works better."). Although my focus here is on the interaction between legislatures and substantive canons, there is a similar interaction between direct democracy and the canons. Citizen-legislators are less likely than professional lawmakers to respond to incentives, but the initiative industry consists of repeat players who may respond to judicial directions. *See* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477 (1997) (noting presence of such repeat players).

31. United States v. Taylor, 487 U.S. 326, 346 (1988) (Scalia, J., concurring in the judgment).

behavior in the future.[32] Rather than force the revelation of information, they work to force a particular kind of public deliberation.[33] They can be thought of as deliberation-forcing or democracy-forcing. Or, to use terms that Professor Schacter coined to describe the differences in the two kinds of approaches, these interpreters act as disciplinarians of the political process, with the first group working to reconstruct or complement politics.[34] Examples of such disciplinarian rules include the *Gregory* clear statement rule designed to protect traditional state functions from federal intervention,[35] the strong presumption against extraterritoriality,[36] and the canon requiring that Congress explicitly and clearly state its intention that States be amenable to suit in federal court.[37] By requiring a clear textual statement to overcome the presumptions, interpreters hope to force Congress to pay close and sustained attention to the issue and to deliberate fully before acting.

Because these interpretive methods are justified largely on the basis of their effects on future congressional action, their legitimacy rests on predictions about changes in congressional behavior. Scholarship providing detailed empirical studies of current congressional behavior and the effects of similar incentive structures is therefore necessary before we know whether the predictions are likely to be accurate. Not only are such analyses virtually nonexistent, but the assumptions about congressional behavior that are used in the place of data often remain unexpressed and unexamined. Indeed, for those of us who have worked in a legislature, the assumptions also are intuitively unconvincing, but our intuitions, based on limited experience, need to be tested more rigorously and broadly. Virtually the only relatively systematic empirical work with which I am familiar has been done in a related context to determine how often and under what conditions Congress is apt to

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32. Occasionally, canons of clear statement are described as market-mimicking (like the linguistic canons described above) because legislators would not have passed a law compromising some important constitutional value without stating their intention clearly in the text. See, *e.g.*, SCALIA, *supra* note 1, at 29:

> Some of the [clear statement] rules, perhaps, can be considered merely an exaggerated statement of what normal, no thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied - so something like a 'clear statement' rule is merely normal interpretation.

However, in most cases, such rules are not defended as consistent with lawmakers' linguistic norms.

33. Again, Cass Sunstein briefly discusses this analogy in his review of Scalia's *A Matter of Interpretation*. *See* Sunstein, *Justice Scalia's Democratic Formalism*, *supra* note 16, at 556-557 (relying on Ayres and Gertner, *supra* note 16, at 97-100). He presents a more extended, but still preliminary analysis in Cass R. Sunstein, *Must Formalism Be Defended Empirically*, (Univ. of Chicago John M. Olin Law and Economics Working Paper No. 70 2d Series, 1999), at 10-16. Some contracts scholars refer to such rules as penalty defaults. This term is inappropriate in the statutory context; a requirement of better deliberation and more transparent decisionmaking is hardly a penalty – it may be a constitutional imperative.

34. *See* Schacter, *Metademocracy*, supra note 20, at 618-36; *See also* Schacter, *Common Law Originalism*, *supra* note 29, at 9 (describing those who eschew reliance on legislative history in statutory interpretation as "disciplinarians").

35. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

36. *See* EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); *see also* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 331, 365 (1999).

37. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); *see also* Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 10 (discussing and listing clear statement rules).

override the Supreme Court's construction of a federal statute.[38] The strong notion of stare decisis accorded to judicial interpretation of statutes rests in part on the argument that Congress can correct the courts' mistakes,[39] a question that demands empirical treatment.

The absence of well-developed empirical work is even more disturbing because similar assumptions about congressional behavior support constitutional theories other than quasi-constitutional theories of statutory interpretation. Some scholars of constitutional law have recently argued that Congress has an active role to play in the formulation of constitutional norms. They envision a dialogue of sorts between the courts and the Congress, as each reacts to the other's pronouncements.[40] This vision of interaction between the branches relies on assumptions about the capacity of Congress to participate in such a dialogue and the methods through which it deliberates about constitutional principles. If these theories are more than metaphors, then their adherents need to support them with empirical analysis that would support their predictions of congressional behavior.

