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Interpreting and Enacting Statutes in the Constitution's Shadows: An Introduction

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The participants in this symposium presented their papers at the Section of Legislation's Program at the Association of American Law Schools meeting in Washington, D.C. on January 6, 2006.

INTERPRETING AND ENACTING STATUTES IN THE CONSTITUTION'S SHADOWS: AN INTRODUCTION

Bernard W. Bell[*]

As a field of scholarship, statutory interpretation draws on a variety of other fields for insight. Perhaps none are more important than constitutional theory and constitutional law. This symposium brings together several noted legislation and constitutional law scholars to discuss two questions at the intersection of statutory interpretation and constitutional law: (1) should constitutional principles influence judicial construction of statutes,, and if so, how; and (2) are legislatures competent to resolve constitutional questions and independently protect constitutional values when considering measures that implicate constitutional norms?

With respect to the first question, constitutional norms can influence judicial construction of statutes in several ways.[1] Most directly, courts employ the avoidance canon — interpreting ambiguous statutes so as to avoid difficult constitutional questions. Judges frequently invoke the canon, often in quite significant cases, [2] and the canon continues to receive scholarly attention. [3]

One can defend the canon as a justifiable manifestation of judicial minimalism or as a form of "*passive virtue," a term coined by Alexander*

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[1] *See* William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1032-34 (1989).

[2] William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L. Rev. 831, 833 n. 5 (2001) (listing cases from 1989 to 1999); *see e.g. Vt. Agency for Nat. Resources v. U.S.*, 529 U.S. 765, 787 (2000); *Dept. of Com. v. U.S. H.R.*, 525 U.S. 316 (1999) (Scalia, J., dissenting); *Pub. Citizen v. U.S. Dept. of Just.*, 491 U.S. 440 (1989); *NLRB*, 440 U.S. 490; *FCC v. Pacifica Found.*, 438 U.S. 726, 777 (1978) (Stewart, J., dissenting).

[3] Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Colum. L. Rev. 1189 (2006); *see* Kelley, *supra* n. 2; Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003 (1994); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U. Cal. Davis L. Rev. 1 (1996); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 Ga. L. Rev. 85 (1995); John Copeland Nagle, Delaware & Hudson *Revisited*, 72 Notre Dame L. Rev. 1495 (1997); Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. Pitt. L. Rev. 529 (2003); Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945 (1997); Ernest A. Young, *Federal Courts: Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549 (2000).

Bickel in his seminal work, The Least Dangerous Branch.[4] The judicial minimalism justification lies at the center of the Justice Brandeis's classic exposition of the canon in his *Ashwander v. Tennessee Valley Authority* concurrence.[5] The Justice identified the practice of, construing statutes to avoid difficult constitutional questions as one of seven practices the Court had developed to avoid "passing upon a large part of all constitutional questions pressed upon it for decision."[6] Bickel suggested a different, more strategic use of the canon. In The *Least Dangerous Branch*, he argued that occasionally courts cannot announce constitutional principles when a case demands it without incurring a level of public wrath that would threaten the Judiciary's institutional position. Bickel advocated the use of certain doctrines, such as standing, ripeness, and desuetude, to reach the just result demanded by true constitutional principles without having to render a decision which could incur majoritarian wrath and diminish the Court's political capital.[7] The avoidance canon serves this purpose quite well. However, since Bickel's day, Congress has largely eliminated the mandatory jurisdiction of the Court.[8] Moreover, even when Bickel wrote, challenges to federal statutes, the only legislation federal courts can construe to avoid constitutional questions, would most often arise from federal courts, and the Supreme Courts had long enjoyed discretion over whether to hear such appeals.

Scholars have argued that the avoidance canon has its costs. Fred Schauer has argued that courts invoking the canon do not really respect majoritarianism — they reduce the number of instances in which they invalidate statutory provisions by rewriting statutes in ways that overturn majoritarian judgments..[9] Indeed, one Justice once quipped, the doctrine allows the Court to render a constitutional decision without explaining its rationale.[10] Judge Posner complains that the doctrine creates a penumbra that makes the Constitution far more expansive than it would be were the Court simply to decide the issues raised by constitutional challenges.[7]

I have noted that the avoidance canon may appear to further

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[4] *See* Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2d ed., Yale U. Press 1986).

[5] 297 U.S. 288 (1936) (Brandeis, J., concurring).

