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The Problematic Nature of Contractionist Statutory Interpretations

Brian G. Slocum, *Florida Coastal School of Law*

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The main thesis of Daniel B. Rodriguez and Barry R. Weingast's recent article, *The Paradox of Expansionist Statutory Interpretations*,[1] is important: the voting decisions of legislators can be influenced by the activist statutory interpretations of courts. Specifically, the authors demonstrate that the broad interpretations of progressive legislation made by courts in the 1960s and 1970s undermined the legislative deals struck between ardent supporters of progressive legislation and the moderate legislators necessary for passage of the statutes. The authors claim the decisions involved "expansionist," as opposed to accurate, interpretations because they extended the statutes beyond the critical legislators' understanding of what the statutory language voted upon meant.[2] Although these expansionist interpretations broadened the reach of important progressive legislation, they had the effect of discouraging moderate legislators from supporting progressive legislation and are partly to blame for the current polarization of Congress and the paucity of such legislation.

Rodriguez and Weingast explain that courts in the 1960s and 1970s were able to achieve expansionist interpretations of progressive legislation by misusing legislative history to support inaccurate conclusions about the intent or purpose of Congress.[3] While the article's insights about expansionist interpretations and the misuse of legislative history are an important contribution to statutory interpretation scholarship, the interpretive mistakes made by courts are largely different now than in the 1960s and 1970s. For some time, the dominant trend has been for judges to rely more on rules of interpretation that typically narrow statutory meaning and less on pragmatic analysis or conclusions about likely congressional intent or purpose.[4] Thus, if progressive social legislation were enacted today, courts would likely not engage in the same improper expansionist interpretations as they did in the past.[5] They would, however, likely engage in improper contractionist interpretations that

* Associate Professor, University of the Pacific, McGeorge School of Law (beginning fall 2008). J.D. Harvard Law School, 1999.

[1] 101 NW. U. L. REV. 1207 (2007).

[2] *See id.* at 1223.

[3] *See id.* at 1221–26.

[4] *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29–36 (2006).

[5] Rodriguez and Weingast themselves note that "statutory expansionism abate[d] in the mid-1980s and beyond, as more 'conservative' courts [have] construed civil rights and other progressive statutes more narrowly than before." *See supra* note 1, at 1241–42.

narrow the statutes beyond the critical legislators' understanding of what the statutory language voted upon meant.

This Essay criticizes the current judicial predilection for contractionist statutory interpretations. Part I explains how the rules of statutory interpretation are currently geared towards producing narrow, often contractionist, statutory interpretations. Part II uses the Supreme Court's recent decisions in *Zadvydas v. Davis*,[6] and *Clark v. Martinez*,[7] to illustrate the problems raised by contractionist interpretations. This Part explains that while contractionist interpretations may not discourage moderate legislators from supporting legislation, they are problematic because they are inconsistent with the judiciary's role as "faithful agents" of Congress.

I. The Rules of Statutory Interpretation and Contractionist Interpretations

A. Distinguishing Contractionist Interpretations from Expansionist Interpretations

As explained above, "expansionist" interpretations extend the meaning of statutes beyond the critical legislators' understanding of what the statutory language voted upon meant.[8] Thus, in the spatial model below (which the authors utilize in their article), Q is the original status quo prior to the legislation. L is the legislation, and x and x* are two variants of judicial changes. By expansively interpreting the statute, as courts did to progressive statutes in the 1960s and 1970s through overly broad conceptions of Congress's intent or purpose, courts change the original meaning of the statute from L further from Q toward x or even beyond x.[9]

Figure 1

[----------x----------L----------x*----------Q----------]
Liberal Conservative

As the authors' explain, these expansionist interpretations can discourage moderates from making deals to vote for progressive (or, theoretically, conservative) legislation, thereby resulting in the enactment of fewer progressive (or conservative) statutes.[10]

Judicial opinions can also, of course, undermine the original meaning of the statute by choosing interpretation x*, which narrows the statute's expected meaning. Rodriguez and Weingast state that the logic

[6] 533 U.S. 678 (2001).
[7] 543 U.S. 371 (2005).
[8] *See supra* notes 1–2 and accompanying text.
[9] *See* Rodriguez & Weingast, *supra* note 1, at 1224.
[10] *See id.* at 1241.

of their argument is "symmetrical with regard to 'contractionist' interpretations," but they do not provide an in-depth explanation of how this is so.[11] While such an exploration was beyond the scope of their main thesis about the paradoxical nature of expansionist interpretations of progressive legislation, it is difficult to imagine that contractionist interpretations raise the same problems as expansionist interpretations.

