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Courts in the Age of Dysfunction

This Essay comments on Benjamin Ewing and Douglas A. Kysar's article, Prods and Pleas: Limited Government in an Era of Unlimited Harm. Ewing and Kysar suggest that we augment the traditional conception of constitutional "checks and balances" with one of "prods and pleas," i.e., that different branches of government can provide incentives to induce action from other branches. They use federal climate nuisance litigation as an example of how such prods and pleas can and should operate. In the existing political climate, I am skeptical that governmental branches listen to reasoned arguments from other branches; thus, I argue that "pleas" will be ineffective. Ewing and Kysar's theory of prods, however, contains an important insight. Branches often respond to political incentives, such that when one branch reaches a decision that undermines the political goals of key actors in other branches (a "prod"), action is possible. In this Age of Dysfunction, when one of the major American political parties seeks to paralyze legislative action, I suggest three areas where judicial prodding might be appropriate: 1) where legislation is blocked by a filibuster; 2) where opposition to legislation rejects science; and 3) where the legislative process produces results that discriminate against diffuse and invisible (and thus powerless) groups. I then use Ewing and Kysar's example of climate change policy and argue that under current circumstances, judicial prodding is, in fact, appropriate.

INTRODUCTION

Otto von Bismarck is reported to have said that there is a "special providence for drunkards, fools, and the United States of America."¹ If so, the

1. S.E. MORISON, THE OXFORD HISTORY OF THE UNITED STATES, 1783-1917, at 413 (1927). There is now very considerable doubt that Bismarck actually said it, as similar quotations

Holy One has fallen down on the job lately. The nation's political system seems completely incapable of solving, or even grappling with, its most pressing problems. Washington policymakers seem bent on austerity in the midst of stagnation, essentially unlearning the most basic macroeconomic lessons of the last sixty years.² Rising powers such as China make massive investments in infrastructure and education, while in this country, our infrastructure falls apart and we slash education funding.³ Not content with inaction, in the summer of 2011 the House of Representatives chose to imitate developing country debt crises by creating one of its own, threatening the nation's credit and leading to a debt downgrade. This self-inflicted wound has led some to suspect that—whether or not the nation's credit rating deserves AAA—its political system does not.

Indeed, the last few years have seen thoughtful commentators on both the right and the left beginning to speculate as to whether the American political system is collapsing under its own weight. As we have moved from the American Century to the Post-American World, America itself has reached the Age of Dysfunction, when the formal institutions of U.S. constitutional government have become impotent to deal with the nation's most important challenges.

Benjamin Ewing and Douglas Kysar seek a way out, suggesting that the dysfunction is more one of intellectual imagination than of constitutional design.⁴ Amending “checks and balances,” they propose seeing American separation of powers as a system of “prods and pleas,” where different branches can incent others to address problems.

I am fairly skeptical of the ability of prods and pleas to augment checks and balances. As I shall suggest, the very nature of the Age of Dysfunction implies that pleas will have little role to play. But the prods/pleas model reveals an important insight: the Constitution's multiplicity of veto points means that the nation's founding document also creates potentially effective government institutions. Instead of bemoaning their lack of institutional competence,

have been found from before Bismarck's public career. The cynicism, however, well expresses the Iron Chancellor's outlook.

2. See Ari Berman, *How the Austerity Class Rules Washington*, NATION, Nov. 7, 2011, <http://www.thenation.com/article/164073/how-austerity-class-rules-washington>.
3. See THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, *THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK* (2011).
4. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011), available at <http://yalelawjournal.org/images/pdfs/1021.pdf>.

courts should embrace their legal capacity to improve policymaking outside the constitutional realm.

I thus attempt in this short Essay to extend Ewing and Kysar’s model and provide some guidelines concerning when courts should take up a prodding role. When does political branch behavior constitute genuine dysfunction, and when does it merely reflect the proper—if occasionally messy—operation of constitutional checks and balances? In proposing three areas where this traditional problem can be mitigated or avoided, I thus hope to provide constructive suggestions about when judicial prods might be useful and legitimate.

I. THE AGE OF DYSFUNCTION

Is American governance broken? Political observers on both the left⁵ and the right⁶ have looked closely at the issue and have come to the conclusion that it is. But this view transcends punditry. In the wake of the federal government’s near-default on its debt, Standard and Poor’s downgraded that debt for reasons that were primarily political rather than economic. As the agency noted, “[t]he political brinkmanship of recent months highlights what we see as America’s governance and policymaking becoming less stable, less effective, and less predictable than what we previously believed.”⁷

Does this perception have any reality behind it? Yes: we can measure it. By the middle of 2011, “[j]ust 23 bills ha[d] been signed into law by the president . . . a staggeringly low number.”⁸ Mere quantity hardly implies quality,

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5. See, e.g., E.J. Dionne Jr., *Why Did Congress Waste Six Months?*, WASH. POST, July 17, 2011, http://www.washingtonpost.com/opinions/why-did-congress-waste-six-months/2011/07/17/gIQARascKI_story.html (arguing that the debt ceiling crisis “ma[de] the United States look dysfunctional and incompetent to the rest of the world”).
 6. See, e.g., David Brooks, *The Vigorous Virtues*, N.Y. TIMES, Sept. 1, 2011, <http://www.nytimes.com/2011/09/02/opinion/brooks-the-vigorous-virtues.html> (warning that “[t]here’s a specter haunting American politics: national decline,” and arguing that “Republicans have done almost nothing to grapple with and address . . . deeper structural problems”); David Frum, *Why Our Government Is Broken*, CNN.COM (Sept. 26, 2011, 3:38 PM), <http://www.cnn.com/2011/09/26/opinion/frum-broken-government/index.html>.
 7. *United States of America Long-Term Rating Lowered to “AA+” Due to Political Risks, Rising Debt Burden; Outlook Negative*, STANDARD & POOR’S (Aug. 5, 2011, 8:13 PM), <http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245316529563>.
 8. Nate Silver, *Unfavorable Ratings for Both Major Parties Near Record Highs*, N.Y. TIMES: FIVETHIRTYEIGHT (July 23, 2011, 5:00 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/07/23/unfavorable-ratings-for-both-major-parties-near-record-highs>. The average number of bills that have been signed into law by the president by July 23 of the first session of

particularly when it comes to national legislation, but—in the middle of the deepest economic crisis since the Great Depression—this does not seem to be the time for inaction. *Time*'s Fareed Zakaria, characterizing today's governance as suffering from "paralysis," adds some more hard numbers:

