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INTRODUCTION

In one of the most celebrated law review articles of all time, Karl Llewellyn argued that the traditional canons of statutory construction are not reliable guides to predicting judicial interpretations, because for every canon supporting one interpretation there is a counter-canon cutting against that interpretation.[1] He accomplished his *tour de force* in large part by focusing upon the "referential" canons—rules referring the Court to an outside or preexisting source to determine statutory meaning[2]—and upon the "linguistic" canons—general conventions of language, grammar, and syntax.[3] Llewellyn did not explore in any detail the "substantive" canons, the clear statement rules or presumptions of statutory interpretation[4] that reflect substantive values drawn from the common law, federal statutes, or the United States Constitution.[5] Much the same exercise could be performed in connection with the substantive canons—for every canon there is a counter-canon—but with this difference: The substantive canons do reflect some overall tendency or slant in the Court's interpretation of statutes. That is, unlike the linguistic canons or the referential canons, the substantive canons are not

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1. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401-06 (1950). Llewellyn wrote great articles but gave them bad titles.

2. Id. at 401-04. By and large, "Thrust But Parry" numbers 2-6, 8-10, and 13-14 involve referential canons. Compare, for example, Thrust #5, "Where various states have already adopted the statute, the parent state is followed," with Parry #5, "Where interpretations of other states are inharmonious, there is no such restraint."

3. Id. at 403-06. By and large, "Thrust But Parry" Numbers 11-12 and 15-28 involve linguistic canons. Compare, for example, Thrust #20, "Expression of one thing excludes another," with Parry #20, "The language may fairly comprehend many different cases where some only are expressly mentioned by way of example."

4. We shall use three different terms throughout this Article for canons of statutory construction. "Presumptions" of interpretation are general policies the Court will "presume" Congress intends to incorporate into statutes. Presumptions can be rebutted by persuasive arguments that the statutory text, legislative history, or purpose is inconsistent with the presumptions. "Clear statement rules" require a "clear statement" on the face of the statute to rebut a policy presumption the Court has created. These two terms—presumption and clear statement rule—are contrasted in *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2169-71 (1991), and *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1237-38 (1991) (Marshall dissenting). To this traditional contrast, this Article adds a third term, "super-strong clear statement rules," that seem to require very specifically targeted "clear statements" on the face of the statute to rebut a policy presumption the Court has created. For examples of such super-strong clear statement rules in the 1990 Term alone, see *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *Blatchford v. Native Village of Noatak & Circle Village*, 111 S. Ct. 2578 (1991); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). See also *United States v. Nordic Village, Inc.*, 60 U.S.L.W. 4159 (U.S. Feb. 25, 1992) (creating a new super-strong clear statement rule against waivers of federal sovereign immunity).

5. For recent scholarship focusing on these substantive canons and infiuencing this Article, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989).

policy neutral. They represent value choices by the Court.

A modern Karl Llewellyn might quarrel that, if the substantive canons are malleable (just as the linguistic and referential canons are), how can they be said to have any systematic effect on the Court's results in statutory cases? We agree that the malleability of the canons prevents them from constraining the Court or forcing certain results in statutory interpretation through deductive reasoning from first canonical principles. Yet we also think that the substantive canons are connected in an important way with the results the Court reaches in statutory cases, though not in the cause-effect (canons produce results) way traditionally assumed and effectively criticized by Llewellyn. Rather the opposite occurs: The canons are one means by which the Court expresses the value choices that it is making or strategies it is taking when it interprets statutes (thus, results produce canons). The canons are constructed, and reconstructed, over time. The precise way in which a Court deploys substantive canons of statutory construction reflects an underlying "ideology," or mix of values and strategies that the Court brings to statutory interpretation.

Our hypothesis is testable. If it is true, different Courts will express their different ideologies by emphasizing, or even creating, different substantive canons in the complex work of statutory interpretation. In Parts I and II of this Article, we test the hypothesis by comparing the Supreme Court's use of constitutionally based canons during the middle Burger Court (roughly, the 1975 through 1980 Terms) with its use of such canons during the late Burger Court (1981 through 1985 Terms) and the emerging Rehnquist Court (1986 Term onward). We believe that this comparison across a limited time period yields striking differences both in the canons the Court invokes and in the way in which the canons are invoked. Several conclusions emerge from our comparison.

One theme is that as the Supreme Court grew less activist in constitutional interpretation during the 1980s,[6] it grew correspondingly more activist in statutory interpretation. That is, the Court in the 1980s became somewhat more reluctant to apply constitutional rules to prohibit state and federal legislative action, but somewhat more stingy

6. As the decade progressed, the Court seemed increasingly reluctant to strike down federal and state statutes on constitutional grounds. Recently, the Court has upheld controversial regulations or statutes delegating criminal sentencing rulemaking to a largely judicial body, see *Mistretta v. United States*, 408 U.S. 361 (1989); restricting the rights of federally assisted medical programs to advise women of abortion options and the rights of women to obtain abortions upon demand, see *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); vesting certain prosecutions in officials outside the control of the executive branch, see *Morrison v. Olson*, 487 U.S. 654 (1988); regulating nude (but not legally obscene) dancing, see *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), and so forth. Even in the arenas of affirmative action and taking of private property, where the current Court seems poised to greater activism, the Court's actual decisions to date are fairly restrained.

about interpreting federal statutes, often basing its analysis upon constitutional concerns. Like the Court in the 1970s, the current Court expresses its constitutional concerns through "presumptions" that can be rebutted by statutory language, legislative history, and overall purpose, as well as through "clear statement rules" that can only be rebutted by clear statutory text.

A further theme of this study is that the current Court emphasizes a different array of clear statement rules than did the Court in the 1970s. The current Court is less inclined to protect individual rights through cautious statutory interpretation than the Court was a decade ago, and more inclined to protect constitutional structures through cautious interpretation. Moreover, consistent with its interest in textualism as its dominant interpretive methodology, the current Court emphasizes clear statement rules much more than presumptions. Indeed, the most striking innovation of the recent Court has been its creation of a series of new "super-strong clear statement rules" protecting constitutional structures, especially structures associated with federalism.

These super-strong clear statement rules are remarkable. On the one hand, they require a clearer, more explicit statement from Congress in the text of the statute, without reference to legislative history, than prior clear statement rules have required. This would suggest that such rules are protecting particularly important constitutional values. But, on the other hand, the super-strong clear statement rules the Court has actually adopted protect constitutional values that are virtually never enforced through constitutional interpretation. That is, the Court in the 1980s has tended to create the strongest clear statement rules to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything. What the Court is doing is creating a domain of "quasi-constitutional law" in certain areas: Judicial review does not prevent Congress from legislating, but judicial interpretation of the resulting legislation requires an extraordinarily specific statement on the face of the statute for Congress to limit the states or the executive department.

That the Court's super-strong clear statement rules are new does not mean they are undesirable, of course. In fact, a good case can be made for such quasi-constitutional law: structural constitutional protections, especially those of federalism, are underenforced constitutional norms. They are essentially unenforceable by the Court as a direct limitation upon Congress's power, and are best left to the political process. But the Court may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake, and super-strong clear statement rules are a practical way for the Court to focus legislative attention on these values.

Notwithstanding this argument, Part III raises normative concerns with these rules. Our main concern is that the reasons the Court and commentators have given for leaving federalism and other structural values underenforced also argue against the Court's new super-strong clear statement rules, which are almost as countermajoritarian as now discredited *Lochner*-style judicial review. In this respect, the Court's new canons amount to a "backdoor" version of the constitutional activism that most Justices on the current Court have publicly denounced. Further, the values protected by this backdoor constitutional lawmaking—presidential preferences over congressional preferences as a source of law, state sovereignty over national regulation, and established interests over interests of the politically marginalized—strike us as constitutionally unworthy.

I. CONSTITUTIONALLY BASED PRESUMPTIONS AND CLEAR STATEMENT RULES: THE CATALOGUE, CIRCA 1981

A good many of the substantive canons of statutory construction are directly inspired by the Constitution, as we shall explain in this Part. Although most of the constitutionally based canons have weighty precedential pedigrees, their importance and the way they are deployed change over time and reflect an underlying ideology, which includes the Court's view of what is an important constitutional value, the relative importance of different constitutional values, and strategies for implementing those values.

The period of the middle Burger Court (1975 through 1980 Terms) was one of moderate judicial activism in both constitutional and statutory interpretation. It was a rather curious activism, though, because the Burger Court's underlying ideology was strongly pluralist and proceduralist. It was pluralist insofar as it protected constitutional values that were generally acceptable to the dominant interest group coalition in America in the late 1970s. It was proceduralist insofar as it tended to enforce procedural values—access, political speech, structures of lawmaking and law execution—rather than substantive values. In short, the Burger Court was activist, but in support of values it believed were prevalent in Middle America.

In a manner consistent with its moderately activist posture in constitutional cases, the Burger Court in statutory cases frequently invoked clear statement rules to protect constitutional rights and structures. As Llewellyn would have appreciated, however, the Court was also more than ready to acknowledge exceptions and caveats to those clear statement rules (counter-rules), or to ignore them altogether in cases in which they were arguably relevant. Generally, the Burger Court's practice is epitomized by three "meta-rules": avoidance of interpretations

which (1) unnecessarily invaded personal rights, (2) disturbed national and international allocations of jurisdiction, or (3) upset state-federal relations. We analyze these meta-rules in the following nine categories.

A. Rule to Avoid Constitutional Difficulties

Probably the most important of the constitutionally based canons is the rule that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[7] The middle Burger Court often invoked this meta-rule, most prominently in *NLRB v. Catholic Bishop of Chicago*.[8]

The issue in *Catholic Bishop* was whether the National Labor Relations Act's broad definition of the National Labor Relations Board's jurisdiction justified the exercise of that jurisdiction over lay faculty at parochial high schools. The Court began its analysis with the "values enshrined in the First Amendment," and with the issue "whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions."[9] Based upon its First Amendment precedents and the importance of a teacher's role in the religious mission of a church school, the Court concluded that there was a "significant risk that the First Amendment will be infringed"[10] by a broad interpretation of the Board's jurisdiction and interpreted the statute narrowly.

Several other middle Burger Court opinions also interpreted statutes to avoid constitutional concerns, protecting individual rights to free exercise of religion, free speech, due process, and equal protection through creative statutory interpretation.[11] But, as if unconsciously tracking Llewellyn, the Court always left itself an option to escape this canon: not surprisingly, it did not apply when the statutory text was unambiguous or the constitutional problems insubstantial. Thus, in *Beal v. Doe*,[12] the Court interpreted Title XIX of the Social Security

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7. *Crowell v. Benson*, 285 U.S. 22, 62 (1932), quoted in *Machinists v. Street*, 367 U.S. 740, 749-50 (1961). See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

8. 440 U.S. 490 (1979).

9. Id. at 501.

10. Id. at 504.

11. See *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (interpreting a tax statute narrowly to avoid free exercise problems); *United States v. Clark*, 445 U.S. 23, 33-34 (1980) (interpreting a civil service statute liberally to avoid possibly unconstitutional discrimination against children born outside of marriage); *Califano v. Yamasaki*, 442 U.S. 682 (1979) (interpreting a statute to reflect due process concerns for Social Security disability recipients from whom recoupment is sought); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (tracking free speech concerns in interpreting FCC power).

12. 432 U.S. 438 (1977).

Act not to require the states to fund abortions for the needy, emphasizing the plain language of the statute and minimizing the constitutional concerns raised by the dissenting opinion.[13]

B. *The Rule of Lenity*

Resting upon such due process values as providing fair notice and constraining prosecutorial discretion, the rule of lenity posits that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[14] This canon is closely related to the rule to avoid constitutional difficulties, for a lenient interpretation of a criminal statute obviates inquiries into underlying due process concerns. The rule of lenity was a very popular canon during the middle Burger Court.[15]

For example, in *Chiarella v. United States*,[16] the Court interpreted the criminal anti-fraud provision of the securities laws to be inapplicable to an employee of a printing company who appropriated information from page proofs to speculate on the stock market. Although there was ample support for such liability based upon the statutory purpose and evolving tort standards, the Court was reluctant to undertake an expansion of criminal liability.[17]

On the other hand, the Court in the late 1970s was willing to apply criminal statutes to reach harsh results when the Court felt the statutes were sufficiently clear.[18] For example, in *United States v.*

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13. Compare id. at 446 (focusing on plain meaning and insubstantial constitutional concerns) with id. at 449 (Brennan dissenting) (arguing that the statute should be interpreted to avoid constitutional problems). See also *Dalia v. United States*, 441 U.S. 238 (1979); *Harris v. McRae*, 448 U.S. 297 (1980).

14. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952), quoted in *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971). See *United States v. Bass*, 404 U.S. 336 (1971).

15. See *Bifulco v. United States*, 447 U.S. 381 (1980) (adopting a lenient interpretation of special parole provisions of a criminal drug statute); *Busic v. United States*, 446 U.S. 398 (1980) (adopting a restrictive interpretation of firearm enhancement penalties); *Dunn v. United States*, 442 U.S. 100, 112-13 (1979) (adopting a narrow interpretation of what is a "proceeding ancillary to a grand jury" for purposes of a false statement statute); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (reading a mens rea requirement into Sherman Act criminal penalties); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978) (applying the rule of lenity to a sentencing provision).

16. 445 U.S. 222 (1980).

17. Compare id. at 241-43 (Burger dissenting) and id. at 246-48 (Blackmun dissenting) with id. at 233-34 (opinion of the Court).

18. Compare *Lewis v. United States*, 445 U.S. 55 (1980) (interpreting a firearm control statute broadly because of the statute's plain meaning) with id. at 69 (Brennan dissenting) (applying the rule of lenity and the rule to avoid constitutional difficulties). See also *United States v. Bailey*,

Batchelder,[19] the Court held that a defendant with a prior felony conviction was properly sentenced to five years imprisonment under Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 for receiving firearms, even though Title VII of the statute provided a sentence of only two years for the same conduct. The Court held that this odd statutory overlap was the consequence of unambiguous statutory language and traced the anomaly to decisions made by Congress in the last-minute addition of Title VII to the Act.[20] Thus, the Court found that there was no room for the operation of the rule of lenity because "there [was] no ambiguity to resolve."[21] The Court also found the rule to avoid constitutional difficulties inapplicable, because that " ' "cardinal principle" of statutory construction . . . is appropriate only when [an alternative interpretation] is "fairly possible" ' from the language of the statute."[22] The Court then upheld the statute, as construed, against constitutional attack.

