

The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey

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This conference on the work of Philip Frickey as scholar, teacher, and institutional citizen has been an education—a somewhat daunting one—in how to achieve greatness as an academic. As a relatively junior person in this company, I have little to contribute to that discussion. But what I can perhaps document is Phil’s intellectual influence on a rising generation of scholars in American public law. Like the monks who preserved the classical heritage of Greece and Rome, Phil and his coauthors, particularly Bill Eskridge, have preserved the “Legal Process” jurisprudence of 1950s giants like Henry Hart, Albert Sacks, Herbert Wechsler, and Lon Fuller and transmitted it to contemporary legal scholars. More than this, Phil’s brilliant elaboration of that jurisprudence in his own work has made the Legal Process approach respectable in a more divided and critical age. As someone who values the wisdom of tradition and believes the Legal Process thinkers still have much to teach us,¹ I consider these to be laudable contributions indeed.

This Essay seeks to honor Phil by exploring the contributions of his Legal Process approach to a problem near and dear to his heart: the uses and legitimacy of canons of statutory construction. I focus, as Phil did in his most

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[†] Alston & Bird Professor, Duke Law School. This Essay is part of a festschrift in honor of Philip Frickey, and as such I intend it to express my profound gratitude for his scholarly contributions and manifold personal kindnesses over the years. I will miss him, on both counts. I am grateful to Dan Farber and the *California Law Review* for the opportunity to participate in this conference, to Erin Blondel for comments on the manuscript, and to Greg Coleman, Guy Charles, and Heather Gerken for helpful conversations on the *Northwest Austin* case.

1. See, e.g., Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005) (arguing for a Legal Process approach to conflicts between domestic and supranational courts) [hereinafter Young, *Institutional Settlement*]; Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory & Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994) (emphasizing the importance of tradition in constitutional theory).

recent work, on the canon of constitutional avoidance²—that is, the rule that courts should construe statutes to avoid significant “doubt” as to their constitutionality.³ That canon figured prominently in one of the most anticipated cases of the 2008 Supreme Court Term, in which the Justices turned aside a major challenge to section 5 of the Voting Rights Act by construing the Act to avoid a potential constitutional problem.⁴ This sort of avoidance boasts a pedigree dating at least as far back as Justice Brandeis’s famous concurrence in the *Ashwander* case.⁵ Although the avoidance canon has come under attack in recent years, Phil’s work has defended it on Legal Process grounds.⁶

This Essay largely supports Phil’s defense of the avoidance canon, but links that defense to another set of canons that Phil has criticized: the various clear statement rules of statutory construction that Phil and Bill Eskridge memorably labeled “quasi-constitutional law.”⁷ These rules require that Congress make its intent especially clear when it legislates in areas of particular constitutional sensitivity—for example, by intruding on the prerogatives of the states.⁸ Although Professors Frickey and Eskridge were concerned that clear statement rules represented an illegitimate form of “stealth” constitutionalism,⁹ I suggest here that they in fact reflect a continuity of statutory and constitutional interpretation that the Legal Process thinkers noted long ago. That continuity, in turn, arises from a basic but underappreciated fact about our Constitution: the canonical document leaves much of the critical “constitutive” work in our polity—that is, the function of setting up our governmental institutions, defining their composition and procedures, and bestowing (and limiting) their powers—to be accomplished by statutes, regulations, and other

2. See generally Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397 (2005).

3. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); see also *Nat’l Labor Relations Bd. v. Catholic Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979).

4. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

5. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–47 (1936) (Brandeis, J., concurring).

6. Frickey, *supra* note 2, at 399–400 (“Brandeis’s rules of avoidance may not have worn well over the years . . . [A] plethora of commentators and judges of different ideological perspectives have in various ways criticized the canon or related techniques.”).

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

8. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (interpreting an ambiguous federal statute not to regulate the internal operations of a state government absent a clear statement of Congress’s intent to do so).

9. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term, Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 85 (1994) (“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.”).

subconstitutional materials.¹⁰ Because important structural statutes, like the Voting Rights Act, perform significant constitutive functions, it makes sense that they should be interpreted in light of constitutional purposes, including federalism and other structural values.

This Essay proceeds in three parts. Part I develops two problems in statutory construction—the canon of constitutional avoidance and judge-made clear statement rules—by reference to some major cases decided in the Supreme Court’s 2008 Term. Part II elaborates the Legal Process School’s approach to these sorts of problems of canonical construction, with particular emphasis on Professor Frickey’s work in this vein. Part III then develops the central Legal Process insight that rules of construction are part of constitutional interpretation as a means of interpreting and protecting the broader structural aspects of the Constitution, namely, federalism and separation of powers.

I

TWO PROBLEMS IN STATUTORY CONSTRUCTION AND CONSTITUTIONAL LAW

The 2008 Supreme Court Term was notable largely for its statutory decisions, which addressed basic matters of election law,¹¹ equal rights,¹² and the preemptive effect of federal law.¹³ These cases illustrate two issues that have loomed large in Professor Frickey’s work: the canon of constitutional avoidance and the clear statement rules of statutory construction. The avoidance canon is “a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.”¹⁴ In *Northwest Austin Municipal Utility District Number One v. Holder*, the Court adopted a vigorously contested reading of the Voting Rights Act to avoid serious questions about the Act’s constitutionality. In three preemption cases, *Good*, *Wyeth*, and *Clearing House*, the Court rejected challenges to a prominent clear statement rule requiring that Congress clearly articulate any intent to displace state law. Each of these decisions thus implicated the legitimacy of canons of construction designed to enforce constitutional values.

10. See generally Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408 (2007) (developing the point that statutes, regulations, and other forms of “ordinary” law perform constitutional functions in our legal system).

11. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009); see also *Bartlett v. Strickland*, 129 S. Ct. 1231, 1243 (2009) (holding that section 2 of the Voting Rights Act did not allow plaintiffs to raise “crossover district” claims).

12. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

13. *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008); *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Cuomo v. Clearing House Ass’n.*, 129 S. Ct. 2710 (2009).

14. *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam).

