How Statutory Interpretation Contributes to Democratic Decline and What Congress Can Do to Fix It

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The Supreme Court's statutory interpretation jurisprudence is weakening democracy in the United States by reducing the ability of the federal government to tackle major issues of national concern. Because legislating in the modern American political environment is difficult, Congress has adopted or adapted various procedural mechanisms under its Article I powers to pass major legislation. The Supreme Court's statutory interpretation doctrines, however, have failed to keep pace with these procedural developments. As a result, the Court's interpretive methods actively inhibit Congress's ability to govern by discouraging common and necessary procedural techniques like leadership drafting and reconciliation. This Note examines the Court's statutory interpretation doctrines and their negative effect on modern legislating and state capacity through the Court–Congress dialogue. It also recommends several possible legislative remedies, like funding enhanced legislative education and a judicial "Office of Legislative Research," to help courts better interpret statutes and reverse the decline in American state capacity.

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INTRODUCTION

The United States is experiencing a crisis of democratic decline.[1] Weakened state capacity is a crucial driver of this decline.[2] State capacity is "the extent to which state goals, however determined, can actually be carried out."[3] It is the ability of governments to provide for their people, manage and overcome crises, and complete major projects in the public interest.[4] State capacity directly contributes to state legitimacy; governments that "get it done" can protect their populations and secure the faith of their people.[5] Mature democracies have many structural barriers to the effective exercise of state capacity, a condition Francis Fukuyama termed "vetocracy."[6] These veto points can promote better outcomes by encouraging deliberation, but when vetocracy prevents effective governance on crucial issues, it contributes to democratic decline by weakening the state's capacity to govern.[7]

Some of the strongest veto points in American democracy are found in Congress, with its highly decentralized and individualized structure.[8] Ongoing trends, including partisan polarization in the American political system, have worsened congressional

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[1] Many academics and commentators from across the political spectrum have made this argument in recent years. *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); ERIC A. POSNER, THE DEMAGOGUE'S PLAYBOOK: THE BATTLE FOR AMERICAN DEMOCRACY FROM THE FOUNDERS TO TRUMP (2020). These works were written before the January 6, 2021 U.S. Capitol insurrection, which academic observers have labeled a "coup attempt." *See* sources cited *infra* note 14. Some observers now label the United States a "backsliding" democracy, *see* INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, GLOBAL STATE OF DEMOCRACY REPORT 2021: BUILDING RESILIENCE IN A PANDEMIC ERA (2021), https://www.idea.int/gsod/global-report [https://perma.cc/9UKG-Z4HA], or an "'anocracy,' somewhere between a democracy and an autocratic state," Dana Milbank, Opinion, *'We Are Closer to Civil War than Any of Us Would Like to Believe,' New Study Says*, WASH. POST (Dec. 17, 2021, 2:38 PM), https://www.washingtonpost.com/opinions/2021/12/17/how-civil-wars-start-barbara-walter-research/ (reviewing BARBARA F. WALTER, HOW CIVIL WARS START: AND HOW TO STOP THEM (2022)). Defining democracy can be tricky. In this paper, "democracy" means a system in which elected representatives govern, theoretically in a way accountable to "the [p]eople." *See, e.g.*, William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,* 114 YALE L.J. 1279, 1282 (2005). Electoral democracy is a system of free, fair elections with genuine electoral contestation, free speech, and rule of law. *See, e.g.*, GINSBURG & HUQ, *supra*, at 9–15. This paper is concerned with democratic governance and thus does not focus on electoral democracy. These are not, however, the only conceptions of democracy. *See generally* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

[2] *See, e.g.,* Samuel Issacharoff, *Democracy's Deficits*, 85 U. CHI. L. REV. 485, 513–16 (2018) (describing the failure of democratic state capacity as a failure to "Get[] It Done"); William G. Howell & Terry M. Moe, *America's Crisis of Democracy*, 136 POL. SCI. Q. 105, 114 (2021) (describing the failure of democratic state capacity in the United States as "ineffective government").

[3] KENNETH FINEGOLD & THEDA SKOCPOL, STATE AND PARTY IN AMERICA'S NEW DEAL 52 (1995).

[4] *See* Issacharoff, *supra* note 2.

[5] *See id.* at 516; *see* Howell & Moe, *supra* note 2.

[6] *See* Francis Fukuyama, *America: The Failed State*, PROSPECT (Dec. 13, 2016), https://www.prospectmagazine.co.uk/magazine/america-the-failed-state-donald-trump.

[7] *See* Issacharoff, *supra* note 2, at 514.

[8] *See* Howell & Moe, *supra* note 2, at 116–17.

dysfunction and arguably brought Congress to its lowest ebb since the Civil War.[9] But Congress can also uniquely promote American state capacity by creating comprehensive laws that work society-wide changes to address major national issues like climate change, health care, and the COVID-19 pandemic.[10] Congressional dysfunction results in democratic decline by contributing to Congress's inability to act on these major issues, thereby weakening American state capacity. Because state capacity is vital to promote democratic legitimacy and arrest or reverse democratic decline, resolving or at least mitigating congressional dysfunction is a high priority that must be shared by all actors within the constitutional system and American society.

One actor well-positioned to assist in this project is the Supreme Court of the United States. As the head of the federal judiciary and a major interpreter of Congress's work product, the Court has a constitutional obligation to defend the government of the United States. The Supreme Court's statutory interpretation doctrines, however, do exactly the opposite. By misunderstanding or ignoring congressional procedures, the Court's current modes of statutory interpretation facilitate congressional dysfunction, weaken state capacity, and contribute to democratic decline in the United States.

This Note will argue that the Supreme Court's modern statutory interpretation doctrines damage American state capacity by systemically weakening the legislative procedures required by Congress to pass major statutes on important issues, thus contributing to democratic decline in the United States ex ante (regardless of the outcome in individual cases).[11] Part I elaborates Congress's unique role in promoting American state capacity through major legislation like "super-statutes," tracks recent developments threatening Congress's production of major legislation, and examines the dialogic relationship between Congress and the Supreme Court. Part II provides examples of how the Court's universalist statutory interpretation theories combine with the dialogic model to weaken Congress's unique role in promoting state capacity, contributing to democratic decline in the United States. Finally, Part III provides specific, realistic legislative proposals to help Congress fix this dynamic and mitigate democratic decline.

I. SUPER-STATUTES, INTER-BRANCH DIALOGUE, AND DEMOCRATIC DECLINE

Democracy is in trouble. The first decades of the twenty-first century have seen the apparent success of authoritarian states like China and Singapore while pundits, activists, and citizens have grown increasingly concerned about the failure or decline of liberal democracies.[12] Professors Aziz Huq and Tom Ginsburg described two

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[9] *See* sources cited *infra* notes 44–46.
[10] *See infra* Section I.A.
[11] For example, the Court in *King v. Burwell*, 135 S. Ct. 2480 (2015), actually upheld the statutory provision at issue in that case, but nonetheless weakened American state capacity by attacking the legislative procedures Congress used to pass the Affordable Care Act. *See infra* Section II.B.
[12] *See, e.g.*, sources cited *supra* notes 1–2.

distinct models explaining the possible causes and courses of this democratic decay: (1) authoritarian reversion, a sudden collapse of democratic institutions (a *coup d'état*, for example); and (2) democratic erosion or decline, "a process of incremental (but ultimately still substantial) decay in the . . . basic predicates of democracy."[13] In addition to its recent brush with authoritarian reversion on January 6, 2021,[14] the United States also remains at risk of democratic decline given the ongoing antidemocratic, populist political tactics of former President Donald Trump and his supporters in the Republican party.[15]

The causes of democratic decline are myriad, historically contingent, and hotly debated. In the last few years, however, scholars and commentators have come to view modern democratic decline as a consequence of institutional decay inside the key pillars of democratic societies, resulting in reduced state capacity.[16] The following sections will discuss one of Congress's unique roles in promoting state capacity, the creation and passage of "super-statutes" addressing major issues of national concern; discuss how current political trends and legislative paralysis threaten this role and some of Congress's responses to that threat; and elaborate a model for Court–Congress relations by which the Court's statutory interpretation doctrines have contributed ex ante to democratic decline.