In this short essay, I do not intend to provide the sort of analysis required to assess the empirical claims of those using statutory interpretation to improve legislative decisionmaking. Rather, this paper suggests an agenda for legal scholars who want to break away from the court-centrism of our discipline by working to increase the attention paid to the state and federal legislative processes. My initial thoughts on this project follow two paths. First, I have strong doubts that the actual legislative process can ever respond to the incentives provided by clear statement rules and textualism to the extent that proponents of these methods seem to envision. Second, notwithstanding those doubts, I find the notion of using incentives to improve democratic deliberation and legislative decisions normatively appealing. It may be that textualists and those who use judicial strategies have unrealistically high hopes, but they are surely right that legislators could do a better job than they do now, particularly in areas that implicate constitutional values not readily amenable to judicial resolution. Thus, I study and advocate adopting more direct and perhaps more productive ways to foster and improve the democratic process, such as

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38. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding*]; Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425 (1992). *See also* JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO (1996) (studying the experience with the legislative veto).

39. *See, e.g.*, Flood v. Kuhn, 407 U.S. 259 (1972); *see also* Lawrence Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (arguing for an absolute rule of stare decisis in statutory cases).

40. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653 (1993); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 105-06 (1998); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 69-70 (1998). *But see* Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CALIF. L. REV. 729-30 (1991) ("[T]he dialectic between the Court and Congress has represented not a healthy, respectful effort to clarify their respective obligations and objectives in a particular area, but rather an attempt by one branch to politicize the Constitution in order to accomplish its policy objectives."). A new theory along these lines is Neal Katyal's interesting article on advicegiving by judges. Clear statement rules can be seen as ways to penalize legislators who do not heed judicial advice. *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1720 (1998). Again, the success of the advice depends on the capacity of the legislators to hear it and to change their behavior.

congressional rules that structure deliberation. These legislatively-adopted deliberation-forcing devices could work in addition to, or instead of, the judicial techniques that have been the primary focus of legal scholarship.

II

Other scholars have noted that the legislative process may not be capable of responding to the incentives of textualism.[41] Perhaps lawmakers cannot meet even the demands of targeted clear statement rules that would apply in far fewer cases than textualism, a general method of interpretation that places heavy burdens on the drafting of all statutory mandates. Not only are there competing pressures that prod Congress away from textual clarity and precision, but the level of congressional awareness about relevant statutory methods and clear statement requirements may be quite low. Empirical analysis is required to determine whether Congress fails to respond to judicial incentives because members simply do not know about them.[42] In my conversations with legislative drafters, I find that many know that courts are increasingly relying on the text and structure of a bill as the primary sources of meaning, but knowledge about particular canons of construction is less widespread and sometimes nonexistent. Similarly, a study by the Governance Institute of the Brookings Institution found that congressional staff members were unaware of the majority of fifteen recent statutory cases that members of the D.C. Circuit believed warranted congressional attention.[43] Furthermore, "to the extent cases are brought to [the staff's] attention, the focus is on the court's ruling. . . . For instance, judicial suggestions that 'congressional attention' be paid to some other aspect of the statutory scheme are unlikely to be seen by committee staff."[44]

Additional studies of the House and Senate Offices of Legislative Counsel, which employ many of the professional legislative drafters, and of the lawyers who staff the substantive congressional committees could reveal the level of congressional cognizance of Supreme Court cases, lower court decisions, and the details of the judiciary's methods of statutory construction. Such studies would also measure how much legislation professional drafters prepare, and how much is written on the floor or by personal staff, without the aid of those who are more likely to be attentive to the

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41. *See, e.g.*, Zeppos, *Justice Scalia's Textualism*, *supra* note 30, at 1637; William N. Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 100 (1988) (listing obstacles even when a majority in Congress agrees on a matter).

42. *See* James J. Brundley, *supra* note 14, at 68 ("It is unrealistic to presume that Congress or its committees are aware of decisions, especially lower court decisions, about which they have said absolutely nothing.").

43. *See also* ROBERT A KATZMANN, COURTS AND CONGRESS 73-74 (1997) [hereinafter KATZMANN, COURTS AND CONGRESS]. This complaint is not a new one. *See, e.g.*, Henry J. Friendly, *The Gap in Lawmaking – Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 794-801 (1963) (listing decisions that should have prompted congressional reaction but that were seemingly ignored and citing as the reason "that Congressmen are too driven to be able to attend to such matters, save occasionally, and then under the pressure of a special force").

44. Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 662 (1992) [hereinafter Katzmann, *Bridging the Statutory Gulf*].

default rules and the interpretive regime. They might also illuminate how textualism changes the influence of staff in the legislature, relative to members of Congress and interest groups[45] This concern is clearly relevant because the textualists' low regard for legislative history stems in part from their perception that such congressional materials are disproportionately influenced by staff, lobbyists, and interest groups. Legal scholars have not ventured into this fertile area for study, leaving it to the political scientists to describe congressional behavior. Thus, the scholarship lacks a sophisticated understanding of legal decisionmaking and doctrine and cannot adequately evaluate the relationship among the branches of government or the role that judicial strategies of interpretation play in legislative deliberation and drafting.

Other avenues for related work concentrating on legislative actors are also available to legal scholars. Reacting to the study of the Governance Institute mentioned above,[46] the D.C. Circuit established a program to route certain statutory decisions to relevant congressional committees, leaders, and legislative counsel.[47] As part of this project, scholars at the Governance Institute are monitoring the congressional reaction to the court decisions and sponsoring seminars to improve drafting, interpretation, and revision of statutes.[48] Scholars must gauge the success of this program, understand what sorts of decisions have been forwarded and the congressional reaction they have produced, and determine whether the initiative should be expanded or modified.

Programs like that of the D.C. Circuit can be thought of as the equivalent of the courts' issuing "congressional impact statements" to ensure that the relevant legislative staff understand the effect of decisions on future legislative output. Focusing on the other participant in this dialogue, Chief Justice Burger once proposed that Congress be required to issue a "court impact statement" with each piece of legislation to detail the burden placed on those interpreting the law.[49] While his idea was mostly an expression of frustration, one could imagine a rule requiring Congress to identify in committee reports any judicial clear statement requirements that might

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45. *See, e.g.*, Bernard W. Bell, R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory 60-62 (1998) (unpublished manuscript) (providing preliminary thoughts on the role of staff and the need to differentiate among different kinds of congressional staff).

46. *See supra* text accompanying notes 43-44.

47. *See* KATZMANN, COURTS AND CONGRESS, *supra* note 43, at 76-81 (describing the rather modest project launched in 1992 between the D.C. Circuit and the House of Representatives); Katzmann, *Bridging the Statutory Gulf*, *supra* note 43, 662-67 (describing genesis of the project); Deanell Reece Tacha, *Judges on Judging, Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 291 (1991) (also describing the Governance Institute and its project). *See also* Robert W. Kastenmeier & Michael J. Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 54, 83 (R. A. Katzmann ed., 1988) (approving of a program like the D.C. Circuit one to solve the problem of Congress' ignorance of relevant court pronouncements).

48. *See* KATZMANN, COURTS AND CONGRESS, *supra* note 43, at 78-79 (quoting the Senate legislative counsel):

> Decisions transmitted have encouraged me and my staff to begin a systematic reexamination of this Office's approach to certain legislative drafting issues. We have also entered into a joint review of drafting issues with our House counterparts and decisions transmitted under the pilot project will be considered in the course of that review.

49. Fred Barbash, *Congress Didn't, So the Court Did*, WASH. POST NAT'L WEEKLY ED., July 15, 1998, §7 at CO1.

be implicated by a particular piece of legislation.[50] Similarly, Justice Ginsburg and Professor Huber have suggested that a "second look at laws" committee be created in Congress and that the professional drafters be explicitly charged with overseeing matters of "statutory housekeeping."[51]

Other institutions deserve to be part of this empirical analysis. In the United States, the recently instituted Corrections Day in the House of Representatives, a procedure to allow Congress a regular opportunity to fix statutory mistakes, could be expanded if further analysis suggests that it could play a positive role.[52] Early experience with Corrections Day has not been overwhelmingly positive. Instead of passing twenty bills a month through the procedure, Congress enacted only twenty of the Corrections Day measures in 1995 and 1996.[53] Most have been narrowly targeted and designed to change regulatory decisions rather than to overturn incorrect judicial interpretations of statutes.[54] The limited impact of this innovation may result from the procedures that surround it; for example, passage in the House requires a three-fifths vote.[55] In addition, the substantive committee with jurisdiction over the legislation must approve any decision to place a proposal on the Corrections Day calendar.[56] Some have argued that the committee arguably responsible for the poor drafting in the first place will be loathe to admit a mistake.[57] In addition, Speaker Gingrich cleared all Corrections Day proposals with a bipartisan review committee, which filtered out any controversial changes.[58] Nevertheless, further study of the process and the hurdles reformers encountered might suggest ways to change it to allow for broader use.