An interpretation that narrows the meaning of a statute results in the moderates receiving more than they expected pursuant to their "bargain" with ardent supporters. The contractionist interpretation has made progressive legislation less progressive or conservative legislation less conservative. Such a windfall would not likely influence the moderates to refuse to support similar legislation in the future. As explained below, contractionist interpretations may reflect the policy interests of the judiciary rather than the concerns of moderate legislators, but this does not mean that contractionist interpretations are unwelcomed by moderates.

In addition, the possibility of contractionist interpretations may sometimes influence ardent supporters to carefully draft statutory language in order to attempt to avoid such interpretations. Unlike the case with moderates and expansionist interpretations, though, it is unlikely that ardent supporters would refuse to support future legislation because of the possibility of contractionist interpretations. After all, unless ardent supporters fear that the likely judicial interpretations would be so contractionist that they would move the statutory meaning past the original status quo and make them worse off than before the legislation was enacted, they would still vote for legislation perceived to be beneficial.

B. The Rules of Interpretation as Systematically Promoting Contractionist Interpretations

It might seem that contractionist interpretations are sufficiently episodic that, unlike the case with the consistently expansionist statutory interpretations of progressive legislation from the 1960s and 1970s, they are unworthy of study. Such a view under-appreciates the systematic nature of narrow statutory interpretations. Although courts purport to be the "faithful agents" of Congress when resolving interpretive issues, they consider the creation and modification of the rules of statutory interpretation to be subject to judicial prerogative.[12] Many of these

[11] *See id.* at 1224.

[12] It is widely recognized that federal courts have the power, as well as the primary role, in creating rules of statutory interpretation. *See, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) ("The central, unquestioned premise in this field is that the judiciary is the proper branch to design and implement tools of statutory interpretation.").

judicially created rules call for narrow interpretations of statutes.[13] Indeed, the judiciary has designed the rules of statutory interpretation to err on the side of contractionist interpretations. Thus, the phenomenon of contractionist interpretations is not confined to those interpretations made by conservative courts hostile to progressive legislation or to liberal courts hostile to conservative legislation. For example, in the case used in Part II.A. to illustrate the problems associated with contractionist interpretations, Justice Scalia made a contractionist interpretation of a very conservative statute.[14]

Some rules in particular call for narrow statutory interpretations. Substantive canons of interpretation, which are policy-based directives about how statutory ambiguity or unclarity should be resolved, almost uniformly direct courts to interpret statutes narrowly.[15] These rules appeal to ideologically diverse interests and vary widely in their strength, but the one feature most have in common is that their application results in the narrowing of statutory language. Thus, a statute (subjectively deemed by the judiciary to be less than clear) might be subject to a narrow interpretation because, for example, it: (1) raises serious constitutional issues; (2) has retroactive effects; (3) attempts to divest courts of judicial review or habeas corpus jurisdiction; (4) might be applied extraterritorially; (5) impacts American Indians or aliens; or (6) raises federalism concerns by possibly abrogating state Eleventh Amendment immunity, exposing states to generally applicable regulations, or displacing state law in areas of traditional state concern.[16]

Why are the narrow interpretations reached pursuant to these and other substantive canons contractionist? The interpretations would not be contractionist, of course, if they reflected legislative intent. But two characteristics of these rules and the manner in which they are applied make them contractionist, at least part of the time.

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[13] *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 943–44, 960 (1992) (suggesting that the most significant rules of interpretation used by the Supreme Court narrow statutory meaning and reflect a preference for continuity rather than change).

[14] *See infra* notes 35–49 and accompanying text.

[15] *See* Shapiro, *supra* note 13, at 925("[T]he dominant theme running through most interpretive guides [including substantive canons] is that close questions of construction should be resolved in favor of continuity and against change."); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634 (2d ed. 1995) (describing substantive canons).

[16] *See* Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 372–76, 401 (2007) (describing the canon of constitutional avoidance, the presumption against retroactivity and the habeas corpus clear statement rule); Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICH. ST. L. REV. 123, 131–50 (describing the federalism canons); Peter S. Heinecke, Comment, Chevron *and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1025–32 (1993) (describing the rule that statutory ambiguities should be interpreted in favor of Native Americans).