A. SUPER-STATUTES, LEGISLATIVE PROCEDURES, AND CONGRESS'S ROLE IN PROMOTING AMERICAN STATE CAPACITY

Congress's ability to pass major legislation on issues of national concern is indispensable to the promotion of American state capacity. The Constitution is a short, old, and vague document that does not squarely address or resolve many important modern problems facing the United States.[17] Because the formal Article V constitutional amendment process is exceptionally difficult, resolving these modern issues requires the constitutional system to evolve through other processes.[18] The standard account places the Court (and sometimes the Executive) at the center of these efforts, but Congress also plays an important role in the evolution of the constitutional system by passing super-statutes.[19]

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[13] Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 92, 96 (2018).
[14] *See It Was an Attempted Coup: The Cline Center's Coup D'état Project Categorizes the January 6, 2021 Assault on the US Capitol*, CLINE CTR. FOR ADVANCED SOC. RSCH.: UNIV. OF ILL. URBANA-CHAMPAIGN (Jan. 27, 2021), https://clinecenter.illinois.edu/coup-detat-project-cdp/statement_jan.27.2021 [https://perma.cc/EPJ7-YRFS].
[15] *See, e.g.*, sources cited *supra* notes 1–2; David A. Graham, *The Paperwork Coup*, ATLANTIC (Dec. 15, 2021), https://www.theatlantic.com/ideas/archive/2021/12/trumps-coup-before-january-6/620998; *Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards*, NEW AM. (June 1, 2021), https://www.newamerica.org/political-reform/statements/statement-of-concern/ [https://perma.cc/W7U4-M3QH].
[16] *See* sources cited *supra* notes 1–2.
[17] *See* William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1267 (2001).
[18] *See id.* at 1268.
[19] *See id.* at 1269.

Professors William N. Eskridge Jr. and John Ferejohn define super-statutes as laws that "seek[] to establish a new normative or institutional framework for state policy . . . [that] 'stick[s]' in the public culture" over time, and that has "a broad effect on the law."[20] For example, it was Congress (in cooperation with the Executive) that created the administrative state during the New Deal, fundamentally altering the structure, capacity, and function of the American government without resorting to formal Article V amendments.[21] While all major laws are not super-statutes, all super-statutes are major laws, so any procedural tool relevant to passing major laws is similarly relevant to passing super-statutes.[22]

Unlike formal constitutional amendments, super-statutes can be passed by congressional majorities, although often over a period of years or decades.[23] This effectively translates majority policy preferences into long-lasting, democratically legitimate, normatively robust legal frameworks and allows determined elected majorities to work changes in the fundamental law of the United States on issues of major national concern without using the burdensome Article V process.[24] Because these statutes are an effective tool used to address the most serious issues facing the nation, they are crucial to accomplishing state goals and thus a vital congressional contribution to American state capacity.

Although Congress's overall structure is constitutionally determined, the ability to govern (and pass super-statutes) is maintained through sub-constitutional legislative processes. The Framers recognized these processes as vital to Congress's independence and effectiveness and constitutionally vested all power for establishing legislative procedure within each house of Congress in the "Rules of Proceedings" Clause.[25] These procedures govern the daily operations of Congress, determining how bills are drafted and passed, how minority interests are protected, how disputes are settled, and a host of other important issues. Some internal procedures help Congress govern more efficiently, like the practice of dispensing with Senate procedures by unanimous consent.[26] Others, like the division of Congress into subject-specific committees, may slow the legislative process but increase expertise and competency among legislators and staff.[27] Some legislative processes are created directly by

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[20] *See id.* at 1216.
[21] *See generally* Patrick J. Maney, *The Rise and Fall of the New Deal Congress, 1933–1945*, 12 OAH MAG. HIST. 13 (1998) (detailing Congress's pivotal role in the creation and execution of the New Deal).
[22] This paper does not claim that every piece of legislation included is indeed a super-statute; instead, the point here is that the Court's methods of statutory interpretation threaten the legislative tools required to pass all major legislation, including super-statutes. *See infra* Part II.
[23] *See generally* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972 (1990) (discussing the years of legislative process that contributed to eventual passage of the Civil Rights Act of 1964).
[24] *See* Eskridge & Ferejohn, *supra* note 17, at 1216–17.
[25] U.S. CONST. art. I, § 5, cl. 2.
[26] *See* WALTER J. OLESZEK, MARK J. OLESZEK, ELIZABETH RYBICKI & BILL HENIFF JR., CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 255–56 (11th ed. 2020).
[27] *See id.* at 117–18.

statute;[28] others, like the precedents governing committee jurisdiction, develop organically over time.[29]

Congress uses certain congressional procedures to reduce roadblocks and ease passage of major legislation. These include combining bills into omnibus packages to build successful legislative coalitions or using post-passage procedures that avoid filibusters.[30] These tools are neither unusual nor normatively undesirable, and most are longstanding features of the congressional landscape. All require enormous effort and deliberation, carry the democratic legitimacy conferred by their authorizing statutes or Congress's "Rules of Proceedings" authority, and contribute to effective governance, thus strengthening American state capacity and democratic legitimacy.[31]

None of this is meant to imply that Congress was designed or functions as an efficient or rational policymaker. Some legislatures are built for efficient, majoritarian control;[32] Congress is not built for such efficiency. The internal division of the body into two houses with different structural incentives and procedures makes the American legislature unwieldy and difficult, even for a political party with total control of the government.[33] Congress often struggles to accomplish major legislative objectives and govern effectively. Regardless, Congress's ability to shape the fundamental law of the United States through super-statutes plays a vital role in creating and maintaining American state capacity.

B. CONGRESSIONAL DYSFUNCTION AND PROCEDURAL RESPONSES

Recent years have seen an increase in congressional dysfunction, reducing the ability of Congress to pass major legislation, including super-statutes, by transforming key aspects of the legislative process. The increased use of the filibuster over the last fifty years has effectively created a sixty-vote supermajority threshold in the Senate for almost every major bill (and many smaller bills), making it difficult even for substantial majorities with unified control of government to advance their governing agendas.[34] Although the filibuster has long been part of the Senate landscape, informal

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[28] *See, e.g.*, Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 83-344, § 310, 88 Stat. 297.
[29] *See* OLESZEK ET AL., *supra* note 26, at 106–09.
[30] *See infra* Part II.
[31] *See infra* Part II.
[32] *See* Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT'L POL. SCI. REV. 297, 298 (1997).
[33] *See, e.g.,* Theda Skocpol, *The Rise and Resounding Demise of the Clinton Plan*, 14 HEALTH AFFS. 66, 73 (1995); Eric Patashnik & Jonathan Oberlander, *Republicans Are Still Trying to Repeal Obamacare. Here's Why They Are Not Likely to Succeed*, WASH. POST: MONKEY CAGE (June 13, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/13/republicans-are-still-trying-to-repeal-obamacare-heres-why-they-are-not-likely-to-succeed/.
[34] It should be noted that the filibuster was also used on major legislation in previous decades; for example, the legislative maneuverings surrounding the 1964 Civil Rights Act were conducted in the shadow of a Southern Democratic filibuster. *See* GRAHAM, *supra* note 23, at 143. The difference is that the modern filibuster is used on a much wider scale. *See infra* note 35.

norms limited its use until approximately the 1970s.[35] Combined with an increasingly individualized political and media environment that rewards extreme policy positions, senators and representatives now have more incentives to derail legislation and less incentive to compromise or govern.[36] Moreover, a host of factors have contributed to geographically and ideologically sorted parties that struggle to find common ground once in office.[37]

It is difficult to empirically measure these claims of congressional dysfunction, in part because it is difficult to measure and compare Congress's ability to legislate across the years. Nonetheless, numerous studies and commentators have noted that recent Congresses have been among the least productive in history, producing fewer laws[38] and fewer major laws[39] than in the past. There are strong critiques of these studies and their conclusions.[40] Most notably, these studies do not consider that the baseline for measurement, the mid-twentieth century, was an unusually productive period enabled by the national government's politically expedient accommodation of Southern racial repression.[41] It must also be noted that although congressional polarization is arguably at its highest level since the Civil War,[42] bipartisan legislating is still common on many issues, and it is possible or even likely that both the extent and effects of congressional polarization have been significantly overstated by some

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[35] *See* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1009 (tracking a forty-fold increase in the number of cloture motions filed from the 1970s to the 2000s). It is difficult to track the number of "filibusters" in any given Congress because the modern filibuster is actually the mere *threat* of a filibuster, which is often enough to kill legislation or prevent its consideration entirely. *See* OLESZEK ET AL., *supra* note 26, at 280–82. Still, Professor Chafetz's work suggests the magnitude of the shift in how frequently filibusters are now used.