Many states also have formal mechanisms for monitoring judicial opinions that interpret statutes, such as offices of revisors of statutes, staff counsel, and legislative drafting and research agencies.[59] For example, in Illinois, the Legislative Reference Bureau produces an annual report of all federal and state appellate decisions that affect the interpretation of Illinois statutes, and the Bureau has the

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50. Currently, all sorts of information must accompany a committee report, including the impact on the federal budget, the presence of any intergovernmental mandates or private sector mandates, and a regulatory impact statement detailing any paperwork burden imposed by the law.

51. Ruth Bader Ginsburg & Peter Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1432-23 (1987); *see also* Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921); Roscoe Pound, *A Ministry of Justice: A New Role for the Law School*, 38 A.B.A. J. 637 (1952) (both proposing a Ministry of Justice to provide a line of communication between courts and legislatures); Friendly, *supra* note 43, at 805-07 (proposing an agency on revision comprising legislators, judges, lawyers and legal scholars and attached in some way to the legislature).

52. *See* John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267 (1996).

53. *See* Thomas G. Donlan, *Good Intentions: An Interesting Legislative Invention Produces Few Interesting Results*, BARRON'S, May 5, 1997, at 58.

54. *See, e.g.*, Catherine Strong, *Got a Law You Think Is Stupid or Unnecessary?*, Assoc. Press Pol. Serv., Oct. 4, 1997, *available in* 1997 WL 7553804 (listing bills that had been placed on the Corrections Day calendar); Press Release from the Speaker's Corrections Day Advisory Group, *Vucanovich Says Corrections Day Provides People with Common Sense Relief*, Sept. 24, 1996 (describing two bills passed by the House overturning minor regulatory decisions).

55. *See* Strong, *supra* note 54.

56. *See* Donlan, *supra* note 53, at 58.

57. *See id.*

58. *See id.*

59. *See* Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1059-75 (1991) (detailing many of the state institutions).

discretion to provide suggestions to the legislature for revisions.[60] Other states have less formal mechanisms; Wisconsin has a Law Revision Committee, comprised of state legislators, which considers judicial decisions sent to it by the Revisor of Statutes.[61]

In England, the Office of Parliamentary Counsel in the Lord Chancellor's office is a powerful institution structured to mediate between the drafting of legislation and the background rules used by judges to understand the legislation. As Professor Atiyah explains:

> English parliamentary counsel know and understand the way in which English judges interpret statutes, and they draft bills in this knowledge. . . . Thus it is not absurd to assume that an English act should be read in light of the canons of interpretation; acts are *designed* to be interpreted in this way by the draftsman.[62]

Even the private bills of members of Parliament are checked by the Office to ensure they are properly drafted. Of course, imposing such strict regimentation on congressional drafting is unlikely. Not only must reformers work within a government organized to meet separation of powers concerns, but United States judges also do not employ a uniform interpretive approach and our national legislature is much more decentralized. Nonetheless, reform suggested by the English experience may not be entirely impossible.

Complementary legal scholarship would focus intensely on examples of federal laws that meet judicial requirements of specificity and textual precision. Under what conditions does congressional output appear to respond to the interpretive regime the courts have constructed? Does the quality of the deliberation that accompanies such laws meet our expectations? If not, does this situation lead to the conclusion that textual clarity is a poor proxy for decisionmaking that involves public deliberation and reason-giving? My guess is that clear statements are sometimes the result of deliberation, but often they are not. Consider the kind of legislation that is often phrased with excruciating precision – special interest tax breaks, transition rules targeted to benefit only a few taxpayers, the quintessential pork barrel programs buried in the pages of an omnibus spending bill.[63] Environmental laws in the last few years have also been precisely worded, in part because of tension between the political branches and in part because "sophisticated, particularized, and well-funded interests on all sides of the issues distrust [the] EPA and strive to insert favorable language into new legislation."[64] In short, narrow and organized special interests may

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60. *See id.* at 1063.

61. *See id.* at 1065.

62. Patrick S. Atiyah, *Judicial-Legislative Relations in England, in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 129, 156 (R. A. Katzmann ed., 1988).

63. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 147 (1997) ("The most specific legislation that comes out of the Congress these days is perhaps the gargantuan and mind-numbingly detailed legislation drafted by the Budget, Appropriations, and Finance Committees.").

64. Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENV'L L. REV. 175, 180 (1992).

find it easier than other groups to meet stricter requirements, imposed either through congressional procedures or indirectly on account of judicial decisions, and they may be able to do so relatively stealthily.[65] Statutory provisions that these groups obtain, which are phrased so clearly and specifically that no textualist could complain, often would not survive the scrutiny of transparent and extended legislative deliberation.