[6] *Id.* at 346 (Brandeis, J., concurring); Cass Sunstein has provided a full-throated defense of minimalism. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (2d ed., Harv. U. Press 2001). Michael Dorf suggests a different form of minimalism, advocating that the courts allow conflicts to go unresolved or use prophylactic rules or remands to allow experimentation before establishing a firm constitutional rule. Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4 (1998).

[7] Bickel, *supra* n. 4, at 144, 143-55, 161, 164.

[8] Robert L. Stern et al., *Supreme Court Practice* § 7.1 (8th ed. 2002).

[9] Frederick Schauer, Ashwander *Revisited*, 1995 S. Ct. Rev. 71.

[10] *Lowe v. SEC*, 472 U.S. 181, 227 (1985) (White, J., concurring) (complaining that the Court's use of the avoidance canon "amount[ed] to no more than a preference for implicitly deciding constitutional questions without explaining our reasoning").

[7] Richard A. Posner, *The Federal Courts: Crisis and Reform* 285 (Harv. U. Press 1985).

constitutional principles in a benign way, giving individuals an extra measure of protection against government encroachment on individual rights..[11] However, the doctrine may harm individuals who rely on government power to address private imbalances of power, some individuals protected by constitutional norms may use their freedom to exercise hegemony over others. For example, the Court used the avoidance canon in *National Labor Relations Board v. Catholic Bishop of Chicago*,[12] construing the National Labor Relations Act narrowly to preclude the NLRB from exercising jurisdiction over church-operated schools.[13] Although the ruling constrained the government vis-à-vis private schools, and in the process furthered the principles underlying the Free Exercise Clause, it also hurt private parties, namely teachers in church-operated schools who desired the protection of the labor laws.[14]

Moreover, courts assume that if the enacting Congress wished to enact a provision that raises a serious constitutional question, Congress can always make its wishes clear by enacting supplemental legislation in response to the courts' narrowing construction. Unfortunately, or perhaps fortunately, the original legislative agreement will probably not be restored even if the enacting Congress fully intended to test the constitutional limits. Congress' composition might well have changed substantially as a result of elections by the time the courts authoritatively interpret the statute. Even if the enacting Congress (or one with very similar preferences) remains in power, the focus of the renewed legislative effort on enacting one provision rather than the entire statute will likely change the legislative dynamic. Representatives who initially agreed to the constitutionally-suspect provision as the price for passage of the aspects of the legislation, might now refuse to re-enact the constitutionally questionable provision — after all, they have already achieved their desired result.[15] Perhaps such a result should not be considered a tragedy, because arguably major constitutional issues should be considered separately, without otherwise being linked to otherwise appealing legislative proposals.

Scholarly discussion of the avoidance canon has recently taken an interesting turn, with scholars focusing on the doctrine in the context of the distinct roles played by the three different branches of government. William Kelley argues that the doctrine intrudes upon the Executive Branches'

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[11] Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. Legis. & Pub. Policy 1, 15-17 & n. 65 (1998-1999).
[12] 440 U.S. 490 (1979).
[13] *Id.*
[14] Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. Legis. & Pub. Policy 1, 15-16 n. 65 (1998-1999).
[15] *See also*, Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, The Rules/Standards Dilemma, and the Line Item Veto*, 44 VILLANOVA L. REV. 189, 223 (1999)(discussing similar changes in legislative dynamics in congressional reconsideration of budget items individually vetoed by the President).

interpretation of statutes, by enabling courts to substitute their judgment on close statutory questions for that of agency officials accountable to the President and Congress, whose construction of a statute must ordinarily be accorded substantial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[16] Trevor Morrison argues that the Executive Branch should feel less constrained to apply the canon, depending on our conception of its rationale. If the doctrine is merely a manifestation of judicial minimalism, the Executive Branch should feel free to ignore the doctrine, whereas if the doctrine provides a more palatable means of advancing constitutional principles than the exercise of judicial review, the Executive Branch should feel constrained by the doctrine.[17]

One might ask whether Congress, in leaving interpretive room in a statute (either intentionally or unintentionally), should be viewed as leaving to agencies the responsibility of assessing constitutional principles in the context of interpreting statutes to fulfill their mission. For example, in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,[18] the Supreme Court noted that it must use common sense as "to the manner in which Congress is likely to delegate . . . policy decisions of [extraordinary] economic and political magnitude to an administrative agency."[19] While *Brown & Williamson* focused on an agency's power to ban a tobacco product and the unique political salience of tobacco regulation, perhaps an analogous argument can be offered with respect to major contested constitutional questions. Indeed, precedent and conventional wisdom suggest that the resolution of constitutional challenges to statutes an agency administers lies beyond the agency's competence and jurisdiction.[20] Surely such precedent provides reason to doubt any assumption that Congress implicitly intends agencies to assume the preeminent role in construing statutes when those statutes raise substantial constitutional questions. Even if the courts concluded that Congress implicitly gave agencies leeway to construe statutes in a manner that infringed upon significant constitutional

