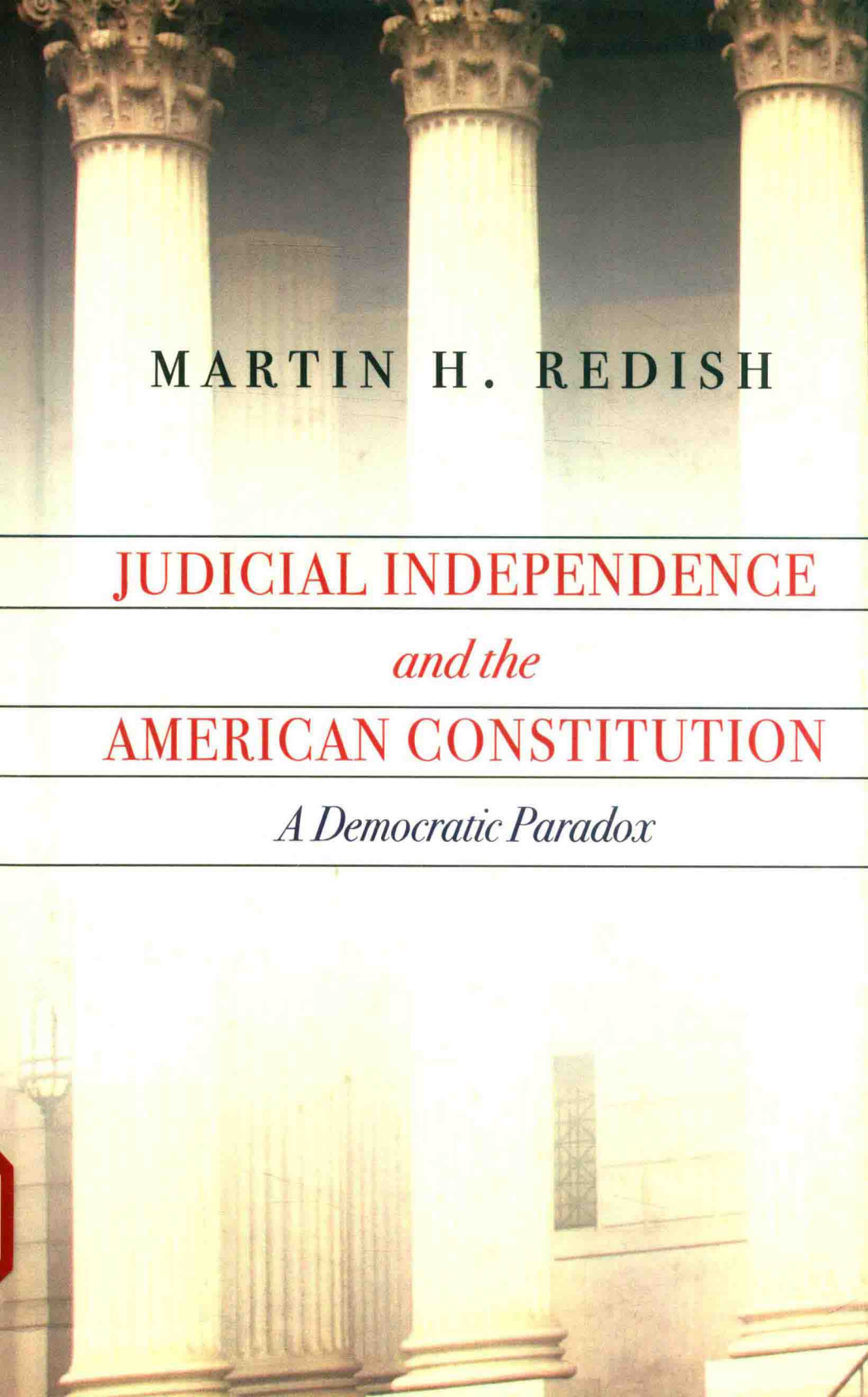

MARTIN H. REDISH

JUDICIAL INDEPENDENCE *and the* AMERICAN CONSTITUTION

A Democratic Paradox

Judicial Independence and the American Constitution

A DEMOCRATIC PARADOX

Martin H. Redish

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Once again, for Caren

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JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION

Contents

Introduction. America's Contribution to Political Thought: Prophylactic Judicial Independence as an Instrument of Democratic Constitutionalism

The famed historian Henry Steele Commager once suggested that while "America has contributed little to formal political philosophy," it is also true that "[t]he generation that fought the Revolution and made the Constitution was politically the most inventive, constructive and creative in modern history."[1] "Its signal achievement," Commager noted, "was to institutionalize principles and theories that had long been entertained by historians and philosophers, but practiced rarely by statesmen and never by kings."[2] This analysis of the contributions to political thought and practice made by the Framers of the American Constitution seriously understates the important and unprecedented innovations they actually made. The American Constitution took important steps beyond its closest predecessor, the unwritten British constitution, by enshrining its fundamental principles in mandatory, written, countermajoritarian directives.

Perhaps the most unsung provision of the American Constitution is Article V,[3] which provides for a complex and difficult supermajoritarian process for amendment of the document's directives. This provision has been regularly ignored by many leading constitutional scholars, who believe either that the document's directives remain binding only to the extent that modern generations affirmatively accept them (though without indicating any process by which such acceptance is to be manifested),[4] or that the document may be amended by some vague notion of a "constitutional moment" where all somehow agree, implicitly and informally, that the document has been modified.[5] Both approaches, of course, completely ignore the unambiguous formal process for alteration required by Article V.

In shaping the American Constitution, the Framers synthesized the concepts of constitutionalism and legal positivism. More important for present purposes, the American Constitution adopted a system of separation of powers that added an innovative framework of prophylactic protections of judicial independence that were unprecedented in thought or practice, as a means of enforcing and protecting the Constitution and the values it was designed to guarantee. The Framers learned a lesson from past republican systems that had failed due to a lack of adequate checks designed to prevent dangerous aggregations of power that led inexorably to tyranny. The goal of this book is to explain the significance of these strong protections of judicial independence as the necessary foundation of our nation's form of constitutional democratic government.

The book's thesis, while relatively straightforward, is multileveled. On one level, my thesis posits that it is only by vigilant enforcement of prophylactically assured judicial independence that our constitutional democratic system can function effectively. Any constitutional system that fails to provide for such prophylactic protections of judicial independence is, in important ways, vulnerable to manipulation and circumvention by the majoritarian elements of government. This is simply because if those vested with the final say as to the meaning of the countermajoritarian Constitution are vulnerable to the pressure, intimidation, or control of the very majoritarian branches sought to be limited by that Constitution, then as a practical matter the document imposes no legal restraint on those branches. As a result of such a failure to insulate the judicial interpreters and enforcers of the countermajoritarian Constitution, the entire foundation of a constitutional system is potentially undermined and democracy threatened. This does not necessarily mean that those branches will regularly ignore the document's directives. But if they observe them, it will be either because those directives are deemed to have purely moral force or because the restrictions are politically acceptable to those in power. Either way, the document will have failed to serve its intended function of legally restraining the majoritarian branches. To be sure, a society may consciously choose a system that fails to impose binding, written countermajoritarian restrictions on majoritarian government, as the British have done. But for the form of mandatory constitutionalism our society clearly chose as a means of checking government and avoiding tyranny, prophylactic guarantees of judicial independence constitute an essential element of the system.

On a second level, however, it is simultaneously essential that the insulated judiciary maintain an appropriate degree of political humility,

commensurate with its limited role in a democratic society. Absent grounding of its decisions in a principled construction of the text of a governing constitutional provision, the unaccountable judiciary lacks either moral or legal authority to ignore or overturn legitimately made political choices by the democratically elected branches.