[36] WALTER J. OLESZEK, CONG. RSCH. SERV., RL34611, WHITHER THE ROLE OF CONFERENCE COMMITTEES: AN ANALYSIS 8–11 (2008).

[37] *See, e.g.*, Richard L. Hasen, *End of Dialogue? Political Polarization, the Supreme Court, and* Congress, 86 S. CAL. L. REV. 205, 234–37 (2013). *See generally* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011) (discussing the possible causes of partisan polarization in Congress and throughout society, including primary elections, gerrymandering, legislative rules, and campaign finance).

[38] *See, e.g.*, Hasen *supra* note 37, at 228–29; Neal Rothschild, *Productivity in Congress Tanked in 2020*, AXIOS (Dec. 13, 2020), https://www.axios.com/congress-legislation-covid-19-2020-28a81b79-8cfc-4fc6-8fa6-e1758dd5f81f.html [https://perma.cc/WF62-RCPS]; *113th Congress Not the Least Productive in Modern History*, NBC NEWS (Dec. 29, 2014, 11:07 AM) https://www.nbcnews.com/politics/first-read/113th-congress-not-least-productive-modern-history-n276216 [https://perma.cc/CGU2-ZPKC].

[39] *See* Hasen, *supra* note 37, at 229–31, 229 n.102.

[40] *See* OLESZEK ET AL., *supra* note 26, at 101–02 (arguing that these studies use overly simplistic measures of congressional function that do not include other goals like oversight or stopping "bad" bills and that they do not account for the effect of procedural changes like omnibusification that result in fewer laws but comparable amounts of substance); SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 79 (2003) (arguing that such measures ignore differences between periods of divided and unified government).

[41] *See* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1702–03 (2015).

[42] *See id.* at 1705.

observers.[43] Nevertheless, there is fairly widespread agreement among the public,[44] academics,[45] and lawmakers[46] that, whatever the cause, congressional dysfunction is real and seriously imperils the American democratic system.

Congress has not been a passive observer of these trends. Beginning in the 1990s, it responded to these challenges, especially the ubiquity of the filibuster, by adjusting its internal procedures in a development Professor Barbara Sinclair called "unorthodox lawmaking."[47] Taking as a baseline the (somewhat overstated)[48] traditional legislative process of introduction, committee consideration, and floor action, Sinclair cataloged alternative legislative processes, like reconciliation and "omnibusification,"[49] that modern lawmakers use to avoid roadblocks like the filibuster.[50] These procedures existed before the modern era of congressional dysfunction,[51] but increased "procedural warfare" and partisan polarization following the "Republican Revolution" of the 1990s dramatically increased the importance and use of such tools in recent decades.[52] Although Congress is still capable of passing major legislation,[53] and major legislation in the past also made use of "unorthodox" tools, Congress is increasingly reliant on such tools to achieve its goals.[54] Thus, any effort seeking to reverse American democratic decline by enabling Congress to promote state capacity through super-statutes must account for the increased use of unorthodox procedures.

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[43] *See id.* at 1702–03.

[44] *See, e.g.*, *Congress and the Public*, GALLUP, https://news.gallup.com/poll/1600/congress-public.aspx [https://perma.cc/4D6L-AS44] (last visited Dec. 16, 2021).

[45] *See, e.g.*, Pildes, *supra* note 37, at 276 n.2; THOMAS E. MANN & NORM J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012). *But see* Farina, *supra* note 41 (arguing that such rhetoric is wildly overblown).

[46] *See, e.g.*, *Is the U.S. Congress Broken? Longtime Lawmaker Gives Insights and Advice*, VAND. UNIV. (June 29, 2021, 2:47 PM), https://news.vanderbilt.edu/2021/06/29/is-the-u-s-congress-broken-longtime-lawmaker-gives-insights-and-advice/ [https://perma.cc/TC5S-3FYW].

[47] *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2016).

[48] *See* Abbe Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1794 (2015).

[49] Reconciliation is a budget tool requiring only fifty votes for passage; "omnibusification" is a trend towards rolling smaller bills into larger legislative packages to facilitate compromise and generate bipartisan support for important bills. *See infra* Part II for further discussion of these tools.

[50] *See* SINCLAIR, *supra* note 47.

[51] *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; MEGAN S. LYNCH, CONG. RSCH. SERV., RL30458, THE BUDGET RECONCILIATION PROCESS: TIMING OF LEGISLATIVE ACTION 10 tbl.4 (2016).

[52] *See* SINCLAIR, *supra* note 47, at 137–69 (describing the historical trends that led to the increase in "unorthodox" lawmaking).

[53] For example, since 2000, Congress has completely revamped the American security state, *see* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, enacted significant financial regulation in the aftermath of the Great Recession, *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), and completely overhauled the American health care system, *see* Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

[54] *See* SINCLAIR, *supra* note 47, at 168–69.

C. THE COURT–CONGRESS DIALOGUE AND DEMOCRATIC DECLINE

The Supreme Court, like all other actors in the federal government, has an obligation to defend and promote democracy in the United States. One means by which the Court can achieve this goal is through its ongoing dialogue with Congress. Under the dialogic theory, which underlies every modern statutory interpretation doctrine, the judiciary (but especially the Supreme Court) hears challenges to statutes, rules on the underlying law, and sometimes reinterprets or strikes down particular provisions or entire statutes.[55] Congress sometimes codifies or overrides the Court's ruling by passing statutes expressly accepting or dismissing particular holdings.[56] Congress will also sometimes make adaptations or changes short of full codification or override to comply with the Court's preferences.[57]

The existence and effect of this dialogue are debated by competing theorists,[58] but empirical studies have shown that congressional drafters, to varying degrees, have knowledge of judicial preferences and sometimes take those preferences into account when developing legislation.[59] Admittedly, Professors Victoria Nourse and Jane Schacter found in their ground-breaking 2002 empirical study of legislative drafters that "delving deeply into interpretive law as a way to maximize clarity does not seem to be part of what [congressional] staffers do on a regular basis."[60] But the Nourse–Schacter study and the more extensive 2013 study by Professors Abbe Gluck and Lisa Bressman did find that legislative staffers were aware of and sometimes considered case law when deciding if and how to draft statutes.[61] Moreover, according to the Nourse–Schacter study, "[i]f the bill was triggered, for example, by a judicial decision, it was likely that there would be substantial legal research" during the drafting process.[62]

Claims about the Court–Congress dialogue are necessarily limited in scope. Given the nonpublic nature of much legislative deliberation and process,[63] empirically

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[55] *See* Hasen, *supra* note 37, at 208–13.
[56] *See id.*
[57] *See id.* The number of direct congressional overrides is likely in decline, increasing the importance of other congressional responses to judicial signals. *See* Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1519–20 (2014).
[58] *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 914 & n.28 (2013) (noting that many "have argued that such a dialogue simply does not exist" and citing several articles by prominent theorists for this proposition).
[59] *See* Gluck & Bressman, *supra* note 58, at 906 ("Contrary to the prevailing wisdom, a majority of our respondents were not only aware of some of the interpretative rules that courts employ . . . but told us that these legal rules affect how they draft, although not always in ways that courts expect."); *see* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 597–605 (2002).
[60] *See id.* at 600.
[61] *See* sources cited *supra* note 59.
[62] *See* Nourse & Schacter, *supra* note 59, at 599.
[63] For example, the decision to introduce legislation may occur informally and before any official record is created.

defining and measuring the full ex ante effect of the Supreme Court's statutory interpretation doctrine would be complicated and is well beyond the scope of this paper. What the literature does suggest, however, is that there is a plausible mechanism and descriptive evidence that the Court's jurisprudence impacts legislative decisions and actions. Thus, while many doctrines of statutory interpretation (and the Supreme Court itself) likely overestimate the extent of the Court–Congress dialogue,[64] the Court's statutory interpretation rulings likely *do* impact how and whether congressional drafters decide to draft and introduce legislation.[65]

Because the Court's decisions to some degree influence the types of bills that are drafted and introduced through the dialogic process, there is a real possibility that the Supreme Court's statutory interpretation doctrines interfere ex ante with congressional decisions about the type and scope of bills that may be brought forward or how those bills are drafted and passed. If the Supreme Court's statutory interpretation jurisprudence consistently worked to empower the legislature and expand state capacity or otherwise support democracy through constructive dialogue with Congress, this might help curb democratic decline in the United States.[66] However, the Court's current doctrines of statutory interpretation are woefully inadequate for that task and instead contribute to democratic decline by attacking the legislative process tools Congress needs to promote American state capacity.