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[16] 467 U.S. 837 (1984). Note, however, that in *Rust v. Sullivan*, 500 U.S. 173 (1991), the majority, relying on *Chevron*, refused to overturn an agency interpretation of a statute that raised a significant constitutional question,. I have suggested that given the manner in which *Chevron* is applied, courts are unlikely to force agencies to follow most interpretive principles recognized by the judiciary, including the avoidance canon. Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?* 13 J.L. & Pol. 105, 125-27 (1997).

[17] To the extent that the doctrine serves as a Bickelian passive virtue, judicial insistence upon application of the doctrine may at times be necessary to protect the courts' institutional role—upholding the rule of law while not undermining their decisions by issuing counter-majoritarian constitutional rulings before the citizenry is ready to accept them.

[18] 529 U.S. 120 (2000).

[19] *Id.* at 133.

[20]. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994); Harold J. Bruff, *Specialized Courts in Administrative Law*, 43 Admin. L. Rev. 329, 361-62 (1991); Student Author, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 Harv. L. Rev. 1682, nn. 1-3 (1977).

values in ways Congress did not contemplate,[21] one might ask whether courts should refuse to recognize such discretion so as to encourage Congress to address the intersection of its statutory goals and the constraint of constitutional principles.

Constitutional values, however, can influence statutory interpretation beyond the application of the doctrine of avoidance. A second category of interpretive devices that effectuate constitutional norms are constitutionally based "plain statement" rules,, strong substantive presumptions that may be rebutted only by clear expressions of legislative intent. The Supreme Court tends to under-enforce, or leave completely unenforced, certain constitutional principles out of a concern for its own institutional limitations.[22] The Court's decision in *Kelo v. City of New London* provides one recent controversial example of this phenomenon.[23] In that case, the Court recognized the potential for abuse when the government takes land for transfer to private entities as part of an economic redevelopment plan,[24] but it established a constitutional rule that involved only modest scrutiny of government officials' exercise of eminent domain in such circumstances[25] The Court explained that in a democracy deference is due local governments.[26]

The Court may establish an interpretive presumption to further the constitutional value even when the Court does not subject government actions to searching constitutional review. The Court has adopted plain statement interpretive rules to protect the states' role in the constitutional system as well as the citizens' interest in being free from retroactive laws. The Court will not interpret a statute to abrogate a state's constitutional sovereign immunity and impose monetary liability upon a state unless the statute does so unambiguously.[27] Neither will the Court interpret a federal statute as imposing a condition on a monetary grant to states in the absence

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[21] Some agencies have jurisdiction over issues which clearly implicate constitutional concerns, and thus Congress clearly contemplates that they may have to address constitutional principles. Congress could not be expected to address all such tensions between policy goals and constitutional principles in advance. The Federal Communications Commission is a prime example of such an agency.

[22] Bernard W. Bell, Marbury v. Madison *and the Madisonian Vision*, 72 Geo. Wash. L. Rev. 197, 202-04 (2003); Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 Harv. L. Rev. 1373, 1411-12 (1978).

[23] 545 U.S. 469 (2005).

[24] *Id.* at 477, 489.

[25] *Id.* at 477-89.

[26] *Id.* at 480-82, 488.

[27] *Hoffman v. Conn. Dept. of Income Maint.*, 492 U.S. 96, 101 (1989); *Atascadero St. Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 597 (1992). I use the term *constitutional sovereign immunity* rather than *Eleventh Amendment sovereign immunity* because the Court has held that the scope of state sovereign immunity exceeds that set forth in the Eleventh Amendment. In the current Court's view, the Eleventh Amendment merely reaffirmed the preexisting sovereign immunity inherent in the constitutional plan. *Fed. Mar. Commn. v. S.C. St. Ports Auth.*, 535 U.S. 743, 751-53 (2002).

of a clear statement in the statute so providing.[28] Nor may the courts infer that a federal statute interferes with areas traditionally regulated by the states, absent Congress's clear expression that it intends to do so.[29]

