BOOK REVIEW

VARIATIONS FOR MIXED VOICES

Gerald L. Neuman†


Who speaks in the name of the Constitution? In Constitutional Dialogues, Louis Fisher debunks the Judiciary’s pretensions to the role of oracle, “supreme in the exposition of the law of the Constitution.” In part, his aim is to demonstrate the elaboration of constitutional law as a political process, shaped by interaction among judges and other political actors. But he also attempts to stake out an intermediate position between equating constitutional law with judicial rulings and fully decentralizing interpretive authority. He advocates a notion of tripartite “coordinate construction” that shares prestige among Supreme Court pronouncements and the interpretive positions of the First and Second Branches.

A political scientist with the Congressional Research Service, known for such books as Presidential Spending Power and Constitutional Conflicts between Congress and the President, Dr. Fisher understandably emphasizes the interpretive voice of Congress. His insights as a close observer of the congressional process are especially welcome. Legal scholars have too rarely taken the trouble to study congressional deliberations on constitutional questions, and political scientists have too rarely taken seriously the characteristics that distinguish constitutional argument. In his current book, Fisher writes from the “internal” perspective of the legal culture as well as from the “exter-

† Assistant Professor of Law, University of Pennsylvania Law School. This review is dedicated to Hon. Abner J. Mikva, in celebration of the tenth anniversary of the events recounted infra. I would like to thank Ed Baker, Mike Fitts, and Seth Kreimer, who were generous with their time and comments, and Mrs. Margaret Ulrich, for her precision and support. All remaining errors are random.


1 Cooper v. Aaron, 358 U.S. 1, 18 (1958).
nal" perspective of a political scientist; he does not take a skeptical stance toward the possibility of "constitutional law." He argues that congressional interpretations of the Constitution actually influence court decisions, and further that this influence reflects a special interpretive authority constitutionally vested in each of the three federal branches. This power of "coordinate construction" justifies legislative action based on congressional interpretations that conflict with prior judicial precedent.

The debate over the binding scope of Supreme Court decisions is an important one. A resurgence of Congress vis-a-vis the Judiciary would echo and facilitate its attempts at resurgence vis-a-vis the President. Respect for coordinate branches has long featured in the tradition of judicial rhetoric. Has the reality corresponded to the rhetoric, revealing constitutional development as a kind of triple concerto?

A sustained argument for coordinate construction might proceed on three levels. First, it might demonstrate empirically that the Supreme Court tends to bring itself into line with Congress's views. Second, it might offer evidence that legislative, judicial, or executive officers view Congress as having special interpretive authority. Third, it might elaborate a normative argument in favor of vesting such authority in Congress.

Fisher operates primarily on the first and second of these levels, providing illustrative evidence for his thesis. The normative background includes majoritarianism, a presumption of equality among the branches, and the unpersuasiveness of arguments for privileging the voice of the Judiciary. But Fisher does not really attempt to derive Congress's power from these assumptions and, perhaps as a result, he leaves the notion of special interpretive authority less than fully specified. For example, he does not spell out the limits (if any) on coordinate construction. Nor is he careful to identify the modes in which "Congress" can speak with special interpretive authority. Ultimately, the stories he has chosen supply only weak support for his thesis, and fail

---

2 For examples of Fisher's judgments on what the Constitution requires, see L. Fisher, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 64-65 (1988) (approving and disapproving of various methods of constitutional interpretation); id. at 151 (on judicial salary increases); id. at 216-21 (rejecting limitless power of Congress over federal court jurisdiction). See also Fisher, How to Avoid Iran-Contras, 76 CALIF. L. REV. 939, 949-50, 958-59 & n.93 (1988) (condemning the coordinate construction activities of Col. Oliver North).

to demonstrate that Congress's interpretive authority applies to constitutional issues generally, rather than to a narrow class of issues and circumstances.

I. Stories' Commentaries

The book is rich in anecdote. Its material is drawn partly from court cases, partly from political history, and partly from activities of modern Congresses that the author has observed firsthand. Collecting together these "vignettes" makes a valuable contribution to the literature, and gives concreteness to the form of dialogue that Fisher advocates.

A few of these tales illustrate constitutional dialogue in the most literal sense: purely communicative debate about the Constitution, in which influence depends solely on the rational persuasive force of the argument. Representatives of Congress and the judiciary do make appearances on each other's turf. Members of Congress once participated as attorneys before the courts, more frequently in the days when the Supreme Court spoke from the Senate basement. Today they are increasingly likely to perform as clients, sending their lawyers across First Street or Constitution Avenue to ask the courts to reinforce their positions. Judges in turn have lobbied Congress both by letter and in person. And of course executive officials appear frequently before court or Congress. Fisher does not, however, discuss educative communications addressed to the people, like the theatrics of the Iran-Contra hearings, or the direct appeals described by Jeffrey Tulis in The Rhetorical Presidency.