When these two levels of analysis are synthesized, the result is that the judiciary's authority to check majoritarian government is, for the most part, confined to situations in which it is invoking provisions of the countermajoritarian Constitution. When it is performing another adjudicatory function, such as enforcing or interpreting a legitimately enacted statute, the scope of its independence is far more narrowly defined. In such situations, the integrity of the judicial function imposes certain protective limitations on the extent to which the political branches may manipulate the judicial process. But beyond those limited protections, it is wholly inappropriate for the judiciary to second-guess or ignore the political choices made by the representative branches of government.

While the book's thesis, stated broadly, is straightforward, its implementation as a means of resolving long-standing controversies about the scope and nature of American judicial independence gives rise to numerous complex issues. Before I can fully explore those controversies and how my approach to American constitutionalism would resolve them, it is first necessary to provide a foundational definition of the concept of the term, "constitutionalism," which I believe is the fulcrum of the American political system.

AMERICAN CONSTITUTIONALISM AS A CORE PRECEPT OF AMERICAN POLITICAL THEORY

American constitutionalism refers to the preeminence of the rule of law through a process of checking government's unlimited power over the individual, the government's relationship to the electorate, and the majority's unlimited power over the minority. This is achieved through use of a written, mandatory, countermajoritarian document as the nation's supreme law. While the inherently adversary nature of our form of political interaction is well established in American history,[6] the essential premise of our system is that whoever gains political power must remain accountable to the electorate and may not suppress the minority for no reason other than ideological disagreement or the desire to gain a competitive advantage in the political marketplace.

The concept of American constitutionalism links two distinct but intertwined levels of theoretical analysis. One is appropriately described as "macro" and the other as "micro." On the macro level, American constitutionalism refers to the core notions of a government confined, not solely by the will of the majority or the decisions of the majoritarian branches of government, but also by a binding, written constitutional structure, subject to revision, repeal, or amendment only by an intentionally cumbersome supermajoritarian process. Although this is admittedly not the only form of democratic government our society could have chosen, there can be little question that it is in fact the system we have selected. First, we chose to have our system of government laid out in a written constitutive document. Second, by its express and unambiguous terms the document's directives are framed as commands, rather than recommendations, suggestions, or pleas. Finally, also by its express terms, this constitutive document is subject to formal alteration only by an intentionally cumbersome supermajoritarian process. The underlying theory of our constitutional system in that fragile countermajoritarian constitutional structure must be protected by as many speed bumps to tyranny as possible. Paradoxically, then, an independent, unaccountable judiciary provides an essential protection of a democratic government.

On the micro level, American constitutionalism is designed to implement and protect the implicit social contract between government and citizen in a liberal democratic society. Only through a fair process of neutral and independent adjudication may government deprive citizen of their lives, liberty, or property.

Although the United States has built a strong tradition of judicial independence, careful examination of how the judicial power has evolved reveals a number of troubling situations where scholars or jurists have advocated or accepted restrictions on judicial power or independence that seriously threaten the judicial authority demanded by the precepts of American constitutionalism. In the chapters that follow, this book will seek to achieve three main goals. First, it will explain why strong judicial independence is so central to American constitutionalism. Second, it will categorize and define the conceivable forms of judicial independence, explaining which forms are demanded by precepts of American constitutionalism and distinguishing those that would actually threaten the American constitutional democratic system if adopted. Finally, it will explore and critique a number of areas of the law in which prominent scholarly theories or established judicial doctrine have had the effect of dangerously undermining the judicial independence central to our democratic system.