C. *Presumption in Favor of Judicial Review*

Responding to due process concerns that administrative action be subject to independent check and review, the Court has posited that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[23] Like the rule of lenity, the presumption in favor of judicial review might be considered a special case of the rule to avoid constitutional difficulties. Also like the rule of lenity, in the late 1970s this presumption sometimes resulted in allowing judicial review and sometimes did not.

On the one hand, based in large part upon the reviewability presumption, the Court held in *Dunlop v. Bachowski*[24] that the Secretary of Labor's decision not to bring a Landrum-Griffin Act lawsuit to overturn an allegedly fraudulent union election was subject to judicial review at the behest of the losing candidate, who did not have a private

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444 U.S. 394 (1980) (interpreting a criminal escape statute broadly); *United States v. Culbert*, 435 U.S. 371, 379 (1978) (adopting a broad reading of the Hobbs Act).

19. 442 U.S. 114 (1979).

20. Id. at 119-21.

21. Id. at 121. "That [the statute] provides different penalties for essentially the same conduct is no justification for taking liberties with unequivocal statutory language." Id. at 121-22.

22. Id. at 122, quoting *Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977).

23. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). The Court further stated that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Id. at 141. See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

24. 421 U.S. 560 (1975).

cause of action.[25] On the other hand, two years later the Court held in *Morris v. Gressette*[26] that the presumption did not justify judicial review of the Attorney General's decision not to challenge a state voting plan at the behest of voters claiming that the plan violated the Voting Rights Act. The Court reasoned that judicial review would frustrate the statutory scheme and that aggrieved voters had other remedies for the claimed violations.[27]

D. Liberal Construction of Statutes to Protect Carolene *Groups*

Responding to the same concerns that arguably have inspired the Court's willingness to subject certain "suspect classifications" to stringent equal protection analysis, the Court in the late 1970s tended to interpret ambiguous statutes to benefit "discrete and insular minorities" (*Carolene* groups). Unlike the canons described above, this canon was not stated as such in general terms by the Court, but the canon can be discerned from the Court's decisions stating interpretive presumptions favoring the group interests of African Americans,[28] Native Americans,[29] and noncitizens,[30] for example. Again, this canon did not assure such groups that statutes would always be interpreted to favor their interests, for the presumption was subject to a persuasive showing of statutory meaning to the contrary.

Frequently, this presumption is closely related to the rule to avoid constitutional difficulties. For example, in *United States v. Clark*,[31] the Court interpreted the Civil Service Retirement Act of 1948 provision that gave deceased employees' benefits to nonmarital children only if they "lived with the employee." Notwithstanding the longtime interpretation of the provision to require the child to have been living with the employee at the time of the latter's death (an interpretation apparently

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25. Id. at 567-68 (starting with the reviewability presumption and finding no compelling evidence to outweigh it).

26. 432 U.S. 491 (1977).

27. Id. at 505-07. Compare id. at 507 (Marshall dissenting) (relying on the *Abbott Laboratories/Bachowski* presumption of judicial review).

28. See *Steelworkers v. Weber*, 443 U.S. 193 (1979) (interpreting Title VII of the Civil Rights Act of 1964 to permit affirmative action favoring African American workers); *United States v. Board of Comm'rs of Sheffield*, 435 U.S. 110, 126-28 (1978) (interpreting the Voting Rights Act very broadly to effectuate Fifteenth Amendment values for protection of African Americans); *Runyon v. McCrary*, 427 U.S. 160 (1976) (interpreting the Civil Rights Act of 1866 very expansively to provide additional remedy to African Americans subject to job discrimination).

29. In construing Indian treaties, the Court has held that " '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

30. See *INS v. Errico*, 385 U.S. 214, 225 (1966).

31. 445 U.S. 23 (1980).

accepted by Congress in the 1970s),[32] the Court interpreted the provision to require only that the child had lived with the employee at some point. This interpretation avoided serious constitutional doubts about the statute,[33] and mirrored the Court's extension of special equal protection scrutiny to nonmarital children classifications in the late 1960s.[34]

This canon is further illustrated by the evolution of the Court's approach to gender issues in statutory interpretation during the 1970s. In the early and middle parts of the decade, the Court sent rather mixed constitutional signals regarding gender-based statutes,[35] and these mixed signals were paralleled in a reluctance to interpret statutes to protect the interests of women.[36] A turning point came after 1976, when the Court adopted an intermediate level of heightened scrutiny for classifications based upon gender.[37] Thus, the latter half of the decade saw the Court interpret the employment discrimination statute (Title VII) more aggressively to protect against gender discrimination.[38]

E. Presumption of Consistency with International Law and Treaties

The four constitutionally based canons explained above enabled the Burger Court to protect individual or group rights rooted in the Constitution, especially First Amendment, due process, and equal protection rights. But most of the constitutionally based canons in the late 1970s were drawn from structural features of the Constitution, namely, its treatment of international obligations, separation of powers, and federalism. We now turn to those structural canons, which the Burger Court applied enthusiastically and somewhat more consistently than it

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32. Id. at 31-34. See also id. at 36 (Rehnquist dissenting).

33. Id. at 27-28 (opinion of the Court).

34. See *Levy v. Louisiana*, 391 U.S. 68 (1968).

35. Compare *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that discrimination against pregnant women is permissible under equal protection analysis) with *Frontiero v. Richardson*, 411 U.S. 677 (1973) (finding discrimination against female military personnel impermissible).

36. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (interpreting Title VII to allow employers to discriminate against pregnant women), overridden by Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978), codified at 42 U.S.C. § 2000e(k) (1988).

37. *Craig v. Boren*, 429 U.S. 190 (1976).

38. See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (interpreting Title VII to prohibit employers from requiring that female employees make larger contributions to pension funds than male employees); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (holding that Title VII was violated by an employer policy denying accumulated leave to female employees returning from pregnancy leave).

The Court's attitude toward pregnancy changed markedly after the Pregnancy Discrimination Act overrode *Gilbert*, see note 36, and the Court's opinions thereafter tended to favor pregnant women. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

applied the canons protecting individual rights.

By operation of the supremacy clause, treaties as well as the precepts of international law are the "supreme Law of the Land."[39] The Court will "interpret general or ambiguous words in statutes in a manner consistent with international law,"[40] and, according to the Court, "an Act of congress [sic] ought never to be construed to violate the law of nations, if any other possible construction remains."[41] Further, the Restatement (Second) of Foreign Relations Law states that "courts do not favor repudiation of an earlier international agreement by implication and require clear indications that Congress, in enacting subsequent legislation, meant to supersede the earlier agreement."[42] International law and treaties thus have a quasi-constitutional status: Congress can override them, but it must do so clearly.

The Burger Court in the late 1970s and very early 1980s tended to follow and apply the presumption of consistency with international obligations more consistently than it did the individual rights canons.[43] The most dramatic example of this presumption in operation was *Dames & Moore v. Regan*.[44] In that case, the Court upheld the executive agreement that procured the return of fifty-two American hostages from the Islamic Republic of Iran in return for the United States' return of frozen Iranian assets and referral of American lawsuits against Iran to an international tribunal. The latter condition of the executive agreement was very questionable under United States statutory law, but the Court sidestepped those questions by reference to traditional claims settlement practice under international law and previously negotiated executive agreements.

F. Presumption Against Congressional Disruption of Traditional Separation of National Powers

Arguably the most important of the constitutionally based canons during the middle Burger Court was the presumption against congres-

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39. U.S. Const., Art. VI, cl. 2 (including treaties); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (acknowledging the supremacy of international law, also).

40. Restatement (Second) of Foreign Relations Law of the United States § 3 comment j (1965).

41. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

42. Restatement (Second) of Foreign Relations Law of the United States § 145 comment h (1965).

43. See *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (relying in part on international agreements to preempt state law); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (interpreting a statutory reference to "treaty" by reference to international law treatment of "executive agreements" as binding "treaties"). See also *United States v. California*, 447 U.S. 1, 5-6 (1980) (interpreting a term used in the Submerged Lands Act by reference to international convention).

44. 453 U.S. 654 (1981).

sional disruption of traditional separation of national powers, either by invading powers traditionally held by the other two branches or by giving away its own power without appropriate limits. This presumption was nowhere stated as such in the Court's opinions during this period, but was instead expressed through more particular canons.

1. Presumption Against Derogation of the Judiciary's Traditional Equity Powers

On the one hand, Article III vests Congress both with virtually plenary power over lower federal court jurisdiction and remedial authority and with substantial power over Supreme Court jurisdiction and remedial authority. The Court has drawn from this allocation of authority the canon that statutes conferring jurisdiction upon federal courts should be narrowly construed to assure that Congress and not the courts make decisions about the extent of jurisdiction.[45] On the other hand, Article III vests the "judicial Power" in the Supreme Court and whatever lower courts Congress creates.[46] The Court has drawn from this allocation of power the proposition that once Congress has vested federal courts with jurisdiction, it is presumed to vest them with all the traditional facets of the "judicial Power."[47]

Illustratively, the Court in *Roadway Express, Inc. v. Piper*[48] held that the federal costs statute does not authorize a federal court to assess counsel fees against a litigant abusing the judicial process; the Court relied on the apparent congressional expectations in enacting and amending the costs statute over time. But the Court further held that the costs statute did not displace a court's "inherent power" to discipline litigants through contempt sanctions, including the imposition of counsel fees against a contemptuous litigant.[49]

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45. See *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908) (addressing federal question jurisdiction); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (addressing diversity jurisdiction). Leading cases applying this proposition during the early and middle Burger Court were *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1969).

46. U.S. Const., Art. III, § 1.

47. *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (stating that "if Congress desired to make such an abrupt departure from traditional equity practice . . . it would have made its desire plain"). See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982).

48. 447 U.S. 752 (1980).

49. Id. at 764-67.

2. Presumption Against Derogation of the President's Traditional Powers

Article II vests the President with the "executive Power," including very substantial power over military and foreign affairs.[50] Based upon this allocation of power, the Court has presumed that when Congress passes laws dealing with foreign affairs and other matters in which congressional and executive power interact, Congress does not intend to interfere with traditional executive functions.[51] The Burger Court was quite enthusiastic about this canon, though it had few occasions to apply it.[52]

Again, *Dames & Moore* is the best example from the middle period of the Burger Court of the power of this canon. Just as the Court in *Piper* found no legislative authorization for assessing counsel fees against abusive litigants, the Court in *Dames & Moore* found no statutory authorization for the executive agreement shuttling U.S. lawsuits from federal court into international arbitration.[53] Nonetheless, the Court held that the President's executive agreement was entitled to legal effect under the supremacy clause because the President's foreign affairs powers included authority to settle foreign claims, at least during foreign policy emergencies,[54] and because Congress's failure to object to the President's longtime exercise of such power amounted to legislative "acquiescence" in its exercise.[55] *Dames & Moore* was a powerful invocation of the presumption against derogation of the President's traditional powers because it was in tension with three separate statutory schemes and with the rule to avoid constitutional difficulties raised by the wholesale transfer of lawsuits to a less formal tribunal.[56]

3. Presumption Against Excessive Delegation of Legislative Powers

Article I vests Congress with the "legislative Power" in the federal government, and Article I, section 7 sets forth the procedures for legis-

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50. See U.S. Const., Art. II, § 1, cl. 1; id. § 2.

51. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Zemel v. Rusk*, 381 U.S. 1, 12 (1965).

52. See *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 232-33 (1986) (utilizing very creative statutory interpretation, essentially deferring to a bilateral understanding between Japan and the President of the U.S.); *Haig v. Agee*, 453 U.S. 280, 301 & n.50 (1981) (presuming that Congress had acquiesced in the President's traditional authority to regulate passports).

53. *Dames & Moore*, 453 U.S. at 675-79.

54. Id. at 688 (limiting the decision to cases involving settlements that are "necessary incident[s] to the resolution of a major foreign policy dispute between our country and another").

55. Id. at 678-83.

56. Id. at 689-90 (dismissing the constitutional issue as not ripe for consideration). See also id. at 690-91 (Powell concurring in part and dissenting in part).

lating statutes.[57] The old "nondelegation doctrine" is supposed to police against excessive congressional delegation of its own lawmaking powers to agencies as a matter of constitutional law, but the Court has not invalidated a statute on those grounds since the 1930s. Instead, the Court now refers to the nondelegation idea as a canon of statutory interpretation rather than as an enforceable constitutional doctrine.[58]

At least one case in the middle Burger Court might exemplify this canon. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[59] the Court invalidated an OSHA rule that prohibited workplace exposure to traces of benzene, based upon a statutory delegation to OSHA to assure a "safe or healthful" workplace. The plurality opinion of four justices emphasized OSHA's inadequate cost-benefit analysis, but Justice Rehnquist's critical fifth vote was based on the conclusion that the delegation of rulemaking power to OSHA was unconstitutionally broad.[60] At least some of the majority Justices were concerned that heavy costs were being imposed upon employers without a clear mandate from Congress. This view of *American Petroleum Institute* is in tension with the Court's decision in *Dames & Moore*, which permitted even more sweeping costs upon U.S. litigants based upon a delegation of lawmaking power to the President through congressional "acquiescence."