A second and more important dialogue for Fisher involves actions that speak loudly in the exercise of governmental power. Justices may write books, but the Supreme Court claims a different kind of authority for the interpretations contained in its judgments. Other political actors may do the same for the interpretations expressed in their official acts. The Constitution assigns powers to each of the three branches; in exercising its powers, each must construe provisions of the Constitution; and each of these authorized interpretations is entitled to respect. Fisher takes pains to reject the model of constitutional interpretation that reserves all constitutional issues for the courts to decide in isolation, with no role for the political branches.\(^4\)

\(^4\) This should be uncontroversial. Despite excesses of rhetoric, such as Felix Frankfurter's statement that "the Supreme Court is the Constitution," see L. Fisher, supra note 2, at 245 (quoting Frankfurter), it is hard to find serious students of the subject who believe in so extreme a model.
Fisher successfully demonstrates that the Court’s interpretations are not “final” in the crudest sense. Political forces can procure their reversal. Judges are not apolitical creatures, but are motivated to preserve the power of their roles. Threats to withdraw jurisdiction or massive noncompliance may prompt them to rethink their positions. Personnel changes can bring the Court in line with majority desires. And if the opposition is strong enough, the Constitution can be amended to overturn almost any interpretation.

In characterizing the Court as a political institution, Fisher demonstrates that constitutional interpretation is an enterprise open to everyone. Values must inform interpretation, and judges derive their values from the culture they live in. Judicial independence does not mean judges from Mars. Every social interaction that affects the values people hold potentially influences constitutional interpretation. Fisher quotes Paul Brest’s observation that “constitutional issues are not radically discontinuous from other political issues.” The interpretive powers of Congress, then, also include the power to embody in ordinary legislation values that may come to possess constitutional significance.

Moreover, under modern balancing approaches, legislative actions against valued rights may often be justified by claims of necessity. Necessity, however, results in part from institutional environments shaped by legislation. Thus it will sometimes be true that Congress, like Wotan, has created the need as well as the weapon.

Coordinate Construction

Yet the foregoing are rather modest claims of congressional influence on constitutional interpretation, and do little but establish the groundwork for Fisher’s discussion of coordinate construction. Fisher claims for Congress and the President a special authority in constitutional dialogue differing in kind from that of state officials and the public at large:

Under the doctrine of “coordinate construction,” the President and members of Congress have both the authority and the competence to engage in constitutional interpretation, not only before the courts decide but afterwards as well. All three branches perform a valuable, broad, and ongoing function in helping to shape the meaning of the Constitution.6

6 Id. at 277 (quoting Brest, Constitutional Citizenship, 34 CLEV. ST. L. REV. 175, 184 (1986)).
6 Id. at 231-32.
Fisher believes that the Supreme Court's resolution of a particular justiciable controversy is binding on the parties to the dispute, and that the other branches must submit to that resolution in the interest of finality and the rule of law. His reference to a power to interpret "afterwards as well," however, means that Congress is bound only by the Supreme Court's particular decisions, and not by its interpretations. Congressional resistance to judicial interpretations is not extralegal. He writes approvingly of Lincoln's view on the limited authority of the Dred Scott decision: "Congress and the President were free to reach their own constitutional judgments, even if at odds with past Court rulings, and then let the Court decide again." 8

Fisher thus aligns himself with commentators ranging from Alexander Bickel to Edwin Meese who champion Lincoln's stance over the judicial supremacist doctrine of Cooper v. Aaron, 9 which treats the Supreme Court's elaboration of constitutional norms as legally binding. Sanford Levinson has recently described the former as the "protestant" view that every individual must ultimately take responsibility for interpreting the Constitution herself, rather than submitting to the doctrinal authority of the Court. 10

Fisher differs from many of these commentators, however, in further ascribing special interpretive authority to Congress because of its status as one of three co-equal branches of the federal government.

Unless we understand the unsettled nature of the Court's authority to review actions by other branches, we are unable to see why the door is deliberately left open for congressional and executive participation. It is one thing to concede the Supreme Court's duty to review state actions but quite another to accept judicial review of coordinate bodies, Congress and the President. 11

Though his rhetoric sometimes slips back to a merely "protestant" po-

---

8 See id. at 238-42.
9 Id. at 242.
12 L. Fisher, supra note 2, at 11. Similarly, Fisher's case against judicial supremacy does not include the antebellum claims of the states to serve as guardians of the Constitution by means of nullification. Characteristically, his discussion of judicial error regarding the Sedition Act of 1798 addresses Jefferson's pardons and Congress's compensatory appropriations, and ignores the Kentucky and Virginia Resolutions on interposition. See id. at 238-39.
sition, his final chapter, emphasizing "Coordinate Construction," forms the climax of the book, advocating an intermediate position between judicial supremacy and the decentralization of interpretive authority.

Fisher inadequately supports this claim, however, by failing to elaborate its details and by relying on a range of narrative illustrations narrower than the apparent reach of his thesis. Although many writers agree that the legitimacy of resisting Supreme Court rulings involves matters of degree, Fisher does not attempt to specify the circumstances that he believes would justify nonacquiescence in the Supreme Court's interpretations. He does not address how wrong the decision must be, how abhorrent its consequences, how likely overruling must be, how often the other branches can submit identical cases to the courts, or what other methods they should use to change the constitutional course. Rejecting the pretensions of Cooper v. Aaron, Alexander Bickel wrote that southern officials who opposed desegregation could rightly "refuse to consider the issue settled and could relitigate it at every opportunity that the judicial process offered, and of course it offers a thousand and one." Fisher cites Bickel's analysis, but does not commit himself on this example.

