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## ESSAY

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### THE DISPARATE IMPACT CANON

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#### INTRODUCTION

In early January, the U.S. Supreme Court heard oral argument in *Husted v. A. Philip Randolph Institute*.<sup>1</sup> The case presented a question of pure statutory interpretation: whether Ohio's procedure for updating its voter registration rolls violates § 8(b)(2) of the National Voter Registration Act (NVRA).<sup>2</sup> At oral argument, Justice Sonia Sotomayor raised the possibility of resolving the case according to a new, potentially revolutionary canon of statutory construction: interpreting federal laws, where reasonably possible, to avoid, minimize, or prohibit racially disparate impacts.<sup>3</sup> Adopting this rule would have important ramifications across numerous fields of law, raise serious constitutional questions, and represent a tremendous victory for the critical race theory movement, which has long emphasized the law's role in perpetuating structural racial inequality.<sup>4</sup> This potential canon also implicates compelling questions—questions that arose during Justice Sotomayor's confirmation proceedings—concerning the proper role of judges.

#### I. THE CHALLENGED PROCEDURE AND ORAL ARGUMENT

*Husted* concerns the extent to which the NVRA limits states' power to update their voter registration rolls to remove outdated, incorrect, or

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<sup>1</sup> 137 S. Ct. 2188 (May 30, 2017) (No. 16-980).

<sup>2</sup> See 52 U.S.C. § 20507(b)(2) (2015) (prohibiting states from removing citizens from the voter registration database due to their failure to vote in previous elections).

<sup>3</sup> See *infra* notes 19-20 and accompanying text.

<sup>4</sup> See, e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxii-xxiii (Kimberlé Crenshaw et al. eds., 1995).

potentially fraudulent records. Under Ohio's so-called "supplemental process," the county board of elections mails a forwardable postcard to every registered voter who has not voted in the preceding two years.<sup>5</sup> If the voter neither returns the postcard, contacts election officials to confirm or update their address, nor votes at any point over the following four years, their registration is cancelled.<sup>6</sup> A person whose registration is cancelled may nevertheless vote in future elections by submitting a new postcard application available over the Internet,<sup>7</sup> by mail from the board of elections,<sup>8</sup> or at many government offices.<sup>9</sup>

The NVRA is drafted in an unnecessarily convoluted manner and contains numerous internal cross-references that further complicate analysis. It provides that a state may not remove a person from its registration rolls on the grounds she "changed residence" unless she fails to respond to a forwardable notice mailed to her previous address and subsequently refrains from voting in two federal elections (i.e., for a four-year period).<sup>10</sup> The State of Ohio argued this provision affirmatively authorizes its Supplemental Process.<sup>11</sup> On the other hand, § 8(b)(2) of the NVRA provides that a state may not remove any person from its voter registration rolls "by reason of the person's failure to vote."<sup>12</sup> The Sixth Circuit, in a two-judge majority opinion, concluded that § 8(b)(2) prohibits Ohio's Supplemental Process because it is initially triggered by a person's failure to vote.<sup>13</sup> The court deemed a person's failure to vote to be the cause of their ultimate removal from the registration rolls.<sup>14</sup> The case turns primarily on how these provisions of the NVRA relate to each other.

At the outset, it is important to recognize that the fundamental constitutional right to vote weighs on both sides of the issue. On the one hand, adopting the plaintiffs' broad construction of the NVRA as prohibiting Ohio's Supplemental Process would further, however marginally, the "affirmative right to vote," referring to the right of people to be recognized as eligible electors and cast a ballot.<sup>15</sup> Requiring the State of Ohio to retain people on its voter

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<sup>5</sup> See *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 703 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2188 (May 30, 2017) (No. 16-980).

<sup>6</sup> *Id.*

<sup>7</sup> See *Register to Vote in Your State By Using This Postcard Form and Guide*, [https://vote.gov/files/federal-voter-registration\\_1-25-16\\_english.pdf](https://vote.gov/files/federal-voter-registration_1-25-16_english.pdf) [<https://perma.cc/Z7VU-2CVS>].

<sup>8</sup> See *Register to Vote and Upload Your Registration*, OHIO SECRETARY OF ST., <https://www.sos.state.oh.us/elections/voters/register/#gref> [<https://perma.cc/V5WZ-CLCW>].

<sup>9</sup> See 52 U.S.C. § 20506(a)(2)-(4) (2012).

<sup>10</sup> 52 U.S.C. § 20507(d)(1)(B); see also 52 U.S.C. § 20507(b)(2).

<sup>11</sup> *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 707-08 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2188 (May 30, 2017) (No. 16-980).

<sup>12</sup> 52 U.S.C. § 20507(b)(2).