G. Presumption Against Federal Derogation of Traditional State Functions

There is a tension in the Constitution between the supremacy clause, which mandates that federal statutes are the "law of the Land" and therefore trump state law, and the underlying principles of "federalism" reflected in Article I and the Tenth Amendment. For many years, the Supreme Court has dealt with this tension by giving preference to federal law (it "preempts" state law where there is a conflict), but with a canonical caveat: When a state's exercise of its police power is challenged under the supremacy clause, the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[61]

The Burger Court was enthusiastic about this canon, but did not invoke it as a heavy presumption to preserve state regulatory power.[62] A

57. U.S. Const., Art. I, §§ 1, 7.
58. See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).
59. 448 U.S. 607 (1980).
60. Id. at 671 (Rehnquist concurring).
61. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
62. See, for example, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

particularly interesting application came in *Ray v. Atlantic Richfield Co.*,[63] which evaluated the Washington Tanker Law's regulation of the design, size, and movement of oil tankers in Puget Sound. The Court invalidated most of the state's pilot licensing requirement because it was explicitly preempted by federal statute (clear statement trumps the canon), and invalidated the state's safety standards because they were inconsistent with the federal goal of creating national uniformity as part of an international negotiating process (presumption of conformity to international obligations).[64] On the other hand, the Court sustained a pilotage requirement not explicitly preempted by federal statute, as well as a tugboat escort requirement that did not interfere with the federal uniformity purpose, because these regulations served important state functions and did not seriously interfere with the federal scheme.[65]

H. Presumption that Intergovernmental Immunities Not Be Disturbed

Inherent in the constitutional structure is the idea that the federal and state governments not interfere with one another's core governmental operations.[66] The Eleventh Amendment specifically embodies at least part of that concept in its provision that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[67] Although the Eleventh Amendment has long been broadly interpreted to prohibit various types of lawsuits against the states beyond those mentioned in the amendment, the Burger Court held that Congress acting under its powers to enforce the Fourteenth Amendment could abrogate state Eleventh Amendment immunity.[68]

Nonetheless, the Burger Court presumed against interpreting federal statutes to invade the states' Eleventh Amendment immunity. In *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, Missouri*,[69] the Court held that Congress's 1966 amendments to the Fair Labor Standards Act (FLSA) did not abrogate state immunity against FLSA lawsuits. Although the

63. 435 U.S. 151 (1978).
64. Id. at 160-68.
65. Id. at 168-73. See also id. at 179-80.
66. See, for example, *Hans v. Louisiana*, 134 U.S. 1 (1890); *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819).
67. U.S. Const., Amend. XI.
68. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).
69. 411 U.S. 279 (1973).

amendments did extend the FLSA's coverage to state employees, Congress did not amend the statute's remedial provision to suggest abrogation of state immunity, nor was there any mention in the legislative history that Congress believed it was abrogating state immunity. The Court was simply not willing "to infer that Congress . . . desired silently to deprive the States of an immunity they have long enjoyed."[70]

I. Presumption of Tribal Immunity from State Regulation

The constitutional and precedential backdrops to the canon presuming that Indian tribes and their reservations are immune from state regulation are complex and need only be outlined here.[71] In the face of constitutional silence on the key questions,[72] Chief Justice Marshall concluded that a tribe is a unique sovereign having a special relationship with the federal government,[73] and that states have no regulatory power in "Indian country."[74] Later decisions have eroded this flat rule against state assertions of authority in Indian country.[75] Under decisions holding that Congress has "plenary power" to regulate tribes and their members,[76] Congress may delegate authority over Indian country to the states. Moreover, even when not armed with a federal delegation of authority, states may sometimes regulate in Indian country.

In the middle years of the Burger Court, a substantive canon was sometimes used to temper state intrusions into Indian country that were arguably authorized by Congress. For example, in *Bryan v. Itasca*

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70. Id. at 285. See id. at 293-94 (Marshall concurring in the result).

71. On federal Indian law generally and statutory interpretation in that field in particular, see Robert Clinton, et al., *American Indian Law: Cases and Materials* (Michie, 3d ed. 1991); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137 (1990).

72. In the three places in which it mentions Indians, the Constitution does not speak clearly about the sovereignty of tribes or whether states have any authority to regulate Indian lands. See U.S. Const., Art I., § 2, cl. 3; id., Art. I, § 8, cl. 3; id., Amend. XIV, § 2.

73. Marshall described an Indian tribe "as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself." *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, 16 (1831). Unlike foreign nations or states of the union, tribes are "domestic dependent nations," he wrote, whose relation to the federal government "resembles that of a ward to his guardian." Id. at 17.

74. Marshall concluded that an Indian reservation is "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of [the state] can have no force." *Worcester v. Georgia*, 31 U.S. (6 Peters) 515, 561 (1832). "Indian country" is a term of art that is defined to include lands within the boundaries of Indian reservations as well as "dependent Indian communities" and Indian allotments existing outside a reservation. See 18 U.S.C. § 1151 (1988) (addressing federal criminal jurisdiction); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (borrowing this statutory definition for civil jurisdictional purposes).

75. See, for example, *Williams v. Lee*, 358 U.S. 217, 220 (1959).

76. See generally Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984).

County,[77] the Court invoked the canon to rebuff a county's attempt to impose a nondiscriminatory personal property tax upon a mobile home owned and occupied by an Indian on a reservation located in the county. Despite federal statutory language that could have been read as delegating this authority to the county,[78] the Court held that state power was "foreclosed by the legislative history . . . and the application of canons of construction applicable to congressional statutes claimed to terminate Indian immunities."[79] The substantive canon—phrased as requiring that a congressional intent to terminate Indian immunities " 'be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history' "[80]—probably strongly influenced the outcome, because the legislative history provided little direct support for the Court's conclusions.[81]

In its middle years, the Burger Court also occasionally used a substantive canon to exclude unilateral state assertions of authority to regulate in Indian country. In *White Mountain Apache Tribe v. Bracker*,[82] for example, the Court concluded that federal law preempted a state's attempt to impose a motor carrier license tax and an excise or use fuel tax upon a non-Indian company performing logging operations in Indian country under contract with a tribal enterprise. Nothing in federal law provided an express or clearly implied preemption, but the Court relied on a presumption against state authority: "Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence."[83] The Court concluded that the factors favoring this special kind of preemption—comprehensive federal regulation of the harvesting and sale of timber, the federal policy promoting tribal economic self-sufficiency, and the fact that the economic incidence of the tax fell upon the tribe—outweighed the state's "generalized interest in raising revenue."[84]

As Llewellyn would have expected, the Burger Court's middle years also included some cases in which the Indian law canon failed to pro-

77. 426 U.S. 373 (1976).

78. Parsed most favorably to the county, the statutory language said that "civil laws of [the] State . . . of general application to private persons and private property shall have the same force and effect within such Indian country as they have elsewhere within the State," and it provided exceptions to this grant of authority in Indian country for certain state taxes, but not the kind of tax at issue in the case. 18 U.S.C. § 1360(a), (b) (1988).

79. 426 U.S. at 379.

80. Id. at 393, quoting *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973).

81. For a more complete discussion of *Bryan*, including the legislative history at issue, see Frickey, 78 Cal. L. Rev. at 1166-68, 1179, 1212, 1214 n.377, 1240 (cited in note 71).

82. 448 U.S. 136 (1980).

83. Id. at 143-44.

84. Id. at 151.

duce the outcomes one might expect. Illustratively, in *Washington v. Yakima Indian Nation*,[85] the Court interpreted a federal statute allowing states to assume criminal and civil jurisdiction over Indian country as authorizing a state to pick and choose a partial, patchwork jurisdiction over that domain based on geographical and subject-matter factors. As Justice Marshall's dissent stressed, nowhere in the majority's discussion of this issue was consideration given to the canonical presumption against state regulation in Indian country and the need for clear federal delegations of authority.[86] Similarly, in *Moe v. Salish & Kootenai Tribes*,[87] the Court upheld a state's authority to collect taxes on sales of cigarettes in Indian country by Indians to non-Indians. Presumptions against state regulation in Indian country were conspicuously absent in the opinion, with the preemption inquiry phrased as merely a search for an actual conflict between federal statutes and state laws. The tension between the garden-variety federal preemption approach of *Moe* and the special, canonical Indian law preemption/balancing approach of *Bracker* was left unresolved by the Burger Court.

II. The Emergence of Super-Strong Clear Statement Rules: Localizing Values in Statutory Interpretation

The later years of the Burger Court and the early years of the Rehnquist Court have not involved a radical change in the catalogue of constitutionally based canons. But the Court in the 1980s did approach these canons in a very different way than it had in the 1970s. Several developments are worth noting. First, the Court has been more uneven in its willingness to interpret federal statutes to avoid clashes with individual liberties recognized in the Constitution. For example, the rule to avoid constitutional difficulties has been much more controversial during the Rehnquist Court than it was in the Burger Court and has rarely been invoked to protect individual liberties. Second, although the Court has not retreated from its enthusiasm for canons drawn from national and international structures in the Constitution, its most important move in this arena has been to reinterpret an old referential canon—deference to administrative interpretations of statutes—to reflect constitutional structures.

Third, and most interestingly, the Court has enforced the federalism-based canons much more enthusiastically in the 1980s than it did in the 1970s. One way the Court has expressed its enthusiasm is through the creation of a series of "super-strong clear statement rules,"

85. 439 U.S. 463 (1979).
86. Id. at 503 (Marshall dissenting).
87. 425 U.S. 463 (1976).

which establish very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text targeted at the specific problem. The Court's creation of super-strong clear statement rules for the federalism-based canons is particularly interesting, for the Court's activism in statutory interpretation has been accompanied by its virtual abandonment of constitutional activism on federalism issues. In other words, "quasi-constitutional law," the reading into statutes of constitutional values subject only to clear legislative override, has replaced constitutional law, the invalidation of federal statutes, as the way in which the Court is enforcing "our federalism."

A. The Court's Uneven Application of the Individual Rights Canons, 1981-91

The Supreme Court in the 1980s continued to recognize the individual rights canons—the rule to avoid constitutional difficulties, the rule of lenity, and the presumption in favor of judicial review.[88] But the Court showed less enthusiasm for these canons. However uneven the Court was in protecting individual liberties through statutory interpretation in the 1970s, it was significantly less protective in the 1980s. This evolution was particularly apparent in cases pitting powerful groups in American society against marginalized ones, and the Court has abandoned most of the presumptions that in the 1970s favored *Carolene* groups.

Through the 1960s and 1970s, the Warren and Burger Courts interpreted civil rights statutes very liberally to protect the interests of the classic *Carolene* group, African Americans. In the 1980s, the Burger and Rehnquist Courts interpreted the same statutes much more restrictively. The trend in the Court's decisions was that if African American interests were aligned against those of another marginal group, the Court was often willing to interpret the statute to favor African Americans; but if their interests were aligned against those of a politically powerful group, the Court tended to favor the powerful group.

For example, in *Bob Jones University v. United States*,[89] a virtually unanimous Court rewrote the Internal Revenue Code to deny tax exemptions to educational institutions that openly discriminated against African Americans. Although the decision is a powerful application of the *Carolene* canon, it had only narrow impact, because the only

88. See *Burns v. United States*, 111 S. Ct. 2182, 2187 (1991) (avoiding due process problems); *McNary v. Haitian Refugee Center*, 111 S. Ct. 888, 898-99 (1991) (applying the presumption of judicial review); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (applying the rule of lenity); *Gomez v. United States*, 490 U.S. 858, 864 (1989) (avoiding Seventh Amendment problems); *United States v. Kozminski*, 487 U.S. 931, 939 (1988) (applying the rule of lenity).

89. 461 U.S. 574 (1983).

schools effectively penalized by it were those like Bob Jones University, an outlier fundamentalist school that openly discriminated because of religious conviction. Most schools that discriminate do so covertly, or even unconsciously, and *Bob Jones* has little effect on such covert discrimination. The IRS did not apply the *Bob Jones* rule to schools that discriminated more covertly, and in *Allen v. Wright*[90] the Burger Court made it hard for African Americans to sue the IRS to secure effective enforcement.

Perhaps more dramatically, the Supreme Court of the 1980s was almost never willing to interpret statutes to effectuate the rights of African Americans and other racial minorities to be free of workplace discrimination when their interests were opposed by employer and union groups.[91] The Court's abandonment of the *Carolene* canon protecting racial minorities took on the appearance of outright hostility in a series of six decisions handed down in May and June of 1989.[92] These decisions, which have triggered the most dramatic civil rights override since the Reconstruction Amendments overrode *Dred Scott*,[93] reinterpreted Title VII and related job discrimination statutes in ways that made it more difficult for African Americans to challenge workplace discrimination.

Notwithstanding the uproar over its 1989 decisions, subsequent job discrimination decisions have only reinforced the impression that the Court has abandoned the *Carolene* canon favoring racial minorities. For example, in *EEOC v. Arabian American Oil Company*,[94] the Court interpreted Title VII not to prohibit United States companies from discriminating against racial minorities who are employed outside of the territorial jurisdiction of the United States, notwithstanding the broad wording of Title VII.

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90. 468 U.S. 737 (1984).

91. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (plurality opinion increasing burden of proof for Title VII claimants); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982) (protecting pre-1964 seniority systems against Title VII attack); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) (strictly enforcing the confusing limitations period in Title VII).

92. *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (interpreting Title VII's counsel fees provision conservatively); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (reinterpreting Section 1981 not to provide a remedy for African American workers fired because of race); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989) (containing a stingy interpretation of the Title VII statute of limitations); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting repeated challenges to Title VII consent decrees by workers later harmed by affirmative action); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (tightening the burden of proof for Title VII claimants); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (providing employers with a new Title VII defense).

93. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The beginnings of this story are told in William N. Eskridge, Jr., *Reneging on History? The Court/Congress/President Game*, 79 Cal. L. Rev. 613 (1991).

94. 111 S. Ct. 1227 (1991).

