

THE SUPREME COURT 1993 TERM

FOREWORD: LAW AS EQUILIBRIUM

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FOREWORD: LAW AS EQUILIBRIUM

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With the confirmation of Justice Stephen Breyer to the United States Supreme Court, the legal process school has quietly attained what every Supreme Court litigator seeks: a majority on the Court. Along with Justice Breyer, Justices Scalia, Kennedy, Souter, and Ginsburg are all alumni of Henry Hart's and Albert Sacks's Harvard Law School courses on "The Legal Process." As such, they have been schooled in legal process's emphasis on the creation of law by interacting institutions, the purposiveness of law and these institutions, and the mediating role of procedure. Perhaps it should not be surprising, then, that the Supreme Court's 1993 Term was replete with these themes, even before Justice Breyer clinched a numerical majority for Hart and Sacks.

The appearance of legal process graduates on the Court comes at an appropriate time. The 1990s is a decade of downscaling in American public law. The constitutional activism characteristic of the Warren Court, and perpetuated to a surprising degree by the Burger Court,¹ has given way to the Rehnquist Court's comparative reluctance to expand, or in some cases even to protect, established constitutional rights of individuals. It has been up to Congress to fill the gaps, partially, with rights-creating or -expanding statutes.² With the decline in the Court's constitutional activism has come a corresponding paucity of discourse about values in the federal courts. The Warren Court contributed to an intensified normative conversation in law that the more cautious Burger Court continued. At the same time that issues of privacy, gender and racial equality, sexual and religious freedom, and the environment continue to generate fierce debate in the

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¹ See, e.g., Anthony Lewis, *Foreword to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* at vii, vii (Vincent Blasi ed., 1983).

² See, e.g., The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (to be codified at 42 U.S.C. § 2000bb) (expanding free exercise protections beyond those afforded in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990)).

halls of Congress, the playing field for these issues in the courts is now usually statutory rather than constitutional interpretation.³ Ironically, the Rehnquist Court's passivity in constitutional cases has been partly offset by a greater activism in statutory interpretation cases. Nevertheless, the shift to statutory interpretation appears to have lowered the stakes of court debates and limited the role of lawyers as litigators and jurists.

At the same time, legal process theorizing about public law has enjoyed a renaissance.⁴ Legal commentary in the 1990s has shown diminished interest in value-laden republican or natural law theories and greater interest in pragmatic theories of public law.⁵ More importantly, for our purposes, commentators are open to theories that explore the institutional context of public law's evolution. In this Foreword, we draw upon positive political theories of institutional interaction to engage in what some readers may consider a scandalous thought experiment. Positive political theory claims that lawmaking institutions are rational, self-interested, interdependent, and affected by the sequence of institutional interaction. When viewed through this lens, law is not simply a formality of deductive analogical reasoning, nor a battle over policy in which traditional conceptions of legal reasoning operate only as a facade for the direct exercise of raw power.

Instead, law is an equilibrium, a state of balance among competing forces or institutions. Congress, the executive, and the courts engage in purposive behavior. Each branch seeks to promote its vision of the public interest, but only as that vision can be achieved within a complex, interactive setting in which each organ of government is both

³ Discussion of statutory interpretation has become correspondingly more prominent in the academic literature. See, e.g., Symposium, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754, 1755 (1993) [hereinafter Symposium, *Speluncean Explorers*]; Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529, 530 (1992) [hereinafter Symposium, *Canons*]; see also Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 4-5 (1993) (noting the explosion in academic literature on statutory interpretation). Statutory interpretation has also received attention in the popular press. For example, several stories about the nomination of Justice Breyer discussed his approach to statutory interpretation. See, e.g., James H. Andrews, *Breyer Would Join Court's Swing Center*, CHRISTIAN SCI. MONITOR (Boston), July 18, 1994, at 6; Linda Greenhouse, *Portrait of a Pragmatist: Confirmation Hearing for Breyer Elicits His Emphasis on Rulings' Lasting Effects*, N.Y. TIMES, July 14, 1994, at A1, D22.

⁴ Witness the publication this year of the 1958 "tentative edition" of HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), and the revived interest those materials have received from legal academics, especially in the 1980s. See *id.* at cxxv-cxxvi.

⁵ Compare Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988) (discussing, at length, the implications of a "revival" of civic republicanism) with DENNIS PATTERSON, *LAW AND TRUTH* (forthcoming 1995) and RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 456 (1990) (arguing that law cannot "accurately or usefully be described as a set of concepts, whether of positive law or of natural law").

cooperating with and competing with the other organs. To achieve its goals, each branch also acts strategically, calibrating its actions in anticipation of how other institutions would respond. We doubt that many readers will question our assumptions of institutional rationality and interdependence with respect to Congress, the President, and administrative agencies. To some lawyers, however, the notion that the Supreme Court engages in strategic behavior may be shocking.

Be that as it may, we believe that any sophisticated vision of modern public law requires an analysis such as ours. If one rejects the formalistic notion that, for judges, law is a closed system of objectively discoverable rules, one should be able to imagine a Court acting strategically in some circumstances. It may be difficult to demonstrate such behavior in any given case, but generating hypotheses and testing them against known information may reveal a basis for inferring the existence of such behavior.

The 1993 Term of the Court is the field against which we will develop our thesis and its ramifications. The main positive consequence of our thesis (developed in Part II) is that law's equilibrium will be a dynamic one. At any given time, most legal issues are in a state of stable equilibrium; even if temporarily displaced, the institutions move back toward the stable position.⁶ The most interesting public law issues, however, tend to be those in which technological, social, or economic changes have rendered an equilibrium unstable, or at least susceptible to movement. At that point, one of the institutions of government, often the Court, will in fact successfully shift public policy to render it more reflective of its own preferences. As a matter of doctrine, we conclude, the Court will interpret statutes to reflect legislative deals in the short-term and new political balances over time. In both instances, the Court will usually defer to agencies as the most reliable barometers of political equilibria (if there be any). The Court's constitutional interpretation is equally dynamic, transparently accommodating apparent national equilibria. For national policies, the Court has displaced most constitutional activism to the quasi-constitutional realm of statutory clear statement rules, but the Court remains activist in reviewing state and local measures.

In short, the 1993 Term's decisions cannot persuasively be understood as mere applications of rule-of-law methods in which the Court neutrally or objectively applies authoritative text or precedent to new issues. Nor are the decisions completely explicable as the Court's sim-

⁶ Stable equilibrium is the common law ideal, best exemplified at the Supreme Court level in admiralty cases. Even when the Court creates new admiralty rules, it is careful to demonstrate the consistency of the new rules with other developments in law and society. *See, e.g.,* *Boca Grande Club, Inc. v. Florida Power & Light Co.*, 114 S. Ct. 1472, 1472 (1994) (Stevens, J.); *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1464-65 (1994) (Stevens, J.); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 408 (1970) (Harlan, J.).

ple application of its own conservative values. Rather, we maintain that the decisions are only comprehensible if viewed as a complex amalgam of rule-of-law and substantive values applied selectively by a strategic Court.

It is in the Court's self-interest to behave strategically, and the Court does so, constantly. Is such a Court normatively attractive? Supplementing the positive vision developed in Part II with suggestions from normative political theory, we develop the tentative outline of a complex prescriptive framework in Part III. On the one hand, viewing law as equilibrium offers a way to reconcile theoretical tensions between democratic values and the rule of law. On the other hand, a Court that exploits policymaking opportunities too often *or* that never confronts a flawed national consensus is disserving both democracy and the rule of law.

I. LAW AS EQUILIBRIUM AND THE ROLE OF THE SUPREME COURT

Oliver Wendell Holmes viewed law as prediction, usually prediction of what the courts would say the common law is.⁷ In the modern administrative state, in which statutes have largely displaced the common law and agencies are the main interpreters of statutory law, Holmes's idea might be expressed in a more complicated way: law is a prediction of the rules that interacting government institutions will apply. The interaction is typically sequential. Congress enacts statutes acceptable to the President, agencies implement them through regulations and enforcement proceedings, the judiciary interprets the statutes and agency actions, and Congress considers amending the statute to update it or to override errant interpretations. A consequence of sequence is that each institution has trumping power. The rule adopted by each institution can be undone by the next institution to act. Congress is the only institution that can enact statutes, subject to the President's veto power,⁸ and agencies can implement the statute in a variety of ways that thwart or expand upon the original legislative design.⁹ The Supreme Court can overturn a Congress-President consensus through statutory or constitutional interpretation.¹⁰ The Court's action, in turn, is subject to the possibility of an override by

⁷ See Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

⁸ See U.S. CONST. art. I, § 7.

⁹ Execution of the "laws" adopted by Congress is regulated by Article II of the Constitution, which places no clear formal constraint on executive agencies. Independent agencies are not clearly regulated at all by the Constitution, and there is nothing in the Court's precedents that requires these agencies to be simple agents of Congress.

¹⁰ Article III of the Constitution imposes no clear formal constraints on the Court's exercise of the "judicial Power" to interpret statutes to resolve cases. *The Federalist* No. 78 contemplated that the judiciary would give narrowing interpretations to "unjust and partial laws" and would invalidate laws inconsistent with the Constitution. See THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Congress acting with the President (for statutory and some constitutional cases) or by a constitutional amendment. Given this potential for sequential trumping, a modern lawyer whose client needs to know what the law “is” has a far more complicated predictive task than that described by Holmes.

The operation of this sequential structure is illustrated by the evolution of Title VII of the Civil Rights Act of 1964,¹¹ which was originally aimed at prohibiting intentional race discrimination in the workplace. A liberal Equal Employment Opportunity Commission (EEOC) early on gave the statute a broader reading, to prohibit employment practices that have an unintended but disparate impact upon racial minorities.¹² A moderately liberal Supreme Court accepted the EEOC’s interpretation in 1971,¹³ and for eighteen years there was a stable institutional equilibrium as to disparate impact liability. A differently constituted Court displaced that equilibrium in 1989,¹⁴ but Congress overrode the Court and reinstated the prior equilibrium through the Civil Rights Act of 1991.¹⁵ A Holmesian in 1964 could not have anticipated the developments in the 1990s, or even in the 1970s. A Holmesian in 1990, however, could have predicted that the law would move back toward the earlier EEOC view,¹⁶ but such a prediction would have had to be based upon an evaluation of Court-Congress-President dynamics and not upon expectations about what any single institution — such as the common law courts on which Holmes focused — was going to do.

Reaching beyond Holmes’s position that law is simply prediction, legal process thinkers maintained that law is purposive, serving the social and economic needs of citizens.¹⁷ For these thinkers, prediction cannot be completely separated from prescription. What one thinks law “is” cannot be segregated from what one thinks law “ought to be” to achieve its purposes. Similarly, institutional interaction is purposive: each institution not only contributes to the general purposes of state activity or the law in question, but also contributes in a way appropriate to its own functions and competence within the system. The history of Title VII reveals that all the relevant actors sought to

¹¹ Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992)).

¹² See HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA* 244-50 (1990).

¹³ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

¹⁴ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-61 (1989) (imposing new burdens of proof on *Griggs* plaintiffs).

¹⁵ Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.).

¹⁶ This was indeed the prediction made in William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 661-62 (1991).

¹⁷ See LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 8-10 (1940); HART & SACKS, *supra* note 4, at 6-9, 102-05, 148.

implement the general principle of racial equality, but approached the task from different institutional perspectives. Congress established the legal rights and obligations outlined by the statute, but did so at a high level of abstraction. Application of the law to specific fact situations and unforeseen problems was the province of the EEOC and the courts. These implementing bodies applied the law in light of their understandings of its purposes. In turn, a later Congress was available to override applications or interpretations that did not meet its conception of the statute's proper goals and effects.

Law is not simply a prediction that preexists the sequential, hierarchical, and purposive interaction of institutions. It is, instead, a product of that interaction — an *equilibrium*, that is, a balance of competing institutional pressures. It is a stable equilibrium when no implementing institution is able to interpose a new view without being overridden by another institution.

For example, in *Patterson v. McLean Credit Union*,¹⁸ a closely divided Supreme Court held that Title VII, which precluded money damages, was the exclusive federal remedy for claims of racial discrimination in the workplace. This was law in the positivist sense — an authoritative statement by the institution that declares the law — but not in a deeper legal process sense, for the decision was contrary to a consensus among other institutions favoring monetary remedies for racial discrimination in the workplace.¹⁹ The Civil Rights Act of 1991²⁰ overrode the *Patterson* decision but raised a new uncertainty. Although the relevant institutions were in a stable equilibrium as to the general issue of workplace discrimination remedies after 1991, they were not in stable equilibrium as to a specific issue: Did the 1991 Act apply retroactively? Congress had sent mixed signals. The EEOC and most lower courts held that the statute's provision of remedies was not retroactive, and the Supreme Court this Term upheld that position in *Rivers v. Roadway Express, Inc.*²¹ Unlike the Court's decision in *Patterson*, which temporarily displaced a stable equilibrium, the Court's decision in *Rivers* created a stable equilibrium. Neither the President nor Congress was willing to place race-based job discrimination back on the political agenda after the exhausting effort that yielded the 1991 Act.

¹⁸ 491 U.S. 164, 178–80 (1989) (rejecting an application of 42 U.S.C. § 1981 (1988) to racial discrimination arising from the conditions of a person's employment).

¹⁹ See Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner at 15–16, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (No. 87-107); Brief of Forty-Seven States, the District of Columbia, and Three Territories as *Amici Curiae* in Support of Petitioner at 13–15, 23–24, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (No. 87-107).

²⁰ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72; H.R. REP. NO. 40 (I), 102d Cong., 1st Sess. 92–93 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630–31.

²¹ See *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1519–20 (1994).

Although the legal process philosophy suggests that law is equilibrium, positive political theories allow us to develop more systematically the legal process approach to institutions.²² Such theories start with the axioms that institutions are *rational* in taking actions that serve their preferences or goals, and that, in pursuing such goals, institutional actors act in light of the knowledge that they are *interdependent*. This interdependence suggests that institutions will behave *strategically*, anticipating the responses of other institutions and signaling the nature and intensity of their preferences to the other institutions. We explain these hypotheses below and, in Part II, apply them to analyze the Court's decisions in the 1993 Term.

A. Institutional Rationality and Interdependence

To say that an institution behaves "rationally" is to say that the institution makes choices that plausibly advance its goals. American jurisprudence has traditionally insisted that public institutions, especially the Supreme Court, behave rationally in this sense. What has divided competing jurisprudences is their different conceptions of the Court's characteristic or permissible goals.

The turn-of-the-century formalists and their current heirs maintain that the Court has a single goal: declaring and enforcing the rule of law. Whereas Congress makes the law and the President and agencies execute the law, the Court declares the law by drawing upon preexisting authorities — the Constitution, statutes, and precedents — and makes the law coherent by reconciling authorities over time.²³ This goal can be expressed in political theory terms as imparting a sense of continuity, stability, and reliability to the law's obligations.

Holmes implied and the legal realists believed that the Court is rational in a different sense: it seeks to import its own substantive preferences into law and policy.²⁴ While formalists maintain a sharp

²² For introductions to "rational choice" or "positive political" theories of the institutional political process, see JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* at vi, vii, 3–9 (1962); WILLIAM H. RIKER & PETER C. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* 1–7 (1973); Symposium, *Positive Political Theory and Public Law*, 80 *GEO. L.J.* 457, 458 (1992). Earlier political science works exploring the role of the Supreme Court within an interdependent political system include WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 26–28 (1964) and C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT, 1957–1960*, at 128–33 (1961). See also ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED 152–87* (1986) (describing the role of the Court as part of the institutional evolution of transportation policy).

²³ On the classical formalists, see Thomas Grey, *Langdell's Orthodoxy*, 45 *U. PITT. L. REV.* 1 (1983). For recent exemplars of formalist inquiry, see Charles Fried, *Constitutional Doctrine*, 107 *HARV. L. REV.* 1140, 1144 (1994); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1184 (1989); and Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 950–53 (1988).

²⁴ When we speak of an institutional preference, we are usually referring to the preference of a controlling group of people within the institution or, at times, to the preference of the institution's "median" member.

distinction between legislative and judicial rationality, realists see the goals of both institutions in instrumentalist terms. Like the President and Congress, the Court reads the Constitution, statutes, and common law precedents in light of its own specific policy preferences or its general network of beliefs and attitudes.²⁵ Pressing the realist attitude, most political scientists tend to view judicial lawmaking as simply distributing power and benefits to groups and interests favored by the Court.²⁶

In addition to the formalist and realist conceptions of institutional rationality is the legal process conception:²⁷ the Court's goal is to preserve the integrity of its institutional character, as well as its special position in American society. Courts are special because they are neutral bodies that adjudicate disputes. When the Court makes decisions about public law, it should be careful neither to sacrifice its adjudicative integrity, nor to undermine its legitimacy in American government. Within these confines, the Court should contribute to lawmaking by using its comparatively greater ability to engage in the reasoned elaboration of principle.

There is good sense in each of these three ways of understanding the Supreme Court's goals, as illustrated by the decision in *Patterson*. The written opinion presents its holding as faithful to stare decisis and mandated by a clear statutory text.²⁸ Some commentators are unimpressed with the formal coherence of the decision and view it as the Court's expression of its substantive dissatisfaction with the multiplication of often expensive remedies for discriminatory acts.²⁹ Finally, the decision can be viewed as resulting from the Court's hesitation to extend its own precedents in a way that might affront a coordinate branch because such a reading would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims" set up by Congress and administered by the EEOC.³⁰ None of these ways of reading *Patterson* is greatly superior to the other two; the decision reflects a combination of rule-of-law (formalist), substantive policy (realist), and institutional competence (legal process) goals

²⁵ See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 102-06 (1930); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 39-40 (1934).

²⁶ See, e.g., LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE* 311-12 (1992); GLENDON SCHUBERT, *THE JUDICIAL MIND* 37-41 (1965); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

²⁷ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959).

²⁸ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-75, 176-82 (1989).

²⁹ See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* ch. 8 (1994); see also Mark V. Tushnet, *Patterson and the Politics of the Judicial Process*, 1988 SUP. CT. REV. 43, 57-59 (arguing that the Court's willingness to raise, sua sponte, the issue of overruling precedent was inspired by the Justices's views about civil rights).

³⁰ *Patterson*, 491 U.S. at 180.

of the majority of Justices. Just as a cable with three interwoven threads is stronger than a single-threaded string, so a decision supported by three different institutional purposes is stronger than a decision supported by a single one.³¹

Similarly, under our understanding of law as equilibrium, law that is a balance among three interacting branches is superior to law as it might be produced by a single institution. The law that results from the input of executive or independent agencies and courts should be a better informed, more widely acceptable law than that fresh out of the legislature.³² Three heads might be better than one, especially if, as legal process theory posits, each head brings a special expertise and satisfies different requirements the citizenry expects from its government. Thus, the Civil Rights Act of 1964 might be a better law if Congress, the President or the EEOC, and the Court interact by rationally pursuing their different institutional goals. One advantage of law as institutional equilibrium is that it renders law more adaptable over time because groups objecting to outdated legal rules have multiple fora in which to press their petitions for change. Additionally, this feature of law might yield more broadly acceptable rules because their evolution will reflect inputs from various institutions.³³

A challenge suggested by the equilibrium nature of law is that the institutions might operate at inefficient cross-purposes, generating unstable or inconsistent rules. Because each institution potentially has different constituencies to satisfy, the institutions may be drawn into a spiral of perpetual mutual trumping, as each tries to achieve its distinctive goals.³⁴ This risk is mitigated by a further feature of law as

³¹ The cable-string metaphor is inspired by the cable-chain metaphor in 5 CHARLES S. PEIRCE, COLLECTED PAPERS ¶ 264 (Charles Hartshorne & Paul Weiss eds., 1960).

³² This was contemplated by THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See also DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 189-90 (1984) (arguing that a judiciary can beneficially influence law-making through its interpretation of the statutory and constitutional law).

³³ Cf. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 672-80 (1981) (arguing that the redundancy of having many possible judicial fora embodied within the federal system of concurrent jurisdiction results in a fairer and more innovative judicial system). The institutions — Congress, the President or the EEOC, and the Court — are likely to be heterogeneous in their approaches, because their personnel are put in office at different times and serve different terms of office under different rules of maximum service, and because the institutions are accountable to different constituencies, operate from different norms and traditions, and have different staff services.

³⁴ The challenge is related to the phenomenon of majority “cycling,” in which choice among three alternatives by players with complex preferences will not yield a single inevitable choice. See WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 119-23 (1982). However, procedures and institutional structures ameliorate cycling in the political process. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 49-55 (1991); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 511-14 (1981).

equilibrium: the interacting institutions act with an awareness of their interdependence.³⁵

B. *Institutions and Anticipated Response*

Interdependent decisionmakers cannot achieve their rational goals simply by choosing the course of action that directly satisfies those goals. Instead, decisionmakers will behave strategically, choosing the course of action that best achieves their goals in light of how they anticipate other decisionmakers will respond to their own possible choices. For example, an astute taxpayer desiring to minimize her tax liability will likely not claim all of her personal expenses as tax deductions, at least in part because she anticipates that the Internal Revenue Service (IRS) would not only disallow many of the deductions, but might impose heavy penalties upon her. The tax-avoiding taxpayer will consider in her calculation how she thinks the IRS would respond to her different possible deductions; she might take a few borderline deductions, but not the ones the IRS rejects in its regulations, nor the ones that she thinks would trigger a full-fledged audit.

Government institutions can be expected to engage in similar *anticipated response* calculations. In deciding whether it will disallow our taxpayer's deductions, the IRS will consider whether its preferred action — squeezing more money out of the taxpayer — would likely be appealed and, if so, sustained in the Tax Court. The Tax Court, in turn, will evaluate the IRS's position not only in light of the Tax Court's preferences, but also in light of whether its decision would be reversed by the Court of Appeals, which will in turn be informed by its appraisal of the prospect of being reversed by the Supreme Court. Understanding this sequence and knowing a great deal about the preferences of the other institutions (the Tax Court, the Court of Appeals, the Supreme Court, and Congress, which can override the agency and the courts), the IRS will rationally choose the tax deduction policy that best meets its goals without risking an override by the institutions that may subsequently respond. The IRS might speculate as follows: we want to deny deduction "x" but will not do so if we know the Tax Court would reverse our decision; the Tax Court will not reverse us if it thinks the Court of Appeals or the Supreme Court will ultimately agree with us; hence the key issue is whether the Supreme Court (or Congress) will disagree with the IRS's view. Thinking backward like

³⁵ Hart and Sacks argued that human beings are by nature social and interdependent, and that our interdependence gives rise to our need for government as a coordinating mechanism. See HART & SACKS, *supra* note 4, at 2, 105. We flip their argument: the existence of state organs imposes interdependence upon both private and public institutions.

this, the IRS will roughly anticipate the equilibrium point and, if well-informed, will choose that point as its own policy.³⁶

Although we believe that the Supreme Court is not as often influenced by the anticipated response feature of institutional decisionmaking as are agencies and lower courts, there is a growing body of empirical evidence indicating that the Court bends its decisions to avoid overrides or other political discipline.³⁷ As we now explain, such behavior is rational, whether the Supreme Court's preferences are dominated by rule-of-law, instrumental, or institutional concerns.

Thus, where the substantive preferences of key Justices dominate their rule-of-law preferences (even if unconsciously), the Court — like our taxpayer and the IRS — is likely to calibrate its response to avoid an override that would set back its substantive agenda. Consider our theory as a way of thinking about *Planned Parenthood v. Casey*.³⁸ The Joint Opinion of Justices O'Connor, Kennedy, and Souter created a legal regime allowing substantial state regulation of abortion even as it reaffirmed *Roe v. Wade*.³⁹ At least two of the three Justices had expressed doubts about *Roe*'s reasoning and its broad pre-emption of state abortion laws.⁴⁰ Their best course of action, however, was to reaffirm *Roe* while curtailing its ambit. The Justices were aware that an explicit overruling of *Roe* would have stimulated a firestorm of protest against the Court and would probably have prodded Congress to enact the proposed Freedom of Choice Act,⁴¹ which would have pre-empted more state regulation. By preserving but narrowing *Roe*, the three Justices in *Casey* achieved a variety of goals: states could regulate abortion within certain parameters, the freedom of choice bill was effectively derailed, and the Court as an institution avoided dam-

³⁶ See John A. Ferejohn & Charles R. Shipan, *Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy*, in CONGRESS RECONSIDERED 393, 397–99 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 4th ed. 1989) (discussing the constraints legislatures as well as individual committees place on agencies' policy position choices).

³⁷ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 390–403 (1991); see also Jeffrey A. Segal, *Courts, Executives, and Legislatures*, in AMERICAN COURTS 373, 388–89 (John B. Gates & Charles A. Johnson eds., 1991) (discussing a study showing increased deference following executive attempts to curb the Court's power but leaving open the question of whether this increased support resulted from changes within the sitting Court's own views or from changes in the Court's composition brought about by the appointment process).

³⁸ 112 S. Ct. 2791 (1992).

³⁹ 410 U.S. 113 (1973).

⁴⁰ See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 518–20 (1989) (Rehnquist, C.J., for a plurality, including Kennedy, J.) (rejecting *Roe*'s trimester framework and applying an unspecified level of scrutiny); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 453–59 (1983) (O'Connor, J., dissenting) (expressing a willingness to reconsider *Roe*).

⁴¹ S. 25, 102d Cong., 2d Sess. (1992); H.R. 25, 102d Cong., 2d Sess. (1992); see S. REP. NO. 321, 102d Cong., 2d Sess. 7 (1991); Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 46–52 (1993).

aging attacks upon it.⁴² Indeed, the Court may have emerged with an enhanced reputation for neutrality, as it appeared that the Justices in the Joint Opinion were rising above their personal preferences to reaffirm the rule of law embodied in *Roe*.

The Court's avoidance of overrides may also be animated by its concern for its institutional position. This is a lesson of the Civil Rights Act of 1991, which was triggered by five decisions in the 1988 Term.⁴³ Although narrow Court majorities viewed the decisions as reflecting rule-of-law values, the cogency of that view was undermined by the perception that the Court was redistributing legal entitlements to disadvantage African-American employees like Brenda Patterson, the loser in one of the cases.⁴⁴ In Congress's view, all five decisions were uncooperative interpretations of statutes enacted to prohibit job discrimination. The Court's legitimacy was shaken, but not irreparably, and the Court has been careful since 1991 to avoid the impression that its civil rights decisions are anti-minority. *Casey* can be similarly viewed as the effort by centrist Justices to position the Court as neutrally as possible on the issue of abortion. These centrist Justices rationally understood that a position rejected by big majorities in Congress and by the public would not be regarded as legitimate.⁴⁵

⁴² The Joint Opinion acknowledged the "sustained and widespread debate *Roe* has provoked," *Casey*, 112 S. Ct. at 2812, and concluded that the Court's image as a legitimate institution would be imperiled by overruling *Roe*. See *id.* at 2814-16. The Joint Opinion contrasted the overrulings of *Lochner v. New York*, 198 U.S. 45 (1905) and *Plessy v. Ferguson*, 163 U.S. 537 (1896) as legitimacy-enhancing for the Court, essentially because those precedents had been overtaken by new understandings about American society. See *Casey*, 112 S. Ct. at 2812-16. The overrulings of those precedents reflected power realignments in American society; the rise of labor unions doomed *Lochner* and increased legal and political participation by African-Americans doomed *Plessy*.