One article provides detailed case studies of the congressional response to clear statement rules.[66] Carol F. Lee studied two laws passed after the Court imposed a clear statement rule for a congressional abrogation of the states' sovereign immunity from suits for money damages.[67] In both cases (the reauthorization of Rehabilitation Act programs and the Superfund Amendments and Reauthorization Act of 1986), Congress enacted provisions abrogating sovereign immunity with language that would pass the Court's clear statement rule. But, as Lee notes,

> [g]iven the substantial fiscal implications of these amendments, the most striking feature of the legislative history is the *lack of serious discussion or debate* on whether state immunity should be abrogated. Not a single member of the House or Senate went on record in either instance to oppose the abrogation of immunity. Indeed, not a single member of the House or Senate even asked the sponsors of the amendments why they should be adopted or how much they would cost."[68]

In the case of the Rehabilitation Act, there was some discussion of the abrogation among the administration, the primary author of the act, and some interested groups; the Superfund provision, Lee argues, "seems to have been enacted without congressional attention."[69]

Lee concludes from these studies, as well as from two others of legislation passed in response to *Garcia v. San Antonio Metropolitan Transit Authority*,[70] that several institutional features determine whether a clear textual statement has actually been accompanied by deliberation.[71] The complexity of the underlying legislation, the presence of a motivated political entrepreneur, the use of appropriations riders rather than amendments to substantive legislation, the strength of opposing interest groups, and the timing of the legislation within the congressional term all affect the scope and content of deliberations. The studies of statutory overrides also provide factors

65. For a recent example, see *Thomas v. Network Solutions, Inc.*, Civ. No. 97-2412 (TFH) (D.D.C. Aug. 28, 1998) (mem.) (finding a clear statement retroactively ratifying an unconstitutionally imposed tax in a rider to an appropriations bill added in the conference committee apparently without the knowledge of more than a few lawmakers). *See also* MASHAW, *supra* note 63, at 72 (also noting that increased proceduralism tends to strengthen special interests that are extraordinarily adept at using stricter requirements to block legislation they oppose); Schacter, *Common Law Originalism*, *supra* note 29, at 44 (describing lobbyist involvement in drafting and noting the absence of systematic empirical work on the role of lobbyists in drafting either statutory language or legislative history).

66. Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988).

67. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

68. Lee, *supra* note 66, at 329 (emphasis added).

69. *Id.* at 331.

70. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

71. *See* Lee, *supra* note 66, at 339-40.

worthy of increased attention, such as differences among committees in the ability to respond to judicial incentives, the interest of the executive branch in passage, and the configuration of interest groups.[72]

Congressional procedures adopted since these studies doubtlessly also affect the ability of groups to obtain the kind of statutory language required by clear statement rules and other interpretive techniques. For example, Congress has adopted budget rules that require offsets be found for any revenue lost by new federal spending programs and tax subsidies.[73] These rules make it easier for Congress to overturn judicial decisions in the tax arena which result in revenue losses for the Treasury than it is for Congress to overturn decisions increasing taxpayers' liabilities.[74] In addition, the need for revenue estimates may also affect the way Congress drafts legislation. In some cases, members may draft precisely to limit the effect of a federal program to only a few beneficiaries; in others, legislators may prefer vague language that undermines the attempts of revenue estimators to project the costs of particular programs. In other words, the clarity of some statutory language may have more to do with budget dynamics than with the nature of the deliberation that accompanied enactment.

If interpreters' only interest in clear statement rules and textualism is to change legislative output so it is more specific (perhaps for rule of law concerns or to curtail delegations of power to executive branch agencies), then they may be unconcerned with the way clarity is achieved. Or if the courts are using clear statement rules as a pretext to strike down laws in a way that allows judges to appear less activist,[75] they may not be concerned about the dynamics of the actual process. But proponents of these methods justify them in part as ways to improve the legislative process and to enhance the quality of congressional deliberation. Thus, any comprehensive assessment of the interpretive theories requires empirical analysis of their effect on congressional behavior.