II. MODERN STATUTORY INTERPRETATION WEAKENS STATE CAPACITY

The Court's dominant theories of statutory interpretation, textualism and purposivism, have a negative ex ante impact on the functioning of American democracy because they are "universalist" theories that do not effectively account for procedural innovations used by Congress to bypass gridlock in the modern era.[67] Universalist statutory interpretation applies the same techniques and assumptions to all statutes regardless of the legislation's form or the procedures used to pass it.[68] The opposite of universalist statutory interpretation would be "anti-universalist" or "contextual[ist]."[69] Contextualist statutory interpretation would consider *how* legislation comes to be, not necessarily to displace the meaning of the text but to better understand that text.[70]

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[64] *See* Nourse & Schacter, *supra* note 59, at 598–99.
[65] *See* Gluck & Bressman, *supra* note 58, at 906–07.
[66] *See, e.g.*, *id.* at 1017–19.
[67] *See* Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 85–86 (2015).
[68] *See id.* (arguing that "all the leading theories of statutory interpretation—textualism, purposivism, intentionalism—are universalist theories, theories that apply regardless of particular legislative processes or features (such as committee jurisdiction, legislative process, or subject area)"); *see also* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Inside Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 758–763 (2014) (arguing that statutes are a "[t]hey," not an "[i]t," and that while the Court does not respect the differences between different types of statutes, these differences are crucial for understanding and interpreting them).
[69] *See* Sitaraman, *supra* note 67, at 117–18.
[70] *See id.*

The textualist project is universalist per se because it refuses as a general matter to examine legislative history.[71] Textualists believe that a statute's text is the only legislative material that carries any democratic weight, and the process by which that text was constructed or the intent of the legislature that enacted it are functionally irrelevant.[72] If the meaning of a statute can only be found within the four corners of the text itself (assisted by judicially created interpretive canons), it does not matter if the provision at issue was passed as a short, single-issue bill or as part of a several-hundred-page omnibus package. Textualism is thus a universalist form of statutory interpretation because it rejects variations within the legislative process as having any bearing on legislative meaning.

Purposivists also interpret legislation based on text but they take stock of other materials to help inform their interpretations. Purposivists view legislative history as one way to confirm or disconfirm judicial impressions of statutory meaning; purposivists might also explicitly consider judicially created canons, practical consequences, or other considerations to bolster their interpretations.[73] These theories rely on considerable deference to the legislature for democratic legitimacy: a belief that "[d]eliberation by elected legislators is more reliable and more legitimate in solving problems . . . than deliberation by unelected judges" undergirds these more legislatively focused theories of statutory interpretation.[74] But even though these theories are much more likely than textualism to take a "highly contextual approach when it comes to 'textual, historical, and evolutive evidence,' . . . they do not wade into the intricacies of legislative structure and process."[75] Purposivist judges instead analyze the goals and motivations of a fictive rational legislator acting rationally to accomplish rational aims.[76] In actuality, legislators are constrained by and operate within political and legislative circumstances that can have an impact on the legislation they produce.[77] Thus, because it makes empirically weak and often fictive assumptions about how legislatures operate, purposivism is a universalist method of statutory interpretation.

This Note argues that these dominant universalist statutory interpretation theories inadvertently or knowingly proscribe particular procedures used to legislate on major issues and thus weaken Congress's unique ability, through major legislation including super-statutes, to make systemic policy changes affecting whole areas of American life.[78] For example, since the 1980s major legislation is increasingly rolled into

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[71] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 31 (1997) ("I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.").
[72] *See* Sitaraman, *supra* note 67, at 117 & n.190 (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003)) ("[T]he legislative process is simply too complex and too opaque to permit judges to get inside Congress's 'mind.'").
[73] *See, e.g.*, William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322-23 (1990).
[74] *See* Eskridge, *supra* note 1, at 1281.
[75] Sitaraman, *supra* note 67, at 117.
[76] *See id.*
[77] *See, e.g.*, sources cited *supra* notes 58–59, 68.
[78] *See supra* Section I.A.

legislative packages (called omnibus bills), which contain numerous, often unrelated provisions to help whip votes, build legislative coalitions, and secure passage;[79] party leadership increasingly uses informal negotiations to draft final compromise versions of bills;[80] and reconciliation, a budgetary procedure requiring only a simple majority to pass the Senate, is increasingly important as the filibuster has become more common.[81] While some commentators view the use of such procedures negatively, these legislative processes have enabled Congress to pass major, long-term priorities in recent decades and thus contribute to American state capacity.[82]

The Supreme Court could support Congress's contribution to state capacity: through the dialogic process described in Section I.C, the Court could encourage and support the use of legislative tools needed to produce major legislation in the modern era. As the following examples show, however, the modern Court's statutory interpretation cases tend to inhibit Congress's ability to pass super-statutes ex ante. By relying on universalist statutory interpretation doctrines that do not acknowledge or are even hostile to vital congressional procedures, the Court disincentivizes congressional drafters from using important tools and publicly signals hostility to the internal processes of a coequal branch of government, effectively weakening American state capacity and thus contributing to democratic decline in the United States.

A. OMNIBUS LAWMAKING AND *LOPEZ*

United States v. Lopez[83] illustrates how modern theories of statutory interpretation can weaken Congress's ability to pass major statutes by discouraging the use of vital legislative procedures. *Lopez* involved a challenge to the constitutionality of the Gun Free School Zones Act of 1990, a statute prohibiting unauthorized individuals from possessing firearms in school zones.[84] Alfonso Lopez Jr., a high school student in Texas, was convicted under the statute for carrying an unloaded firearm onto school property.[85] He appealed his conviction on the grounds that Congress had overstepped its authority under the Commerce Clause by regulating guns in school zones.[86] The Court agreed, holding in part that Congress had not provided enough detail in its legislative findings to justify the Act under the commerce power.[87]

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[79] *See* Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, 2 ISSUES LEGAL SCHOLARSHIP 1 (2002).
[80] *See* OLESZEK, *supra* note 36, at 16.
[81] *See* David Wessel, *What is Reconciliation in Congress?*, BROOKINGS: UP FRONT (Feb. 5, 2021), https://www.brookings.edu/blog/up-front/2021/02/05/what-is-reconciliation-in-congress/ [https://perma.cc/5MEV-YGXJ].
[82] *See, e.g.*, sources cited *supra* note 53.
[83] 514 U.S. 549 (1995).
[84] *See* Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844.
[85] 514 U.S. at 551.
[86] *Id.* at 552.
[87] *Id.* at 562–63.