Fisher's focus on congressional nonacquiescence obscures the violent potential of uninhibited coordinate construction (and of "protestantism" as well). To a great extent, Congress acts only by speaking, and relies on the other branches to carry out its directives. The Executive Branch employs more direct means. It can execute human beings as well as laws. It can arrest human beings, and hold them in confinement, or transport them to foreign countries. And it may do these things swiftly and irremediably. Though Fisher says that the political branches are free to withhold compliance in like cases and "let the Court decide again," the opportunity for decision may come too late, or never.

Fisher's strongest example is a considerably milder one, the story of the Child Labor Amendment: the Supreme Court rejected Congress's effort to regulate child labor under the commerce clause in 1918, and repulsed Congress's renewed effort to suppress child labor through

12 See, e.g., id. at 247.
14 But see L. FISHER, supra note 2, at 233 (noting Meese's "unfortunate references to . . . the Little Rock Case"); id. at 275 ("The unanimous ruling in 1958, signed by each Justice, was essential in dealing with the Little Rock crisis.").
15 See Ex parte Merryman, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).
17 See L. FISHER, supra note 2, at 238-42.
an excise tax in 1922, whereupon Congress sent a constitutional amendment to the states for ratification. The slow process of ratification was mooted when Congress reenacted the statutory ban as part of the Fair Labor Standards Act of 1938. The child labor example does illustrate the political branches' victory over judicial precedent on a constitutional issue, so great a victory that Bruce Ackerman has characterized it as a "structural amendment." But the victory was already won in other fields of regulation before Congress reenacted its child labor provisions, so that the reenactment was hardly a daring challenge to the Court. Moreover, Fisher's discussion is oddly silent about the President's role in that victory; whether or not one accepts Ackerman's account of the New Deal struggle as a rare form of higher lawmaking by the People, it is hard to view it as exemplifying a routine power of Congress.

Other examples of Fisher's also tend to support theses either narrower or broader than his notion of coordinate construction. For example, Fisher quotes from Justice Jackson's striking homily pointing out that:

Nothing in the history or attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to reexamine its previous judgment or doctrine. The Court differs, however, from other branches of the Government in its ability to extricate itself from error. It can reconsider a matter only when it is again properly brought before it in a case or controversy; and if the case requires, as a tax case does, a statutory basis for a case, the new case must have sufficient statutory support.

Fisher rightly classifies this, however, as a "Judicial Invitation[]" — the majority needed Congress's aid to arrange a prospective overruling for a tax law precedent that the Court had already badly impaired.

---

19 See H.R. REP. No. 2182, 75th Cong., 3d Sess. 6, 10-11 (1938) (discussing NLRB v. Jones & Laughlin Co., 301 U.S. 1 (1937)).
20 See Ackerman, supra note 18, at 1051-56 (New Deal legislation legitimated by successful shift from "normal politics" to "higher lawmaking" track).
21 L. FISHER, supra note 2, at 247 (quoting Helvering v. Griffiths, 318 U.S. 371, 400-01 (1943)).
22 See Helvering, 318 U.S. at 402-04 (inviting Congress to enact legislation inconsistent with Eisner v. Macomber, 252 U.S. 189 (1920), which had held that a common stock dividend on common stock was not income for purposes of the sixteenth amendment).
Jackson's reference to "a legislative body," and the citations in an accompanying footnote, make plain that he was not invoking a special power of Congress, but rather one shared by state legislatures.

Moreover, Jackson was not inviting or legitimating massive resistance to court doctrine. The distribution of government powers may create temporary lacunae requiring officials to take actions of uncertain legality in the hope of subsequent ratification. That was one basis on which the Supreme Court upheld President Lincoln's blockade of the Confederacy in *The Prize Cases.* Unfortunately, the modern history of separation of powers has been characterized by the Executive's efforts to convert such emergency, conditional powers into unregulable inherent powers. Equating Jackson's observation with a broad power of coordinate construction would amount to a similar transformation.

Fisher moves too quickly in inferring the legitimacy of coordinate construction in conflict with the courts from the duty of executive officials or Congress to make "initial interpretations," that is, to consider constitutional objections to their proposed actions or enactments. First, that duty is shared by state officials, and so it cannot entail a special authority of co-equal federal branches. Moreover, Congress itself has afforded no such deference to the "initial interpretations" of state officers — Congress reinforced their duties of circumspection by imposing civil and criminal sanctions under the Civil Rights Act of 1871, and it has never made available a defense for conscientious nonacquiescence.

It is also not clear that "initial interpretation" is a responsibility of Congress, as opposed to a responsibility of its individual members. Should a member with constitutional doubts about a statute feel any more bound by the views of a congressional majority than by the views of the Supreme Court? To the extent that we trace the member's duty, as Fisher does, to her oath to support the Constitution under Article VI, section 3, we are identifying an individual, "protestant"-type duty shared by state officials, and not a power vested in a branch.

The duty of "initial interpretation" is also asymmetrical —it obliges legislators to oppose unconstitutional laws, but obviously cannot impel them to support every law that would be constitutional. Constitu-
tional provisions leave legislatures an enormous range within which to select favored policies. In consequence, statutes that provide greater protection for constitutional rights than the courts think the Constitution affords, are not necessarily instances of coordinate construction.