A. *Constitutional Avoidance and the Northwest Austin Case*

Section 5 of the Voting Rights Act requires state and local governments in certain parts of the United States to “preclear” all changes in state election procedure with federal authorities in Washington, D.C.¹⁵ Those authorities may preclear a new procedure only after concluding that the proposed change neither “has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”¹⁶ The *Northwest Austin* case involved a local public utility district that wished to allow district residents to elect its board members while voting in general county elections rather than at special polling places. The public utility district, which had never been accused of racial bias in the conduct of its elections,¹⁷ argued that it was entitled under the terms of the statute to “bail out” of section 5’s preclearance requirement.¹⁸ If the Act were interpreted to foreclose an entity like the utility district from bailing out, the district insisted, then section 5 would exceed Congress’s authority to enforce the terms of the Fifteenth Amendment.¹⁹

The district’s statutory argument rested on section 4(b) of the Act, which provides that a “State or political subdivision” may bring suit to bail out of its obligations under the Act by demonstrating that it has not been guilty of any unlawful discriminatory practices.²⁰ A three-judge district court rejected this argument, concluding that section 14(c)(2) of the Act confined the “political subdivisions” that may seek bailout to a “county or parish . . . [or] any other subdivision of a State which conducts registration for voting.”²¹ Because the utility district did not register voters, the district court concluded that it was ineligible for bailout.²²

In the Supreme Court, the utility district argued that section 14(c)(2)’s restrictive definition of “political subdivision” applied only to certain portions of the Act, and that the bailout provisions should be interpreted to embrace a broader, ordinary meaning of “political subdivision” congruent with the ambit of the preclearance obligation itself.²³ The Court had previously interpreted that

15. 42 U.S.C. § 1973c(a) (2006).

16. *Id.*

17. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508 (2009).

18. *Id.* at 2510.

19. *Id.* The Fifteenth Amendment prohibits each government in the United States from denying any citizen the right to vote based on that citizen’s “race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1. Section 2 states that “Congress shall have the power to enforce this article by appropriate legislation.” *Id.* § 2.

20. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 279 (D.D.C. 2008), *rev’d sub nom* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009); *see* 42 U.S.C. §§ 1973b(a)(1), 1973c(a).

21. 573 F. Supp. 2d at 231; *see* 42 U.S.C. § 19731(c)(2).

22. 573 F. Supp. 2d at 231.

23. Brief for Appellant at 17–22, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322).

obligation, after all, to cover entities such as cities that did not register voters.²⁴ However, election law experts initially gave this argument relatively little chance of success; as Heather Gerken wrote, “the statutory argument is one that almost no one . . . thought was particularly tenable because of prior Court opinions.”²⁵ Nor was it clear that, if interpreted to preclude bailout for entities like the district, the Act would actually be unconstitutional.²⁶ After all, the three-judge district court had not only rejected the district’s bailout argument but also upheld the Act’s constitutionality as interpreted.²⁷ Finally, as Justice Thomas’s concurrence pointed out, there was some doubt whether the district’s statutory argument could—even if successful—support all the relief that the district had requested.²⁸ Nonetheless, the Court brushed these objections aside, interpreting the Act to permit “bailout” under the circumstances and resting that interpretation squarely on the need to avoid any doubt as to the Act’s constitutionality.²⁹

Chief Justice Roberts grounded the avoidance doctrine in a restrained view of the Court’s role vis-à-vis Congress:

In assessing [serious constitutional] questions, we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called on to perform.” “The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States.” The Fifteenth Amendment empowers “Congress,” not the Court, to determine in the first instance what legislation is needed to enforce it.³⁰

24. *United States v. Sheffield Bd. of Comm’rs*, 435 U.S. 110, 121–22 (1978).

25. Posting of Heather K. Gerken to Balkinization, <http://balkin.blogspot.com/2009/06/supreme-court-punts-on-section-5.html> (June 22, 2009, 10:42 AM). Likewise, Richard Hasen opined shortly after oral argument that “[s]ince there’s no good statutory loophole, the larger constitutional question seems unavoidable.” Richard L. Hasen, *Sordid Business: Will the Supreme Court Kill the Voting Rights Act?*, SLATE, Apr. 27, 2009, <http://www.slate.com/id/2216888/>.

26. The avoidance at issue in *Northwest Austin* was thus “modern,” as opposed to “classical” avoidance. *See generally* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997) (developing this distinction). Under the classical version of the doctrine, a court interprets the statute using traditional methods of statutory construction and then actually decides whether that construction would be constitutional. If this best interpretation would require invalidating the statute, the court then adopts another acceptable construction that avoids that necessity. *See id.* at 1949. Under the modern version of the doctrine, however, a court displaces the “best” interpretation as long as that interpretation raises serious constitutional “doubts”; the court does not actually resolve those doubts by deciding the constitutional question. *See id.* In *Northwest Austin*, the Court did not actually decide whether section 5 of the Voting Rights Act would be unconstitutional if construed to foreclose bailout to an entity like the district.

27. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d at 224.

28. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2517–19 (2009) (Thomas, J., concurring).

29. *Id.* at 2513 (majority opinion).

30. *Id.* (citations omitted); *see* *Clark v. Martinez*, 543 U.S. 371, 382 (2005) (asserting that “[t]he [avoidance] canon is thus a means of giving effect to congressional intent, not of subverting it”).

As several commentators have noted, however, the avoidance canon is restrained in the sense that it avoids actually striking down the law in question, yet it is quite activist in other important senses.³¹ Frederick Schauer has pointed out, for example, that a court that bypasses the most plausible interpretation of a statute to avoid constitutional doubt effectively denies force to the disfavored interpretation, just as if the court had struck that interpretation down.³² Similarly, Judge Richard Posner has observed that the avoidance canon creates a “judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the . . . Constitution itself.”³³ The upshot, as Professor Frickey has stated, is that “the avoidance canon, purportedly designed to avoid the fraught business of judicial review and potential confrontations with a coordinate branch, actually amounts to a robust version of judicial review without the safeguards of reasoned elaboration of constitutional law.”³⁴

As I have discussed at greater length elsewhere, it seems clear that the avoidance canon must be defended as a normative canon of statutory construction—that is, as a means of enforcing particular constitutional values, not as a “best guess” at what Congress would have wanted under the circumstances.³⁵ When a court avoids a constitutional doubt, it is protecting constitutional values by resisting statutory interpretations that would put pressure on those values. As Professor Frickey has pointed out, “[t]he canon provides a means to mediate the borderline between statutory interpretation and constitutional law, and between the judicial and legislative roles, where judicial line-drawing is especially difficult and where underenforced constitutional values are at stake.”³⁶ The *Northwest Austin* case highlights this function. If voting experts are right that “the Court applied the canon to adopt an *implausible* reading of a statute that appeared contrary to textual analysis, congressional intent, and administrative interpretation,”³⁷ then the avoidance

31. See, e.g., Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 73–74; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983). I use “activist” here to signify simply an assertion of judicial power vis-à-vis the political branches. See generally Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002) (exploring the meaning of judicial “activism”).