Whatever vitality the *Carolene* canon favoring racial minorities had in the Burger Court has for the time being been extinguished in the Rehnquist Court. Interestingly, and at the same time, the Rehnquist Court has continued to apply the *Carolene* canon favoring women in workplace situations.[95] Thus the Rehnquist Court has extended Title VII to permit affirmative action for women,[96] to prohibit employer policies discriminating against potentially pregnant women to protect the fetus,[97] to permit state regulation discriminating in favor of women,[98] and to protect women against sexual harassment in the workplace.[99] Although middle-class and working women have had some successes during the Rehnquist Court, pregnant women desiring abortions, and especially women who are poor, have not fared so well, reflecting the Rehnquist Court's ambivalence on the abortion issue. In this context, the most striking case involving the Rehnquist Court's changing attitude toward canons protecting individual liberties is *Rust v. Sullivan*.[100]

In *Rust*, the Court upheld a Department of Health and Human Services (HHS) rule prohibiting doctors in a federally funded program from providing any information or counseling regarding abortion to pregnant women. Three dissenting justices argued that this interpretation of the statute violated both the First Amendment right of the doctors to provide advice to patients and the Fifth Amendment right of the patients to obtain abortions.[101] Dissenting separately, Justice O'Connor relied on the canon to avoid difficult constitutional issues, an approach which would seem tailor-made for the case because the statute was open-ended and the constitutionally suspect rule was one recently devised by HHS after twenty years of allowing such consultations. "If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly," explained Justice O'Connor. "That decision should be left to Congress; we should not tell Congress what it cannot do before it has chosen to do it."[102]

Rust v. Sullivan is important in several respects. It is concrete evidence of the Rehnquist Court's constitutional skepticism about abortion. However much the Court may interpret job discrimination statutes in favor of middle class working women, the Court is not willing to extend that *Carolene* canon to abortion situations. Moreover,

95. Unless the woman is a woman of color. See *Patterson*, 491 U.S. 164.
96. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).
97. *UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).
98. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).
99. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).
100. 111 S. Ct. 1759 (1991).
101. Id. at 1778 (Blackmun dissenting).
102. Id. at 1789 (O'Connor dissenting).

Rust suggests the possibility that the canon to avoid difficult constitutional issues may be a less efficacious protection for individual liberties during the Rehnquist Court than it was even in the late Burger Court. Perhaps significantly, in the leading Rehnquist Court case invoking the canon, the "difficult" constitutional issue involved separation of powers (asserted congressional invasion of the presidential appointments power) and not individual rights.[103] Finally, *Rust* may be significant in the Court's willingness to uphold arguably unauthorized agency action in the face of difficult constitutional issues. This deference to the executive branch is related to the Court's treatment of national and international structures through the canons, to which we now turn.

B. The National and International Powers Canons: Protecting the Prerogatives of the Executive, 1981-91

Like the Court in the 1970s, the Court in the 1980s was most enthusiastic about applying canons of interpretation to protect the structures of our national separation of powers and of international understandings.[104] Separation of powers was also a major theme of the Court's constitutional jurisprudence during the 1980s, though the Court waffled famously in its decisions. Nonetheless, the 1980s witnessed a dramatic change in the way the Court actually pursued these themes. In our view, the unifying element is an apparent hostility to the exercise of congressional power, in stark contrast to the Court's endorsement of broad presidential power. As evidence, we point to the Rehnquist Court's reformulation of two traditional presumptions as clear statement rules and its reformulation of one Burger Court clear statement rule as a new super-strong clear statement rule.

1. Rule Against Extraterritorial Effect of Statutes

In *EEOC v. Arabian American Oil Company (Aramco)*,[105] the Court recognized the power of Congress to pass statutes that have effect beyond the boundaries of the United States. But the Court countered that actual power with an old canon of construction as to its presumed

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103. *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). The second leading Rehnquist Court invocation of this canon, *Gomez*, 490 U.S. at 864, involved jury trial rights, but the Court has narrowly interpreted *Gomez* in a subsequent decision involving the same statutory provision. See *Peretz v. United States*, 111 S. Ct. 2661, 2666-67 (1991).

104. See *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991) (applying the rule that Congress does not displace the Court's inherent powers); *Mistretta*, 488 U.S. at 373 n.7 (suggesting the presumption against excessive delegation of congressional power); *Morrison*, 487 U.S. at 682-83 (interpreting a special prosecutor statute narrowly to avoid congressional invasion of executive prosecutorial power).

105. 111 S. Ct. 1227 (1991).

exercise, namely, " 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' "[106] According to the Court, the canon serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. The Court expressed the canon as a clear statement rule, to be displaced only by clear statutory language, which the Court did not find in the broadly phrased mandate of Title VII.

The dissenting opinion in *Aramco* presented a broad array of arguments suggesting that Congress in 1964 assumed that Title VII would apply to United States employees of United States companies, even those working abroad.[107] The dissent also argued that the Court's opinion transformed an old "presumption" into a new and more powerful "clear statement rule" that is in practice much harder to rebut: "Clear statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them."[108] While clear statement rules can only be trumped by statutory text, presumptions are merely one type of evidence the Court will consider, in combination with statutory text, legislative history, and other sources.

Most interestingly, the *Aramco* clear statement rule relies for its potency on considerations of international comity, even though such concerns are usually minimal when United States law regulates the conduct of United States companies toward United States citizens. This is even more anomalous when one compares *Aramco* with Rehnquist Court decisions giving an exceedingly narrow construction to international conventions entered into by the United States and foreign countries regarding service of process and discovery in transnational litigation.[109] In these decisions, the Rehnquist Court has been willing to negate international as well as congressional expectations when they run against settled United States practice and procedure. What ties together *Aramco* and these cases is the theme that the Court is now making it harder for Congress to subject United States companies to new

106. Id. at 1230, quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

107. Id. at 1240-44 (Marshall dissenting).

108. Id. at 1238.

109. Compare *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) (holding that the Hague Service Convention does not apply when a United States subsidiary is served as an agent of a foreign corporation) with id. at 714-16 (Brennan concurring in the judgment) (observing that international expectations were that the Hague Convention would apply). Compare *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522 (1987) (holding that the Hague Evidence Convention provides an optional but not exclusive way to obtain foreign evidence from a foreign litigant) with id. at 554-58 (Blackmun dissenting) (noting that international expectations were that the Hague Convention would be the exclusive mechanism).

duties and obligations when they are acting transnationally.

2. Super-Strong Rule Against Congressional Derogation of Presidential Foreign Affairs Power

In cases such as *Dames & Moore*, the middle Burger Court declined to interpret statutes to curtail the President's foreign affairs powers. This clear statement rule became stronger in the late 1980s. The best example is *Japan Whaling Association v. American Cetacean Society*,[110] in which the Court held that the Department of Justice did not violate the Packwood and Pelly Amendments when it failed to certify Japan's whaling practices to an international remedial body as an apparent violation of international agreements. Yet the Pelly Amendment on its face directed the Department to certify whether "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program."[111]

The Court concluded that it was not clear that Japan's practices, which regularly exceeded the international limits, "diminish[ed] the effectiveness" of those limits within the meaning of the Pelly Amendment.[112] According to the Court, the executive branch therefore enjoyed considerable discretion as to when it was required by statute to certify violations. This holding is a strained reading of the statutory text and is strongly contrary to the Pelly Amendment's legislative history.[113] What seemed to move the Court was the argument that the President needed flexibility not to certify so that he could negotiate a bilateral agreement with Japan on this matter. If that is so, *Japan Whaling* has transformed the *Dames & Moore* clear statement rule permitting Congress to abrogate traditional presidential powers only through a clear statement in the statutory text into a super-strong clear statement rule requiring the statutory clear statement to target the specific issue unmistakably. The super-strong clear statement rule in *Japan Whaling* protects presidential discretion in foreign affairs matters somewhat more than the ordinary clear statement rule in *Dames & Moore*.

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110. 478 U.S. 221 (1986).

111. 22 U.S.C. § 1978(a)(1) (1988). The Packwood Amendment followed the same certification process but required that it be expedited and removed the President's discretion not to impose sanctions. 16 U.S.C. § 1821(e)(2) (1988).

112. *Japan Whaling*, 478 U.S. at 232-33.

113. See id. at 247 (Marshall dissenting).

3. Rule Deferring to Agency Interpretations

The most important canonical development in the 1980s on national and international matters was the Court's creation of a clear statement rule deferring to agency interpretations. Before the 1980s, the Court had long deferred to agency interpretations of statutes the agencies were charged with enforcing, more as a practical, referential canon than as a clear statement rule inspired by constitutional considerations.[114] The Court in the 1980s transformed that traditional canon by imbuing it with constitutional significance and giving it more bite.

The first step came in *Chevron U.S.A., Inc. v. Natural Resources Defense Council.*[115] The Court reversed an appellate decision that had overturned a new EPA rule based upon the lower court's examination of legislative assumptions at the time the statute was passed. The Supreme Court held that the lower court had been insufficiently deferential to the agency's interpretation of a broadly worded statute. The Court grounded its holding in separation of powers terms. To the extent that Congress has left policy decisions ambiguous in statutes it passes, it is constitutionally less legitimate for unelected judges to make those policy choices than it is for executive agencies, which are responsible to the President, an elected official, to make them. *Chevron* transformed a practical, referential canon into a rule directly inspired by constitutional considerations.

Although suggestive, *Chevron* left open the question of what evidence a court can consider in deciding whether an agency interpretation is contrary to the statute. In *K Mart Corp. v. Cartier, Inc.*,[116] the Court seemed to say that a court may only consider the statutory text and structure in determining whether an agency interpretation is valid, suggesting the possibility that legislative history contrary to the agency interpretation would not suffice. As applied by the Court, the *Chevron* clear statement rule is the following: Unless refuted by the clear language of the statute, a court must defer to the agency interpretation.[117] The *Chevron* rule has pervaded the Court's statutory interpretation

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114. See, for example, *Udall v. Tallman*, 380 U.S. 1 (1965). The Burger Court, for example, required a formal delegation of rulemaking authority to an agency before it would defer. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 140 (1976). This may be changing in the current Court. Compare *Aramco*, 111 S. Ct. at 1236-37 (Scalia concurring in part and in the judgment).

115. 467 U.S. 837 (1984).

116. 486 U.S. 281 (1988).

117. See also *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *Cottage Sav. Ass'n v. Commissioner*, 111 S. Ct. 1503 (1991); *Martin v. OSHRC*, 111 S. Ct. 1171 (1991); *Mobil Oil Exploration & Prod. v. United Distribution Cos.*, 111 S. Ct. 615, 623 (1991); *Sullivan v. Everhart*, 494 U.S. 83 (1990); *Sullivan v. Zebley*, 493 U.S. 521 (1990); *Mead Corp. v. Tilley*, 490 U.S. 714 (1989).

cases in the last several years and is an important explanation for *Japan Whaling* and *Rust v. Sullivan.*

C. *The Federalism Canons: The Court's New Super-Strong Clear Statement Rules, 1981-91*

The most remarkable development in the 1980s was the greater enthusiasm the Court brought to the federalism-based canons. The Court not only created new canons reflecting federalism-based values, but also transformed some of the existing clear statement rules into super-strong clear statement rules. What is even more remarkable about these developments is that they occurred during a period in which the Court was abandoning any role in enforcing federalism values through constitutional interpretation. Consider the following array of clear statement rules and super-strong clear statement rules.

1. Rule Against Federal Conditions on State Administration of Federal/State Programs with Federal Funding

The decade of the 1980s began with a dramatic signal that the Supreme Court would use interpretive activism through clear statement canons to promote its vision of cooperative federalism. In *Pennhurst State School and Hospital v. Halderman*[118] the federal statute in question,[119] which provided financial assistance to states for the care and treatment of the developmentally disabled, included a bill of rights stating that people with mental disabilities have a "right" to "appropriate treatment" in the "least restrictive" environment.[120] In holding that the statute did not create enforceable rights against participating states, Justice Rehnquist's opinion for the Court acknowledged that "Congress may fix the terms on which it shall disburse federal money to the States."[121] The Court, however, then tempered congressional power to attach strings to federal money flowing to states with a new clear statement rule:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a

118. 451 U.S. 1 (1981).

119. The Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486, codified at 42 U.S.C. § 6000 et. seq. (1988).

120. 42 U.S.C. § 6010 (1988).

121. *Pennhurst*, 451 U.S. at 17.

> clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.[122]

This formulation is reminiscent of the famous requirement of a "knowing and voluntary waiver" of individual constitutional rights[123] that frequently arises in another quasi-contractual setting, plea bargaining.

Pennhurst created its canon by analogy to the longstanding canon requiring a clear congressional abrogation of a state's Eleventh Amendment immunity to suit in federal court.[124] Later in the opinion, the Court stated that its canon "applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate," and stressed that the "crucial inquiry . . . [is] whether Congress spoke so clearly that we can fairly say that the State could make an informed choice" to undertake the obligations in question.[125] In dissent, Justice White complained that precedent had not suggested, much less held, "that Congress is required to condition its grant of funds with contract-like exactitude," and that "Eleventh Amendment concerns are not implicated in these cases."[126]

The Court in *Pennhurst* stated in dictum that "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its spending power."[127] Later in the 1980s, however, the Rehnquist Court, in an opinion by its Chief Justice, uncoupled any linkage between judicial aggressiveness at the constitutional level and at the interpretive level in situations like *Pennhurst*. In *South Dakota v. Dole*,[128] the Court held that Congress could constitutionally condition a state's receipt of highway funds upon the state's illegalizing drinking by those under twenty-one years of age. The Court indicated that conditions on federal funds that do not violate parts of the Constitution other than the spending clause are subject only to the minimal requirement of being in pursuit of "the general welfare," a question on which "courts should defer substantially to the judgment of Congress."[129] In

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122. Id.

123. See *Johnson v. Zerbst*, 304 U.S. 458 (1938).

124. At the end of the block quotation in the text cited at note 122, the Court in *Pennhurst* included a "Cf." cite to *Employees of the Dep't of Public Health & Welfare v. Department of Public Health & Welfare*, discussed in text accompanying notes 69-70.

125. *Pennhurst*, 451 U.S. at 24-25.

126. Id. at 48 n.14 (White dissenting).

127. Id. at 17 n.13 (opinion of the Court).

128. 483 U.S. 203 (1987).

129. Id. at 207. Chief Justice Rehnquist also said that "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' " Id., quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978). Presumably this "rational relationship" test, if applied at all, would be undertaken very deferentially, in light of the Court's deference in determining whether an exercise of the spending power promotes the general welfare.

considering limitations on the spending power, *South Dakota v. Dole* quoted the *Pennhurst* canon, and in context this clear statement rule seems to be the only meaningful constraint.[130] Thus, judicial aggressiveness at the interpretive level correlates with judicial deference at the constitutional level.