If future legal scholarship suggests that transparent deliberation and rational explanation are not necessarily related to textual precision - or that they are not frequently associated with it - then the judicial methods seem less legitimate. I suspect that empirical work will demonstrate either that Congress does not respond to interpretive strategies as their proponents anticipate, or that the congressional response is indeterminate. The latter finding may result from the difficulty of

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72. *See, e.g.*, Solimine & Walker, *supra* note 38, at 446 ("cases on taxation which can be expected to engender intense interest group activity, are overridden" at statistically significant higher rates); *id.* at 449 (noting that many overrides came from the Judiciary Committees or the Education and Labor Committees); Eskridge, *Overriding*, *supra* note 38, at 348 (noting that state and local governments are disproportionately successful in overriding judicial decisions); *see also* KATZMANN, COURTS AND CONGRESS, *supra* note 43, at 79 (listing some of the factors relevant to the congressional reaction to judicial decisions).

73. *See* Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 399-400 (1998).

74. *See* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 532-35 (1998) (discussing a specific example, congressional attempts to overturn Arkansas Best Corp. v. Commissioner, 485 U.S. 212 (1988)).

75. This is one of the charges leveled by Professors Eskridge and Frickey in their analysis of clear statement rules. *See* Eskridge and Frickey, *Quasi-Constitutional Law*, *supra* note 10, at 635-36; *see also* Herz, *supra* note 64, at 204.

identifying and measuring the quality of deliberation in the political branches. Scholars will also find that drawing conclusions from congressional silence is challenging. When Congress does not pass a clear textual statement, have members determined that they do not want to vary the default rule provided by the judicial presumption, or were they merely unaware of the need for a clear statement? Did other factors, unrelated to the transparency of the deliberation or to political accountability, undermine congressional efforts at clarity? How can researchers derive meaningful and accurate results from silence?

If the scholarship leads in the expected directions, the legitimacy of deliberation-forcing judicial techniques is subject to serious question. Not only are they unlikely to achieve their objective of improving the legislative process, but in many cases their use will lead to a statutory interpretation precisely contrary to the intent of Congress. For example, contrary to the default rule of *Gregory*, federal legislators who draft a broadly applicable statute are likely to intend that state and local governments comply with its mandates. Yet, application of the canon to a law without a precisely worded statutory provision will exempt subnational governments from the law's scope. In short, the clear statement rule will lead to a clearly erroneous result, in terms of what the politically accountable branches have decided in a particular case, and there is no assurance that Congress will be able to either correct this specific result or to avoid similar erroneous interpretations in the future.

If scholars demonstrate that textualism and clear statement rules do not improve decisionmaking in the legislative process (or that we can never know their effects), would other methods work? Other judicial strategies are possible. For example, judges could adopt more direct means of ensuring that Congress deliberate and give reasons for its actions, perhaps by requiring compelling evidence of public deliberation on particular issues that implicate constitutional values. Justice Stevens, in *Fullilove v. Klutznick*, applied such an analysis in the context of minority set-asides in a federal public works bill, thus justifying the judicial intrusion into the deliberative process of Congress as required by the due process clause.[76] This approach could be broadly applied, with courts more regularly treating Congress as they do administrative agencies, requiring lawmakers to provide sufficient reasons for their decisions.[77] But such a judicial approach is, at the least, problematic. What

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76. Fullilove v. Klutznick, 448 U.S. 448, 546-551 (1980) (Stevens, J., dissenting); *see also* Fallon, *supra* note 13, at 86 (noting that the Court seldom uses deliberation-forcing techniques in constitutional jurisprudence, but not considering the quasi-constitutional clear statement rules of interpretation).

77. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 223 (1976):

> Rational lawmaking, if we take the formula seriously, would oblige this collective body to reach and to articulate some agreement on a desired goal. . . . The projections and assessments of conditions and consequences must presumably take some account of evidence, at least in committee sessions. A member who never attends the committee meetings should at least examine the record of evidence before casting a vote, or be told about it, and should certainly never vote by proxy. The committee must explain its factual and value premises to the full body.;

Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 367-68 (1984) ("[A] role for courts in our constitutional system might be based on the identification of flaws in the legislative process."). *Cf.* Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 299 (1975) (noting the possibility of an "articulated rationale" approach in due process jurisprudence, "an approach in which challenged government action will be evaluated by the Court only in terms of purposes actually argued by the

would count as deliberation – how public must it be, how long must the proposal be in the public domain before action has been taken, how extensive must the discussion be? How many members of Congress must be actively involved in the debate about a particular bill, or a provision in a bill, before the deliberation has been sufficiently democratic and robust?[78] And is such a judicial strategy likely to prompt genuine discussion and the articulation of reasons, or merely to elicit hypocritical justifications to mask rent-seeking by special interests and lawmakers?[79] Does it matter?[80]