More than two years into the Obama Administration, hundreds of key positions in government remain vacant for lack of Senate confirmation. The Treasury Department had to handle the global financial crisis, recession, bank stress tests and automaker bailouts, as well as its usual duties, with about a dozen of its senior positions—almost its entire top management—vacant. Senate rules have been used, abused and twisted to allow constant delay and blockage. The filibuster, historically employed about once a decade, is now a routine procedure that allows the minority to thwart the will of the majority. In 2009, Senate Republicans filibustered a stunning 80% of major legislation.⁹

The House of Representatives, meanwhile, has done its part, refusing to accept Senate adjournment so that President Obama cannot make any recess appointments and leading the push toward federal default.¹⁰

Hasn't it always been this way? Well, no. As Zakaria notes, remembering greater government efficacy "is not nostalgia. It is how the system worked in the 1980s and '90s to save Social Security, reform the tax code, rationalize immigration policy and close hundreds of military bases."¹¹

Assigning a cause for this dysfunction is straightforward: the Republican Party has gone off the rails. As Andrew Koppelman noted in this *Journal*, "The Republican Party, increasingly, is the party of urban legends: that tax cuts for the rich always pay for themselves, that government spending does not create jobs, that government overregulation of banks caused the crash of 2008, that

Congress for the past twenty years is approximately forty. This average was calculated by taking the number of public laws signed by July 23 of the first session of each Congress from the 102nd Congress to the 112th Congress. Data were collected from the *CQ Almanac's* Appendix, which lists public laws by session of Congress. *Series Appendix*, *CQ ALMANAC ONLINE*, <http://library.cqpress.com/cqalmanac/toc.php?mode=cqalmanac-appendix> (last visited Feb. 14, 2012).

9. Fareed Zakaria, *The Debt Deal's Failure*, *TIME*, Aug. 15, 2011, <http://www.time.com/time/magazine/article/0,9171,2086858,00.html>.
10. See, e.g., Sam Hananel, Assoc. Press., *Labor Board Headed for Gridlock Again*, *YAHOO NEWS*, Oct. 28, 2011, <http://news.yahoo.com/labor-board-headed-gridlock-again-184109170.html> (detailing Republican plans to handcuff the NLRB).
11. Zakaria, *supra* note 9.

global warming is not happening.”¹² Koppelman’s words appeared in April 2011; since then, the GOP has gone further into embracing myths, most notably that austerity cures recessions, and that a federal government default would be economically preferable to increasing the federal debt ceiling.¹³

Why has this happened? One important trend has been noticed by many on the right: “epistemic closure,” a phrase coined by libertarian Julian Sanchez of the Cato Institute,¹⁴ which describes modern conservatism as having become “worryingly untethered from reality”¹⁵ due to its refusal to take seriously—or even listen to—viewpoints from anywhere but within the precincts of the conservative movement.¹⁶ Epistemic closure does not necessarily create dysfunction, but in today’s GOP it has given rise to a worldview in which the other side is so fundamentally dangerous that it must be resisted at all costs—even if it makes attempts at reasonable compromise. Republicans spent the 111th and 112th Congresses opposing ideas that they once espoused because supporting them could benefit the Democratic Party. Republican proposals for health care reform previously relied on private insurance, subsidies, and an individual mandate¹⁷: no sooner did President Obama endorse this framework than Republicans rejected it as a “government takeover” driven by “death panels” and pronounced the individual mandate unconstitutional.¹⁸ Republicans insisted that only tax cuts could stimulate the economy: when President Obama proposed extending payroll tax cuts, Republicans vowed to

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12. Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 22 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html>.
 13. See, e.g., Lara Marlowe, *Right-Wing Republicans Prefer Ruin to Compromise*, IRISH TIMES, July 28, 2011, <http://www.irishtimes.com/newspaper/opinion/2011/0728/1224301495723.html>.
 14. Julian Sanchez, *Frum, Cocktail Parties, and the Threat of Doubt*, JULIANSANCHEZ.COM (Mar. 26, 2010), <http://www.juliansanchez.com/2010/03/26/frum-cocktail-parties-and-the-threat-of-doubt>.
 15. Julian Sanchez, *A Coda on Closure*, JULIANSANCHEZ.COM (Apr. 22, 2010), <http://www.juliansanchez.com/2010/04/22/a-coda-on-closure>.
 16. For further discussion of “epistemic closure,” and several prominent examples of it, see Patricia Cohen, “Epistemic Closure”? *Those Are Fighting Words*, N.Y. TIMES, Apr. 27, 2010, <http://www.nytimes.com/2010/04/28/books/28conserv.html>.
 17. See Julie Rovner, *Republicans Spurn Once-Favored Health Mandate*, NPR.ORG (Feb. 15, 2010), <http://www.npr.org/templates/story/story.php?storyId=123670612>; *Summary of a 1993 Republican Health Reform Plan*, KAISER HEALTH NEWS (Feb. 23, 2010), <http://www.kaiserhealthnews.org/Stories/2010/February/23/GOP-1993-health-reform-bill.aspx>.
 18. Bill Adair & Angie Drobnic Holan, *PolitiFact’s Lie of the Year: “A Government Takeover of Health Care,”* POLITIFACT (Dec. 16, 2010, 11:30 PM), <http://www.politifact.com/truth-o-meter/article/2010/dec/16/lie-year-government-takeover-health-care>.