2. Super-Strong Rule Against Congressional Waiver of States' Eleventh Amendment Immunity from Suit in Federal Court

The Eleventh Amendment canon, alive and well but lacking Herculean power in the middle years of the Burger Court,[131] underwent a steroidal transformation in the 1980s. What had once been a presumption-based approach to resolve federal statutory ambiguity—after statutory language, legislative history, and other factors were consulted—became a super-strong clear statement rule focusing on statutory language alone and requiring a very clear statement by Congress. In *Atascadero State Hospital v. Scanlon*,[132] Justice Powell's opinion for the Court concluded that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute."[133] Stressing that abrogation of Eleventh Amendment immunity, though within congressional power, disrupts the " 'constitutionally mandated balance of power' "[134] between the federal governments and the states, the Court stated that "it is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress *unequivocally* express this intention in the statutory language ensures such certainty."[135] In dissent, Justice Brennan complained that the freshly minted requirement

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130. See *Dole*, 483 U.S. at 207-08. In this period the death knell probably occurred in 1985 for any attempt to use constitutional law to cabin conditional federal grants to states. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had held that the federal power to regulate interstate commerce could not constitutionally be used to regulate certain core state functions. The *National League of Cities* limitation on the commerce power would have been somewhat analogous to federalism-based constitutional limits on the spending power. *Pennhurst* cited *National League of Cities* with a "see" citation following its dictum positing constitutional limits on tbe spending power. See 451 U.S. at 17 n.13. By 1987, when the Court addressed *South Dakota v. Dole*, *National League of Cities* had been overruled. For discussion of the demise of *National League of Cities* as a constitutional matter and the corresponding rise of a super-strong clear statement rule in its place, see text accompanying notes 144-154.

131. See text accompanying notes 66-70.

132. 473 U.S. 234 (1985).

133. Id. at 242 (emphasis added).

134. Id., quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985) (Powell dissenting).

135. *Atascadero*, 473 U.S. at 243 (emphasis added).

of an unusually strong clear statement frustrated congressional intent and was designed simply "to keep the disfavored suits out of the federal courts" based on "a fundamental policy decision, vaguely attributed to the Framers of Article III or the Eleventh Amendment, that the federal courts ought not to hear suits brought by individuals against States."[136]

Since *Atascadero*, the Court has stuck with this super-strong clear statement rule concerning congressional abrogation of Eleventh Amendment immunity and has applied a similarly strict approach to judging whether a state itself has waived its Eleventh Amendment rights.[137] Among the odd consequences of this approach are at least two worth noting. First, the process has played a kind of "bait and switch" trick on Congress, because older federal statutes that would have effected an abrogation of Eleventh Amendment immunity if judged under the less rigid canon of the era of their enactment are now found lacking in sufficient textual clarity.[138] Second, the canon has resulted in at least a partial realignment of the traditional conceptualization of the relationship among the federal government, the states, and Indian tribes. In *Blatchford v. Native Village of Noatak*,[139] the Eleventh Amendment canon trumped the longstanding canons favoring broad interpretation of federal statutes benefiting Indian tribes, as the super-strong rule was invoked to defeat a tribe's effort to rely upon a federal jurisdictional statute to sue a state in federal court. Indeed, as the dissent pointed out, the trumping was so complete that the majority opinion failed even to note that the Indian law canons exist.[140]

The Court has divided sharply on whether congressional power exists under the commerce clause to abrogate the states' Eleventh Amendment immunity,[141] and recent changes in the composition of the Court may result in a holding that the commerce power lacks this component. Nonetheless, it seems clear that Congress has this power when enforcing the Fourteenth Amendment.[142] Thus, the current state of the

136. Id. at 254 (Brennan dissenting).

137. For cases finding no congressional abrogation of state immunity because statutory language subjecting states to liability (and sometimes suit) was not "clear" enough, see *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). On state waivers under *Atascadero*, see *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (finding a state waiver).

138. See text accompanying notes 211-216.

139. 111 S. Ct. 2578 (1991).

140. See id. at 2587-90 (Blackmun dissenting).

141. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality opinion of Brennan, concluding that the commerce clause power includes the authority to abrogate Eleventh Amendment immunity).

142. Removing Congress's Fourteenth Amendment authority to abrogate Eleventh Amendment immunity would require overruling *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which the

law fits our pattern well—judicial restraint at the constitutional level, judicial activism at the interpretive level—and it is unlikely to change dramatically in the near future.

3. Super-Strong Rule Against Congressional Regulation of Core State Functions

Much ink has been spilled,[143] including some of our own,[144] examining the Burger Court's effort, by a 5-4 vote in *National League of Cities v. Usery*,[145] to provide states with a constitutional immunity against federal regulation of core state functions, and the Court's eventual overruling of *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,[146] another 5-4 case. Recently, the Rehnquist Court seems to have revived *National League of Cities*, at least as a new super-strong rule of statutory interpretation.

In *Gregory v. Ashcroft*,[147] the question was whether the proscription against mandatory retirement provided by tbe federal Age Discrimination in Employment Act[148] (ADEA) prevented a state from requiring its judges to retire by age seventy. The outcome turned on whether a judge was an "employee" for purposes of the statute. Elected state judges clearly came within an exception to the definition of "employee" for elected officials; appointed state judges also arguably came within a different exception, one for "appointee[s] on the policymaking level."[149] We did not expect this to be a difficult case: in our view, the admitted ambiguity of the "policymaker" exception should have been resolved through well-established canons and conventional statutory in-

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Court seems unlikely to do. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 15-16 (1989) (plurality opinion of Brennan) (citing recent cases reaffirming *Fitzpatrick*).

143. See, for example, Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84 (1985); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 S. Ct. Rev. 341; Martin H. Redish and Karen L. Drizin, *Constitutional Federalism & Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. Rev. 1, 38-39 (1987); Bernard Schwartz, National League of Cities *Again—R.I.P. or a Ghost That Still Walks?*, 54 Fordham L. Rev. 141 (1985); William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985).

144. See Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of* National League of Cities, 2 Const. Comm. 341 (1985); Philip P. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering* National League of Cities, 2 Const. Comm. 123 (1985).

145. 426 U.S. 833 (1976).

146. 469 U.S. 528 (1985).

147. 111 S. Ct. 2395 (1991).

148. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967), codified as amended, 29 U.S.C. §§ 621-34 (1988).

149. The exceptions were for "any person elected to public office in any State or political subdivision . . ., or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 29 U.S.C. § 630(f)(1988).

terpretive approaches, and appointed judges should fall outside the ADEA and be subject to state rules about retirement.[150]

In *Gregory*, Justice O'Connor's opinion for the Court agreed with our outcome, but reached it in a far more dramatic manner. Rather than relying upon conventional interpretive methods and canons, she created a new super-strong clear statement rule for federal regulation of at least some state functions. "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be *absolutely certain* that Congress intended such an exercise."[151] To support this new rule, Justice O'Connor referred to the policies of federalism and the super-strong clear statement rule enforcing federalism-based values in the Eleventh Amendment cases.[152] She also stated that the "responsibility" of the people of the states to determine the qualifications of their highest officers is, under the Tenth Amendment and the guarantee clause, of core constitutional significance.[153] The forcefulness of this rhetoric of federalism in *Gregory* is exemplified by Justice O'Connor's statement, remarkable to our eyes, that Congress's authority under the supremacy clause to preempt state law "in areas traditionally regulated by the States" is "an extraordinary power in a federalist system" that "we must assume Congress does not exercise lightly."[154]

The supremacy clause is an exception to our basic system of federalism, rather than a foundational premise upon which the Constitution replaced the Articles of Confederation? The guarantee clause goes beyond its words—which just say that the United States shall ensure that state governments are republican in form—to provide states with canonical interpretive protection against all but absolutely clear federal regulation of at least some state functions? That same guarantee clause that has been nonjusticiable for at least 140 years, if not forever?[155] *Gregory* is a breathtaking example of the Rehnquist Court's transfor-

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150. See Philip P. Frickey, *Lawnet: The Case of the Missing (Tenth) Amendment*, 75 Minn. L. Rev. 755 (1991). It is there argued that, although the plain meaning of the policymaker exception may support limiting it to executive branch officials, the sharp distinction between elected judges (who are exempted from the statute) and appointed judges (who would be protected) that would result cannot be defended in light of overall statutory purpose, the canon of avoiding absurd results, the canon of avoiding serious constitutional issues (concerning the irrationality of the purported distinction and, even post-*Garcia*, the extreme intrusion upon core state functions), and a policy of resolving genuine federal statutory ambiguity to avoid encroachment upon state processes.

151. *Gregory*, 111 S. Ct. at 2403 (emphasis added).

152. See id. at 2400-01.

153. Id. at 2402.

154. Id. at 2400.

155. See *Luther v. Borden*, 48 U.S. (7 Howard) 1 (1849).

mation from constitutional to interpretive activism on questions of federalism.

4. Presumption Against Statutory Regulation of Intergovernmental Taxation

Notwithstanding early suggestions that intergovernmental taxation is strongly disfavored under the Constitution,[156] the Court in this century has interpreted the Constitution to permit a wide variety of federal taxes that burden the states[157] and state taxes that burden the federal government,[158] so long as the taxes in question do not discriminate against national or state sovereigns, their obligations, or their employees. Like the federalism areas discussed above, intergovernmental immunity is no longer actively enforced by the Supreme Court as a matter of constitutional law. But a recent case suggests that the Court will deploy the precepts of its constitutional cases as a presumption for interpreting federal statutes touching upon intergovernmental tax immunity.

The issue in *Davis v. Michigan Department of Treasury*[159] was whether Michigan could exempt state employees from taxation of retirement benefits, while subjecting all other retired employees, including federal employees, to such taxes. A federal statute consents to state taxation of federal employees so long as it "does not discriminate against the officer or employee because of the source of the pay or compensation."[160] In *Davis*, of course, there was no state discrimination against federal retirees (they were treated exactly like retirees of private employers), but there was discrimination in favor of state retirees (they received a tax break unavailable to either private or federal retirees). Nonetheless, the Court was confident that the federal statute invalidated the unequal tax treatment, because the Court interpreted the federal statute as a mere codification of federal constitutional law,[161] even though the federal statute was actually enacted before the Supreme Court decisions that modernized intergovernmental tax immunity. The Court then evaluated the Michigan tax plan under its constitutional precedents.

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156. See *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 315 (1819), especially as interpreted in *The Collector v. Day*, 78 U.S. (11 Wallace) 113, 124-28 (1870); *Dobbins v. Commissioners of Erie County*, 41 U.S. 435 (1842).

157. *South Carolina v. Baker*, 485 U.S. 525 (1988).

158. *Graves v. O'Keefe*, 306 U.S. 466 (1939).

159. 489 U.S. 803 (1989).

160. 4 U.S.C. § 111 (1988).

161. *Davis*, 489 U.S. at 813. See also *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 396-97 (1983).

Davis at least stands for the presumption that federal statutes touching upon intergovernmental tax immunity are "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity."[162] The decision might also be read as one in which the Court avoided difficult constitutional questions by interpreting the statute's consent to state taxation narrowly. And *Davis* in the future might even be read to support a clear statement rule that the Court will interpret federal statutes in line with constitutional precedents unless the statutory text disavows those precedents.[163]

5. Presumption Against Applicability of Federal Statutes to State and Local Political Processes

The federalism values at work in *Pennhurst*, the Eleventh Amendment cases, and *Gregory* have strongly influenced the role of the rule of lenity in recent federal criminal cases involving state politics. Although these cases do not articulate a clear statement rule expressly, their results are perhaps best understood as creating a rebuttable presumption that federal criminal statutes will not be used as a weapon to interfere in local politics.

In *McNally v. United States*,[164] the Court held that the federal mail fraud statute[165] did not reach a scheme under which a state official and powerful persons in the state's dominant political party conspired to assign state insurance business to certain agencies that were required to "kick back" part of the insurance premiums. No monetary loss to the state was shown, and the federal prosecutor's theory of the case was that the conspirators had defrauded the state citizenry and the state government of their intangible right to honest government. Even though the mail fraud statute by its terms reached "any scheme or artifice to defraud,"[166] and even though applying it to these facts would have been consistent with the background of the statute and the inter-

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162. *Davis*, 489 U.S. at 813. See also *Memphis Bank & Trust Co.*, 459 U.S. at 396-97 (adopting a similar rule).

163. Note, however, that *Davis* itself carefully examined the legislative history of Section 111. See 489 U.S. at 811-813.

164. 483 U.S. 350 (1987).

165. 18 U.S.C. § 1341 (1988).

166. The statute subjected to criminal penalty:

> Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or purposes, . . . for the purpose of executing such scheme or artifice or attempting so to do, [uses the mails or causes them to be used].

Id.

pretations of it in the lower courts,[167] Justice White's majority opinion concluded that the statute protected only against fraud involving money or property rights. Justice White relied on a strong version of the rule of lenity, under which the harsher of two readings of a criminal statute should be chosen "only when Congress has spoken in clear and definite language."[168] He bolstered the application of the rule by noting that its use avoided involving "the Federal Government in setting standards of disclosure and good government for local and state officials,"[169] and he seemed dubious that federal criminal law should be interpreted to reach the acts of state officials and their associates that are not clearly in violation of the state's own laws.[170] Justice Stevens, in dissent, complained that the Court was using the rule of lenity to come to the aid of "the most sophisticated practitioners of the art of government" who ought to have known that their acts would be deemed unlawful based on precedents in the lower federal courts.[171]

More recently, in *McCormick v. United States*[172] the Court entertained another federal criminal case containing colorful facts about the realities of state politics. During his reelection campaign, a state legislator who had sponsored and secured passage of legislation important to an interest group in the past and had promised to do so again in the future informed the group's lobbyist that his campaign expenses were high and that "he had heard nothing" from the group—comments that sounded like a threat to abandon his promise to carry future legislation for the group unless a payment were received. The lobbyist then delivered a series of cash payments to the legislator, who neither listed them as campaign contributions nor reported them as income for federal tax purposes. Nor did the lobbyist record the payments as campaign contributions. The legislator was reelected and did sponsor more legislation for the group. Justice White for the majority in *McCormick* held that this conduct was not "extortion," as defined in the Hobbs Act.[173] Justice White interpreted the statute narrowly to require solid proof of an explicit quid pro quo, as opposed to mere anticipation of favorable future legislative action. A major reason to cabin the Hobbs Act was a fear of intruding into ordinary state political processes.[174]

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167. See *McNally*, 483 U.S. at 362-77 (Stevens dissenting.)
168. Id. at 359-60.
169. Id. at 360.
170. See id. at 361 n.9.
171. See id. at 375 n.9 (Stevens dissenting).
172. 111 S. Ct. 1807 (1991).
173. 18 U.S.C. § 1951 (1988) (defining extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right").
174. See *McCormick*, 111 S. Ct. at 1816.