<sup>13</sup> *A. Philip Randolph Inst.*, 838 F.3d at 711.

<sup>14</sup> *Id.* at 711-12.

<sup>15</sup> Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 192-93 (2014).

rolls who have neither responded to the board of elections' postcard, contacted election officials to confirm or update their address, nor voted for a total of six years allows those people to vote in subsequent elections without having to submit a new registration postcard. Approximately 7515 voters took advantage of that opportunity during the 2016 election due to a preliminary injunction ordered by the Sixth Circuit.<sup>16</sup>

On the other hand, Ohio's efforts to update its voter registration rolls promote what may be termed the "defensive" right to vote: the right, recognized by the U.S. Supreme Court, of each voter to have their vote be counted and given full effect without being diluted, nullified, or effectively cancelled out by invalid votes or votes from ineligible people.<sup>17</sup> Outdated, incorrect, or potentially fraudulent voter registration records can facilitate double voting, voting by ineligible people who have moved to other jurisdictions, mistakes by election officials, or potentially even absentee voting fraud.<sup>18</sup> Ohio's Supplemental Process for updating its registration rolls protects, at least to some extent, this defensive right to vote.

At oral argument, Justice Sotomayor suggested a potential new approach to resolving any ambiguity in the NVRA. She declared, "[T]here's a strong argument . . . that at least in impact, this is discriminatory. I understand that some people don't believe in impact, but you have to look at it to determine . . . whether something is reasonable."<sup>19</sup> Later in the argument, she expressed concern that the State of Ohio's interpretation of the NVRA would have "a negative impact on certain groups in this society."<sup>20</sup> Neither Justice Sotomayor nor any other Justices followed up on this thread, but her statements contain the seeds of a potentially powerful, controversial, and even revolutionary approach to statutory interpretation: adopting a "disparate impact" canon of statutory construction.

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<sup>16</sup> See Brief for the Petitioner at 14, *Husted v. A. Philip Randolph Inst.*, 137 S. Ct. 2188 (July 31, 2017) (No. 16-980) (citing Ohio Sec'y of State, *Provisional Supplemental Report for Nov. 2016 Election*, <https://goo.gl/KSZnCS> [<https://perma.cc/89BD-3VTV>]).

<sup>17</sup> See Morley, *supra* note 15, at 192-93 (describing the defensive right to vote); see, e.g., *Anderson v. United States*, 417 U.S. 211, 226 (1974) (holding that a person has the constitutional right to have his or her vote be "given full value and effect, without being diluted or distorted by the casting of fraudulent" or otherwise invalid ballots); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (holding that a person's right to vote is "denied by a debasement or dilution of the weight of [his or her] vote just as effectively as by wholly prohibiting the free exercise of the franchise"); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (holding that the right to vote is violated by "dilution" of people's votes through means such as "stuffing of the ballot box").

<sup>18</sup> See generally Michael T. Morley, *Why Claim Voter Fraud?* (unpublished manuscript) (on file with author).

<sup>19</sup> Transcript of Oral Argument at 23, *Husted v. A. Philip Randolph Inst.*, No. 16-980 (Jan. 10, 2018) [hereafter, *Husted Transcript*].

<sup>20</sup> *Id.* at 29.

A “disparate impact” canon would provide that, if a federal law is ambiguous (meaning it is reasonably susceptible to multiple interpretations), a court should refuse to adopt any construction that would allow a racially disparate impact against members of minority groups.<sup>21</sup> Different variations of the canon are possible, of course. It could be construed broadly to apply to any federal statute, or more narrowly to apply only to laws directly related to constitutional rights, such as the right to vote. It could mean interpreting laws to ensure they do not cause racially disparate impacts, or go further and require courts to interpret laws to prohibit states or private parties from adopting policies or engaging in practices with disparate impacts.

In this case, Justice Sotomayor suggested that construing the NVRA to allow Ohio’s Supplemental Process would adversely impact racial minorities, because that process causes them to be removed disproportionately from the state’s registration rolls.<sup>22</sup> A disparate impact canon would counsel that § 8(b)(2) of the NVRA should be interpreted to prohibit the Supplemental Process. Although the Court is unlikely to apply such a canon in *Husted*, Justice Sotomayor’s provocative suggestion raises a range of important issues, and progressive judges are likely to consider applying it—whether overtly or as an implicit part of their reasoning—in future cases.