The Gun Free School Zones Act was introduced separately as a stand-alone bill in the House and Senate.[88] The House bill was the subject of a House Judiciary Committee hearing.[89] The Senate version of the bill, substantially similar to the House version, was incorporated into and passed as part of the Crime Control Act of 1990,[90] an omnibus bill produced by informal conferences between the House and Senate that merged numerous smaller bills.[91]

As the government argued in its brief and as the dissent noted, numerous outside studies and congressional testimony on the House bill established a connection between violence in schools and interstate commerce, but the majority dismissed these findings by noting that "the Government concedes that '[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'"[92] The Court ultimately ruled that no such justification existed in any case, using this narrow reading of the legislative evidence to bolster its interpretation.[93] The Court argued that Congress needed to add specific legislative evidence supporting its reading of the Commerce Clause directly into the statute and the legislative history surrounding the omnibus bill; it simply ignored the relevant House Judiciary Committee report.[94]

This reading would be easily countered by a better understanding of the legislative process. The Gun Free School Zone Act was passed as part of a larger omnibus legislative package.[95] Unlike smaller, single-subject bills, omnibus packages contain numerous provisions.[96] They are constructed in this way for several reasons. First, they may address complicated, national issues that require comprehensive solutions best effectuated by combining bills covering multiple topics.[97]

Second, omnibus bills tend to reflect careful compromise between competing policies and political factions.[98] The 1990 Crime Bill, for example, initially included conservative priorities like habeas litigation reform that were unpalatable to Congress[99] and were removed after careful negotiation, while other provisions were

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[88] *See* Gun-Free School Zones Act of 1990, S. 2070, 101st Cong. (1990); Gun-Free School Zones Act of 1990, H.R. 3757, 101st Cong. (1990).
[89] *Gun-Free School Zones Act of 1990: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary,* 101st Cong. (1990).
[90] *See* Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844.
[91] *See* HARRY HOGAN, KEITH BEA, SUZANNE CAVANAGH, CHARLES DOYLE & MAUREEN MURPHY, CONG. RSCH. SERV., CRIME CONTROL ACT OF 1990 (P.L. 101–647): SUMMARY 1 (1990).
[92] *Lopez*, 514 U.S. at 562.
[93] *See id.* at 562–68.
[94] *See id.*
[95] *See* HOGAN ET AL., *supra* note 91.
[96] *See* Garrett, *supra* note 79.
[97] *See* HOGAN ET AL., *supra* note 91.
[98] *See* Garrett, *supra* note 79, at 2–3.
[99] *See* Statement, President George Bush, Statement on Signing the Crime Control Act of 1990 (Nov. 29, 1990), https://www.presidency.ucsb.edu/documents/statement-signing-the-crime-control-act-1990 [https://perma.cc/68QV-XJ2H].

added to build enough consensus to pass the bill and receive a presidential signature.[100] This political process is a key feature of omnibus lawmaking; by combining different legislation into a single package, omnibus bills decrease political costs for legislators to pass important but controversial policies, allow for effective negotiating, logrolling, and horse-trading over particular provisions, and help congressional leaders build support by addressing the priorities of individual legislators.[101] Omnibus bills thus promote state capacity by allowing Congress to effectively build legislative majorities to pass major legislation including super-statutes.[102]

There are possible downsides to this type of legislating.[103] Omnibus legislating merges many bills together through a process more focused on building a legislative majority than careful drafting, increasing the chance of drafting errors or inconsistencies.[104] This is not unique to omnibus bills, but the sheer size of omnibus packages and the manner in which they are negotiated likely increases the chance of such errors.[105] Moreover, because they are careful compromises and contain many provisions, there is no guarantee that the legislative evidence for the omnibus bill will speak directly to an interpretative question about a component provision.[106] But whatever the downside in clarity, omnibus bills are a key tool for passing major legislation like super-statutes and thus contribute to American state capacity.

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[100] *See id.*

[101] *See* Garrett, *supra* note 79, at 2–3.

[102] *See id. See generally* Glen S. Krutz, *Getting Around Gridlock: The Effect of Omnibus Utilization on Legislative Productivity*, 25 LEGIS. STUD. Q. 533, (2000) (finding "omnibus usage to be a positive and significant independent influence on legislative productivity").

[103] One popular argument, made by political opponents of particular omnibus bills, is that legislators "don't read" or understand what is in omnibus bills. *See, e.g.*, Dan Mangan, *GOP Congressman on Obamacare Replacement: 'I Don't Think Any Individual Has Read the Whole Bill'*, CNBC (May 4, 2017, 10:26 AM), https://www.cnbc.com/2017/05/04/gop-congressman-i-dont-think-any-individual-has-read-health-bill.html [https://perma.cc/Z62E-V9EE]. This argument fundamentally misunderstands the legislative drafting process. Enacted text is primarily drafted by staff, including expert committee staff who are directly accountable to democratically elected legislators or the "nonpartisan drafters in the Offices of Legislative Counsel" who are responsible both to the legislators who requested their assistance and to the institution of Congress. *See* Gluck & Bressman, *supra* note 58, at 967–68. Omnibus bills, especially major, politically salient bills like super-statutes (and the smaller statutes combined to create omnibus bills), are thoroughly vetted by party leadership, individual lawmakers, House and Senate committees, partisan and nonpartisan staff, executive agencies, lobbyists, and others. *See* OLESZEK ET AL. *supra* note 26, at 23–26. This happens before formal introduction, at committee markups, during floor consideration, and sometimes after passage. *See id.*; *see also* Mangan, *supra* ("'Let's put it this way: People in my office have read all parts of the bill. I don't think any individual has read the whole bill,' [Republican Representative Thomas] Garrett said. 'That's why we have staff.'"). *See generally* SINCLAIR, *supra* note 47, at 170–218 (describing the intensive debate surrounding the drafting and passage of the Affordable Care Act). Because legislators retain final decision-making authority and are kept in the loop about granular developments by their professional staff, demanding that legislators read every bill would add nothing but delay to an already overburdened legislative process. Moreover, no commentator could reasonably make the same argument in an executive context; if every legislator must know the contents of major legislation before passage, why shouldn't the President read and approve every major administrative rule or action?

[104] *See* Garrett, *supra* note 79, at 3.

[105] *See id.*

[106] *See id.*

When the *Lopez* Court attempted to regulate omnibus bills by requiring a heightened showing of evidence, it was directly targeting the major advantages of these bills. Viewed through a dialogic lens, the *Lopez* Court was effectively signaling to Congress that it would require a higher level of evidentiary clarity to uphold certain determinations under the Commerce Clause.[107] But demanding a higher level of evidentiary clarity might impede the political negotiations that make omnibus legislating possible; where legislators disagree, vagueness rather than clarity might promote compromise and facilitate passage of the legislation.[108] A single-subject bill drafted by one senator might be able to include specific findings or language,[109] but particularized findings of fact in an omnibus bill might be nearly impossible given the many authors involved and could make such bills difficult or impossible to pass.[110] Because textualism and purposivism are universalist theories of interpretation that do not consistently parse different kinds of bills and legislative processes, the Court effectively equated omnibus legislation with single-subject bills. This raises the political and opportunity costs of legislating and imperils future omnibus bills by requiring high levels of proof that are more difficult to achieve in omnibus legislation than in single-subject bills. Because major bills, including super-statutes, are frequently constructed as omnibus measures, the Court effectively made it more difficult for Congress to exercise one of its unique contributions to state capacity. In doing so, the Court's universalist interpretive theories weakened Congress's ability to respond to national issues, thereby contributing to democratic decline.

A better understanding of the legislative process would recognize the political trade-offs inherent in omnibus legislation and would allow statutory interpreters to appreciate the distinct means by which single-subject and omnibus bills are drafted. Statutory interpreters that recognize modern legislative techniques might also be willing to accept less specificity and coherence in omnibus bills.[111] Even if the interpreter did not accept this lack of specificity, a better understanding of legislative processes might instruct the statutory interpreter to evaluate the legislative evidence for the component legislation as well as the overall package, as the dissent did in *Lopez*, because the individual component bills may contain relevant interpretive evidence.[112] A more robust theory of statutory interpretation recognizing the different forms of legislation thus might have accorded more weight to Congress's finding that gun violence had an effect on interstate commerce, either by accepting the trade-off between legislative clarity and democracy promotion in omnibus bills or by looking to the legislative evidence present in component legislation.

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[107] United States v. Lopez, 514 U.S. 549, 563 (1995).
[108] *See* Garrett, *supra* note 79, at 2–3.
[109] *See* Gluck & Bressman, *supra* note 58, at 936–37.
[110] *See id.*; Garrett, *supra* note 79, at 2–3.
[111] *See* Sitaraman, *supra* note 67, at 119.
[112] *See Lopez*, 514 U.S. at 618–19 (Breyer, J., dissenting).