32. Schauer, *supra* note 31, at 87.

33. Posner, *supra* note 31, at 816.

34. Frickey, *supra* note 2, at 400; see also Schauer, *supra* note 31, at 90 (making the same point).

35. See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000). On the distinction between “normative” and “descriptive” canons, see Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 749 (1992); see also Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 185 (making a similar distinction between “substantive” and “language” canons).

36. Frickey, *supra* note 2, at 402.

37. Hasen, *supra* note 35, at 3 (emphasis added).

canon plainly played a strong normative role in driving the Court's construction of the Act.

B. "*Quasi-Constitutional*" Clear Statement Rules and the Preemption Cases

In its 2008 Term, the Supreme Court decided three major cases concerning the preemptive effect of federal regulatory regimes on state law. Historically, the centerpiece of the Court's preemption jurisprudence has been a "presumption against preemption" in construing federal statutes. In *Rice v. Santa Fe Elevator Corp.*,³⁸ the Court stated that, generally speaking, "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."³⁹ This presumption is the most important, and most frequently invoked, of the pro-federalism clear statement rules that Professors Frickey and Eskridge examine in their seminal article on *Quasi-Constitutional Law*.⁴⁰ In that article, Frickey and Eskridge recognize the virtues of clear statement rules as a means of protecting constitutional values without going so far as to invalidate legislation.⁴¹ Nonetheless, they criticize such rules as undermining judicial candor by encouraging judges to mask substantive value choices in the rhetoric of statutory construction, and as reflecting—in particular contexts—particular value choices that they find normatively suspect.⁴²

Two of the 2008 Term preemption decisions, *Altria Group, Inc. v. Good* and *Wyeth v. Levine*, explicitly rested on the presumption against preemption.⁴³ In *Altria*, smokers of so-called light cigarettes sued cigarette manufacturers under the Maine Unfair Trade Practices Act, claiming that the manufacturers had fraudulently advertised that their cigarettes delivered less tar and nicotine

38. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

39. *Id.* at 230. For a historical account of the development of the Court's preemption jurisprudence, and the *Rice* presumption's place within that development, see Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); see also Ernest A. Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 250–54 (Richard A. Epstein & Michael S. Greve eds., 2007) (stressing the functional importance of the *Rice* presumption).

40. Eskridge & Frickey, *supra* note 7. Oddly, Professors Frickey and Eskridge did not include *Rice*'s presumption against preemption of state law among the five pro-federalism clear statement rules discussed in the Vanderbilt article. This may be because that article focused on the Court's "super-strong clear statement rules" in the federalism area, see *id.* at 619, and the *Rice* presumption—despite its structural importance—has never been "super-strong"; indeed, it is often ignored or overcome by relatively weak evidence of Congress's intent. Moreover, Frickey and Eskridge focused on the new federalism rules developed by the late Burger and Rehnquist Courts, whereas the *Rice* rule predates those courts by nearly half a century. In any event, *Rice* operates in much the same way as the other clear statement rules that Frickey and Eskridge discussed, and it raises many of the same potential problems.

41. See *id.* at 630–32.

42. See *id.* at 632–45.

43. *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2009); *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

than regular brands.⁴⁴ The manufacturers argued that both the Federal Cigarette Labeling and Advertising Act and the Federal Trade Commission's enforcement efforts under the Act preempted these state law claims.⁴⁵ The Supreme Court, however, rejected both these preemption arguments.⁴⁶ The *Rice* presumption against preemption figured importantly in the Court's analysis of the federal statute's express preemption clause. As Justice Stevens wrote for the majority, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"⁴⁷

Wyeth involved a state common law tort suit against a pharmaceutical manufacturer alleging failure adequately to warn that the administration of an anti-nausea drug in a certain fashion could cause gangrene.⁴⁸ The manufacturer argued that the Food and Drug Administration's approval of the drug and its warning label preempted the plaintiff's state law claim. In rejecting the manufacturer's argument, the Court embraced the *Rice* presumption against preemption even more firmly than it had in *Altria*, calling that presumption a "cornerstone[] of our pre-emption jurisprudence."⁴⁹ Moreover, the Court explicitly rejected two attempts by the defendants to undermine that presumption, holding that the presumption applied notwithstanding longstanding federal regulatory activity in the relevant field, and that it applied to "implied conflict pre-emption" claims as well as to express preemption claims.⁵⁰ The Court likewise turned aside a frontal assault on *Rice* by the manufacturer and its amici arguing that the presumption was inconsistent with the original understanding of the Supremacy Clause.⁵¹

The third case, *Cuomo v. Clearing House Ass'n*, found the plain meaning of the statute in question sufficient to reject the preemption argument, but nonetheless stressed the magnitude of the intrusion on state law that would result from a preemption finding.⁵² *Clearing House* was a suit by the federal

44. *Altria Group*, 129 S. Ct. at 541.

45. *Id.*

46. *See id.* at 549, 551.

47. *Id.* at 543 (quoting *Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005)).

48. *Wyeth*, 129 S. Ct. at 1191–92.

49. *Id.* at 1194.

50. *Id.* at 1195 n.3.

51. *See* Brief for Product Liability Advisory Council, Inc. as Amicus Curiae Supporting Petitioner at 2, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (No. 06-1249) ("The time has come for this Court to clarify once and for all that . . . the presumption against preemption simply does not apply to the analysis of whether state law conflicts with federal law."). For an effort to refute that argument, see Brief for Constitutional and Administrative Law Scholars as Amicus Curiae Supporting Respondent at 4–18, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (No. 06-1249). I was the primary author of the latter brief, along with Erin Glenn Busby and Melissa Davis, and we were honored that Phil Frickey was a signatory.

52. *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2720–22 (2009). For an extended discussion of the banking law issues in *Clearing House* and the case's place in the Roberts Court's evolving preemption jurisprudence, see Arthur E. Wilmarth, Jr., *Cuomo v. Clearing House: The*

Office of the Comptroller of the Currency (OCC) and a banking trade group to enjoin New York's Attorney General from requesting certain nonpublic information from national banks doing business in the state. Rejecting the claim that the state's action was preempted, Justice Scalia's majority opinion brushed aside the federal agency's claim for *Chevron* deference⁵³ and construed the National Bank Act's grant of exclusive "visitorial powers" to the OCC as coexisting with the state's power to enforce its fair lending laws.⁵⁴ The Court emphasized that "[t]he consequences of the [OCC's] regulation"—its effort to foreclose state officials from enforcing their own valid banking laws—"cast doubt upon its validity."⁵⁵ Although the Court disclaimed the need to rely on *Rice*, its analysis came close to recognizing that such an intrusion on state regulatory authority is presumptively not Congress's intent. In all three of the 2008 Term preemption cases, then, the Court sought some heightened showing of congressional intent before interpreting federal statutes to intrude on state prerogatives.