In protecting the citizens' interest in notice of their legal obligations, the Supreme Court adopted a plain statement rule providing that a statute will not be interpreted to apply retroactively in a manner that imposes new obligations or increases the penalties on pre-existing obligations unless Congress explicitly makes the statute retroactive.[30] Thus, in *Landsgraf v. USI Film Products*,[31] the Court refused to apply certain provisions imposing new liabilities and increasing damages liability to cases pending at the time the Civil Rights Act Amendments of 1991 were enacted because there was no clear statement that such retroactive application was intended.[32] In both the federalism and retroactivity areas, the federal courts have, for institutional reasons, under-enforced constitutional norms.

The creation of plain statement norms may presage a change in constitutional doctrine that may bring far more searching constitutional review of legislation implicating the historically under enforced constitutional norm. The crafting of the federalism plain statement canons presaged a dramatic expansion of constitutional doctrines constraining federal modification of the federal-state balance. Thus, in the 1990s the Court narrowed Congress's powers under the Commerce Clause; and the Enforcement Clauses of the Civil Rights Amendments,[33] expanded the states' constitutionally based sovereign immunity[34] and created an anti-commandeering doctrine that precluded the government from relying on state governments to enforce federal policies.[35] In a recent article, Philip Frickey details numerous cases in which the Warren court employed the avoidance canon in the 1950's.[36] Wielding these doctrines allowed the Court to largely nullify certain government actions without doing so on constitutional grounds. Those decisions also presaged an expansion of constitutional doctrines protecting individual liberties in some of the same

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[28] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 190 n. 11 (1982); *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[29] *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991); *accord Rapanos v. U.S.*, 126 S. Ct. 2208 (2006); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Raygor v. Regents of U. of Minn.*, 534 U.S. 533, 543-44 (2002); *Solid Waste Agency of Northern Cook County v. U.S.*, 531 U.S. 159, 173 (2001); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

[30] *Landgraf v. USI Products*, 511 U.S. 244, 280 (1994); *accord INS v. St. Cyr*, 533 U.S. 289 (2001); *Lindh v. Murphy*, 521 U.S. 320 (1997).

[31] 511 U.S. 244.

[32] *Id.* at 281, 286.

[33] *E.g. U.S. v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *U.S. v. Lopez*, 514 U.S. 549, 551 (1995).

[34] *E.g. Bd. of Trustees of U. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

[35] *Printz v. U.S.*, 521 U.S. 898 (1997); *see* Laurence H. Tribe, *American Constitutional Law* vol. 1, § 5-11, 878-94 (3d ed., Found. Press 2000).

[36] Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Cal. L. Rev. 397 (2005).

doctrinal areas in which the Court had relied on the avoidance canon.[37]

But why are plain statement rules used only to safeguard federalism and non-retroactivity norms?[38] Unquestionably, federal courts tend to under enforce other constitutional norms due to the judiciary's institutional constraints. It is unclear why principles of federalism and non-retroactivity of law are particularly worthy of protection by a clear statement rule.

Moreover, , courts consider many substantive values in construing statutes even when those values are not embodied in plain statement rules. Some, no doubt, are derived from policies implicit in the corpus of statutory law and presumably intended to reflect legislative intent.[39] But it is not clear that all the policies courts consider derive from such sources..[40] Perhaps constitutional values should be considered more systematically as a source of policies that courts should consider in construing statutes.[41]

One of the Florida Supreme Court's decisions during the presidential election controversy in 2000 illustrates this approach. In *Palm Beach Canvassing Board v. Harris*,[42] the Court sought to resolve a conflict of two provisions of Florida election law—one requiring county canvassing boards to report election returns by 5:00 p.m. on the seventh day following the election, and the other permitting a request for a manual recount by

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[37] *See* Lucas A. Powe, Jr., *The Warren Court and American Politics* 93-99, 154, 310-17 (Belknap Press 2000).

[38] Arguably, there is a plain statement rule regarding the interpretation of statutes precluding judicial review of agency action. *Bd. of Govs. v. MCorp Fin. Inc.*, 502 U.S. 32, 43-44 (1991); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Bowen v. Mich. Acad. of Fam. Phys.*, 476 U.S. 667, 670 (1986).

[39] In construing tax law, for example, inclusions in income are construed broadly while exclusions from income are construed narrowly. *Commr. v. Jacobson*, 336 U.S. 28, 48-49 (1949); *Commr. v. Miller*, 914 F.2d 586, 590 (4th Cir. 1990); *see Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87-88 (1934).