Although the most dramatic examples of this nascent presumption involve federal criminal statutes, the presumption has figured prominently in at least one Sherman Act case, *City of Columbia v. Omni Outdoor Advertising, Inc.*[175] Although the Court did not explicitly formulate a clear statement rule, it reasoned that the federal antitrust laws need to steer clear of local politics and used that precept as the basis for its holding that public-private conspiracies to ruin competition are immune from Sherman Act liability.

6. Federalism as an Eroding Agent: The Potential Demise of the Canon Disfavoring State Regulation in Indian Country

The federalism values at work in *Pennhurst*, the Eleventh Amendment cases, *Gregory*, and the federal criminal cases also may have dramatically deflated the longstanding canon presuming that states have no regulatory role in Indian country. Federal Indian law is so murky that any conclusion about it is difficult and so technical that any full discussion of it would be diverting, but the development is worth noting in passing because it fits our thesis well.

In *Cotton Petroleum Corp. v. New Mexico*,[176] the Court upheld application of a state oil and gas severance tax upon a non-Indian company under contract with a tribe to extract oil and gas in Indian country, even though the practical incidence of the tax probably fell largely upon the tribe.[177] Justice Stevens' majority opinion acknowledged only grudgingly the existence of the Indian law canons[178] and then undertook a two-step process to defeat immunity from state taxation. Unlike earlier cases,[179] Justice Stevens essentially equated a contractor doing business with a tribe to a contractor doing business with the federal government. Since federal contractors are presumptively subject to state taxation, so too are tribal contractors. More fundamentally, in contrast to most conventional understandings of federal Indian

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175. 111 S. Ct. 1344 (1991). See also *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842, 1849 (1991) (Scalia dissenting) (adopting a presumption against a broad reading of the Sherman Act's interstate commerce component).

176. 490 U.S. 163 (1989).

177. Our discussion of *Cotton Petroleum* is based on Frickey, 78 Cal. L. Rev. at 1172-73, 1187-89, 1197, 1202, 1221, 1227-28, 1237 (cited in note 71). Rather than burden this Article with the technicalities of federal Indian law in general and *Cotton Petroleum* in particular, we ask interested readers to consult that source.

178. The Court noted that "although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence." *Cotton Petroleum*, 490 U.S. at 177.

179. See, for example, *White Mountain Apache Tribe*, 448 U.S. 136 (discussed in text at notes 82-84).

law flowing from the work of Chief Justice Marshall,[180] Justice Stevens seemed to view Indian reservations as presumptively within the jurisdiction of state legislative power.[181] If this approach to federal Indian law stands, the field has been turned on its head.

Again, strong conceptions of federalism have taken root at the interpretive level, this time potentially demolishing a longstanding canon of interpretation that cuts against state power. Again, this is occurring in an area in which the Court will not impose solutions through constitutional review. Not coincidentally, we also believe, the potential demolition of the Indian law canon was accomplished by equating tribes with the federal government, and then using the interpretive process to limit federal power to regulate within what the Court perceives to be the state's domain.

III. Concerns About the Supreme Court's New Canonical Jurisprudence

A theme that emerges from Part II is the following: The current Court does not see itself to be as constitutionally activist as prior Courts have been; it is loathe to strike down federal statutes that arguably violate precepts of separation of powers, federalism, international comity, freedom of speech and religion, nondiscrimination on the basis of race and gender, and so forth. Yet the current Court is unusually activist in the way it does statutory interpretation, creating clear statement rules and super-clear statement rules as means by which the Court can read constitutional values into statutes, albeit with the possibility of congressional override. The question is: Is the Court's posture normatively desirable?

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180. See text at notes 73-74.

181. The language in *Cotton Petroleum* is so inconsistent with Chief Justice Marshall's conclusions that it deserves quoting. "States and tribes have concurrent jurisdiction over the same territory," *Cotton Petroleum* states, apparently as a general proposition of law. 490 U.S. at 192. Moreover, turning to matters of taxation in particular:

> [A] multiple taxation issue may arise when more than one State attempts to tax the same activity. If a unitary business derives income from several States, each State may only tax the portion of that income that is attributable to activity within its borders. Thus, in such a case, an apportionment formula is necessary in order to identify the scope of the taxpayer's business that is within the taxing jurisdiction of each State. In this case, however, all of Cotton's leases are located entirely within the borders of the State of New Mexico and also within the borders of the Jicarilla Apache Reservation. Indeed, they are also within the borders of the United States. There are, therefore, three different governmental entities, each of which has taxing jurisdiction over all of the non-Indian wells. The federal sovereign has the undoubted power to prohibit taxation of the Tribe's lessees by the Tribe, by the State, or by both, but since it has not exercised that power, concurrent taxing jurisdiction over all of Cotton's on-reservation leases exists. Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over all of Cotton's leases.

Id. at 188-189 (citations and footnote omitted).

There is no clear answer to the inquiry we have just posed, because the Court is still moving tentatively, rather than definitively, toward articulation of new or revised clear statement rules and their application. In this Part we will propound what we consider the best available theory for what the Court seems to be doing, with a focus on the new super-clear statement rules grounded upon separation of powers and federalism, and suggest concerns with what we view as the Court's direction in this arena.

We begin our inquiry with a recognition that the Court has not thoroughly thought through its use of the canons in doing statutory interpretation and that much of what the Court has been doing may have been unconscious. Nonetheless, we believe there is an underlying theory embedded in what we see the Rehnquist Court doing with the canons. The theory is not shared by all the justices and perhaps is not unambiguously accepted by more than one or two. But the following theory provides the most sympathetic account for understanding the Court's activity.[182]

In a representative democracy such as ours, most important political decisions should be made by the political branches, primarily Congress and secondarily the Executive.[183] Judicial review in a democracy is exceptional and should be deployed by unelected judges only when there is a clear inconsistency between a statute or regulation and the Constitution.[184] Indeed, we have learned over time that certain constitutional values—most notably the structural rather than individual rights values—are either unenforceable by the Court because they involve essentially nonjusticiable political questions or will be underenforced by the Court.[185] These unenforced or underenforced constitutional norms include the nondelegation doctrine,[186] federalism

182. The following account is drawn liberally from William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 Cardozo L. Rev. 1597 (1991).

183. Article I vests the primary lawmaking power in Congress, though the President has a formal role through the veto of Article I, Section 7, and an important informal role through executive and agency rulemaking. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Also, the Executive may have a primary lawmaking role in some foreign affairs matters. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

184. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

185. For the latter idea, see Sager, 91 Harv. L. Rev. 1212. See also Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 Minn. L. Rev. 311 (1987).

186. See *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989) (finding the nondelegation doctrine too vague to enforce as constitutional law but suggesting it might be a useful precept of statutory interpretation); id. at 415-16 (Scalia dissenting generally, but concurring on this issue).

limitations on the national government,[187] and separation of powers.[188]

While a Court that seeks to avoid antidemocratic constitutional activism might refuse to invalidate federal statutes because of their infringement of these constitutional norms, such a Court might also seek other ways to protect those norms. One way to articulate and protect underenforced constitutional norms is through interpretive presumptions, clear statement rules, and super-strong clear statement rules—canons of statutory construction.[189] The canons, especially the "tough" ones, can protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly. Protecting underenforced constitutional norms through super-strong clear statement rules makes sense: it is not ultimately undemocratic, because Congress can override the norm through a statutory clear statement; such rules still provide significant protection for constitutional norms, because they raise the costs of statutory provisions invading such norms; and ultimately such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution.

This theory provides what we believe to be the best account of what the Rehnquist Court believes itself to be doing with the canons today. The canons are not necessary to protect individual liberties, such as those enshrined in the First Amendment, because those constitutional protections are not underenforced to the same extent that the structural protections are. Hence cases like *Rust v. Sullivan.* The canons are necessary to assure that the political branches make the most important policy choices in our democracy. Hence *Chevron.* And the canons are critically important to give meaning to underenforced constitutional norms, especially federalism norms. Hence *Pennhurst, Atascadero, Gregory,* and *Cotton Petroleum.* Hence, also, *Omni Outdoor*

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187. The commerce clause has emerged as a virtually limitless authorization for national regulatory legislation. See, for example, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). More generally, Article I, § 8 is either unenforceable or (at the very least) underenforced as a limitation on national power. The Court has held that the Tenth Amendment is unenforceable as a limitation on Congress's power to regulate the states directly. *Garcia v. San Antonio Metropolitan Transit Auth'y*, 469 U.S. 528 (1985).

188. Although the Court in *Bowsher v. Synar*, 478 U.S. 714 (1986), seemed poised to enforce separation of powers norms against an overreaching Congress, it dramatically retreated (over impassioned dissents by Justice Scalia) in *Morrison v. Olson*, 487 U.S. 654 (1988), and *Mistretta*, 488 U.S. 361, upholding unconventional arrangements. Consider also the Court's highly deferential view of the President's exercise of arguably unconstitutional foreign affairs powers in *Dames & Moore.* These cases suggest that separation of powers norms are underenforced, but not completely unenforced, by the Court.

189. This is not the only way, of course. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585 (1975), argues that Congress is in the best position to protect underenforced norms.

Advertising, *McNally*, and *McCormick*.[190]

Notwithstanding the attractiveness of this theory for the Court's use of the canons, there are several caveats we shall raise. They are concerns that (1) the Court's actual practice is incoherent with its theoretical underpinning in the concept of underenforced constitutional norms; (2) the Court's new canons are countermajoritarian and unnecessarily burden the legislative process; and (3) the Court's new canons reflect substantive biases that are hard to defend normatively.

A. Coherence Concerns

Although we believe that the theory outlined above is the most sophisticated and sympathetic theory that explains what the Court thinks it is doing when it creates and applies these new canons, especially the new super-strong clear statement rules, we fear that the Court's practice is ultimately incoherent with the logical consequences of the theory and with the Court's own recent precedents. In other words, even our best theory for the Court's practice falls apart upon further examination.

An initial difficulty is that the Court's actual practice is not consistent with the theory of underenforced constitutional norms. The leading theorists of underenforced constitutional norms—Lawrence Sager, Paul Brest, Stephen Ross—emphasize that constitutional provisions protecting individual liberties such as free speech and equal protection are underenforced because of the Court's concern about the countermajoritarian difficulties in striking down statutes enacted by popularly elected legislatures.[191] Their insight suggests the value of a clear statement rule to avoid constitutional difficulties, as articulated in *NLRB v. Catholic Bishop of Chicago*.[192] Yet the current Court does not enforce that clear statement rule vigorously;[193] it has instead created super-strong clear statement rules protecting structural norms. Thus, the theory of underenforced constitutional norms supports Justice O'Connor's minority view in *Rust v. Sullivan* rather than the majority's view, in which a novel agency interpretation overrode significant but underenforced constitutional values of free speech and gender equality.

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190. Under our theory, the Court would be most aggressive in enforcing the rule of lenity when a federal criminal prosecution invaded important state concerns. Both *McNally* and *McCormick* were federal prosecutions of state officials.

191. See Brest, 27 Stan. L. Rev. 585 (cited in note 189); Ross, 72 Minn. L. Rev. 311 (cited in note 185); Sager, 91 Harv. L. Rev. 1212 (cited in note 182).

192. 440 U.S. 490, 500 (1979).

193. Except to protect underenforced structural norms. See *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989) (applying the rule to interpret a statute to protect the President's freedom of consultation concerning judicial appointments).

The Court's probable response to this problem is that structural constitutional norms are more underenforced than individual rights norms are and, hence, require greater protection through something like super-strong clear statement rules. There is much to be said for this response, for the nondelegation doctrine and federalism are almost never enforced through constitutional invalidation of federal statutes, and separation of powers limits are rarely enforced. While the equal protection clause and the First Amendment might be *under*enforced, they seem to have more enforceable bite than the *un*enforced structural protections. Ergo the Court enforces the former through direct judicial review (constitutional law) and the latter through clear statement rules (quasi-constitutional law).

This response becomes problematic when one considers the stated reasons for *un*enforcement of structural constitutional norms. In *Garcia*, the Court announced that federalism-based limits on national power are unenforceable against Congress because the Court has been unable to develop "principled constitutional limitations" from the Tenth Amendment and the commerce clause and because "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[194] We shall focus on these federalism norms, but note that similar reasoning underlies the Court's failure to enforce the nondelegation doctrine and separation of powers.[195]

These reasons for unenforcement of federalism norms through judicial review are equally valid arguments for the unenforcement of federalism norms through statutory interpretation. On the one hand, if the Court fails to enforce structural constitutional norms because the Constitution provides little guidance as to their content in specific cases, how does the Court expect to come up with clear statement rules that are any more principled? The Court's decision in *Gregory v. Ashcroft* is not a very impressive effort in this regard. *Garcia* overruled *National League of Cities* largely because neither the lower courts nor the Su-

194. *Garcia*, 469 U.S. at 550.

195. Thus, in *Mistretta*, 488 U.S. at 371-379, the Court reasoned that the nondelegation doctrine provides insufficient standards for the Court to invalidate federal legislation. An equally obvious reason for not enforcing the doctrine is that the political system can be expected to self-regulate excessive delegation. To wit: Congress, the offender in cases of excessive delegation, has good reason to avoid or correct the problem, because excessive delegation diminishes congressional power.