block the cuts.¹⁹ Most pertinently for Ewing and Kysar, Republicans attacked “command-and-control” environmental regulation and proposed cap-and-trade systems instead: as soon as Democrats embraced the idea, Republicans opposed it as central planning.²⁰

It is unprecedented for a party to consistently reject its own ideas in the hopes of preventing another party’s President from advancing his legislative agenda. But such behavior is not petty partisanship: it is *grand* partisanship. It derives from a deeply held vision about the nature and purpose of the American Republic and the other party’s threat to that vision. For example, former House Speaker Newt Gingrich, who as of this writing leads the polls for the Republican presidential nomination, wrote in a recent book that President Obama heads a “secular, socialist machine” that “represents as great a threat to America as Nazi Germany or the Soviet Union once did.”²¹ Given this viewpoint, it hardly surprises that the Republican Party prefers to disrupt the workings of government rather than cooperate with its political enemies. The GOP thus has genuinely created an *Age of Dysfunction*: it is not a temporary phenomenon but will remain the normal baseline of U.S. politics as long as the GOP maintains its current posture.²²

One might well ask whether the dysfunction will last if the GOP achieves unified control over all branches of government in the upcoming elections, a reasonably probable occurrence at this writing. Although a complete argument on this point cannot be achieved within the constraints of either space or the reader’s patience, here are two answers.

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19. See Charles Babington, Assoc. Press., *GOP May Okay Tax Increase That Obama Hopes To Block*, YAHOO NEWS, Aug. 22, 2011, <http://news.yahoo.com/gop-may-ok-tax-increase-obama-hopes-block-124016578.html>; see also James Fallows, *The GOP Position on Taxes Gets Worse*, ATLANTIC, Aug. 22, 2011, <http://www.theatlantic.com/politics/archive/2011/08/the-gop-position-on-taxes-gets-worse/243930> (noting the “boundless cynicism” of the Republican position).
 20. See Daniel J. Weiss, *The GOP Changes Its Tune on Cap and Trade*, CTR. FOR AM. PROGRESS (Oct. 22, 2010), http://www.americanprogress.org/issues/2010/10/cap_and_trade_gop.html.
 21. NEWT GINGRICH WITH JOE DESANTIS, *TO SAVE AMERICA: STOPPING OBAMA’S SECULAR-SOCIALIST MACHINE* 4 (2010). On the right, somehow this position coexists with the allegation that President Obama is, in fact, a Muslim. See *Beyond Obama Muslim Myth Stands the Right Wing*, MEDIA MATTERS FOR AM. (Aug. 19, 2010, 7:47 PM), <http://mediamatters.org/research/201008190061>.
 22. Both the GOP’s ideology and its willingness to create dysfunction in order to accomplish its political goals thus serve as the reasons for what some might consider my overly vituperative attack on the contemporary Republican Party. I list instances and quotations as a way of convincing skeptical readers of at least the high plausibility of my account.

First, it seems reasonable to assume that Democrats in a Senate minority will return the favor of the McConnell leadership: even if they filibuster with only half the frequency that Republicans have done, it would still amount to more filibusters than any Congress prior to the 110th. As the historical statistics indicate, although Democrats are not the causes of the increase in filibusters, they have not returned the institution to preexisting norms when finding themselves in the minority.²³ Moreover, Democratic filibusters are most likely in areas such as Medicare, which stands as a principal driver of long-term deficits, and thus are commensurately most likely to be the target of proactive legislation by a Republican Congress.

Second, even if Republicans achieve unified control, it is reasonable to assume that they will maintain governmental dysfunction. On the eve of the Democratic takeover in 2006, Thomas E. Mann and Norman J. Ornstein comprehensively demonstrated that Republican rule in the House and Senate was so partisan and ideological as to yield institutional decline and an inability to respond to the nation's problems. Under a Republican President, GOP congressional majorities became completely supine and thoroughly abdicated their oversight responsibilities. The abandonment of "regular order"—considering legislation in subcommittee and committee, and allowing amendments—meant that legislation was often written in the middle of the night by leadership staff and lobbyists, yielding incoherent legislation that took rent-seeking to new levels. Quite often, even committee chairs had no idea what was in the bills they jammed through their panels. These trends derived

23. See *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Feb. 14, 2012). One of the nation's leading conservative commentators has made a similar prediction:

[W]hat seems beyond argument is that the U.S. political system becomes more polarized and more dysfunctional every cycle, at greater and greater human cost. The next Republican president will surely find himself or herself at least as stymied by this dysfunction as President Obama, as will the people the political system supposedly serves, who must feel they have been subjected to a psychological experiment gone horribly wrong, pressing the red button in 2004 and getting a zap, pressing blue in 2008 for another zap, and now agonizing whether there is any choice that won't zap them again in 2012. Yet in the interests of avoiding false evenhandedness, it must be admitted: The party with a stronger charge on its zipper right now, the party struggling with more self-imposed obstacles to responsible governance, the party most in need of a course correction, is the Republican Party.

David Frum, *When Did the GOP Lose Touch with Reality?*, N.Y. MAG., Nov. 21, 2011, <http://nymag.com/news/politics/conservatives-david-frum-2011-11/index4.html>.

in large part from the GOP's ideological vision.²⁴ To be sure, this is a different sort of dysfunction than the inability to confirm appointments, but it is a dysfunction nonetheless.

The GOP's tactics concerning the debt ceiling are emblematic of the Age of Dysfunction. It might be somewhat controversial to label this strategy as a "hostage-taking," except that Republican leaders use the same terminology with pride. As Senate Republican Minority Leader Mitch McConnell commented:

I think some of our members may have thought the default issue was a hostage you might take a chance at shooting. . . . Most of us didn't think that. What we did learn is this—it's a hostage that's worth ransoming. And it focuses the Congress on something that must be done.²⁵

McConnell also confirmed that this strategy has become "the new normal" for Republicans.²⁶ The Age of Dysfunction is here to stay.