Some of Fisher's concrete examples in the search and seizure area illustrate this defect in his approach. Both state and federal legislatures can restrain their respective agents by adding statutory prohibitions to the constitutional ones. Even if legislators conclude that the Court has rightly construed the ban on "unreasonable searches," they may choose for the present to forbid a category of otherwise reasonable searches. Fisher characterizes this choice as the rebalancing of privacy and law enforcement interests that were erroneously weighed by the courts, but it does not really amount to constitutional interpretation at all, as is particularly emphasized by the degree to which later Congresses feel free to tinker.

More might be read into one of these search and seizure examples, however, to the extent that Congress also extended protection against searches by state officials. Congress enacted the Privacy Protection Act of 1980 to avert the consequences of a Supreme Court decision uphold-

26 See id. at 255.

27 Of course, as I mentioned earlier, such statutes do enter into a constitutional dialogue with the courts — statutory protections, if actually observed, may help mold social notions of privacy that inform fourth amendment analysis, and the statute itself is one easily accessible form of evidence of an expectation of privacy "that society is prepared to honor." Florida v. Riley, 109 S. Ct. 693, 696 (1989) (quoting California v. Ciraolo, 476 U.S. 207, 214 (1986)).

ing a search of a newspaper's editorial office, and chose to restrict both state and federal searches. One might view this statute as a legislative construction of the first, fourth, and fourteenth amendments predicated on congressional power under section 5 of the fourteenth amendment, relying on Justice Brennan's famous second alternative in Katzenbach v. Morgan. But the very thing that makes Brennan's opinion in Morgan so noteworthy is the contrast between his proposal for special section 5 powers of Congress and the usual distribution of authority in the constitutional dialogue.

Morgan power cases, like "political question" cases, would deflate a claim of complete judicial monopoly if anyone made it, but they do not demonstrate general powers of coordinate construction. As read in Morgan, section 5 expressly commits to Congress a power to enforce a particular amendment through legislation, i.e., via bicameral passage and presentment. Moreover, this emphasis on the authority of legislative action undermines Fisher's stated thesis by withholding co-equal privilege from executive action.

More interesting are Fisher's adversions to constitutional common law. In the law of search and seizure, as elsewhere, some of the Court's rulings do not announce irreducible constitutional minima, but rather erect safeguards or remedies implementing constitutional principles as a matter of federal common law. For example, the Burger Court tended to view the fourth amendment exclusionary rule in that light. The distinction implicates powers of displacement — federal

---

31 See 126 Cong. Rec. 26563 (1980) (remarks of Rep. Kastenmeier) ("With respect to searches directed against persons preparing materials for broadcast or publication, we retained the features of the original bill—which apply to State and local as well as Federal officials. The justification involved is the historic obligation of the Federal Government to protect the free speech values of the first amendment."). On the other hand, one might equally view these provisions as employing the commerce power to minimize disruption of publishing and broadcasting; see S. Rep. No. 874, 96th Cong., 2d Sess. 9 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News at 3956 (invoking commerce clause), and note the tell-tale limitation to "a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce." Privacy Protection Act, supra note 30.
33 See Morgan, 384 U.S. at 650-51. As long as we are talking about Justice Brennan's proposal, even section 5 powers differ from coordinate construction notions because of the "ratchet" principle: Congress can enhance individual rights beyond court holdings, but cannot diminish them. See id. at 651 n.10.
34 See L. Fisher, supra note 2 at 264-70. If one views dormant commerce clause analysis as an exercise in constitutional common law, then see id. at 247-49 as well.
common law binds the states, but is subject to revision by Congress pursuant to a variety of legislative powers, including the necessary and proper clause. This fact alone would suffice to facilitate interbranch dialogue tangential to constitutional interpretation. The field of discussion blurs, however, because of chronic uncertainty in characterizing particular decisions as direct interpretation or common-law-making. If Congress misjudges what the Justices intended, it may attempt to over-ride by statute a ruling that it mistakenly views as constitutional common law. The statutory challenge might evoke a rebuff from the Court, but instead might prompt the Court to rethink the status of its rule. Although Congress's coordinate power to modify constitutional common law rules cannot be equated with a power to modify constitutional interpretations, it can add to the legitimacy of some efforts to probe the Court's firmness.

Institutional as well as intellectual difficulties beset reliance on the notion of Congress's expressing constitutional construction in legislation. To say that a statute expresses a congressional judgment on its own constitutionality is often a transparent fiction. Judicial practice accords a formal presumption of constitutionality to all legislation, state and federal, regardless of whether the legislators ever have or ever could have considered the constitutional objection. Congress has never attempted to develop a constitutional jurisprudence independent of the Court's, and has no institutional mechanism to insure its continuing fidelity to its own supposed constitutional interpretations. Fisher notes, apparently with approval, that both Houses of Congress resolve constitutional objections to bills by majority vote. He has noted elsewhere the pressures contributing to instances of congressional failure to consider constitutional issues.