B. POST-PASSAGE PROCESSES IN *KING V. BURWELL*

Although the Roberts Court rarely engages in explicit legislative process analysis, in *King v. Burwell*,[113] the "rare . . . instance in which the [Roberts] Court at least attempt[ed] to consider a statute's legislative-process realities in its interpretation,"[114] the Court made a host of claims about legislative process.

The arguments in *Burwell* turned on a single phrase, "established by the State,"[115] in the more than 900-page Affordable Care Act (ACA) and threatened to undo the first comprehensive overhaul of the American health care system in half a century. The majority opinion drafted by Chief Justice Roberts ultimately upheld the law, but the Court asserted that "Congress wrote key parts of the Act behind closed doors" and that this was contrary to "the traditional legislative process."[116] The Chief Justice also asserted that "much of the Act" was written using reconciliation, "limit[ing] opportunities for debate and amendment, and bypass[ing] the Senate's normal 60–vote filibuster requirement."[117] The Court blamed Congress's "inartful drafting," rebuking not only the text but the process by which that text had been created.[118]

Although the ACA certainly had flaws, on each of these points the majority was factually incorrect.[119] This Section will evaluate the process claims made by the *Burwell* Court in light of the dialogic model and argue that the Court was not only wrong on the facts but also wrong to send dismissive signals about post-passage procedures, specifically leadership drafting and reconciliation. More importantly, the Court's discussion of the legislative process used to pass the ACA weakened Congress's ability to pass major legislation in the future and thus contributed to democratic decline.

1. Leadership Negotiation and Drafting

One major claim made by the Court in *Burwell* was that the ACA was written "behind closed doors" and that this was contrary to "the traditional legislative process."[120] This language, apart from being weighted with normative political implications,[121] ignores modern developments in the post-passage procedures used by

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[113] 135 S. Ct. 2480 (2015).
[114] WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 16 (Supp. 2018).
[115] *See* 135 S. Ct. at 2489–90.
[116] *Id.* at 2492.
[117] *Id.*
[118] *See id.*
[119] *See generally* ESKRIDGE ET AL., *supra* note 114 (cataloguing the factual errors in the Court's argument).
[120] 135 S. Ct. at 2492.
[121] *See* ESKRIDGE ET AL., *supra* note 114, at 19 & n.15 (arguing that "the implication of this claim—that there was no debate on the bill—is untrue" and that this was a talking point used by political opponents of the law).

Congress to pass major legislation and highlights the Court's reliance on universalist forms of statutory interpretation that do not properly account for these developments.

Post-passage procedures, also called "conciliation procedures,"[122] are the processes by which different versions of a bill are combined before final passage.[123] The House and Senate often pass different versions of a bill's text. To present final legislation for presidential signature or veto, however, the text must be identical; the House and Senate must engage in one of several conciliation procedures to create a single, identical version of the bill. Congress has several conciliation procedures available depending on the legislative and political context of a given bill. Some bills may be drafted entirely in one chamber and passed by the other without amendment, while others are amended back and forth between the chambers.[124] In either situation, chamber or committee leadership may engage in negotiations to resolve their differences informally in one version of the bill, which is then passed by both chambers.[125] At other times, especially on complicated or large bills, the chambers may appoint a formal conference committee to negotiate the final language.[126]

The Court's *Burwell* opinion was highly critical of the conciliation process, leadership drafting, that Congress used to pass the ACA.[127] Leadership drafting refers to the routine practice whereby chamber and committee leaders work together informally to merge or create a bill that can garner enough votes for passage.[128] To the extent that the *Burwell* Court's "behind closed doors" language asserted that the bill was written using leadership drafting, it was factually incorrect because the text of the bill was drafted by a traditional committee process in two Senate committees over the course of several months.[129] On the other hand, if the *Burwell* Court intended to criticize the choice to use leadership drafting and not a conference committee during the post-passage process, it was factually correct—the compromise version combining the committee drafts *was* produced by leadership drafting in the Senate and then passed without amendment in the House[130]—but wrong to suggest that this was improper or unusual.

Leadership drafting is, in fact, the new normal for significant legislation and has arguably been so since at least the mid-1960s.[131] There are many reasons for this, especially the increased use of the filibuster that forces all legislation (and conference

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[122] Not to be confused with "reconciliation," which is a special form of post-passage procedure for budget bills.
[123] HONG MIN PARK, STEVEN S. SMITH & RYAN J. VANDER WIELEN, THE CHANGING POLITICS OF CONCILIATION: HOW INSTITUTIONAL REFORMS AND PARTISANSHIP HAVE KILLED THE CONFERENCE COMMITTEE 12 (2017).
[124] *See* OLESZEK ET AL., *supra* note 26, at 330.
[125] *See id.* at 328.
[126] *See id.* at 338–358 (describing the conference committee process).
[127] *See* King v. Burwell, 135 S. Ct. 2480, 2492 (2015).
[128] ESKRIDGE ET AL., *supra* note 114, at 20.
[129] *See* SINCLAIR, *supra* note 47, at 172.
[130] *See id.* at 197.
[131] ESKRIDGE ET AL., *supra* note 114, at 20.

committee reports) in the Senate to achieve a supermajority for passage.[132] For a complex bill like the ACA, careful compromises are required to maintain the sixty-vote margin necessary to pass the Senate.[133] The major advantage of leadership drafting is tight political control over the bill's text that facilitates final passage through a polarized Congress.[134]

By contrast, there are certain advantages to the conference committee process that cannot easily be replicated by leadership drafting. As discussed above, drafting errors are likely to occur in major bills like the ACA given the size and breadth of such legislation.[135] The conference committee process, open to more members and staff and providing a final public work product before passage (the conference report), is a tool that might provide a chance for Congress to correct such errors; it also helps produce broader political buy-in by including more voices in the conciliation process.[136] The conference report may also provide statutory clarity to judicial interpreters because it sometimes explains what changes were made in conference and why.[137] In the abstract, then, the *Burwell* Court was encouraging Congress to use different conciliation processes to produce better legislative clarity, a reasonable and positive goal.

But the *Burwell* Court's conception that Congress should *always* use such procedures was driven by universalist theories of statutory interpretation that do not take legislative circumstances into account. The Senate's choice to use leadership drafting to merge its committee drafts was driven by the need to closely manage internal divisions within the Democratic caucus.[138] Moreover, House approval of the Senate version was the only practical option for final passage because Democrats had lost their sixty-vote Senate margin (after the death of Senator Ted Kennedy) and could not overcome potential Republican filibusters of any conference committee.[139] These choices were grounded in the Democratic decision to *govern effectively* by passing major legislation on a key issue priority. All of these decisions and the processes used to pursue them were permissible under Congress's authority to control its own internal procedures and are common in the modern era.

Even by the Court's own terms, a better understanding of the ACA's legislative process would reveal extensive committee debate and amendment of the Act prior to final passage; the Court might thus have conceived the bill's flaws (including the language at issue in *Burwell*) as a natural consequence of comprehensive legislating

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[132] *See* Sarah A. Binder, *Where Have All the Conference Committees Gone?*, BROOKINGS (Dec. 21, 2011), https://www.brookings.edu/opinions/where-have-all-the-conference-committees-gone/ [https://perma.cc/DZ7W-4ZSH]; OLESZEK, *supra* note 36, at 9.
[133] ESKRIDGE ET AL., *supra* note 114, at 20.
[134] *See id.*
[135] *See supra* Section II.A.
[136] *See* OLESZEK, *supra* note 36, at 27–28, 31.
[137] *See* OLESZEK ET AL., *supra* note 26, at 352–58.
[138] *See* SINCLAIR, *supra* note 47, at 183.
[139] *See id.* at 196-97.

in a highly polarized era rather than a result of too little deliberation.[140] Just as importantly, the *Burwell* decision signaled to Congress that the Court would disapprove of certain legislative processes, like leadership drafting, even when those processes are commonplace, permissible under Congress's constitutional authority, and necessary for the passage of major legislation. This universalist position creates opportunity costs for those procedures, weakening Congress's ability to enhance American state capacity through major legislation like super-statutes and thus contributing to democratic decline.