On the most basic level, one might reasonably expect the educated American citizen to be aware of both the countermajoritarian nature of the judiciary in American democracy and the foundational purposes that the independent judiciary is designed to serve. Surprisingly, however, many respected constitutional theorists have either failed to grasp the nuances and complexities of the nation's constitutional system or unwisely rejected many of the system's foundational premises, instead advocating recognition or adoption of such dangerous or misguided concepts as "constitutional realism," "popular constitutionalism" or "departmentalism." Even those courts and scholars who have both understood and accepted the basic premise of the essential intersection between judicial independence and the foundational precepts of American constitutionalism have struggled with troubling questions, which continue to surround that intersection. These include (1) what, exactly, are the scope and reach of the prophylactic protections of judicial independence? (2) How can the existence of these protections be reconciled with an appropriate role for processes of judicial discipline and removal? (3) What specific purposes of American constitutionalism are served by preservation of judicial independence? (4) Under what emergency circumstances, if any, may the guarantees of judicial independence be restricted or circumvented? (5) What are the specific constitutional sources of judicial independence, and does anything turn on which source is invoked? And, finally, (6) what are the limits implicit in our democratic system on the independence of the judiciary? Put another way, to what pathologies may invocation of judicial independence lead, if that concept is not properly defined and limited?

In this book, I explore and respond to all of these questions by examining the inherent intersection between the precepts of American constitutionalism and the requirement of an independent judiciary. The book includes in its title *A Democratic Paradox* because in it I explain the intentionally created paradoxical nature of our political and constitutional system: In order to preserve the essence of popular rule in which the governors are representative of and accountable to the people, a significant level of legal authority must be vested in a governmental body that has been intentionally and formally insulated from the requirements of representation and accountability. This is true not only in performance of the traditional judicial review function, but also as a necessary check on the elected government's ability to deceive the electorate by means of obscured or sub rosa legislative manipulation. This paradoxical form of governmental structure itself flows logically from an even more foundational paradox, this one growing out of the Framers' recognition of the inherently

paradoxical nature of the human condition. On the one hand, a commitment to democratic government necessarily reflects a belief in the possibility of human flourishing and self-realization. Through participation in decisions directly affecting one's life, the individual grows personally, morally, and intellectually. On the other hand, simultaneously inherent in the human psyche is the tendency to authoritarian suppression of others. The goal of our paradoxical constitutional and political framework, then, is to reconcile the oxymoronic "skeptical optimism" about the human condition that the Framers so wisely brought to the task of shaping our young nation's new form of government with its simultaneous recognition of the potential for human flourishing.

Recognition of this structural paradox dictates acceptance, not only of a rigorously independent judiciary, but of one whose independence and authority are characterized by strong prophylactic protections, which are in many cases properly understood as far stronger than courts and scholars have traditionally deemed them to be. For example, in this book I will make the bold and controversial assertions that (1) the power of Congress to suspend the writ of habeas corpus recognized in Article I, section 9 of the Constitution is properly seen to have been superseded (and therefore rendered unconstitutional) by enactment of the Fifth Amendment's Due Process Clause; (2) the power of Congress to impeach and remove federal judges is properly restrained by recognition of the reasons why judicial independence was prophylactically protected in the first place; (3) the underlying theory of procedural due process, constitutionally enshrined in both the Fifth and Fourteenth Amendments, logically dictates the need for prophylactic protections of judicial salary and tenure in much the same manner as explicitly and formally imposed on the federal judiciary by Article III; and (4) as a result of this recognition of the scope of procedural due process, state judiciaries in which judges lack these prophylactic protections of their salary and tenure should be deemed violations of the Fourteenth Amendment's Due Process Clause.

It should be noted that it would be a mistake to place blind faith in the judiciary's ability to enforce individual rights or preserve democracy. All too often in American history, during so-called pathological periods the judiciary has failed to perform its checking function effectively.[7] But that unfortunate fact does not alter the basic point that must be made: Absent the availability of an insulated judiciary, there effectively exists no means at all of assuring those foundational American values. At least with an independent judiciary available, there is reason to hope and expect it will perform the checking function for which it was designed. Absent the

availability of that check, absolutely no hope exists that majoritarian invasion of minority rights will be stopped.