⁴³ See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The 1991 Act also overrode decisions from the 1990 Term, see *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991), and from the 1985 Term, see *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

⁴⁴ See, e.g., ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM I* (1990) (commenting that the Rehnquist Court's civil rights decisions cast doubt on the Justices' belief in the persistence of "a race problem").

⁴⁵ Many commentators have asserted that Supreme Court decisions often reflect public opinion. See, e.g., THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 97 (1989); William Mishler & Reginald S. Sheehan, *The Supreme Court as Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 90-91 (1993) (arguing that Supreme Court decisions taken as a whole usually reflect liberal-conservative swings in public opinion, and that the 1988 Term, when *Patterson* and the other anti-minority interpretations of Title VII were handed down, was the most exceptional divergence). But see Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 711, 716 (1994) (rejecting the claim that public opinion has a direct effect on the Court and arguing "[w]hatever influence public opinion exercises . . . occurs indirectly, through the choice of justices by presidents chosen by the people").

Finally, *Casey* illustrates how the Court's rule-of-law values might themselves augur in favor of its considering legislative reactions. It is far from clear what the rule of law required in *Casey*. Does the Due Process Clause's protection of "liberty" include a woman's "liberty" to control her body? Has *Roe v. Wade* been so undermined by subsequent decisions that it carries no force as precedent? There are honest differences of opinion as to what the rule of law required in *Casey*. If the current Congress has a clear view as to what "liberty" means under the Due Process Clause or under a statutory analogue, that understanding may be relevant to the rule-of-law meaning of that provision — especially if one interprets the rule of law to be a rule of authoritative textual commands.⁴⁶

C. Institutional Signalling and Implicit Bargains

Overrides are hardly the only means by which interdependent lawmaking institutions communicate with one another.⁴⁷ Lawmaking institutions routinely send "signals" to one another⁴⁸ — expressions of preference that have no traditionally understood legal "authority." Nonetheless, a signal may have legal consequences, and these consequences may have been precisely the reason for the signal. For example, "dictum" in a Supreme Court opinion is not law in a formal sense and has no binding stare decisis value.⁴⁹ Yet what the Court says in its opinions, whether it is essential to the holding or not, is often treated as "law" by other legal actors, especially lower courts. Committee reports generated in Congress and messages and statements generated in the White House are likewise signals sent to the other institutions and are often treated as evidence of legal equilibria by agencies, courts, and private parties.

⁴⁶ Professional linguists consider conventionally accepted word usage in determining what language means and whether a text is ambiguous. See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 16–17, 94–95 (1993); Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 *YALE L.J.* 1561, 1568–69 (1994).

⁴⁷ Institutions also communicate directly. The President talks to Congress through speeches, messages, or lobbying; congressional leaders regularly report to the President, and all congressional members gripe to agencies; both Congress and the President communicate to the Court through arguments and briefs in cases involving their interests, and sometimes through a personal appearance before the Court. See, e.g., *Dalton v. Specter*, 114 S. Ct. 1719, 1722 (1994) (deciding 9–0 against Sen. Specter, who came before the Court both as plaintiff and lawyer).

⁴⁸ On signalling games of the type we are describing, see JEFFREY S. BANKS, *SIGNALING GAMES IN POLITICAL SCIENCE* 3–6 (1991); William B.T. Mock, *Game Theory, Signalling, and International Legal Relations*, 26 *GEO. WASH. J. INT'L L. & ECON.* 33, 35–40 (1992); Edward P. Schwartz, Pablo T. Spiller & Santiago Urbiztondo, *A Positive Theory of Legislative Intent*, 57 *LAW & CONTEMP. PROBS.* 51, 55–59, 71–74 (Winter 1994) (special issue).

⁴⁹ For instance, in some cases in the 1993 Term, the Court declined to follow dicta. See *Heck v. Humphrey*, 114 S. Ct. 2364, 2369–70 (1994) (Scalia, J.); *Department of Taxation & Fin. v. Milhelm Attea & Bros.*, 114 S. Ct. 2028, 2034 (1994) (Stevens, J.); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1676 (1994) (Scalia, J.).

Signals contribute to the efficient operation of an institutional system. Like bids in a game of bridge, signals are a relatively cheap way for cooperating institutions to exchange preferences in the process of reaching the best contract or deal.⁵⁰ When the Supreme Court fills up an opinion with dicta, it is usually laying out a broad roadmap of its views in the case at hand, without having to wait for other cases to raise all the issues. So, too, committees in Congress may avoid the effort of putting together time-consuming statutory deals by stating their understanding of the relevant law in reports dealing with related bills. The President can avoid the political costs of a veto by massaging the signed bill with his ameliorative interpretation of its effects.⁵¹ Signals express not only an institution's preferences, but also the intensity of those preferences. Strongly directive dicta, committee report language, and presidential signing or veto statements put other institutions on notice that they are in for a fight if they ignore the messages being sent.

Compared with formal overrides, signalling is also a less conflictual way for lawmaking institutions to communicate with one another. Without actually striking down federal legislation, the Supreme Court can lay out limitations on congressional authority through dicta in constitutional opinions and narrow constructions of statutes that venture close to constitutional boundaries. The Court rationally sends such signals to avoid unnecessary conflict with an institution that can hurt the Court badly.⁵² Congress rationally attends to such signals because the Court in turn can undermine congressional interests by narrowly construing or by invalidating statutes.

This kind of signalling among lawmaking institutions has the systemic advantage of resolving most institutional disputes without open, mutually destructive conflict. Over a period of time, moreover, signals and actions consistent with those signals can be a way that interde-

⁵⁰ See JOHN VON NEUMANN & OSKAR MORGENTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 53-54 (3d ed. 1953).

⁵¹ See Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 363, 366 (1987); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 700-01, 704-07 (1991).

⁵² Although the congressional powers to override the Court by proposing constitutional amendments, to impeach and to remove Justices, and to strip the Court of jurisdiction over specified classes of cases are hard to invoke, their mere threat may have some effect. See MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 126-31 (1982); Segal, *supra* note 37, at 383-86. It is easier for Congress to hurt the Court by refusing to raise judicial salaries to keep up with inflation, by ignoring the Chief Justice's administrative and personnel requests, and by overloading the judiciary with too many cases. See Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 345-47 (1988). Sustained congressional criticism of the Court may lower the Court's prestige as well.

pendent institutions create implicit bargains.⁵³ Institutions have differing priorities as well as preferences about public law issues. Their differing preferences create risks of conflict, but their differing priorities offer ways to minimize or to avoid conflict. By a series of signals and actions, the coordinate institutions can indicate their priorities and their willingness to reach deals whereby each institution defers to the most important preferences of the others.

On the other hand, if institutions are competing rather than cooperating, signals must be viewed differently. Like bluffs in poker or false-carding in bridge, signals might be a way for one institution to gain strategic advantages over its competitors, by suggesting a state of affairs that would discourage the other institutions from aggressively pursuing those interests.⁵⁴ Because the Supreme Court, the President, and Congress are competitors for national power as well as cooperating institutions, we would expect both sincere signals and bluffs in these institutions' bargaining games.⁵⁵

*Marbury v. Madison*⁵⁶ illustrates this complexity. By refusing to participate or to file papers in the case, Secretary of State Madison signalled the Jeffersonian Administration's possible defiance, which Congress seconded by abolishing the 1802 Term of the Court.⁵⁷ These signals were credible to the Court, which signalled its own disapproval of the administration by declaring the refusal to deliver Marbury's commission unlawful, but avoided a mandamus by invalidating the statute purportedly giving the Court jurisdiction to hear the case. The Court's holding set out the power of judicial review and signalled the Marshall Court's willingness to strike down the administration's acts in other settings. This was probably a bluff on the part of the Court, which struck down national legislation only twice before the Civil War.⁵⁸ In this century, the Court has rarely deployed its judicial re-

⁵³ See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 294, 295-96, 299-302 (1993).

⁵⁴ See VON NEUMANN & MORGENSTERN, *supra* note 50, at 51-55.

⁵⁵ A further complexity is introduced by the incentives members of the Court or Congress have to generate signals that reflect their own preferences but not those of the institution as a whole. Thus, legislators through colloquies and judges through concurring opinions try to influence the law, but their efforts are usually recognized as bluffs. Tougher calls are posed by congressional committee reports and dicta in opinions for the Court; individuals have incentives to bluff, but the institution monitors bluffs rather effectively.

⁵⁶ 5 U.S. (1 Cranch) 137 (1803).

⁵⁷ See Robert L. Clinton, *Game Theory, Legal History, and the Origins of Judicial Review*, 38 AM. J. POL. SCI. 285, 287, 298 (1994); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 5.

⁵⁸ See *Marbury*, 5 U.S. (1 Cranch) at 180; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857).

view powers to challenge the President's or Congress's core powers or to thwart a powerful national political consensus.⁵⁹

II. IMPLICATIONS OF LAW AS EQUILIBRIUM: THE 1993 TERM

The 1993 Term provides a laboratory for studying the implications of understanding law as equilibrium. Our analysis is both positive and critical. On the one hand, we maintain that viewing law as equilibrium suggests an easily comprehensible rationality in the Court's approach to issues of constitutional law, statutory interpretation, and administrative law. On the other hand, we maintain that the Court's decisions are not completely explicable in terms of either formalist (rule-of-law) or realist (policy) theory. Hence, our view of law as equilibrium is not only a sufficient theory for the 1993 Term, but a necessary one as well.

A. *The Role of the Court in Constitutional Law: Acquiescence in National Consensus, Vigilance Against State Advantage-Taking*

Constitutional cases offer the Court wide-ranging lawmaking opportunities, but at substantial institutional peril. When the Court invalidates statutes as violative of the Constitution, the Court is able to displace an existing equilibrium or, more dramatically, to establish a new equilibrium where the Court wants it to be. The Court in those cases can usually be overridden only by a constitutional amendment, which is costly and impracticable because it requires supermajorities in Congress and among the states.⁶⁰ The Court's decisions invalidating state-required school prayer⁶¹ and protecting flagburners,⁶² for example, were highly unpopular and vigorously denounced by legislators,

⁵⁹ See Robert A. Dahl, *Decision Making In a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285-86 (1957). We follow Dahl's critics in believing that an account of Supreme Court activism must take into account the Court's decisions striking down state legislation and interpreting federal legislation narrowly. See, e.g., JOHN B. GATES, *THE SUPREME COURT AND PARTISAN REALIGNMENT* 14-15, 17 (1992); Jonathan Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 60-62 (1976); Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 309-12 (1993). But we follow Dahl in maintaining that the Court does not directly invalidate important national equilibria often. See Frank H. Easterbrook, *The Demand for Judicial Review*, 88 NW. U. L. REV. 372, 379 (1993).

⁶⁰ See U.S. CONST. art. V; Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 112 (1993); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 218-19 (Jon Elster & Rune Slagstad eds., 1988).

⁶¹ *Engel v. Vitale*, 370 U.S. 421, 424 (1962), *reaffirmed in* *Lee v. Weisman*, 112 S. Ct. 2649, 2657 (1992).

⁶² *Texas v. Johnson*, 491 U.S. 397, 420 (1989), *reaffirmed in* *United States v. Eichman*, 496 U.S. 310, 312, 318-19 (1990).

but efforts to override them foundered on the difficult process of constitutional amendment.

The costs or risks of such constitutional activism are substantial, however.⁶³ Judicial invalidation of congressional or presidential action on constitutional grounds is a challenge to powerful national institutions. Even if a constitutional amendment to override the Court is not feasible, Congress or the President can hurt the Court institutionally and, if they care deeply enough, can undermine the Court's action through the appointments process.⁶⁴ A further risk is that the Court's announcement of new constitutional principles often commits the Court to an institutional investment over the long run: hearing more cases that elaborate upon the original constitutional principle, monitoring lower courts as they apply the principle, and reconsidering the principle in light of unforeseen ramifications. Given its severely limited resources and agenda, the Court cannot make new constitutional commitments often.⁶⁵

The Court generally, and individual Justices particularly, can be expected to consider several factors in contemplating such commitments.⁶⁶ Two considerations are the intensity as well as the nature of the Court's preferences about the issue and the likely costs of judicial activism, discounted by the Court's tolerance for risk. Here, the Court's institutional concerns and its substantive value preferences work together to produce an outcome. If a risk-averse Court finds challenged governmental action at best mildly objectionable and foresees high costs of administering a new constitutional rule, the Court is unlikely to create such a new rule. The current Court is both risk-averse and politically conservative. Hence, this is not a Court that is going to interfere much with the death penalty⁶⁷ or to expand upon the substantive element of the Due Process Clause to protect individ-

⁶³ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 199-206 (1962); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 175-81 (1970).

⁶⁴ See *supra* note 52.

⁶⁵ "[A] court that decided the equivalent of five cases such as *Brown v. Board of Education* in a single year would have seen the end of the institution, I am sure," said Alexander Bickel. Conference, *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 476 (1964).

⁶⁶ Like other political institutions, the Court is a collection of individuals, each of whom has her or his own preference configuration. Indeed, because the Court consists of a small number of individuals (nine, usually), the preferences of any one may be important. Thus, even if the institutional considerations discussed in this section were important for only one Justice (and we would insist that they influence all or most), they could often be critical for the Court as an institution. Since the Supreme Court takes only the "hard cases," i.e., ones that have yielded divisions in the lower courts or involve important national political issues, the Court is often closely divided. In a closely divided (five-to-four or six-to-three) Court, one or two Justices can be critical to the Court's decision.

⁶⁷ See, e.g., *Tuilaepa v. California*, 114 S. Ct. 2630, 2636-39 (1994) (Kennedy, J.); *McCleskey v. Kemp*, 481 U.S. 279, 314-19 (1987) (Powell, J.); cf. *Callins v. Collins*, 114 S. Ct. 1127, 1127 (1994) (denying certiorari in capital case over the dissent of Justice Blackmun who argued "that

ual rights,⁶⁸ but it is prone to expand protection of property rights, albeit cautiously and incrementally.⁶⁹ The foregoing calculus also suggests the Court's greater willingness to invalidate state legislation than comparable national legislation, because state legislatures cannot hurt the Court the way Congress can.

A third consideration is the Court's preference for leaving rulemaking about constitutional values to Congress or the states in some cases. This factor is important because of an asymmetry in the capacity of the political system to override the Court in constitutional cases. While only the supermajoritarian constitutional amendment process can formally override the Court when it *creates* new individual rights, the normal political process of statute enactment can effectively override the Court when it *refuses to create* individual rights. The Voting Rights Act Amendments of 1982,⁷⁰ for example, were Congress's response to the Court's refusal in 1980 to apply the Fifteenth Amendment to regulate racial vote dilution in the context of at-large electoral configurations. Knowing that Congress stands available to give greater scope to constitutional rights may encourage the Court to err on the side of restraint, especially when the Court is ambivalent about such rights.⁷¹ Relatedly, a Court uncertain of its preferences about the legitimacy of a state policy has an incentive to leave the issue to state-by-state resolution through legislation or state constitutional chal-

the death penalty, as currently administered, is unconstitutional." *Id.* at 1138 (Blackmun, J., dissenting)).

⁶⁸ See, e.g., *Albright v. Oliver*, 114 S. Ct. 807, 813-814 (1994) (Rehnquist, C.J.) (finding no substantive due process action for wrongful prosecution).

⁶⁹ See *Dolan v. Tigard*, 114 S. Ct. 2309, 2322 (1994) (Rehnquist, C.J.); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1993) (Kennedy, J.).

⁷⁰ Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (overriding *City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980)).

⁷¹ Although the Court in this context may be criticized as unduly timid, it is usually not viewed as hostile toward Congress or politically salient groups. If the Court interprets a statute in a constricted fashion, Congress may be institutionally offended at the defiling of its statute, and the beneficiaries of the law may perceive the Court as obstinately, even hostilely, refusing to defer to their legitimate victories through the democratic process. That is the lesson of the override of the 1989 Supreme Court decisions in the Civil Rights Act of 1991. In contrast, if the Court refuses to expand the Constitution and leaves the ultimate decision to Congress, the rhetoric is less heated and focuses on fixing the Court's policy mistake rather than accusing the Court of institutional reneging or of hostility toward identifiable interests. This explains the reaction to *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 281-82 (1990), in which the Court left to state legislatures, and perhaps to Congress, the responsibility of defining the right to die. An intermediate category exists when the Court arguably cuts back on pre-existing constitutional rights grounded in the Court's precedents and leaves Congress the option of reinstating those rights by statute. This scenario, exemplified both by section 3 of the Voting Rights Act Amendments, § 3, 96 Stat. at 134, and the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (to be codified at 42 U.S.C. § 2000bb), leaves the Court open to charges of double-crossing sensitive groups (racial and religious minorities, in these instances), but raises little concern about judicial refusal to honor congressional directives.

lenge.⁷² On the other hand, the Court might be motivated to some form of activism if it believes Congress or the states will legislate inappropriately (recall *Casey*).

1. *Deference to National Equilibria.* — Because the current Court seems risk-averse, is unified on only a few intensely felt issues, and understands that the other two branches (during the 1993 Term controlled by the Democrats) view the largely Republican-appointed Court with some suspicion, we should not often expect the Court to upset national political equilibria. The 1993 Term's only overt constitutional activism involving federal law was *United States v. James Daniel Good Real Property*.⁷³ A closely divided Court held that the Constitution requires that notice and an opportunity for a hearing be afforded before real property is seized under the Drug Enforcement Act of 1970. Although the Department of Justice howled, the decision created no stir in the Capitol because it was not felt to have undermined fundamentally the statutory scheme and because imposing protective procedures has traditionally been the province of the Court. Decided at the beginning of the Term, *James Daniel Good* was followed by an uninterrupted streak of decisions deferential to national political equilibria.

Although the Constitution is replete with explicit protections for criminal defendants, the conservative and statist Rehnquist Court is unlikely to apply them vigorously, and it did not this Term.⁷⁴ Indeed, the only explicit overruling of a precedent of the Court during the 1993 Term came in *Nichols v. United States*,⁷⁵ which narrowed the right to counsel articulated by the Burger Court. Although *Nichols* might be viewed simply as a product of the Court's substantive values concerning criminal procedures, it also illustrates several interesting features of the Court's institutionally strategic behavior. Because Congress and the President have grown increasingly conservative as to the procedural rights of criminal defendants, the Court has substantial freedom to implement its own strongly held conservative preferences, without fear of override. In order to achieve its substantive "law and

⁷² See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977). This theory would reconcile *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973), which rejected an equal protection challenge to inequalities in state spending on education, with *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982), which allowed an equal protection challenge to state exclusion of illegal aliens from its school system. In the former case, at least one Justice (Powell, perhaps) expected more effective redress under state constitutions, as was the case. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989).

⁷³ 114 S. Ct. 492 (1993) (Kennedy, J.).

⁷⁴ See *Davis v. United States*, 114 S. Ct. 2350, 2354-57 (1994) (O'Connor, J.) (refusing to expand *Miranda*); see also cases cited *infra* note 95 (upholding almost all challenged state-level procedures for criminal defendants).

⁷⁵ 114 S. Ct. 1921, 1928 (1994) (Rehnquist, C.J.) (overruling *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam)).

order" agenda, the Rehnquist Court has compromised the rule-of-law values of stare decisis in *Nichols*⁷⁶ and earlier decisions narrowing criminal procedural rights.⁷⁷ These cases exemplify a more general proposition: to the Court, stare decisis considerations are least compelling for prior decisions that expanded constitutional rights, because such decisions cannot easily be overridden in the normal political process.⁷⁸

If a current President and Congress are united in favor of a national policy, the Court is unlikely to invalidate the policy. *Weiss v. United States*⁷⁹ rejected constitutional challenges to the institution of "military judges," who are ordinary officers assigned on an ad hoc basis for indeterminate terms to adjudicate court martials. Such a casual judiciary would violate the Due Process Clause in most civilian contexts, but the Court deferred to a practice accepted by Congress and the President in the military context.⁸⁰ Deference to a Congress-President consensus provided an even more compelling reason for the Court to reject the Appointments Clause issue presented by this practice, because the Court has no institutional reason to invalidate on separation-of-powers grounds a practice that has yielded no interbranch conflict.⁸¹ In contrast, the Court can be expected to fragment (often contentiously) if Congress and the President take opposing sides on a separation-of-powers issue.⁸² Nonetheless, the Court thrives on such

⁷⁶ See *Nichols*, 114 S. Ct. at 1931-33 (Blackmun, J., dissenting).

⁷⁷ See *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991) (Rehnquist, C.J.) (stating that stare decisis concerns are not strongly implicated when the Court overrules criminal procedure decisions "decided by the narrowest of margins, over spirited dissents"); *California v. Acevedo*, 500 U.S. 565, 576-79 (1991) (Blackmun, J.); *Collins v. Youngblood*, 497 U.S. 37, 52 (1990) (Rehnquist, C.J.); *Alabama v. Smith*, 490 U.S. 794, 802-803 (1989) (Rehnquist, C.J.); see also *Solorio v. United States*, 483 U.S. 435, 436, 450-51 (1987) (Rehnquist, C.J.) (overruling precedent protecting court-martial defendants). But see *Payne*, 501 U.S. at 834-35 (Scalia, J., concurring) (defending the overruling of activist precedents as consistent with stare decisis principles). For decisions overruling habeas precedents, see *infra* note 230.

⁷⁸ Cf. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (observing relaxed stare decisis "in cases involving the Federal Constitution, where correction through legislative action is practically impossible"). We would supplement Brandeis's rule with the caveat that *rights-denying* constitutional decisions (which *can* be overridden by Congress) should be harder to overrule than *rights-creating* decisions (which cannot easily be overridden).

The Court's greater willingness to overrule precedent in order to contract (rather than expand) constitutional rights because Congress can override such restrictive decisions through normal legislation, suggests a willingness by the Court to recognize that greater interplay between the branches may be desirable. See *Payne*, 501 U.S. at 828-29. That is, the Court may be willing to narrowly construe constitutional rights precisely because it wants to increase legislative participation in constitutional interpretation, even at the risk of making a legislative override more feasible.

⁷⁹ 114 S. Ct. 752, 754-55 (1994) (Rehnquist, C.J.).

⁸⁰ See *id.* at 760-61; *id.* at 769 (Souter, J., concurring).

⁸¹ See *id.* at 769 (Souter, J., concurring); *id.* at 757-58 (Rehnquist, C.J.) (noting apparent statutory authorization for this practice).

⁸² Consider the Court's divisions in *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1982). On the Court's notorious vacil-

cases, for the Court's prestige is enhanced if the other branches must turn to it for an authoritative adjudication of their powers.

It is apparent that it is the views of the *current* President and Congress that have import for the Court's institutionally strategic behavior. In *Turner Broadcasting Co. v. FCC*,⁸³ the Court reviewed new requirements that cable television systems dedicate a specified portion of their channels to local commercial and public broadcasting stations. Congress imposed the requirements in the Cable Television Consumer Protection and Competition Act of 1992,⁸⁴ the first statute passed over President Bush's veto. The Clinton Administration has supported the Act's policy. The Court diluted traditional First Amendment analysis in this case to defer temporarily to Congress and the new administration. Justice Kennedy's opinion for the Court declined to apply "strict scrutiny" to the "must carry" provisions, by categorizing the Act's regulation of cable company offerings as a "content neutral" measure designed "to preserve access to free television programming for the 40 percent of Americans without cable."⁸⁵ But the statute's insistence that cable companies program local stations and public broadcasting stations appears to be animated by what those stations are likely to say, and that is content-based.⁸⁶ For this reason, a state cannot impose "local news" and "public interest" requirements on local newspapers, even if most communities have only one newspaper.⁸⁷ This doctrinal conundrum is explained by a view of law as equilibrium. The Court has allowed the *federal* government a wide berth in regulating broadcast media at the national level, but has afforded *state* governments little discretion in regulating the print media at the local level.⁸⁸ This phenomenon is in large part the consequence of the

lation in these cases, see Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 105-06 (1988); Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 513-24 (1989).

⁸³ 114 S. Ct. 2445 (1994) (Kennedy, J.).

⁸⁴ Pub. L. No. 102-385, 106 Stat. 1460.

⁸⁵ *Turner Broadcasting*, 114 S. Ct. at 2460-64 (Kennedy, J.). Applying the intermediate scrutiny of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), Justice Kennedy found the government interests purportedly advanced by the Act to be substantial, but remanded for further factfinding as to whether the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broadcasting*, 114 S. Ct. at 2470, 2472 (Kennedy, J., for a plurality) (quoting *O'Brien*, 391 U.S. at 377); see *id.* at 2473 (Stevens, J., concurring in order to establish a judgment of the Court).

⁸⁶ See *Turner Broadcasting*, 114 S. Ct. at 2476-78 (O'Connor, J., dissenting).

⁸⁷ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). But cf. *Turner Broadcasting*, 114 S. Ct. at 2464-66 (Kennedy, J., for a plurality) (distinguishing *Tornillo*).

⁸⁸ Compare *Tornillo*, 418 U.S. at 258 (holding that a Florida statute that created a right to reply to press criticism of a candidate for nomination or election violated First Amendment guarantees of a free press) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392-95 (1969) (upholding FCC's fairness doctrine for television, relying on the untenable explanation that the airwaves represent a limited forum) and *NBC v. United States*, 319 U.S. 190, 226-27 (1943) (applying a lenient standard of review to FCC regulation of radio, with similar rationale). The plu-

Court's inclination to defer more readily to national but not local political consensus on controversial issues.⁸⁹

A similar phenomenon is apparent in the Court's voting rights cases. During the 1992 Term, the Court opened up the state redistricting process to reverse-discrimination challenges in *Shaw v. Reno*.⁹⁰ The racial gerrymandering in *Shaw* was adopted by North Carolina in response to the Attorney General's refusal to "preclear" an earlier redistricting plan, as required under section 5 of the Voting Rights Act. If the Attorney General's broad interpretation of section 5, and the Supreme Court's use of racial proportionality as a criterion for establishing vote dilution under section 2 of the Act, together require the creation of districts like those in *Shaw*, then the door is open for a successful constitutional challenge to the Voting Rights Act itself. Justice Thomas suggested such a challenge this Term in two decisions applying the Act, *Holder v. Hall*⁹¹ and *Johnson v. De Grandy*.⁹² But a majority of the Court, including *Shaw* author Justice O'Connor, were disposed to avoid a repeat of 1982's congressional override following a restrictive reading of the Act, and preferred to develop constitutional limits through lawsuits to invalidate state redistricting efforts in response to the Act.⁹³

To protect the Act itself from challenge, however, the current Court interprets the Act cautiously. In both Voting Rights Act cases

ality opinion in *Turner Broadcasting* properly declined to extend the much-criticized limited broadcast spectrum rationale of *Red Lion/NBC* to assess the regulation of cable, see *Turner Broadcasting*, 114 S. Ct. at 2456-58 (Kennedy, J., for a plurality), but accomplished much the same result by characterizing the regulation as content-neutral. We are inclined to believe that the reasoning in all these decisions is makeweight and that *Tornillo* and *Red Lion* (and *Turner Broadcasting*) can best be reconciled by reference to the "paramount importance" to the Court "of according substantial deference to the predictive judgments of Congress." *Id.* at 2472 (Blackmun, J., concurring).