[40] Courts frequently seem to consider the effect that competing interpretations will have on their docket and construe statutes to avoid opening the floodgates of litigation. Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. Pa. J. Const. L. 377 (2003). Thus in *United States v. University Hospital*, 729 F.2d 144, 157 (2d Cir. 1984), the Second Circuit rejecting the government's proffered interpretation of section 504 of the Rehabilitation Act because that interpretation "would invariably require lengthy litigation primarily involving conflicting expert testimony to determine whether a decision to treat, or not to treat, or to litigate or not to litigate, was based on a 'bona fide medical judgment'. . . ." As some have noted, there is no reason to assume that preventing a significant increase in litigation is a congressional policy, Stern, *supra.* at 400-402, and indeed, some have noted that the floodgates argument is embraced despite a reasonable argument that Congress did intend to expand liability or jurisdiction. *See e.g.* Harvey R. Boller, *Unlawful Treatment of the Handicapped by Federal Contractors and an Implied Private Cause of Action: Shall Silence Reign?* 33 Hastings L.J. 1293, 1357 (1982; Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 Duke L.J. 34, 43-44; *see also,* Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. Pa. L. Rev. 755, 758, 795, 849 (1992) (discussing interpretation of section 1983).

[41] Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 Ala. L. Rev. 1281 (2003) (suggesting that courts should use significant evolutions in constitutional doctrine to construe ambiguous statutes, so as to further broad coherence between constitutional and statutory principles). William Eskridge attributes a number of interpretive canons to constitutional concerns, ESKRIDGE, *supra* note __ at 324-27. It is not clear that the Court grounds all or most of these canons in constitutional considerations.

[42] 772 So. 2d 1220 (Fla. 2000).

midnight of the fifth day after the election. The Court recognized that honoring a request for a manual recount on the fifth day after the election might preclude a canvassing board from complying with the statutory deadline for reporting the election results. While the Court considered various conventional interpretive approaches,[43] it also relied on a doctrine that election laws should be liberally construed in favor of citizens' right to vote, an interpretive doctrine based on the right to vote inherent in the Florida Constitution.[44]

Perhaps courts should construct substantive interpretive canons based on constitutional provisions in other situations.[45] For example, it may be reasonable to employ a canon that civil rights statutes will be interpreted so as to achieve full racial equality.[46] Of course, the nature of the principle embodied in the Equal Protection Clause is now intensely contested.[47] Some view the Fourteenth Amendment as establishing an anti-subordination principle. Such a view suggests that race-conscious approaches are permissible, and suggests that statutes be interpreted to take into account the perspectives of the traditionally disadvantaged.[48] Others argue that the Equal Protection Clause embodies a principle of color-blindness. To them race-conscious approaches violate equal protection and their position suggests that statutes should not be read to permit such race-conscious action.

Statutory interpretation might well serve as a technique to initiate a dialogue with Congress on constitutional values. Courts might interpret statutes in ways that require legislatures to reconsider the contours of statutes that have constitutional implications. Courts might in effect interpret a statute in a way that does not impinge upon a constitutional value until Congress has explicitly revisited the statute. To do so, a court might invoke the doctrine of avoidance, a plain statement rule, or simply engage in interpreting the statute. Several commentators have embraced such techniques.[49] Professor Calabresi has suggested such an approach with

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[43] *Id.* at 1234-36,

[44] *Id.* at 1236-38.

[45] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 468-74 (1989).

[46] *Id.* at 472-73, 483-84; Eskridge, *supra* n. 1, at 1032-34. Indeed, one observer suggests that the influence should run the other way—that congressional action approving affirmative action and disparate impact analysis should influence the Court's interpretation of the Equal Protection Clause. Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J.L. & Pol. 381 (2000).

[47] John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 Fordham L. Rev. 423 (2002) (discussing the anti-differentiation, anti-oppression, and anti-subordination principles).

[48] Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 619-20 (1995) (discussing approach of interpreting statutory ambiguities to ameliorate perceived patterns of political, social, and cultural oppression and exclusion); *see* Tanya Kateri Hernandez, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*, 63 La. L. Rev. 875, 885 (2003).