From the opposite perspective, it might be suggested that, absent supporting empirical proof, there is no way to know whether the presence of salary and tenure protections actually assure judicial independence. While there does exist some level of supporting anecdotal evidence, it would be all but impossible to establish the superiority of judges protected by salary and tenure guarantees by means of some form of definitive empirical proof. But the question then becomes, on which side in this debate should the burden of proof be imposed? Common sense would seem to dictate the conclusion that judges whose salary and tenure are subject to the control of the legislature will be more restrained by political considerations than judges whose salary and tenure are guaranteed. Certainly, the Framers proceeded on the basis of this assumption, as Hamilton's *Federalist* No. 78 makes clear. Indeed, long before the drafting of the Constitution, the Declaration of Independence listed among the colonists' grievances with the English Crown that the King "ha[d] made Judges dependent on his will alone for the Tenure of their Officers, and the amount and payment of their salaries." As Hamilton reasoned in *Federalist* No. 79, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."[8] Though the book will advocate a revolutionary expansion of the scope and reach of judicial independence as an essential means of preserving the foundations of American constitutionalism, it also recognizes the need to sort out the specific types of decisional independence *not* appropriately exercised by an independent judiciary, in order to preserve the essence of American democratic principles.

The first two chapters of the book explain the concept of constitutionalism as it exists both normatively and historically in American political theory, which recognizes and develops the symbiotic relationship among three foundational elements of American political theory and structure: (1) democracy, (2) constitutionalism, and (3) judicial independence. These two chapters further develop the theory and structure of judicial independence, both as it has evolved and as it needs to be modified in the future in order to fulfill its foundational role in American political thought. Subsequent chapters, in contrast, focus on several of the most important practical implications of the intersection of these three elements. Some of these implications have already become accepted elements of American constitutional law, but others concern subjects in which courts and scholars have, for the most part, failed to grasp the logical outgrowths of our commitment to this tripartite intersection of political values.

In the first chapter I lay the groundwork for the remainder of the book by defining, structuring, and defending the principle of American constitutionalism, exploring how it not only coexists with but is actually essential to preservation of our form of democracy, and explaining why a vigorously independent judiciary is essential to the preservation of America's form of both constitutionalism and democracy. The chapter emphasizes what I deem American political theory's most important contribution to political philosophy: the concept of a prophylactically protected independent judiciary as the means of implementing and preserving the rule of law within a predominantly democratic society.

This chapter previews later chapters by emphasizing the need for final judicial authority to interpret and enforce the American Constitution (drawing on both historical and logical argument, grounded in what I deem to be the foundational premises of our form of constitutionalism), as well as the need for the judiciary to be insulated from political pressures. In doing so, it critiques the theory of "departmentalism," which, at least in its more extreme forms, would allow each branch to have the final say as to the constitutionality of its own actions.

The purpose of chapter 2 is to explain and contrast the different conceivable forms of judicial independence. This examination is necessary because the concept can potentially apply in a variety of situations, and not all of them are consistent with principles of either democracy or constitutionalism.

Chapter 3 explores the tension between the needs for judicial independence, on the one hand, and for checking judicial abuse through methods of discipline and removal, on the other. This issue has traditionally received at best limited attention, and this is as true of the Framers as it is of modern jurists and scholars. The thesis of this chapter is that while impeachment and removal are legitimate in truly extreme cases, it is vitally important to keep these possibilities extremely limited, lest the threat of impeachment or removal be so great as to completely undermine—albeit through the back door—the goals sought to be achieved by establishment of judicial independence in the first place.

Chapter 4 considers the role of state courts within the framework of American constitutionalism. State courts have always played an important role in the interpretation and enforcement of federal law. However, in judicial or academic discussions of judicial independence, state courts have always been the elephant in the room. The prophylactic protections of judicial independence embodied in Article III do not apply directly to state courts. However, the Due Process Clause of the Fourteenth Amendment

guarantees at least a certain degree of judicial independence on the part of state judges. As it has traditionally been construed, that clause guarantees a "neutral adjudicator" before life, liberty, or property may be taken by the state. Although the Supreme Court has traditionally defined neutrality as the avoidance of "possible temptation to the average man as judge,"[9] the Court has been unwavering in its conclusion that in order to preserve such neutrality it is not essential that state courts possess the prophylactic protections of independence guaranteed to federal judges by Article III. In this chapter, I challenge that conclusion, and argue that, to the contrary, the adjudicatory neutrality required by due process must incorporate guarantees of salary and tenure.