Similar reasons apply in separation of powers cases. In foreign affairs cases in particular, the Court often expresses concern that it is not competent to judge executive action, and that the Constitution provides the Court with insufficient guidance. See *Goldwater v. Carter*, 444 U.S. 996, 998-1006 (1979) (plurality opinion). Moreover, in cases of Congress-versus-President conflict, each branch has means to protect itself against encroachment.

preme Court ever developed workable standards for implementing a constitutional immunity from federal regulation of states *qua* states.[196] *Gregory* threatens to return to the same quandary—at the interpretive rather than the constitutional level—of defining whether the subjects of regulation are "indisputably attributes of state sovereignty," whether state compliance with federal regulation "directly impairs" the state's ability "to structure integral operations in areas of traditional governmental functions," and whether the federal interest in regulation outweighs the state interest in autonomy.[197] *Gregory* itself provides little guidance on when to apply the super-strong canon, referring at one time or another to "areas traditionally regulated by the States,"[198] state decisions of "the most fundamental sort for a sovereign entity,"[199] "authority that lies at 'the heart of representative government,' "[200] and intrusion on "state governmental functions."[201] This list would seem to run the gamut from everything within the traditional police power to state operation of all its governmental processes to state methods of selecting high officials.

At a minimum, one would expect *Gregory* to immunize state processes of selecting judges from all but crystal-clear federal regulation. One would be wrong. The same day the Court handed down *Gregory*, it decided *Chisom v. Roemer*.[202] *Chisom* held that Section 2 of the Voting Rights Act,[203] which prohibits state electoral processes that result in the dilution of the voting strength of a racial minority, applies to the election of state judges. Justice Stevens' majority opinion approached the interpretive question quite conventionally, relying heavily upon the legislative history and purpose of the statute. The majority never even considered whether any super-strong clear statement rule about federal regulation applied; indeed, it did not even cite *Gregory*. In dissent, Justice Scalia argued that subsection (b) of Section 2, which refers to the right of minorities to "participate in the political process and to elect *representatives* of their choice,"[204] demonstrates that the statute does not reach judges, for they do not fit the ordinary definition of "representatives."[205] Justice Scalia noted the potential applicability

196. See *Garcia*, 469 U.S. at 537-47.

197. See id. at 537, (reciting the test of *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981), that implemented *National League of Cities*).

198. *Gregory*, 111 S. Ct. at 2400.

199. Id.

200. Id. at 2402.

201. Id. at 2406.

202. 111 S. Ct. 2354 (1991).

203. 42 U.S.C. § 1973 (1988).

204. 42 U.S.C. § 1973(b)(1988) (emphasis added).

205. See *Chisom*, 111 S. Ct. at 2370-72 (Scalia dissenting). The majority responded that

of the super-strong clear statement rule of *Gregory*, but acknowledged that perhaps *Gregory* was distinguishable.[206] Justice O'Connor was a member of the (silent) majority in *Chisom*, and thus we have no guidance from the author of *Gregory* about why it was inapplicable in the voting rights case.[207]

On the other hand, if the Court fails to enforce structural constitutional norms because it has concluded that the Constitution leaves enforcement of those norms to the political process (Congress and the President), then isn't the Court's creation of super-strong clear statement rules a backdoor way for the Court to take these issues back from the political process? Again, *Garcia* was premised in part upon the argument that it is not necessary for the Court to protect federalism values through judicial review, because the structure of the national

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"representatives" means "the winners of representative, popular elections." Id. at 2366.

206. Justice Scalia wrote:

> [I]n *Gregory* interpreting the statute to include judges would have made them the only high-level state officials affected, whereas here the question is whether judges were excluded from a general imposition upon state elections that unquestionably exists; and in *Gregory* it was questionable whether Congress was invoking its powers under the Fourteenth Amendment (rather than merely the Commerce Clause), whereas here it is obvious. Perhaps those factors suffice to distinguish the two cases. Moreover, we tacitly rejected a "plain statement" rule as applied to the unamended § 2 in *City of Rome v. United States*, 446 U.S. 156 . . . (1980), though arguably that was before the rule had developed the significance it currently has. I am content to dispense with the "plain statement" rule in the present case, . . . but it says something about the Court's approach to today's decision that the possibility of applying that rule never crossed its mind.

Id. at 2373.

A few brief comments are in order. *Gregory* may (and perhaps should) end up as simply a commerce clause precedent, but the majority opinion stated, arguably in dictum, that "this Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers." *Gregory*, 111 S. Ct. at 2405. *Gregory* also alluded to another federalism aspect of *Pennhurst* (discussed in other respects at text accompanying notes 118-130), in which the Court adopted a presumption that Congress is not exercising its Fourteenth Amendment enforcement powers in regulating states unless there is a clear statement to the contrary. See 111 S. Ct. at 2405-06. The Court in *Gregory* thought that "[t]he *Pennhurst* rule looks much like the plain statement rule we apply today," and accordingly interpreted statutory ambiguity against congressional power "regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." Id. at 2406. (By the way, contrary to Justice Scalia's comment, the Voting Rights Act was adopted pursuant to the Fifteenth Amendment, but that does not change the analysis.)

For more conflict over the meaning of *Gregory*, compare *Hilton v. South Carolina Public Railways Comm'n*, 112 S. Ct. 560, 566 (1991) (holding that *Gregory* is a rule of statutory interpretation rather than constitutional law) with id. at 568-69 (O'Connor dissenting) (finding that *Gregory* is rooted in the Constitution).

207. One percipient commentator, our colleague Dan Farber, has suggested that the real distinction between *Chisom* and *Gregory* is that in the former Congress was enforcing the guarantee clause by ensuring a more republican form of state government, while in the latter it was arguably interfering with the exercise of republican rights by the state citizenry in deciding what the terms of office for their high state officials should be. See Daniel A. Farber, *The Return of Federalism*, Trial Magazine 63-65 (Oct. 1991).

government protects states' interests and their sovereign integrity. If state sovereignty interests are well-protected by the structures of the national political process, what need is there for the Court to add extra protections by means of super-strong clear statement rules, such as those suggested in *Pennhurst, Atascadero, Cotton Petroleum,* and *Gregory*?

One might read these cases as a backdoor curtailment of *Garcia*.[208] Such a reading only renders the cases more deeply problematic, however. Although the Court's flip-flops in this area are notorious,[209] any effort to overrule an important and recently decided precedent such as *Garcia* would have to mount a persuasive rebuttal against the reasoning in that opinion. We are doubtful that the Court is capable of writing such a rebuttal, and we believe there is much to be said for the reasoning in *Garcia*. Just as *Garcia* suggested, the Court never developed clear standards for applying *National League of Cities*. And, as *Garcia* also suggested, the states are particularly well represented in the national political process.[210] In our view, the Court has a responsibility to answer these arguments if it intends to reverse (even if only in part) the *Garcia* rule through backdoor constitutional lawmaking.

B. Countermajoritarian Concerns

The coherence concerns developed above raise the related concern that the Court's new canons represent a form of judicial activism that is particularly questionable because it is backdoor. In other words, by enforcing federalism-based values through statutory interpretation, the Court has not avoided the countermajoritarian difficulty—indeed, the Court may well have only deepened it by engaging in under-the-table constitutional lawmaking. A possible response to this concern is that

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208. For example, Justice O'Connor, the author of *Gregory*, and Chief Justice Rehnquist, the author of *Pennhurst*, wrote emotional dissenting opinions in *Garcia*.

209. Namely, *Garcia* (in 1985) overruled *National League of Cities* (decided in 1976), which itself had overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968). Thus, this is not an area of law in which stare decisis has been an important constraint upon the Court. Indeed, a cynic might suggest that the issue of state constitutional immunity from federal regulation runs in something like an eight-year cycle.

210. Like *Garcia* itself, we do not rely on the original constitutional framework, in which the states elected Senators and constituted the Electoral College to elect the President, because those formalities have been overtaken by time. But functionally the interests of the states remain well represented. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L. J. 331, 348-49, 351-52 (1991) (observing that states are unusually successful in obtaining congressional overrides of Supreme Court decisions cutting against their interests); Carol Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 Urban Law. 301 (1988). For example, state and local governments quickly obtained a statutory override of *Garcia* itself in the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (1985), codified at 29 U.S.C. § 201 (1988).

the Court's new super-strong clear statement rules are essentially a constitutional way-station, a compromise position based upon the classic legal process concept of "due process of lawmaking."

The response would run as follows: Every time the Court interprets a federal statute or the Constitution, it is potentially imposing its own preferences on the product of the popularly elected legislature. Yet every time the Court engages in the political activity of interpretation, Congress can override the Court. Supermajorities in Congress, plus the consent of the states, are usually required to override the Court's constitutional interpretations limiting federal power, but only normal majorities are required to override the Court's restrictive statutory interpretations. Relatively speaking, therefore, the Court's implementation of federalism-based values through super-strong clear statement rules (quasi-constitutional law) is less countermajoritarian than its implementation of those values through direct judicial review (constitutional law).

Although this response makes a lot of sense, it is beclouded with ambiguities and difficulties. To begin with, the response does not provide any firm basis for believing that the aggregate amount of countermajoritarian judicial activity would be any less under the Court's backdoor, quasi-constitutional activism than under a regime of open constitutional activism. Indeed, there is good reason to think that the Court's super-strong clear statement rules might provide the Court with a cover for a great deal more countermajoritarian activism, overall, than would open invalidation through judicial review. For example, if the Court overruled *Garcia* and sought once again to enforce the Tenth Amendment, it would face a lot of political heat. Such political heat may have contributed to the Court's failure to deploy *National League of Cities* to strike down any federal law after 1976. Because the Court sees itself as using up political capital every time it invalidates a statute, it thinks twice about exercising judicial review. To the extent the Court does not see itself as being "on the spot" when it interprets statutes, it may believe it has more freedom to interpret statutes to thwart legislative expectations than it does to strike them down. In that event, the Court's overall level of activism may be much higher under a *Gregory* super-strong clear statement rule than under a *National League of Cities* constitutional rule.

Additionally, one should be careful not to understate the countermajoritarian nature of super-strong clear statement rules. Presumptions of statutory interpretation are sometimes countermajoritarian, because they are often rooted in values of special interest to the judiciary, such as the availability of judicial review. But such presumptions can be rebutted through reference to the circumstances of the legislation, includ-

ing legislative history. It is harder to rebut clear statement rules, because they require rebuttal on the face of, or by implication from, the statute itself. Thus, even ordinary clear statement rules are particularly countermajoritarian, because they permit the Court to override probable congressional preferences in statutory interpretation in favor of norms and values favored by the Court.

Recall *Aramco*, in which the Court interpreted the Civil Rights Act of 1964 to be inapplicable to American employees who work overseas for American companies. Given the sweeping language of the Act and the equally sweeping statements in the legislative history concerning the eradication of all manifestations of job discrimination, it seems very probable that Congress in 1964 would have expected the statute to apply in *Aramco*-type situations (which are much more common now than they were in 1964). As the dissent argued, the old presumption against extraterritorial application of U.S. law could have been rebutted by such evidence. The Court escaped from these arguments by reconceptualizing the presumption as a clear statement rule that could be rebutted only by textual evidence. This strikes us as strongly countermajoritarian.

If presumptions are often countermajoritarian and ordinary clear statement rules more countermajoritarian, then the Court's new super-strong clear statement rules are extraordinarily countermajoritarian: they not only pose the possibility of ignoring legislative expectations, but they also make it quite hard for Congress to express its expectations even when it is focusing on the issue. Consider the recent case of *Dellmuth v. Muth*.[211] The Court in that case applied the *Atascadero* super-strong clear statement rule to find that the Education of the Handicapped Act of 1975 (EHA) did not permit damage suits against the states. The decision was countermajoritarian, for the text assumed the viability of such lawsuits, and specific legislative history confirmed the assumption.[212]

But the decision was more than simply countermajoritarian. It suggested a certain judicial haughtiness and uncooperativeness that is surely inconsistent with the humble due process of lawmaking rationale for the Court's super-strong clear statement rules. For under the Supreme Court's prevailing Eleventh Amendment precedent in 1975,[213] when Congress adopted the statute, the jurisdictional language covering actions against the states plus the specific legislative history were prob-

211. 491 U.S. 223 (1989).

212. 121 Cong. Rec. 246-47 (Jan. 15, 1975) (statement of Sen. Williams, the Senate sponsor).

213. *Employees of the Dep't of Public Health & Welfare v. Department of Public Health & Welfare, Missouri*, 411 U.S. 279 (1973) (discussed in text at notes 69-70).

ably enough to rebut the presumption against congressional abrogation of the states' Eleventh Amendment immunity, and were perhaps even strong enough to satisfy a traditional clear statement rule. In 1985, of course, the Court changed its approach to the *Atascadero* super-strong clear statement rule.

Given this shift, Congress in 1986 enacted the following statute: "A State shall not be immune under the Eleventh Amendment . . . from suit in Federal Court for a violation of [statutes protecting people with disabilities, including the EHA]."[214] Congress complained that its intent in the Rehabilitation Act had been thwarted by *Atascadero* and overrode that decision in a way expected to head off state immunity claims under other statutes protecting people with disabilities. Yet in *Dellmuth*, the Court not only held that the EHA of 1975 failed to abrogate state immunity, but cited as evidence the subsequent 1986 statute, which contained the requisite clear statement but did not apply to the case in question.[215] Congress promptly overrode *Dellmuth* in 1990. What is most striking to us is that it took Congress three statutes and fifteen years to accomplish what Congress probably thought it had done in 1975. That is extraordinarily countermajoritarian.

As the *Dellmuth* example illustrates, the countermajoritarian nature of the Court's super-strong clear statement rules is not necessarily mitigated by the possibility of a congressional override. Even when Congress thinks it is overriding the Court, the Court has frustrated Congress's expectations in cases like *Dellmuth*.[216] More important, it is sometimes as difficult to override a Supreme Court statutory decision as it is to override a constitutional one. Thus, in the current period of divided government, with the President and the Court aligned on issues of civil rights against the preferences of Congress, an override of a Supreme Court statutory decision requires the same supermajorities in Congress that a constitutional amendment requires.[217] Even when the President is not opposed to an override, powerful interest groups—including the ones that won the Supreme Court case—will be,

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214. 42 U.S.C. § 2000d-7(a)(1) (1988).