Many others believe that Congress does not responsibly exercise the interpretive authority it has already. Fisher lets an apt vignette of the case against Congress slip through in quoting Strom Thurmond's description of the Privacy Protection Act of 1980 as an attempt to "strike a careful balance between the first amendment right to free ex-

35 See id. at 35.
37 See, e.g., Brest, supra note 5, at 183-84; Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C.L. Rev. 587 (1983); cf. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCE 235-39 (1980) ("Observers of our national government and defenders of judicial review in particular have often forcefully contended that the nonjudicial branches are simply incapable of responsible constitutional decisionmaking.").
38 See text accompanying note 30.
pression and the fourth amendment. That the good Senator thinks the fourth amendment protects the government's right to search is depressing, though not surprising.

II. WHO IS SPEAKING, PLEASE?

The reification of Congress as an interpretive entity masks important distinctions among various contributors to the constitutional dialogue. Fisher's examples of coordinate construction usually concern statutes enacted through bicameralism and presentment to the President, but also involve resolutions of a single House and unenacted bills. The statutes include the special category of legislation enacted by the First Congress, and the series of later statutes that can amount to longstanding interpretations. Fisher does not discuss a different form of coordinate construction, the interpretations expressed by the Senate in its advice and consent role. These various "congressional" voices speak differently, and sometimes inconsistently. Attributing interpretive authority to all of them could tend toward "protestantism" rather than special powers of coordinate construction.

The interpretations of the First Congress remain in a category by themselves. Much of their persuasive authority depends on "original intent" strands of the interpretive practice of the courts (though this did not stop Chief Justice Marshall from invalidating a provision of the Judiciary Act of 1789 in Marbury v. Madison). Moreover, they hardly provide an example of ongoing dialogue with the courts: we know of no constitutional issues that were raised in the Supreme Court while the First Congress was sitting, and the dialogue since it disbanded has been profoundly one-sided.

Longstanding congressional interpretations play a particularly significant role in the separation of powers, where their implications for the power of Congress have usually been melancholy. The very existence of the bill of attainder clause in Article I, section 9 calls attention to the absence of a more general conceptual norm of separated powers; if the branches were already limited to their paradigmatic functions, the

39 L. Fisher, supra note 2, at 256.
40 See id. at 252, 254.
41 See id. at 235-37, 243-44.
ban on bills of attainder would be redundant. The respective domains of the Executive and the Legislature have especially drawn content from historical usage. This process certainly illustrates the negative power of Congress to legitimate encroachments by another branch through acquiescence over time. The constitutional effect of "persistent legislative practice" has most often been to give away power to the President. Surprisingly, Fisher lists United States v. Curtiss-Wright Export Co. as an example of Congress's successes in coordinate construction. The withering of the domestic nondelegation doctrine comes equally to mind.

Coordinate construction would be exhibited as a more powerful doctrine if it enabled the contemporary Congress to wrest back the powers that earlier Congresses have yielded through acquiescence over time. But often enough the living voice of Congress is drowned out by ancestral echoes.

A. Just Say No

Persistent legislative practice was not enough to prevent the Supreme Court, in INS v. Chadha, from invalidating the legislative veto device that Congress had evolved for controlling delegated authority. Chadha and its corollaries involve a double defeat for congressional coordinate construction: the Court rejected the constitutional interpretation expressed in copious instances of veto-bearing legislation, and held instead that concurrent majorities in Congress cannot speak in binding fashion. The Court let presidential verbal statements impugning legislative vetoes undermine the dialectical action of signing them into law, and it felt free to rely on its own interpretation of Article I. The Court's opinion gave more notice to a single presidential soliloquy.

44 L. FISHER, supra note 2, at 235-37.
45 299 U.S. 304 (1936) (recognizing broad inherent presidential authority in foreign affairs in the course of upholding delegation, giving prominent attention to a speech by Representative John Marshall).
46 But see L. FISHER, supra note 23, at 108-10, 127 (criticizing Curtiss-Wright and its application).
49 See Chadha, 462 U.S. at 942 n.13 (citing Jackson, A Presidential Legal Opinion, 66 HARV. L. REV. 1353 (1953)). Justice Jackson's (extrajudicial) view of this secret "opinion" was somewhat different: "Despite the high official position of its author, it was not an official act but a personal explanation and opinion of Franklin D. Roosevelt on a smoldering issue between the Executive and Congress." Jackson, supra, at 1360.
than to the accumulated evidence of executive compliance with past vetoes. Congress was mocked with its own past successes in the course of a lengthy footnote asserting the greater legitimacy of delegated lawmaking.

Admittedly, my slippage from "presidential" to "executive" illustrates the parallel difficulties in working out the coordinate construction thesis on the Executive Branch side. When the President decides, on balance, to sign into law a bill containing a legislative veto provision, he waives a "constitutional and effective power of self-defence"; when he directs compliance with a legislative veto, his action further legitimates its actual exercise. When subordinate officials comply with a legislative veto, however, locating the speaker becomes more complex. Fisher's discussion does not make clear to what degree the special authority of coordinate construction should be viewed as delegated and subdelegated within the Executive Branch. That question is complicated by the Court's continued rejection of the unitary executive theory and its implications. Advice from high-level Justice Department circles is likely to inform compliance or noncompliance policy, but not necessarily to control it. Subdelegation would push us once more to the Article VI oath, decentralization, and "protestantism."