The first is that many substantive canons are quite powerful and require courts to choose second-best interpretations that are less textually persuasive and less likely to reflect congressional intent. The most powerful substantive canons—clear statement rules—require particularly precise indications of congressional intent in order to be overcome.[17] The application of these rules frequently results in the creation of implied exceptions to otherwise unambiguously broad statutory language.[18] While courts will typically defend a chosen rule on the ground that its application will result in a statutory interpretation that reflects congressional intent, substantive canons reflect the values of courts, not those of Congress.[19] Rather than serving as gauges of congressional intent, these rules are chosen for other reasons, such as a desire to force Congress to expressly address issues that the judiciary deems to be sensitive.[20] For example, clear statement rules have been particularly popular with conservative Justices, as they have recently created various clear statement rules designed to protect federalism interests.[21]

The second contractionist feature of substantive canons is that courts do not typically consider the temporal implications of creating or broadening the strength or scope of these rules.[22] One of the chronically overlooked and under-theorized problems in statutory interpretation is that courts frequently create and modify substantive canons and other rules of interpretation but generally apply these new or modified rules of

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[17] *Cf.* Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959, 1972–73 (1994) (arguing that because they require such explicit statutory language, clear statement canons are concerned more with protecting important values than they are with capturing the most accurate reconstruction of congressional intent).

[18] *See* Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 384 (2005) ("The well-established presumption against reading a statute to operate 'retroactively' . . . often causes courts to infer exceptions to statutory provisions whose words, on their face, appear to cover all pending cases.").

[19] *See* William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) (arguing that the Court's clear statement rules "amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced").

[20] *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 613–46 (1995) (describing how courts use rules of interpretation to pursue various visions of democracy).

[21] *See* Obhof, *supra* note 16, at 132–33.

[22] Courts can enlarge the scope of a canon by making it applicable in cases in which it formerly did not apply. *See infra* Part II.A. (describing how the Court has modified the scope of the canon of constitutional avoidance). Courts can make canons stronger in two different ways. One is by making the canon more difficult to overcome by making its presumption stronger. The other is by changing the point in the interpretive process when courts will apply the rule. *Cf. The Supreme Court, 2006 Term—Leading Cases: Definition of "Violent Felony"*, 121 HARV. L. REV. 345, 351 n.51 (2007) (noting that much of the judicial debate over the rule of lenity has concerned whether the rule should be applied only after exhausting all other interpretive aids or whether it should be applied earlier in the process, such as before the court considers legislative history).

interpretation retroactively.[23] In other words, courts do not typically consider whether new or modified rules should be applied only prospectively to statutes enacted after the judicial decisions that created or modified the rules. When a substantive canon is created or is modified by increasing its strength or scope but no consideration is given to whether the new or modified rule should be applied only prospectively, the end result is typically a contractionist interpretation.[24] The court has changed the original meaning of the statute in a manner that could not have been anticipated by Congress.

Courts attempt to legitimize rules of interpretation, and reduce criticisms that the rules do not correspond with congressional intent, by asserting that Congress is assumed to enact statutes in light of established rules of interpretation.[25] It is questionable, though, how much attention Congress pays to the rules of interpretation when drafting legislation.[26] Even if Congress does consider the rules of interpretation, substantive canons (and especially clear statement requirements) have been criticized because they assume an unrealistic level of congressional foresight.[27] Moreover, in any given case it is often difficult to predict how much clarity will be required by courts to satisfy the presumptions created by substantive canons. In addition, the failure of courts to consider temporal issues when creating or modifying rules of interpretation further

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[23] One exception to the automatic retroactive application of new or modified rules is that the Court will not apply a new rule retroactively to overturn a previous interpretation. *See* John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 755–56 (2008) (refusing to overturn its previous interpretation of a statute, in which it had interpreted a limitations period as jurisdictional in nature with regard to suits against the United States, on the basis of a new rule of interpretation that created a rebuttable presumption of equitable tolling with regard to suits against the United States).

[24] Although the trend is for the creation and expansion of canons, rather than their elimination and narrowing, a judge may also narrow the scope or strength of a canon, which would not produce a contractionist interpretation. The modification could produce an expansionist interpretation, though, if Congress relied on the originally constituted canon when choosing statutory language. If, for example, the Court weakened the presumption against retroactivity, statutes enacted prior to the Court's modification might be applied retroactively even though at the time of the statute's passage such retroactive application would have been unexpected.

[25] *See, e.g.*, United States v. Texas, 507 U.S. 529, 534 (1993) ("Congress does not write upon a clean slate [when statutory presumptions are involved]. . . . '[C]ourts may take it as a given that Congress has legislated with an expectation that the presumption will apply' . . . .") (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 507 U.S. 529 (1993)).