[49] Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 82 Minn. L. Rev. 1 (1998) (discussing the Calabresi approach).

regard to statutes that have been extant for some period of time.[50]

More broadly, when statutes implicate constitutional values, perhaps courts should reconsider their expressed devotion to the "honest agent" approach of statutory interpretation. Under the "honest agent" approach a court must honestly seek to interpret the statute in the way the legislature intended rather than rely upon any substantive considerations the court might find appealing. Approaches that partially reject the "honest agent" approach and give judicial policy judgments more weight have been proffered as an alternative. William Eskridge's dynamic statutory interpretation theory has become the best known of these approaches.[51] Eskridge argues that over time the importance of the real or constructed intent of the enacting legislature should diminish and consideration of the manner in which the court believes the statute would work best should increase.[52]

When statutes implicate constitutional values, perhaps courts should feel less bound by the "honest agent" approach and interpret the statute in terms of how the statute will work most appropriately given the constitutional interests involved. Courts could, for example, consider themselves less constrained by the ordinary meaning of words or syntax canons and focus more on the contours of constitutional norms and the statute's fit within those constitutional norms. Under this approach, the Justices, in deciding whether the Voting Rights Act applies to judicial elections, would focus less on the meaning of the word "representative" in everyday parlance and focus more intently on the competing interpretations' implications for constitutional values such as the right to vote, racial equality, and judicial independence.[53] The changed focus does not solve the interpretive problem, but it changes the weight of various considerations. In any event, such an approach might capture how such cases are decided.[54] The decisions in statutory interpretation cases may well reflect the Justices' views on the closely-related constitutional issues, regardless of the other interpretive factors at issue.[55]

This symposium also considers legislatures' capacities to address constitutional issues, a subject that also has great importance and has

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[50] Guido Calabresi, *A Common Law for the Age of Statutes* 135-38 (Harv. U. Press 1982).
[51] WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994).
[52] *Id.* at 9-11, 49.
[53] *Dept. of Com.*, 525 U.S. 316; *Chisom v. Romer*, 501 U.S. 380 (1991).
[54] Eskridge, *supra* n. 1, at 1034-36.
[55] *See e.g. Dept. of Com.*, 525 U.S. 316; *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *Department of Commerce* eight of the nine Justices intimated their views on the constitutional issue, and each of the eight construed the statute consistently (though one could have concluded that Congress intended one approach and that the congressional approach was constitutionally prohibited or more conservative than the Constitution permitted). 525 U.S. 316.

sparked lively debate.[56] In *Marbury v. Madison*,[57] the Supreme Court asserted that it is emphatically the province of the courts to say what the law is, which includes invalidating unconstitutional acts of Congress.[58] We have long assumed that political processes cannot be relied upon to always respect constitutional principles.[59] However, the Supreme Court does seem to assume that Congress will often seriously consider constitutional issues relevant to legislative enactments; therefore, in many areas the Court accords Congress's actions a presumption of constitutionality.[60] Even apart from such a presumption, Congress's ability to consider constitutional issues is critical. Legislators, like judges, have a duty to uphold the Constitution,[61] and many statutes cannot be reviewed at all (because, for instance, no one has standing or because the matter is considered a non-justiciable political question),[62] or at least only after citizens' exercise of their rights has been frustrated.

Skepticism about Congress's ability to seriously consider constitutional questions is certainly justified. Many scholars have doubts about elected officials' fidelity to constitutional principles.[63] Congress and state legislatures routinely ignore certain constitutional rulings.[64] Moreover, members of legislatures do not consider the Constitution as the primary determinate of their conduct.[65] And indeed, since the 1930s, there has been a view that Congress should leave close constitutional questions for the courts rather than resolving the issues themselves.[66] Abner Mikva has

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[56] Neal Devins . *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 441 (2001); Abner K. Mikva, *How Well Does Congress Support and Defend the Constitution*, 61 N.C. L. REV. 587, 609-10 (1983); MICHAEL A. BAMBERGER, RECKLESS LEGISLATION (2000); Note, *Should the Court Presume that Congress Acts Constitutionally*, 116 Harv. L. Rev. 1798 (2003).

[57] 5 U.S. 137 (1803).

[58] *Id.*

[59] *See e.g.* Tom Campbell, *Separation of Powers in Practice* 20 (2004); John Arthur, *Words That Bind: Judicial and the Grounds of Modern Constitutional Theory* 20-23 (Westview Press 1995); Alexander Hamilton, *The Federalist No. 78*, in *The Federalist Papers* 464, 469 (Clinton Rossiter ed., New Am. Lib. 1961).