As I have already noted, Professors Frickey and Eskridge have been skeptical of clear statement rules like the presumption against preemption. They summarized their argument:

[I]n the abstract there are powerful arguments for quasi-constitutional law rooted in a vision of our public lawmaking processes as a partnership in which the judiciary plays an active role, but eventually defers to the democratically accountable branches. In some contexts, these arguments may have substantial persuasive power. We fear, however, that they have had little contextual bite in many of the recent cases We also fear that a lack of recognition and candor about what the Court has done recently with quasi-constitutional law has submerged a variety of hotly contestable normative and empirical issues.⁵⁶

At least as traditionally formulated, the *Rice* presumption seems vulnerable to some of these criticisms. Just as the *Northwest Austin* Court justified the avoidance canon in terms of deference to Congress,⁵⁷ the Court has always

Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection, in THE PANIC OF 2008: CAUSES, CONSEQUENCES AND IMPLICATIONS FOR REFORM (Lawrence E. Mitchell & Arthur E. Wilmarth, Jr. eds., forthcoming 2010), available at <http://ssrn.com/abstract=1499216>.

53. Under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the courts defer to a federal administrative agency's interpretation of a statute that it administers if the statute is ambiguous and the agency's interpretation is reasonable. On the complicated interaction of *Chevron* with the *Rice* presumption in preemption cases, see Ernest A. Young, *Executive Preemption*, 102 *Nw. U. L. Rev.* 869 (2008).

54. *Clearing House*, 129 S. Ct. at 2715; see Wilmarth, *supra* note 52 (manuscript at 44–48) (suggesting structural similarities between Justice Scalia's refusal to defer to the OCC under *Chevron* in *Cuomo* and analysis under a presumption against preemption).

55. *Clearing House*, 129 S. Ct. at 2717.

56. Eskridge & Frickey, *supra* note 7, at 646.

57. See *supra* note 30 and accompanying text.

phrased the presumption against preemption in terms of what Congress most likely wanted.⁵⁸ Yet it is far from clear that Congress in fact harbors any general solicitude for state regulatory authority that would justify the *Rice* presumption as a descriptive canon of statutory construction. The presumption is better justified as a normative canon designed to protect state autonomy in our federal system.

If *Rice* cannot be justified as a best guess at Congress's likely intent, then the criticism advanced by Professors Frickey and Eskridge—that clear statement issues undermine candor and submerge contestable normative issues—have some force. I believe that criticism can be met, however, and that it is best met from within the Legal Process paradigm that Frickey and Eskridge have done so much to advance. That paradigm, I argue, offers a persuasive justification for both clear statement rules like the *Rice* presumption and the canon of constitutional avoidance. I develop this argument in the next Part.

II

LEGAL PROCESS THEORY AND THE CONSTITUTION OUTSIDE THE CONSTITUTION

Recasting the avoidance canon and the *Rice* presumption against preemption as normative canons of statutory construction hardly ends the debate over their legitimacy. Normative canons are, after all, highly controversial.⁵⁹ Justice Scalia, for example, has questioned “where the courts get the authority to impose” such rules.⁶⁰ Judges employing such canons cannot cast themselves as “faithful agents” of Congress; rather, they must find some other source of legal justification for the normative values that the canons protect. I suggest that that source is the Constitution itself—the constitutional values implicated by the underlying “doubt” in the case of the avoidance canon, and the particular value of federalism in the case of the presumption against preemption.⁶¹ Further, I claim that this argument is best defended in terms of

58. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (describing the presumption as an “assumption” about when Congress means to supersede state police powers). After all, the Court generally invokes the *Rice* presumption in tandem with a statement that “[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.” *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2009) (alteration in original) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); see also *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) (also quoting *Medtronic*).

59. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 945 (4th ed. 2007).

60. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29 (1997); see also *Rodriguez*, *supra* note 35, at 744 (observing that the “substantive form of canonical construction raises a . . . central concern . . . that judicial policymaking through the guise of statutory interpretation is illegitimate.”).

61. I have elaborated these views at greater length elsewhere. On the avoidance canon, see *Young*, *supra* note 35, at 1585–99. On the presumption against preemption, see Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*,

Legal Process ideas concerning the continuity of constitutional and statutory interpretation.

A. *The Legal Process School*

Neil Duxbury has characterized the Legal Process jurisprudence as “premissed [sic] on nothing more specific or substantial than an attitude” rather than a coherent theory; this, he suggests, makes the precise nature of process jurisprudence “remarkably difficult to pin down.”⁶² He notes, moreover, that “[t]hose who adopted the process attitude were concerned not so much with developing a distinct theory as with cultivating their attitude in order to cast light on what they considered to be the principal problems in the creation and application of law.”⁶³ This is, to some extent at least, a fair description not only of Henry Hart and Al Sacks’s project in *The Legal Process* itself but also of the work of Phil Frickey, Bill Eskridge, and others reviving and developing Legal Process principles in the specific context of statutory construction. In each instance, any effort to crystallize the content of Legal Process jurisprudence takes a backseat to handling particular doctrinal problems.

Certain key principles do emerge, nonetheless.⁶⁴ One is the principle of “institutional settlement,” which holds that law should allocate decision making to the institutions best suited to decide particular questions, and that the decisions reached by those institutions must then be respected by other actors in the system, even if those actors might have reached a different conclusion had they decided the matter in the first instance.⁶⁵ Richard Fallon identifies a second and related “anti-positivist principle,” which sees the law allocating responsibility among institutions “as a rich, fluid, and evolving set of norms for effective governance and dispute resolution, not as a positivist system of fixed and determinate rules.”⁶⁶ This view implies that “[a]ny particular legal directive must be seen and interpreted in light of the whole body of law” and that “legal

46 WM. & MARY L. REV. 1733, 1848–50 (2005) [hereinafter Young, *Making Federalism Doctrine*]; Young, *supra* note 39, at 250–54.

62. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 207 (1995).

63. *Id.*

64. I am indebted here to Richard Fallon’s helpful summary of six characteristic Legal Process assumptions, see Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 963–66 (1994), as well as to Professors Eskridge and Frickey’s extended introduction to the Legal Process materials themselves, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to 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).