[26] *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 597–605 (2002) (finding that Congress does not pay particular attention to the rules of interpretation when drafting legislation).

[27] *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 9–10 (2005) (stating that the Court's use of clear statement rules "may be ignoring clearly discoverable legislative purpose" and frustrating the "policy preferences of the legislature" because they assume "an unrealistic level of congressional foresight").

undermines the assumption that Congress is able to choose statutory language in light of the rules of interpretation that will be applied by courts.

The conclusions made above regarding contractionist interpretations may seem to conflict with the conclusions drawn by Rodriguez and Weingast about expansionist interpretations. According to Rodriguez and Weingast, expansionist interpretations of progressive social legislation are problematic because moderates have relied on the possibility of these interpretations in deciding not to support such legislation.[28] As I argue above, however, contractionist interpretations occur in part because Congress often *cannot* predict how courts will interpret legislation.[29] Perhaps our conclusions differ because Rodriguez and Weingast focused on judicial interpretations of a specific type of legislation during a certain defined time period, while I focused on generally applicable rules. Alternatively, perhaps interpretations based on judicial findings of statutory intent or purpose are more predictable than interpretations based on rules of interpretation.[30] The resolution of such questions is beyond the scope of this Essay, but it does seem likely that although contractionist interpretations create other problems (as explained below), any polarization of Congress is not likely due to the manner in which courts *currently* interpret statutes.

II. The Problems Created by Contractionist Interpretations

A. An Example: *Clark v. Martinez*

As explained above, contractionist interpretations do not raise the same issues as do expansionist interpretations because it is not likely that the possibility of contractionist interpretations cause moderates or ardent supporters to refuse to support legislation. They should be viewed as problematic, however, because the interpretations, being contractionist, do not correspond with legislative intent and, as Section B of this Part argues, cannot be legitimized on the basis that Congress can overrule them through subsequent legislation. To illustrate these problems, this Essay will describe the Supreme Court's interpretations of one of the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). It may seem odd to some that I criticize the Court's interpretations of IIRIRA, which can be fairly seen as humane interpretations of a notoriously harsh, punitive and controversial

[28] *See supra* notes 1–3 and accompanying text.

[29] Theoretically, if Congress could predict how courts will interpret legislation, they would be able to anticipate, ex ante, at least some problems and draft the legislation accordingly.

[30] *Cf.* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 326–27 (1995) (questioning the claim that textualism limits judicial discretion).

immigration statute.[31] Although I (greatly) sympathize with such views, one of the Court's interpretations is undoubtedly contractionist and serves as an example of the problems associated with such judicial (contr)activism.

In *Zadvydas v. Davis*,[32] the Court applied the canon of constitutional avoidance in interpreting one of the provisions created by IIRIRA, 8 U.S.C. § 1231(a)(6), which states that certain immigrants "may be detained beyond the [90-day] removal period." The Court, required by the avoidance canon to adopt a "fairly possible" interpretation of the statute that would avoid the constitutional questions raised by the indefinite detention of immigrants who legally are considered to have entered the country, held that these immigrants can be detained only for a six-month period unless there is a "significant likelihood of removal in the reasonably foreseeable future."[33] Thus, as a result of the Court's use of the avoidance canon, the holding was one of statutory construction that was driven by constitutional concerns. While it was arguably an implausible second-best interpretation achievable only through the application of the avoidance canon, the statutory interpretation in *Zadvydas* was defensible considering the constitutional issues involved and the Court's assertion that Congress had previously doubted the constitutionality of indefinite detention of deportable immigrants.[34]

The same defense cannot be made for the Court's subsequent decision in *Clark v. Martinez*,[35] where the Court extended the *Zadvydas* statutory holding to include a different group of immigrants—inadmissible immigrants—who have far different constitutional rights.[36] In *Martinez*, the Court added a new and powerful aspect to the avoidance canon by directing that a statutory interpretation made by invoking the canon be uniformly applied in subsequent cases even when the later cases do not raise any serious constitutional issues. The Court thus held that § 1231(a)(6) should be interpreted as imposing the same limitations on the detention of inadmissible immigrants as it found in *Zadvydas* were applicable to the detention of deportable immigrants.[37]

The Court recognized that its interpretation of § 1231(a)(6) in *Zadvydas* was driven by the avoidance canon. It rejected the notion, however, that it needed to determine whether indefinite detention of

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[31] *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 368 (2002) (referring to IIRIRA as the "toughest immigration legislation adopted in half a century").