A defender of the Court might argue that Congress should use procedures that can clear the sixty-vote filibuster hurdle, like conference committees, because these procedures often result in better-drafted legislation and protect minority rights. But this universalist assertion about legislative process ignores empirical realities about the modern Congress. Governing parties have rarely been able to achieve filibuster-proof supermajorities in the last several decades[141] which, combined with increasing congressional dysfunction and polarization, has made overcoming the filibuster a serious hurdle for any legislation.[142] Moreover, the constitutional structure of Congress, including the malapportionment of the Senate, already protects political minorities.[143] A preference for procedures subject to filibuster signals to Congress that the Court prefers simpler, smaller bills, disqualifying most super-statutes from consideration. Whatever benefits in legislative clarity that might be accrued in this way would likely be outweighed by weakened American state capacity and concomitant democratic decline.

2. Reconciliation

In addition to conference committees, *Burwell* also signaled to Congress that the Court would look down on another modern conciliation process: reconciliation, an optional procedural tool allowing Congress to "implement its comprehensive fiscal policy . . . by changing tax and entitlement laws" with a simple majority of the House and Senate.[144] Although reconciliation bills are limited by statute to certain kinds of provisions, the reconciliation process cannot be filibustered and is thus an important legislative tool in the modern era.[145] There is nothing untoward or unusual about the reconciliation process, which has been used by every president since Reagan to pass major legislation.[146]

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[140] *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts*, 129 HARV. L. REV. 62, 101 (2015); ESKRIDGE ET AL., *supra* note 114, at 17.
[141] *See Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/F39V-P9W8] (last visited June 22, 2022).
[142] *See supra* Section I.B.
[143] *See* Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Senate from Within*, 13 J. LEGAL ANALYSIS 502, 503 (2021).
[144] *See* OLESZEK ET AL., *supra* note 26, at 69–71, 73–75.
[145] *See* LYNCH, *supra* note 51, at 1 (describing budget reconciliation as "probably the most potent budget enforcement tool available to Congress for a large portion of the budget").
[146] *See id.*; ESKRIDGE ET AL., *supra* note 114, at 21.

The majority opinion in *Burwell* insinuated otherwise, arguing that "Congress passed much of the [ACA] using a complicated budgetary procedure known as 'reconciliation,'" limiting opportunities for debate and bypassing the Senate's "normal" sixty-vote filibuster requirement.[147] Beyond being factually incorrect,[148] the Court's implication that reconciliation is normatively undesirable is a dangerous, universalist assertion that risks weakening Congress's ability to pass major legislation.

Since the 1980s, Congress has frequently used reconciliation to accomplish budgetary policy goals.[149] Although reconciliation avoids the filibuster, it includes explicit minority protections to offset this effect; some of the "complicated" reconciliation procedures referenced in *Burwell* are the result of a statutory compromise to limit abuses of the process, called the "Byrd Rule," which specifies that reconciliation can only be used for certain categories of provisions.[150] The use of reconciliation in the ACA context, despite the majority's criticisms, complied with the statutory strictures laid out by the 1974 Budget Act and was entirely within Congress's constitutional power under the Rules of Proceedings Clause. Even on the Court's own terms, the reconciliation process includes extensive opportunities for debate and amendment; for example, the so-called vote-a-rama on the Senate floor, which is a necessary precondition of the reconciliation process, allows senators to offer scores of amendments, all of which receive a vote.[151]

A critic might argue, as the *Burwell* Court did, that reconciliation is normatively undesirable because it avoids the filibuster and thus fails to protect political minorities.[152] However the filibuster, like reconciliation, is established under Congress's power to create its own rules of proceedings, and Congress is fully within its constitutional authority to create procedures that reform or avoid the filibuster.[153] Additionally, the constitutionally malapportioned structure of the Senate overrepresents and protects political minorities even absent the filibuster.[154] Thus, the filibuster carries no implicit normative or constitutional value, and Congress is free to establish procedures circumventing it.

Moreover, this critique of the legislative process implicitly discounts the democratic values served by procedures that avoid the filibuster, most importantly by enhancing Congress's contribution to state capacity. Reconciliation allows legislative majorities to pass policy priorities reflecting important state goals, arguably enhancing

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[147] King v. Burwell, 135 S. Ct. 2480, 2492 (2015) (citation omitted).
[148] 900 pages of the bill were passed using traditional committee consideration and floor procedure, both subject to debate, amendment, and filibuster, while only fifty-five were passed via reconciliation. *See* ESKRIDGE ET AL., *supra* note 114.
[149] *See* LYNCH, *supra* note 51.
[150] *See* BILL HENIFF JR., CONG. RSCH. SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 1–2 (2021).
[151] *See* OLESZEK ET AL., *supra* note 26, at 69–70.
[152] *See, e.g.*, Dan McLaughlin, *The Filibuster Protects Minority Rights. That Does Not Make It Racist*, NAT'L REV. (Mar. 23, 2021, 6:30 AM), https://www.nationalreview.com/2021/03/filibuster-protects-minority-rights-that-does-not-make-it-racist/.
[153] *See* Gould et al., *supra* note 143, at 504.
[154] *See id.* at 503.

state capacity by promoting effective majority governance.[155] Congress balanced this efficiency by providing for internal checks to limit what kinds of legislation could be achieved through reconciliation.[156] Statutory interpreters should understand and respect these choices and recognize reconciliation as a legitimate trade-off enshrined in statute by a coequal branch of government.

The Court's disdain for reconciliation, on the other hand, shows that current universalist theories of statutory interpretation lack the theoretical flexibility to understand these trade-offs or the legitimate democratic processes that led to their creation. Because neither textualism nor purposivism actively account for the different, equally legitimate procedures used by Congress to pass different kinds of legislation, *Burwell* signals to Congress that the Court disapproves of perfectly legal and more efficient forms of legislating. Moreover, by specifically discouraging legislative procedures designed to ease the passage of major legislation, the Court is weakening Congress's ability to enact super-statutes and thus contributing to democratic decline.

III. SOLUTIONS: BRINGING LEGISLATIVE ANALYSIS INTO THE JUDICIARY

If current statutory interpretation is weakening state capacity and thus contributing to democratic decline, what can democracy-minded reformers do to arrest this trend? Some might recommend that the Court voluntarily adopt non-universalist doctrines of statutory interpretation that better reflect the legislative process. But this is unlikely to work because the Court is not interested in deeper analysis of legislative processes. The modern textualist Court is intent on reducing the role that legislative evidence plays in statutory interpretation; textualist judges who believe in the primacy of text alone or view the Court's role as "disciplining" Congress for textual errors[157] are unlikely to voluntarily change their interpretive methods in any way that would systematically consider congressional processes. It is thus incumbent on Congress to push the Court in this direction using its constitutional authorities. This Part will propose two possible avenues to accomplish this goal: long-term cultural change driven by investments in legislative legal education for the law students who will one day be the nation's lawyers and judges, and short-term investments to expand the availability of legislative analysis and interpretive tools for the federal courts.

A. PROMOTING LEGISLATIVE LEGAL EDUCATION

Better statutory interpretation requires training in legislative processes that most lawyers and judges do not receive. This is hardly an insurmountable barrier. Lawyers are certainly capable of mastering complicated procedures; the Federal Rules of Evidence and Civil Procedure are quite complex, but many lawyers master and employ both to great effect. Lawyers are also capable of using complex research tools, like Westlaw and LexisAdvance, that are incomprehensible to many laymen. That almost

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[155] *See* OLESZEK ET AL., *supra* note 26, at 74–75.
[156] *See id.* at 75–77; HENIFF, *supra* note 150, at 1–2.
[157] *See* SCALIA, *supra* note 71, at 31–32; Schacter, *supra* note 1, at 609–10, 636–46.

every lawyer is capable of understanding and employing these tools speaks to the high competence and capability of properly trained American attorneys.