65. See HART & SACKS, *supra* note 64, at 4 (“[D]ecisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed.”); *id.* at 158 (stressing the importance of comparative institutional competence in allocating authority to decide); see also Fallon, *supra* note 64, at 964; Young, *Institutional Settlement*, *supra* note 1, at 1158–63 (discussing this principle in the context of foreign affairs law).

66. Fallon, *supra* note 64, at 965.

interpretation should be purposive, not rigid or mechanical.”⁶⁷ Relatedly, in construing the allocation of decision-making authority, “the principles and policies underlying federalism and the separation of powers deserve special weight.”⁶⁸ More generally, institutional settlement puts process firmly at the center of legal thinking.⁶⁹

Although Legal Process thinkers emphasized the importance of nonjudicial actors such as administrative agencies, they envisioned a special role for courts. They believed, for example, that “[t]he rule of law . . . requires the availability of judicial remedies sufficient to vindicate fundamental legal principles.”⁷⁰ The fundamental constraint is that “courts must be principled in their reasoning.”⁷¹ That is, courts must decide cases based on general, neutral reasons that transcend the immediate controversy before them.⁷²

But subject to that constraint, process jurisprudence embraced a principle of “reasoned elaboration” according broad creative powers to courts.⁷³ For Hart and Sacks, for example, “[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living.”⁷⁴ Hence, judges should apply statutes and common law doctrines “in ways that subserve their purposes, as well as the general purposes of the law.”⁷⁵

Although this Legal Process worldview is often portrayed as a response to the Legal Realists,⁷⁶ it may be more accurate to say that process jurisprudence emerged as a parallel critique of Formalism that differed from Realism by insisting on the continuing value of rationalism in law.⁷⁷ Critically, Legal

67. *Id.* (footnote omitted).

68. *Id.* (identifying a “principle of structural interpretation”).

69. Eskridge & Frickey, *supra* note 64, at xciv–xcv.

70. Fallon, *supra* note 64, at 966.

71. *Id.*

72. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

73. Fallon, *supra* note 64, at 966 (noting that the judicial role “is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers”); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, reprinted in G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 136 (1978).

74. HART & SACKS, *supra* note 64, at 148.

75. Eskridge & Frickey, *supra* note 64, at xcii.

76. G. Edward White has argued, for example, that “Reasoned Elaboration emerged in the late 1930’s and the early 1940’s when certain social experiences . . . generated overwhelming academic hostility to jurisprudential Realism.” White, *supra* note 73, at 136–37. Neil Duxbury brands this account “another common misconception about American jurisprudence.” DUXBURY, *supra* note 62, at 205. This is because “[h]istorically, the process-oriented approach to the study of law parallels if not precedes legal realism itself.” *Id.* But if we put historical chronology to one side, it may nonetheless be helpful to say that process jurisprudence offers a conceptual response to realist skepticism about the determinacy of law that does not require a retreat to formalism. As Professor Duxbury acknowledges, this response gained widespread currency “once the mood of realism began to wane.” *Id.*

77. *See* Eskridge & Frickey, *supra* note 64, at lxii–lxiii:

Although the legal realists generally did not, some of the centrist critics of formalism

Process thought insisted that law and the judicial function differ significantly from raw politics and policy.⁷⁸ Thus, while acknowledging the Realist point that “general directives often do not transparently tell officials and citizens what to do in specific situations,” Legal Process proponents of “reasoned elaboration” rejected Realist claims that “the official simply imposes a political interpretation on the general directive and that law is a prediction of how the official will exercise his discretion.”⁷⁹ Instead, the Legal Process School insisted that “an official applying a ‘general directive arrangement’ must ‘elaborate the arrangement in a way which is consistent with the other established applications of it’ and ‘must do so in a way which best serves the principles and policies it expresses.’”⁸⁰

In their Harvard Law Review *Foreword*, Professors Frickey and Eskridge echo this view of Legal Process jurisprudence as an intermediate position between the Legal Realist and formalist views:

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.⁸¹

Courts, in other words, must maintain a distinction between law and politics, while recognizing that sensitivity to the underlying normative imperatives of American society remains part of their job description. They do this by elaborating legal texts and doctrines in light of the overall structure of American law and the broad general principles held by the American political community. As I hope to show in the next Section, this means—in part—interpreting statutes in light of constitutional principles.

valued rationality in law. But the centrists’ version of rationalism was different from that of the formalists: the formalists believed in a static rationality . . . while the new rationalists believed that law’s rationality is informed by an organic relationship among legal rules, social policies, and ethical principles.

See also DUXBURY, *supra* note 62, at 205 (“[P]rocess jurisprudence exemplifies the emergence of reason as the dominant ideological and theoretical motif in American legal thought.”).

78. See, e.g., Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 378 (1946) (stating that a reasoned decision does not reflect the judge’s “personal predilections” but attempts “to discover the natural principles underlying group life, so that [the judge’s] decisions might conform to them”).

79. Eskridge & Frickey, *supra* note 64, at xcii.

80. *Id.* (quoting HART & SACKS, *supra* note 64, at 147).

81. Eskridge & Frickey, *supra* note 9, at 34; see also DUXBURY, *supra* note 62, at 205 (“Process jurisprudence . . . marks the beginning of American lawyers attempting to explain legal decision-making not in terms of deductive logic or the intuitions of officials, but in terms of reason which is embodied in the fabric of the law itself.”). For a similar view, not explicitly framed in Legal Process terms, see Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

B. Reasoned Elaboration and the Constitution Outside the Constitution

Debates about canons of construction—including the avoidance canon and, more recently, clear statement rules—have long been a staple of the academic literature on legislation. In this Section, I argue that we can advance those debates by looking back to the Legal Process concept of “reasoned elaboration.” Viewed from this perspective, statutory interpretation always takes place against a background of underlying purposes and values, including constitutional values. That basic continuity of statutory and constitutional interpretation, in turn, allows us to think of the avoidance canon and the clear statement rules not so much as substitutes for constitutional adjudication, but rather as a means by which constitutional principles are sometimes vindicated.