⁸⁹ Compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-93 (1989) (O'Connor, J., for a plurality) (giving less deference to state or local affirmative action policies than to congressional ones) with *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563-66 (1990) (Brennan, J.) (deferring, with a divided Court, to congressionally deliberated affirmative action policy, adopted over presidential opposition).

⁹⁰ 113 S. Ct. 2816, 2832 (1993) (O'Connor, J.).

⁹¹ 114 S. Ct. 2581, 2592, 2618 (1994) (Thomas, J., joined by Scalia, J., concurring in the judgment).

⁹² 114 S. Ct. 2647, 2667 (1994) (Thomas, J., joined by Scalia, J., dissenting); see *id.* at 2664-67 (Kennedy, J., concurring in part and concurring in the judgment) (arguing that the Voting Rights Act should be cautiously applied, in light of constitutional concerns).

⁹³ See *Vera v. Richards*, No. CIV.A.H-94-0277, 1994 WL 484492, at *2 (S.D. Tex. Aug. 17, 1994) (holding three gerrymandered congressional districts unconstitutional under *Shaw*); *Hays v. State*, No. 92-1522, 1994 WL 477159, at *1 (W.D. La. July 29, 1994) (invalidating Louisiana districts as racial gerrymandering); *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1551 (S.D. Ga. 1994) (rejecting consent decree altering method of electing state judges). But see *Shaw v. Hunt*, No. 92-202-CIV-5-BR, 1994 WL 457269, at *1 (E.D.N.C. Aug. 22, 1994) (on remand from Supreme Court) (holding that North Carolina's districts pass strict scrutiny because they further state's compelling interest in complying with Voting Rights Act).

this Term, the Court rejected broad readings of the statute that might have encouraged states trying to comply with the statute to engage in constitutionally suspect districting practices.⁹⁴ Thus, although the Court in both cases deferred to electoral decisions made at the state or local level, any deference to local efforts to comply with the Voting Rights Act may be in part to prevent potential constitutional problems and thereby to avoid a confrontation with the national legislative/executive consensus represented by the Voting Rights Act.

2. *Libertarian Reversal of State Equilibria.* — The contrast between *Shaw* and *De Grandy* suggests that the Court is less deferential to institutions that cannot respond as effectively (the states as opposed to Congress); in such cases, the Court's conservative values tend to manifest themselves most strikingly. Not surprisingly, the Court that during the 1993 Term upheld virtually all challenged federal policies against attack struck down all or part of local laws or policies in eleven of nineteen individual rights cases and laid out new constitutional restrictions on state action in two cases.⁹⁵ The differential level of activism must not be overstated, however. Because of the Court's

⁹⁴ In *Holder*, a majority of the Court declined to read § 2 of the Voting Rights Act as authorizing vote-dilution challenges to the size of a governing body. See *Holder*, 114 S. Ct. at 2588 (Kennedy, J., for a plurality); *id.* at 2591 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 2592 (Thomas, J., concurring in judgment). In *De Grandy*, the Court held that vote dilution could not necessarily be inferred from a failure to maximize majority-minority districts. See *De Grandy*, 114 S. Ct. at 2659-60.

⁹⁵ The Court struck down state action (at least in part) in a number of cases. See *International Union, UMW v. Bagwell*, 114 S. Ct. 2552 (1994) (Blackmun, J.) (due process); *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516 (1994) (Rehnquist, C.J.) (free speech and assembly); *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994) (Souter, J.) (establishment of religion); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994) (Stevens, J.) (due process); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (Rehnquist, C.J.) (takings); *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994) (Blackmun, J., for a plurality); *id.* at 2200 (O'Connor, J., concurring in the judgment) (due process in death cases); *Ibanez v. Florida Dep't of Business & Professional Regulation, Bd. of Accountancy*, 114 S. Ct. 2084 (1994) (Ginsburg, J.) (commercial speech); *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (Stevens, J.) (free speech at home); *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994) (Stevens, J.) (double jeopardy); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (Blackmun, J.) (equal protection, gender); *Powell v. Nevada*, 114 S. Ct. 1280 (1994) (Ginsburg, J.) (probable cause).

The Court imposed new constitutional obligations on states, without outright invalidation of their laws, in two cases. See *Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (Souter, J.) (remanding for more fact development in a case involving cruel and unusual punishment in conditions of confinement); *Waters v. Churchill*, 114 S. Ct. 1878 (1994) (O'Connor, J., for a plurality) (involving free expression in the state workplace for state employees).

The Court sustained challenged state action in a number of cases. See *Tuilaepa v. California*, 114 S. Ct. 2630 (1994) (Kennedy, J.) (cruel and unusual punishment, death penalty); *Romano v. Oklahoma*, 114 S. Ct. 2004 (1994) (Rehnquist, C.J.) (due process in death cases); *Stansbury v. California*, 114 S. Ct. 1526 (1994) (per curiam) (self-incrimination); *Victor v. Nebraska*, 114 S. Ct. 1239 (1994) (O'Connor, J.) (due process, burden of proof in criminal cases); *Albright v. Oliver*, 114 S. Ct. 807 (1994) (Rehnquist, C.J., for a plurality); *id.* at 817 (Kennedy, J., concurring in the judgment); *id.* at 819 (Souter, J., concurring in the judgment) (due process, malicious arrest and prosecution); *Schiro v. Farley*, 114 S. Ct. 783 (1994) (O'Connor, J.) (double jeopardy).

discretionary certiorari jurisdiction, state policies usually escaped judicial review altogether, and most of the decisions creating new individual protections against state officials would apply to federal officials as well.

The Court's activism strongly reflected the Justices' substantive desire to protect citizens against unjustified state intrusions, especially intrusions for aesthetic or environmental purposes.⁹⁶ Americans should be secure in their personal safety,⁹⁷ property,⁹⁸ homes,⁹⁹ and businesses. Emphatically developing this last security, the Court in *Dolan v. City of Tigard*¹⁰⁰ invalidated as an uncompensated taking the city's conditioning of a building permit upon a store owner's willingness to devote part of her property to a bike pathway and a flood greenway. Chief Justice Rehnquist's opinion for a closely divided Court conceded that he was imposing a new and unprecedented requirement on local governments, which now must show a "rough proportionality" or a "reasonable relationship" between a required land use upon which a building permit is conditioned and the public costs of the proposed development.¹⁰¹ The decision is remarkable in light of the Rehnquist Court's lack of interest in developing a rule against "unconstitutional conditions" in cases in which liberty rather than property rights are burdened by national regulations.¹⁰² *Dolan* reveals the same casual treatment of precedent when reviewing state laws that we noted in the federal law cases. The decision also illustrates how the Court's lawmaking authority in constitutional cases can empower specific groups (landowners, shopkeepers) at the expense of other groups (environmentalists, local governments). In short, the Court's exploitation of lawmaking opportunities in cases such as *Dolan* has distributional consequences. Here, as in the criminal process context, where

⁹⁶ This theme was implicated in none of the six cases completely upholding state action, because they all involved rights of death row inmates and alleged criminal perpetrators.

⁹⁷ See *Callins v. Collins*, 114 S. Ct. 1127, 1128 (1994) (Scalia, J., concurring) (denying certiorari in death penalty case).

⁹⁸ "Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1993) (Kennedy, J.); *cf. id.* at 515 (Thomas, J., dissenting) (disagreeing with the Court's holding but strongly approving of the Court's newfound interest in property rights).

⁹⁹ See *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2047 (1994) (Stevens, J.) (overturning ban on resident signs and emphasizing invasion of the privacy of one's home).

¹⁰⁰ 114 S. Ct. 2309 (1994).

¹⁰¹ *Id.* at 2319; *cf. id.* at 2322-23 (Stevens, J., dissenting) (stating that the Court's new rule "erect[s] a new constitutional hurdle in the path" of state attempts to impose development conditions and arguing that the "new test on which the Court settles is not naturally derived" from the state court decisions on which the Court relies); *id.* at 2330 (Souter, J., dissenting) (arguing that the *Dolan* case does not present "a suitable vehicle for taking the law beyond" its current state).

¹⁰² See *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (Rehnquist, C.J.) (allowing federal government to impose restrictions on medical consultations about abortion in connection with federal funding); *cf. South Dakota v. Dole*, 483 U.S. 203, 206-12 (1987) (Rehnquist, C.J.) (giving broad deference to attachment of conditions to federal funds for state roadbuilding).

the risk of override is low, the Court can bend precedent to enshrine its own substantive agenda.

The dormant commerce clause cases reveal another feature of the Court's substantive agenda. The Court frequently strikes down state and local policies for imposing unacceptable burdens on "free trade among the several States."¹⁰³ Unfortunately, the Court does not have a coherent theory of what is "unacceptable." *C & A Carbone, Inc. v. Town of Clarkstown*¹⁰⁴ evaluated an ordinance that required solid waste to be processed at one local transfer station. Justice Kennedy's opinion for the Court struck down the ordinance as an unjustified "discrimination" against out-of-state commerce. Concurring in the judgment, Justice O'Connor applied a balancing test and concluded that the town's regulatory objectives did not justify the excessive burdens imposed on interstate commerce.¹⁰⁵ Both approaches are well-grounded in the Court's precedents and are plausible ways of enforcing the national market objectives of the Court-created doctrine. As Justice Souter's dissenting opinion argued, however, the majority Justices slighted the town's regulatory objective, which was not protectionist but assertedly arose out of a need to centralize local trash processing.¹⁰⁶

Positive political theory provides some support for Justice Souter's position. The Constitution contemplates that state and local governments will be the primary engines of "developmental" policies designed to improve the local economy and "allocative" policies designed to control the day-to-day operation of government services. A respectable body of political theory suggests that the Framers' choice was a wise one; local governments will tend to adopt efficient policies to avoid losing desirable citizens who vote with their feet to abandon poorly functioning regimes.¹⁰⁷ For similar reasons, local governments will tend not to adopt purely redistributive policies — unless they can re-

¹⁰³ *Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1822 (1994) (Thomas, J.) (state use tax); see *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2217-18 (1994) (Stevens, J.) (state milk pricing order); *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S. Ct. 1345, 1350 (1994) (Thomas, J.) (surcharge for out-of-state solid waste).

¹⁰⁴ 114 S. Ct. 1677 (1994).

¹⁰⁵ See *id.* at 1687 (O'Connor, J., concurring in the judgment).

¹⁰⁶ See *id.* at 1696-98 (Souter, J., dissenting). Because the trash processing center was ultimately to be turned over to the town itself, the policies of *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808-09 (1976), which held that the dormant commerce clause does not apply to state purchasing decisions, were implicated as well.

¹⁰⁷ See William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, VAND. L. REV. (forthcoming 1994) (drawing from PAUL E. PETERSEN, *CITY LIMITS* ch. 4 (1981)). Also, most allocative and many developmental policies are more effectively devised and operated at the local level. See Deborah J. Merritt, *The Guaranty Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988).

distribute wealth from outsiders to their own citizens.¹⁰⁸ Other than *Carbone*, all the decisions last Term striking down state or local policies under the dormant commerce clause involved apparent efforts to redistribute costs and burdens from the local citizenry to outsiders. The Court in *West Lynn Creamery v. Healy*¹⁰⁹ for the first time struck down a subsidy-with-tax scheme that indirectly — but unmistakably — redistributed resources in the same way. *Carbone*, by contrast, involved what appears to have been a classic allocative measure. The ordinance did discriminate against out-of-state processors, but also against competitors within the locality. It struck Justice Souter, and strikes us, as the sort of lawmaking that need not be regulated by the Supreme Court.

Justice O'Connor's concurring opinion in *Carbone* illustrated another distinctive feature of the dormant commerce clause cases. Unlike other decisions interpreting the Constitution, those invoking as well as refusing to invoke the dormant commerce clause can be overridden by Congress.¹¹⁰ Unlike congressional overrides of the Court's statutory decisions, though, Congress can only authorize a dormant commerce clause violation if it does so in "unmistakably clear" terms.¹¹¹ The possibility of congressional correction, combined with the wide acceptance in national politics of the free national market principle, has encouraged the Court to give free reign to its own free market preferences and to invest substantial resources in its dormant commerce clause jurisprudence.¹¹² Conversely, congressional signals or statutes approving state policies that affect interstate commerce ought to induce the Court to apply a more lenient standard of review. Several of the Court's dormant commerce clause cases astutely followed such congressional signals and upheld challenged state burdens on interstate or international commerce. For example, Justice Ginsburg's opinion in *Barclays Bank, PLC v. Franchise Tax Board*¹¹³ relied on

¹⁰⁸ See Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 404 (1986); Mark V. Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 128 n.14.

¹⁰⁹ 114 S. Ct. 2205, 2212–15 (1994) (Stevens, J.).

¹¹⁰ See Farber, *supra* note 108, at 404.

¹¹¹ *Carbone*, 114 S. Ct. at 1691 (O'Connor, J., concurring in the judgment); see William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 398–99 (1983); cf. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (Stevens, J.) (finding Supremacy Clause pre-emption of traditional state allocative functions only when such is the "clear and manifest purpose" of Congress).

¹¹² A congressional override of a judicial invalidation of a state policy under the dormant commerce clause is unlikely to damage the Court. These cases involve pure policy judgments about economic deregulation at the state and local level in pursuit of national free market values, where no federal statute addresses the issue. Losing parties are unlikely to feel invidiously scorned by the Court, and Congress has had none of its statutes frustrated by judicial misinterpretation. Contrast our discussion of the criminal procedure cases, in which the preferences of both the Court and Congress press against judicial activism. See *supra* pp. 45–46.

¹¹³ 114 S. Ct. 2268 (1994).

congressional signals of approval to uphold California's method of taxing multinational companies against dormant commerce clause attack.¹¹⁴

3. *The Disappearance of Carolene Products and Judicial Solicitude for Discrete and Insular Minorities.* — Chief Justice Stone's tantalizing footnote four in *United States v. Carolene Products Co.*¹¹⁵ suggested that the Court may show less deference to the legislature when legislation (1) on its face appears to violate a specific prohibition of the Constitution; (2) restricts those political processes which can cause the repeal of legislation, such as the right to vote, disseminate information and assemble peaceably; or (3) is "directed at particular religious . . . or national . . . or racial minorities" or is inspired by "prejudice against discrete and insular minorities." Footnote four has fascinated scholars for two generations¹¹⁶ and is the basis for Professor Ely's brilliant "representation-reinforcing" theory of judicial review,¹¹⁷ but it is not a robust theory for understanding the Supreme Court, as we now explain.

The Supreme Court is an institution of national power. The nomination and appointment process ensures that the Court will ordinarily include at least some politically well-connected insiders who reflect the ideology of the current governing coalition. Those members of the Court whose ideologies conflict with the current governing coalition will likely be fearful of overrides and other forms of discipline from other institutions. Even were the Court inclined to be counter-hegemonic, the complex system of implicit bargains the Court has made with the coordinate branches of national government narrow the Court's doctrinal options, preventing the Court from challenging the positions of other branches. Significantly, groups truly marginalized by the political process may not have the resources or the energy to adjudicate successfully through the Supreme Court level. These structural features of the Court's position in the federal system make the Court an unlikely ally for outsider groups challenging stable national equilibria, as we found above.

For analogous reasons, the Court will not displace state and local equilibria to enforce *Carolene* values. Instead, the Court will enforce either its own values or stable national equilibria. For example, *Dolan*

¹¹⁴ See *id.* at 2283–86; see also *Northwest Airlines v. County of Kent*, 114 S. Ct. 855, 861–66 (1994) (Ginsburg, J.) (upholding airport user fees under federal law which overrode Court's earlier dormant commerce clause precedent).

¹¹⁵ 304 U.S. 144, 152 n.4 (1938).

¹¹⁶ See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 743–44 (1985) (arguing that footnote four endowed the Bill of Rights with a false "specificity"); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 689–716 (1991) (asserting that footnote four has retained its appropriateness in the current political environment).

¹¹⁷ See JOHN H. ELY, *DEMOCRACY AND DISTRUST* 75–104 (1980).

and *Carbone* invalidated ordinances that did not violate the plain meaning of any constitutional provision¹¹⁸ and that did not involve any apparent dysfunction in the political process. The decisions benefitted interests (shopkeepers and waste processors) presumably well-represented in local politics. Neither decision was compelled by precedent. Both represented the Court's imposition of its own economic libertarian values upon local populations.

If anything, the Court's equal protection jurisprudence has shown an "inverted *Carolene*" quality: so long as a group really is politically marginalized, the Court will tolerate virtually any action by Congress or the states that adversely affects the minority; it is only when a minority is becoming a key player in national politics that the Court constitutionalizes longstanding concerns about discrimination. Justice Blackmun's opinion for the Court in *J.E.B. v. Alabama ex rel. T.B.*,¹¹⁹ prohibiting sex-based discrimination in jury selection, recounted the history of sex discrimination in state jury systems. Although women have never been an "insular minority" in United States history (women are discrete but neither isolated nor a numerical minority), they have been politically marginalized for most of it. Yet the Warren Court — the inspiration for Ely's representation-reinforcing theory — held that women could constitutionally be exempted from jury service.¹²⁰ Indeed, until 1971, the Supreme Court had never invalidated a state or local law that differentiated on the basis of sex. In the 1970s, when women won congressional super-majorities and almost obtained state ratification for the Equal Rights Amendment, the Supreme Court invalidated sex classifications right and left.¹²¹

J.E.B. extended precedent which had held that litigants cannot use their peremptory challenges to strike potential jurors because of their race or ethnicity¹²² to invalidate sex-based challenges. It is ironic that a conservative Court would issue such a sweeping statement of the invidiousness of sex-based discrimination at a point when women have enough clout to achieve most of their goals through the legislature.

¹¹⁸ *Carbone* and the other dormant commerce clause cases do not even have a constitutional referent. See *West Lynn Creamery v. Healy*, 114 S. Ct. 2205, 2211 n.9 (1994) (applying the doctrine of the "negative" Commerce Clause, which is not expressed in the Commerce Clause itself but was developed in a line of Supreme Court cases); *id.* at 2219–20 (Scalia, J., concurring in the judgment). *Dolan* arose under the Takings Clause, but the Court invalidated a "regulation" or a "condition" of the sort that it had never invalidated before; there was no physical "taking" as that term is ordinarily used.

¹¹⁹ 114 S. Ct. 1419, 1422–25 (1994).

¹²⁰ See *Hoyt v. Florida*, 368 U.S. 57, 58–69 (1961), *overruled by Taylor v. Louisiana*, 419 U.S. 522, 533–35 (1975).

¹²¹ See *J.E.B.*, 114 S. Ct. at 1424–25 (surveying cases in which the Court addressed discrimination against women).

¹²² See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630–31 (1991); *Powers v. Ohio*, 499 U.S. 400, 415–16 (1991); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

J.E.B. illustrates an important feature of law as equilibrium: the deeper changes in law, including constitutional law, occur when the relative social, economic, and political power of affected groups changes. Although informal attitudes toward gender have been stubborn, and women do not yet work or play on equal terms with men, the law began to witness a sea change once women's interests were more aggressively pressed upon, and within, the political system.¹²³

Contrast the legal fate of the Satmar Hasidim. The Satmar, a sect of Judaism whose members live together in isolated communities of religious devotion, are the classic "discrete and insular minority." For the most part, the residents of the Village of Kiryas Joel in New York State educate their children in private religious schools. However, these religious schools have been unable to provide the special educational services to handicapped children that are required by federal and state law.¹²⁴ A local public school district temporarily provided special services at an annex to one of the village's religious schools, but the district stopped doing so in accordance with Supreme Court decisions finding such arrangements in conflict with the Establishment Clause.¹²⁵ Because the handicapped Satmar children suffered trauma when educated in public schools outside of their religious community, the New York legislature enacted a special statute establishing the Village as its own school district so that special education services could be provided to children with learning disabilities. In *Board of Education of Kiryas Joel v. Grumet*,¹²⁶ the Court struck down this accommodation as violative of the Establishment Clause. The legal box into which the Court put the Satmar penalized them beyond the typical neglect the Court has shown for cultural outsiders.¹²⁷ In *Grumet*, the Court not only struck down a local policy designed to protect a group of true outsiders; it struck down a policy that was designed in part to

¹²³ See, e.g., *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516, 2523–25 (1994) (Rehnquist, C.J.) (applying an intermediate rather than strict application of First Amendment principles to allow regulation of anti-abortion protesters); *NOW v. Scheidler*, 114 S. Ct. 798, 803–06 (1994) (Rehnquist, C.J.) (allowing RICO lawsuits against groups attempting to shut down abortion clinics); *Harris v. Forklift Sys.*, 114 S. Ct. 367, 371 (1993) (O'Connor, J.) (allowing hostile work environment lawsuits under Title VII even if there is no physical or psychological injury).

¹²⁴ See Education of the Handicapped Act, 20 U.S.C. §§ 1400–1485 (1988); N.Y. EDUC. LAW, art. 89 (McKinney 1981).

¹²⁵ See *Aguilar v. Felton*, 473 U.S. 402, 408–14 (1985) (disallowing a secular annex at the religious school); *School Dist. v. Ball*, 473 U.S. 373, 381–98 (1985).

¹²⁶ 114 S. Ct. 2481 (1994).

¹²⁷ The federal and state laws protecting students with disabilities have pushed a voluntarily isolated group into continuous dealings with the state. It is ironic that, despite the holding in *Grumet*, five of the Justices suggested — but only suggested — that *Aguilar v. Felton*, 473 U.S. 402 (1985), should be overruled. See *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring in part and concurring in the judgment) ("The Court should, in a proper case, be prepared to reconsider *Aguilar*"); *id.* at 2505 (Kennedy, J., concurring in the judgment) ("*Aguilar* may have been erroneous"); *id.* at 2515 (Scalia, J., dissenting) (arguing that *Aguilar* and several other cases, presumably including *Kiryas Joel*, "should be overruled at the earliest opportunity").

implement the product of a national consensus, the Individuals with Disabilities Education Act.

*B. The Role of the Court in Statutory Interpretation:
Ratification, Evolution, and Ground Rules*

The Supreme Court performs three systemic roles in statutory interpretation: it implements statutory agreements, reshapes those deals to adapt to changed circumstances, and announces the ground rules for predicting the effect of contemplated statutes.

For rule-of-law reasons, the Court owes substantial loyalty to the Congress that enacts a statute. A Court engaged in statutory interpretation will also be attuned to the interests of the current Congress, whose preferences will be complex. Because the Court and Congress are institutional repeat players, the current Congress will want the Court to respect the wishes of the enacting Congress, just as the current Congress hopes its own wishes will later be respected.¹²⁸ For recent statutes, this current congressional preference will be strong, because the enacting coalition will still be potent and most of its members will still be in Congress. For older statutes, the calculation changes. *Ex ante*, it seems less important to any given Congress that its deals be maintained beyond the period in which the impetus for the legislation remains unchanged. Indeed, a rational legislator, *ex ante*, might well prefer judicial interpretation to accommodate changed circumstances and to avoid frustrating statutory purposes.¹²⁹ Additionally, over time the legislative sponsors and supporters of the statute leave office and are replaced by others who are often less interested in prior controversies. As the social and congressional landscape changes after the enactment of the statute, the Court frequently has greater freedom to undo parts of the statutory deal without much fear of override.

This erosion in allegiance to the enacting Congress is coupled with a second role for the Court: applying statutes to new circumstances. This role is especially important when those circumstances involve unanticipated consequences of the statute. In such cases, the Court may well be more concerned with the preferences of the current rather than the enacting Congress, for the current Congress will better reflect the distributional balance of power in the country. Relatedly, the Court has substantial discretion in applying statutes to unanticipated

¹²⁸ See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 878-87 (1975).

¹²⁹ See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 309-14 (1989); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 921-41 (1985) (arguing that the original intent doctrine began as a means of structural interpretation deferring to state power and autonomy, not to the individual beliefs of the Framers).

circumstances, and the Court may often distribute statutory entitlements without regard for the wishes of Congress. Nevertheless, the Court would still be concerned with treading on current legislative prerogatives, which could trigger an override.

Finally, the current Congress is very interested in knowing how the Court might apply its statutes in the immediate future (Congress understands that all bets are off in the distant future, for the reasons discussed above). Hence, the Court has something of an obligation to convey to Congress those signals that will help Congress more systematically anticipate how the Court will interpret statutes. Those ground rules are not distributionally neutral. This setting of ground rules represents another opportunity for the Court to affect the distribution of rights and duties.

The plurality of roles and variety of pressures render it highly unlikely that the Court will adhere to any single foundation for interpreting statutes. As we have demonstrated elsewhere, the Court does not adhere to any single foundation for statutory meaning, but has traditionally followed a multi-factored, pragmatic approach to statutory interpretation that shows certain regularities.¹³⁰ In this section we will explore those regularities — the primacy of statutory text supplemented by legislative history, the role of evolutive factors, and the importance of canonical norms — in light of the institutional features of lawmaking.

1. Implementation: The Primacy of Text, Supplemented by Legislative History. — An institutional perspective complements the traditional rule-of-law view that statutory text should be the key source of statutory meaning. The text of a statute is the most obvious “focal point” for law in our culture.¹³¹ So long as statutory text is the primary means by which citizens, agencies, and courts coordinate their understandings about law’s equilibrium, text must be the starting point for statutory interpretation.¹³²

Especially for recently enacted statutes, the focal value of the text is enhanced by another consideration: the text is usually evidence of

¹³⁰ See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345–62 (1990); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1101–13 (1992).

¹³¹ See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 246–49 (observing that the Supreme Court in 1989 tended to apply “plain meaning” analysis in statutory interpretation cases). On the theory of focal points, consult THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 68–70, 111–13 (1960).

¹³² Of the 56 statutory interpretation decisions of the 1993 Term, we believe that only two are flatly inconsistent with the statutory text: *Reed v. Farley*, 114 S. Ct. 2291 (1994) (Ginsburg, J., for a plurality; Scalia, J., concurring in part and in the judgment) and *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994) (Scalia, J.); and two more are inconsistent with a sensible reading of the text: *MCI Telecomm. Corp. v. AT&T Co.*, 114 S. Ct. 2223 (1994) (Scalia, J.) and *Ratzlaf v. United States*, 114 S. Ct. 655 (1994) (Ginsburg, J.). We explain below why we think these decisions departed from the statutory text.

current political consensus. An interpretation in 1994 slighting the apparent meaning of a statute enacted in 1991 is likely to upset the coalition that produced the statute and, if the coalition is still powerful, subject the Court to the risk of a conflictual override. Many statutory cases that reach the Court involve statutes enacted by recent Congresses, and a third of the statutory cases in the 1993 Term involved statutes enacted in the previous fifteen years.¹³³ Not surprisingly, the Court routinely followed the plain meaning in cases involving recently enacted statutes, but not in cases involving older laws.¹³⁴

That the Court relies primarily on textual analysis does not mean that it does so persuasively, however. The Currency and Foreign Transactions Reporting Act of 1970, as implemented by regulation,¹³⁵ requires financial institutions to report currency transactions larger than \$10,000; a criminal enforcement provision penalizes any person "willfully violating"¹³⁶ the Act. Because people outside of financial institutions were evading the 1970 Act by breaking up their transactions into increments of less than \$10,000, Congress in the Money Laundering Control Act of 1986 added a provision to the 1970 Act to prohibit anyone from "structuring" a transaction "for the purpose of evading" the reporting requirements of the 1970 Act.¹³⁷ As a result of this amendment, the original enforcement provision now criminalizes acts "willfully violating" the new anti-structuring provision. This Term, the Court, in *Ratzlaf v. United States*,¹³⁸ held that a jury could not convict a defendant for structuring transactions in which the government showed only that the defendant did so for the specific purpose of evading the 1970 reporting requirements.¹³⁹ The Court imposed a fur-

¹³³ The Court handed down 87 written decisions this Term; 56 of the decisions involved statutory interpretation; 36 of the statutory decisions primarily involved statutes enacted in the last 30 years; 19 of the statutory decisions primarily involved statutes enacted in the last fifteen years.