II. PLEASE PLEAS ME

In the context of this political dysfunction, Ewing and Kysar's support for pleas seems more than a little naïve: why make a plea to someone who refuses to listen as a matter of principle? Perhaps Ewing and Kysar use "prods and pleas" because it sounds nice in opposition to "checks and balances." But in the Age of Dysfunction, a plea and \$1.75 will get you a cup of coffee at your local Starbucks.

The failure of a pleas strategy has already occurred. It is not clear from Ewing and Kysar's list which recent events are prods versus pleas.²⁷ But if we

24. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 141-224 (2006).

25. David A. Fahrenthold, Lori Montgomery & Paul Kane, *In Debt Deal, Triumph of the Old Washington*, WASH. POST, Aug. 3, 2011, http://www.washingtonpost.com/politics/in-debt-deal-the-triumph-of-the-old-washington/2011/08/02/gIQARSFfql_story_1.html.

26. See Ezra Klein, *McConnell: "The Debt Ceiling Will Not Be Clean Anymore,"* WASH. POST: WONKBLOG (Aug. 2, 2011, 4:31 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/mcconnell-the-debt-ceiling-will-not-be-clean-anymore/2011/07/11/gIQAEXDDql_blog.html.

27. For example, Ewing and Kysar state that a judicial dissent is a "prod" because it "forces confrontation," Ewing & Kysar, *supra* note 4, at 366, an assertion that I find puzzling. See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980) ("The comments in the dissenting opinion about the . . . equal protection rational-basis standard . . . are just that: comments in

interpret “pleas” in its commonsense meaning—that is, an “earnest entreaty”²⁸—no recent interbranch plea has succeeded either with the recipient institution or with the electorate in creating political pressure to respond favorably to the plea.²⁹

Climate litigation represents the ultimate example of plea failure. In *Massachusetts v. EPA*, the Supreme Court ordered the EPA to consider whether carbon dioxide posed a threat to human health.³⁰ The agency’s scientists and policymakers concluded that greenhouse gases were a danger to the public and should be regulated. They sent an e-mail, with attached memorandum, to the White House saying so. Rather than consider the substance of the EPA’s findings, the White House took an easier route: it refused to open the e-mail.³¹ It is hard on this record to think that pleas have much force as an analytical framework for understanding the U.S. constitutional structure.³²

a dissenting opinion.”). Similarly, I cannot understand why Ewing and Kysar suggest that the House of Representatives’ vote to repeal the Patient Protection and Affordable Care Act should be seen as a “prod.” Ewing & Kysar, *supra* note 4, at 362 n.33. After all, the House bill was dead on arrival in the Senate, which had no incentive to consider it.

28. *Plea*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/plea> (last visited Feb. 14, 2012).
29. See, e.g., David M. Herszenhorn, *Senate Rejects Repeal of Health Care Law*, N.Y. TIMES, Feb. 2, 2011, <http://www.nytimes.com/2011/02/03/health/policy/03congress.html> (noting the Democrats’ confidence that they would easily defeat the amendment).
30. 549 U.S. 497, 534-35 (2007).
31. See Felicity Barringer, *White House Refused To Open Pollutants E-Mail*, N.Y. TIMES, June 25, 2008, <http://www.nytimes.com/2008/06/25/washington/25epa.html>. Strictly speaking, of course, the EPA’s e-mail represented more than a plea, because it responded to a binding court order. But that simply strengthens the point: if the administration will ignore an e-mail that carries legal force, then why would it respond to a mere plea?
32. Because I reach this conclusion, I believe that Ewing and Kysar’s focus on reaching the merits in cases is tangential to the task at hand. Ewing and Kysar suggest that if a court reaches the merits, a dissent could function as a plea to policymakers. Since I do not see pleas as forming an effective governing tool, reaching the merits would only make sense as a prod. But the argument from prodding is not an argument for reaching the merits: it is an argument for using a prod. Reaching the merits per se will not be useful—only ruling in a way that prods the political branches will be.

III. A KIND WORD AND A GUN

Ewing and Kysar's other tool, the prod, obviously has more potential, because it relies not on the opposing branch's "reasoned elaboration"³³ but rather its political interest: other branches must act in the face of a prod or simply accede to disfavored outcomes. Given current dysfunction and the general difficulty of legislating, forcing the hand of opposing branches constitutes a real threat. As the prominent early twentieth-century legal theorist Alphonse Capone noted: "You can get further with a kind word and a gun than with just a kind word."³⁴

But what, exactly, is a prod? My definition would likely satisfy Ewing and Kysar, albeit implicitly: the development of a common law cause of action or the interpretation of a statute designed to address a policy problem, in a political context where the other branches must act in order to advance their own political goals. By way of illustration, when a court uses a prod, the targeted branch will perceive doing nothing as an unattractive political option. Legally, the targeted branch can overturn the court's decision, by way of statute or sometimes regulation. Note that this is because prods do not involve constitutional litigation; thus, Congress is free to overturn or preempt them. While we might not be free of ambiguities surrounding political process failure, we can here finally at least liberate ourselves from the counter-majoritarian difficulty.³⁵

33. I take this phrase from HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 143 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994)(tentative ed. 1958).

34. This quote is almost certainly apocryphal. While many will recognize it from Robert de Niro's portrayal of Capone in *THE UNTOUCHABLES* (Paramount Pictures 1987), there is no interview, newspaper story, or magazine article that can properly verify if Capone, in fact, said it. Notably, it was described as "probably spurious" in MARK LEVELL & BILL HELMER, *THE QUOTABLE AL CAPONE* 3 (1990). Whether David Mamet, the screenplay writer for *The Untouchables*, made it up or Capone actually said it, Capone is now clearly associated with this quotation.

35. Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986). Critics might quickly note that such a position is too cynical by half: after loudly complaining that Congress is dysfunctional, I then deny any counter-majoritarian problems by sweetly suggesting that Congress override the judiciary if judges make a "mistake." I plead guilty, but with an affirmative defense. Perhaps it is disingenuous to suggest that Congress override the judges, but if the critic believes it is disingenuous, then she must acknowledge that Congress is broken, so *no* branch has very good democratic bona fides. And if Congress cannot respond to the people's will, then why should it be deferred to in the first place?

But lurking behind Ewing and Kysar's embrace of prods is a fundamental problem: how do we know when a prod is appropriate? More precisely, how do we know that there is a problem to be fixed in the first place? Ewing and Kysar's test case of climate change regulation provides a paradigmatic example. The House Energy and Commerce Committee recently proclaimed on a party-line vote that anthropogenic climate change does not exist.³⁶ From the majority party perspective, then, there is simply no problem to fix; indeed, if there is a problem, it lies in the danger of centralized governmental overreach.³⁷

The theory of political process failure unifies the three areas where I believe prodding to be appropriate. Oceans of ink have been spilled on the question of political process failure in constitutional law, and I will not re-spill them here. Instead, in this Part, I will suggest three standards³⁸ by which courts can be on fairly firm ground in using prods: with respect to filibusters, scientific consensus, and disadvantaged groups.³⁹

A. *Judging the Filibuster*

The Senate's legislative operations have essentially ground to a halt because of the GOP minority's repeated abuse of the filibuster.⁴⁰ There was an average

36. John Rennie, *House Repubs Vote that Earth Is Not Warming*, SCI. AM. (Mar. 16, 2011), <http://www.scientificamerican.com/podcast/episode.cfm?id=house-repubs-vote-that-earth-is-not-11-03-16>.

37. One could deny the very existence of this problem by arguing that the judiciary should simply prod when it wants to; in other words, it constitutes a political branch as much as the legislature and the executive do. I do not read Ewing and Kysar as making this argument. Rather, I interpret them as arguing that the judiciary should use its unique function as the creator of common law to prod the political branches. Put another way, they contend that although the judiciary plays a political role in the constitutional system, it is not a political actor—at least not in the same way as Congress and the President. Although one could make the more radical argument, it is beyond the scope of this Essay.

38. These categories have ample vagueness and will need to be fleshed out. But this is true of all legal standards, whether we are speaking of “due process,” “arbitrary and capricious,” “directly related,” or many others. My proposed standards are not perfect. They are a start.

39. Although Ewing and Kysar's framework conceivably can be applied to any interbranch prodding, their focus on climate change nuisance litigation obviously highlights their advocacy of courts using prods to push the political branches.

40. Under Senate rules, a measure is ordinarily approved by simple majority, but under Rule XXII, debate cannot be cut off without sixty senators voting to do so. STANDING RULES OF THE SENATE, S. DOC. NO. 106-1, R. XXII, at 21 (2000). Thus, for practical purposes, a measure must have sixty votes in order to be enacted, because unless it has sixty votes, it cannot come to a vote in the first place. In contemporary parlance, forty-one or more senators' refusal to halt debate on a matter, thus preventing it from coming to a vote, is referred to as a filibuster. This Essay uses that terminology. See *Filibuster and*

of one filibuster per Congress during the 1950s. That number has grown steadily since: in the 1980s, 27% of all measures required a cloture motion to come to a vote. But after Democrats retook control of the Senate in 2006 and Republicans found themselves in the minority, tactics preventing majority rule soared.⁴¹ According to UCLA's Barbara Sinclair, while 8% of major legislation in the 1960s was subject to "extended-debate-related problems" like filibusters, 70% of major bills were so targeted during the 110th Congress.⁴²

Previous scholarship has focused either on the constitutionality of the filibuster⁴³ or analyses of the filibuster in the context of judicial appointments.⁴⁴ In the Age of Dysfunction, however, we might ask a somewhat more subtle question: how should the normalization of filibusters affect common law adjudication and statutory interpretation?

One could argue, of course, that it should not affect anything at all. The Constitution allows each house of Congress to make its own rules, and if the Senate wants to grind itself into impotence, then that is its prerogative. But this answer relies on the demonstrably false assumption that courts have no policymaking role outside of constitutional adjudication. The very existence of the common law belies the argument, as Ewing and Kysar wisely note.⁴⁵

My first suggested principle, then, is that courts should be more willing to prod other branches when attempts to solve social problems have been met

Cloture, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (last visited Feb. 14, 2012).

41. See Barbara Sinclair, *The New World of U.S. Senators*, in CONGRESS RECONSIDERED 1, 7 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2009). One should not exclusively blame Republicans for the filibuster morass: when the Democrats were in the minority during the first half of the 1980s, filibusters became more common. Still, the biggest jumps in the use of the filibuster came during Republican minorities: the early 1970s, the early 1990s, and the massive jump at the beginning of the 110th Congress. Mitch McConnell's leadership of Senate Republicans has seen the obliteration of previous records of cloture votes, nearly doubling any previous four-year total. See *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Feb. 14, 2012).
42. See Sinclair, *supra* note 41, at 7.
43. See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 253 (1997) (arguing that the filibuster is constitutional but its entrenchment in Senate Rules is not); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 482 (2004) (arguing that both the filibuster and its entrenchment are constitutional).
44. See, e.g., John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, The Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257; Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923 (2005).
45. See Ewing & Kysar, *supra* note 4, at 356-57.

with a filibuster. The filibuster provides a particularly clear indication of a political process failure, and thus legislative inaction should receive less deference from the judiciary. If the House passes a bill that has presidential backing and majority support in the Senate, then the failure of that bill to become law might be *acceptable* within our constitutional system but hardly represents the workings of effective (or perhaps even democratic⁴⁶) government. This suggestion carries the important merit of clear discernibility: when a bill is brought up, it either achieves cloture or it does not.