If we limit special interpretive authority to the President himself as the canonical personification of his branch, then his powers of coor-

---

50 See Chadha, 462 U.S. at 960-61, 964 n.7; Brief of United States Senate at 49-50, INS v. Chadha, 462 U.S. 919 (1983) (tabulating 229 vetoes of suspensions of deportation); Brief of Senate on Reargument at 41-43, INS v. Chadha, 462 U.S. 919 (1983) (listing 23 disapprovals of executive reorganizations); id. at 45-49 (listing 65 disapprovals of presidential budget deferrals). A stronger argument in the Court's favor could be built on the instances of presidential veto of statutes because of their legislative veto provisions, and of executive noncompliance with exercised vetoes. But the Court saw no need for such care.

51 See Chadha, 462 U.S. at 953 n.16.


53 See Morrison v. Olson, 108 S. Ct. 2597 (1988); Humphrey's Executor v. United States, 295 U.S. 602 (1935); cf. Myers v. United States, 272 U.S. 52 (1926) (noting "duties . . . the discharge of which the President can not in a particular case properly influence or control").

54 Compare, for example, Secretary of Education Hufstedler's refusal, pursuant to an Opinion of the Attorney General, to obey a legislative veto, with the insistence of the Federal Energy Regulatory Commission, an independent agency, on compliance. See Consumer Energy Council of America v. FERC, 673 F.2d 425, 438, 454 n.121 (D.C. Cir. 1982), aff'd mem. 463 U.S. 1216 (1983); B. Craig, The Legislative Veto: Congressional Control of Regulation 107-14, 137-38 (1983).

The similarity between this difficulty and the contours of the presentment clause problem in Chadha is not coincidental. See e.g., Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 1071-87 (1975) (differentiating among legislative veto schemes based on President's control of executive source of proposal); Strauss, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L.J. 789, 812-17 (same).
dinate construction are amplified by the usual advantages of his unity.\textsuperscript{55} Moreover, as a result of the presentment clause, Congress can speak through legislation only by securing the President's agreement or by harmonizing disparate personalities into concurrent supermajorities. The President faces no such obstacle; indeed he benefits from a form of double-counting.

Fisher argues that legislative vetoes are an indispensable method of legislation, and describes approvingly congressional "noncompliance" with the Chadha decision by means of continued enactment of legislative vetoes for appropriations, as well as the use of informal equivalents such as agency undertakings to be guided by consultation with a congressional committee.\textsuperscript{56} I think the story he tells illustrates other interesting aspects of constitutional dialogue. First, one might note that Congress has not directly assaulted Chadha in the ruthless manner that a coordinate construction doctrine might justify. The statute invalidated in Chadha authorized either House of Congress by simple majority vote to override executive decisions to "suspend deportation" of particular named aliens. But Congress has not responded by pressuring the executive to deport individual aliens in spite of suspension decisions, and forcing the individuals to shoulder the costs of relitigating Chadha at the risk of physical expulsion.\textsuperscript{57} That kind of vigorous nonacquiescence, like the nonacquiescence in statutory interpretation that the Reagan administration pursued against disability benefit claimants, would achieve dialogue at the cost of the immediate suffering of the powerless.

Testing the limits of Chadha as applied to appropriations statutes can represent skepticism about judicial dicta rather than noncompliance with the decision.\textsuperscript{58} This oblique method of reopening the dialogue by shifting its ground avoids direct confrontation. The Court's opinion in Chadha has been widely criticized because of Chief Justice Burger's blindly formalistic approach to separation of powers. The opinion declares the invalidity of any legislative veto, by one or both Houses, that has the effect of changing the legal responsibilities of any private individual or public official outside the Legislative Branch. This broad

\textsuperscript{55} See The Federalist, supra note 52, at No. 70 (A. Hamilton).

\textsuperscript{56} See L. Fisher, supra note 2, at 225; see also Pear, Pact Challenged by Bush Counsel, N.Y. Times, Mar. 26, 1989, at A1, col. 5 (second thoughts on agreement conditioning continued Contra aid on agreement of four committees).

\textsuperscript{57} To the contrary, Congress recently repealed even the vestigial requirement that suspensions be reported to it. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 2(q)(1)(B), 102 Stat. 2614.

scope extends far beyond the categories of cases the Supreme Court has actually decided. Even if Chief Justice Burger sought to resolve the case on the basis of a formalistic definition of "legislative" action, the constitutional implications of legislative vetoes that directly affect individual rights arguably differ from those of legislative vetoes that affect only housekeeping aspects of government. Indeed, despite widespread agreement that Chief Justice Burger's opinion was defective, there is considerable scholarly support for the result in Chadha.

If Fisher is correct about the necessity, then Congress may yet persuade the Court to preserve a more limited role for the legislative veto. Congress can evidence its need for the device by continuing to enact them over time and cajoling the executive into compliance. Restricting legislative vetoes to intragovernmental measures may postpone a reflexive, premature invalidation, because such measures less frequently incite litigable controversies. Eventually, the Court might distinguish Chadha and uphold some of them — Chief Justice Rehnquist has recently exhibited a more sophisticated approach to separation of powers than his predecessor's.