¹³⁴ Of the 36 cases involving recently enacted statutes, the Court simply applied the plain meaning in 20 cases; of the 20 cases involving statutes more than 30 years old, the Court used plain meaning as its primary source in only 4 cases.

¹³⁵ Pub. L. No. 91-508, 84 Stat. 1118 (1970) (codified as amended at 31 U.S.C. §§ 5311-5325 (1988)); see 31 C.F.R. § 103.22(a) (1993).

¹³⁶ 31 U.S.C. § 5322(a) (1988 & Supp. V 1993).

¹³⁷ Pub. L. No. 99-570, § 1354(a), 100 Stat. 3207-18, 3207-22 (1986) (codified at 31 U.S.C. § 5324 (1988)).

¹³⁸ 114 S. Ct. 655 (1994).

¹³⁹ Waldemar and Loretta Ratzlaf were restaurateurs by occupation and high-stakes gamblers by avocation. They transacted much of their restaurant business and gambling in cash, apparently to avoid paying taxes. Waldemar admitted at trial that they kept over \$100,000 in cash in a piece of bedroom furniture. In 1988, the IRS got wind of the Ratzlafs' fishy style of business and conducted a revealing audit. See Brief for the United States at 5, *Ratzlaf v. United States*, 114 S. Ct. 655 (1994) (No. 92-1196).

In 1990, the Ratzlafs arrived in Nevada with a shopping bag full of cash, which they planned to use to pay off \$160,000 in Waldemar's gambling debts. The casino told Waldemar that it would have to file a report, whereupon he and Loretta went from bank to bank, purchasing separate cashier's checks for \$9,500. The jury found that the Ratzlafs knew of the reporting

ther scienter requirement: the jury must also find that the defendant specifically knew that structuring (not just evading the reporting requirements) is unlawful. While this may be a (barely) plausible reading of the statute, it is not the most plausible, and certainly not the only plausible reading. If the Ratzlafs did what the government charged in their case, they were “willfully violating” the provision that told them not to structure transactions “for the purpose of evading” the 1970 Act’s reporting requirements.

Justice Ginsburg’s opinion for the Court maintained that if this alternative interpretation were accepted, the enforcement provision’s “willfulness” requirement would be superfluous for anti-structuring offenses.¹⁴⁰ But the Court is frequently willing to read a statute in a way that renders some language, or even an entire provision, superfluous if the superfluity is an apparent drafting oversight.¹⁴¹ It seems likely that Congress in 1986 was simply inattentive to possible superfluities. In dropping the anti-structuring provision into the Act by its 1986 amendment, Congress focused only on filling a regulatory gap, and was apparently unaware that the new anti-structuring provision was the only one in the revised statutory scheme that had a separate scienter requirement.¹⁴²

When a recent statute does not have a plain meaning (as in our view of *Ratzlaf*), the Court has a strong incentive to consider the statute’s legislative history to determine whether there was a legislative deal for the Court to enforce. The Rehnquist Court cites legislative history much less than the Burger Court did,¹⁴³ the Court should be wary of such indirect signals, for they may be bluffs on the part of

requirements and that they structured the transactions with the specific purpose of evading them. See *Ratzlaf*, 114 S. Ct. at 663–64 (Blackmun, J., dissenting).

¹⁴⁰ See *Ratzlaf*, 114 S. Ct. at 659 (opinion for the Court).

¹⁴¹ See, e.g., *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1493–95 (1994).

¹⁴² The 1986 amendment was added to resolve a split in the circuits over whether the United States could prosecute depositors (as opposed to banks) that sought to evade the bank reporting obligations. The Senate Report accompanying a prior bill that incorporated what would become the anti-structuring provision stated that “a person who converts \$18,000 in currency to cashier’s checks by purchasing two \$9,000 cashier’s checks at two different banks . . . with the specific intent that the participating bank or banks not be required to file Currency Transaction Reports for those transactions, would be subject to potential civil and criminal liability.” S. REP. NO. 433, 99th Cong., 2d Sess. 22 (1986). Apart from supporting the government’s position that Congress did not intend to override the traditional view that “ignorance of the law” is not a defense, this passage (and others discussed in the Brief for the United States at 35, *Ratzlaf v. United States*, 114 S. Ct. 655 (1994) (No. 92-1196)) strongly suggests that Congress did not notice the “double scienter” language, and did not intend a double scienter requirement. Precisely this question was asked by Senator D’Amato, and precisely this answer was given by the Justice Department. See *Hearing on S. 571 and S. 2306 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 2d Sess. 141–42 (1986).

¹⁴³ See *ESKRIDGE*, *supra* note 29, ch. 7; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355–57 (1994). There are many examples of the Court’s critical examination of legislative history. See, e.g., *Williamson v. United States*, 114 S. Ct. 2431, 2435–36 (1994) (O’Connor, J.); *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251,

Congress or of unrepresentative members. But legislative signals can also be evidence of political equilibrium, and so it is rational for the Court to consider legislative history for what it is worth, even if the statutory text appears to have a plain meaning.¹⁴⁴ This deepens the mystery of *Ratzlaf*, which found the legislative history of the 1986 Act inconclusive, even though the history confirmed that Congress was not even aware of the double scienter problem.¹⁴⁵ In any event, the Court is more likely to find the legislative history useful in those cases where it finds the text of a statute ambiguous or confused.¹⁴⁶

The issue in *Landgraf v. USI Film Products*,¹⁴⁷ which was argued together with *Rivers v. Roadway Express, Inc.*, was whether the new damage provisions added to Title VII by the Civil Rights Act of 1991 apply to cases that were pending on appeal when the statute was enacted. Section 402(a) of the statute provides: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."¹⁴⁸ As the Court held, the statutory text is ambiguous, because it does not tell us upon whom the Act shall "take effect" on the date of enactment. On the one hand, courts had previously interpreted similar "take effect" language in other amendments to Title VII to be inapplicable to pending cases, and Congress's 1972 amendments to Title VII had used clearly targeted language to assure application to pending cases.¹⁴⁹ On the other hand, the Act specifically denied retroactivity to other changes adopted in the statute.¹⁵⁰ These specific retroactivity provisions would have been superfluous if section 402(a) were interpreted to render the whole act

2258-59 (1994) (O'Connor, J.); see also *Shannon v. United States*, 114 S. Ct. 2419, 2426 (1994) (Thomas, J.) (refusing to credit committee report that had no statutory referent).

¹⁴⁴ In the 1993 Term, the Court explicitly examined and relied on legislative history in 10 of the 36 decisions interpreting statutes enacted in the last 30 years. The legislative history was useful in confirming that the Court's understanding of the statute's plain meaning well reflected the underlying statutory deal. See, e.g., *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 777-79 (1994) (Blackmun, J.); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526-27 (1994) (Ginsburg, J.). Or, at least, the legislative history showed that the Court's understanding was not inconsistent with decisions Congress had deliberately made. See, e.g., *Department of Revenue v. ACF Indus.*, 114 S. Ct. 843, 851 (1994) (Kennedy, J.); *NOW, Inc. v. Scheidler*, 114 S. Ct. 798, 805-06 (1994) (Rehnquist, C.J.).

¹⁴⁵ Compare *supra* note 142 (legislative history supporting dissent in *Ratzlaf*) with *Ratzlaf*, 114 S. Ct. at 662 & n.17 (responding to none of the arguments stressed in note 142).

¹⁴⁶ See, e.g., *Johnson v. De Grandy*, 114 S. Ct. 2647, 2659-62 (1994) (Souter, J.); *Howlett v. Birkdale Shipping Co., S.A.*, 114 S. Ct. 2057, 2062-63 (1994) (Kennedy, J.); *United States v. Granderson*, 114 S. Ct. 1259, 1266-67 (1994) (Ginsburg, J.); *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170 & n.9 (1994) (Souter, J.).

¹⁴⁷ 114 S. Ct. 1483 (1994).

¹⁴⁸ Civil Rights Act of 1991, Pub. L. No. 102-166, § 402(a), 105 Stat. 1071, 1099.

¹⁴⁹ See *Landgraf*, 114 S. Ct. at 1493 n.10.

¹⁵⁰ See 1991 Act § 402(b) (rendering the Act prospective with regard to the overruling of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)); *id.* § 109(c) (specifying that the extraterritorial application provision is prospective only).

prospective only. (Recall from *Ratzlaf* that the Court has a presumption against interpretations rendering other provisions superfluous.)

Just as we argued with respect to *Ratzlaf*, the text of the statute at issue in *Landgraf* raises more questions than it answers about where the deal lay.¹⁵¹ Justice Stevens's opinion for the Court carefully examined the legislative background of the statute, observing that the 1991 Act originated in a bill introduced in 1990 to override the 1988 Term decisions. The 1990 override bill stipulated that each section applied to "all proceedings pending on or commenced after" the date of the Supreme Court decision it was intended to override.¹⁵² But that bill was vetoed by President Bush, in part because the President objected to the retroactivity provisions. The Senate failed by one vote (66-34) to override the veto in 1990.¹⁵³ A similar bill, introduced in 1991, seemed likely to meet the same fate, until an eleventh-hour compromise in the Senate revamped the bill so as to make it acceptable to at least one more senator and, once the veto point was reached in the Senate, to the President as well. Among the changes was the adoption of section 402(a) in place of the complex and precise retroactivity provisions. After the bill was passed, the Congressional Record filled up with conflicting statements about whether it was intended to be retroactive.¹⁵⁴ These statements indicate that Congress remained severely divided on the issue, with Democrats generally favoring retroactivity and Republicans almost uniformly opposing it; that President Bush and well over one-third of the Senate were opposed to retroactivity; and, probably, that the retroactivity issue could have undermined support for the bill, had the issue been raised more aggressively before the vote. As Justice Stevens put it, "legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct."¹⁵⁵ Thus assured that the various signals were all bluffs and that there was no clear deal to enforce, Justice Stevens's opinion then decided the case by invoking the Court's strong preference for statutory nonretroactivity.¹⁵⁶

¹⁵¹ Cf. *McKnight v. General Motors Corp.*, 114 S. Ct. 1826 (1994) (per curiam) (holding that nonretroactivity of 1991 Act was not an obvious conclusion from the statutory text).

¹⁵² See S. 2104, 101st Cong., 1st Sess. § 15 (1990).

¹⁵³ See 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990).

¹⁵⁴ The original sponsors stated that the final bill was retroactive (except for §§ 402(b) and 109(c)). See 137 CONG. REC. S15,485 & S15,963 (daily ed. Oct. 30 & Nov. 5, 1991) (statements of Sen. Kennedy); 137 CONG. REC. H9530-31 (daily ed. Nov. 7, 1991) (Rep. Edwards); 137 CONG. REC. H9549 (daily ed. Nov. 7, 1991) (Rep. Fish). Senator Dole (R-Kan.), for himself and 13 other Republican Senators, submitted an interpretive memorandum taking the position that the final compromise was not retroactive. See 137 CONG. REC. S15,472 (daily ed. Oct. 30, 1991). Senator Danforth (R-Mo.), for himself and for six other moderate Republicans who had voted in 1990 to override the President's veto, submitted an interpretive memorandum, also taking the position that the final compromise "shall not apply retroactively." *Id.* at S15,485.

¹⁵⁵ *Landgraf*, 114 S. Ct. at 1496.

¹⁵⁶ See *id.* at 1496-1505.

Given our hypothesis that, for recently enacted statutes, the Court should be inclined to utilize legislative history to establish the meaning of unclear statutory text, the Court's positive use of legislative history in *Landgraf* seems at odds with its unwillingness to rely upon legislative history in *Ratzlaf*. This difference can, of course, be superficially attributed to differing assessments of textual clarity. A majority of the *Landgraf* Court agreed that the text of the Civil Rights Act of 1991 was unclear, but the majority in *Ratzlaf* was unwilling to "resort to legislative history to cloud a statutory text that [was] clear."¹⁵⁷ A more subtle explanation is available, however. Reference to legislative history in *Landgraf* can be explained in terms of the charged political wrangling that led to the delicate 1991 compromise, a compromise that the Court knew many members of Congress would be loath to see unsettled. The statute in *Ratzlaf*, on the other hand, involved a relatively obscure offense that seems not to have raised legislators's blood pressures significantly during consideration and passage. Although the Court may portray its decisions to use legislative history as based on whether textual meaning is "plain," the very assessment of whether text is plain may be influenced by institutional considerations.

2. *Evolution: Statutory Purpose, Common Law and Statutory Precedent, Post-Enactment Signals.* — Statutory text never anticipates all the issues that the statute will have to address, and over time the unresolved issues will multiply when social circumstances change and the political-legal equilibrium shifts. As statutes evolve, the text loses some of its focal power, and other considerations become increasingly important in statutory interpretation — the purpose of the law, the surrounding legal terrain, and statutory precedents.¹⁵⁸ The 1993 Term was replete with cases invoking these evolutive considerations.¹⁵⁹

The Federal Employers' Liability Act of 1908 (FELA)¹⁶⁰ gives a cause of action for damages against railroads "to any person suffering

¹⁵⁷ *Ratzlaf v. United States*, 114 S. Ct. 655, 667 (1994).

¹⁵⁸ See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-43 (1982); ESKRIDGE, *supra* note 29, ch. 2; HART & SACKS, *supra* note 4, at 1180-87, 1333-34.

¹⁵⁹ See, e.g., *Williamson v. United States*, 114 S. Ct. 2431, 2435 (1994) (O'Connor, J.) (purpose); *Heck v. Humphrey*, 114 S. Ct. 2364, 2372-74 (1994) (Scalia, J.); *id.* at 2374 (Thomas, J., concurring) (precedent); *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239, 2245-47 (1994) (Blackmun, J.) (precedent, legal terrain); *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2074-75 (1994) (Souter, J.) (precedent); *Digital Equip. Corp. v. Desktop Direct*, 114 S. Ct. 1992, 1996-97, 2001-02 (1994) (Souter, J.) (purpose, precedent); *Elder v. Holloway*, 114 S. Ct. 1019, 1021-23 (1994) (Ginsburg, J.) (purpose, precedent); *American Dredging Co. v. Miller*, 114 S. Ct. 981, 985-87 (1994) (Scalia, J.) (precedent); *Hagen v. Utah*, 114 S. Ct. 958, 967-70 (1994) (O'Connor, J.) (subsequent legislative signals and private interpretation); *Caspari v. Bohlen*, 114 S. Ct. 948, 953-56 (1994) (O'Connor, J.) (precedent); *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370-71 (1993) (O'Connor, J.) (purpose, precedent); *id.* at 371-72 (Scalia, J., concurring) (precedent); *Florence County Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 364-66 (1993) (O'Connor, J.) (purpose, precedent).

¹⁶⁰ 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1988)).

injury while he is employed by such carrier."¹⁶¹ In *Consolidated Rail Corp. v. Gottshall*,¹⁶² the Court confirmed a new category of FELA liability for negligent infliction of emotional distress when an employee sustains either a physical impact or an immediate risk of such an impact by reason of the carrier's negligence. Justice Thomas's opinion for the Court argued that the statutory term "injury" is capacious enough to include emotional distress, that the common law has overwhelmingly endorsed this tort, and that the new cause of action would serve the statute's remedial purposes.¹⁶³ Although the weight of authority in 1908 favored a simple physical impact test, Justice Thomas adopted the more liberal zone of danger test because, he argued, it is more consistent with the statute's remedial goals. However, he rejected the even more remedial common law approach, followed in most states today, that allows recovery for bystanders; Justice Thomas reasoned that the bystander rule was unknown to the common law in 1908 and subjects railroads to excessive liability. Reflecting the Court's traditional practice, in FELA cases, of "develop[ing] a federal common law of negligence . . . informed by reference to the evolving common law,"¹⁶⁴ *Gottshall* illustrates how statutes are interpreted dynamically when the relative social and political power of affected parties (in this case, workers and railroads) changes over time. At the same time, the Court's rejection of the common-law bystander rule exemplifies the importance of the Court's dominant ideology, which in labor cases reveals tight fists around management obligations to workers.¹⁶⁵

Strikingly more dynamic was the Court's decision in *Reed v. Farley*,¹⁶⁶ which held that the federal writ of habeas corpus cannot be used to enforce the portion of the Interstate Agreement on Detainers (IAD) which specifies that a state has no more than 120 days to try an out-of-state prisoner over whom it has temporary custody. This interpretation is inconsistent with the plain meaning of the federal habeas corpus statute, which entitles a state prisoner to release if he or she is "in custody in violation of the Constitution or laws or treaties of the United States."¹⁶⁷ Because the IAD is a "law . . . of the United States"

¹⁶¹ 45 U.S.C. § 51 (1988).

¹⁶² 114 S. Ct. 2396 (1994).

¹⁶³ See *id.* at 2403-07.

¹⁶⁴ *Id.* at 2412 (Souter, J., concurring).

¹⁶⁵ See *id.* at 2417-19 (Ginsburg, J., dissenting); see also *NLRB v. Health Care & Retirement Corp.*, 114 S. Ct. 1778 (1994) (Kennedy, J.) (restricting the application of the National Labor Relations Act prohibition against unfair labor practices); *id.* at 1791-92 (Ginsburg, J., dissenting) (objecting to the Court's unsettling of a longstanding equilibrium in order to distribute benefits to management).

¹⁶⁶ 114 S. Ct. 2291 (1994).

¹⁶⁷ 28 U.S.C. § 2254(a) (1988).

and the state conceded that it had been violated,¹⁶⁸ Orrin Reed should as a matter of law have been released. Justice Ginsburg's plurality opinion and Justice Scalia's concurring opinion both sidestepped this difficulty by invoking precedent which held that habeas relief is only available for "fundamental" defects resulting in a "miscarriage of justice."¹⁶⁹ But the precedent they cited interpreted the separate habeas statute applicable only to federal prisoners; hence these Justices were expanding precedent, rather than just invoking it, and expanding precedent in the teeth of the habeas statute's plain meaning. Indeed, the majority's application of the precedent to Orrin Reed seems to be contrary to the terms and policy of the IAD, which not only directs states to try temporary prisoners within 120 days of the beginning of custody, but directs the trying court to dismiss late prosecutions with prejudice.¹⁷⁰ This congressional determination would seem to go a long way toward meeting the fundamental defect test of federal habeas corpus precedent.

Reed is a puzzle only if viewed through a rule-of-law lens. It reflects the inevitability of dynamic interpretation when statutes yield unexpected distributional consequences. The Great Writ has had such consequences, as the numbers and rights of state and federal prisoners have ballooned far beyond the expectations of the originating Congress. The Rehnquist Court has unusually strong preferences in this matter because the habeas statute, if literally applied, would, in the Court's view, flood the federal judiciary with meritless litigation. Consequently, the Court has devised a series of procedural roadblocks to invocation of the habeas statute by state prisoners.¹⁷¹ The Court is able to accomplish this lawmaking feat in part because the habeas statutes applicable to both state and federal prisoners are generally worded laws that the Court and Congress have considered to be an effective delegation to the Court to create statutory common law (similar to FELA). Moreover, the Court's substantive and institutional preferences regarding habeas parallel Congress's preferences. Indeed,

¹⁶⁸ *Reed*, 114 S. Ct. at 2302-03 (Blackmun, J., dissenting).

¹⁶⁹ *Id.* at 2297-2300 (Ginsburg, J., for the plurality); *see id.* at 2301 (Scalia, J., concurring in part and in the judgment). In *Reed*, Justices Ginsburg and Scalia both relied on *Hill v. United States*, 368 U.S. 424 (1962).

¹⁷⁰ *See* 18 U.S.C. app. § 2, at 703 (1988) (consolidating Articles IV(c) and V(c) of the IAD).

¹⁷¹ *See, e.g.,* *Heck v. Humphrey*, 114 S. Ct. 2364, 2372 (1994) (Scalia, J.); *Caspari v. Bohlen*, 114 S. Ct. 948, 953 (1994) (O'Connor, J.) (applying the habeas restriction created in *Teague v. Lane*, 489 U.S. 288 (1989)); *cf. Custis v. United States*, 114 S. Ct. 1732, 1738-39 (1994) (Rehnquist, C.J.) (rejecting right to collateral challenge of previous state convictions when used to enhance federal sentence under Armed Career Criminal Act). *But cf. Burden v. Zant*, 114 S. Ct. 654, 655 (1994) (per curiam) (reversing a denial of habeas petition). *See generally* Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 799-802, 820-26 (1992) (arguing that the Court has acted with imprudent hubris in silencing lower federal habeas courts).

the Court's steady restriction of the habeas remedy has accompanied congressional efforts to accomplish the same goal by statute.¹⁷²

Consider, finally, the Court's attitude toward "subsequent legislative history." Such history is a potentially useful signal of congressional attitudes toward ongoing statutory implementation, and the Court has long considered such signals when it interprets statutes.¹⁷³ The Rehnquist Court regularly inveighs against such evidence as the most unreliable of signals; in *Ratzlaf*, for example, the majority refused to credit a subsequent committee report commenting on the anti-structuring offense in connection with a predecessor bill to an anti-laundersing act of 1992.¹⁷⁴ Yet the committee report suggested that Congress, in adopting the subsequent statute, was consciously relying on the then-unanimous interpretation of the anti-structuring law as demanding only proof "that the defendant knew of the . . . reporting requirement" but not proof "that the defendant knew that structuring itself had been made illegal."¹⁷⁵ This was in fact a relevant signal from Congress, and deepens the mystery of *Ratzlaf*. The contrast with *Reed v. Farley* and other recent habeas decisions is striking. The Court is aware of Congress's rightward drift on prisoner access to habeas corpus. Although the Court will not cite such "evidence" in an opinion, its decisions have moved in lockstep with Congress's evolving attitude toward habeas corpus.¹⁷⁶ Just as subsequent legislative history is a particularly manipulable congressional signal, so the Court's stated doctrine on this subject cannot be taken at face value.

3. *Ground Rules: The Canons of Construction as an Interpretive Regime.* — The canons of statutory construction are a homely body of rules and presumptions of statutory meaning. Karl Llewellyn's classic critique argued that the canons do not constrain judicial decisionmak-

¹⁷² In 1990, the House Judiciary Committee inserted liberalizing habeas corpus provisions (overriding conservative Supreme Court decisions) into the omnibus crime bill of that year, H.R. REP. NO. 681, 101st Cong., 2d Sess., pt. 1, at 123-35 (1990), but the House passed a very conservative habeas title, which actually would have cut back on the Great Writ more than the Court had done as of 1990. See 136 CONG. REC. H8,876-82 (daily ed. Oct. 4, 1990). The House conferees killed the habeas title altogether. In 1993, the habeas reform title of the Senate Judiciary Committee's omnibus crime bill sought to revise the Supreme Court's rules modestly. See S. 1607, 103d Cong., 2d Sess. § 304 (1993) (codifying a slightly more liberal version of *Teague v. Lane*, 489 U.S. 288 (1989)). As in 1990, the habeas title was dropped in the final bill.

¹⁷³ See James J. Brudney, *Legislative History Treatment of Judicial Decisions — Idle Chatter or Telling Response?*, 93 MICH. L. REV. (forthcoming 1994); William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 LAW & CONTEMP. PROBS. 75, 76-79 (Winter 1994) (special issue).

¹⁷⁴ *Ratzlaf*, 114 S. Ct. at 662 n.18.

¹⁷⁵ H.R. REP. No. 28, 102d Cong., 1st Sess., pt. I, at 45 (1991) (citing *United States v. Hoyland*, 903 F.2d 1288 (9th Cir. 1990), one of the cases overruled by *Ratzlaf*). See generally Brudney, *supra* note 173 (providing a roadmap of judicial use of legislative signals).

¹⁷⁶ For example, in 1991, the liberal Judiciary Committee reported a moderate habeas title, which would have curtailed *Fay v. Noia*, 372 U.S. 391 (1963). See H.R. 3371, 102d Cong., 1st Sess. tit. XI (1991). Within months, the Supreme Court overruled *Fay* in *Coleman v. Thompson*, 501 U.S. 722 (1991).

ing, because "there are two opposing canons on almost every point" of statutory interpretation; he demonstrated his thesis by compiling a list showing every canon to have a counter-canon.¹⁷⁷ Law as equilibrium, however, is not as much concerned with constraining judges as with understanding how institutions coordinate their activities and distribute benefits in the legal system. Under this conception of law, the canons of statutory construction can be understood as part of what John Ferejohn has called an "interpretive regime."¹⁷⁸

An interpretive regime is a system of background norms and conventions against which the Court will read statutes. An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes's scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities. Interpretive regimes serve both rule-of-law and coordination purposes. The integrity of an interpretive regime provides some degree of insulation against judicial arbitrariness; by rendering statutory interpretation more predictable, regular, and coherent, interpretive regimes can contribute to the rule of law. This goal is subject to Llewellyn's criticism, but the Supreme Court is itself aware of that criticism and can therefore be expected to counteract its force. For example, Justice Stevens's opinion in *Landgraf* adverted to Llewellyn and acknowledged two "seemingly contradictory statements found in [the Court's] decisions concerning the effect of intervening changes in the law."¹⁷⁹ But the remainder of his opinion sought to reconcile those statements and resolved whatever contradictions there had been in favor of a strong presumption against the application of statutes to nonlitigation events completed before the statute's enactment.¹⁸⁰ For issues of statutory retroactivity, *Landgraf* greatly diminishes the force of Llewellyn's criticism.

An interpretive regime also serves institutional coordination functions. One goal of such a regime, and of the canons, is to lower the costs of drafting statutes. Drafting complete statutes that cover all conceivable contingencies is impracticable because of staff limitations and the inability of legislators to achieve consensus on all issues. This creates the possibility of numerous statutory ambiguities that might

¹⁷⁷ 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 (1950); see *id.* at 401-06.

¹⁷⁸ William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law, in THE RULE OF LAW* 265, 267 (Ian Shapiro ed., 1994) (Nomos XXXVI); see Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1224-25.

¹⁷⁹ *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994); see also *id.* at 1496 n.16 (noting that Llewellyn also identified competing canons regarding retroactive application of statutes).