In supporting this conclusion, the chapter will undertake three tasks. First, it will explore the meaning of neutrality for purposes of due process, in particular the Court's most recent application of the concept in *Caperton v. A. T. Massey Coal Co.*[10] I argue that the Court's holding in *Caperton* that a decision by a judge in favor of a large contributor to his campaign violates due process is anomalous, because the post-election gratitude focused on by the Court is far less of a threat to judicial independence than the chilling caused by a judge's fear that he or she will not be retained because of unpopular judicial decisions. Yet surprisingly, the Court has never found any constitutional problem with governmental structures in which state judges may be removed by political processes. Second, the chapter will explain why the current structure of state judiciaries is unconstitutional—not because of their methods of initial *selection,* but rather because of their problematic processes of *retention.* As long as judges possess no fear of loss of tenure or reduction in salary, how they are initially selected is—at least as a constitutional matter—of no great concern. Finally, the chapter will use the due process inquiry as a jumping off point to attack the poorly reasoned and extremely dangerous theory of "popular constitutionalism," associated with such leading constitutional scholars as Larry Kramer. The idea that final interpretation of constitutional provisions should somehow be vested in the populace as a whole is fundamentally inconsistent with the notions of countermajoritarianism that are essential to the dictates of American constitutionalism. Thus, to the extent the popular accountability of state judiciaries is somehow grounded in these concepts of popular constitutionalism, I argue that the process is not only misguided but also a serious threat to core notions of the nation's constitutional system.

In chapter 5, I explore one of the most significant functions served by a system of strong judicial insulation from public and governmental pressures: protection against legislative deception. Traditionally, the purpose

served by an independent judiciary has been seen largely as the protection of minorities against majoritarian abuse, and there is no doubt that implementation of countermajoritarianism remains a vitally important function served by a system of strong judicial independence. However, judicial independence also serves an important majoritarian function, namely, assuring the accountability of the governors to the governed.

Judicial independence in this context assures that the political branches may not enlist the judiciary as an unwilling participant in the imposition of what amounts to a fraud on the public. To understand how such a scheme would operate, one first needs to keep in mind that the principle of "political commitment" is central to the smooth functioning of a representative democratic society. By this I mean that at least in significant part, representatives of the electorate are judged by the positions they take publicly on particular normative issues of social policy, often as embodied in proposed legislation. Thus, if a member of the electorate is in favor of Position A, and her elected representative voted against legislation adopting Position A, the democratic process enables her to demand an explanation from her representative or to oppose the representative's reelection.

While to a certain extent this is an oversimplification of the democratic process, there can be no doubt that dictates of accountability demand that elected representatives' positions on controversial legislation (and which legislation is appropriately designated "controversial" will of course vary depending upon the needs and interests of the individual voter, leading to the inescapable conclusion that *all* proposed laws must be assumed to be of such a character) must be made public to the voters. But even more pathological for the democratic process than secret legislative votes would be legislative deception—in other words, statutes that purport to enact "A" but, through the back door of procedural or evidentiary manipulation, are effectively transformed into "B" or even "Not A." At least in the case of secret legislative votes the voters are on notice that they have not been informed of their representatives' votes. In the case of legislative deception, in contrast, the voters are misled into believing that they are in fact aware of their representatives' political commitments, though the reality is very different. I argue that fundamental principles of separation of powers flowing from the formalized independence of the judiciary dictate the unconstitutionality of such legislative manipulation through interference with what I call "decisional independence."[11] Such interference occurs when Congress either (a) directs the judiciary to decide a particular case without simultaneously modifying the generally controlling subconstitutional law, or (b) directs the judiciary to employ procedural or evidentiary