Climate regulation represents a good but not perfect example of how the use of filibusters signaled a breakdown in the political process.⁴⁷ In June 2009, the House approved the American Clean Energy and Security Act, a cap-and-trade framework for regulating greenhouse gases, sometimes known as the Waxman-Markey Act after its two primary authors. The President signaled his support, and a majority of Senators supported a substantially similar legislative scheme. But neither cap-and-trade nor any other form of climate legislation stood any chance in the Senate: no bill could attract a supermajority of sixty votes and achieve cloture. The prospect of a filibuster killed any hopes of the bill's passage.⁴⁸ That makes climate change a suitable subject for a prod.

*B. Law in Science – Science in Law*⁴⁹

The Age of Dysfunction has witnessed fierce debates about the use of science in policymaking. This should not be surprising: partisan-ideological

46. Consider the familiar problem of the counter-majoritarian difficulty. Dozens of legal scholars have wrung their hands over the supposed problem of an unelected judiciary taking policy matters into its own hands—at times overturning the decisions of democratically elected legislatures. Yet none has seen fit to ask how the judiciary might function to enhance majoritarianism in light of the filibuster. One central irony of postwar American legal thought is that many civil rights bills passed the House, received presidential support, and attracted majority backing in the Senate, and none of the scholars castigating the Supreme Court for *Brown* seemed worried about the repeated Southern filibusters that brought school segregation into the courts in the first place. See Martin B. Gold & Dimple Gupta, *The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 208-09 (2004) (noting that by 1959, “over a dozen civil rights bills had been defeated by filibusters”).

47. It is “good but not perfect” for an obvious reason: none of the major Senate climate bills actually came to a cloture vote, depriving this framework of its clarity. If the filibuster prod becomes more established, however, future Senate majority leaders could take care to put the filibuster on the record.

48. See Ryan Lizza, *As the World Burns*, NEW YORKER, Oct. 11, 2010, http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza.

49. Cf. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899).

conflict has caused dysfunction, and since the mid-1990s, the Republican Party has demonstrated a growing hostility to scientific inquiry. By the middle of the Bush Administration, sophisticated observers⁵⁰ could rightfully compare the Republican approach to postmodernism, because of its insistence that supposed “facts” were just ideology dressed up in objective clothing.⁵¹ Senior administration officials derided opposition to their policies as hopelessly “reality-based.”⁵²

Does this constitute a problem that warrants judicial intervention? One might well say not. Congress has a right to be ignorant, and in the case of the current House of Representatives, it appears to have exercised that right to the fullest extent. But the judiciary’s commitment to “reasoned elaboration”⁵³ implies that it is also committed to reason, and attacks on science constitute an attack on reason itself.⁵⁴ One need not adopt quaint Langdellian notions of “legal science”⁵⁵ to see that—as an institution—the courts provide a very

50. See, e.g., E.J. Dionne Jr., *Assault on the Media*, WASH. POST, May 27, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/26/AR2005052601538.html> (“Conservative academics have long attacked ‘postmodernist’ philosophies for questioning whether ‘truth’ exists at all and claiming that what we take as ‘truths’ are merely ‘narratives’ woven around some ideological predisposition. Today’s conservative activists have become the new postmodernists. They shift attention away from the truth or falsity of specific facts and allegations—and move the discussion to the motives of the journalists and media organizations putting them forward.”).

51. See Joshua Micah Marshall, *The Post-Modern President*, WASH. MONTHLY, Sept. 2003, <http://www.washingtonmonthly.com/features/2003/0309.marshall.html>.

52. See Ron Suskind, *Faith, Certainty, and the Presidency of George W. Bush*, N.Y. TIMES MAG., Oct. 17, 2004, <http://www.nytimes.com/2004/10/17/magazine/17BUSH.html>. For more recent examples of the Republican Party’s embrace of postmodernism, see Jonathan Chait, *Luntz, Meet Foucault*, NEW REPUBLIC (Feb. 3, 2010, 10:10 AM), <http://www.tnr.com/blog/jonathan-chait/luntz-meet-focault>; and Jonathan Chait, *Mitt Romney’s Potemkin Village*, N.Y. MAG.: DAILY INTEL (Dec. 5, 2011, 12:41 PM), <http://nymag.com/daily/intel/2011/12/mitt-romneys-potemkin-village.html>.

53. See HART & SACKS, *supra* note 33, at 383.

54. The links between reasoned decisionmaking and science are straightforward enough that they seem obvious even to conservative commentators. See, e.g., Kathleen Parker, *Rick Perry, The Republicans’ Messiah?*, WASH. POST, Aug. 26, 2011, http://www.washingtonpost.com/opinions/rick-perry-the-republicans-messiah/2011/08/26/gIQAGnY5gJ_story.html (“[Perry’s] dog whistles to the congregation: He’s not sure anyone knows how old Earth is, evolution is just a ‘theory’ and global warming isn’t man-made. That we are yet again debating evolutionary theory and Earth’s origins—and that candidates now have to declare where they stand on established science—should be a signal that we are slip-sliding toward governance by emotion rather than reason.”).

55. The best text analyzing Langdellian legal science is Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

congenial forum for rational, scientific inquiry. Thus, my second suggestion is that the judiciary should be more willing to prod when the political branches have rejected science as a basis of policymaking.

Can judges make these sorts of scientific determinations? When it comes to public nuisance, the *Restatement (Second) of Torts* invites judges to do so by stating that a “significant interference to the public health can constitute a public nuisance.”⁵⁶ The Supreme Court thinks that they can, which is why it assigned trial court judges the gatekeeping role in determining the admissibility of scientific expert testimony. The *Daubert* standard⁵⁷ provides guidelines for when judges should admit scientific expert testimony, and it is a decent first approximation of what judges considering prods could examine when conducting a non-testimonial scientific inquiry. Put another way, judges could view congressional action or inaction as deserving a prod if its basis fails to meet the *Daubert* standard or other like threshold for courtroom admissibility.⁵⁸

Judicial prodding in the wake of congressional scientific ignorance would resemble something like the deferential “arbitrary and capricious” review of administrative agency determinations.⁵⁹ If reasonable people could disagree about the science, then courts should have nothing to say about the matter. But if one side’s view of the issue relies on data that would be inadmissible even under the relatively generous *Daubert* standards, then courts should feel little compunction in stepping in.⁶⁰

56. RESTATEMENT (SECOND) OF TORTS § 821B (1977).

57. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

58. The *Daubert* guidelines consider whether scientific techniques have been:

1. Empirically tested: the theory or technique must be falsifiable, refutable, and testable.
2. Subjected to publication in a peer reviewed journal.
3. Evaluated against known or potential rate of error.
4. Employed with standards and controls concerning their operation.
5. Generally accepted by a relevant scientific community.