¹⁸⁰ See *id.* at 1496-1505, 1497 n.18 (relying on LON L. FULLER, *THE MORALITY OF LAW* (1964), and taking an approach similar to that in HART & SACKS, *supra* note 4, at 628).

generate large costs.¹⁸¹ The Court can perform a valuable coordinating function by generating “off-the-rack,” gap-filling rules that are accessible *ex ante* to the drafters. Knowing the interpretive regime into which statutes will be developed over time, the players in the legislative bargaining process will be better able to predict what effects different statutory language will have. This will permit them to leave much unsaid in the statute itself, which will permit more statutes to be enacted and at a cheaper overall cost. This goal is one that the Rehnquist Court has been consciously pursuing,¹⁸² and the Court has since 1986 developed an elaborate landscape of rules and presumptions that ought to be helpful to an attentive Congress. Lest there be any doubt on this score, we attach as an Appendix to this Foreword the regime of rules and presumptions of statutory interpretation that are ascertainable in the Court’s opinions from the 1986 Term through the 1993 Term.

The usefulness of the canons under the foregoing theory does not depend upon the Court’s choosing the “best” canons for each proposition. Instead, the canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it. This point is most applicable to the canons relating to grammar, word choice, and inference from different syntactical configurations. The Court has been criticized for invoking the canon *expressio unius est exclusio alterius* (the expression or inclusion of one thing implies the exclusion of others) on the ground that it is unrealistic.¹⁸³ Even if this criticism is correct, the canon remains valuable if it is usually respected, as it is by the current Court.¹⁸⁴ This is a signal to legislative drafters, who thereby know *ex ante* that, if they want to make lists in their statutes, the lists should be exhaustive.

While any systematic collection of canons might be an efficient coordinating device, different collections may not be equivalent. The use of one set of canons rather than another may affect the distribution of

¹⁸¹ On the substantial costs of statutory ambiguity, consult Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 126–30 (1992).

¹⁸² “What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.” *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J.).

¹⁸³ See Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 813 (1983).

¹⁸⁴ The Court frequently relies on arguments by negative implication (*expressio unius* types of argumentation). See, e.g., *O’Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2054 (1994) (Scalia, J.); *Posters ‘N’ Things, Ltd. v. United States*, 114 S. Ct. 1747, 1751 (1994) (Blackmun, J.); *Custis v. United States*, 114 S. Ct. 1732, 1736 (1994) (Rehnquist, C.J.); *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1592 (1994) (Scalia, J.); *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1448–50 (1994) (Kennedy, J.); *Department of Revenue v. ACF Indus.*, 114 S. Ct. 843, 849–50 (1994) (Kennedy, J.).

benefits within the legislative bargaining process. This feature is most apparent in the canons that represent presumptions in favor of substantive policies. One canon that was prominent this Term was the rule against shifting counsel fees in litigation.¹⁸⁵ This canon affects the enforcement of statutes by making it harder for Congress to stimulate enforcement through private attorneys general. *Landgraf's* choice of a general presumption against statutory retroactivity similarly makes it systematically harder for Congress to reach actions occurring before statutory enactments, or even to negate Supreme Court opinions that have unsettled congressional expectations (as in *Rivers*).

The Supreme Court's authority to create interpretive regimes having distributional effects illustrates the substantial lawmaking authority the Court has under a conception of law as equilibrium. Although Congress can meet the requirements of the canons by drafting statutes to rebut their presumptions or rules, Congress has fewer options to negate the Court's power to shape the interpretive regime under which the country operates.¹⁸⁶ Nonetheless, Congress is fairly acquiescent in this arrangement, based upon the following implicit bargain. The canons that have the greatest distributive effect tend to be those that are inspired by constitutional values — but constitutional values that the Court rarely enforces through judicial review.¹⁸⁷ For example, the nonretroactivity of new legal obligations is a value sprinkled throughout the Constitution, but the Court rarely strikes down federal statutes for violating this principle.¹⁸⁸ Instead, the Court presumes against such retroactivity in civil cases like *Landgraf*. The constitutionally based canons (see the Appendix for a listing) are vehicles for the Court to enforce values it considers important, but in a manner that does not challenge the ultimate power of a coordinate branch of government.

A related theme is the usefulness of the canons as signalling devices in the Court-created interpretive regime. Virtually all of the textual and referential canons are "presumptions" of meaning; they are merely a factor to be considered, or a tiebreaker in close cases. Some of the substantive canons, however, have now been developed as more powerful "clear statement rules," which are presumptions that can only be rebutted by clear statements in the statutory text. The Court's choice to articulate a canon as a clear statement rule rather than as a

¹⁸⁵ See, e.g., *Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1965 (1994) (Stevens, J.); *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1033 (1994) (Rehnquist, C.J.).

¹⁸⁶ Of course, Congress may enact certain rules of construction applicable to all federal statutes. See 1 U.S.C. §§ 1-6 (1988).

¹⁸⁷ See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 629-32 (1992).

¹⁸⁸ See, e.g., *United States v. Carlton*, 114 S. Ct. 2018, 2021-23 (1994) (Blackmun, J.) (pointing out that retroactive tax legislation has survived numerous due process challenges); cf. *Powell v. Nevada*, 114 S. Ct. 1280, 1283 (1994) (Ginsburg, J.) (finding that the Court's constitutional precedents regarding criminal prosecutions apply retroactively).

presumption not only imposes a higher burden on those seeking to trump the canon, but signals the intensity of the Court's preferences.¹⁸⁹ The Court's choice in *Landgraf* to characterize the rule against statutory retroactivity as a "presumption" that could be rebutted by legislative history as well as statutory text was a signal of the Court's views about the importance of the constitutional nonretroactivity value. Three concurring Justices advocated a clear statement rule, which reflected more intense preferences for nonretroactivity.¹⁹⁰

The most striking signal the Court sent last Term was that gun-toting and transaction-structuring defendants cannot be convicted of crimes without proof of unusually specific intent to commit those crimes. The rule of lenity — the canon that saw the most action this Term¹⁹¹ — requires that, if the state seeks to penalize people, statutory ambiguities be resolved in favor of defendants. *Ratzlaf* is best read as a rule of lenity case; if the 1970 Act as amended were ambiguous, Waldemar and Loretta Ratzlaf should perhaps go free. We still find this decision hard to explain under traditional formalist or even realist criteria, and we feel the same way about *Staples v. United States*,¹⁹² which overturned a conviction for unlawful possession of a machine gun because the government did not prove that the defendant had specific knowledge that the weapon was in fact fully capable of firing automatically.

Why is a Court that is ordinarily oriented toward law and order showing such solicitude for these criminal defendants? In our judgment, these decisions are signals of the Court's extreme displeasure

¹⁸⁹ Compare *Hagen v. Utah*, 114 S. Ct. 958, 965 (1994) (O'Connor, J.) (articulating the presumption that ambiguities in statutes and treaties affecting Indians will be resolved in their favor) with *id.* at 971 (Blackmun, J., dissenting) (arguing that the Indians should win, based upon the requirement that the statutory text contain "clear and unequivocal evidence" before Indians can be deprived of rights).

¹⁹⁰ See *Landgraf v. USI Film Prods*, 114 S. Ct. 1483, 1522 (1994) (Scalia, J., concurring in the judgment, joined by Kennedy and Thomas, JJ.).

¹⁹¹ Defendants were sprung by the rule of lenity in *Ratzlaf*, as well as in other cases. See *Staples v. United States*, 114 S. Ct. 1793, 1804 (1994) (Thomas, J.) (machine gun possession); *United States v. Granderson*, 114 S. Ct. 1259, 1267 (1994) (Ginsburg, J.) (criminal sentence). Defendants got their property back in *James Daniel Good*. See also *McFarland v. Scott*, 114 S. Ct. 2568, 2572-73 (1994) (Blackmun, J.) (interpreting a federal statute to require counsel for capital defendants who are preparing habeas petitions); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2340-41 (1994) (Stevens, J.) (striking down a state law precluding judicial review of punitive damage awards). The Court found a clear statement of criminal liability, and hence declined to apply the rule of lenity, in a number of cases. See *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747, 1750-54 (1994) (Blackmun, J.) (drug paraphernalia); *Custis v. United States*, 114 S. Ct. 1732, 1735-36 (1994) (Rehnquist, C.J.) (sentence enhancement); *Beecham v. United States*, 114 S. Ct. 1669, 1672 (1994) (O'Connor, J.) (firearms); see also *Shannon v. United States*, 114 S. Ct. 2419, 2424-25 (1994) (Thomas, J.) (disregarding claim that instructions to jury under insanity defense statute must inform jurors of the involuntary commitment consequences); *United States v. Alvarez-Sanchez*, 114 S. Ct. 1599, 1603-04 (1994) (Thomas, J.) (upholding the admissibility of a custodial statement).

¹⁹² 114 S. Ct. 1793 (1994) (Thomas, J.).

with Congress on a range of interrelated issues. First, for the Court at least, the crimes in these cases are in the nature of *malum prohibitum* instead of *malum in se* and hence do not justify any form of criminal strict liability.¹⁹³ Justice Ginsburg admonished the government in *Ratzlaf* that “currency structuring is not inevitably nefarious,” because strategic small-dose deposits might be made by a person “fearful that the bank’s reports would increase the likelihood of burglary [!], or in an endeavor to keep a former spouse unaware of his wealth [!]” or “in order to avoid the impact of some regulation or tax [!!!].”¹⁹⁴ Justice Thomas waxed similarly in *Staples* to reject the government’s view that guns are “dangerous items.” Thus, “despite their potential for harm, guns generally can be owned in perfect innocence,” apparently including the “readily convertible semiautomatic” that Harold E. Staples, III was charged with possessing.¹⁹⁵ Mr. Staples, meet the Ratzlafs.

More important are two other values that coalesce around the ever-expanding nationalization of crime: federalism and a concern about the business of the federal judiciary. From the standpoint of political theory, we should expect the Court to react with hostility when Congress loads up the dockets of the already-swamped federal courts with criminal cases, which must receive priority scheduling, especially when the crimes have no special national significance or regulatory interest.¹⁹⁶ When this is coupled with the Court’s general anti-regulatory, libertarian bent and its respect for the integrity of state

¹⁹³ See J. WILLARD HURST, *DEALING WITH STATUTES* 64–65 (1982) (arguing that rule of lenity concerns are greatest for crimes that are *malum prohibitum*).

¹⁹⁴ *Ratzlaf*, 114 S. Ct. at 660–61 (citations omitted).

¹⁹⁵ *Staples*, 114 S. Ct. at 1800 & n.6. Justice Thomas essentially contrasted ownership of *bad guns*, which (like hand grenades) are regulable as a public welfare crime, *United States v. Freed*, 401 U.S. 601, 607–10 (1971), with *good guns*, which (like automobiles) are unregulable except upon a showing of very specific intent. See *Staples*, 114 S. Ct. at 1800–02.

¹⁹⁶ The federal judiciary, through Chief Justice Rehnquist, has publicly expressed its opposition to the federalization of crime on the following grounds:

[E]xpansion of federal jurisdiction would be inconsistent with long-accepted concepts of federalism, and would ignore the boundaries between appropriate state and federal action. . . . [I]t will [also] swamp the federal courts with routine cases that states are better equipped to handle, and will weaken the ability of the federal courts effectively to deal with difficult criminal cases that present uniquely federal issues.

. . . [F]ederal courts, overburdened by criminal cases, will be unable to carry out their vital responsibilities to provide timely forums for civil cases.

Federalization of State Prosecutions: Position of the Judicial Conference of the United States, *enclosed in Letter* from Chief Justice Rehnquist, Presiding Officer of the Judicial Conference, to Rep. Jack Brooks, Chairman of the House Comm. on the Judiciary, in 140 CONG. REC. S6090 (daily ed. May 19, 1994); see also William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 6–7 (“Most federal judges have serious concerns about the numbers and types of crimes now being funnelled into the federal courts.”); Mary Deibel, *Justices Warn Against “Police Courts,”* MEMPHIS COM. APPEAL, March 4, 1994, at A4 (stating that, while presenting the Supreme Court’s budget to the Senate Appropriations Committee, Justices Kennedy and Souter warned of serious consequences for the federal court system when pressed for their views on the federalization of crime).

authority against congressional regulation, we can imagine a Court operating on the assumptions that conduct that is (to the Court) merely *malum prohibitum* rather than *malum in se* is presumptively lawful and should be subject only to the general state police power unless there is an overriding national interest. If Congress wishes to federalize such crimes, it has the power to do so, but the Court may interpret the congressional command grudgingly, giving it only the scope compelled by a narrow parsing of its four corners.

In our judgment, the narrow statutory readings of *Staples* and *Ratzlaf* are difficult to square with the rule-of-law value in following statutory text, are inconsistent with Congress's recent policy judgments expanding the reach of the federal criminal code, and dishonor relatively recent congressional agreements. Why, then, would not the Court have feared an override and come out the other way? In this area, the Court and the Congress are at loggerheads, and the Court may feel that it must communicate its concern to Congress clearly, come what may. Although ordinarily the Court might be expected to assist the current Congress by not requiring that it return to a statutory area and fix small mistakes, in this area the Court is an active opponent of Congress and seems to be throwing up what roadblocks it can. In addition, because there are few interest groups to derail feel-good, do-something federal crime bills, the Court may sense that it alone is left to confront Congress. These instincts may well represent good policy, but they more clearly represent a vision of law as institutional equilibrium. Whatever is driving these decisions, it is not values traditionally associated with the rule of law.

C. *The Role of Agencies in Statutory Interpretation*

Our thesis provides an interesting way to understand the relationship of the Supreme Court to independent and executive agencies. Law as equilibrium suggests a strategic explanation for the rule exemplified by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁹⁷ Justice Stevens's opinion for the Court set out a framework by which the Court would ordinarily defer to agency interpretations of the statutes they were charged with enforcing, unless Congress had clearly spoken on the issue. This rule of deference was justified on separation of powers grounds: an agency is more accountable to the democratic process than the Court is.¹⁹⁸ We can augment the Court's justification by emphasizing that agencies are better informed, more efficient barometers of the political equilibrium than the Court is. Because of their place in governance, agencies are both knowledgeable

¹⁹⁷ 467 U.S. 837 (1984).

¹⁹⁸ See *id.* at 864-66.

about and responsive to presidential and congressional preferences.¹⁹⁹ Agencies are also the first government organ to address most interpretive issues, and when they do so they are usually able to anticipate the responses of other national institutions accurately enough to avoid overrides. Knowing that an agency is likely to have much better information than the Court does, the Court will rationally defer to the agency on most issues. Not deferring carries with it an increased risk of a political rebuke.

On the other hand, *Chevron* does not assure deference, and the 1993 Term was not a particularly deferential Term. By a liberal count, federal agency positions prevailed in thirteen of twenty-one civil cases.²⁰⁰ This batting average of 62% is lower than the 71% cumulative average agencies had from the 1981 through the 1992 Terms of the Court.²⁰¹ Some of the most important decisions of the 1993 Term rejected agency positions, especially those allegedly "overenforcing"

¹⁹⁹ Presidents appoint and dismiss executive agency heads and commissioners, and review most agency regulations. See Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 17-19 (Spring 1994) (special issue). Congress monitors agencies through oversight hearings, bugs them through informal contacts, and pressures or rewards them through the appropriations process.

²⁰⁰ Agency positions prevailed in a number of cases. See *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2389 (1994) (Kennedy, J.) (HHS); *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1909-12 (1994) (O'Connor, J.) (EPA); *Dalton v. Specter*, 114 S. Ct. 1719, 1727-28 (1994) (Rehnquist, C.J.) (presidential commission); *Security Servs., Inc. v. KMart Corp.*, 114 S. Ct. 1702, 1708-10 (1994) (Souter, J.) (ICC); *United States v. Irvine*, 114 S. Ct. 1473, 1483 (1994) (Souter, J.) (IRS); *United States Dep't of Defense v. Federal Labor Relations Auth.*, 114 S. Ct. 1006, 1016 (1994) (Thomas, J.) (Dep't of Defense); *FDIC v. Meyer*, 114 S. Ct. 996, 1005-06 (1994) (Thomas, J.) (FSLIC); *ABF Freight Sys., Inc. v. NLRB*, 114 S. Ct. 835, 838-40 (1994) (Stevens, J.) (NLRB); *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 774-75, 782 (1994) (Blackmun, J.) (Dep't of Labor); *Weiss v. United States*, 114 S. Ct. 752, 760, 763 (1994) (Rehnquist, C.J.) (Dep't of Defense); *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993) (O'Connor, J.) (EEOC). We also count *Landgraf* and *Rivers*, in which the Court followed but did not rely on the EEOC's interpretation. We are tempted but do *not* count *Northwest Airlines, Inc. v. County of Kent, Mich.*, 114 S. Ct. 855, 859 (1994) (Ginsburg, J.) (Dep't of Transportation), in which the Court noted the absence of agency guidance and invited the agency to develop rules.

Agency positions were rejected in a number of cases. See *Johnson v. De Grandy*, 114 S. Ct. 2647, 2663 (1994) (Souter, J.) (Dep't of Justice); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2259 (1994) (O'Connor, J.) (Dep't of Labor); *MCI Telecommunications Corp. v. AT&T Co.*, 114 S. Ct. 2223, 2231-32 (1994) (Scalia, J.) (FCC); *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2052-53, 2056 (1994) (Scalia, J.) (FDIC); *NLRB v. Health Care & Retirement Corp. of America*, 114 S. Ct. 1778, 1785 (1994) (Kennedy, J.) (NLRB); *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1594 (1994) (Scalia, J.) (EPA); *Central Bank, N.A. v. First Interstate Bank, N.A.*, 114 S. Ct. 1439, 1454-55 (1994) (Kennedy, J.) (SEC); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 529-31 (1993) (Ginsburg, J.) (Dep't of Labor).

²⁰¹ See Merrill, *supra* note 143, tbls. 2 & 3, at 359-60. Merrill appears only to count decisions where there is a formal "case[] involving deference," *id.* at tbl. 2, whereas we have looked more broadly at every agency position outside of the criminal context and have counted cases where the Court breathes not a word of the agency position in its opinion.

statutory rules.²⁰² This phenomenon is, in part, a consequence of law-making structures in a libertarian polity; rules of standing and judicial review make it much easier for litigants to challenge aggressive agency regulation (overenforcement) than agency passivity and inaction (underenforcement).²⁰³

Additionally, the decisions rejecting agency interpretations did so because the interpretations were inconsistent with the statutory text. The lesson of *Chevron*, the Court was reminding these agencies and the Solicitor General's Office,²⁰⁴ is that agencies can interpret statutes dynamically, so long as their interpretations do not traverse the plain meaning of the statute, a value that the Supreme Court will enforce "to the letter."²⁰⁵ This is a shrewd move on the part of the Court. Such decisions reaffirm the *Marbury* idea that the Court — and not the Solicitor General or a bunch of agencies — is the ultimate arbiter of what the "law" is, and preserve opportunities for the Court to trump agency interpretations it does not like.

As in *Ratzlaf*, the Court's plain meaning analysis in these cases was underwhelming. Consider *MCI Telecommunications Corp. v. AT&T Co.*²⁰⁶ Section 203(a) of the Communications Act²⁰⁷ requires communications common carriers to file schedules of charges and conditions of service with the FCC; section 203(b)(2) permits the FCC to

²⁰² See *Greenwich Collieries*, 114 S. Ct. at 2259 (invalidating the Department of Labor's burden of proof rule in black lung cases); *MCI*, 114 S. Ct. at 2233 (holding that the FCC's power to "modify" statutory requirements does not allow the agency to dispose of filing requirements altogether); *O'Melveny*, 114 S. Ct. at 2055–56 (rejecting the FDIC's view that the savings and loan bailout statute supplants state law as the standard of care applicable to defendants); *Health Care*, 114 S. Ct. at 1785 (voiding the NLRB's longstanding test for determining when nurses are "supervisors" and hence exempt from the National Labor Relations Act); and *Central Bank*, 114 S. Ct. at 1448 (rejecting the SEC's view that aiders and abettors are covered by the anti-fraud provision of the securities law). On the distinction between "under-" and "overenforcing" a statute, see Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 768 (1991).

²⁰³ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (Rehnquist, J.) (finding that non-enforcement decisions are generally unreviewable); *Allen v. Wright*, 468 U.S. 737, 752–753 (1984) (O'Connor, J.) (highlighting the problem of having standing to challenge agency nonenforcement: who can show *actual* injury?).

²⁰⁴ The Solicitor General lost about half of the 61 cases in which the government filed a brief; the Reagan Administration's Office, by contrast, won about two-thirds of its cases. We attribute the Solicitor General's poor showing, in part, to the Republican Court's "hazing" a new Democratic administration. Cf. SEGAL & SPAETH, *supra* note 26, at 313 (finding that ideology is the primary basis for the Court's historical support of the Solicitor General). Nonetheless, the Solicitor General can usually do better than a .500 batting average, even under a hostile Court. Some advice for the Office: buy more dictionaries (*Webster's Third* took a shot in *MCI*, 114 S. Ct. at 2229–30), and hire some good linguists. (Hint: Cunningham, Levi, Green and Kaplan (a law professor and three linguists), cited above in note 46, accurately predicted Court decisions in the three cases they analyzed for the 1993 Term. See *id.* at 1562 & n.2.)

²⁰⁵ *KMart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291–92 (1988) (Kennedy, J.); see also Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 515.

²⁰⁶ 114 S. Ct. 2223 (1994) (Scalia, J.).

²⁰⁷ 47 U.S.C. § 203(a) (1988).

"modify any requirement made by or under the authority of this section." Responding to the perceived need for more competition in the long distance telephone market, the FCC between 1980 and 1992 issued a series of orders that ultimately allowed nondominant (non-AT&T) companies to avoid the expensive process of filing and amending tariff schedules. The Supreme Court held that the FCC's policy violates the plain meaning of section 203(b)(2).²⁰⁸ The FCC argued that its authority to modify *any requirement* of section 203 allows it, in appropriate circumstances, to exempt companies from the filing requirements. Justice Scalia's opinion for the Court held that the authority to *modify* means only "to change moderately or in minor fashion," a standard dictionary definition of "modify."²⁰⁹ Because the FCC's orders worked a "fundamental" rather than "minor" change in section 203's requirements, it was not a permissible modification.²¹⁰

Justice Scalia's opinion in *MCI* is more dogmatic than cogent. The opinion conceded that one definition of "modify" in *Webster's Third* is "to make a basic or important change in," but dismissed this use as colloquial and idiosyncratic to that dictionary.²¹¹ As Justice Stevens argued in dissent, Justice Scalia was wrong. The distinguished *Oxford English Dictionary* refers to an exemption of whole categories from a regulatory regime as an example of "modify."²¹² Most on point, the 1933 edition of *Black's Law Dictionary*, published the year before the Communications Act was passed, defined the term as "an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter

²⁰⁸ See *MCI*, 114 S. Ct. at 2231-33.

²⁰⁹ See *id.* at 2229.

²¹⁰ See *id.* at 2230-32.

²¹¹ *Id.* at 2229-30 & nn.2-3 (explaining the Court's rejection of the definition in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (1976) and related Merriam-Webster products). Justice Scalia belittled *Webster's Third* for its colloquial usages, but the Court itself relies on that dictionary more than any other. See, e.g., *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2245 (1994) (using the maligned dictionary's definition of the word "or" in a decision handed down three days after the Court's ruling in *MCI*); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 n.12 (1994) (stating that *Webster's Third* has been the Court's most frequently cited dictionary over the five Terms from 1988-1992). Before the 1993 Term, Justice Scalia regularly credited *Webster's Third*. See, e.g., *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2453, 2455 (1992); *State v. Hodari D.*, 499 U.S. 621, 624 (1991). Moreover, the Court (including Justice Scalia) has traditionally followed a word's "ordinary" meaning rather than its "technical" meaning. See, e.g., *Liteky v. United States*, 114 S. Ct. 1147, 1155-57 (1994) (Scalia, J.) (insisting upon a colloquial meaning of "bias or prejudice," thereby importing an unstated invidiousness requirement into statute).

²¹² The *Oxford English Dictionary* provides this illustration from 1610: "For so Mariana modifies his Doctrine, that the Prince should not execute any Clergy man, though hee deser[v]e it." See *MCI*, 114 S. Ct. at 2237 n.5 (Stevens, J., dissenting) (quoting OXFORD ENGLISH DICTIONARY 952 (2d ed. 1989)).

intact."²¹³ If section 203 is viewed "as part of a statute whose aim is to constrain monopoly power, the Commission's decision to exempt nondominant carriers is a rational and 'measured' adjustment to novel circumstances."²¹⁴

It is hard to view the nondeference decisions as simply the Court's articulation of a text-based rule of law. It is easier to understand the decisions as reflecting the same economic libertarian, anti-regulatory philosophy revealed in the rule of lenity, takings, and dormant commerce clause cases. The current Court valorizes the free market and gives the benefit of the doubt to businesses and banks that have made it in that market.²¹⁵ It is not willing (or able) to deny Congress the authority to regulate the market, but the Court can make such regulation more difficult by reading Congress's work product narrowly. The Court's literalist approach curtails agency activism, but without challenging Congress's authority in any direct way. Indeed, the textualist opinions openly invite legislative revision.

Another explanation for the nondeference cases is suggested by Linda Cohen and Matthew Spitzer.²¹⁶ Cohen and Spitzer start with the neglected point that the Supreme Court presides over the entire federal court system and depends on lower courts to carry out any agenda the Court might have.²¹⁷ Accordingly, the Court administers rewards and punishments (affirmances and reversals) to lower courts, and these are signals as to how much more or less deferential lower courts should be to agencies. Thus, what is important each Term is not just the Court's willingness to defer to agencies, but also whether the Court is affirming or reversing lower courts. Cohen and Spitzer predict that the current Court, populated by Reagan-era Justices and presiding over circuit courts similarly peopled, will early in the Clinton Administration reward lower courts that are tough on agencies, even when the policies being invalidated predate the Clinton period.²¹⁸ The

²¹³ BLACK'S LAW DICTIONARY 1198 (3d ed. 1933). See generally Note, *supra* note 211, at 1447-48 (arguing that the Court has been inconsistent in its use of dictionaries and suggesting that the Court has engaged in dictionary shopping).

²¹⁴ *MCI*, 114 S. Ct. at 2237 (Stevens, J., dissenting).

²¹⁵ The winners-over-losers in the main nondeference cases listed above were coal operators over black lung victims (*Greenwich Collieries*); AT&T over *MCI (MCI)*; aiders and abettors to alleged S&L crooks over federal regulators (*O'Melveny*); hospitals over nurses (*Health Care*); and banks over defrauded investors (*Central Bank*).

²¹⁶ Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (Spring 1994) (special issue).

²¹⁷ See *id.* at 71-72; cf. 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, 1135 (1987) (concluding that the Court's relationship with the lower federal tribunals affects its "approach to statutory and administrative matters").

²¹⁸ See Cohen & Spitzer, *supra* note 216, at 108-09; cf. TONY KUSHNER, *ANGELS IN AMERICA: MILLENNIUM APPROACHES* 63 (1992) (quoting the character Martin Heller, who boasts that federal judges appointed in the 1980s are Reagan "land mines" that will detonate periodically).