If we are uncomfortable with the notion of the judiciary intruding into the deliberative process to this extent,[81] another option deserves sustained and serious scrutiny. Congress can adopt internal rules and procedures designed, in much the same way as clear statement rules are designed to provide members a lever to force deliberation on particular issues.[82] Congressional procedures may foster deliberation and rationalization better than judicial doctrines. A framework that affects a substantial amount of congressional business may be more salient to lawmakers and the public than judicial pronouncements in one or a few court opinions.[83] In that way, procedures are more direct than judicial incentives, although neither prescribes the contours of acceptable deliberation. Moreover, the scope of many judicial decisions, which are often explicitly limited to the particular cases the courts have decided, are more uncertain than the reach of a comprehensive procedural framework. This uncertainty, coupled with courts' historically inconsistent use of substantive canons of statutory construction[84] and judicial disagreement about the role of textualism,[85]

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government proponent, and not in terms of whatever purposes the Court can invent").

78. *See* RICHARD L. HALL, PARTICIPATION IN CONGRESS 21-24, 56-85, 224-25 (1996) (empirical study revealing that only a small number of very engaged legislators are active on any particular bill and that this pattern of behavior describes both the activity in the committees and on the floor).

79. *See* Linde, *supra* note 77, at 231 ("Articulated reasons have their place in an agency's pursuit of the goals assigned to it. Pursued in the legislative process, the hope for candor is more likely to produce hypocrisy."); Michael Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1601 (1988) ("It simply is not possible to ensure that people *are* public-regarding merely because they defend or rationalize their actions on those grounds [of public-regarding verbiage].").

80. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 243-244 (1993) (noting that the requirement of justification "might well contribute to public-regarding outcomes. It may 'launder' preferences by foreclosing certain arguments in the public domain .... It might even bring about a transformation in preferences and outcomes, simply by making venal or self-regarding justifications seem off-limits."); Jon Elster, *Strategic Uses of Argument*, *in* BARRIERS TO CONFLICT RESOLUTION 236 (K. Arrow ed., 1995) (calling this the "civilizing force of hypocrisy"); David Miller, *Deliberative Democracy and Social Choice*, XL POL. STUD. SPECIAL ISSUE 54, 61 (1992) ("Preferences that are not so much immoral as narrowly self-regarding will tend to be eliminated by the process of public debate."); *see also* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 126 (1996) (although skeptical about ability of open debate to "transform self-interested claims into public-spirited ones," public discussion does help "to rule out arguments that one would not accept if others made them").

81. One would imagine that those already convinced that clear statement rules are overly intrusive, *see* Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 743 (1996), would be extremely wary of this approach.

82. *See, e.g.*, Garrett, *Political Safeguards*, *supra* note 28, at 1180-82.

83. *See* Schacter, *Common Law Originalism*, *supra* note 29, at 51 (noting that those who refuse to use legislative history as a strategy to change congressional behavior "suffer[] from an exceedingly caricatured and court-centered view of legislative history").

84. On the same day that it adopted the *Gregory* clear statement rule, the Court decided *Chisom v. Roemer*, 501 U.S. 380 (1991), which concerned an extension of Section 2 of the Voting Rights Act to judicial elections, but made no mention of the clear statement rule. Perhaps the cases are distinguishable because *Chisom* involved national action under the Fourteenth Amendment, and in *Gregory*, Congress was relying on its commerce clause power. However, Justice O'Connor's opinion in *Gregory* indicates that the clear statement rule would apply in both cases. *See also*

might persuade lawmakers that they could safely disregard the clear statement requirement or the demands of textualism in a particular case. Congressional procedures can be triggered by one member of Congress who cannot so easily be ignored.

Fortunately, future legal scholarship can generate data and conclusions that will begin to answer our questions about the comparative benefits of a congressional rule structuring deliberation and a judicially imposed requirement of clear statement. For example, lawmaking in areas that implicate federalism is affected both by judicial clear statement rules and by a congressional framework, the Unfunded Mandates Reform Act.[86] Some laws are subject to both, some to one or the other (the law at issue in *Gregory* falls under the Act's second exception for a provision that prohibits discrimination on the basis of age), and perhaps a few to neither. Analysis of these laws will allow us an opportunity to compare the effects of the judicial and legislative approaches and to identify any interactions between them, as well as to determine which, if either, actually improves the democratic process in ways that enhance political accountability.