## II. THE DISPARATE IMPACT CANON AS A SUBSTANTIVE CANON OF CONSTRUCTION

There are three main types of canons of statutory construction: textual, extrinsic source, and substantive.<sup>23</sup> Textual canons of construction are rules, generalizations, and presumptions about the meaning of language that are ostensibly drawn from grammatical rules and usage conventions.<sup>24</sup> They include principles such as *expressio unius est exclusio alterus* (the inclusion of some things implies the exclusion of others),<sup>25</sup> the last antecedent rule,<sup>26</sup> and the principle of declining to adopt interpretations of legal provisions that

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<sup>21</sup> One could imagine a variation of this canon under which a court should reject any construction that leads to a racially disparate impact against members of any racial group, including Caucasians.

<sup>22</sup> See *Husted* Transcript, *supra* note 19, at 23, 29.

<sup>23</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97–108 (1994).

<sup>24</sup> See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927 (1992).

<sup>25</sup> See *Leatherman v. Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the canon to Federal Rule of Civil Procedure 9(b)).

<sup>26</sup> See *Jama v. Immigration and Customs Enf’t*, 543 U.S. 335, 343–44 (2005) (“[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” (internal quotations omitted)).

would render certain words mere surplusage.<sup>27</sup> Extrinsic source canons direct courts to interpret statutes in light of some other source, such as an agency's interpretation,<sup>28</sup> other jurisdictions' constructions,<sup>29</sup> or legislative history.<sup>30</sup>

Substantive canons, in contrast, counsel courts to interpret statutes to promote or disfavor certain outcomes.<sup>31</sup> Such canons may take many forms, though most of these variations are effectively equivalent to each other. Some require courts to apply laws liberally or narrowly.<sup>32</sup> For example, remedial laws<sup>33</sup> and certain types of statutes, including securities<sup>34</sup> and civil rights laws,<sup>35</sup> must be construed broadly. Other substantive canons effectively act as tiebreakers, providing that if a statute reasonably may be read in multiple ways, courts must adopt one type of interpretation over another.<sup>36</sup> For example, the rule of lenity directs courts to construe ambiguous statutes in favor of criminal defendants,<sup>37</sup> and the constitutional avoidance canon forbids

<sup>27</sup> See *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1132-33 (2015) (holding that the Court of Appeals interpreted the term "restrain" too broadly, rendering other statutory language mere surplusage).

<sup>28</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

<sup>29</sup> See *Willis v. E. Tr. & Banking Co.*, 169 U.S. 295, 307 (1898) ("[T]he known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded."); see also *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944) (noting that this canon "is a presumption of legislative intention . . . which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention").

<sup>30</sup> See *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text.").

<sup>31</sup> See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13 (2005) ("[S]ubstantive canons reflect judicially-based concerns, grounded in the courts' understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies."); cf. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 27 (1997) (arguing that substantive canons of interpretation "load the dice for or against a particular result").

<sup>32</sup> See WILLIAM N. ESKRIDGE JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 850 (3d ed. 2001).

<sup>33</sup> See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (stating that the Securities Exchange Act is an example of remedial legislation which "should be construed broadly to effectuate its purposes").

<sup>34</sup> See *id.* But see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) ("[G]eneralized references to the remedial purposes of the 1934 Act will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." (internal quotations omitted)).

<sup>35</sup> See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700-01 (1978) ("[T]he Civil Rights Act [42 U.S.C.A. § 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.").

<sup>36</sup> See ESKRIDGE, *supra* note 32, at 851.

<sup>37</sup> See *Liparota v. United States*, 471 U.S. 419, 427 (1985); *Dixon v. United States*, 465 U.S. 482, 491 (1984).

courts from adopting interpretations that unnecessarily raise avoidable constitutional questions.<sup>38</sup>

Some substantive canons take the form of presumptions which require or forbid courts from construing a law in a particular manner in the absence of some affirmative evidence to support such a conclusion. For example, the presumption against preemption requires courts to assume that a federal statute concerning a traditional area of state regulation does not preempt state law, absent some affirmative indication in the law itself.<sup>39</sup> Clear statement rules go even further, prohibiting a court from reaching a particular conclusion unless clear, express, and unambiguous language in a statute requires it.<sup>40</sup> For example, a law cannot be interpreted as waiving sovereign immunity unless the waiver is clear and unambiguous.<sup>41</sup> Likewise, federal laws cannot be applied extraterritorially without clear statutory language providing for it.<sup>42</sup>

Courts and commentators defend substantive canons on numerous grounds. Sometimes they are justified as tools for helping courts apply Congress's intent more accurately.<sup>43</sup> From this perspective, substantive canons reflect Congress's actual priorities and overarching concerns. Presumptively construing statutes to avoid undermining these priorities brings about outcomes that more closely reflect Congress's overall expectations, wishes, and values. Under this view, substantive canons enhance courts' ability to act as faithful agents of the legislature, even when the legislature has not taken the trouble to spell out its specific expectations in detail.