[32] 533 U.S. 678 (2001).

[33] *Id.* at 701.

[34] *See id.*

[35] 543 U.S. 371 (2005).

[36] *Id.* at 386–87; *see* Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1023–28 (2007).

[37] *Martinez*, 543 U.S. at 377–78.

inadmissible immigrants would raise serious constitutional questions before it interpreted § 1231(a)(6) as similarly not authorizing their indefinite detention.[38] Instead, Justice Scalia, writing for the Court, stated:

> It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern, . . . whether or not those constitutional problems pertain to the particular litigant before the Court.[39]

In other words, the Court's lowest common denominator principle stands for the proposition that the avoidance canon must be applied, and a second-best interpretation selected, even when the particular application of the statute before the Court does not raise any serious constitutional questions but a different application not before the Court would.

The Court's invocation of its lowest common denominator principle in *Martinez* had very broad consequences. Before IIRIRA replaced the previous statutory regime with § 1231(a)(6), courts almost uniformly held that the Attorney General had both statutory and constitutional authority to detain inadmissible immigrants indefinitely.[40] Due to the Court's use of the avoidance canon in *Zadvydas* and *Martinez*, the Attorney General was precluded from indefinitely detaining not only deportable immigrants, whose indefinite detention raises serious constitutional problems, but also inadmissible immigrants, whose indefinite detention does not currently raise serious constitutional problems.[41]

The Court in *Martinez* claimed that it was not adding a new element to the avoidance canon, stating that the "lowest common denominator" principle has always been a legitimate and necessary consequence of the invocation of the avoidance canon.[42] Such a statement was rather surprising considering that the Court earlier in *Zadvydas* had emphasized the long-standing constitutional distinction between the two classes of immigrants (deportable and inadmissible immigrants) and that its decision only concerned deportable immigrants.[43] One has to conclude that the Court was either being disingenuous or, more likely, did not

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[38] *See id.* at 380–81.

[39] *Id.* at 380–81.

[40] *See* Slocum, *supra* note 16, at 396–97.

[41] *See id.*

[42] 543 U.S. at 380–83.

[43] Zadvydas v. Davis, 533 U.S. 678, 695 (2001) ("[The] cases before us [do not] require us to consider the political branches' authority to control entry into the United States.").

anticipate that its interpretation would be uniformly applied in a subsequent case. Jonathan Siegel has also disputed the Court's characterization of the lowest common denominator prinicple in *Martinez* as long-standing, claiming that the principle is new in the sense that courts in the past have often interpreted the same statutory language in different ways depending on the status of the litigant before the court.[44]

The modification and application of the avoidance canon resulted in a contractionist interpretation in *Martinez*. As noted above, IIRIRA was a notoriously harsh immigration statute. The extension of the *Zadvydas* interpretation, through the retroactive application of a modification to a substantive canon that produces second-best interpretations, likely, and inappropriately, overturned settled expectations. Congress may very well have relied on the old avoidance canon rule when drafting the detention statute. There was certainly no evidence that, when drafting IIRIRA, Congress intended to take the dramatic step of removing the Attorney General's longstanding power to indefinitely detain inadmissible immigrants. Such a purpose would have been at odds with the overall tenor of the legislation and the other provisions enacted.[45]

Indeed, Congress, although it did not need to do so, enacted statutory language in IIRIRA that made the Attorney General's authority to detain inadmissible immigrants *more* explicit. Prior to IIRIRA's enactment, some courts found that the Attorney General had the authority to detain inadmissible immigrants indefinitely through the "intersection of several statutory provisions," none of which explicitly authorized indefinite detention.[46] Thus, IIRIRA's provision that the Attorney General "may" detain immigrants beyond the removal period made that power more explicit. It is probable that Congress would have thought (if it considered the issue at all) that any constitutional problems that would be raised by the indefinite detention of deportable immigrants would not undermine the long-standing authority that the Attorney General possessed to detain inadmissible immigrants.

Using the spatial model below, and assuming that harsh immigration legislation is conservative in nature, the *Zadvydas* and *Martinez* decisions at the very least changed the original meaning of the detention provision of IIRIRA from L to x. Indeed, as explained above, one can make the further claim that the Court's interpretations moved the legislation from L to x*, thereby putting the government in a worse position than before the legislation was enacted.

Figure 2

[----------x*----------Q----------x----------L----------]
Liberal Conservative

[44] *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 352–65 (2005).

[45] *See* Aleinikoff, *supra* note 31, at 368.