See id. at 593-94.

59. *Cf.* Administrative Procedure Act, 5 U.S.C. § 706 (2006) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .”).

60. At this stage, I remain agnostic about what judges should do if merely a strong preponderance of scientific evidence appears on one side of a policy debate but that evidence falls something short of a clear consensus. Perhaps the best approach would be to use a sliding scale: judges should be more inclined to prod to the extent that scientific evidence is imbalanced.

According to this relatively conservative formulation, judicial action in this area will be rare. Scientists often disagree, and the patterns of scientific inquiry emphasize uncertainty. But climate change is one place where judicial action is clearly warranted: the scientific consensus about the veracity of anthropogenic climate change is deep, broad, and robust.

One could find a reason why, despite overwhelming scientific evidence, Congress might not have taken action on climate change. For instance, Congress might believe that it should not tie the President's hands in negotiating with foreign nations in terms of relative reductions in carbon emissions. If the United States committed to reducing emissions, it would give China or India little incentive to do the same. One might disagree with the wisdom of such an argument, but one could hardly call it irrational.

The current Republican position on climate change, however, is not about bargaining advantage: it is about conspiracies, hoaxes, and liberal cabals. The *National Journal's* survey of "Congressional Insiders" in February 2007 revealed that only 13 percent of key Republicans believed in man-made global warming—a ten percentage point drop from a year previous.⁶¹ Yet, there is no inherent reason why conservatism is at odds with science. Ronald Reagan's administration, for instance, strongly backed research on ozone depletion and spearheaded the Montreal Protocol, the most successful environmental treaty in history.⁶²

61. *Congressional Insiders Poll*, NAT'L J., Feb. 3, 2007, http://syndication.nationaljournal.com/images/203Insiderspoll_NJlogo.pdf. This is not restricted to climate change, but rather to most scientific endeavors. See generally CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* (2005); Bruce Bartlett, *Newt Gingrich and the Destruction of Congressional Expertise*, N.Y. TIMES: ECONOMIX (Nov. 29, 2011, 6:00 AM) <http://economix.blogs.nytimes.com/2011/11/29/gingrich-and-the-destruction-of-congressional-expertise> ("Mr. Gingrich did everything in his power to dismantle Congressional institutions that employed people with the knowledge, training and experience to know a harebrained idea when they saw it. When he became speaker in 1995, Mr. Gingrich moved quickly to slash the budgets and staff of the House committees, which employed thousands of professionals with long and deep institutional memories. . . . Unfortunately, Gingrichism lives on. Republican Congressional leaders continually criticize every Congressional agency that stands in their way. In addition to the C.B.O., one often hears attacks on the Congressional Research Service, the Joint Committee on Taxation and the Government Accountability Office.").

62. See generally RICHARD ELLIOT BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* 65-67 (enlarged ed. 1998) (detailing the Reagan Administration's efforts to phase out chlorofluorocarbons and other ozone-depleting substances); Nathaniel Gronewold, *Montreal Protocol Eyed as Weapon in Fight Against Climate Change*, N.Y. TIMES, July 21, 2009, <http://www.nytimes.com/gwire/2009/07/21/21greenwire-montreal-protocol-eyed-as-weapon-in-fight-again-58237.html> ("Widely regarded as the most successful environmental treaty of all time, the Montreal Protocol is credited with eliminating 97 percent of gases used in refrigerant and cooling

C. *Disadvantaged Groups*

More than a quarter of a century ago, Bruce Ackerman observed that the groups favored by the Supreme Court’s famous “footnote four” – “discrete and insular minorities”⁶³ – are not those that necessarily lose out in the democratic struggle for political influence. Rather, he argued, pluralist democracies generally fail to protect diffuse and invisible groups. Ackerman’s point was that, if the Court really wanted to protect those who lack political influence, it would protect not only African-Americans and women, but also GLBT individuals and the poor. Unless constitutional lawyers recognized this plain truth, Ackerman contended, the Constitution’s promise of justice would become a meaningless formality.⁶⁴

Perhaps because Ackerman focused on constitutional law, he overlooked the possibility of protecting such groups in other areas. But if a well-working pluralist democracy would overlook such groups, then a dysfunctional one figures to do worse. It stands to reason, then, that our third prodding principle should be that the judiciary should be more inclined to prod in order to protect the interests of groups disadvantaged by pluralist politics.

Such an argument should be familiar, as it essentially recapitulates the broad outlines of Cass Sunstein’s proposal for “substantive” canons of statutory construction.⁶⁵ Sunstein argued that judges should read ambiguous statutes in such a way as to favor disadvantaged groups, but he did not appear to include the poor in his definition of “disadvantaged,” focusing only on racial minorities.⁶⁶ This is problematic because, as Ackerman has shown, it is diffuse

systems that were eating away at the atmospheric layer that protects life from harmful ultraviolet radiation.”).

63. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

64. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985).

65. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 472-73 (1989). These canons are “substantive” in that they advance certain substantive policy goals; many traditional canons are simply linguistic guides to interpretation without any necessary substantive content. For example, the traditional canon of *expressio unius exclusio alterius* (i.e., the express mention of one thing excludes others) does not advance or hinder particular substantive legislative goals.