Justice Frankfurter, a patron saint for Legal Process thinkers of the next generation, considered the avoidance canon to be a “rule of constitutional adjudication” rather than a rule of statutory construction.⁸² Likewise, Henry Hart and Al Sacks considered “policies of clear statement” to be “constitutionally imposed.”⁸³ This stance toward these two normative canons of interpretation flowed from the conception of reasoned elaboration and purposive interpretation at the heart of process jurisprudence:

Not only does every particular legal arrangement have its own particular purpose but that purpose is always a subordinate one in aid of the more general and thus more nearly ultimate purposes of the law. Doubts about the purposes of particular statutes or decisional doctrines, it would seem to follow, must be resolved, if possible, so as to harmonize them with more general principles and policies. The organizing and rationalizing power of this idea is inestimable.⁸⁴

This conception of statutory purpose—that is, as not limited to the legislature’s specific purposes, but also incorporating the more fundamental purposes of public law—effectively renders statutory and constitutional law continuous.⁸⁵ Courts (and possibly other interpreters) integrate statutes into the constitutional framework by interpreting statutes in line with constitutional principle.

This same sense of continuity appears, although implicitly, in the structure of that other canonical Legal Process text, Henry Hart and Herbert Wechsler’s monumental *The Federal Courts and the Federal System*.⁸⁶ Hart and Wechsler

82. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting).

83. HART & SACKS, *supra* note 64, at 1376.

84. *Id.* at 148.

85. *Cf.* Frickey, *supra* note 2, at 407 (“Hart and Sacks saw their background assumptions concerning the purposivism of legislatures and legislation as constitutionally informed.”).

86. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953). That text, unlike Hart and Sacks’s *Legal Process*, was published early on and continues to be updated. The current version is RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009) [hereinafter HART & WECHSLER].

developed the structure of American federalism and separation of powers by placing constitutional features (e.g., Article III's provision for federal jurisdiction and limitation of judicial power to cases and controversies⁸⁷) alongside statutory ones (e.g., the Supreme Court's jurisdictional statute or the Rules of Decision Act⁸⁸) and judge-made doctrines (e.g., prudential standing rules or the abstention doctrines⁸⁹). In other words, Hart and Wechsler emphasized the "organic" interconnection of constitutionally entrenched and non-entrenched features in constituting our judicial system. Moreover, they offered an influential vision of federalism resting not on constitutional borders between enumerated federal functions and reserved state powers,⁹⁰ but rather on Congress's activity in enacting federal law and the institutional impediments that hold that activity in check.⁹¹

This Legal Process view of statutory and constitutional law as fundamentally integrated reflects a foundational reality of our constitutional system. If one considers the basic functions of a constitution—for example, constituting the government and conferring rights on individuals against government action⁹²—one quickly recognizes that the Constitution itself is radically incomplete. For example, our canonical constitutional document says nothing about such basic governmental structures as political parties, the voting rules for ordinary legislation in Congress, or federal administrative agencies.⁹³ Likewise, the Constitution's rights provisions omit such basic and valued rights as protection from private discrimination, access to medical care and income security in old age, or preservation of a clean environment.⁹⁴ These basic features of our legal system, all of which perform "constitutional" functions, are codified in statutes or in even more ephemeral form, such as in the internal operating rules of the House and the Senate.

87. U.S. CONST. art. III, § 2; see HART & WECHSLER, *supra* note 86, at 113–27 (discussing standing as a constitutional doctrine rooted in Article III).

88. 28 U.S.C. § 1257 (2006) (prescribing the Supreme Court's jurisdiction over appeals from state courts); *id.* § 1652 (state laws as rules of decision); see HART & WECHSLER, *supra* note 86, at 448–58 (describing how statutory limits on Supreme Court review of state courts guarantee state courts' control over the content of state law); *id.* at 558–64 (describing the role of the Rules of Decision Act and the *Erie* doctrine in structuring American federalism).

89. See HART & WECHSLER, *supra* note 86, at 128 (discussing prudential standing rules); *id.* at 1049–1140 (discussing *Pullman*, *Younger*, *Colorado River*, and other judge-made abstention doctrines).

90. See, e.g., U.S. CONST. amend. X; Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

91. HART & WECHSLER, *supra* note 86, at 459 (discussing "the interstitial nature of federal law"). For an important recent effort to flesh out this vision, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEXAS L. REV. 1321 (2001).

92. See, e.g., Frank I. Michelman, *Constitutional Authorship*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64, 65 (Larry Alexander ed., 1998).

93. See Young, *supra* note 10, at 415–22.

94. See *id.* at 422–26.

Elsewhere, I have described these statutes, regulations, rules, and practices that perform constitutive functions as part of a “constitution outside the Constitution.”⁹⁵ They differ from the canonical document, of course, in the sense that they are not entrenched against change by ordinary legislation. It is easy to overstate the importance of that distinction, however. The canonical Constitution frequently changes through interpretation without formal amendment,⁹⁶ and many lesser enactments that create governmental structures or confer rights on individuals are, as a practical matter, quite difficult to overturn. Consider, for example, the Social Security Act, which is less likely to be repealed than many constitutional provisions. In any event, my point is not to suggest that statutes, regulations, and the like that perform constitutive functions should be accorded any special status in the law; rather, I mean simply to point out the undeniable reality that statutes and other forms of “ordinary” law frequently perform the same functions as constitutional law.⁹⁷

The role of this extra-canonical constitution is pervasive in our constitutional system. It accounts for the ability of our constitutional system to survive over two centuries of fairly radical political, social, and economic change even though formal amendment is nearly impossible. The Constitution adapts effectively because relatively little institutional detail is committed to entrenched provisions that cannot be readily changed.⁹⁸ And although the Legal Process thinkers did not speak of a “constitution outside the Constitution” in so many words, that notion meshes well with their view that “the ‘law’ bearing on allocations of institutional responsibility [is] a rich, fluid, and evolving set of norms for effective governance and dispute resolution.”⁹⁹ As I explain in the last Part, it also makes sense of their commitment to the avoidance doctrine and policies of clear statement as an integral part of constitutional interpretation.

III

THE CONTINUITY OF INTERPRETATION

Professor Frickey has said that the canon of constitutional avoidance “has the hybrid quality of quasi-constitutional law. It is a tool of public law on the borderline between constitutional law and subconstitutional law, and between judicial and legislative functions.”¹⁰⁰ Frickey approved of this hybrid quality of

95. See Young, *supra* note 10. For a similar argument, much earlier, see Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

96. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (overruling recent precedent to hold that the juvenile death penalty violates the Eighth Amendment); *Wickard v. Filburn*, 317 U.S. 111 (1942) (adopting a considerably broader view of Congress’s Commerce Power than that taken by prior courts).