[60] Student Author, *Should the Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 Harv. L. Rev. 1798 (2003) [hereinafter *Should the Court Presume*].

[61] U.S. Const. art. VI, cl. 3; *see generally* Tom Campbell, *Separation of Powers in Practice* 37-48 (Stan. L. & Pol. 2004).

[62] For example, some statutes cannot be reviewed because the individuals involved lack standing or because the matter is considered a non-justiciable political question.

[63] Bamberger, *supra* n. 64; Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 Duke L.J. 435, 441 (2001); Mikva, *supra* n. 67; *Should the Court Presume*, *supra* n. 60.

[64] Michael A. Bamberger, *Reckless Legislation: How Lawmakers Ignore the Constitution* (Rutgers U. Press 2000); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & Contemp. Probs. 273 (1993) (reporting that more than 200 new legislative vetoes have been enacted since *INS v. Chadha*, 462 U.S. 919 (1983)).

[65] Bamberger, *supra* n. 64, at 201, 205-06.

[66] Franklin Delano Roosevelt, *A Frequently Misquoted Letter:,July 6, 1935*, in *The Public Papers and Addresses of Franklin D. Roosevelt* vol. 4, 297, 298 (Samuel I. Rosenman ed., Random H. 1938) (letter from President Franklin Delano Roosevelt to Congressman Samuel B. Hill). Perhaps the Supreme

argued that Congress lacks the institutional capacity to seriously consider constitutional issues.[67]

Thus, it is relatively easy to make the case that Congress and state legislatures will not systematically protect constitutional rights or observe constitutional limits and that at times political imperatives predominate at the expense of constitutional principles. Moreover, Congress and state legislatures surely do not invariably feel compelled to adhere to judicially-declared constitutional doctrines rather than adhere to their own conception of the Constitution. Some of the work criticizing legislatures appears to presume that courts are the sole expositor of constitutional law, and fault legislatures for failing to comply with the Constitution because they do not legislate in accordance with judicially-declared constitutional doctrines.[68] It is also the case that Congress is likely to consider constitutional issues in such a way as to create discontinuities in constitutional law by deciding issues in contexts that create tension with broad principles.[69] The constitutional judgments underlying Congress's enactment of a flag-desecration statute,[70] if accepted, would surely have, created some incongruities in free speech doctrine.[71]

Nevertheless, not only can Congress play a role in giving content to constitutional principles and protecting constitutional rights, but sometimes Congress's role is essential. Not surprisingly, Congress has helped to define rights in areas where its own institutional interests are at stake.[72] Moreover, judges and scholars have argued that Congress can be trusted to safeguard

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Court's more assertive view of its interpretive preeminence, *see Cooper v. Aaron*, 358 U.S. 1, 8 (1958), has contributed to the congressional view.

[67] Abner K. Mikva, *How Well Does Congress Support and Defend the Constitution?* 61 N.C. L. Rev. 587, 609-10 (1983); *see* Bamberger, *supra* n. 64 (reporting that most legislators believe they lack the information necessary to make constitutional decisions).

[68] This seems to be the premise underlying Bamberger's book. Bamberger, *supra* n. 64.

[69] *See* Campbell, *supra* note __, at 21-24.

[70] *Flag Protection Act of 1989*, Pub. L. No. 101-131, 103 Stat. 777 (1989).

[71] *U.S. v. Eichman*, 496 U.S. 310 (1990) (held *Flag Protection Act of 1989* unconstitutional). The statute Congress enacted with regard to Terri Schiavo and congressional reaction to the Ninth Circuits decision in the pledge of allegiance case provide additional examples of circumstances in which Congress focuses on specific circumstances without attempting to reconcile its legislation with broader constitutional doctrine. Relief of the Parents of Theresa Marie Schiavo, Pub. L. 109-3, 119 Stat. 15; Act of Nov. 13, 2002, §§ 1(9), 2(a), 3(a), 116 Stat.2057, 2058, 2060-2061 (reaffirming the Pledge of Allegiance and the National Motto ("In God We Trust") and stating that the Pledge of Allegiance is "clearly consistent with the text and intent of the Constitution"). Of course, courts are not completely immune from such pressures, *see, e.g.*, Korematsu v. U.S., 323 U.S. 214 (1944); Marsh v. Chambers, 463 U.S. 783 (1983); Bush v. Gore, 531 U.S. 98 (2000); *see generally*, Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904) (Holmes, J., dissenting)("great cases, like hard cases, make bad law"); Korematsu v. U.S., 323 U.S. at _245-46 (Jackson, J., dissenting).