1993 Term provides some evidence to support their hypothesis, because in the nondeference cases the Court was affirming (and therefore rewarding) lower courts that had reversed agencies.²¹⁹

III. EQUILIBRIUM'S NORMATIVE IMPLICATIONS FOR PUBLIC LAW

Part II provides evidence for our descriptive thesis, that any explanation of the Court's decisionmaking must consider the Court's strategic behavior in pursuit of institutional and other goals. A key legal process assumption apparent from the foregoing description is the Court's typical desire to avoid open conflict with the political branches, either by deferring to them or by obscuring conflicts under cover of textualist technique or clear statement rules. In this Part we subject this assumption to a normative critique drawn from a more subtle understanding of law as equilibrium.

The Court's avoidance of open conflict with the political branches may undermine the long-term interests of the Court itself in three different contexts. First, in pure statutory interpretation cases, the current Court tends to mask its disagreements with Congress under the aegis of textualist analysis. Part II expressed skepticism about the Court's ability to write persuasive textualist opinions. This Part further maintains that the Court's newfound textualism only exacerbates the normative tension between democracy and the rule of law, and that a more pragmatic approach better serves both democratic and rule-of-law values. Second, in statutory interpretation cases with constitutional issues in the background, the Court's capricious invention and invocation of super-strong clear statement rules avoids immediate constitutional conflict at the price of candid ventilation of constitutional concerns and sacrifices the reliability of the canonical interpretive regime constructed by the Court. Third, in constitutional cases, the Court is too deferential to national political equilibria that are inconsistent with the constitutional traditions the Court is charged with enforcing. By deferring, the Court slights its unique institutional role of protecting basic constitutional values.

Our general point is that a focus on short-term conflict avoidance undermines the Court's longer-term institutional position and influence. For the Court to play a constructive role, it must show greater restraint in statutory cases, in which the Court is currently most ac-

²¹⁹ In five of the eight nondeference cases, the Court was affirming lower courts; in two the Court was reversing lower courts; one case involved elements of both (*De Grandy*). Less supportive of the Cohen-Spitzer thesis were our aggregate findings, however. Of the 20 agency cases in which the Court flatly affirmed or reversed lower courts (i.e., leaving out *De Grandy*), the Court granted certiorari in 10 cases in which judges were reversing agencies and 10 cases in which judges were affirming agencies. In the former category, the Court affirmed lower courts in five cases and reversed in five cases; this is not a signal that would encourage lower courts to reverse agencies. In the latter category, the Court affirmed lower courts in eight cases and reversed in only two; this is a signal for lower courts to defer.

tivist. Our judgment is that the current Court is exploiting its law-making opportunities too often in statutory cases such as *Ratzlaf* and *MCI*, and should either offer substantive defenses of its activism or should be more cooperative. In other words, the Court should either “put up” or “shut up” in statutory cases. On the other hand, the Court is too timid in reviewing national policies on constitutional grounds, especially where core values of freedom and citizenship are involved and the political branches have not adequately addressed or balanced these values. We conclude this Foreword with an example of how the Court can contribute to tomorrow’s equilibrium by destabilizing today’s squalid consensus.

A. *Text versus Practice*

The larger debate embedded within the Court’s most contentious statutory cases this Term involves the meaning of the rule of law in a democracy. There is a potential tension between democratic values and rule-of-law values in our system. The former promote responsiveness to changing political preferences, while the latter promote stability or predictability of rights and obligations.

Our approach has the normative advantage of reconciling democratic values with the rule of law. The process we have described is a dialectical one, and the dialogue is potentially integrative; the back-and-forth process of anticipated responses, signalling, and implicit bargains is a way by which democratically elected decisionmakers internalize values of predictability and stability and rule-of-law decisionmakers internalize values of popular accountability. Law’s equilibrium, however, suggests a difficulty in perfectly achieving this reconciliation, for the Court is tempted to read its substantive views into statutes when inertia or an important political player protects the Court from a statutory override.

In contrast, the new, tougher version of textualism advocated by Justices Scalia and Thomas exacerbates the tension between democracy and the rule of law and ultimately serves as a cover for the injection of conservative values into statutes. Insisting that statutory interpretation ignore legislative history and adhering to dictionaries at the expense of common sense, the new textualism is insensitive to the expectations of elected representatives.²²⁰ Maintaining that clear statutory texts can trump longstanding practice and taking a dogmatic and often bizarre view of what is clear, the new textualism sacrifices the security and predictability associated with the rule of law. An inter-

²²⁰ Equally insensitive to Congress’s expectations is the new textualism’s view that unreasonable implications of clear statutes are best corrected by Congress through legislation rather than by the Court through interpretation. This view ignores Congress’s limited legislative agenda, which is a primary reason courts and agencies are necessary in the first place. See Brudney, *supra* note 173.

pretive philosophy that slights both democracy and rule of law, and results in odd applications (*MCI, Ratzlaf, Reed*), is not attractive. Nor has this philosophy seduced the Court. Only Justice Thomas shares Justice Scalia's zeal for text, the whole text, and nothing but the text.²²¹

In *Holder* and *De Grandy*, Justice Thomas mounted an analytically powerful attack on a generation's worth of Voting Rights Act jurisprudence.²²² Section 2 of the Voting Rights Act, as amended in 1982, provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote" because of race.²²³ Justice Thomas argued that the "ordinary meaning" of this text reaches only practices that affect minority citizens' access to the ballot, but conceded that the Court has extended the text to reach broader challenges to electoral configurations that allegedly result in racial vote dilution. Relying on committee reports accompanying the 1982 amendments, the Court in *Thornburg v. Gingles*²²⁴ had held that the Act contemplates challenges against multimember districts. Starting with a textualist analysis that was at least as cogent as that invoked in *Ratzlaf* and *MCI*, Justice Thomas, joined only by Justice Scalia, urged the Court to overrule *Gingles*.²²⁵ In *Holder*, four Justices (Blackmun, Stevens, Souter, Ginsburg) explicitly defended the Court's vote-diluting approach to voting rights as a longstanding equilibrium that had been repeatedly ratified by congressional reenactments of the Voting Rights Act,²²⁶ and in *De Grandy*, seven Justices essentially rejected the approach of Justices Thomas and Scalia.²²⁷

We agree with the approach taken by the four Justices in *Holder*. In statutory interpretation cases, absent a strong substantive justification, the Court should be unwilling to disturb a stable equilibrium, especially one that was recently reinstated by Congress in response to

²²¹ Some cases from prior Terms illustrate this proposition. See, e.g., *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1566 n.12 (1993) (illustrating that all but Justices Scalia and Thomas reject the new textualist approach to legislative history); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 611 n.4 (1991) (indicating that all other Justices except Justice Scalia himself give some weight to legislative history).

²²² See *Holder*, 114 S. Ct. at 2591-2619 (Thomas, J., concurring in the judgment); *De Grandy*, 114 S. Ct. at 2667 (Thomas, J., dissenting).

²²³ 42 U.S.C. § 1973(a) (1988).

²²⁴ 478 U.S. 30 (1986).

²²⁵ See *Holder*, 114 S. Ct. at 2618-19.

²²⁶ See *Holder*, 114 S. Ct. at 2626-30 (separate opinion of Stevens, J.).

²²⁷ See *De Grandy*, 114 S. Ct. at 2655-63 (Souter, J., for six Justices) (assessing the merits of minority voters' vote dilution claims against the State of Florida's reapportionment plan); *id.* at 2664-67 (Kennedy, J., concurring in part and in the judgment).

a temporary displacement of that equilibrium.²²⁸ Furthermore, the Court should not disturb a widely shared understanding that it has confirmed in its own precedents. This recalls a descriptive lesson of our model: considerations of *stare decisis* are strongest when the questionable precedent is one that is consistent with current legal and social values;²²⁹ conversely, *stare decisis* will not save a precedent that is clearly out-of-sync with current political winds.²³⁰

Although the new textualism did not prevail in the Voting Rights Act cases, a narrow majority of the Court did rely on its tenets to disrupt a settled equilibrium in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*²³¹ Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful “for any person, directly or indirectly,” to employ “any manipulative or deceptive device” in connection with the purchase or sale of securities.²³² The Court held that section 10(b) does not impose a duty upon people who aid or abet others in committing securities fraud. Justice Kennedy’s opinion argued directly from the text of section 10(b), which does not specifically penalize aiding and abetting, and by negative implication from Congress’s willingness explicitly to impose such liability in other regulatory statutes.²³³ He also maintained that imposing such liability would be inconsistent with the expectations of Congress in 1934 and with the Court’s elaboration of the statutory policy of requiring plaintiffs to allege that they have relied on the defendant’s fraud.²³⁴ Justice Ken-

²²⁸ The Voting Rights Act Amendments in 1982 specifically overrode *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980), which had interpreted the Act to require a discriminatory purpose in vote dilution cases and had repudiated a lower court consensus that vote dilution claims were not subject to a strict showing of discriminatory intent. See *Holder*, 114 S. Ct. at 2627 & n.4 (separate opinion of Stevens, J.). The Court’s refusal to displace this stable equilibrium a second time did not mean that the Court was inclined to read the statute generously, however. In *Holder*, it refused to expand the Voting Rights Act to regulate the size of an electoral body. See *Holder*, 114 S. Ct. at 2588.

²²⁹ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921), quoted in *Runyon v. McCrary*, 427 U.S. 160, 191 (1976)); see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808–12 (1992) (joint opinion) (finding that the values of liberty and autonomy still strongly support the decision of *Roe v. Wade*, 410 U.S. 113 (1973)).

²³⁰ The Rehnquist Court has overruled a boatload of habeas corpus precedents, reflecting a new but stable Court-Congress equilibrium that disapproves of liberal prisoner access to the Great Writ. See, e.g., *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1717 (1992) (White, J.); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (O’Connor, J.) (finally killing *Fay v. Noia*, 372 U.S. 391 (1963), after years of bleeding the precedent); *McClesky v. Zant*, 499 U.S. 467, 493–96 (1991) (Kennedy, J.). See also pp. 45–46 (discussing the Court’s narrowing of the procedural protections of criminal defendants).

²³¹ 114 S. Ct. 1439 (1994).

²³² Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (1988).

²³³ See *Central Bank*, 114 S. Ct. at 1446–48; cf. *Packers and Stockyards Act of 1921*, § 202, 42 Stat. 161 (codified as amended at 7 U.S.C. § 192(g) (1988)) (imposing liability explicitly on those who “aid or abet”).

²³⁴ See *Central Bank*, 114 S. Ct. at 1448–50.

nedly made a fine text-based case, but for a statement of law that no party in the case had asked the Court to adopt in the certiorari papers.²³⁵

In dissent, Justice Stevens wrote for the same four Justices who responded to Justice Thomas in *Holder*.²³⁶ Like the parties in *Central Bank*, Justice Stevens thought that a stable equilibrium had formed on this issue. In hundreds of cases, the SEC and every federal court of appeals to consider the issue had concluded that aiders and abettors are subject to liability under section 10(b), based upon statutory policy and general principles of tort law.²³⁷ Congress was specifically aware of those decisions, and the relevant committees had signalled approval of them.²³⁸ Justice Stevens worked from the precept, long established in the Court's precedents, that a "settled construction of an important federal statute should not be disturbed unless and until Congress so decides."²³⁹

We do not read *Central Bank* simply as an opinion in which text trumps practice, for Justice Kennedy also relied on substantive reasons for reading aiding and abetting out of section 10(b).²⁴⁰ A broad view of section 10(b) would create legal exposure for banks, attorneys, and accountants assisting in securities offerings.²⁴¹ This would, he surmised from a single law review article, have vast distributive conse-

²³⁵ Certiorari was sought and granted on the narrower issue of what standards should be applicable to aider and abettor liability under the cause of action courts had implied from § 10(b). *See id.* at 1457 (Stevens, J., dissenting).

²³⁶ *See id.* at 1455. Justices Blackmun, Souter, and Ginsburg joined in Justice Stevens's opinion.

²³⁷ *See id.* at 1456.

²³⁸ *See id.* at 1458-59 & n.8 (relying on the 1988 amendments and committee reports to the 1983 amendments to the Securities Act). The 1983 report approvingly noted "judicial application of the concept of aiding and abetting liability to achieve the remedial purposes of the securities laws." H.R. REP. NO. 355, 98th Cong., 1st Sess. 10 (1983), quoted in *Central Bank*, 114 S. Ct. at 1458 n.8.

²³⁹ *Central Bank*, 114 S. Ct. at 1458 (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 74 (1990) (Stevens, J., concurring)). Justice Kennedy conceded that "our cases have not been consistent in rejecting arguments such as these," *id.* at 1453, and the Court has regularly followed Justice Stevens's precept in securities cases. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745-47 (1984); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-33 (1975); *Blau v. Lehman*, 368 U.S. 403, 412-13 (1962); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845-46 (1986) (deferring to the CFTC's interpretation of the Commodities Exchange Act, 7 U.S.C. §§ 12(a)(5), 18 (1976) (amended 1983), in part, because Congress had twice amended the statute without overruling the CFTC's interpretation); *cf. Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980) (overturning a relatively recent lower court consensus where there were no directly supportive legislative signals that were attached to an amendment to the statute). Justice Kennedy cited *Aaron*. *See Central Bank*, 114 S. Ct. at 1453.

²⁴⁰ *See Central Bank*, 114 S. Ct. at 1453-54 (Kennedy, J.). Another plausible substantive reason was the current Court's concern for the ramifications of the implied cause of action created by lower courts under § 10(b). *Central Bank* may have been a compromise: rather than abolishing the longstanding implied cause of action, the Court would abolish the not-quite-as-longstanding aiding and abetting liability.

²⁴¹ *See id.* at 1448.

quences unintended by the enacting Congress — including not just higher costs but a closing off of professional services to smaller companies. Justice Kennedy did not explore the equally vast distributional consequences of closing off this form of liability. For the many defrauded investors whose only recourse is against aiders and abettors, and for the SEC, whose enforcement of the statute would have been facilitated by an ability to prosecute, and therefore deter, investment professionals, the result was disappointing.

Although override bills have been introduced in both chambers of Congress,²⁴² *Central Bank* will likely survive if financial institutions mobilize in opposition to legislation. Hence, the Court may have succeeded in exploiting the difficulty of congressional overrides in order to redistribute legal rights and obligations in ways that the Court prefers. The Court's discretion to influence public policy in this way is a consequence of law as equilibrium, but we would urge the Court to be more cautious in exercising its policymaking discretion than it was in *Central Bank*. It serves neither democracy nor the rule of law for the Court to unsettle a longstanding private equilibrium without well-considered substantive justification.

If *Central Bank* had played a role in connection with a securities offering in the 1930s, competent counsel would have hedged their advice as to aiding and abetting liability. Because of accumulated authority, counsel in the 1980s would have committed malpractice to have given *Central Bank* the answer reached by Justice Kennedy. Institutions wanting to know their legal obligations do not rely on isolated texts; they look to practice, including agency rules and advice letters, judicial decisions, congressional feedback, actions of similarly situated parties, and the reactions of the agency. If they find a stable equilibrium — private action induced by vigilant agency enforcement that has been upheld repeatedly in court — they will consider that “law,” whatever its relationship to the statutory text. When the Supreme Court disrupts such a stable practice, as it did in *Central Bank*, it is not only unsettling a specific legal regime, but is also raising the possibility of general insecurity, in which neither private parties nor Congress can rely on settled law. This weakens the Court's stabilizing role in statutory interpretation, and undermines both democratic values and rule-of-law values.

B. Clear Statement Rules and the Stealth Constitution

One way in which the Court can appropriately perform its stabilizing role is to apply clear statement canons to prevent congressional enactments from unnecessarily traversing constitutional values. When candidly set forth and applied, clear statement rules are among the

²⁴² See S. 2306, 103d Cong., 2d Sess. (1994); H.R. 3447, 103d Cong., 2d Sess. (1994).

many ways the Court can signal to Congress its concerns about the constitutionality of government actions. But when the Court transparently manipulates the canons to fit its own substantive agenda, the Court places its credibility and legitimacy at risk. Like the Court's erratic textualist performance in statutory cases, its application of quasi-constitutional clear statement rules has been tactically clever in the short-term but institutionally risky in the longer-term. The Court's adventurism has been most apparent, and most normatively questionable, in the super-strong clear statement rules protecting states' rights at the expense of individual rights and national policies.²⁴³

In 1991 the Court held in *Gregory v. Ashcroft*²⁴⁴ that it would have to be "absolutely certain" that Congress intended "intrusive exercises" of its Commerce Clause power in statutes regulating the states;²⁴⁵ according to this new super-strong clear statement rule, only an extremely well-targeted statutory statement would permit the Court to apply "intrusive" federal statutes against the states. Although we might disagree with the decision's reasoning,²⁴⁶ *Gregory* does have virtues under our theory. It offered and defended a priority rule that trumps other canons of interpretation. Like *Landgraf* and *Rivers* (presumption against retroactive statutes) and *Ratzlaf* and *Staples* (rule against criminal conviction without proof of specific intent), *Gregory* might contribute to a more predictable interpretive regime to guide Congress's statute writing. Also, such decisions permit the Court to give some effect to "underenforced" constitutional values,²⁴⁷ without generating a direct confrontation with Congress. The decision in *Gregory* was the Court's signal to Congress that the Tenth Amendment has bite again, after a brief period of toothlessness, at least where Congress regulates the states as states.²⁴⁸ This Term, however, the Amendment showed its teeth in a most unlikely place — the Bankruptcy Code.

²⁴³ See Eskridge & Frickey, *supra* note 187, at 619-45. We hypothesize that these super-strong clear statement rules represent an implicit bargain within the Court, between the new textualists (Scalia, Thomas, sometimes Kennedy) and the federalists (Rehnquist, O'Connor, sometimes Kennedy). The federalists gain an indirect way to protect the states against "excessive" national intrusion, while the textualists gain a useful mechanism to interpret unclear statutes without reference to their *bête noir*, legislative history.

²⁴⁴ 501 U.S. 452 (1991) (O'Connor, J.).

²⁴⁵ *Id.* at 464.

²⁴⁶ See Philip P. Frickey, *Lawnet: The Case of the Missing (Tenth) Amendment*, 75 MINN. L. REV. 755, 763 (1991).

²⁴⁷ See Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 315-26 (1987); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978).

²⁴⁸ Chief Justice Stone called the Tenth Amendment a "truism" in *United States v. Darby*, 312 U.S. 100, 124 (1941), the worst disrespect one can pay to a constitutional provision. Justice O'Connor reinvented the truism label but infused it with irony in her opinion in *New York v. United States*, 112 S. Ct. 2408, 2417-19 (1992), in which she used it to strike down part of a federal radioactive waste law.

The issue in *BFP v. Resolution Trust Corp.*²⁴⁹ was whether the proceeds of a foreclosure sale of mortgaged real estate conclusively satisfy the Bankruptcy Code's requirement that transfers of property by insolvent debtors within a year of filing for bankruptcy be in exchange for "a reasonably equivalent value."²⁵⁰ Based on this plain language, several lower courts had required a finding of market equivalents for foreclosure sales.²⁵¹ A closely divided Court, in a majority opinion by Justice Scalia, held that, so long as the relevant state procedures are followed, whatever price the sale generates satisfies the Bankruptcy Code. In other words, the price received for foreclosed property is a "reasonably equivalent value," whatever its amount.

BFP is an astonishing decision for a textualist, as Justice Souter's dissenting opinion charged.²⁵² Justice Scalia stoically asserted that "reasonably equivalent value" is ambiguous language,²⁵³ but even the Ninth Circuit opinion affirmed by the Supreme Court admitted that its interpretation conflicts with the "plain-language" of the provision, and supported its holding through policy analysis.²⁵⁴ The lower court's ruling sought to avoid injecting uncertainty into the foreclosure sale bidding process and to ensure the smooth functioning of local real estate markets. The court also invoked a third policy of respecting state power in areas of traditional allocative regulation.²⁵⁵

Justice Scalia ultimately jumped on this policy bandwagon, and in a big way. Invoking *Gregory*, his opinion reasoned that the statute is not sufficiently "clear and manifest" to "displace traditional State regulation" of foreclosure sales.²⁵⁶ Justice Souter responded that the Bankruptcy Code's policy of voiding certain transfers necessarily creates clouds on all sorts of property and contractual transactions otherwise valid under state law,²⁵⁷ and that Congress considered these federalism concerns when it amended the Code in 1984 and specifically rejected an amendment that would have guaranteed the integrity of state foreclosure sales.²⁵⁸

Justice Souter's arguments strike us as unanswerable under traditional rule-of-law premises. Even as a matter of quasi-constitutional

²⁴⁹ 114 S. Ct. 1757 (1994).

²⁵⁰ 11 U.S.C. § 548(a)(2)(A) (1988).

²⁵¹ See *BFP*, 114 S. Ct. at 1760-61.

²⁵² See *id.* at 1768-70 (Souter, J., dissenting). Compare *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1916 (1994) (Thomas, J., joined by Scalia, J., dissenting) (arguing that § 401 of the Clean Water Act, 33 U.S.C. § 1341 (1988), read as a whole, limits the power of states to impose their own discharge requirements) with *id.* at 1914-15 (Stevens, J., concurring) (arguing that the statute's plain meaning clearly does not attach any constraints on state power).

²⁵³ *BFP*, 114 S. Ct. at 1766 (opinion for the Court).

²⁵⁴ *In re BFP*, 974 F.2d 1144, 1148 (9th Cir. 1992).

²⁵⁵ See *id.* at 1148-49.

²⁵⁶ *BFP*, 114 S. Ct. at 1765 & n.8 (citing *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)).

²⁵⁷ See *id.* at 1775-77 (Souter, J., dissenting).

²⁵⁸ See *id.* at 1767 n.1, 1769-70 & n.6, 1777-78.

interpretation, *BFP* was a clumsy move. By applying the super-strong clear statement rule to federal regulation interfering with state property law, Justice Scalia radically expanded *Gregory*, which involved only federal regulation of state governments themselves, into an approach at odds with the Constitution's Supremacy Clause.²⁵⁹ This expansion of *Gregory* starkly contrasts with *Holder* and *De Grandy*, two cases that did involve direct federal regulation of state governments and in which the Court failed to mention *Gregory*.²⁶⁰ Tellingly, no party in *BFP* cited *Gregory*.

Although the outcome in *BFP* strikes us as sensible under the Ninth Circuit's policy analysis, the Supreme Court's decision undermines the Court's rational goals. By giving its policy-driven result an unsupportable formalist gloss, Justice Scalia's opinion flunks any requirement of judicial candor²⁶¹ and raises questions about just when the apparent meaning of the Bankruptcy Code can be overridden out of respect for state authority or for some unstated other reason.²⁶² Contrast *Landgraf* and *Rivers*. We lament the result in *Rivers*,²⁶³ but we endorse the Court's approach in those cases. Justice Stevens's opinions are refreshingly fair-minded about the strength of opposing

²⁵⁹ Cf. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2632-34 (1992) (Scalia, J., concurring in part and dissenting in part) (arguing against narrow construction of express federal statutory provisions pre-empting state tort remedies).

²⁶⁰ We feel that *Gregory* concerns must have inspired the votes of Chief Justice Rehnquist and Justices Kennedy and O'Connor in *Holder*. Their rationale for holding that a challenge to the size of an electoral body is outside the ambit of § 2 of the Voting Rights Act was that there is no "objective" benchmark for determining what is the "right" size. See *Holder v. Hall*, 114 S. Ct. 2581, 2586 (1994) (plurality opinion of Kennedy, J.); *id.* at 2589-91 (O'Connor, J., concurring in part and in the judgment). In most instances this would be no decisive objection, for in statutory cases the Court is routinely called upon to make such political judgments. The plurality's concern, however, was that the Court should require more determinate guidance from Congress — a clearer statement — when those judgments relate to electoral configurations, which are core state functions under *Gregory*.

²⁶¹ For a description of the requirements of judicial candor, consult David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 732-36 (1987). But see Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 406-12 (1989) (arguing that the complexity of factors in a judicial decision make an attempt at candor a chimerical venture). We are also disturbed by an unmistakable distributional drift in this Term's cases, which one after another made it harder to penalize or police fraudulent conduct. Aside from *BFP*, *Central Bank*, and *Ratzlaf* (cases we have already discussed), see *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2056 (1994), which reversed the Ninth Circuit's creation of a federal rule to allow prosecution of savings and loan fraud, and *ABF Freight Sys., Inc. v. NLRB*, 114 S. Ct. 835, 839-40 (1994), which acquiesced in the NLRB's granting of relief to an employee who perjured himself. This is in marked contrast to the Court's aforementioned lack of solicitude for the procedural rights of defendants accused of non-white collar crimes.

²⁶² See Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 571-98 (1993) (making a pragmatic case for applying the strictly textualist approach to the Bankruptcy Code).

²⁶³ The presumption against statutory retroactivity need not apply when Congress is "restoring" prior rights, as it did when it overrode the Court's unanticipated decision in *Patterson*. See *ESKRIDGE*, *supra* note 29, ch. 8.

arguments (conceding, for example, the good textual arguments favoring retroactivity) and present a thoughtfully worked out interpretive regime for statutory retroactivity issues that surely will be helpful to Congress.

BFP suggests a more subtle problem with the Court's interest in promoting underenforced constitutional norms through clear statement rules: the dangers of stealth constitutionalism. Insistence upon a super-clear statement from Congress when its statutes venture close to — but not beyond — a constitutional periphery is a way for the Court to enforce its favored constitutional values, but without risking an open confrontation with Congress. Justice Scalia's opinion in *BFP*, by contrast, contained no analysis of the constitutional concerns and made no effort to understand the Court's pre-*Gregory* precedents, or even *Gregory* itself. The decisions surely came as a surprise to Congress. Indeed, there is a "bait and switch" feature to cases like *Gregory* and *BFP*: when Congress enacted the statutes in question, the constitutionality of the state-infringing provisions was clear and Congress could not have anticipated the *Gregory* rule; nor could a reasonable observer have predicted the expansion of *Gregory* in *BFP*. When the Court's practice induces Congress to behave in a certain way and the Court then switches the rules, Congress justifiably feels taken.²⁶⁴

We are open to the response that the Court should be free to develop workable precepts of interpretation and harmonization rules, and that such development necessarily involves shifts in direction. Moreover, we do not counsel the Court to abandon constitutional concerns when it interprets statutes, and we offer *Landgraf* as an exemplar. Justice Stevens's opinion openly explored the constitutional values and crafted a presumption that accommodated those values and reflected a fair view of the Court's precedents. His opinion should have come as no surprise to Congress. Unfortunately, with the exception of *Landgraf*, the Court has taken a casual rather than systematic and reflective approach to interpretive principles.

To illustrate this concern, contrast *BFP* with *Hagen v. Utah*.²⁶⁵ The question in *Hagen* was whether a turn-of-the-century federal statute had retracted the boundaries of an Indian reservation, thereby leaving outside the reservation, and within state criminal jurisdiction,

²⁶⁴ Cf. *United States v. Carlton*, 114 S. Ct. 2018, 2026 (1994) (Scalia, J., concurring in the judgment) (discussing a clear example of "bait-and-switch taxation"). For an Eleventh rather than Tenth Amendment example of bait and switch, see Eskridge & Frickey, *supra* note 187, at 638–39. The utility of such a strategy is reduced once Congress becomes aware of what is going on, and the confirmation hearings for Justice Breyer reveal that Senator Biden, the Chair of the Judiciary Committee, is aware of and strongly concerned about the Court's strategy. See *Supreme Court Confirmation Hearing for Judge Stephen G. Breyer Before the Senate Judiciary Committee*, 103d Cong., 2d Sess. (July 13, 1994, Afternoon Session), available in LEXIS, Nexis Library, Fednew File.