[46] Barrera-Echavarria v. Rison, 44 F.3d 1441, 1445 (9th Cir. 1995) (en banc).

By applying its modification of the avoidance canon retroactively in *Martinez*, the Court inappropriately deprived Congress of the ability to enact statutory language that would have accomplished its purposes.

B. Overruling Contractionist Interpretations and Choosing Statutory Interpretation Methodologies

The objectionable nature of contractionist interpretations might seem obvious. Some scholars have defended such interpretations, however. Einer Elhauge, for example, refers to rules that run contrary to legislative intent as preference-eliciting rules of interpretation and claims that they are often beneficial because they can result in more precise legislation subsequently enacted by Congress.[47]

On its face, the idea that courts should choose statutory interpretations that do not reflect congressional intent conflicts with their "faithful agent" role and raises separation of powers issues, but other reasons also counsel against such interpretations. First, while it is true that Congress monitors the statutory decisions of the Supreme Court, it pays far less attention to the interpretations made by the various courts of appeals.[48] Considering that most statutory interpretations never reach the Supreme Court, it is unrealistic to think that Congress will overrule most of the contractionist interpretations made by courts. Second, there are many reasons why Congress may not overrule the contractionist interpretations of which it is aware, even if it disagrees with them. For example, Congress may be focused on other more pressing matters, may disagree about how to resolve the issues or may simply conclude that overriding an interpretation is not politically viable.[49] Placing significance on legislative inaction has thus been widely criticized by scholars.[50] Finally, even if Congress enacts legislation overruling a judicial decision, the new legislation is often not as broad as the original legislation. If, for example, the judicial decision relied on a rule of interpretation such as the avoidance canon, which avoids interpretations that merely *raise* constitutional issues, Congress may be wary of re-enacting the same provision (with clearer language, of course), even if it believes that the provision is not actually unconstitutional.

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[47] *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165–66 (2002).

[48] *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 331–32 (2005).

[49] *See* Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (listing reasons why little weight should be attributed to legislative inaction).

[50] *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 68–69 (1988) (noting that, while a few have defended the limited use of legislative inaction as an interpretive tool, scholars have generally been extremely skeptical of the practice).

Demonstrating the inappropriate nature of expansionist interpretations made through the misuse of legislative history and contractionist interpretations made through rules of interpretation necessarily raises questions about proper statutory interpretation methodologies.[51] Although they criticize how courts have used legislative history in order to reach expansionist interpretations, Rodriguez and Weingast claim that their theory does not necessarily support textualism, just a more sophisticated intentionalism that properly considers legislative history.[52] At first glance, however, their conclusions about the importance of judicial observance of legislative deals do seem to give support to textualism. John Manning argues that one of the justifications for textualism is that its "presumption of deliberate drafting but untidy compromise is more respectful of the central place of compromise in the constitutional design of the legislative process" than are intent or purpose based theories.[53] A judicial presumption of deliberate drafting "enables legislators to rely on semantic detail to express the level of generality at which a proposed legislative policy is acceptable to them."[54]

While the idea that judges should focus on semantic details has persuasive force, the type of textualism that produces contractionist interpretations (through the retroactive application of new or modified rules of interpretation that produce second-best interpretations) should be rejected. If textualist courts truly desire to respect the semantic details enacted by Congress, a more moderate and carefully calibrated approach to the rules of interpretation should be pursued. Such an approach should focus more on rules that are designed to capture likely congressional intent rather than promote other goals such as forcing Congress to expressly address issues the Court thinks are important.

CONCLUSION

This Essay does not dispute Rodriguez and Weingast's valuable demonstration of how the expansionist interpretations of progressive legislation made by courts in the 1960s and 1970s undermined the legislative deals struck between ardent supporters of progressive legislation and the moderate legislators necessary for passage of the statutes. Rather, this Essay demonstrated that their arguments about the problems associated with expansionist interpretations are not in fact symmetrical with regard to contractionist interpretations. Contractionist interpretations likely do not, for example, have the same polarizing effect on Congress as have expansionist interpretations of progressive

[51] *See supra* note 1, at 1219 ("[E]verything turns on how the court approaches its interpretive responsibilities . . . .").

[52] *See id.* at 1229–33.

[53] *See* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2011 (2006).

[54] *See id.*

legislation. Nevertheless, as this Essay has argued, contractionist interpretations are problematic because they reveal a judiciary that is, perhaps increasingly, interested in pursuing public policy at the expense of Congress through the application of rules of interpretation that often are not, and cannot, be accounted for by Congress when it drafts legislation.