Many substantive canons can also be defended as mechanisms for protecting constitutional values.<sup>44</sup> Most basically, the constitutional avoidance canon reinforces constitutional restrictions by directing courts to construe laws, when reasonably possible, to avoid approaching those limits. Other canons require courts to interpret laws to promote particular constitutional values such as federalism, judicial review, and state

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38 *Boos v. Barry*, 485 U.S. 312, 331 (1988); *see also Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

39 *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

40 *See William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4, 597 (1992) (describing clear-statement rules of various strength).

41 *See Sossamon v. Texas*, 563 U.S. 277, 284 (2011) ("A State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute.").

42 *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 250-51 (1991).

43 *See William N. Eskridge, Jr., Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 675 (1999) (pointing out the lack of empirical evidence that this rationale is valid).

44 *See Amy Coney Barrett, Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 176-77 (2010) (defending substantive canons as tools for "guard[ing] against the inadvertent congressional exercise of extraordinary constitutional powers"); Eskridge & Frickey, *supra* note 40, at 597, 631 ("[S]uper-strong clear statement rules are a practical way for the Court to focus legislative attention" on "constitutional values.").

sovereignty.<sup>45</sup> At the very least, substantive canons are deliberation-forcing mechanisms that require Congress to recognize when its legislation will impact constitutionally sensitive values and draft its laws to expressly do so.

Requiring such explicit, specific language when Congress enacts constitutionally sensitive laws also increases the attendant political cost and facilitates democratic accountability. Additionally, this approach minimizes the number of occasions on which federal statutes will intrude upon constitutionally significant areas by directing courts to adopt alternative constructions whenever possible. On the other hand, while courts have authority to decide whether a statute is unconstitutional, they arguably lack power to make it harder—or to establish special linguistic or other requirements beyond the Article I, § 7 process<sup>46</sup>—for Congress to enact entirely valid laws on the grounds they are “almost” or “possibly” unconstitutional or raise difficult constitutional questions.<sup>47</sup>

A third rationale for substantive canons is to improve public policymaking by facilitating interbranch dialogue. Holding a statute unconstitutional can chill further legislative experimentation in that area unless and until a constitutional amendment occurs. When the Court instead construes a law pursuant to a substantive canon, the matter returns to Congress to consider whether to push the issue further by adopting an alternate, clearer statute to overrule the Court’s construction.<sup>48</sup> Applying a substantive canon is a form of interbranch signaling that allows the Court to express its policy preferences in a less overtly confrontational manner than simply invalidating a statute.<sup>49</sup> Supporters of this theory believe interbranch dialogue improves public policy and that the Court should act as a co-equal participant in the federal

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<sup>45</sup> See Eskridge & Frickey, *supra* note 23, at 101-05.

<sup>46</sup> See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (enforcing constitutional requirements for the enactment of legislation).

<sup>47</sup> Some scholars have criticized the avoidance canon on the grounds that it usurps Congress’s discretion. See Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 840 (1991) (“[S]ustaining and applying a statute that Congress never intended to enact is hardly a lesser usurpation of the legislative power than is overturning a statute on constitutional grounds.”).

<sup>48</sup> See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 350 (1991) (providing empirical data concerning Congressional scrutiny and override of Supreme Court decisions based on canons of statutory construction); see also Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court’s Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 19, 32 (1996) (explaining that while the constitutional avoidance canon “affords Congress a chance to clarify its intent,” “problems of inertia and a heavy workload” typically prevent Congress from doing so).

<sup>49</sup> See Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 918-19 (2001) (describing judges as “partners” in legislation who should engage in dialogue with the legislature); Eskridge & Frickey, *supra* note 23, at 40 (describing canons as similar to dicta as a useful means of signaling preferences to the legislature or other courts).

lawmaking process.<sup>50</sup> Supporters of a faithful agent model of the judiciary typically disagree with this rationale, pointing out that courts are not co-equal participants in the policymaking process.<sup>51</sup>

Finally, some argue that substantive canons of construction make judicial interpretation of statutes more predictable for both Congress and litigants. When canons are articulated in advance and consistently applied, they give Congress clear guidance about how to accomplish its legislative goals and the likely consequences of different statutory alternatives.<sup>52</sup> They also make the legislative process more efficient by providing a default set of interpretive rules, alleviating the need for legislatures to craft rules for each law they pass.<sup>53</sup> Such predictability also promotes the rule of law, at least in theory, by limiting judges' discretion to construe vague or ambiguous statutes.<sup>54</sup> Critics contend, of course, that the constraining effect of the canons is overstated or even illusory because judges often retain broad discretion in deciding whether a statute is sufficiently ambiguous to invoke a substantive canon, which of several potentially applicable canons to apply, and whether other considerations are sufficient to override a canon.<sup>55</sup>