²⁶⁵ 114 S. Ct. 958 (1994).

the area in which the petitioner had allegedly committed a crime. The Solicitor General argued that the Court should hold that Congress may diminish an Indian reservation only through a statute containing, in the words of the Court, "explicit language of cession or other language evidencing the surrender of tribal interests and an unconditional commitment from Congress to compensate the Indians."²⁶⁶ The Court's precedents on the diminishment of reservations are a hopelessly conflicting lot if assessed from rule-of-law values,²⁶⁷ and the Solicitor General's suggestion would have provided substantial coherence to this area of the law.²⁶⁸ In one paragraph, however, Justice O'Connor's majority opinion rejected the proposal because precedent established that the canon protecting tribal interests was merely a presumption, not a clear statement rule.²⁶⁹ Ultimately, the Court applied the presumption only weakly, allowing a statute with ambiguous language to effect a diminishment. The Court found evidence of statutory meaning in sources that the Court currently disfavors — post-enactment congressional signals, later administrative practice, and the current character of the land area in question, which is largely non-Indian.²⁷⁰

From the perspective of law as equilibrium, this result — driven by a judicial appreciation of current context and post-enactment signals — is unexceptional so long as no serious public values are at stake. Unlike *BFP*, however, there are structural values — recognized since the Marshall Court — implicated in any diminishment of tribal interests. *Hagen*, and not *BFP*, would have been an appropriate case for the Court to create a stronger clear statement rule. If canons are designed, as we believe and the Court maintains they are, to create a predictable interpretive regime, the Court's use of them makes little sense in either case: *BFP* left Bankruptcy Code interpretation less predictable than before, and *Hagen* missed an opportunity to inject predictability into a chaotic series of Indian law precedents. The apparent explanation of the Court's divergent approach in the cases is its greater concern for the integrity of state property transactions than for the integrity of tribal jurisdiction.

²⁶⁶ *Id.* at 965.

²⁶⁷ See Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1144–50, 1180 (1990).

²⁶⁸ A strong canon protecting tribal interests would also promote the rule of law in other ways, primarily by being true to Marshall Court-era precedent and in recognizing and protecting the structural, sovereign nature of the federal-tribal relationship, similar to the way in which *Gregory* protects state governments from all but clearly advertent federal regulation. See, e.g., Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 440 (1993).

²⁶⁹ See *Hagen*, 114 S. Ct. at 965–66.

²⁷⁰ See *id.* at 967–70.

The approaches bandied about in these cases — and in the rule of lenity cases discussed above — look more like loose cannons than lucid canons. The incoherence of the Court's approach reflects the tension that exists between the temptation the Court faces to invoke the canons selectively in support of the Court's substantive values and institutional position, and the role the Court has declared for itself to set forth an interpretive regime of rules and guides for statutory drafters and interpreters. The latter is obviously better for the country and, ultimately, for the Court as well. While the short-term benefits of manipulating the canons is apparent, the long-term harm should also be considered. If the Court both creates a coherent interpretive regime such as we have outlined in the Appendix and then applies it with some constancy, then the Court has not only served a core function of the judiciary but has also revealed its usefulness to the political branches. In that event, the Court can enhance its credibility when it does have a well-considered constitutional objection to a course of action undertaken by the political branches.

C. *The Role of Constitutional Discourse:
Mediation and Rupture*

Law as equilibrium, which assumes the values of continuity, stability, and predictability, might seem least plausible or desirable in the context of constitutional law. Has not the Court frequently upset political equilibria with activist exercises of judicial review? Are there not occasions in which, regardless of the institutional implications, judicial review injects a needed normative counterweight into public policy? In our view, however, our model not only explains the Court's exercises of judicial review well but also provides a useful lens through which to view the normative debates surrounding judicial review.

Law as equilibrium provides both an explanation and a defense for *Brown v. Board of Education*,²⁷¹ for example. Because segregation reflected a distinctly local — not national — policy²⁷² that was inconsistent with the values held by the Justices, the Court had strong incentives for activism in this area. Those incentives were strengthened by the institutional paralysis of Congress, thwarted by Southern filibusterers from overriding apartheid itself but equally unwilling to discourage the Court. Thus, the Court in *Brown* operated within an

²⁷¹ 347 U.S. 483 (1954)

²⁷² The only national policy of apartheid was racial segregation in the armed forces, which had been formally ended by executive order in 1948, but was not actually ended in the Army and the Marine Corps until the Korean War. See MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES, 1940–1965*, at 616–17 (1981). Apartheid was also at war with national policies, such as the Cold War contrast between “free” America and “enslaved” communist bloc states. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980).

institutional framework which provided it the impetus as well as the freedom to abolish American apartheid. Nonetheless, the Court, surely understanding that its long-term institutional capital was on the line, implemented *Brown* slowly. *Brown II* obligated the recalcitrant states to desegregate public education only "with all deliberate speed,"²⁷³ and when many school boards did nothing the Court remained mute. The Court also immediately ducked the socially charged issue of antimiscegenation laws.²⁷⁴ When a strong national consensus favoring racial justice emerged in the 1960s and took root in the Johnson White House and the Great Society Congress, the Court was much better situated institutionally to enforce *Brown* in more than a grudging way. Not surprisingly, the Court ordered recalcitrant school districts to desegregate immediately²⁷⁵ and invalidated state antimiscegenation statutes.²⁷⁶

Brown reveals one important normative role for the Court in adjudicating constitutional challenges to state and local policies: the enforcement of national norms against recalcitrant or slow-moving states.²⁷⁷ This role is also played out, though less dramatically, in the dormant commerce clause cases which invalidate local economic policies disrupting free national markets. State and local cases can also reveal a more subtle role for the Court: mediation. The issues on which our society is riven — including abortion, the death penalty, censorship, freedom of religion and the role of religious belief in the political sphere, sexuality and its regulation — are played out mostly at the state and local levels. On such emotionally charged issues, an institutional viewpoint suggests that the Court would avoid taking a position that flatly repudiates the concerns of a politically salient interest, but would instead attempt to mediate a controversy in a way that accommodates the primary needs of each warring group. We believe the Court has adopted such a rational strategy on issues of abortion, affirmative action, and the death penalty.²⁷⁸

²⁷³ See *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

²⁷⁴ See *Naim v. Naim*, 350 U.S. 891 (1955), *dismissed by* 350 U.S. 985 (1956).

²⁷⁵ See *Green v. County Sch. Bd.*, 391 U.S. 430, 441-42 (1968).

²⁷⁶ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

²⁷⁷ We think the Court missed an opportunity to enforce such a norm this Term in *Campbell v. Wood*, 114 S. Ct. 2125 (1994), in which the Court denied certiorari and thereby allowed the State of Washington to impose capital punishment by hanging. This form of execution is physically "cruel" and now unusual, surviving in only two states and South Africa. See *Campbell v. Wood*, 18 F.3d 662, 697-703, 726-28 (9th Cir. 1994) (en banc) (Reinhardt, J., dissenting).

²⁷⁸ See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (joint opinion) (reaffirming but reinterpreting *Roe v. Wade*, 410 U.S. 113 (1973), a compromise contrary to the positions of both parties); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-20 (1978) (opinion of Powell, J.) (disallowing outright racial quotas but permitting race to be considered as a plus factor); *Gregg v. Georgia*, 428 U.S. 153, 196-98 (1976) (plurality opinion) (abandoning *Furman v. Georgia*, 408 U.S. 238 (1972) and allowing states to impose the death penalty, but only under circumstances in which the jury's discretion is carefully controlled).

In the 1993 Term, this mediating approach was illustrated by *Madsen v. Women's Health Center, Inc.*²⁷⁹ The Court upheld an injunction that created a 36-foot "buffer zone" separating Operation Rescue and other pro-life protesters from a health clinic performing abortions, but the Court invalidated the injunction's 300-foot buffer zone around the homes of clinic employees and bar against protesters approaching clients of the clinic. Chief Justice Rehnquist's opinion applied an improvised level of First Amendment scrutiny, a more rigorous version of intermediate scrutiny. This framework raises the same analytic concerns we voiced in connection with *Turner Broadcasting*,²⁸⁰ but the Chief Justice's opinion effected a compromise that strikes us as Solomonic.²⁸¹ The decision prohibited the most threatening and disruptive conduct, and duly signalled lower courts (by the Court's adoption of something less demanding than strict scrutiny) that they can fashion creative relief in these tense situations. On the other hand, the conduct that is most like traditional persuasive speech was deregulated, and lower courts were duly signalled that they ought to prohibit no more speech than necessary to protect clients and workers. Most important, Chief Justice Rehnquist's opinion insisted that courts be available to referee future clashes between Operation Rescue and abortion clinics. The Court cannot control the intensity of people's feelings about abortion, but it can create national strategies that keep people from one another's throats.

The hardest question under our theory is when, if ever, the Court should disrupt a national equilibrium. Few examples exist in which even the Warren Court disrupted a *national* equilibrium through judicial review.²⁸² The Court has often upheld national equilibria that, if adopted at the state level, would have almost surely been invalidated.²⁸³ Nonetheless, consistent with the "free speech tradition" that

²⁷⁹ 114 S. Ct. 2516 (1994).

²⁸⁰ See *supra* pp. 47–48. The *Madsen* injunction targeted a specific group with a particular message. Regulations that discriminate in this way usually require strict scrutiny, see, e.g., *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983), which we think could be satisfied in this case by the burden the protests placed on the clients' rights to abortion and medical counseling.

²⁸¹ But see *Madsen*, 114 S. Ct. at 2534 (Scalia, J., dissenting) (noting that the "appearance of moderation and Solomonic wisdom" of the Court's judgment is "deceptive").

²⁸² The most famous exercises in Warren Court activism involved displacement of local or state equilibria. See *Miranda v. Arizona*, 384 U.S. 436, 463–91 (1966) (applying rules already generally followed by FBI to state police officers); *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965) (invalidating anomalous state statute criminalizing contraception); *Reynolds v. Sims*, 377 U.S. 533, 584–87 (1964) (requiring malapportioned state legislatures to reapportion); *Mapp v. Ohio*, 367 U.S. 643, 655–60 (1961) (applying to the states the exclusionary rule already in place for federal prosecutors).

²⁸³ See *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding criminal conviction of Japanese-American who refused to relocate from the West Coast); *Hirabayashi v. United States*, 320 U.S. 81, 104–05 (1943) (upholding criminal conviction of Japanese-American refusing to obey curfew order).

has developed in the twentieth century,²⁸⁴ the Court in recent years has favored freedom of expression even in settings in which society is intolerant.²⁸⁵ The Free Speech Clause of the First Amendment appears to us to be the strongest, most consensual rule-of-law area in constitutional discourse. To be sure, most invalidations have involved state censorship,²⁸⁶ and in the context of federal restrictions on expression, the Court has tended to give the federal political branches ample room to demonstrate that apparent censorship is justified (recall *Turner Broadcasting*). Only when the national political branches have failed to deliberate on the relevant constitutional values has the Court exercised its authority to disrupt the equilibrium. A few illustrations follow.

In the 1950s, the Court declined to invalidate the Smith Act, which made it a crime to advocate overthrowing the federal government by force or violence.²⁸⁷ As the decade of McCarthyism unfolded and it became clear that the federal political branches were not deliberating about and accommodating free speech values, the Court took a carefully calibrated approach to reasserting the primacy of free speech without undue institutional disruption or much chance of an embarrassing override by the political branches. In *Kent v. Dulles*,²⁸⁸ the Court took a narrow, quasi-constitutional route to invalidate the State Department's rule forbidding the issuance of passports to American citizens who were identified as communists. Rather than strike down the rule as a violation of the First Amendment, the Court held that, because of the serious constitutional values at stake, only a clear statement authorizing the State Department to disqualify the applicant could suffice. Despite quick denunciations from President Eisenhower and some congressional leaders, the Court escaped this situation without formal rebuke, even though a statute rather than constitutional amendment would have effected an override.²⁸⁹ In later cases, the Court continued its policy of deferring formally to the national equilibrium that communist affiliation was criminal, but nonetheless found

²⁸⁴ See HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA AT xviii-xxi (1988).

²⁸⁵ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 398 (1989) (invalidating, in an opinion joined by Scalia and Kennedy, state statute criminalizing desecration of American flag); *Cohen v. California*, 403 U.S. 15, 26 (1971) (striking down, in a majority opinion by Justice Harlan, the Warren Court's most conservative Justice, the disturbing-the-peace conviction of a man wearing a "fuck the draft" jacket in a state courthouse).

²⁸⁶ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

²⁸⁷ See Smith Act, 18 U.S.C. § 2385 (1948); *Dennis v. United States*, 341 U.S. 494, 516-17 (1951).

²⁸⁸ 357 U.S. 116 (1958).

²⁸⁹ See Daniel A. Farber, *National Security, the Right to Travel, and the Court*, 1981 SUP. CT. REV. 263, 278-81.

narrow ways to invalidate Smith Act prosecutions.²⁹⁰ As the Red Scare ebbed, the Court deserved some of the credit, even though it avoided the depletion of its institutional capital that an outright invalidation of the Smith Act and similar schemes would have caused.

More recently, the Court in *Texas v. Johnson*²⁹¹ struck down a state statute forbidding flag desecration. Consistent with our model, the state rather than federal origin of the statute may have simplified this exercise. When Congress immediately enacted a similar federal statute without much deliberation about First Amendment values, the Court held its ground and struck the new statute down as well.²⁹² The Court was denounced in some circles, but may have actually gained in stature through its imposition of the rule of law in the face of political rhetoric. We suggest that the failure of Congress to show any appreciation for the First Amendment tradition²⁹³ radically decreased the deference that one otherwise would have expected the Court to give congressional products. Concomitantly, the Court's confidence in its First Amendment rule-of-law values gave it the impetus to stick with its approach and to weather the institutional storm. Indeed, the legislative background of the federal flag desecration statute left no doubt that the Court was the only national institution situated to enforce rule-of-law values.

In contrast, when the Court views the congressional deliberations as seriously taking constitutional values into account, the Court has been deferential, even in circumstances in which it would have invalidated a similar state statute. Perhaps the best recent example is *Rostker v. Goldberg*,²⁹⁴ where the majority of the Court upheld the exclusion of women from selective service registration at least in part because it was convinced that Congress had squarely addressed and carefully deliberated the rule-of-law values implicated by this discrimination.²⁹⁵

²⁹⁰ See *Scales v. United States*, 367 U.S. 203, 251–55 (1961) (interpreting the Smith Act narrowly to set aside convictions); *Yates v. United States*, 354 U.S. 298, 334 (1957) (same). Only some years later did the Warren Court, again in a case involving state censorship, directly undercut the doctrinal basis for upholding measures that made communist affiliation illegal. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

²⁹¹ 491 U.S. 397 (1989).

²⁹² See *United States v. Eichman*, 496 U.S. 310, 318–19 (1990).

²⁹³ See John A. Clark & Kevin T. McGuire, *Congressional Response to Supreme Court Decision Making: The Flag Burning Cases 14–16* (April 14, 1994) (unpublished paper presented at the 1994 annual meeting of the Midwest Political Science Association) (showing that members' votes were influenced, in addition to pressure from constituents, by their own policy preferences rather than concerns for the constitutional values reflected in flag desecration).

²⁹⁴ 453 U.S. 57 (1981).

²⁹⁵ See *id.* at 70 (stating that "Congress and its Committees carefully considered and debated two alternative" proposals); see also *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (suggesting that, had sex classification in federal social security statute been based on "a deliberate congressional intention to remedy the arguably greater needs" of certain women, it might well have been upheld).

Two cases the Court saw but did not resolve this Term suggest a further role that an equilibrium Court might play in constitutional cases: *United States Department of Defense v. Meinhold*,²⁹⁶ in which a gay serviceman challenged the pre-1993 military exclusion of bisexuals, lesbians, and gay men, and *Evans v. Romer*,²⁹⁷ the challenge to Colorado's constitutional initiative prohibiting state or local laws that advantage sexual orientation minorities. Both issues will return to the Court throughout the decade and will provide our legal process Court with challenging constitutional moments. An institutional analysis, superficially consistent with our theory of law as equilibrium, would suggest judicial deference to recent legislative and popular majorities, and that may be the path the Court will choose. But the Court has powerful incentives to surprise the pundits on this issue. A deeper normative lesson of law as equilibrium is that the Court's long-term position will be undermined by short-sighted deference in either situation.

The institutional case for judicial restraint is formidable. The current Court has revealed itself to be both ambivalent and embarrassed about issues of sexuality, and wholly confused about homosexuality in particular.²⁹⁸ The first impulse of such a Court is not to leap to the defense of lesbians, gay men, and bisexuals. The least likely arena for the Court's intervention is the United States armed forces, where national security concerns reinforce the Court's deferential tendencies (recall *Weiss*²⁹⁹). Although *Meinhold* arose under the pre-1993 version of the military exclusion, the 1993 compromise reached in the political process — “don't ask, don't tell” — augurs against judicial intervention even if the Court were otherwise inclined.

An institutionalist perspective should not stop with the foregoing deferential analysis, however. For the reasons developed earlier in this Foreword, state anti-homosexual policies will usually be more constitutionally vulnerable than national policies, especially if the policies being challenged strike the Court as out-of-line with the drift of national debate. Hence, we should expect some support within the Court for striking down laws like the Colorado initiative if the Court perceives the anti-gay initiative movement to be an example of temporary and parochial gay-bashing. For similar reasons, an all-or-nothing frontal attack on the military's exclusion is unlikely to succeed. On the other hand, as Justice Ginsburg signalled in *Weiss*,³⁰⁰ a more narrow chal-

²⁹⁶ 114 S. Ct. 374 (1993) (mem.) (granting in part the Solicitor General's request for a stay of the district court's order awarding relief, pending the case's disposition on appeal in the Ninth Circuit Court of Appeals).

²⁹⁷ 854 P.2d 1270 (Colo.) (en banc), cert. denied, 114 S. Ct. 419 (1993).

²⁹⁸ See RICHARD A. POSNER, SEX AND REASON 346-48 (1992).

²⁹⁹ 114 S. Ct. 752 (1994).

³⁰⁰ See *id.* at 769 (Ginsburg, J., concurring) (stating that the Court's “close inspection” of the claims asserted in *Weiss* reaffirms the courts' function of ensuring “that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not

lenge to the exclusion “as applied” might be successful. As the Court did in the communist prosecutions during the 1950s, the Court in the 1990s might be willing to invoke due process or free speech protections to prevent the exclusion of personnel, such as Keith Meinhold, who merely express their identity.³⁰¹

The Court would take some heat for any decision questioning the military exclusion, even a fact-specific “as applied” challenge. Why should a conservative Court, ambivalent about the relationship between law and sexuality, take such short-term risks? As we now argue, the Court’s longer-term institutional interests would not be served by deference even in the context of the armed forces (the hardest case under our model). To begin with, discrimination on the basis of status, rooted in hostility toward an unpopular group, is deeply inconsistent with constitutional rule-of-law values that the Court is uniquely charged with enforcing.³⁰²

Like the McCarthy era witchhunts against supposed communists, there is an element of hysteria and even viciousness in congressional hostility to gays and lesbians.³⁰³ Moreover, any exclusion is inconsistent with our constitutional traditions of free speech and equal citizenship. Soldiers who may not reveal their sexual preference are prohibited from conversing about issues of sexuality in the most powerful way human beings persuade each other — by injecting one’s personal perspective. Nor can society pretend that it is treating the lesbian or gay soldier as an equal citizen. Would the *Brown* Court have tolerated a system which allowed African-American children to attend white schools if they could “pass” as whites? A regime holding

turn on the charity of a military commander” (quoting *Winters v. United States*, 89 S. Ct. 57, 59–60 (1968) (Douglas, J., opinion in chambers)).

³⁰¹ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 249–51, 254–55 (1957) (finding that the State Attorney General’s investigation into subversive persons constituted an infringement of First Amendment rights and that the imposition of a contempt sanction for refusals to answer questions is a denial of due process); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 243–47 (1957) (holding that the State Board of Bar Examiners’ refusal to allow a former member of the Communist Party to take the bar exam, in large part because of his prior Communist Party affiliation, represented a denial of due process).

³⁰² See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (demonstrating that “mere negative attitudes, or fear” on the part of private citizens cannot form a rational basis for government action); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

³⁰³ See POSNER, *supra* note 298, at 346. Congress’s recent actions reinforce the suspicion that its military policy is rooted in insufficient attention to constitutional values. Sixty-three members of the Senate recently voted to withhold federal funds from public schools that provided counseling that affirms homosexuality as a positive lifestyle choice. See *Senate Votes to End Funding to Schools That Teach Gay Acceptance*, CHI. TRIB., Aug. 2, 1994, at 7. We find it impossible to label this anything but mean-spirited. Under any conception of homosexuality, even one rooted in outmoded notions of personality disorder, denying counseling is simply inhuman. The Senate did reverse this vote once its implications were apparent. See *Helms Loses Bid to Ban Talk of Gays in Schools*, S.F. CHRON., Sept. 24, 1994, at A4.

open the prospect of citizenship only upon terms of anonymity is more rather than less discriminatory.³⁰⁴

Under our view of law as equilibrium, the Court ought to be sensitive to assertions of citizenship by previously marginalized groups that are no longer willing to accept their unequal status. Openly gay people are everywhere, including one of the authors of this Foreword.³⁰⁵ The public presence of open bisexuals, gay men, and lesbians reflects an ongoing redistribution of social and political power and makes it increasingly difficult to sustain any policy that treats them differently from other citizen groups. Accordingly, a Court that flatly sustains openly anti-homosexual regulations is a Court that risks looking as foolish or short-sighted as the *Plessy* and *Korematsu* Courts, which deferred to popular prejudice and upheld segregation of Americans by race. Both decisions undermined the Court's claim to protect a constitutional rule of law. Just as racial apartheid was an unstable equilibrium in the long term, so an apartheid of the closet³⁰⁶ is similarly unstable once there are cracks in the closet door.

Conversely, a Court deferring to an unstable consensus will have missed an opportunity to facilitate an extremely useful dialogue within our pluralism.³⁰⁷ A critical role, perhaps ultimately *the* critical role, for the Court in a pluralist society is to facilitate the integration of new groups and interests into the existing system. The challenge for the current Court in the gay rights cases is to find some way to reconcile the unease felt by popular majorities with Justice Harlan's insistence in his *Plessy* dissent that "there is in this country no superior, dominant, ruling class of citizens In respect of civil rights, all citizens are equal before the law."³⁰⁸ A tragedy of *Bowers v. Hardwick* is that the Court's construction of the case as one where "homo-

³⁰⁴ A recently published biography of Justice Powell, who provided the crucial swing vote in *Bowers v. Hardwick*, 478 U.S. 186 (1986), indicates that Justice Powell's inability to validate homosexual citizenship was rooted in a profound ignorance about the widespread presence of homosexuals in society. Although gay men and lesbians had in fact worked for him as judicial clerks, Justice Powell believed at the time of his critical *Bowers* vote that he had never met a "homosexual." See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 511-30 (1994).

³⁰⁵ See William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 644-45 (1994) (continuing a tradition inaugurated by Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979)).

³⁰⁶ See EVE K. SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET passim* (1990).

³⁰⁷ Many commentators have recognized the distinctive role courts can play in enhancing the political discourse. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993) (describing "an America in which courts are a vital functioning part of political discourse, not some bastard child standing aloof from legitimate political dialogue"); Louis M. Seidman & Mark V. Tushnet, *The Empty Vessel: Constitutional Discourse in the Age of Cynicism* (1994) (unpublished manuscript, on file with the Harvard Law School library); cf. Michael E. Solimine & James L. Walker, *The Supreme Court, Judicial Review, and the Public: Leadership versus Dialogue*, 11 CONST. COMM. 1, 5 (1994) (describing the Court's leadership function in creating new popular majorities).

³⁰⁸ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

sexual” but not “heterosexual” sodomy would be outside the law³⁰⁹ defensively asserted a caste superiority that has unsettled rather than settled the issue.³¹⁰ The Court’s effort in that case to close off discussion — to closet discourse — by reasserting outdated ways of understanding homosexuality has undermined the Court’s credibility as a neutral arbiter of law.

The military’s suppression of lesbian, gay, or bisexual identity (“don’t tell”) is a censorship of dissent about gender and sexual orientation that parallels the government’s suppression of flagburning. In striking down both state and federal flagburning statutes, the Court was hardly sanctioning deviant activity, and surely some of the Justices took pride in protecting expressive activity they personally disliked. The Court as an institution suffered short-term criticism but has ultimately improved its stature by insisting upon First Amendment principles against temporary majorities. The Court has a similar opportunity in the gay rights cases. The Court ought to preclude the government from segregating lesbians and gay men into second-class citizenship and, even more so, from penalizing people for saying who they are.

CONCLUSION

In our judgment, the traditional debate in Supreme Court commentary between legal formalism, which praises rule-of-law values, and legal realism, which maintains that judicial personal preferences rule, misses a third important explanatory inquiry: the institutional perspective. In this Foreword, we have proposed one way of setting institutional analysis on an equal plane with formalism and realism. We believe that law as equilibrium provides an insightful avenue to assess the behavior of the Supreme Court in both its descriptive and

³⁰⁹ See *Bowers v. Hardwick*, 478 U.S. 186, 188 n.2, 189 (1986).

³¹⁰ See generally Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 645 n.95 (1990) (citing 33 law review articles and comments critical of *Bowers*). The decision has been criticized as bad history, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1081–91 (1988); as undermining self-governance, see Frank I. Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1494–99, 1532–37 (1987); as ignorant, see POSNER, *supra* note 298, at 341–50; as homophobic, see Thomas B. Stoddard, *Essay, Bowers v. Hardwick: Precedent by Personal Predilection* 54 U. CHI. L. REV. 648, 655–56 (1987); and as slippery, see Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1741–42 (1993). Commentators have all but uniformly urged the Court to overrule *Bowers* and have asserted grounds of due process, see CHARLES FRIED, *ORDER AND LAW* 81–84 (1991); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 799–802 (1989); equal protection, see Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988); freedom of expression, see David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 325–30 (1994); or cruel and unusual punishment, see Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1461 (1992).

normative dimensions. If, as Hart and Sacks urged, “[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living,”³¹¹ it makes no sense to assess it in isolation from the institutional setting within which it must be done.

No doubt even the reader who finds our self-styled “thought experiment” useful also finds it incomplete. But if we have raised more questions than we have answered, they strike us as important questions to be raised. We will have served our purpose if our theory of law as equilibrium has left the skeptical reader in intellectual disequilibrium.

³¹¹ HART & SACKS, *supra* note 4, at 148.