66. Sunstein did address the problem of the poor when he advocated for “welfare rights” as a canon of construction. *Id.* at 473-74. But he offered no process justification for this canon, arguing instead (unpersuasively, in my view) that such rights represent constitutional norms and that welfare rights and attention to disadvantaged groups are implicit in previous judicial statutory interpretation decisions. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 949 (4th ed. 2007) (finding that many of Sunstein’s substantive canons enjoy “no explicit support, and implied rejection in recent cases”). In any

and invisible minorities who stand to have the biggest problem achieving political success commensurate with their population.

So who are these diffuse and invisible groups? Victims of climate change might even be a better example than the poor. Not only are climate victims diffuse, but in many circumstances they will be invisible even to themselves, as tracing specific causal links between climate change and particular disasters is—at least at this stage—beyond scientific capacity. Many victims of climate change caused by American industry reside in other nations and will thus be unable to affect the political process of the United States. Most importantly, the most severely disadvantaged victims of climate change will not be born for many years, leaving their ability to exercise the franchise somewhat impaired.

The obvious objection to arguing for prods to defend diffuse and invisible groups stems from the supposed inability of the courts to determine which groups actually qualify, and thus constitute worthy recipients of judicial concern. The answer to this objection is a broad and deep scholarly literature that is occupied in doing just that. Much of this literature is used by conservative jurists to justify government inaction: regulation will invariably be captured by special interests, or present moral hazard, or reduce economic efficiency.⁶⁷ So when one attempts to invoke the principle behind this scholarship to justify allowing judges to empower disadvantaged groups, and one is then told by the same people that such an attempt is bound to founder on the rocks of judicial incompetence, one has the right to reply with the sovereign prerogative of laughter. Judges, we are told, cannot be physicists, epidemiologists, generals, intelligence professionals, school principals, or prison officials. But it is not asking too much of them to be well-informed citizens: in many instances, judges aided by the appropriate Brandeis briefs have the same or better competence than legislators to determine the effects of their decisions.

We can find a useful precedent for using this prod in Judge Richard Posner's dissent in *United States v. Marshall*.⁶⁸ A federal statute sets a five-year mandatory minimum sentence for any person convicted of selling more than one gram of a "mixture or substance containing a detectable amount" of

event, recognizing "welfare rights" is not the same as construing statutes to the benefit of poor people.

67. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3 (1971).

68. 908 F.2d 1312 (7th Cir. 1990) (en banc).

LSD.⁶⁹ The defendant, Marshall, was sentenced to twenty years in prison for conspiring to distribute, and distributing, more than ten grams of LSD, in this case enough for 11,751 doses. The statutory formulation imposes heavy sentences on major retailers of drugs like cocaine or heroin who cut their products with something else. But LSD itself weighs almost nothing, so consumers almost always buy it in combination with a carrier, most commonly blotting paper. Because it is sold by the dose, the weight has no relevance to the transaction. The government claimed, however, that the LSD/blotting paper combination counts as a “mixture” of LSD and paper, essentially mandating that the seller’s sentence may depend largely on the weight of the medium he chooses. Thus, “under the current statutory scheme, and at a weight per dose of .05 milligrams . . . a major dealer would be able to possess up to 20,000 doses of LSD in granular form without subjecting himself to the mandatory five-year minimum penalty”;⁷⁰ at the same time, a single dose sold on a sugar cube would carry a mandatory five year sentence.⁷¹ Marshall challenged this prospect as having no rational basis, such that it violated his right to equal protection.

Judge Easterbrook, writing for the en banc majority, found that the statute was constitutional, applied it as written, and upheld the trial court’s sentence under the Federal Sentencing Guidelines. Easterbrook argued that an interpretation that does not account for the weight of the carrier effectively deletes the statute’s plain reference to a “mixture.” Easterbrook denied that the mere possibility of anomalies should govern interpretation and took the path of least resistance: if Congress wanted to change the statutory scheme, then it was welcome to do so.⁷²

Judge Posner and four other judges dissented, arguing that the anomalies under the scheme were so great as to raise a constitutional issue. “To base punishment on the weight of the carrier medium,” Posner argued, “makes about as much sense as basing punishment on the weight of the defendant.”⁷³ Although this case seems to be a dispute about theories of statutory interpretation, Daniel Farber gets to the heart of the issue—and most likely Judge Posner’s rationale:

69. 21 U.S.C. § 841(b)(1)(B)(v) (2006).

70. *Marshall*, 908 F.2d at 1330 (Cummings, J., dissenting).

71. *See id.* at 1332 (Posner, J., dissenting).

72. *See id.* at 1320-21 (majority opinion).

73. *Id.* at 1333 (Posner, J., dissenting).

If the court rule[d] in favor of the government, as a practical political reality there is no chance that Congress would ever reconsider the issue, for doing so would risk being seen as soft on drugs. But if the court rule[d] for the defendant, the Justice Department [would] surely succeed in getting the issue put on the congressional agenda, giving Congress the opportunity to clarify the statute.⁷⁴

Such an approach clearly makes sense, and it demonstrates that the “political donnybrook” advocated by Rick Hills (and also by Ewing and Kysar) applies to many areas outside that of implied preemption.⁷⁵

CONCLUSION

The Age of Dysfunction need not be permanent. The United States has experienced several political realignments during its history, and something will eventually occur to break the logjam, for good or ill. Courts, of course, cannot dictate trends in American politics. In the meantime, however, jurists have a choice: they can passively observe as paralysis reigns, or they can exercise the powers that—as Ewing and Kysar persuasively argue—the Constitution gives them. The latter is the better course: if the worst are full of passionate intensity, the best should not lack all conviction.⁷⁶

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74. Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1429 (2000).

75. Ewing & Kysar, *supra* note 4, at 409 (quoting Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007)).

76. *Cf.* William Butler Yeats, *The Second Coming* (1920), in *SELECTED POEMS AND FOUR PLAYS OF WILLIAM BUTLER YEATS* 89, 90 (M.L. Rosenthal ed., 4th ed. 1996).