It is debatable whether a disparate impact canon is consistent with these rationales. Supporters would point out that racial minorities face substantial socioeconomic disparities resulting from the lingering vestiges of slavery, Jim Crow, and other forms of historical discrimination, ongoing current discrimination, and potentially even subconscious bias.<sup>56</sup> By rejecting constructions of statutes that cause or allow racially disparate impacts, courts avoid exacerbating these structural inequalities or their consequences. A disparate impact canon would promote socially desirable outcomes, help

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<sup>50</sup> See Eskridge, *supra* note 43, at 682; see also Grace E. Hart, Note, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 YALE L.J. 438, 480 (2016).

<sup>51</sup> Barrett, *supra* note 44, at 116-17, 124-25 (explaining that substantive canons are inconsistent with notions of "legislative supremacy" and the view that federal judges are "Congress's faithful agents").

<sup>52</sup> See Spiropoulos, *supra* note 49, at 947; Eskridge & Frickey, *supra* note 23, at 67 ("Knowing the interpretive regime into which statutes will be developed over time, the players in the legislative bargaining process will be better able to predict what effects different statutory language will have."); Hart, *supra* note 50, at 480.

<sup>53</sup> See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

<sup>54</sup> See Eskridge, *supra* note 43, at 681-82 (recognizing that substantive canons render judges' interpretations of statutes more predictable).

<sup>55</sup> See SCALIA, *supra* note 31, at 28-29; see also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (providing the classic compendium of dueling canons of statutory construction).

<sup>56</sup> See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L. J. 869, 891 (1995) ("[D]isparities in socio-economic achievement" among members of different racial groups "are a useful proxy for the lingering effects of discrimination."); Taunya Lovell Banks, *Trampling Whose Rights? Democratic Majority Rule and Racial Minorities: A Response to Chin and Wagner*, 43 HARV. C.R.-C.L. L. REV. 127, 159 (2008) ("[C]ontinuing disparities in the socioeconomic status of blacks and whites . . . are consequences of the Jim Crow era.").



remedy past and ongoing injustices, and promote the broad constitutional goal of racial equality.

As a descriptive matter, it is unlikely that a disparate impact canon would reflect congressional intent for most statutes. Interpreting federal laws to avoid disparate impacts may harm certain constituencies, such as businesses that face greater liability or people who are deprived of employment or other opportunities they would have received under an alternate interpretation.<sup>57</sup> Moreover, disparate impact is a controversial theory that some contend is unfair and discriminatory. Compelling evidence would be necessary for a court to conclude that Congress implicitly wished federal laws to be construed in light of such a controversial principle.

It can also be argued that Congress includes explicit language when it wishes to address disparate impacts in federal statutes. For example, in *Mobile v. Bolden*, the Supreme Court interpreted § 2 of the Voting Rights Act (VRA)<sup>58</sup> as prohibiting only state election laws, requirements, and procedures that facially discriminated against minority voters or were enacted as a result of intentional discrimination.<sup>59</sup> In response, Congress amended § 2 of the VRA in 1982<sup>60</sup> to overturn that interpretation, requiring courts to invalidate state election rules that cause racially disparate impacts in voting, as well.<sup>61</sup> Congress's failure to either include comparable language in most other laws or amend them to add such language suggests it does not wish for most laws to be interpreted to avoid or prohibit racially disparate impacts. For all these reasons, under a faithful agent approach to statutory interpretation, construing laws to avoid disparate impacts is generally unlikely to further congressional intent.

Presumptively construing statutes to avoid racially disparate impacts also would likely lead to a wide range of unexpected results and applications.<sup>62</sup>

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<sup>57</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009) (adjudicating white firefighter's constitutional challenge to the City of New Haven's decision to reject the results of a promotion exam to avoid potential liability under the Civil Rights Act because racial minority candidates did not score highly enough).

<sup>58</sup> See Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (Aug. 6, 1965) (codified at 52 U.S.C. § 10301(b) (2012)) ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.").

<sup>59</sup> 446 U.S. 55 (1980).

<sup>60</sup> See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (June 29, 1982) (codified at 52 U.S.C. § 10301(b) (2012)).

<sup>61</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.").

<sup>62</sup> See, e.g., *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2548 (2015) (Alito, J., dissenting) ("[P]rograms that are designed and implemented to help the

Because racial disparities exist concerning almost every aspect of life—wealth, income, health, employment, educational attainment, marriage and incarceration rates, and access to transportation, to name only a few—a substantial percentage (perhaps even majority) of federal laws may give rise to racially disparate impacts.<sup>63</sup> Adopting such a canon could have a tremendous and largely unpredictable effect on the implementation of federal law, particularly if it were applied retroactively to existing statutes. Of course, supporters of the canon would point to the magnitude and extent of racial disparities and wide range of laws with racially disparate impacts as compelling reasons supporting its adoption.