97. See Young, *supra* note 10, at 448–61. On the constitutive role of statutes, see also William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

98. See Young, *supra* note 10, at 456–57.

99. Fallon, *supra* note 64, at 965.

100. Frickey, *supra* note 2, at 461.

the avoidance canon, suggesting that it “provides a means to mediate the borderline between statutory interpretation and constitutional law . . . between the judicial and legislative roles . . . [and] between constitutional law and constitutional culture.”¹⁰¹ Professors Frickey and Eskridge were more critical of “quasi-constitutional” clear statement rules, however. They insist in their Harvard *Foreword* that “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.”¹⁰²

I argue that Professor Frickey was right about the avoidance canon but unduly sour on clear statement rules. Both principles reflect the Legal Process notion that statutory and constitutional interpretation are continuous, and they acknowledge the constitutive role that statutes and other extra-canonical legal materials play in forming our “constitution outside the Constitution.” Both the avoidance canon and clear statement rules, like the presumption against preemption, counsel courts to interpret statutes in light of constitutional values. In so doing, they integrate statutes into the broader constitutional structure and vindicate broader public values immanent in constitutional law. Chief Justice Roberts’s interpretation of the Voting Rights Act in *Northwest Austin*, for example, may not have represented the “best” reading of the statutory text considered in isolation, but it did serve to integrate section 5’s provisions into a broader federalist scheme designed to balance national power and state autonomy.

The chief difference, of course, between the avoidance canon and clear statement rules is that the former comes into play where a legitimate doubt exists as to the constitutionality of a broad reading of the statute in question, whereas the latter tend to vindicate constitutional values even where no such doubt exists—that is, where there is no question that a broad reading of the relevant statute would be upheld against constitutional challenge. This difference accounts for Justice Thomas’s dissent in *Gonzales v. Oregon*,¹⁰³ where the Court held that the Attorney General’s regulation barring the use of lethal drugs for physician-assisted suicide, made legal under an Oregon state law, was inconsistent with the underlying federal Controlled Substances Act (CSA). The majority interpreted the federal statute narrowly in light of the traditional primacy of the states in regulating the medical profession. Justice Thomas, however, dissented:

I agree with limiting the applications of the CSA in a manner consistent with the principles of federalism and our constitutional structure But that is now water over the dam. The relevance of

101. *Id.* at 402.

102. Eskridge & Frickey, *supra* note 9, at 76.

103. 546 U.S. 243 (2006).

such considerations was at its zenith in *Raich*, when we considered whether the CSA could be applied to the intrastate possession of a controlled substance [medical marijuana] consistent with the limited federal powers enumerated by the Constitution. Such considerations have little, if any, relevance where, as here, we are merely presented with a question of statutory interpretation, and not the extent of constitutionally permissible federal power.¹⁰⁴

Justice Thomas's view—at least in this opinion—seems to be that constitutional values belong only in constitutional cases; they have no role in shaping the interpretation of statutes when no doubt of the statutes' constitutionality exists.

This view, it seems to me, misses an important, if underappreciated, aspect of the avoidance canon. As Professor Frickey noted, “serious constitutional doubts sometimes extend to governmental actions that the courts are unlikely to invalidate as a matter of constitutional law, but that courts may nonetheless address by provisional institutional checking.”¹⁰⁵ Frickey argued that the avoidance canon is “particularly appropriate” in two related contexts: first, “cases, generally raising structural constitutional issues, in which line-drawing by the Court is especially difficult,” and second, “circumstances in which courts, facing institutional impediments to the exercise of traditional judicial review, use the canon to protect what amount to ‘underenforced’ constitutional norms.”¹⁰⁶ These two contexts are connected, of course, in that underenforcement frequently stems from the problems that courts encounter drawing constitutional lines.

Gonzales v. Oregon fits comfortably within both categories. The underlying constitutional concern involved the limits of the Commerce Power, an area of notorious line-drawing difficulty.¹⁰⁷ And there is little doubt that—owing to such difficulties—the constitutional principle of limited and enumerated powers is “underenforced.”¹⁰⁸ Yet there was no constitutional “doubt” in the picture; if Congress had, in fact, authorized the Attorney General to make a rule barring the use of controlled drugs for physician-assisted suicide, the Court would surely have upheld that rule under *Raich*. Although the Oregon case involved no clear statement rules, the federalism concerns driving interpretation were more akin to such rules than to the avoidance canon.

104. *Id.* at 301–02 (Thomas, J., dissenting) (citing *Gonzales v. Raich*, 545 U.S. 1, 74 (2005) (Thomas, J., dissenting)).

105. Frickey, *supra* note 2, at 459.

106. *Id.* at 455; *see also* Young, *supra* note 35, at 1603–05 (making a similar argument).

107. *See, e.g.*, Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 205 (discussing the Court's difficulties in drawing lines to limit Congress's powers over interstate commerce and the effect of those difficulties on the Court's legitimacy).

108. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236–37 (1994). On underenforced constitutional norms generally, *see* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

The absence of a constitutional doubt declines in importance once we recognize that the statutes involved in cases like *Gonzales v. Oregon* also play constitutive roles in our federal system. In the absence of a Commerce Clause with bite—as it was interpreted, say, prior to 1937—the line between national and state authority will typically turn not on Article I of the Constitution but rather on the terms of the statutes that Congress enacts. A law like the Controlled Substances Act, for example, allocates some functions to national authorities while reserving others to the states.¹⁰⁹ Once we understand that the texts of Article I and the Tenth Amendment do not exhaust the structural provisions of our federal constitution, it makes sense to say—*contra* Justice Thomas—that constitutional values are just as relevant when interpreting the CSA’s constitutive scope as they are in interpreting the Commerce Clause itself.¹¹⁰

The preemption cases in the Court’s 2008 Term illustrate the same dynamic. These cases are particularly useful examples, precisely because there is no underlying constitutional “problem” to be avoided by construing the federal statute narrowly. The *Rice* presumption is thus the *only* available means of giving independent or general weight to constitutional values of state autonomy, as its application serves to integrate federal statutes into a broader federalist structure that is respectful of those values. The substantive issues at stake in preemption cases, moreover, tend to be of broader importance than those at stake in constitutional litigation under the Commerce Clause itself.¹¹¹ Justice Stevens has thus consistently insisted that preemption cases are “case[s] about federalism”¹¹²—not simply exercises in statutory construction.

The majority opinions in *Altria Group*, *Wyeth*, and *Clearing House* reflect this effort to integrate the statutory apparatus of the regulatory state into the more traditional federal structure reflected in the canonical Constitution. All three opinions grappled with the central puzzle of contemporary preemption doctrine—that is, how to assimilate potentially preemptive action by federal administrative agencies into a doctrinal structure that relies heavily on the built-in political and institutional checks on Congress’s action.¹¹³ In each case, the Court’s insistence on evidence of Congress’s intent to preempt state law—in the face of arguments that agency action preempted state regulation—preserved important values of state autonomy while reserving to Congress the option of

109. See Young, *supra* note 10, at 429–33.

110. *Id.* at 467–68.