Moreover, the informal substitutes that Fisher describes include processes substantially similar to those that operated before Chadha. Studies of rulemaking in the heyday of the legislative veto suggested a trend toward bargaining in the shadow of the veto. The continuation of this trend could cut either way. On the one hand, a Court willing to

---

60 Lower courts, however, have extended Chadha to legislative vetoes of executive reorganizations and impoundment of appropriated funds. See, e.g., City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987); EEOC v. CBS, 743 F.2d 969 (2d Cir. 1984); EEOC v. Hernando Bank, 724 F.2d 1188 (5th Cir. 1984); see also AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (pre-Chadha).


62 But see supra note 59. One of the tools that a legislature can employ to enhance its voice in the constitutional dialogue is agenda control. The direction of doctrinal development in a system that includes a norm of precedent is substantially path-dependent. Lawyers attempt to exploit this characteristic in their strategic choice of plaintiffs and defendants, and Fisher illustrates the Justices' strategic exercise of discretionary jurisdiction. See L. FISHER, supra note 2, at 169-70. Legislatures sometimes manipulate jurisdiction; this phenomenon includes not only the disputed power to withhold jurisdiction but also the undoubted power to create categories of mandatory appeals. Congress can also frame cases strategically by shaping its legislation.

63 See B. CRAIG, supra note 54, at 74-78; Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 HARV. L. REV. 1369, 1409-23 (1977); see also Frickey, The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota, 70 MINN. L. REV. 1237, 1242-46 (1986) (similar findings under state suspension procedure).
let empirical evidence of the actual workings of government inform its separation of powers decisions might eventually be forced to conclude that silencing the legislative veto has driven policymaking further into off-stage whispers, rather than improved its deliberative character. On the other hand, the traditional presumption of administrative regularity has proven to be a potent source of judicial blindness to the actualities of administrative decisionmaking. Fictionalized rulemaking procedure has come strongly into vogue since the issuance of Executive Order 12,291. A Court primarily concerned with the symbolic, facial legitimacy of Congress's oversight methods might let de facto intervention by committees flourish, but deny them the option of de jure action.

It must also be remembered that legitimating one-House, and especially committee, vetoes would add new independent voices to the constitutional dialogue. Legislative vetoes, if permissible, are official acts with force of law; they would enable Congress to "speak" more frequently, though more variously.

B. Speak Softly, But Speak For Yourself

Congress and its members have also sought the assistance of the courts in recovering power from the Executive. Participation as amicus in defense of its constitutional authority returns Congress to purely communicative constitutional dialogue. Initiating litigation involves the additional power of opening or reopening the conversation at times of its (or their) own choosing.

The courts have not always been receptive to such efforts by Congress or its members to draw them into conversation. Ever since its 1974 decision giving Senator Kennedy victory over an intrasession pocket veto by President Nixon, the D.C. Circuit has struggled to identify when legislators should be heard to complain of injury to legislative prerogatives. Although analogies to voting rights and other individual rights contexts appear to support congressional standing, the judges have been reluctant to intervene prematurely in intragovernmental disputes. Then-Circuit Judges Robert Bork and Antonin Scalia condemned the entire notion of congressional standing as violating the separation of powers. Scalia insisted that the role of the courts was

---

63 See L. Fisher, supra note 2, at 30-31.
64 See id. at 31-33.
65 See Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881, 893 (1983) ("It is of no use to draw the courts into a public policy dispute after the battle is over, or after the enthusiasm that produced it has waned.").
66 See Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).
"neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers." 67 Bork similarly maintained that it was better for courts to stand aside, letting the "power of the branches with respect to one another . . . ebb and flow as the exigencies of changing circumstances suggest." 68

Current D.C. Circuit practice, in contrast, admits congressional standing, but relies on a power of "equitable discretion" to dismiss suits brought by individual members of Congress seeking relief that Congress itself could have given them but did not. 69 This practice privileges the voices of blocking coalitions over the voices of dissident members. It amounts to a constitutional common law rule implementing perceived separation of powers concerns, made possible by Congress's general failure to legislate court access for congressional plaintiffs. 70 The Supreme Court has thus far passed up opportunities to clarify these issues. 71

Faced with judicial hesitancy to accept the invitation to converse, Congress may attempt the additional step of rewriting the rules governing the opportunity to litigate. One of Congress's greatest successes in coordinate construction was such an instance of metaspeech, the Declaratory Judgment Act of 1934. With Justice Stone's encouragement, Congress converted a perceived Article III rule, equating noncoercive relief with forbidden advisory opinions, into a purely historical feature of the federal common law of remedies. Congress thereby empowered the federal courts merely to speak, and it has turned out that the lesser power exceeds the greater. The consequences for administrative law and constitutional litigation have been profound. Could Congress repeat this feat by augmenting its own power to converse with the courts?

One of Fisher's stories calls into question the power of coordinate construction to resolve this debate. Like any good saga, it begins with an earlier generation: 72 in Ex parte Lévita, 73 the Supreme Court had

---

70 But see 2 U.S.C. § 288l(a) (1982) (granting Senate Counsel standing to intervene in existing litigation to the limits of Article III).
73 302 U.S. 633 (1937).
tersely rejected on standing grounds a lawyer's challenge to Justice Black's appointment from the Senate, after Justice Van Devanter had been lured off the bench by a generous retirement statute.\textsuperscript{74} Lévitt claimed that the appointment violated the ineligibility clause of Article I, section 6,\textsuperscript{75} which was designed to restrict the Executive from influencing legislators with the prospect of lucrative appointments.\textsuperscript{76} The Court found, however, that Lévitt shared only "a general interest common to all members of the public."\textsuperscript{77} In modern terms, the requirement of injury for standing is regarded as constitutionally based, but the requirement that the injury not be generally shared is usually regarded as prudential, i.e., a rule of constitutional common law adopted by the Court to govern the federal courts.