APPENDIX

THE REHNQUIST COURT'S CANONS OF STATUTORY CONSTRUCTION

This Appendix collects the canons of statutory construction that have been used or developed by the Rehnquist Court, from the 1986 through the 1993 Terms of the Court (inclusive). The Appendix divides the canons into three conventional categories: the textual canons setting forth conventions of grammar and syntax, linguistic inferences, and textual integrity; extrinsic source canons, which direct the interpreter to authoritative sources of meaning; and substantive policy canons which embody public policies drawn from the Constitution, federal statutes, or the common law.

TEXTUAL CANONS

- Plain meaning rule: follow the plain meaning of the statutory text,¹ except when text suggests an absurd result² or a scrivener's error.³

LINGUISTIC INFERENCE

- *Expressio unius*: expression of one thing suggests the exclusion of others.⁴
- *Noscitur a sociis*: interpret a general term to be similar to more specific terms in a series.⁵

¹ See *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *United States v. Providence Journal Co.*, 485 U.S. 693, 700-01 (1988). *But see id.* at 708, 710 (Stevens, J., dissenting) ("[The Court has] long held that in construing a statute, [it is] not bound to follow the literal language of the statute — 'however clear the words may appear on superficial examination' — when doing so leads to 'absurd,' or even 'unreasonable,' results." (quoting *United States v. American Trucking Ass'ns., Inc.*, 310 U.S. 534, 543-44 (1940) (internal quotation marks omitted))).

² See *United States v. Wilson*, 112 S. Ct. 1351, 1354 (1992); *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1316-17 (1992); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989).

³ See *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173, 2186 (1993).

⁴ See *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2054 (1994); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 730-31 (1989); *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 133-34 (1989). *But see Burns v. United States*, 501 U.S. 129, 136 (1991) ("[A]n inference drawn from Congressional silence certainly cannot be credited."); *Sullivan v. Hudson*, 490 U.S. 877, 891-92 (1989) (refusing to read an express provision in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(3) (1982), which allows for the recovery of fee awards in adversarial administrative proceedings, to generate a "negative implication" that the court lacks power to award such fees in a nonadversarial proceeding).

⁵ See *Beecham v. United States*, 114 S. Ct. 1669, 1671 (1994); *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990); *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989).

- *Ejusdem generis*: interpret a general term to reflect the class of objects reflected in more specific terms accompanying it.⁶
- Follow ordinary usage of terms, unless Congress gives them a specified or technical meaning.⁷
- Follow dictionary definitions of terms, unless Congress has provided a specific definition.⁸ Consider dictionaries of the era in which the statute was enacted.⁹ Do not consider “idiosyncratic” dictionary definitions.¹⁰
- “May” is usually precatory, while “shall” is usually mandatory.¹¹
- “Or” means in the alternative.¹²

GRAMMAR AND SYNTAX

- Punctuation rule: Congress is presumed to follow accepted punctuation standards, so that placements of commas and other punctuation are assumed to be meaningful.¹³
- Do not have to apply the “rule of the last antecedent” if not practical.¹⁴

TEXTUAL INTEGRITY

- Each statutory provision should be read by reference to the whole act.¹⁵ Statutory interpretation is a “holistic” endeavor.¹⁶
- Avoid interpreting a provision in a way that would render other provisions of the Act superfluous or unnecessary.¹⁷
- Avoid interpreting a provision in a way inconsistent with the policy of another provision.¹⁸

⁶ See *Hughey v. United States*, 495 U.S. 411, 419 (1990).

⁷ See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989).

⁸ See *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988).

⁹ See *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610–11 (1987).

¹⁰ See *MCI Telecommunications Corp. v. AT&T Co.*, 114 S. Ct. 2223, 2229–30 (1994).

¹¹ See *Mallard v. United States Dist. Court*, 490 U.S. 296, 302 (1989).

¹² See *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2244–45 (1994).

¹³ See *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241–42 (1989); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 528–29 (1987).

¹⁴ See *Nobelman v. American Sav. Bank*, 113 S. Ct. 2106, 2111 (1993).

¹⁵ See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 523 (1993); *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120, 123–24 (1989); *Massachusetts v. Morash*, 490 U.S. 107, 114–15 (1989).

¹⁶ See *Smith v. United States*, 113 S. Ct. 2050, 2057 (1993); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

¹⁷ See *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986). *But see* *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1493–95 (1994) (acknowledging that petitioner's textual argument, based upon “the canon that a court should give effect to every provision of a statute,” “has some force” but refusing to accept the averred meaning, because it was “unlikely that Congress intended the [disputed clause] to carry the critically important meaning petitioner assigns it”).

¹⁸ See *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

- Avoid interpreting a provision in a way that is inconsistent with a necessary assumption of another provision.¹⁹
- Avoid interpreting a provision in a way that is inconsistent with the structure of the statute.²⁰
- Avoid broad readings of statutory provisions if Congress has specifically provided for the broader policy in more specific language elsewhere.²¹
- Interpret the same or similar terms in a statute the same way.²²
- Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue.²³
- Provisos and statutory exceptions should be read narrowly.²⁴
- Do not create exceptions in addition to those specified by Congress.²⁵

EXTRINSIC SOURCE CANONS

AGENCY INTERPRETATIONS

- Rule of deference to agency interpretations, unless contrary to plain meaning of statute or unreasonable.²⁶
- Rule of extreme deference when there is express delegation of law-making duties to agency.²⁷
- Presumption that agency interpretation of its own regulations is correct.²⁸

CONTINUITY IN LAW

- Rule of continuity: assume that Congress does not create discontinuities in legal rights and obligations without some clear statement.²⁹

¹⁹ See *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2384 (1992).

²⁰ See *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 668–69 (1990); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987).

²¹ See *Custis v. United States*, 114 S. Ct. 1732, 1736 (1994); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 524 (1993); *West Virginia Univ. Hosp., Inc. v. Casey*, 449 U.S. 83, 92 (1991).

²² See *Sullivan v. Strop*, 496 U.S. 478, 484–85 (1990); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

²³ See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524–26 (1989); *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 444–45 (1987).

²⁴ See *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

²⁵ See *United States v. Smith*, 499 U.S. 160, 166–67 (1991).

²⁶ See *Sullivan v. Everhart*, 494 U.S. 83, 88–89 (1990); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786–87 (1990); *id.* at 797 (Rehnquist, C.J., concurring); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291–92 (1988).

²⁷ See *ABF Freight Sys., Inc. v. NLRB*, 114 S. Ct. 835, 839–40 (1994).

²⁸ See *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386–87 (1994); *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 159 (1987).

²⁹ See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521–22 (1989); *Finley v. United States*, 490 U.S. 545, 554 (1989).

- Presumption that Congress uses same term consistently in different statutes.³⁰
- Super-strong presumption of correctness for statutory precedents.³¹
- Presumption that international agreements do not displace federal law.³²
- Borrowed statute rule: when Congress borrows a statute, it adopts by implication interpretations placed on that statute, absent express statement to the contrary.³³
- Re-enactment rule: when Congress re-enacts a statute, it incorporates settled interpretations of the re-enacted statute.³⁴ The rule is inapplicable when there is no settled standard Congress could have known.³⁵
- Acquiescence rule: consider unbroken line of lower court decisions interpreting statute,³⁶ but do not give them decisive weight.³⁷

EXTRINSIC LEGISLATIVE SOURCES

- Interpret provision consistent with subsequent statutory amendments,³⁸ but do not consider subsequent legislative discussions.³⁹
- Consider legislative history if the statute is ambiguous.⁴⁰

³⁰ See *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2244-45 (1994); *Smith v. United States*, 113 S. Ct. 2050, 2056-57 (1993).

³¹ See *California v. FERC*, 495 U.S. 490, 498-99 (1990); *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-33 (1990).

³² See *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 538-39 (1987).

³³ See *Molzof v. United States*, 112 S. Ct. 711, 716 (1992); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987). *But see* *Shannon v. United States*, 114 S. Ct. 2419, 2425 (1994) (declining to construe the Insanity Defense Reform Act of 1984, 18 U.S.C., §§ 17, 4241-4247 (1988), in accord with prior judicial interpretations of the District of Columbia statute upon which the Act was based by finding the applicable canon to be "merely a 'presumption of legislative intention' to be invoked only 'under suitable conditions'" (quoting *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944))).

³⁴ See *Davis v. United States*, 495 U.S. 472, 482 (1990); *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988).

³⁵ See *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1030-33 (1994).

³⁶ See *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2213 (1992); *Monessen S.W. Ry. v. Morgan*, 486 U.S. 330, 338-39 (1988).

³⁷ See *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1452-53 (1994).

³⁸ See *Bowen v. Yuckert*, 482 U.S. 137, 149-51 (1987).

³⁹ See *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990); *id.* at 631-32 (Scalia, J., concurring in part). *But see* *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085, 2089 (1993) (inferring congressional approval of judicial regulation of the implied job-5 cause of action from subsequent congressional legislation acknowledging such a cause of action "without any further expression of legislative intent to define it"); *cf.* *Hagen v. Utah*, 114 S. Ct. 958, 969 (1994) (considering history of legislative amendment to subsequent act as evidence that the later act incorporated the provisions of an earlier act, even though the amendment was ultimately rejected).

⁴⁰ See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991).

- Committee reports are authoritative legislative history,⁴¹ but cannot trump a textual plain meaning,⁴² and should not be relied on if they are “imprecise.”⁴³
- Committee report language that cannot be tied to a specific statutory provision cannot be credited.⁴⁴ House and Senate reports inconsistent with one another should be discounted.⁴⁵
- Presumption against interpretation considered and rejected by floor vote of a chamber of Congress or committee.⁴⁶
- Floor statements can be used to confirm apparent meaning.⁴⁷
- Contemporaneous and subsequent understandings of a statutory scheme (including understandings by President and Department of Justice) may sometimes be admissible.⁴⁸
- The “dog didn’t bark” canon: presumption that prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule.⁴⁹

SUBSTANTIVE POLICY CANONS

CONSTITUTION-BASED CANONS

- Avoid interpretations that would render a statute unconstitutional.⁵⁰ Inapplicable if statute would survive constitutional attack, or if statutory text is clear.⁵¹

I. Separation of Powers

- Super-strong rule against congressional interference with President’s authority over foreign affairs and national security.⁵²

⁴¹ See *Johnson v. De Grandy*, 114 S. Ct. 2647, 2656 n.9 (1994); *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992); *Southwest Marine, Inc. v. Gizoni*, 112 S. Ct. 486, 492 (1991).

⁴² See *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994); *Republic of Arg. v. Weltover, Inc.*, 112 S. Ct. 2160, 2168 (1992); *American Hosp. Ass’n v. NLRB*, 499 U.S. 606, 613 (1991).

⁴³ See *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2258–59 (1994).

⁴⁴ See *Shannon v. United States*, 114 S. Ct. 2419, 2426 (1994).

⁴⁵ See *Moreau v. Klevenhagen*, 113 S. Ct. 1905, 1908 (1993).

⁴⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1174 (1994).

⁴⁷ See *Department of Revenue v. ACF Indus., Inc.*, 114 S. Ct. 843, 851 (1994).

⁴⁸ See *Hagen v. Utah*, 114 S. Ct. 958, 969 (1994); *Darby v. Cisneros*, 113 S. Ct. 2539, 2545–47 (1993).

⁴⁹ See *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991).

⁵⁰ See *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 465–66 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

⁵¹ See *Peretz v. United States*, 501 U.S. 923, 932 (1991); *Rust v. Sullivan*, 500 U.S. 173, 182 (1991).

⁵² See *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988); *United States v. Johnson*, 481 U.S. 681, 690–91 (1987); see also *United States v. Stanley*, 483 U.S. 669, 679 (1987) (concerning LSD experiments by the military).

- Rule against congressional invasion of the President's core executive powers.⁵³
- Rule against review of President's core executive actions for "abuse of discretion."⁵⁴
- Rule against congressional curtailment of the judiciary's "inherent powers"⁵⁵ or its "equity" powers.⁵⁶
- Rule against congressional expansion of Article III injury in fact to include intangible and procedural injuries.⁵⁷
- Presumption that Congress does not delegate authority without sufficient guidelines.⁵⁸
- Presumption against "implying" causes of action into federal statutes.⁵⁹
- Presumption that U.S. law conforms to U.S. international obligations.⁶⁰
- Rule against congressional abrogation of Indian treaty rights.⁶¹
- Presumption favoring severability of unconstitutional provisions.⁶²

2. *Federalism*

- Super-strong rule against federal invasion of "core state functions."⁶³
- Super-strong rule against federal abrogation of states' Eleventh Amendment immunity from lawsuits in federal courts.⁶⁴
- Rule against inferring enforceable conditions on federal grants to the states.⁶⁵

⁵³ See *Morrison v. Olson*, 487 U.S. 654, 682-683 (1988); see also *Carlucci v. Doe*, 488 U.S. 93, 99 (1988) (noting the "general proposition" that the executive branch's power to remove officials from office is incident to the original congressional grant of authority to appoint that official).

⁵⁴ See *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775 (1992).

⁵⁵ See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991).

⁵⁶ See *California v. American Stores Co.*, 495 U.S. 271, 295 (1990).

⁵⁷ See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2135-37 (1992); *id.* at 2146 (Kennedy, J., concurring in part and concurring in the judgment).

⁵⁸ See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

⁵⁹ See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102-05 (1991); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

⁶⁰ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2560 (1993).

⁶¹ See *South Dakota v. Bourland*, 113 S. Ct. 2309, 2315 (1993).

⁶² See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

⁶³ See *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1764-65 (1994); *Gregory v. Ashcroft*, 501 U.S. 452, 461-64 (1991); *cf.* *Holder v. Hall*, 114 S. Ct. 2581, 2586 (1994) (plurality opinion) (refusing to accept "benchmark" size of government in evaluating challenge under the Voting Rights Act, 42 U.S.C. § 1973 (1988), that departed from county's chosen use of single-commissioner form of government).

⁶⁴ See *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989); *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989); *Pennsylvania v. Union Gas*, 491 U.S. 1, 7 (1989) (finding abrogation); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) ("The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.").

⁶⁵ See *Suter v. Artist M*, 112 S. Ct. 1360, 1366 (1992).

- Rule against congressional expansion of federal court jurisdiction that would siphon cases away from state courts.⁶⁶
- Rule against reading a federal statute to authorize states to engage in activities that would violate the dormant commerce clause.⁶⁷
- Rule favoring concurrent state and federal court jurisdiction over federal claims.⁶⁸
- Rule against federal pre-emption of traditional state functions,⁶⁹ or against federal disruption of area of traditional state regulation.⁷⁰
- Presumption against federal pre-emption of state-assured family support obligations.⁷¹
- Presumption against federal regulation of intergovernmental taxation by the states.⁷²
- Presumption against application of federal statutes to state and local political processes.⁷³
- Presumption that states can tax activities within their borders, including Indian tribal activities,⁷⁴ but also presumption that states cannot tax on Indian lands.⁷⁵
- Presumption against congressional derogation from state's land claims based upon its entry into Union on an "equal footing" with all other states.⁷⁶
- Presumption against federal habeas review of state criminal convictions supported by independent state ground.⁷⁷
- Presumption of finality of state convictions for purposes of habeas review.⁷⁸

⁶⁶ See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1675 (1994); *Finley v. United States*, 490 U.S. 545, 552–54 (1989).

⁶⁷ See *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992).

⁶⁸ See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).

⁶⁹ See *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2243 (1994); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *California v. ARC Am. Corp.*, 490 U.S. 93, 100–01 (1989).

⁷⁰ See *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1764 (1994).

⁷¹ See *Rose v. Rose*, 481 U.S. 619, 635–36 (1987) (O'Connor, J., concurring in part and concurring in the judgment).

⁷² See *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 810 (1989).

⁷³ See *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991) (Sherman Act); *McCormick v. United States*, 500 U.S. 257, 269 n.6 (1988) (Hobbs Act); *McNally v. United States*, 483 U.S. 350, 361 (1987) (mail fraud statute). *But see* *Evans v. United States*, 112 S. Ct. 1881, 1891 (1992) (applying the Hobbs Act).

⁷⁴ See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 174 (1989).

⁷⁵ See *Oklahoma Tax Comm'n v. Sac and Fox Indians*, 113 S. Ct. 1985 (1993); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 112 S. Ct. 683, 688, 693–94 (1992).

⁷⁶ See *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987).

⁷⁷ See *Wright v. West*, 112 S. Ct. 2482, 2488–89 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

⁷⁸ See *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720–22 (1993).

- Principle that federal equitable remedies must consider interests of state and local authorities.⁷⁹
- Presumption that Congress borrows state statutes of limitations for federal statutory schemes, unless otherwise provided.⁸⁰

3. *Due Process*

- Rule of lenity: rule against applying punitive sanctions if there is ambiguity as to underlying criminal liability⁸¹ or criminal penalty.⁸² Rule of lenity applies to civil sanction that is punitive⁸³ or when underlying liability is criminal.⁸⁴
- Rule against criminal penalties imposed without showing of specific intent.⁸⁵
- Rule against interpreting statutes to be retroactive,⁸⁶ even if statute is curative or restorative.⁸⁷
- Rule against interpreting statutes to deny a right to jury trial.⁸⁸
- Presumption in favor of judicial review,⁸⁹ especially for constitutional questions,⁹⁰ but not for agency decisions not to prosecute.⁹¹
- Presumption against pre-enforcement challenges to implementation.⁹²
- Presumption against exhaustion of remedies requirement for lawsuit to enforce constitutional rights.⁹³
- Presumption that judgments will not be binding upon persons not party to adjudication.⁹⁴
- Presumption against national service of process unless authorized by Congress.⁹⁵

⁷⁹ See *Spallone v. United States*, 493 U.S. 265, 276 (1990).

⁸⁰ See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355-56 (1991).

⁸¹ See *United States v. Granderson*, 114 S. Ct. 1259, 1263 (1994); *United States v. Kozminski*, 487 U.S. 931, 939 (1988).

⁸² See *United States v. R.L.C.*, 112 S. Ct. 1329, 1337 (1992). *But see* *Chapman v. United States*, 500 U.S. 453, 463-64 (1991) (arguing that the rule of lenity is not applicable when sentence is clearly stated).

⁸³ See *NOW v. Scheidler*, 114 S. Ct. 798, 805 (1994).

⁸⁴ See *Crandon v. United States*, 494 U.S. 152, 158 (1990).

⁸⁵ See *Staples v. United States*, 114 S. Ct. 1793, 1797 (1994).

⁸⁶ See *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1501 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

⁸⁷ See *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1518 (1994).

⁸⁸ See *Gomez v. United States*, 490 U.S. 858, 863 (1989).

⁸⁹ See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498-99 (1991).

⁹⁰ See *Webster v. Doe*, 486 U.S. 592, 603 (1988).

⁹¹ See *Lincoln v. Vigil*, 113 S. Ct. 2024, 2027 (1993).

⁹² See *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 777 (1994).

⁹³ See *McCarthy v. Madigan*, 112 S. Ct. 1081, 1087 (1992).

⁹⁴ See *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989).

⁹⁵ See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 107-08 (1987).

- Presumption against foreclosure of private enforcement of important federal rights.⁹⁶
- Presumption that preponderance of the evidence standard applies in civil cases.⁹⁷

STATUTE-BASED CANONS

- *In pari materia*: similar statutes should be interpreted similarly,⁹⁸ unless legislative history or purpose suggests material differences.⁹⁹
- Presumption against repeals by implication.¹⁰⁰
- Purpose rule: interpret ambiguous statutes so as best to carry out their statutory purposes.¹⁰¹
- Narrow interpretation of statutory exemptions.¹⁰²
- Presumption against creating exemptions in a statute that has none.¹⁰³
- Allow *de minimis* exceptions to statutory rules, so long as they do not undermine statutory policy.¹⁰⁴
- Presumption that federal private right of action (express or implied) carries with it all traditional remedies.¹⁰⁵
- Presumption that court will not supply a sanction for failure to follow a timing provision when the statute has no sanction.¹⁰⁶
- Rule against state taxation of Indian tribes and reservation activities.¹⁰⁷
- Presumption against national “diminishment” of Indian lands.¹⁰⁸
- Narrow interpretation of exemptions from federal taxation.¹⁰⁹

⁹⁶ This presumption is very probably not a viable canon today. See *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 520–21 (1990).

⁹⁷ See *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

⁹⁸ See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 527–29 (1993); *Morales v. TWA, Inc.*, 112 S. Ct. 2031, 2039 (1992); *TWA, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 432–33 (1989); *Communications Workers v. Beck*, 487 U.S. 735, 750–52 (1988); *Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511, 517 (1987).

⁹⁹ See *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1027–28 (1994).

¹⁰⁰ See *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 509 (1989); *Traynor v. Turnage*, 485 U.S. 535, 547–48 (1988); *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 564–67 (1987).

¹⁰¹ See *Reves v. Ernst & Young*, 494 U.S. 56, 60–61 (1990).

¹⁰² See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 524–25 (1993) (ERISA); *U.S. Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2024 (1993) (FOIA); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 33–35 (1987) (FLSA).

¹⁰³ See *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994).

¹⁰⁴ See *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2457–58 (1992).

¹⁰⁵ See *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1033 (1992).

¹⁰⁶ See *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 506 (1993).

¹⁰⁷ Rule against state taxation may no longer be prevailing canon in Indian cases. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987).

¹⁰⁸ See *Hagen v. Utah*, 114 S. Ct. 958, 965–66 (1994).

¹⁰⁹ See *United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Souter, J., concurring in the judgment); *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988).

- Presumption against taxpayer claiming income tax deduction.¹¹⁰
- Presumption that the Bankruptcy Act of 1978 preserved prior bankruptcy doctrines.¹¹¹
- Federal court deference to arbitral awards, even where the Federal Arbitration Act is not by its terms applicable.¹¹²
- Strong presumption in favor of enforcing labor arbitration agreements.¹¹³
- Rule favoring arbitration of federal statutory claims.¹¹⁴
- Strict construction of statutes authorizing appeals.¹¹⁵
- Rule that Court of Claims is proper forum for Tucker Act claims against federal government.¹¹⁶
- Rule that "sue and be sued" clauses waive sovereign immunity and should be liberally construed.¹¹⁷
- Presumption that statute creating agency and authorizing it to "sue and be sued" also creates federal subject matter jurisdiction for lawsuits by and against the agency.¹¹⁸
- Construe ambiguities in deportation statutes in favor of aliens.¹¹⁹
- Principle that veterans' benefits statutes be construed liberally for their beneficiaries.¹²⁰
- Liberal application of antitrust policy.¹²¹
- Presumption against application of Sherman Act to activities authorized by states.¹²²
- Principle that statutes should not be interpreted to create anticompetitive effects.¹²³

¹¹⁰ See *Indopco, Inc. v. Commissioner*, 112 S. Ct. 1039, 1043 (1992).

¹¹¹ See *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992).

¹¹² See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987).

¹¹³ See *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 498 U.S. 168, 173 (1990).

¹¹⁴ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987).

¹¹⁵ See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579 (1987).

¹¹⁶ See *Preseault v. ICC*, 494 U.S. 1, 11-12 (1990).

¹¹⁷ See *FDIC v. Meyer*, 114 S. Ct. 996, 1003 (1994).

¹¹⁸ See *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2472 (1992).

¹¹⁹ Cf. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (recognizing, but finding it unnecessary to rely upon, the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" to affirm Court of Appeals's reversal of immigration judge's decision to deny alien's asylum request). The relatively lenient standards announced in *Cardoza-Fonseca*, see *id.*, are of possibly questionable validity today. See *INS v. Elias-Zacarias*, 112 S. Ct. 812, 816 (1992) (interpreting statutory requirements of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1988), to bar an alien's claim for political asylum).

¹²⁰ See *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 573-74 & n.9 (1991).

¹²¹ See *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2586 (1993).

¹²² See *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991).

¹²³ See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S. Ct. 2753, 2761 (1992).

- Strong presumption that federal grand juries operate within legitimate spheres of their authority.¹²⁴

COMMON LAW-BASED CANONS

- Presumption in favor of following common law usage where Congress has employed words or concepts with well settled common law traditions.¹²⁵ Follow evolving common law unless inconsistent with statutory purposes.¹²⁶
- Rule against extraterritorial application of U.S. law,¹²⁷ except for antitrust laws.¹²⁸
- Super-strong rule against waivers of United States sovereign immunity.¹²⁹
- Rule that debts to the United States shall bear interest.¹³⁰
- Super-strong rule against conveyance of U.S. public lands to private parties.¹³¹
- Rule presuming against attorney fee-shifting in federal courts and federal statutes,¹³² and narrow construction of fee-shifting statutes to exclude unmentioned costs.¹³³
- Presumption that jury finds facts, judge declares law.¹³⁴
- Rule presuming that law takes effect on date of enactment.¹³⁵
- Presumption that public (government) interest not be prejudiced by negligence of federal officials.¹³⁶

¹²⁴ See *United States v. R. Enters., Inc.*, 498 U.S. 292, 300–01 (1991).

¹²⁵ See *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992) (common law definition of employee); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98–99 (1991) (state corporation law); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989) (common law of agency); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47–48 (1989) (domicile). *But see* *Taylor v. United States*, 495 U.S. 575, 593–95 (1990) (refusing to follow common law meaning inconsistent with statutory purpose).

¹²⁶ See *Consolidated Rail v. Gottshall*, 114 S. Ct. 2396, 2404 (1994).

¹²⁷ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2560 (1993); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989).

¹²⁸ See *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2908–09 (1993).

¹²⁹ See *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1014–15 (1992); *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992); *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991); *United States v. Dalm*, 494 U.S. 596, 608 (1990). *But see* *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94–96 (1990) (demonstrating that once sovereign immunity is waived, equitable doctrines can be applied).

¹³⁰ See *United States v. Texas*, 113 S. Ct. 1631, 1634 (1993).

¹³¹ See *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197–98 (1987).

¹³² See *Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1965 (1994).

¹³³ See *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 86–87 (1991).

¹³⁴ See *Shannon v. United States*, 114 S. Ct. 2419, 2424 (1994).

¹³⁵ See *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

¹³⁶ See *United States v. Montalvo-Murillo*, 495 U.S. 711, 717–18 (1990).

- Presumption that federal agencies launched into commercial world with power to “sue and be sued” are not entitled to sovereign immunity.¹³⁷
- Presumption favoring enforcement of forum selection clauses.¹³⁸
- Presumption against criminal jurisdiction by an Indian tribe over a nonmember.¹³⁹
- Presumption that party cannot invoke federal jurisdiction until she has exhausted her remedies in Indian tribal courts.¹⁴⁰
- Presumption that federal judgment has preclusive effect in state administrative proceedings.¹⁴¹
- Presumption importing common law immunities into federal civil rights statutes.¹⁴²

¹³⁷ See *Loeffler v. Frank*, 486 U.S. 549, 554–55 (1988).

¹³⁸ See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589 (1991); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

¹³⁹ See *Duro v. Reina*, 495 U.S. 676, 693–94 (1990).

¹⁴⁰ See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15–17 (1987).

¹⁴¹ See *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991).

¹⁴² See *Burns v. Reed*, 500 U.S. 478, 484–85 (1991); *Spallone v. United States*, 493 U.S. 265, 278–80 (1990); *Forrester v. White*, 484 U.S. 219, 225–26 (1988).