By contrast, few lawyers study the legislative process in any great depth. Law school curricula, especially the foundational first-year courses, almost uniformly undervalue legislative processes in favor of judicial (and sometimes administrative) ones.[158] Partly as a result, federal law clerks and judges have less educational and professional experience with legislative processes than with judicial and administrative processes.[159] Additionally, despite the widespread availability of legislative research tools like Congress.gov, there is only cursory instruction in law school on the different types of legislative evidence or how to find them. While better, more comprehensive legislative casebooks and courses are becoming available, they are far from the norm.[160] Moreover, law professors themselves are an unlikely source of change, because so few have ever worked in the legislature.[161] Therefore, to overcome these entrenched practices of legislative education in law schools, Congress must act to improve legal education regarding legislative processes.

First, Congress should establish grant programs to strengthen legislative research programs in law schools. Congress could develop a grant program funding professorships focused on legislative process. This would create employment opportunities for ambitious young law professors whose research focuses on the intersection of law and legislative process, gradually increasing the pool of qualified professors working on and teaching these issues while also driving law schools to increase their depth of knowledge in this area. Congress could also develop grants to support legislative research institutes that would draw top law school faculty and provide resources to conduct research on vital, but undertheorized, topics on Congress's role in the legal system. Developing prestigious centers of congressionally focused legal scholarship might attract top law students to study the legislative process, building a cohort of future lawyers more knowledgeable in and cognizant of legislative issues. Congress already provides federal funding to universities for research on a host of topics;[162] thus, a research grant program funding legislative studies would almost certainly fall within the appropriations power.

To draw additional lawyers into the legislative process, Congress could also establish a standardized law clerkship system in the House and Senate, analogous to

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[158] *See* James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. LEGAL EDUC. 3, 5 (2015).

[159] *See* Dakota S. Rudesill, Keepers of the U.S. Code: The Case for a Congressional Clerkship Program 7 (discussion draft) http://docplayer.net/216794204-Discussion-draft-keepers-of-the-u-s-code-the-case-for-a-congressional-clerkship-program-dakota-s-rudesill-1.html [https://perma.cc/BR4E-9CHM] (last visited June 22, 2022) [hereinafter Rudesill, Keepers of the U.S. Code] ("Fourteen percent of federal appellate jurists have served in a legislature as a member or an employee . . . [and] [j]ust *four percent* of Top 20 law school professors . . . have worked for a legislative body.").

[160] *See generally* Brudney, *supra* 158 (advocating increased legislative education in law schools).

[161] *See* Rudesill, Keepers of the U.S. Code, *supra* note 159.

[162] *See Higher Education Research and Development: Fiscal Year 2019*, NAT'L SCI. FOUND. (Jan. 29, 2021), https://ncses.nsf.gov/pubs/nsf21314#data-tables [https://perma.cc/7AK9-AWEU] (listing all federal research expenditures for universities in FY 2019).

the law clerks that power the federal judiciary, as suggested by Professor Dakota Rudesill.[163] This, too, would attract intelligent and ambitious young law students to Congress, potentially influencing their intellectual development in favor of the legislature and the legislative process while breaking down pervasive myths and fictions about Congress within the legal profession.[164] These clerks would learn legislative processes, contribute their legal expertise to the development and passage of legislation, and build networks within the legislature that could result in future employment opportunities.[165] Because these positions would be within Congress, and Congress assuredly has constitutional authority over its own staffing decisions, this program would be within Congress's authority and, in fact, Congress has already drafted relevant legislation in the past that it could use as a model.[166]

B. PROVIDING STATUTORY INTERPRETATION RESOURCES TO THE COURTS

Educating the next generation of lawyers to be more sympathetic to Congress is a long- term solution, however, and would be contingent on influencing the courts to be more friendly towards congressional process arguments in the short term. Luckily, the appropriations power provides Congress with numerous possible tools to influence the judiciary's statutory interpretation doctrines. By providing additional resources to the courts, especially the Supreme Court, Congress could assist and influence the federal judiciary without violating the separation of powers.

First, Congress should establish and provide resources for mandatory legislative evidence training for all federal law clerks. The Congressional Research Service (CRS), a nonpartisan expert agency of the congressional bureaucracy, could develop a set of training materials covering the ins and outs of legislative process, how this process is reflected in different types of publicly available legislative history, where that legislative history can be found, and how that history might be interpreted in court cases. Congress could allocate resources to develop this training curriculum and even condition funding for judicial clerk salaries on successful implementation of the curriculum.

Such a program would not violate the separation of powers. Congress has sole power over federal appropriations[167] and additionally has significant authority over other aspects of the federal courts.[168] There are few constitutional stipulations on how Congress can provide funds to the judiciary.[169] It is Congress that currently authorizes

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[163] *See* Rudesill, Keepers of the U.S. Code *supra* note 159, at 7–8; *see generally* Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. UNIV. L. REV. 699 (2010) [hereinafter, Rudesill, *Closing the Legislative Experience Gap*] (suggesting and outlining the benefits of such a program).
[164] *See* Rudesill, *Closing the Legislative Experience Gap*, *supra* note 163, at 701–02, 709.
[165] *See id.*
[166] *See id.* at 703–04 (tracking the history of these legislative efforts).
[167] *See* U.S. CONST. art. I, § 8, cl. 1.
[168] *See* U.S. CONST. art. III, § 1, cl. 1.
[169] *See id.* Congress may not abolish the Supreme Court, must give judges "[c]ompensation" for their services, and may not or "diminish[]" the pay of judges "during their [c]ontinuance in [o]ffice." *See id.*

judges to appoint law clerks (and indeed all judicial staff) and provides for their salaries; Congress could simply modify these statutes to insert additional training requirements.[170] Congress already requires judicial staff to perform certain tasks, for example requiring the marshal of the Supreme Court to attend all sessions of the Court or the librarian of the Supreme Court to acquire any books or other materials needed by the Court.[171] This would also be in keeping with Congress's practice of imposing training or other qualifications for specific personnel in various executive agencies.[172]

Congress could go one step further and create an Office of Legislative Research (OLR) within the judiciary. OLR could be staffed by experts on legislative process, including detailees from the nonpartisan CRS, and could provide neutral advice and assistance to law clerks and judges conducting legislative research on statutory interpretation cases. OLR could provide a valuable service to judges and law clerks that might defray the common critique by legal professionals that legislative history is too complicated to consider in judicial decision-making. Judges could use this independent legislative research service in any way they choose; they could ask OLR to generate legal memos on particular legislative processes like reconciliation or explain complicated legislative history surrounding major legislation, or they could ignore OLR entirely.

Because OLR would not bind judges to any particular interpretative methodology, it would likely pass constitutional muster. Congress would not force courts to make particular rulings or directly influence the outcomes of individual cases. Instead, Congress would be providing *additional resources*, essentially enhanced civic education, to the judiciary without binding judges in any way. This could also be seen as a weakness of this remedy; it may not actually fix the problem at hand, especially if judges simply ignore it. But judges are intelligent, conscientious actors who want to follow the law and protect democracy. Providing them with additional resources and information about the legislative process might improve democratic outcomes in the courts and would not unconstitutionally constrain the power of the judiciary.

These proposals may encounter political difficulties in the current Congress. But a political strategy focused on the "civics education" aspect of the proposal and aimed at depoliticizing the issue while developing bipartisan support might generate a legislative supermajority. Failing that, these reforms (which are all budgetary in nature) could likely be passed through budgetary reconciliation, requiring only a simple majority of both houses.

CONCLUSION

Enhanced legislative legal education and additional statutory interpretation resources for the federal judiciary will not single-handedly protect American

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[170] *See* 28 U.S.C. §§ 675, 712, 751, 752 (establishing and creating stipulations for law clerk programs at the district courts, appellate courts, and Supreme Court).
[171] *See* 28 U.S.C. §§ 672(c)(1), 674 (c).
[172] *See, e.g.*, 6 U.S.C. § 711.

democracy from decline. Broad efforts are needed in every part of the federal government and every sector of American society. But Congress is not helpless; indeed, the imminent danger and magnitude of the threat to American democracy demand that Congress, and all actors in the constitutional system, must use every available tool and act decisively to promote state capacity and protect democracy. These reforms are one small, achievable piece of that puzzle.