[72] *See Impoundment Control Act of 1974*, Pub. L. No. 93-344, 88 Stat. 332 (1974) (codified at 2 U.S.C. §§ 681-691f); *War Powers Resolution*, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548); *see generally* Jesse H. Choper, *Judicial Review and the National Political Process* (U. of Chi. Press 1980). .

federalism.[73] But Congress has also defined and vindicated constitutional values in the area of individual rights. In the 1960s, Congress enacted a series of civil rights laws to address racial discrimination, including the Civil Rights Act of 1964[74] and the Voting Rights Act of 1965.[75] These legislative initiatives, as enhanced by agency interpretations of those statutes (interpretations only later confirmed by courts) have proven far more efficacious in securing racial equality in employment and political participation than any constitutional doctrine crafted by the Supreme Court.[76] Similarly, the Civil Rights Act of 1964,[77] the Pregnancy Discrimination Act,[78] and Title IX of the Educational Amendments of 1972[79] have had a significant impact in securing gender equality.

Privacy law of reflects a similar pattern. Federal and state privacy statutes have established far greater protections than those provided by constitutional decisions applying the Fourth Amendment. For example, the primary limitations on the government with respect to wiretapping are not those imposed by Fourth Amendment doctrine, but by the Electronic Communications Privacy Act.[80]

Therefore, when constitutional principles are politically salient or have the support of politically-influential segments of the public,[81] Congress does sometimes seriously consider and expand upon constitutional principles. Indeed, the Supreme Court has been quite cognizant of the ability of Congress and state legislatures to give sustained attention to constitutional principles, and it has sometimes deferred judgment while such issues germinate in state legislatures.[82] Moreover, the Court has crafted doctrines that do not specify substantive rules but rather encourage the other branches of government to seriously consider constitutional issues and decide the appropriate balance between constitutional imperatives and competing policy considerations.[83] Courts often craft doctrines that leave

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[73] Indeed, there has been a long standing debate over whether the political safeguards of federalism are largely sufficient to protect the interests of states. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-55, 550-51, 554 (1985) (noting "the effectiveness of the federal political process in preserving the States' interests"); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546 (1954). *But see* Tribe, *supra* n. 35, at §§ 5-9, 851-53. *See generally* Larry D. Kramer, *Putting Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215, 217 (2000).

[74] 42 U.S.C. § 2000 (1964).

[75] 42 U.S.C. § 1973 (1965).

[76] *See* Bell, *supra* n. 22.

[77] 42 U.S.C. § 2000.

[78] Pub. L. No. 95-555, 92 Stat. 2076 (1978).

[79] 20 U.S.C. §§ 1681-1688 (1972).

[80] *See* Bell, *supra* n. 22.

[81] Constitutional rights safeguard citizens who are members of groups that, in ordinary political times, will often wield significant political power, such as the press, religious groups, and owners of real property.

[82] *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring); *Kelo*, 545 U.S. 469.

[83] Bell, *supra* n. 22.

the protection of constitutional values largely in the hands of political actors, reserving only modest doctrines designed to force them to treat constitutional issues seriously. For example, the courts may require elected officials to address issues explicitly or may require legislators to adopt rules of general applicability so as to ensure that legislators seriously consider constitutional values.[84] More specifically, the Court has held that a legislature cannot single out the press, or any portion of the press, for taxation.[85]

While constitutional principles most dramatically constrain government when judges exercise the power of judicial review, the values underlying constitutional principles certainly influence the rights and obligations of citizens far more broadly. The underlying values may influence interpretation of statutes when competing interpretations have constitutional implications. Those underlying values may also be given effect by legislatures in their consideration and passage of statutes. Ultimately, then, the questions raised by this symposium, the influence of substantive constitutional values on statutory interpretation and legislators' capacities to consider constitutional issues, are critical ones that continue to demand sustained attention.

[84] *Leathers v. Medlock*, 499 U.S. 439 (1991); *Minneapolis Star and Trib. Co. v. Minn. Commr. of Revenue*, 460 U.S. 575 (1983); *Hampton v. Mow Sung Wong*, 426 U.S. 88, 103 (1976); *N.Y. Times Co. v. U.S.*,403 U.S. 713, 732 (1971)..

[85] *Leathers*, 499 U.S. 439; *Minneapolis Star and Trib. Co.*, 460 U.S. 575.