111. See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1384–86 (2001).

112. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 887 (2000) (Stevens, J., dissenting) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)).

113. See generally Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008); Young, *supra* note 39. On the importance of the political and inertial checks on Congress’s action, see generally Clark, *supra* note 91, at 1339–42.

expanding the scope of federal preemption should it feel the need to do so.¹¹⁴

As in *Gonzales v. Oregon*, however, Justice Thomas's stance may be the most interesting. His position on the presumption against preemption, as reflected in recent cases, has been complex. On the one hand, Thomas has rejected the use of the *Rice* presumption in express preemption cases, where federal legislation explicitly preempts some state norms and the Court's task is to construe the *extent* of Congress's intent to displace state law. In his dissent in *Good*, for example, Thomas described the application of *Rice* in such cases as "nothing more than a 'remnant of abandoned doctrine.'"¹¹⁵ Under his reading of the cases, "the Court is no longer willing to unreasonably interpret expressly pre-emptive federal laws in the name of congressional purpose . . . or because Congress has legislated in a field traditionally occupied by the States The text of the statute must control."¹¹⁶ And Thomas purported to reserve the question of *Rice*'s application in *Wyeth*—an implied preemption case.¹¹⁷

On the other hand, Justice Thomas's concurrence in *Wyeth* questioned the very notion of "implied conflict preemption"—an argument that has figured prominently in a number of important recent decisions.¹¹⁸ He wrote:

I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal

114. The possibility that Congress may revisit the issue and make clear its intent to preempt state law does not, of course, mean that such revision is easy. Legislative inertia is a powerful force, although such legislative overrides do occur. *See, e.g.,* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991). But to say that overriding a court's application of a clear statement rule may be difficult is simply to say that such rules may, in fact, function as meaningful constraints on legislative action. That, I have argued elsewhere, is a very good thing—especially given the weakness of traditional constitutional constraints in the federalism area. *See* Young, *supra* note 39, at 250–54. My central point here is that clear statement-type constraints derive their normative justification from the same constitutional principles that undergird more traditional doctrines of constitutional federalism. *See also* Young, *Making Federalism Doctrine*, *supra* note 61, at 1756 (offering a related defense of clear statement rules).

115. 129 S. Ct. 538, 558 (2008) (Thomas, J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992)).

116. *Id.* (internal quotation marks and citations omitted).

117. *Wyeth v. Levine*, 129 S. Ct. 1187, 1208 n.2 (2009) (Thomas, J., concurring) ("Because it is evident from the text of the relevant federal statutes and regulations themselves that the state-law judgment below is not pre-empted, it is not necessary to decide whether, or to what extent, the presumption should apply in a case such as this one, where Congress has not enacted an express-pre-emption clause.")

118. *Id.* at 1205 (Thomas, J., concurring); *see also* *Bates v. Dow Agrosciences*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in part and dissenting in part) (noting that he is "increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied pre-emption").

law. Because implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment.¹¹⁹

Three things are worth noting in Thomas's concurrence. First, a rollback of preemption doctrine to "express preemption or nothing" would mark a significant gain for principles of state autonomy. Second, even though Thomas has questioned the *Rice* presumption against preemption, his insistence on express action by Congress before finding preemption is, effectively speaking, the same thing as a clear statement requirement. Finally, the *Wyeth* concurrence marks the most extended effort thus far to ground a view of preemption doctrine in explicitly constitutional principles of federalism, rather than in some imputed view of Congress's intent.

Justice Thomas's stance in *Wyeth* thus reflects, at a profound level, the continuity of statutory and constitutional interpretation that informed the Legal Process School. Although one might quarrel with particular wrinkles of Thomas's approach to preemption, his suggestion that Congress must explicitly act to preempt state law unquestionably performs Professor Frickey's function of mediating the boundary between statutory and constitutional law. That same function is evident, although somewhat less explicit, in the majority opinions in both of the Court's 2008 Term preemption cases and the *Northwest Austin* decision. That fact suggests that, while the Legal Process School has been pronounced dead more than once, it remains alive and well in contemporary debates on the most important questions of statutory construction. We have Phil Frickey's work, in large part, to thank for that.

CONCLUSION

The standard history of American jurisprudence portrays various schools of thought coming and going in succession: the Legal Realists exploded the pretensions of mechanical jurisprudence; the Legal Process School responded to Legal Realism, and then gave way to Law and Economics, Critical Legal Studies, etc. The truth is, however, that each of these perspectives lingers long after other movements come on the scene. One need not deny the contributions of subsequent modes of legal thought to say that the Legal Process perspective remains viable and valuable today. From statutory construction¹²⁰ to federal jurisdiction¹²¹ to international law,¹²² Legal Process thought enlightens and informs current debates. That this is so owes much to the work of Phil Frickey.

119. *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring). Justice Thomas's stance likely drew upon an important article by his former law clerk, Caleb Nelson, who likewise questioned broad notions of implied preemption while at the same time arguing that the *Rice* presumption is inconsistent with the original meaning of the Supremacy Clause. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

120. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 59, at 712–64.

121. See HART & WECHSLER, *supra* note 86, at 72–80.

122. See Young, *Institutional Settlement*, *supra* note 1, at 1151–63.

I have focused in this Essay on Phil's work concerning the canon of constitutional avoidance and the various clear statement rules that protect constitutional values in statutory interpretation. Both principles, as Phil recognized, mediate the boundary between constitutional and statutory law. And I have suggested that this mediating function is particularly important in a constitutional system that leaves much of its institutional structure to be "constituted" by ordinary legislation. In such a system, it makes sense for constitutional and statutory interpretation to be continuous.

The Legal Process School famously offered an idealized image of the legislature as composed of reasonable people pursuing reasonable ends in a reasonable manner.¹²³ In closing this Essay, I want to suggest that whatever we actually think of legislators in this more skeptical time, that description amounts to a pretty good picture of our friend Phil Frickey. In a crowded intellectual field that puts a premium on novelty and counter-intuitiveness, Phil's career reminds us that *reasonableness* can be brilliantly and elegantly done.¹²⁴

123. See HART & SACKS, *supra* note 64, at 1378 (suggesting that a court interpreting a statute "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably").

124. In this company, I use "brilliantly" advisedly. See Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).