Perhaps the most important concern with the disparate impact canon is that several Justices<sup>64</sup> and commentators<sup>65</sup> have questioned the constitutionality of disparate impact theories. A disparate impact canon would require a court to reject a colorable, constitutionally valid construction of a federal law solely based on the race of the people who that construction would adversely affect. Far from affording “equal protection” of the laws to everyone regardless of race, such race-conscious interpretations arguably give special protection exclusively to racial minorities. A majority of the Supreme Court, however, currently approves of the constitutionality of disparate impact theories.<sup>66</sup>

Even assuming a disparate impact canon is both desirable and constitutional, a separate issue is whether Congress or the Supreme Court would be the appropriate entity to adopt it. Congress likely could enact a statute codifying the disparate impact canon as a presumptive rule of statutory interpretation for the U.S. Code.<sup>67</sup> If the Court were to adopt a canon on its own, however, that new equilibrium would “shift[] the burden of

poor can provide the grounds for a disparate-impact claim . . . . [W]hen disparate impact is on the table, even a city’s good-faith attempt to remedy deplorable housing conditions can be branded discriminatory.” (internal quotation marks and citation omitted)).

63 See *Washington v. Davis*, 426 U.S. 229, 248 (1976) (noting that “a whole range of tax, welfare, public service, regulatory, and licensing statutes” might disproportionately burden minorities).

64 See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2531 (Thomas, J., dissenting) (“Disparate impact liability is thus a rule without a reason, or at least without a legitimate one.”); *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (“[I]f the Federal Government is prohibited from discriminating on the basis of race . . . then surely it is also prohibited from enacting laws mandating that third parties . . . discriminate on the basis of race.”); see also *Schuette v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1634-35 (2014).

65 See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 585 (2003) (discussing the “tension between equal protection and disparate impact statutes”); see also Eang Ngov, *When “the Evil Day” Comes, Will Title VII’s Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 541 (2011) (concluding that it is unlikely that disparate impact will pass a “narrowly tailored requirement”).

66 See *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525; *Ricci*, 557 U.S. at 585.

67 See generally Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (describing how “Congress has constitutional power to codify some rules of statutory interpretation,” but has chosen to do so “sporadically and unselfconsciously”).

inertia,” requiring opponents to navigate a lengthy and complicated legislative process to reverse the Court’s decision, either in general or with regard to particular statutes.<sup>68</sup> Indeed, even if a majority of Congress neither intended to implicitly incorporate such a meaning into federal law nor supported such an interpretation, the numerous vetogates strewn throughout the legislative process could allow certain stakeholders or a determined minority to block Congress from undoing the change.<sup>69</sup>

The Court effectively applied a disparate impact canon in *Griggs v. Duke Power Co.*, in which it held that Title VII of the Civil Rights Act of 1964<sup>70</sup> prohibits not only intentional racial discrimination in employment, but employment practices that disproportionately affect racial minorities.<sup>71</sup> Relying on *Griggs*, the Court interpreted comparable language in the Age Discrimination in Employment Act<sup>72</sup> and Federal Housing Act<sup>73</sup> as prohibiting disparate impacts, as well. In its most recent ruling on the issue, the Court explained that antidiscrimination laws “encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.”<sup>74</sup> The disparate impact canon to which Justice Sotomayor alluded would take the interpretive approach in *Griggs* even further, applying it even to statutes that do not mention race.

### III. RACE CONSCIOUSNESS AND THE ROLE OF THE JUDGE

The decision to adopt a disparate impact canon turns in part on whether a judge believes it is appropriate to interpret and apply the law based on Wechslerian neutral principles,<sup>75</sup> or instead take into account individual litigants’ personal circumstances and characteristics, such as race, gender, sexual orientation, and wealth. Judicial confirmation hearings for the past several vacancies on the U.S. Supreme Court have often directly revolved around this issue. Chief Justice Roberts memorably declared during his

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<sup>68</sup> William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1458 (2008).

<sup>69</sup> See *id.* at 1444-48 (discussing the many ways that each chamber of Congress can block proposed legislation).

<sup>70</sup> 42 U.S.C. § 2000e-2(a) (2012).

<sup>71</sup> 401 U.S. 424 (1971) (holding that Title VII prohibits employers from unnecessarily relying upon employment-related tests that minority candidates disproportionately fail).