Other congressional structures adopted in recent years also promise to be fertile subjects for legal scholars. Congressional proposals to reduce spending for small, narrowly targeted federal programs, which many believe are more likely to be private-regarding than to be public-regarding, have included requirements that such provisions be widely publicized and be tied clearly to the sponsoring lawmaker.[87] Similarly, reducing the ability of Congress to act through omnibus legislation[88] – something along the lines of single subject rules or more rigorous germaneness requirements – might do more to improve congressional deliberation than would textualism. Many states have rules imposing similar structures on legislative

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Schacter, *Common Law Originalism, supra* note 29, at 52 (noting that many techniques of statutory interpretation are used by judges in a way that is "hardly predictable in any clear or precise way").

85. Justice Scalia overstated the acceptance of textualism in his dissent when he wrote:

> I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.

Chisom v. Roemer, 501 U.S. 380, 403 (1991) (Scalia, J., dissenting).

86. Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

87. *See, e.g., Guidelines to be Followed by the Chairman in Considering Targeted Transition Rules*, July 18, 1988 (issued by Lloyd Bentsen, Chairman of the Senate Finance Committee) (responding to a series of negative press reports about so-called "rifleshot" provisions, i.e., provisions "to protect specific taxpayers, transactions, or projects from a change in the law," by requiring that they be added in open mark-up sessions and that sponsors and beneficiaries be clearly identified); Lawrence Zelenak, *Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?*, 44 TAX L. REV. 563, 567 (1989) (describing the reaction of the Ways and Means Committee); Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. __, Part IV (forthcoming 1998) (discussing rifleshot policy and similar effect of provisions of the federal Line Item Veto Act).

88. *See* JOHN B. GILMOUR, RECONCILABLE DIFFERENCES? CONGRESS, THE BUDGET PROCESS, AND THE DEFICIT 180-81 (1990) (noting that the number of bills has declined in the past four decades while the number of pages of laws enacted has increased substantially, providing data, and concluding that the data support the notion that Congress is now working more through omnibus bills than in the past).

deliberation, which would provide useful comparisons for study.[89] The scholarly agenda for those of us who study the legislative process is a full one, and it may force the law schools to abandon not only their court-centrism, but also their federal-centrism. The latter shift is increasingly important as more responsibility is "devolved" to state and city officials and as direct democracy shapes more economic and social policies.[90]

III

Legal scholarship that draws on the disciplines of political science, philosophy, and economics, as well as traditional legal doctrine, has begun to address some of the questions I have raised in this essay. Additional detailed empirical and theoretical work is required to assess the deliberation-forcing justifications for textualism and clear statement rules and the assumptions about the legislative process on which they are based. It must be broadened to include the study of congressional structures that directly shape lawmaking as well as judicial deliberation-forcing methods. Not only must scholars work to understand whether such congressional rules better meet the democratic aspirations of the judicial techniques, but we must also determine when Congress is likely to adopt such rules and how they are best structured.[91] In this essay, I have focused on one small corner of the study of the legislative process. The study of legislation raises a multitude of questions for legal scholars whose work will identify and answer questions of institutional design, electoral structures, congressional rules, the interaction between the legislative and executive branches, the interplay among federal, state, and local governments, and the relationship between direct democracy and representative legislatures.

Legal scholarship on the legislative process and the role of the political branches in the constitutional structure will build on the work of scholars like Bernard Schwartz, whose careful study of constitutional law, administrative law, and legal institutions has influenced legal scholars and practitioners. And, such work will respond to a goal of legal scholarship of which Judge Edwards approves, but does not extend past lawyers' role in the courtroom: "to be of value to the law it is essential that the work in question express interest in, and respect for, the possibilities of what lawyers and judges do."[92] In this age of legislation, scholarship that enhances our

89. *See generally*, RICHARD BRIFFAULT, BALANCING ACTS: THE REALITY BEHIND STATE BALANCED BUDGET AMENDMENTS (1996) (studying state balanced budget requirements to gain insight into the possible effects of a federal requirement); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. Cal. L. Rev. 541 (1988) (discussing state constitutional provisions designed to encourage legislative deliberation).

90. *See, e.g.*, Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. (forthcoming 1999) (arguing that state initiatives shape the agenda at the federal level as well as affect state and local policies).

91. For a thoughtful analysis of some of the inherent limitations in empirical work in this are, see Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. (forthcoming 1999).

92. Edwards, *Another Postscript*, *supra* note 7, at 563 (quoting James Boyd White, *Law Teachers' Writing*, 91 MICH. L. REV. 1970, 1976 (1993)).

understanding of the legislative process plays an indispensable role in what modern lawyers, judges, and law professors do.