When a different issue arose under this clause concerning Circuit Judge Abner J. Mikva,\textsuperscript{78} Congress sought to circumvent Lévitt through an express statutory grant of authority permitting dissenting members of Congress to bring suit. The attempt failed in the little-noticed case of McClure v. Reagan,\textsuperscript{79} which is, to the best of my knowledge, the only instance in which the modern Supreme Court has invalidated a statutory grant of standing. That it did so by summary affirmance is all the more remarkable.

A prospective statute permitting dissident members of Congress to speak as plaintiffs seems an appropriate means of protecting against executive cooptation of future Congresses.\textsuperscript{80} The statute actually en-

\textsuperscript{74} See L. Fisher, supra note 2, at 146, 151.

\textsuperscript{75} U.S. Const. art. I, § 6 reads: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."

\textsuperscript{76} See The Federalist, supra note 52, at No. 76 (A. Hamilton). History informs that this corruption of the Legislature by executive patronage was a central concern of the Whig tradition. See G. Wood, The Creation of the American Republic, 1776-1787, at 32-34, 551-52 (1969).

\textsuperscript{77} Lévitt, 302 U.S. at 634.

\textsuperscript{78} Judge Mikva was appointed before it became clear whether a pending salary increase for the Judiciary would become law. The Attorney General has traditionally interpreted the ineligibility clause, on both grammatical and practical grounds, as limited to increases in emoluments that precede the appointment. See 125 Cong. Rec. 26046-48 (1979) (memoranda from Office of Legal Counsel).


\textsuperscript{80} Against its historical background, see supra note 76, it would appear that the injury contemplated by the ineligibility clause was increased executive influence on the legislative process. Though the resulting injury may be so widespread as to justify a prudential standing rule against citizen suits, that does not mean that Congress should
acted in 1979, which authorized suit only by members of the Congress then sitting to challenge appointments from that Congress to the D.C. Circuit, had a rather different flavor, but for Article III purposes the principle should be the same. Moreover, since the Senate, rather than Congress as a whole, gives advice and consent to appointments, the "initial interpretation" expressed through confirmation may exclude the views of the House of Representatives; once more it is not easy to identify the voice of "Congress" on a constitutional issue. Nonetheless, the Supreme Court summarily affirmed the decision of the three-judge court dismissing the case for lack of standing.

If McClure is a sport, or was just badly litigated, then it may tell us little about congressional standing or Congress's power to confer standing on itself and its members. It suggests, however, that the Court may insist upon asserting the paradoxical Marburian power of refusing gifts of jurisdiction. Justice Scalia has already expressed the view that broad grants of standing in environmental statutes violate Article III. There is, however, nothing inherently nonjusticiable about a "generalized grievance pervasively shared" against unlawful conduct — most criminal prosecution is based on little else. The real question in determining the constitutionality of a statutory grant of standing is the scope of the Executive Branch's monopoly on litigative speech. Standing provisions specifically designed to enforce limits on the Executive constitute a candid "attempt by Congress to increase its own powers at the expense of the Executive Branch," although not necessarily a "congressional usurpation of Executive Branch functions." Special Article III rules rejecting congressional standing, though phrased as limits on the power of the courts, would really amount to limits on the powers of Congress vis-à-vis the Executive. They may prove to illustrate yet another failure of coordinate construction.

lack the power to authorize litigation to vindicate legislative independence. Proving actual corruption of the legislative process should not be necessary when a member of Congress complains that he has been outvoted in a body that has been exposed to unlawful temptations. Litigants improperly subjected to decisions by judges without Article III tenure and salary protections are not required to prove that the judges are actually subservient, or that Article III judges would have decided their cases differently. Nor can it be said that suits to unseat wrongfully appointed officials are traditionally nonjusticiable, given the history of actions in the nature of quo warranto. See 3 W. Blackstone, Commentaries on the Laws of England *262-64.

Despite its other strengths, *Constitutional Dialogues* does not succeed in building a secure middle way between the rocky road of "protestantism" and the primrose path to judicial supremacy. Congress as a political institution exerts influence on constitutional development. But so do subgroups within Congress, and groups partly or wholly outside the federal government, like political parties, state legislatures, churches, television networks, and law schools.\(^4\) Even within the narrower vision of the legal culture, "Congress" has too many competitors and too many limitations to serve as the triumvir Fisher envisions.

Thus Fisher's lessons turn us back to ourselves. If the Court, however Supreme, is neither final nor infallible, we should not look within the national government for a second-best. The solution is not to relax the inhibitions on more powerful, self-interested actors, for whom dialogue is mainly a metaphor. The remedy to be applied is more speech. If the Court cannot lead with a solo voice then it, and we, must listen with care to millions.

---