<sup>72</sup> See *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (“[I]t was error for the Court of Appeals to hold that the disparate-impact theory of liability is categorically unavailable under the ADEA.”).

<sup>73</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015) (citing 42 U.S.C. §§ 3604(a), 3605(a) (2012)).

<sup>74</sup> *Id.* at 2518.

<sup>75</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (arguing that judgments must be “genuinely principled,” based on “analysis and reasons quite transcending the immediate result that is achieved”).

confirmation hearing that, as a Supreme Court Justice, it would be his “job to call balls and strikes, and not to pitch or bat.”<sup>76</sup> Although this description is consistent with what many Americans perceive to be the appropriate role for a judge,<sup>77</sup> numerous critics responded that the Supreme Court’s decisionmaking involves substantially more discretion than Roberts suggested.<sup>78</sup> Justice Cardozo, rejecting this view of judging nearly a century earlier, wrote: “It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.”<sup>79</sup>

President Barack Obama proclaimed that he wished to appoint nominees to the Court who would understand how

laws affect the daily realities of people’s lives—whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation. I view the quality of empathy, of understanding and identifying with people’s hopes and struggles as an essential ingredient for arriving [at] just decisions and outcomes.<sup>80</sup>

Numerous, predominantly left-leaning commentators embraced this view of judging.<sup>81</sup>

<sup>76</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Hon. John G. Roberts, Jr.).

<sup>77</sup> See Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 24 (2007) (explaining that Justice Roberts’ analogy “tapp[ed] into many if not most Americans’ attitudes about judges—they want their judges to follow the law, wherever it takes them, and not to legislate from the bench or substitute their personal preferences for those which are embodied in the law”).

<sup>78</sup> See, e.g., Jack M. Beerman, *The New Constitution of the United States: Do We Need One and How Would We Get One?*, 94 B.U. L. REV. 711, 722 (2014) (“[M]ost of the important cases that reach the Supreme Court are not governed by any easily discernible legal doctrine, which is why Supreme Court review is necessary in the first place.”); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702 (2007) (“Judges, however, cannot ‘just’ decide constitutional cases according to ‘the rules’ because they cannot agree on what the rules are in the vast majority of the most important cases.”).

<sup>79</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 (1921).

<sup>80</sup> Press Release, The White House, Remarks by the President on Justice David Souter (May 1, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-justice-david-souter> [<https://perma.cc/V7PM-CDPL>]. After nominating Merrick Garland to the Court, Obama commented in a joking tone that he was “[s]orry” that Garland is “a white guy,” but explained Garland was nevertheless “a really outstanding jurist.” Jordan Fabian, *Obama on Garland: ‘Yeah, He’s a White Guy, But He’s a Really Outstanding Jurist’*, THE HILL (Apr. 7, 2016), <http://thehill.com/homenews/administration/275549-obama-on-garland-yeah-hes-a-white-guy-but-hes-a-really-outstanding> [<https://perma.cc/LBE3-G7J2>].

<sup>81</sup> See, e.g., Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1965 (2012) (“Empathy *does* help resolve the legal issue of which litigant ought to prevail, because the legal question at issue often cannot be answered without understanding the way in which the litigants will be impacted by the decision.”); Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1649 (2010) (“It is those judges who are unable to understand the views and problems of others . . . who may not be up to the task of administering justice equally and

In a lecture for a symposium called, “Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation,”<sup>82</sup> then-Judge Sotomayor expressed similar sentiments, explaining that her background made her a more qualified jurist:

I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life . . . . Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.<sup>83</sup>

Consistent with these comments, several of Justice Sotomayor's opinions while on the Supreme Court express empathy for racial minorities and other disadvantaged or marginalized groups, frequently describing the situations at issue from their perspective or giving special consideration to the unique consequences that various potential outcomes would have for them.<sup>84</sup> For example, in *Green v. Brennan*, she concluded that the statute of limitations for a constructive discharge claim should run from the date an employee resigns, rather than from the date of the last allegedly discriminatory act.<sup>85</sup> Sotomayor explained that an employee suffering severe discrimination might “force himself to tolerate [it] . . . until he can afford to leave. . . . And, if he feels he must stay for a period of time, he may be reluctant to complain about discrimination while still employed.”<sup>86</sup>

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impartially.”); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1203 (1992) (“[W]e want jurors and judges to have, and to remember, experiences that enable their empathy and evaluative judgments.”).