215. *Dellmuth*, 491 U.S. at 227-32.

216. See *Nordic Village*, 60 U.S.L.W. at 4163 (Stevens dissenting). Compare *Ohio Pub. Employees Retirement System v. Betts*, 492 U.S. 158 (1989) (refusing to follow the Conference Committee directive in interpreting the ADEA) with id. at 182 (Marshall dissenting) (criticizing the majority for ignoring the Conference Report). Compare also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (majority opinion) with id. at 661 (Blackmun dissenting).

217. Overriding a statutory decision supported by the President requires two-thirds support in both chambers of Congress to overcome an actual or threatened presidential veto. U.S. Const., Art. I., § 7. This is the same supermajority required for Congress to propose a constitutional amendment. Id., Art. V. Of course, the latter must then be approved by three-quarters of the states, a requirement not posed for an override of a statutory decision.

and the legislative process offers numerous opportunities for determined minorities to thwart override efforts.

C. Normative Concerns

Notwithstanding concerns that the Court's new super-strong clear statement rules are not consistently linked to a coherent practice of judicial review and may in fact be a form of countermajoritarian judicial activism, the rules might be defended as justifiable activism. Perhaps the constitutional norms they protect are unusually valuable. Although the Rehnquist Court does not see itself as an activist Court, at least some of its decisions have sought to justify its clear statement rules as normatively desirable. In reading the Rehnquist Court's clear statement cases, we find three constitutional values that the Court is emphasizing: Executive rulemaking, federalism, and private ordering.

As we suggest below, the Court's special concern for each of these values is normatively questionable because the Court's special protection for each value slights other equally important constitutional values. But also consider throughout our discussion the way in which the Rehnquist Court's new clear statement rules reflect an overall constitutional vision that is strikingly old-fashioned:[218] Ordering by private elites is preferred over governmental intrusion; state power is preferred over national power; and rulemaking by the executive is preferred over lawmaking by Congress.

1. Preference for Ordering by Private Elites over Governmental Regulation

One theme that emerges from the Court's recent canonical activity is the Court's preference for private ordering over governmental regulation, but only when the private ordering is accomplished by traditional elites. This theme is a saddening one if borne out by the Court's activity in the 1990s, but it is a theme suggested by the Court's activity in the 1980s, especially near the end of the decade.

The theme is strongly suggested by the contrast between cases like *Aramco*, which transformed the presumption against extraterritorial application of federal statutes into a clear statement rule, and *Rust v. Sullivan*, which refused to apply the rule to avoid difficult constitutional issues to protect the interests of poor and middle-class preguant women who might desire abortions. The contrast is all the more striking

218. Note the striking similarity between how we see the Rehnquist Court's overall agenda and how Professor David Shapiro viewed Justice Rehnquist's personal ideological agenda in the mid-1970s. See David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293 (1976).

in that the Court in *Rust* relied heavily upon the agency position, thereby rejecting two decades of prior agency practice and legislative understanding, while the Court in *Aramco* refused even to discuss the longstanding agency position which the Court was rejecting. Although the constitutional values at stake in *Rust*—a woman's right to an abortion and a doctor's right to counsel her patients—are controversial within the Court, they strike us as much more worthy of protection than the pre-New Deal, pre-transnational business value of limited territorial effect. *Aramco*'s interest in this value, which gives important protections to transnational corporations, seems hard to understand.

Our contrast between *Aramco* and *Rust* is deepened by considering the Court's other Title VII decisions in the last few Terms. The primary observation is that when the interests of employers are threatened by vigorous enforcement of Title VII, the Court has all but uniformly cut back on the statute to protect those interests. The most significant victory for victims of discrimination came in *Johnson v. Transportation Agency*,[219] which reaffirmed the Court's prior approval of affirmative action in the workplace. In *Johnson*, however, both employers and unions were supportive of affirmative action, which gave them a mechanism to avoid disparate impact lawsuits. Thus, the Court has not regulated affirmative action plans adopted by unions and employers, but instead expressed its reservations about such plans by making it easier for employers and unions to defend against disparate impact ("bad numbers") lawsuits in *Wards Cove Packing Company v. Atonio*.[220]

From the perspective of the cynic, at least, the Court seems to have carefully calibrated its hostility to Title VII plaintiffs, strongly preferring the interests of women to those of African Americans, even though the statute itself was enacted mainly out of concern for the economic inequality of African Americans. Thus, *Johnson* expanded the Court's tolerance for affirmative action plans to help female employees as well as African American ones. And in the same Term that *Wards Cove* set back efforts by racial minorities to advance their place in the workforce, the Court handed down six decisions interpreting Title VII and related job discrimination statutes. Three of the decisions (including *Wards Cove*) seemed targeted against racial minorities in particular.[221] Two

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219. 480 U.S. 616 (1987).

220. 490 U.S. 642 (1989).

221. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (adopting a narrow view of Section 1981, which only protects against discrimination by reason of race); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting collateral attacks on prior consent decrees containing hiring and promotion preferences, the overwhelming majority of which contain preferences for African Americans); *Wards Cove*, 490 U.S. 642 (making burden of proof harder for plaintiffs in disparate impact cases, which are an important vehicle for uncovering racial discrimination).

decisions were generic procedural cutbacks, harming all Title VII plaintiffs.[222] One decision was a nominal victory for a plaintiff—an upper-class white woman who had met the male standards of a prestigious accounting firm yet still was denied employment opportunities.[223]

A different line of cases altogether also supports this theme. The Court in the late 1980s created a clear statement rule presuming that federal jurisdiction to enforce important national policies cannot be invoked when there is a private agreement to arbitrate—even though the agreement is arguably a boilerplate term in a contract of adhesion.[224] These decisions reflect a judicial willingness to abandon statutorily mandated federal jurisdiction in cases in which there is certain to have been unequal bargaining power, and hence a likelihood that private arbitral remedies will sacrifice national policies created by Congress.

To the extent that the Court is systematically protecting vested private interests from governmental intrusion, the Court is reflecting *Lochner*-era baselines, in which governmental regulation was the exception rather than the rule. That sort of activism—classically represented in *Aramco*—has been normatively passe since the New Deal. The Court's apparent insensitivity to the interests of African Americans seems normatively suspect after *Brown v. Board of Education.* While the Rehnquist Court may have good reasons for trimming back the Warren Court's activism in favor of racial minorities, it has advanced no defense for regression to a regime in which the Court seems hostile to minorities even while responding enthusiastically to more established interests. That all this has taken place at the sub-constitutional level—where the mysteries of and ennui about statutory interpretation may shroud what is actually taking place—is cause for particular concern.

2. Preference for State Sovereignty over National Regulation

A second theme of the Court's recent canonical jurisprudence is an intense devotion to protecting state sovereignty interests. Unlike the first theme, which emerges only after systematic scrutiny of the Court's recent decisions, this theme is one the Court is openly pursuing. For example, the theme is obvious from the Court's recent decisions pro-

222. See *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (interpreting counsel fees provision conservatively); *Lorance*, 490 U.S. 900 (containing a stingy interpretation of Title VII's statute of limitations).

223. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

224. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (involving an age discrimination claim); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (involving a securities law claim); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (also involving a securities law claim).

tecting state sovereignty from federal regulatory interference—such as *Pennhurst*'s clear statement rule against conditions attached to federal funding of state programs; *Gregory*'s super-strong clear statement rule against national regulation of core state governmental functions; *Atascadero*'s super-strong clear statement rule against federal abrogation of state immunity from lawsuits; *Davis*' presumption that federal statutes touching upon intergovernmental tax immunities follow Supreme Court constitutional decisions affording states wide leeway in taxing federal employees; *Cotton Petroleum*, which may signal the Court's willingness to undermine traditional canons protecting Indian tribes against state regulation; and recent decisions such as *Coleman v. Thompson*,[225] which presume against federal habeas relief and in favor of established state procedures for adjudicating constitutional claims of convicted criminals. Relatedly, the Court in *United States v. Nordic Village, Inc.*[226] has just extended the reasoning of these precedents protecting state sovereignty to create a super-strong clear statement rule against federal waivers of the United States' own sovereign immunity.

Unlike the first theme, the second theme seems more normatively attractive. Its main articulation is in *Gregory v. Ashcroft*, in which Justice O'Connor's opinion for the Court rhapsodized about the values of federalism:

> It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . . Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . .[227]

There is much to be said for this vision of federalism, and this value might be applied soundly in *Gregory*, which we think is an easy case for all the traditional reasons. But the value of federalism is not unambiguous even to the Court, which in *Chisom*, decided the same day as *Gregory*, ignored the value to apply the Voting Rights Act—a massive intrusion into core state sovereign functions—to regulate the elections of state judges.

Chisom suggests that however much our polity might value federalism, it is a value we are prepared to sacrifice for at least some overriding national policies. In particular, the Court has not grappled with the truly difficult issue of why federalism in particular (and sovereign im-

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225. 111 S. Ct. 2546 (1991) (holding that constitutional claims presented for the first time in state habeas cannot be subject to review in federal habeas).

226. 112 S. Ct. 1011 (1992) (extending the *Atascadero* super-strong clear statement rule to apply to waivers of United States sovereign immunity).

227. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2400 (1991).

munity generally) should not be sacrificed when individual rights and public policies are at stake. The dissenting opinion in *Coleman* put it well:

> Federalism, however, has no inherent normative value: it does not . . . blindly protect the interests of the States from any incursion of the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. "Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions."[228]

If, as both the *Gregory* majority and the *Coleman* dissent assert, federalism ultimately subserves the preservation of individual liberties, there seems scant reason not to sacrifice state sovereignty interests to individual rights in the name of, and not against, the norm of federalism. Federalism can mean that individual liberties are doubly protected—at both the state level and through national super-regulation. This is a reading of federalism that is more consistent with the supremacy clause of the Constitution, and with the Constitution's evolution as a document that protects individual rights and liberties. It is also a reading of federalism the Court itself gave in *Tafflin v. Levitt*,[229] which created a clear statement rule (based upon the supremacy clause) presuming that federal statutory schemes are enforceable in state as well as federal courts.

3. Preference for Executive Rulemaking over Congressional Lawmaking

Unlike the interpretive slant toward private ordering and state sovereignty, the Court's canonical preference for executive rulemaking over congressional lawmaking has been discussed widely in the scholarly literature, at least in the context of *Chevron* and judicial deference to agency interpretations.[230] Accordingly, as is appropriate at the end of a

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228. 111 S. Ct. at 2569-70 (Blackmun dissenting, quoting William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 432 (1961)) (objecting to the Court's cutting back further on babeas relief, based upon questionable and ritualistic invocation of "federalism").

229. 493 U.S. 455 (1990). See id. at 800-02 (Scalia concurring).

230. For discussions of *Chevron* and related developments, see, for example, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. Chi. L. Rev. 481 (1990); Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L.J. 511; Sidney A. Shapiro and Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 Duke L.J. 819; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093 (1987); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071 (1990).

long article, we may be brief.

From a normative perspective, this preference may be supportable both as promoting judicial economy and as accommodating our constitutional structure to the modern administrative state's need for flexibility.[231] But *Chevron* and *Japan Whaling* are also grounded in another normative value, deference of unelected judges to a democratically accountable branch. As with the federalism canons, this value seems superficially attractive. Yet, like homages to federalism, in this context encomiums to executive accountability seem acontextual and hollow. When the contest in a *Chevron* situation is expressed not as a choice between the interpretation of the democratically accountable executive branch and that of the unelected judiciary, but rather as a conflict between the democratically elected Congress that passed the statute in some year past and an executive agency connected to the current elected President, the invocation of democratic legitimacy for the Court's preference for executive rulemaking becomes much more problematic.[232] The implications of recasting the conflict in this way are particularly troublesome in the current era of divided government, in which one political party tends to control Congress and the other controls the executive branch and federal judicial appointments. Even if one does not subscribe wholeheartedly to the notion that the Court's preference for executive rulemaking is unabashed partisanship—the Republican judiciary supporting the Republican executive branch at the expense of the Democratic Congress—both the appearance and practical effect of the preference are normatively questionable.

CONCLUSION

In the early years of the Burger Court, quasi-constitutional law was of interest to conservative constitutional scholars because it would give Congress "a role in fixing the consequences" of constitutionally activist judicial review in the promotion of individual rights.[233] It is a measure of how far public law has evolved since then that today constitutional scholars of a quite different ideological perspective might entertain quasi-constitutional law as preferable to typical *Marbury*-style judicial review in the hands of today's Court. Thus, the current constitutional centrist or liberal might view *Gregory* as preferable to *National League*

231. See generally Strauss, 87 Colum. L. Rev. 1093 (cited in note 230).

232. See Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. Ill. L. Rev. 399. For a game-theoretic assessment of the strategic possibilities for the Supreme Court along these lines, see William N. Eskridge, Jr. and John Ferejohn, *The Article I, Section 7 Game*, 80 Geo. L. J. 523 (1992).

233. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 45 (1975).

of Cities, Chevron better than reviving the nondelegation doctrine, and so forth.

In our view, at least one key question is whether this preference amounts to anything more than purely comparative pragmatism. In other words, for example, is *Gregory* supportable on its own terms, or is the only nice thing that can be said about the decision that its consequences are somewhat less drastic than imposing the same value judgments through traditional judicial review and reviving *National League of Cities*?

As we have explained, in the abstract there are powerful arguments for quasi-constitutional law rooted in a vision of our public lawmaking processes as a partnership in which the judiciary plays an active role, but eventually defers to the democratically accountable branches. In some contexts, these arguments may have substantial persuasive power. We fear, however, that they have had little contextual bite in many of the recent cases in which the Court has employed sub-constitutional interpretive techniques. We also fear that a lack of recognition and candor about what the Court has done recently with quasi-constitutional law has submerged a variety of hotly contestable normative and empirical issues. Modesty may be a "species of nobility," as Spinoza once wrote,[234] but judicial modesty cloaking judicial activism strikes us as falling into another category altogether.

234. Benedict Spinoza, *Ethics* 126 (A. Boyle transl., E. P. Dutton, 1941) (orig. ed. 1670).