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Dangling Constitutional Conversation, The

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FOREWORD: THE DANGLING CONSTITUTIONAL CONVERSATION*

Philip P. Frickey**

This symposium encompasses the presentations made at the 2006 meeting of the Legislation Section of the Association of American Law Schools on the topic of "Enacting and Interpreting Statutes in the Constitution's Shadows." Because of illness, I was unable to join Bernard Bell, Neal Devins, Lisa Kloppenberg, and Muriel Morisey on the panel. Both for my own benefit and for that of the scholarly community as a whole, I am delighted that this symposium has come to pass so that their oral presentations, now extended into print, are available.

Each essay assumes that Congress and the federal courts engage in an ongoing, elaborate, interactive game. Professor Morisey argues that the courts, in reviewing federal statutes challenged as unconstitutional, have failed to accord Congress sufficient respect for the capacity to make reasonable decisions within its institutional design—where issues are analyzed, debated, and resolved by a process far different from the judicial one. Professor Bell provides a thorough overview of the Court-Congress interactions on one constitutional borderline—when a court assesses whether a challenged statute does, or might, violate the Constitution, and whether in that circumstance the court ought to avoid the constitutional issue by interpreting the statute to obviate the problem. Professor Devins extends this analysis of the avoidance canon by considering whether, from assumptions of strategic judicial behavior, the current Court is likely to confront Congress head-on concerning sensitive constitutional issues, or duck those issues through statutory interpretation. Dean Kloppenberg returns to her extensive scholarship on the avoidance canon to discuss whether, as she has contended, the Court should more forthrightly address constitutional issues rather than avoid them. Like Devins, Kloppenberg also speculates on the path that the current Court might take in constitutional cases of extraordinary sensitivity, such as those involving the War on Terror. Devins and Kloppenberg weave their reactions to some of my work1 into their analysis, which I appreciate.

These essays stand on their own; in this small space I write merely

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* With apologies here and throughout to Paul Simon.
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to highlight a question that lies in the background. Much work in public law, including elements of these essays, views the Constitution as if it were a fog, covering each institution whether within its own domain (to the extent that such even exists) or interacting with each other. Are the institutions “[c]ouched in [their] indifference / [l]ike shells upon the shore,”2 in at most some “dangling conversation”?3 Is it possible for such institutions to engage in dialogue, at least if that term is given its ordinary import for human interactions? If so, as Professor Morisey intimates, are the institutional interactions “[l]ike a poem poorly written / . . . verses out of rhythm / [c]ouplet out of rhyme”?4 If not, then human interaction cannot easily serve as a metaphor in these circumstances. Institutional theories toward dialogic solutions might well be just faking it—hollow nods toward institutional quiescence and self-protection. “If you’ll be my bodyguard / I can be your long lost pal.”5

On the other hand, dialogic theories of constitutional law and allied fields, such as statutory interpretation, have been with us for a long time.6 Much law is rooted in fictions of one sort or another. So long as the fictions are not confused with descriptive reality, they might be able to do important normative work.7 When we “lean on / [o]ld familiar ways,”8 like dialogic theory, we may be “[s]till crazy after all these years,”9 but crazy like a fox.

It remains to be seen how the newly constituted Supreme Court will proceed in contexts of significant constitutional controversy. If Professor Devins is right, Dean Kloppenberg may well get what she wants: constitutional rulings straight up, so to speak, rather than the watered-down outcomes of constitutional avoidance. Some day, looking back, we might think we were John Roberts’d into submission, and I may be a simple desultory Philip.10

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3 Id.
4 Id.
6 For scholars alive today the most famous is, of course, Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed., Yale U. Press 1986).
7 See e.g. Frickey, supra n. 1 at 408 (the important purposive model of statutory interpretation developed by Henry Hart and Albert Sacks was based on assumptions about legislatures that were not intended to be descriptively accurate, but instead were justified by the normative attractiveness of the statutory interpretations that would result from employing them).
8 Paul Simon, Still Crazy After All These Years, in Still Crazy After All These Years (Warner Bros. 1975) (CD).
9 Id.