<sup>82</sup> See Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1561 (2017) (Sotomayor, J., dissenting) (“It is individual plaintiffs, harmed by the actions of a farflung foreign corporation, who will bear the brunt of the majority's approach and be forced to sue in distant jurisdictions with which they have no contacts or connection.”); *Astrue v. Ratliff*, 560 U.S. 586, 602 (2010) (Sotomayor, J., dissenting) (declaring that an attorney fee award under the Equal Access to Justice Act should not be subject to offset for debts the plaintiff owes the Government, because such an interpretation “will make it more difficult for the neediest litigants to find attorneys to represent them in cases against the Government”). In particular, she has urged courts to take harder looks at officer-involved shootings, rather than categorially believing police officers who claim to have feared for their lives. See *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282-83 (2017) (Sotomayor, J., dissenting from denial of certiorari) (“We rarely intervene where courts wrongly afford officers the benefit of qualified immunity.”); *Mullenix v. Luna*, 136 S. Ct. 305, 313-15 (2015) (Sotomayor, J., dissenting) (concluding that a police officer had violated a suspect's clearly established rights by firing at his fleeing car).

<sup>85</sup> 136 S. Ct. 1769, 1778 (2016).

<sup>86</sup> *Id.*

In *Schuette v. Coalition to Defend Affirmative Action*, Sotomayor dissented from the majority's decision upholding provisions in the Michigan Constitution restricting the ability of state college officials to adopt affirmative action programs.<sup>87</sup> She lamented that the majority was “out of touch with reality” for wanting to “leave race out of the picture entirely” in deciding the case.<sup>88</sup> Speaking in seemingly personal terms, she explained:

Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, “No, where are you *really* from?”, regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”<sup>89</sup>

In *Utah v. Strieff*, she again expressed concern for the lived experience of racial minorities, arguing in dissent that police should not be permitted to search or arrest a person for whom a valid arrest warrant exists, if their initial stop of that person was invalid.<sup>90</sup> Citing Ta-Nahesi Coates, she wrote:

[I]t is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.<sup>91</sup>

A disparate impact canon would effectively require a type of generalized empathy by requiring judges to construe ambiguous statutes to avoid creating or allowing racially disparate impacts that exacerbate the pervasive challenges and obstacles racial minorities face. In cases where it applied, the canon would alleviate the need for judges to attempt to understand the personal experiences of racial minorities and federal statutes' impact on them on a

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<sup>87</sup> 134 S. Ct. 1623, 1651 (2014) (Sotomayor, J., dissenting).

<sup>88</sup> *Id.* at 1675.

<sup>89</sup> *Id.* at 1676.

<sup>90</sup> 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting).

<sup>91</sup> *Id.* at 2070. Justice Sotomayor also joined a 5-4 majority in *Pena-Rodriguez v. Colorado* 137 S. Ct. 855 (2017), to abrogate the centuries-old prohibition on juror testimony about statements made during deliberations, codified in FED. R. EVID. 606(b) and embodied in precedents such as *Warger v. Shauers*, 135 S. Ct. 521 (2014). The Court in *Pena-Rodriguez* allowed members of a jury to testify about racist comments by other jurors because racial bias is “a familiar and recurring evil” that “implicates unique historical, constitutional, and institutional concerns” and “risk[s] systematic injury to the administration of justice.” *Pena-Rodriguez*, 137 S. Ct. at 868.

case-by-case basis, and instead extend them a generalized benefit of the doubt. Adopting such a canon would be a natural, albeit substantial, extension of Sotomayor's jurisprudential approach.

#### CONCLUSION

Justice Sotomayor's comments relating to the possibility of applying a disparate impact canon of interpretation to § 8(b)(2) of the NVRA in *Husted* raise numerous critical questions that impact virtually every aspect of federal law. Following up on Sotomayor's lead and vigorously urging adoption of such a canon seems to be a logical step for civil rights advocates and social justice activists. The canon would require courts to construe federal laws to protect the interests of racial minorities and avoid reinforcing socioeconomic inequality. It would arguably be a step toward redressing both historical and ongoing marginalization of minority communities in the political process. Should Justice Sotomayor choose to apply this canon or advocates urge its adoption, it could easily become the next major front in the statutory construction wars.

For courts to adopt a disparate impact canon on their own raises serious separation of powers issues. Additionally, some may object that the canon is unfair or raises Equal Protection problems. Such objections raise the larger question of whether existing prohibitions on unintentional racially disparate impacts, such as Congress's amendments to § 2 of the Voting Rights Act or the Supreme Court's interpretation of Title VII of the Civil Rights Act in *Griggs*, are constitutional. The matter also turns in large part on the proper role of a judge in adjudicating cases. If she is guided by empathy toward litigants and a desire to mitigate the sometimes harsh consequences of the law upon them, the disparate impact canon is a potentially attractive alternative. If a judge instead views her role as applying abstract, neutral rules to all litigants equally in a color-blind manner, the disparate impact canon will appear inappropriate.

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